

DECISION SUMMARY ISSUED BY THE INFORMATION COMMISSIONER (WA)

Decision title and citation: *Re Rodrigo and Police Force of Western Australia* [1999] WAICmr 26

COMPLAINT No: F0791999

DECISION No: D0261999

PARTIES: Gabriel David RODRIGO

Complainant

POLICE FORCE OF WESTERN AUSTRALIA

Respondent

No. of documents in dispute: Not applicable

Relevant Sections: s.23; clause 5(1)(b)

The complainant is a sentenced prisoner. In December 1998, the complainant's solicitor sent a letter to the agency requesting access under the *Freedom of Information Act 1992* ('FOI Act') to all documents relating to the complainant. The agency did not consider that that request met the terms of s.12(1)(b) of the FOI Act and sought clarification of the scope of the request. As the required information was not forthcoming by the due date, the agency apparently closed its file and informed the solicitor accordingly.

A further access application was lodged with the agency on 5 February 1999. The agency treated it as an access application for non-personal information and informed the complainant's solicitor that an application fee of \$30 was required in order for the application to be further processed and asked the solicitor again to identify the particular documents required. Although the access application referred to an incident in 1974/75 involving the complainant, the agency informed the solicitor that no documents had been identified in its database in respect of the particular 1974/75 incident. The agency also informed the solicitor of the correct procedures to obtain a copy of the complainant's criminal record.

By letter dated 25 March 1999, the solicitor specified the documents sought under the FOI Act. On that occasion, he informed the agency that access was sought to all incident reports relating to the complainant's criminal charges, all depositions and witness statements in relation to those matters, all prosecution briefs and correspondence to and from the agency and the Director of Public Prosecutions.

By letter dated 13 May 1999, without identifying any of the requested documents, the agency refused the complainant access to the requested documents. Access was refused pursuant to s.23(2) of the FOI Act, on the ground that the requested documents are all exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. The complainant's solicitor applied for internal review of the agency's decision. In a letter dated 1 June 1999, the internal reviewer confirmed the initial decision of the agency to refuse the complainant access to the requested documents pursuant to s.23(2) on the ground that the requested documents are all exempt under clause 5(1)(b). On 9 June 1999, the solicitor lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

Review by the Information Commissioner

I obtained from the agency its FOI file maintained for the purposes of dealing with the complainant's access application and the originals of the documents identified as falling within the scope of the access application. On 27 July 1999, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the agency's decision to refuse access to the requested documents under s.23(2) of the FOI Act may be justified. Nothing further was received from the complainant or his solicitor. Therefore I am not dissuaded from my preliminary view. A summary of my reasons follows.

Section 23 – Refusal of access

The agency refused access to the requested documents in accordance with s.23(2) of the FOI Act. Section 23(2) provides that an agency may refuse access to requested documents without having identified any or all of them and without specifying the reason why matter in any particular document is claimed to be exempt matter if it is apparent, from the nature of the documents as described in the access application, that all of the documents are exempt documents and there is no obligation under s.24 to give access to an edited copy of any of the documents.

If an agency relies upon s.23(2) of the FOI Act and does not identify the requested documents to an access applicant, as the agency has done in this instance, the agency must satisfy the requirements of both paragraphs (a) and (b) of s.23(2). If it can be shown that the documents are of the type described in paragraph (a), then it is necessary to consider the requirements of paragraph (b), that is, whether the agency is obliged under s.24 to give access to an edited copy of any of the documents.

In order to determine the first question, I must consider the nature of an exempt document and exempt matter. The terms "exempt document" and "exempt matter" are defined in the Glossary in the FOI Act. An exempt document is a document that contains exempt matter. Exempt matter means matter that is exempt under one or more of the clauses in Schedule 1 to the FOI Act. In this instance, the agency claims the requested documents are exempt because they contain matter that is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. Clause 5(1)(b) provides that matter is exempt matter if its disclosure could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted.

Clearly, the complainant is aware of the fact of the particular investigation, having been convicted and sentenced for various offences arising from that investigation. Further, some of the material in the requested documents would have been made public in court on the occasion that the complainant entered his plea of guilty. However, in *Police Force of Western Australia v Kelly and Anor* (1996) 17 WAR 9, at pages 14-15, Anderson J said that the exemption in clause 5(1)(b) is not limited to new revelations and can apply regardless of the actual state of knowledge of the complainant about the particular matter, or the stage the investigation has reached. In *Kelly's* case, Anderson J also made it clear that documents can "reveal an investigation" even when the investigation has been revealed through other materials or the investigation has concluded. His Honour considered that the same state of affairs could be separately revealed in separate documents and that the separate disclosure of each separate document reveals that state of affairs.

Having considered the nature of the documents described in the complainant's access application, and having examined the documents produced to me by the agency, it appears to me that those documents contain matter that could reasonably be expected to reveal the fact of a particular investigation by police of particular incidents involving certain people and something of the content of that investigation. In my view, the documents described in the access application would all be exempt under clause 5(1)(b). I have also considered whether the agency is under an obligation to give the complainant access to edited copies of the requested documents. I do not consider that it would be practicable to edit those documents or that the agency is under any obligation, in this instance, to give access in that form. Clearly, editing by deleting exempt matter would result in the deletion of the very information sought by the complainant.

Clause 5(1)(b) is subject to the limit on exemption in clause 5(4), but I am satisfied that none of the documents contains matter of the kind described in clause 5(4)(a)(i), (ii) or (iii). Further, in the absence of any submissions from the complainant, there is nothing before me to suggest otherwise. In any given situation, an agency has a discretion under s.3(3) to release documents that are technically exempt. Some of the requested documents contain matter that is personal information about third parties other than the complainant. Others are routine court documents found on a prosecution brief, such as Committal Cover Sheet, Statement of Material Facts, Committal for Sentence, Election Date Face Sheet, Complaints and Brief Jacket. In respect of the latter documents, I consider that this is a case where there was some scope for the agency to exercise its discretion and grant access.

As Information Commissioner, I do not have the discretion that the agency has under s.3(3). I must apply the law made by the Parliament and as it has been interpreted by the Supreme Court of Western Australia. In this instance, the agency has decided not to exercise its discretion. Therefore, the only questions for me to determine are whether the documents described in the complainant's access application are all exempt and the agency's decision to refuse access in accordance with s.23(2) was justified.

Conclusion

For the reasons given, I find that the requested documents are exempt under clause 5(1)(b). I confirm the decision of the agency to refuse access to the requested documents pursuant to s.23(2) of the FOI Act.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER
9 August 1999