

MARKHAM AND JUSTICE

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

**File Ref: 94144
Decision Ref: D02595**

Participants:

Terence Markham
Applicant

- and -

Ministry of Justice
Respondent

- and -

F
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - prison officer's reports on the actions of another prison officer - clause 8 - confidential communications - whether confidential information obtained in confidence - whether disclosure could reasonably be expected to prejudice the future supply of information of that kind - whether, on balance, in the public interest to disclose.

FREEDOM OF INFORMATION - Part 3 - whether right to correct agency's records includes right to change record of opinion.

Freedom of Information Act 1992 (WA) Part 3; ss.68(1); 72(1); 75(1); 102(3); Schedule 1 clauses 3(1); 5(1); 8(2) and (4).

Prisons Act 1981 (WA) ss.9; 12.

Re Simonsen and Edith Cowan University (Information Commissioner, WA, 13 July 1994, unreported).

Re Gahan and City of Stirling (Information Commissioner, WA, 21 October 1994, unreported).

News Corporated Limited v National Companies and Securities Commission (1984) 57 ALR 550.

Ryder v Booth [1985] VR 869.

Re Read and Public Service Commission (Information Commissioner, WA, 16 February 1994, unreported).

DECISION

The decision of the agency is confirmed to the extent that I have decided that the documents are exempt under clause 8(2) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

9th August 1995

REASONS FOR DECISION

BACKGROUND

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 refuse Mr Markham ('the complainant') access to two documents of the agency requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant is a Senior Prison Officer stationed at Canning Vale Prison. On 28 August 1994, another Senior Prison Officer submitted a two page report to the Superintendent of Canning Vale Prison, containing a number of allegations against the complainant. A second report, dated 6 September 1994, was subsequently submitted by the same Senior Prison Officer to the Superintendent. The second report was created following a discussion between the complainant and its author after the complainant became aware of the existence of the first report.
3. Copies of the reports dated 28 August and 6 September 1994 ('the disputed documents') were requested by the complainant, pursuant to his rights of access under the FOI Act, on 16 September 1994. In addition, the complainant requested access to one other document, being a report written by the then Acting Deputy Superintendent. On 23 September 1994, Mr W Bykerk, the agency's FOI Co-ordinator, informed the complainant that that document was located on the complainant's personnel file held at the prison and that he may read or request a copy of that document under existing procedures outside the operation of the FOI Act. On 11 October 1994, a decision on access to the other requested documents was made by Mr Bykerk. Access was refused on the grounds that the requested documents are exempt under clause 3(1), clauses 5(1)(a), (b) and (c) and clause 8(2) of Schedule 1 to the FOI Act.
4. On 1 November 1994, the complainant requested internal review of that decision. On 17 November 1994, Mr P Nella, Manager, Records Management Branch of the agency, decided to vary the initial decision. Mr Nella abandoned the claims under clause 3(1) of Schedule 1 to the FOI Act, but decided that the disputed documents are exempt under clauses 5(1)(a), (b) and (c) and clause 8(2). On 12 December 1994, the complainant sought external review by the Information Commissioner.

REVIEW BY THE INFORMATION COMMISSIONER

5. On 20 December 1994, in accordance with my obligations under s.68(1) of the FOI Act, I notified the agency that I had accepted this complaint for review. Pursuant to my authority under s.75(1) and under s.72(1)(b), I also required the production to me of the requested documents, together with the agency's file

maintained in respect of this access application. Those documents were delivered to my office on 23 December 1994.

6. Although a preliminary conference with the parties was arranged by my office to explore the option of conciliation in this matter, the complainant subsequently withdrew from that arrangement. As a result, further attempts to reach a settlement between the parties were abandoned.
7. On 13 February 1995, the author of the disputed documents applied to my office to be formally joined as a third party in the proceedings and he was so joined. The third party was provided with copies of the agency's notice of decision and a schedule describing the disputed documents and the exemptions claimed. He was invited to make submissions on the exempt status of those documents and he provided my office with written submissions supporting the claims of the agency.
8. On 20 March 1995, I advised the agency that I required further information and, accordingly, pursuant to my authority under s.72(1)(a) of the FOI Act, I required the agency to give me information about any investigations that the agency may have conducted following its receipt of the disputed documents.
9. On 27 March 1995, the agency provided the further information and additionally informed me that the disputed documents had been seized by officers of the Police Force of Western Australia. On 24 April 1995, again, pursuant to my authority under s.72(1)(a) of the FOI Act, I required the Commissioner of Police to provide information to me as to whether or not the disputed documents were required by his agency for the conduct of any investigation. On 3 May 1995, the Commissioner of Police informed me that the disputed documents were not then, and were not at any time, the subject of any investigation by his agency.
10. On 11 and 12 May 1995, after examining the disputed documents and considering the submissions of the parties, I provided the parties with my preliminary view and reasons for reaching that preliminary view. On the information before me, I rejected the agency's claims that the disputed documents are exempt under clause 3(1) or clauses 5(1)(a),(b) and (c). However, it was my view that those documents may be exempt under clause 8(2). Consequently, the agency abandoned its claims for exemption based on clauses 3(1), 5(1)(a) and (c), but maintained that the disputed documents are exempt under clause 5(1)(b) and clause 8(2) of Schedule 1 to the FOI Act. The third party also provided additional material in support of his claims that those documents are exempt under clause 8(2). The complainant's submission addressed the public interest test in accordance with the onus on him under s.102(3) of the FOI Act.

