BROWN AND POLICE

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: 95009** **Decision Ref: D02295**

Participants:

Justin David Brown
Complainant

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - clause 8(2) - confidential communications - statements by serving police officers to Internal Investigations Branch - Police Force Regulations - - information of a confidential nature given and received in confidence - prejudice to future supply - reasonable expectation - possibility of self-incrimination - public interest factors.

FREEDOM OF INFORMATION - documents that are not in existence at the date of the access application but which came into existence shortly thereafter.

Freedom of Information Act 1992 (WA) ss. 4; 13(1)(b); 30; 68(1); 72(1)(b); 75(1); Schedule 1 clause 8(2).
Freedom of Information Act 1982 (C'wth) s.43(1)(c)(ii).
Police Force Regulations 1979 (WA) Regulation 603.
Police Act 1892 (WA) s. 138.
The Shortening Ordinance 1853 s. H.
Interpretation Act 1918 (WA) ss. 47(2); H of Second Schedule.
Interpretation Act 1984 (WA) ss. 77(1); 77(4).

Re Edelsten and Australian Federal Police (1985) 4 AAR 220.
Re Murtagh and Federal Commissioner of Taxation (1984) 54 ALR 313.
Re Simonsen and Edith Cowan University (Information Commissioner, WA, 13 July 1994, unreported).
Attorney-General's Department v Cockcroft (1986) 10 FCR 180.
Ryder v Booth [1985] VR 869.
Richards v Law Institute of Victoria (County Court of Victoria, 13 August 1984, unreported).

Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, 15 June 1995, unreported).
Police Service Board v Morris [1984-1985] 156 CLR 397.
Re Read and Public Service Commission (Information Commissioner, WA, 16 February 1994, unreported).
Re Veale and Town of Bassendean (Information Commissioner, WA, 25 March 1994, unreported).
Re Pau and Medical Board of Western Australia (Information Commissioner, WA, 7 December 1994, unreported).
Re Lawless and Medical Board of Western Australia (Information Commissioner, WA 5 July 1995, unreported).

DECISION

The decision of the agency is varied. In substitution it is decided that:

(i) the undated and unsigned report of Constable Blake No 8674, is exempt under clause 8(2) of Schedule 1 to the *Freedom of Information Act 1992;* and

(ii) the reports dated 31 July 1994 of First Class Constable Turner No 8181 are not exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

14th July 1995

REASONS FOR DECISION

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 access to documents of the agency requested by Mr Brown ('the complainant') under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 15 July 1994, the complainant was arrested by police for a traffic offence and he was taken to the Fremantle Traffic Office for a breathalyser test. Whilst in custody at the Traffic Office the complainant is alleged to have assaulted a police constable by severely biting him on the finger. The complainant was charged in relation to the traffic offences and was also charged with the assault of the police officer. The result of the charge of assaulting a public officer has not yet been determined by the court.

3. On 19 July 1994, the complainant lodged a formal complaint with the Internal Investigation Branch (IIB) of the agency, alleging that he was assaulted by a police officer on the night of his arrest resulting in an injury, namely, a perforation to his ear-drum. That complaint was investigated by police from IIB and reports were obtained from a number of police officers involved with the complainant on the night of the his arrest. At the conclusion of that investigation, the then Commander of IIB informed the complainant in writing, *inter alia*, that a female officer had reported that, in her efforts to make the complainant release his grip on the other officer's finger, she had struck the complainant a number of blows to the left side of his face. The then Commander of IIB expressed the opinion that there was little doubt that it was those blows which had caused the injury to the complainant's ear. However, IIB recommended no action be taken against that police officer on the basis that the officer's actions had been lawful under the *Criminal Code*, and it appears that none was taken.

4. On 20 July 1994, the complainant lodged an application with the agency seeking access under the FOI Act to records relating to his arrest. On 26 October 1994, some 53 days after expiration of the statutory period of 45 days within which an agency is required to make a decision on an access application, Acting Senior Sergeant Harnwell, FOI Manager in the agency, granted the complainant access to some documents and access to edited copies of others. However, access to two documents was denied on the ground that those documents are exempt under clause 8(2) of Schedule 1 to the FOI Act.

5. On 29 November 1994, solicitors for the complainant applied to the agency for internal review of the agency's decision to deny access to two documents being reports made by police officers to IIB. On 20 December 1994, Acting Commander Hawkes, Internal Review Officer of the agency, confirmed the agency's initial decision that the two reports supplied to IIB ('the requested

documents') are exempt documents under clause 8(2) of Schedule 1 to the FOI Act. On 4 January 1995, solicitors for the complainant applied to have the decisions of the agency reviewed by the Information Commissioner.

