

EDWARDS AND MOJ

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

**File Ref : 94103
Decision Ref: D02494**

Participants:

Barry John Edwards
Applicant

- and -

Ministry of Justice
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - record of a telephone conversation - clause 3(1) - personal information about third parties - public interest - applicant's reasons for wanting access may be relevant where public interest is a consideration - protection of personal privacy.

Freedom of Information Act 1992 (WA) s.10; 21; 68(1); 72(1)(b); 74(1); 74(2); 75(1); 102(3); Schedule 1 clause 3(1).

Re Smith and State Government Insurance Commission (5 December 1994, unreported).

DECISION

The decision of the Ministry of Justice of 22 August 1994 is confirmed. The requested document is exempt under clause 3(1) of Schedule 1 to the FOI Act.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

12th December 1994

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision of the Ministry of Justice ('the agency') to deny Mr Barry John Edwards ('the applicant') access to one document pursuant to an application for access made by the applicant under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 25 March 1994 the applicant applied to the agency for access to documents described as "*...files held in my name by the Probation and Parole Service and Department of Corrections as they were known in 1972 when I came into contact with them.*"
3. Subsequently, on 29 April 1994 the agency requested from the applicant an extension of the "permitted period" of 45 days within which it was required to deal with his access application. The applicant agreed to the agency's request that the permitted period be extended to 26 May 1994.
4. On 25 July 1994 the agency provided the applicant with a partial notice of decision relating to that part of his request which dealt with documents held on a file described as the "Inmates Personal Record" file. Mr Bill Bykerk, FOI Co-ordinator, an authorised decision-maker for the agency, decided on that date to grant the applicant access to all documents except one which was described by him, in a schedule provided to the applicant, as a brief hand-written record of a telephone call between an un-named caller and an officer at Wooroloo Prison ('the disputed document'). Access to the disputed document was refused by Mr Bykerk on the ground that it contained personal information about a person other than the applicant and was, therefore, exempt under clause 3(1) of Schedule 1 to the FOI Act. On 2 August 1994, the agency granted the applicant access in full to the remaining documents that were within the ambit of his request.
5. On 5 August 1994 the applicant sought internal review by the agency of its decision to deny him access to the disputed document. On 22 August 1994, Mr Peter Nella, the internal reviewer, confirmed the original decision to deny access on the ground that the disputed document was exempt under clause 3(1) because it contained personal information about a third party. On 24 August 1994 the applicant applied to the Information Commissioner for external review of that decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. On 30 August 1994, in accordance with my statutory obligation under s.68(1) of the FOI Act, I notified the agency that I had formally accepted this complaint for review. In accordance with my usual practice and pursuant to my authority under s.75(1) and s.72(1)(b), I required the production to me of the disputed document and the agency's file maintained in respect of this access application.
7. In this instance, the internal reviewer had adopted the reasoning of the initial decision-maker who had decided that the disputed document contained exempt matter but he had, in addition, identified and weighed the public interest factors for and against release, and concluded that, on balance, the factors against release of the document outweighed the factors in favour.
8. On 17 October 1994 one of my officers made contact with other parties whom I considered might be affected by a decision made on this complaint, and, without revealing the nature of the exempt matter, advised them of the nature of the complaint before me and invited submissions about the release or otherwise of the disputed document which contained information considered by me to be personal about them. Subsequently I received a request from third parties to be joined as parties to this complaint and they advised me that they objected to the release of the document.
9. On 7 November 1994, I informed the applicant that it was my view that the disputed document contained personal information about at least two other third parties and that this information was, *prima facie*, exempt under clause 3(1) of Schedule 1 to the FOI Act. Further, pursuant to his onus under s.102(3), he was required to identify the public interest factors which he claimed, on balance, favoured the disclosure of this document.
10. The applicant's submission in favour of release of this document was provided to me on 10 November 1994. Enclosed with his response were a number of other documents, including copies of various letters written by the applicant to Members of Parliament, both State and Federal, to the police, the courts, other government departments and various agencies. Most of this information, if not all, was irrelevant for my purposes. However, the applicant informed me that his access to the disputed document "*...would promote the interests of public safety and the welfare of my progeny and their contemporaries.*" No explanation of this claim was offered nor were any other public interest factors identified by the applicant.
11. On 18 November 1994 a member of my staff met with the third parties and took oral submissions from them, which submissions were reduced to writing and provided to me. Following that meeting, and after I had considered all the material before me, the applicant was informed on 5 December 1994 that it was my preliminary view that he had not discharged his onus under s.102(3) of the FOI Act. He was invited, in light of this preliminary view, to reconsider his complaint. He was also invited, if he wished nonetheless to pursue his complaint, to make further submissions on the public interest.