THE EXEMPTIONS

11. The disputed documents are described in paragraph 2 of this decision. The agency and the third party claim that both documents are 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.*

12. To establish a claim for exemption under clause 8(2), an agency must not only persuade me that the information, if disclosed, would reveal information of a confidential nature obtained in confidence, but also that the disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. If those elements are established, consideration must then be given to whether clause 8(4) operates to limit the exemption. That is, matter is not exempt matter under sub-clause (2) if its disclosure would, on balance, be in the public interest.
13. As I have stated in previous decisions (*Re Simonsen and Edith Cowan University* (13 July 1994, unreported), at paragraph 24; *Re Gahan and City of Stirling* (21 October 1994, unreported), at paragraph 20), the Concise Oxford Dictionary defines "prejudice" as meaning, *inter alia*, "harm or injury that results or may result from some action or judgement".
14. I also accept as being a correct explanation of the meaning of the phrase "could reasonably be expected to prejudice", the meaning given by all the judges in *News Corporation Limited v National Companies and Securities Commission* (1984) 57 ALR 550 when those words arose for consideration by the Federal Court. 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."
15. The decision of the Full Court of the Victorian Supreme Court in *Ryder v Booth* [1985] VR 869 is also relevant to my consideration of the meaning 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."

16. Therefore, these are the tests that must be applied by agencies in the first instance and, ultimately, by me, when access to a document is refused on the basis of a claim for exemption under clause 8(2) of Schedule 1 to the FOI Act.

Do the disputed documents contain information of a confidential nature obtained in confidence?

17. There is material before me from the third party which evidences that it was his understanding that the disputed documents were supplied in confidence and in accordance with a general understanding in the prison system that reports of that nature are also received in confidence. The information contained within those documents which is considered to be "confidential", concerns the administration of a prison and opinions and allegations about the performance of other prison officers. Further, both documents contain a hand-written notation that indicates they were received and treated as confidential and that the allegations would be, and subsequently were, investigated by the authorities. On that basis, I am satisfied that those documents contain information of a confidential nature that was given and received in confidence.

Could disclosure of the disputed documents reasonably be expected to prejudice the future supply of that kind of information to the agency?

18. The agency claimed that the kind of information contained within the disputed documents is volunteered in confidence by prison officers and that its ability to obtain that kind of information is dependent on the maintenance of confidentiality. I was also informed that the matters under investigation by the agency as a result of receiving the disputed documents concerned matters of administration and prison officers were not duty bound to report such matters. In support of that statement I was referred to s.12 of the *Prisons Act 1981*.

19. The duties of prison officers are found in section 12 of the *Prisons Act 1981*. Section 12(b) provides:

"12. Every officer -

(a)...

(b) has a responsibility to maintain the security of the prison where he is carrying out his duties and shall report to the superintendent every matter coming to his notice which may jeopardize the security of the prison or the welfare of prisoners."

20. It was the submission of the agency that s.12(b) created no statutory obligation on prison officers to report the kind of matters contained in the disputed documents. Further, it was submitted that the willingness of prison officers to volunteer such information, and the absence of any sanctions for failing to volunteer such information, required the maintenance of confidentiality. That view was also supported by the third party, although he considered that he was bound by s.12(b) to report such matters. In my opinion, the matter contained in the disputed documents is not matter primarily relating to the security of a prison or the welfare of prisoners. Any connection to matters relating to the security of the prison is, in my view, remote. Therefore, it is my view that the third party was not bound by his duties under s.12(b) of the *Prisons Act 1981* to report on those matters contained in the disputed documents, even though, in his submission, he believed that he was.