REVIEW BY THE INFORMATION COMMISSIONER

6. On 18 January 1995, pursuant to my obligation under s.68(1) of the FOI Act, I notified the agency that this complaint had been accepted for external review. In accordance with my authority under s.75(1) and s.72(1)(b) of the FOI Act, I also sought the production to me of the requested documents, together with the file maintained by the agency with respect to this matter. I considered that the letter dated 20 December 1994 from Acting Commander Hawkes, which purported to be the notice required under s.13(1)(b) of the FOI Act, did not comply with the requirements of s.30 of the FOI Act. Therefore, I also sought further information from the agency to justify its decision that the requested documents are exempt under clause 8(2) of Schedule 1 to the FOI Act.

7. On 24 January 1995, I received the requested documents and the additional information I had requested from the agency. After my examination of the requested documents and a consideration of the additional information provided to me by the agency, it was my preliminary view that the agency had not persuaded me that the requested documents are exempt under clause 8(2) of Schedule 1 to the FOI Act. On 4 May 1995, the agency and the complainant were informed of my preliminary view and reasons for that view. Consequently, I received a further written submission from the agency on 19 May 1995 and written submissions in support of the exemption from the two police officers concerned. I also took oral submissions from Acting Commander McLeod, the acting officer in charge of IIB and oral submissions from solicitors for the complainant.

8. The agency maintains its claims that the requested documents are exempt under clause 8(2) of Schedule 1 to the FOI Act. However, it also argues, in the alternative, that the requested documents are outside the scope of the access application as they did not exist at the time the application was made.

9. In addition, in the course of determining this matter, as a result of a request from my office for a further search of its records, the agency found a copy of another report prepared by one of the police officers. That report is also dated 31 July 1994. Whilst it is similar to the one provided to my office in response to my request of 18 January 1995, there are differences and I am satisfied that it is a separate document for the purpose of the access application and my determination of this matter.

THE DISPUTED DOCUMENTS

10. The three documents in dispute in this matter consist of:

    Document 1 an undated and unsigned report provided to the Internal Investigations Branch by Constable J A Blake No 8674 (folios 50-53);

    Document 2 a signed report dated 31 July 1994, by First Class Constable C J Turner No 8181 (folios 54 and 55); and

    Document 3 a signed report dated 31 July 1994, by First Class Constable C J Turner No 8181, marked "Attachment No 8".

11. Although Document 3, marked "Attachment No 8", varies slightly, each report commences with the following words:

    "In accordance with the obligation placed upon me by the Police Regulations I have to report as follows, but the following report is not provided of my own free will, but pursuant to an obligation placed upon me and the report is tendered and the questions are answered on the basis that it and they will not be used in evidence in action brought against me."

12. I am satisfied that the three disputed documents described above were provided in accordance with the obligation placed upon police officers by the *Police Force Regulations 1979* to report upon matters affecting their duties pursuant to a lawful order to do so issued by the investigating officer from IIB. I am also satisfied, from the inclusion of the above words in those reports, that the officers making them considered that the reports were not provided voluntarily.

PRELIMINARY ISSUE

13. Before discussing the agency's claims that the disputed documents are exempt, I will firstly deal with the alternative argument of the agency for refusing access to the disputed documents. That argument concerns the question of whether the right of access under the FOI Act applies to documents that are not in existence at the date of the access application but which come into existence shortly thereafter.

14. In my view, it is clear from the provisions of the FOI Act, that an access application only applies to existing documents and that an agency is not required to create a document in order to satisfy an access applicant. An agency may choose to create a document or to provide information in order to satisfy a request but that it is not something that the FOI Act requires. However, that is a different question to whether or not documents which are not created in order to satisfy an access application, but which come into existence in any event after the

date of the access application but before the decision on access has been made, can be within the ambit of the application.

15. In *Re Edelsten and Australian Federal Police* (1985) 4 AAR 220, the Commonwealth Administrative Appeals Tribunal ('the Tribunal') considered the preliminary question of whether the Tribunal, in reviewing an agency's decision to refuse access, should consider only those documents considered by the agency or whether it should consider relevant documents that came into existence subsequent to that decision but prior to the Tribunal's hearing.