12. The applicant provided me with his response to this invitation on 8 December 1994 but he did not provide any further public interest factors in support of his request for access to the disputed document. He again enclosed information consisting of copies of various documents similar to those previously supplied to me. None of this additional information was relevant to the onus which the applicant bore under s.102(3).

EXEMPTION UNDER CLAUSE 3

13. The agency claims the disputed document is exempt under clause 3(1) of Schedule 1 to the FOI Act. Clause 3 provides:

"3. Personal information

Exemption

- (1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*

Limits on exemption

- (2)...
- (3)...
- (4)...
- (5)...

- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

14. In the Glossary in Schedule 2 of the FOI Act, "**personal information**" is defined to mean: "*...information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -*

- (a) *whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
- (b) *who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample."*

15. As I have said in previous decisions, and most recently in *Re Smith and State Government Insurance Commission* (5 December 1994, unreported), in my view, this exemption is designed to protect the privacy of individuals. The protection of personal privacy is an important feature of the legislation in Western Australia and I consider there to be a strong public interest in maintaining that privacy, subject

only to some clearly demonstrated countervailing public interest that requires the disclosure of such information.

16. The agency advised the applicant, in its notice of decision of 25 July 1995, that the public interest was not served by the release of the disputed document because:

"[t]he disclosure of the material would be an unreasonable invasion of the privacy of the individual as the identity of the party in connection with the material in question is not already public knowledge.

The knowledge of the material would not assist you in gaining a better understanding of the Ministry's administrative and decision making processes.

The material in no way relates to your underlying interest in access (as evidenced by documents provided by you), being the collection of material that may assist you in your efforts to secure a pardon in relation to your convictions.

The material is not relevant to any decision made by the Ministry in relation to the administration of your sentence and disclosure would not therefore provide you with any material upon which you could question or challenge a decision the agency."

17. The latter three of those considerations relate to the applicant's reasons for seeking access to the disputed document. Section 10 of the FOI Act provides that a person's right to be given access is not affected by any reasons the person gives, nor the agency's belief as to what those reasons might be. However, in my view, in certain circumstances, an applicant's reasons may be relevant to any consideration of where the balance of the public interest lies.
18. I have examined the disputed document and considered the submissions of the applicant and the third parties. I am satisfied that the document contains personal information about the applicant as well as the third parties. I am not able to reveal the identity of the third parties nor the substance of their arguments because, to do so would be a breach of my duty under s.74(1) and (2) of the FOI Act which requires, in the course of dealing with a complaint and providing reasons for my decision on that complaint, that I avoid the disclosure of exempt matter.
19. Although the disputed document contains some information that is personal to the applicant, and the fact that it is personal information about him is, by virtue of s.21 of the FOI Act, a factor in favour of its disclosure, the public interest in this applicant being able to exercise his rights of access to this information must be balanced against the public interest in the right to privacy of third parties. This latter aspect of the public interest, together with other factors identified by the third parties, in my view, is the stronger in this instance. Further, I am of the view that it is not possible to edit the document in such a way that disclosure

would not reveal personal information about the third parties and it was not, therefore, practicable for the agency to give access to an edited copy.

20. Taking all of these matters into consideration, I am not satisfied that the applicant has discharged his onus under s.102(3) of the FOI Act and he has not persuaded me that there is a public interest which, on balance, requires the disclosure of the document. Accordingly, I find that the document is exempt under clause 3(1).