21. The agency referred to the findings in my decision in *Re Read and Public Service Commission* (16 February 1994, unreported) at paragraph 54 of that decision, where I said, *inter alia*, "... the fact that grievances may involve questions about the management practices of senior officers, which fact was alluded to in the additional reasons provided to my office by Ms Robbins on 31 December 1993, I find that it is reasonable to expect that some employees would be reluctant to identify inappropriate practices of this type in the future, and to bring these to the attention of OMP for informal resolution if confidentiality was not assured."

22. In support of that view, I received a copy of a submission to the agency from Mr Peter Moore, Acting Director, Prison Operations, Corrective Services Division of the agency, in relation to confidential information and confidential sources of information generally. Mr Moore has experience as a prisons administrator and is a reporting officer for the purpose of an inquiry under s.9 of the *Prisons Act 1981*. He said:

"1. That revealing information given in confidence to the person, the subject of such information, creates a catalyst and a dangerous potential for the relationships between Prison Officers who work under continuing personal stress from the nature of the work environment. This bears serious consequences for the order and good government of any prison. The existence of confidential information given by a Prison Officer which may be or is

suspected to be adverse to another Prison Officer intrinsically does not matter unless some adverse consequence results. This can only occur following investigation and corroborative proof during which the Officer reported becomes a "suspect" and is allowed the right of reply consistent with the Rules of Natural Justice. Where no following actions occur and, yet, the Officer reported on is told of the information given against him or her, this has the undesirable effect of generating feuds and internecine reprisals which last for years.

2. *There is no surer way to uncover wrongdoing in a prison, as in any setting, than by information received. The major incentive in such co-operation is that the source of such information remains confidential. Revealed sources means revealed identities which invite reprisals - sometimes of a brutal nature - and the loss of informants, with a consequence that wrongdoing flourishes undetected..."*
23. In the instant case, the complainant has been informed of the substance of the allegations and is aware of the identity of the author of the documents. However, based on the material before me and my own examination of the disputed documents, I am satisfied that the disclosure of those documents could reasonably be expected to result in a reduction in the quality or quantity of information volunteered to the agency by prison officers, where that information relates to administrative issues such as the management and performance of personnel. In my view, there is no obligation upon officers to report such matters and few, if any, other influences to encourage them to do so. I recognise that there exists a potential for disharmony between prison officers who work in a very closed and confined environment, and that disharmony may potentially disrupt the operation of the prison. I accept that this fact would be a strong disincentive to officers to provide that kind of information in the future if the disputed documents were to be disclosed, and if it were also to become known to prison officers that such documents had been disclosed.
24. Therefore, I am satisfied that disclosure of the disputed documents could reasonably be expected to prejudice the future supply of that kind of information to this agency. I find that the requirements of paragraphs (a) and (b) of clause 8(2) are established. However, the exempt status or otherwise of the disputed documents involves a consideration of the "public interest test", that is, whether disclosure would, on balance, be in the public interest.

The Public Interest Test

25. The onus of persuading me that disclosure of matter described in clause 8(2) of Schedule 1 to the FOI Act, would, on balance, be in the public interest, lies on the complainant under s.102(3) of the FOI Act. The complainant identified the following aspects of the public interest as relevant in this instance:

- (i) the public interest in an individual knowing the precise nature of allegations against him or her;
 - (ii) the public interest in individuals being afforded a right of reply to documents which are prepared and submitted in secret; and
 - (iii) the public interest in ensuring that individuals are able to access and correct information in documents that is inaccurate or misleading.
26. Balanced against those public interests are the following factors, which the agency claimed should prevail:
- (i) the public interest in protecting the privacy of individuals;
 - (ii) the public interest in protecting the requirement of confidentiality for the conduct of investigations;
 - (ii) the public interest in ensuring the continued supply of information volunteered by staff members; and
 - (iv) the public interest in maintaining confidentiality in a secure prison environment in order to preserve the safety of prisoners, prison staff and the community.
27. In my view, there are two main competing public interests that must be balanced in this instance. I recognise a public interest in officers employed in State and local government agencies being informed of the nature of allegations made against them, being given an opportunity to answer those allegations, and being informed of how the relevant agency has dealt with those allegations from an administrative point of view. I also recognise a public interest in the maintenance of a system in agencies, such as this agency, that enables issues to be brought to the attention of management and to be promptly and efficiently resolved by management.
28. In my view, taking into account the prison environment, I consider it desirable that issues relating to the performance by prison officers of their duties be dealt with informally wherever possible, rather than by invoking the provisions of s.9 of the *Prisons Act 1981* and establishing a formal inquiry. The latter procedure is, of necessity, costly to the agency and, indirectly, to the community. In my opinion, the public has a right to expect that agencies resources are used effectively and that appropriate procedures are employed by the agency to resolve most management difficulties that arise from time to time. Further, I am satisfied that such informal procedures are in place and are appropriately used by the agency.
29. The agency informed me that the general process for investigating allegations or complaints is as follows. If an incident is made known to the Superintendent of the relevant prison, the Superintendent may deal with the matter or may refer it to the Director General of the agency. If the Director General requires the matter to be dealt with the Internal Investigations Unit, instructions will follow. An investigation is conducted (including the taking of statements and a review of any