16. The Tribunal referred to another decision of the Tribunal, *Re Murtagh and Federal Commissioner of Taxation* (1984) 54 ALR 313, in which the Tribunal had decided that it may make a decision with respect to documents which had come into existence after the date of the request for access, provided that those documents were within the ambit of the decision under review. On that occasion the Tribunal in *Re Murtagh* went on to make the following comment at p 316:

> *"The original decision-maker may, and usually does, give a decision with respect to all documents within the category of the applicant's request which are known to be in the possession of the agency* ***at the time of his decision.*** *A decision on internal review may, and usually does, take into account all documents within the category of the applicant's request which are known to be in the possession of the agency* ***at the time of that decision****"* (my emphasis).

17. In my view, although an access application does not apply to all future relevant documents, it may apply to documents of an agency which come into existence after the date of the access application but before the date of the decision. Whether or not an agency responds to an access application solely with respect to documents existing and held by the agency at the date of the request, or at the date of the decision, or some date shortly before the decision, will depend on the circumstances of the particular application. In any case, an applicant should be informed by the agency, in its notice of decision, of the basis on which the decision is made in that regard by specifying the date selected by the agency as being the relevant date for that purpose. Further, in accordance with the principles of administration in s.4 of the FOI Act, I consider that an agency should apply the test of "reasonableness" and that a decision-maker should take into account all documents known to be in existence at the date of the access application or that could reasonably be expected to come into existence shortly thereafter. A common-sense approach to this question is likely to eliminate the need for successive applications and reduce the administrative burden on the agency.

18. In this instance, the access application is dated 20 July 1994. One of the disputed documents is dated 31 July 1994 but the other is undated. The undated document was created as a result of the complainant's complaint to IIB on 19 July 1994, although that complaint was not received by IIB until 25 July 1994. Whilst I am satisfied that the requested documents were not in existence at the time the complainant lodged his FOI request with the agency, they came into existence a short time later. By the time Acting Senior Sergeant Harnwell and Acting

Commander Hawkes made their respective decisions on access, the requested documents were clearly in existence and within the scope of the access application. Indeed, the decisions of both Acting Senior Sergeant Harnwell and Acting Commander Hawkes specifically concerned the disputed documents. Therefore, I reject the agency's submission on this point and I consider that both decision-makers were correct to consider and decide the exempt status of the disputed documents.

THE EXEMPTION

19. Each disputed document is claimed by the agency to be exempt under clause 8(2) of Schedule 1 to the FOI Act. Clause 8(2) provides:

> *"(2) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information of a confidential nature obtained in confidence; and*
>
> *(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*
>
> ***Limits on exemption***
> *(3)...*
> *(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."*

20. If a document is a confidential communication of the type that is described in paragraph (a) of clause 8(2), then the "elements" of paragraph (b) must also be satisfied to establish a *prima facie* claim for exemption. In my view, those elements are:

> (i) there must be an expectation of prejudice (harm or injury) to the ability of the agency in the future to obtain information of the general class or character under consideration in this case; and
>
> (ii) the expectation that the particular harm or injury could result from disclosure of the document must be **reasonably** based.

21. As I stated in my reasons for decision in *Re Simonsen and Edith Cowan University*, (13 July 1994, unreported), the Concise Oxford Dictionary, Eighth Edition, defines "prejudice" as meaning, *inter alia, "harm or injury that results or may result from some action or judgement"*. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 190, the Federal Court said that the words *"...could reasonably be expected to prejudice the future supply of information"* in s.43(1)(c)(ii) of the Commonwealth FOI Act were intended to receive their ordinary meaning and required a judgement 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 those who would otherwise supply information of the relevant kind to the Commonwealth would decline to do so if the documents in question were disclosed.

22. As I have said before, I have also found the decision of the Full Court of the Victorian Supreme Court in *Ryder v Booth* [1985] VR 869 to be relevant and useful when considering the application of the exemption in clause 8(2). In that case the court considered whether the Victorian equivalent of clause 8(2)(b) applied to medical reports provided in confidence to the State Superannuation Board. On the question of whether disclosure would be reasonably likely to impair the future supply of similar information, Young C.J. said, at p 872:

> *"The question then is, would disclosure of the information sought impair (i.e. damage) the ability of the Board to obtain similar information in the future. Put in terms of the present appeals this means that the question is, would the disclosure of the information damage the ability of the Board to obtain frank medical opinions in the future. It may be noted that it is the ability of the Board that must be impaired. The paragraph is not concerned with the question whether the particular doctor whose report is disclosed will give similar information in the future but with whether the agency will be able to obtain such information. There may well be feelings of resentment amongst those who have given information "in confidence" at having the confidence arbitrarily destroyed by the operation of the legislation, but it is another thing altogether to say that they or others will not provide such information in the future. It is not sufficient to show that some people may be inhibited from reporting so frankly if they know that their report may be disclosed. More is required to satisfy the onus cast upon the agency by s.55(2) of the Act."*

23. Further, it is also my view that the requirement in paragraph (b) of clause 8(2) that the future supply of information of that kind could reasonably be expected to be prejudiced, is a reference to similar information or information of the class or character contained in the documents under consideration: *Richards v Law Institute of Victoria* (County Court, 13 August 1984, unreported) at page 9.