relevant documentation) and the subject of the investigation is informed of the substance of any allegations or complaints. A report is then prepared, including observations and recommendations, and is submitted to the Director General. The agency informed me that a formal mechanism exists to inform officers the subject of allegations of the substance of the allegations made against them. At the completion of the investigation, and if charges are to result, the officer is informed in writing of the allegations by the departmental Prosecuting Officer.

30. The agency informed me that the complainant was, through discussions held with the then Acting Deputy Superintendent of the prison in the presence of another person at a meeting on 30 August 1994, made aware of the substance of the complaints made in the report dated 28 August 1994. The agency did not consider that the other disputed document, dated 6 September 1994, contained any further specific complaints but that, nevertheless, that letter was also included in the investigation of the earlier complaints. Having inspected and considered that document, I am of the view that it does not contain any matter of any substance such that the public interest demands that the complainant be informed of it and given an opportunity to respond. I was informed by the agency that no formal advice had been supplied to the complainant in relation to the complaints raised by the third party because the complaints did not, and will not, lead to any charges.
31. It is my view, taking into account the material before me, that the public interest in a person in the position of the complainant being informed of allegations being made against him or her, and given an opportunity to respond to them, has been satisfied in this instance. The complainant was made aware of the substance of the allegations made against him in the report of 28 August 1994, at the meeting of 30 August 1994 and again in the Acting Deputy Superintendent's report of 1 September 1994, which confirmed the meeting and was included on the complainant's personal file, and to which he had access. The complainant has, in fact, signed and made an annotation on the Acting Deputy Superintendent's report to the effect that the complainant refutes the allegations and intends to challenge them. The complainant subsequently provided to my office copies of correspondence which indicate, *inter alia*, that the complainant did, in fact, respond in writing to the allegations in the report and that, as a result of enquiries by the agency into the complainant's concerns, the Acting Deputy Superintendent's report has now been removed from the complainant's personal file.
32. It is clear to me, therefore, both from the documents provided to me by both the complainant and the agency and from the submissions of the agency, that the complainant has been informed of the substance of the allegations made against him, has been afforded an opportunity to respond to those allegations, and, if somewhat belatedly, has now been informed by the Director General of the agency of the outcome of the agency's investigations into them. I consider that the public interest in a complainant being informed of the substance of the allegations against him does not require in this instance that he be given access to the actual records containing those allegations, particularly when those records are confidential communications, as I have found them to be in this case.

33. In addition, although I do not necessarily consider there to be a public interest in the complainant being informed of the identity of the author of the documents, such that it would outweigh any public interest against disclosure, it is my understanding that the complainant knows the identity of the third party. It appears that the complainant was aware of the identity of the author of the disputed documents at the time he made his access application. However, if the complainant did not know, but only suspected, the identity of the third party before he made his access application, it was confirmed by the agency's response to his access application. The complainant requested access to, *inter alia*, all correspondence about him from the Senior Prison Officer, whom he named. The complainant gave further details of the two specific documents he believed to exist. The agency, in its response, confirmed that it held two documents fitting the description given, and thereby confirmed the identity of their author.
34. Although Part 3 of the FOI Act provides the complainant with a right to access and correct personal information contained in the agency's documents, that right, in my view, does not include an automatic right to change a record containing an opinion genuinely held by someone else. The right to correct the agency's records only arises if the complainant can establish, to the satisfaction of the agency in the first instance, and to my satisfaction in the case of external review, that the record is incomplete, inaccurate, out of date or misleading.
35. Therefore, for the reasons given, I am not persuaded that disclosure of the disputed documents would, on balance, be in the public interest. I find that both documents are exempt under clause 8(2) of Schedule 1 to the FOI Act. Although the agency claimed that the disputed documents are also exempt under clause 5(1)(b) of Schedule 1 to the FOI Act, it is unnecessary for me to consider that claim in light of my findings under clause 8(2).