24. Therefore, if I am satisfied as to the requirements of paragraph (a) of clause 8(2), I must ask whether, in the context of the complaint before me, disclosure of the disputed documents could reasonably be expected to harm the ability of the agency to obtain reports from police officers about matters relating to the performance of the officers' duties, in circumstances where the police officers are under a duty to obey a lawful order to provide such reports.

Do the disputed documents contain confidential information received in confidence?

25. Information is inherently confidential if it is not in the public domain. That is, the information must be known by a small number or limited class of persons.

Further, where the person supplying the information specifically requests that the information should not be disclosed, and the person receiving it agrees, then an obligation of confidence arises.

26. Clearly, the information contained in the reports is known only to a limited number of people and is not public or widely known. There is information before me from the two police officers to the effect that each officer was of the belief that his or her report was provided to IIB in confidence and in accordance with accepted practices in the agency. There is also evidence before me that access to information in IIB files is restricted to a limited number of employees in that branch and that the contents of those files are confidential. Further, the reports were submitted directly to IIB, rather than through the normal chain of command. Although Documents 2 and 3 were submitted to a Sergeant in the first instance, it is my understanding he sent them directly to IIB. The disputed documents each contain an account of what occurred whilst the officers concerned were on duty on the night of 15 July 1994. That information is clearly known only to a limited number of persons. On that basis, I am satisfied that the documents contain confidential information that was given and received in confidence.

The expected prejudice

27. It is the written submission of the agency that the expected prejudice to the future supply of such information will be a reduction in full and frank disclosures by police officers to IIB investigators. This argument was also at the heart of the oral submissions of Acting Commander McLeod. Acting Commander McLeod is a commissioned officer of over 20 years experience, including experience in the Criminal Investigation Branch, the Internal Affairs Unit of the agency and as Acting Officer in Charge of the IIB.

28. It was the submission of Acting Commander McLeod that the "prejudice" to the future ability of the agency to obtain what it considers to be satisfactory statements from officers if the documents in dispute are disclosed on this occasion, will consist of:

    (i) untruthful or incomplete statements being provided where police officers involved in an incident which is under investigation as the result of a complaint collaborate and all give the same version of events; and

    (ii) truthful officers or those who co-operate with the investigators will be ostracised by their work-mates and peer pressure will discourage them and others from speaking out and telling the truth in the future.

29. Acting Commander McLeod's submission was, in essence, that IIB has encountered difficulty in the past, and is still experiencing difficulty, in that - because of the "police culture" as it is known - police officers have not always been completely full and frank in their reports to IIB when they or their colleagues are under investigation. However, strategies are now in place to deal with that difficulty and are having an effect. The submission was that the agency is concerned that, should these documents be disclosed and it becomes known to

police officers that their reports may be disclosed, many of them may be less than full and frank in their reports because of peer pressure.

Could that prejudice reasonably be expected to result from disclosure of the disputed documents?

30. I accept that a diminution in the quality or quantity of information supplied to investigators may constitute a "prejudice" sufficient to satisfy this part of the requirements of paragraph (b) of clause 8(2). In *Cockcroft* the Court said that the words "could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency" should not be seen as imposing on an agency the obligation to establish a case on the balance of probabilities.

31. In a decision of the Supreme Court in Western Australia, *Manly v Ministry of Premier and Cabinet* (15 June 1995, unreported) Owen J, referring to the judgment of Sheppard J in *Cockcroft*, said at page 44:

> *"How can the* [Information] *Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had "real and substantial grounds for thinking that the production of the document could prejudice that supply" or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision-maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasoned decision-maker."*

32. What are the real and substantial grounds for expecting that police officers will be less than frank with their reports to IIB investigators if these documents are disclosed? In its submission dated 19 May 1995, the agency referred me to two additional statements obtained from Constables Blake and Turner and, in particular, to the statement by Constable Blake which the agency submitted supported its view that the disputed documents are exempt under clause 8(2) of Schedule 1 to the FOI Act. Constable Blake submitted:

> *"If in the future the same incident occurred and I was requested to submit a report I would not submit the full details as supplied in my present report.*
>
> *Also should the person requesting my report be granted permission to have my report he may if anything untoward is said about him commence litigation against me."*

33. However, it is not to the point that the individual officers concerned will not, or are unlikely to, provide similar reports in future. Since the exemption is directed

at the ability of the agency to obtain that kind of information in the future, the issue is whether police officers generally will refuse to provide reports which they are duty bound to do or will be less than frank and candid in the reports that they do provide to IIB.

34. Acting Commander McLeod also submitted that, in spite of the coercive powers in the police regulations, it was the strength of the police culture and especially peer pressure that made it likely that police officers in general would close ranks and be less than frank with investigators if their actions, or those of their colleagues, were under investigation.

35. Internal disciplinary authority over members of the police force is the primary and usual means of ensuring that individual police officers do not jeopardise public confidence by their conduct, nor neglect the performance of their duty nor abuse their powers (per Brennan J. in *Police Service Board v Morris* [1984-1985] 156 CLR 397, at p 412). The *Police Force Regulations 1979* contain, *inter alia,* an internal disciplinary "code" for police officers in Western Australia. Regulation 603 of the *Police Force Regulations 1979* states:

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

36. Gibbs C.J. in *Police Service Board v Morris,* at 404, said that a similar regulation then in force and relating to the police in Victoria was primarily for the purpose of securing obedience to orders. Brennan J. in the same case, citing the comments of Crockett J. in the decision of the Full Court of the Supreme Court of Victoria from which the appeal to the High Court was instituted, described the requirements of the similar legislation in Victoria in the following terms:

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

37. In the case of *Police Service Board v Morris* the High Court was concerned with the question of whether the general duty of a police officer to obey a lawful order of a superior officer to answer questions about his or her activities whilst on duty is consistent with a right to refuse to answer questions on the grounds that the answers may tend to incriminate him or her or expose him or her to the imposition of a penalty. The Court held that the privilege against answering such questions is capable of applying to a statutory provision which requires members of the police force to answer questions tending to show the commission by them of disciplinary offences (per Gibbs C.J. at p.p. 403-404; per Wilson and Dawson JJ. at p.p. 407-408; per Brennan J. at p. 411; Murphy J. dissenting). However, the Court held that, in the context of the provisions of the relevant regulation in Victoria, which was in substantially similar terms to regulation 603, a police officer to whom an order was given to answer questions on a disciplinary matter could not object to answering on the ground that his or her answers might expose him or her to penalties for breach of duty (Gibbs C.J., Wilson, Dawson and

Brennan JJ. on the basis that the privilege was excluded by the particular regulation; Murphy J. on the basis that the privilege is against self-exposure to criminal process and not to non-criminal process).

38. In answer to a specific question from me on the current policy of the agency relating to the use and application of regulation 603, I was advised by the Deputy Commissioner of Police that disciplinary action would be taken against any officer who refused to provide a written report or to answer questions. However, the agency was unable to determine the number or frequency of charges of this nature or if any member had in fact been charged with a disciplinary offence for refusing to answer questions or provide a report as required.

39. In their additional statements provided to me by the agency, both constables expressed a fear about civil action against each of them as a reason for non-release of the disputed documents. I reject the claim that the risk of civil litigation is a reason to deny access to documents under the FOI Act. In the case of police officers, it is my view that there is adequate protection in the general law for officers who act reasonably and lawfully in the performance of their duties.

40. Section 138 of the *Police Act 1892*, provides, *inter alia*, that section H of the *Shortening Ordinance 1853* shall be incorporated with and taken to form part of that Act. A reference to section H of the *Shortening Ordinance 1853* is, by s.47(2) of the *Intrepretation Act 1918*, deemed to be a reference to the corresponding section of the Second Schedule to the *Interpretation Act 1918*. Section H of the Second Schedule to the *Interpretation Act 1918* provides:

> *"No action shall lie against any Justice of the Peace, Officer of Police, Policeman, Constable, Peace Officer, or any other person in the employ of the Government authorized to carry the provisions of this Act, or any of them, into effect, or any person acting for, or under such persons, or any of them, on account of any act, matter, or thing done, or to be done, or commanded by them, or any of them, in carrying the provisions of this Act into effect again any parties offending or suspected of offending against the same, unless there is direct proof of corruption or malice; and if any such person shall be sued for any act, matter, or thing which he shall have so done, or shall so do, in carrying the provisions of this Act into effect, he may plea the general issue and give the special matter in evidence; and in case of judgment after verdict, or by a Judge sitting as a jury, or on demurrer being given for the defendant, or of the plaintiff discontinuing, or becoming non-suit in any such action, the Court before which the action was brought may award treble costs to the defendant or such portion of those costs as the Court thinks fit."*

Although the *Interpretation Act 1918* was repealed by s.77(1) of the *Interpretation Act 1984*, s.77(4) of the *Intrepretation Act 1984* provides that s.47(2) and the Second Schedule to the *Interpretation Act 1918* continued to apply to any Act to which that section previously applied. Accordingly, section H

of the Second Schedule to the *Interpretation Act 1918* is incorporated into, and forms part of, the *Police Act 1892*.

41. In my view, the above provision is a source of legislative protection for police officers acting lawfully and without malice in the performance of their duties under the *Police Act 1892*. I accept that Constables Blake and Turner are genuinely concerned about their rights as police officers. It may be that those officers, and others, may not be as well informed about their rights as one would expect.

42. In any case, the likelihood of civil action is not a reason to deny access under the FOI Act. That point has often been submitted to me by agencies as justification for claiming an exemption. However, it is not an argument that I accept. As I have said in a number of my previous decisions, in my opinion, there is a public interest in citizens being able to exercise their rights at law where the facts establish a cause of action: *Re Read and Public Service Commission* (16 February 1994, unreported) at paragraph 85; *Re Veale and Town of Bassendean* (25 March 1994, unreported) at paragraph 38; see also *Re Pau and Medical Board of Western Australia* (7 December 1994, unreported) at paragraph 24. In any event, it has not been established that any of the documents reveals a cause of action, and I make no comment on that point, or that disclosure could reasonably lead to litigation. It has also not been established that those documents could be admissible in any proceedings against the officers concerned.

43. The agency also claimed that the Police Union would direct its members not to co-operate with IIB and that, if this occurred, the future supply of reports would be prejudiced. However, in response to a query from my office, the Deputy Commissioner advised me that the Police Union has no power to direct police officers in the performance of their duties. Therefore, I reject this claim as a reason to deny access to documents of the agency.

44. However, I do accept as reasonably based the claim that peer pressure in the police organisation is a fact of life. In my view, the desire to conform to group norms and to be accepted in what is a para-military organisation is well documented as part of the police culture and as one of its strengths. I accept the view that there are negative aspects of that culture as well and that those aspects exist in the agency even though the agency is experiencing a change to its structure and management processes aimed at minimising those undesirable influences. Although I accept that there may have been occasions in the past and present on which police officers have been less than full and frank in their reports to IIB, there is not sufficient evidence before me - nor is it necessary for the purposes of this decision - to make a finding as to the extent to which that may or may not have been the case. I make no comment on that aspect of the agency's submissions. The question for my determination is whether disclosure of Documents 1, 2 or 3 could reasonably be expected to damage the agency's ability to obtain information of the kind in those documents.

45. Although the agency's submission was not clear on this point, it is my understanding that the agency claims that, as disclosure of the disputed documents would be the first disclosure of documents of that type under the FOI Act, news of such release would spread among the police officers very quickly

with the result that the expected prejudice would follow as a matter of course with officers being less frank in their responses to IIB investigators.

46. However, I am not entirely persuaded by the claims of the agency on this point. There is simply no material before me to establish a connection between disclosure of the disputed documents and the alleged prejudice to the agency's ability to obtain such reports from officers about the performance of their duties. In fact, the evidence of Acting Commander McLeod suggests otherwise. The Acting Commander informed me that full and frank disclosures at the present time are not always made by police in spite of the obligation which they are under to report on matters connected with the performance of their duty.

47. It appears to me that any effect on the quantity or quality of information coming into the hands of IIB is likely to be influenced by a number of factors unrelated to possible disclosure under the FOI Act. I accept that there may be a risk to the ability of IIB to obtain information if officers do not co-operate fully with investigators. However, in my view, given the disciplinary provisions of the *Police Force Regulations 1979* and the stated policy that officers would be charged for disobeying a lawful order to report, I am not persuaded that there are real and substantial grounds for expecting that disclosure of the disputed documents would necessarily have the effect claimed by the agency.

48. I also note that the documents in dispute in this instance were apparently created after the constables had been advised of the complaint by an investigator from IIB, and in circumstances where the constables concerned were directed to report on the matter. It was not a case where the officers involved were interviewed separately to avoid collusion, nor was it an instance where the investigator had reached the point in his investigation where he considered that one or more of them may have been guilty of an offence under the *Criminal Code* and had advised each of them of his or her right to remain silent and then proceeded to an in-depth interview. That is, it is not an instance in which the disputed documents are of a type that are created by an investigator during a one-to-one interview where the opportunity exists to probe an officer's responses and thus to gain more information, including perhaps incriminating evidence, than that officer may have been prepared to give in the first instance. This suggests to me that a number of options exist for the agency to ensure that it can obtain the information necessary to conduct its internal investigations.

49. Further, as I have said in my earlier decisions, and most recently in *Re Lawless and Medical Board of Western Australia* (5 July 1995, unreported), at paragraph 49, the provisions of the FOI Act clearly exclude "class claims" of exemption for all documents of a particular type. In order to properly deal with an access application under, and in accordance with, the provisions of the FOI Act, it is necessary that each document be examined and a decision made in relation to each document, or part thereof.

50. I have examined the three disputed documents and considered the likely effect of disclosing the contents of those particular documents as well as the effect of disclosing documents "of that kind". In my view, there is a difference between

Document 1 and Documents 2 and 3, the latter two being substantially similar to each other. Documents 2 and 3 are reports from a police officer who was on duty at the time the complainant was brought to Fremantle Traffic Office, but who was otherwise only marginally involved in what occurred in the Traffic Office that night.

51. I have read Documents 2 and 3 and taken into account the fact that police officers in the position of First Class Constable Turner are duty bound to provide a written report, pursuant to a lawful order to do so, on an incident of this nature. I am of the view that it could not be said that the agency's ability to obtain such reports in the future could reasonable be expected to be prejudiced by the disclosure of those documents.

52. In spite of the peer pressure, which I acknowledge as a reality in the police organisation, it seems to me that the Commissioner of Police has at his disposal a powerful tool in the disciplinary regulations in order to secure reports of the kind contained in Documents 2 and 3. Therefore, it is my view that the agency's ability in the future to obtain reports from police officers relating to the performance of the duties of those officers, in circumstances where the officers are only indirectly involved in the matter giving rise to the requirement to provide such a report, could not reasonably be expected to be prejudiced by the disclosure of Documents 2 and 3. I find that Documents 2 and 3, being the reports of First Class Constable Turner, are not exempt under clause 8(2) of Schedule 1 to the FOI Act. However, in my opinion, different considerations arise in relation to Document 1.

53. Document 1 is a report from the officer directly concerned with the matter of complaint. In my view, faced with an internal investigation into the circumstances whereby a complainant is allegedly injured whilst in custody, any police officer directly involved in such an incident is not obliged to report in the manner in which Constable Blake reported.

54. It would appear, on the authority of *Police Service Board v Morris,* that police officers may not refuse to report upon, or answer questions in relation to, disciplinary matters on the basis of the privilege against exposure to a penalty. However, the position in respect of criminal matters is not so clear. That question did not arise for decision in *Police Service Board v Morris.* However, in my view, some support for the proposition that the privilege against self-incrimination may be claimed by a police officer in order to refuse to report or answer questions, the answers to which may tend to incriminate him or her, is to be found in the judgment of Murphy J.

55. Murphy J. (*contra* Gibbs C.J. Wilson, Brennan and Dawson JJ) considered that the regulation there in question neither expressly nor impliedly excluded the privilege, although His Honour considered that the exposure against which the privilege protects is self-exposure to criminal process and does not extend to self-exposure to non-criminal process. At pages 406-407, His Honour said:

> *"If the members were asked a question the answer to which would tend to expose them to criminal proceedings they would be entitled to object to answering on the ground of self-incrimination and failure to answer on that ground would not constitute a breach of reg. 95A(7)...It is only if the penalties for breaches of discipline under the Act can be characterised as criminal in nature that the privilege would apply."*

56. In my opinion, therefore, regulation 603 may not be able to used to compel police officers to report or answer questions in circumstances where an investigation concerns allegations of a criminal offence. In my opinion, police officers in that respect are no different to members of the public who find themselves being questioned about a criminal matter. However, it is not apparent from either the documents themselves, or the other material before me, whether either Constable Blake or First Class Constable Turner was advised by IIB whether the investigation was of a disciplinary nature or a criminal nature.

57. If the investigation was of a disciplinary nature, then, in my opinion, both officers were bound to report fully and frankly in relation to the occurrences on the night in question. The opening words of the reports suggest that the officers accepted that this was the case. However, if the investigation concerned criminal conduct, or alleged criminal conduct, then, in accordance with the common law, one or more of the officers may well have been entitled to refuse to provide a report as ordered in respect of at least some of the events in question. In his final report, the investigator concluded that the actions of the constable concerned amounted to a defence under the criminal law. In my view, that conclusion suggests that the investigation concerned a criminal matter rather than a disciplinary one.

58. I have carefully considered the nature and contents of Document 1 and the words, quoted at paragraph 11 above, which preface it. Clearly, those words are intended to render that document inadmissible in any proceedings against that officer. Whether or not those words have that effect, it is clear that the officer submitted that report for the purpose of the internal investigation only and on the basis that its contents could not be used in any proceedings against her.

59. Taking into account the contents of Document 1 and the words that preface it, I consider that there are real and substantial grounds to expect some prejudice to the ability of the agency in the future to obtain reports from police officers who are directly and personally involved in matters giving rise to an investigation by IIB, if that document were to be disclosed. In my view, its disclosure could reasonably be expected to have the effect of causing officers who are directly involved in an incident which may involve allegations of criminal conduct, more often to claim the privilege and refuse to report to IIB either fully and frankly or at all.

60. I stress that it is not to be taken from anything I have said that I have found or consider anything in Constable Blake's report to be incriminatory of her. That is altogether a different question to whether she was entitled to claim the privilege. In my view, the material before me is sufficient to establish the requirements of paragraphs (a) and (b) of clause 8(2) with respect to Document 1. Therefore, the

exempt status or otherwise of that document requires a consideration of whether disclosure would, on balance, be in the public interest.

The public interest test

61. The agency submitted that there was a public interest in the agency being accountable for its investigations of complaints against police. However, it was argued that that public interest was served by the role of the Parliamentary Commissioner for Administrative Investigations (the Ombudsman) in overseeing the police complaint process.

62. The complainant's solicitor did not take issue with the claim that the disputed documents are confidential communications of a type described in paragraph (a) of clause 8(2). The complainant's solicitor also accepted the claim of Acting Commander McLeod that the agency is unable to control the content of reports submitted by police officers pursuant to an order under regulation 603. However, it was his submission that disclosure of the documents was in the public interest because it would assist in preparing the complainant's defence to the charge of assaulting a public officer.

63. The complainant's solicitor recognised that there was a public interest in the agency's investigations into complaints about police, such as the complaint made by the complainant to IIB, being impartial, effective and fair and in being seen to be so. In this instance, it was argued, its procedures are defective because the complainant had not been advised of what the police officers had reported to IIB. Instead, the complainant had only received information about the alleged assault on his person in the letter from the then Commander of IIB at the conclusion of the IIB investigation of his complaint. Other information he had obtained through the disclosure of documents by the agency following his access application did not disclose the fact of that assault. It was the submission of the complainant's solicitor that, as there was no independent evidence of the alleged assault, disclosure of the disputed documents would, on balance, be in the public interest.

64. I recognise a public interest in ensuring that investigations into complaints against police are proper and that the agency is accountable for its investigations of its own personnel. In my view, there is also a public interest in this complainant, and others in a similar situation, knowing how the agency deals with complaints made about its officers and the steps taken, in a general sense, to investigate those complaints. An aspect of that public interest includes being informed of the reasons why the agency has reached a particular decision on a complaint. It is also my view that the minimum requirement to satisfy this aspect of the public interest is the provision of a notice that summarises relevant material in the reports of the police officers concerned, and includes an explanation of how the agency resolved the conflicts, if any, and if they were resolved, between the evidence of those officers and the claims of the complainant.

65. I have examined a copy of the agency's correspondence to the complainant which informed him of the outcome of its investigation into his complaint. In my view, that

document does not go nearly far enough towards addressing the public interest requirements that I have identified above. Whilst I accept the role and function of the Ombudsman in overseeing the police complaints processes, the reports of the Ombudsman into those matters are generally not published in the way that I am required to publish my decisions and reasons for my decisions, nor are the agency's reports into its internal investigations available for public scrutiny.

66. However, from my examination of the contents of Document 1, it is my view that disclosure of that document would not assist to make the agency more accountable in its investigations into complaints against police. Therefore, in the circumstances of the matter before me, it is my view that the public interest in maintaining the integrity of an internal investigation process, which has the potential to be a powerful accountability mechanism, outweighs the public interest in the complainant having access to information that may or may not be useful for his defence of a charge in the courts of petty sessions. I find that Document 1 is exempt under clause 8(2) of Schedule 1 to the FOI Act.

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