

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

**File Ref: F0941999
Decision Ref: D0271999**

Participants:

Ronald George MacKenzie
Complainant

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – telephone interception warrant – whether the requested document is a document of an exempt agency – document in possession or control of an exempt agency – section 10(1) – right of access – Schedule 2 – list exempt agencies – document of an agency – document created by an exempt agency – accountability requirements of the FOI Act.

Freedom of Information Act 1992 (WA) s. 10(1), Schedule 1 clause 5(2), Schedule 2; Glossary, clauses 2(2), 4(1) and 6(1).

Telecommunications (Interception) Act 1979 (Cth).

Telecommunications (Interception) Western Australia Act 1996(WA).

DECISION

The decision of the agency is confirmed. The requested document is a document of an exempt agency to which there is no right of access under s.10(1) of the *Freedom of Information Act 1992*

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

12 August 1999

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Police Force of Western Australia ('the agency') to refuse Mr MacKenzie ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act'). The agency claims that the requested document is a document of an exempt agency and not a document of the agency.
2. The complainant is a serving police officer. On 29 April 1999, the complainant lodged an application with the agency seeking access under the FOI Act to a document described as a telephone interception warrant issued to monitor a particular telephone number.
3. The agency refused the complainant access to the requested document on the ground that it is a document of an exempt agency, namely, the Bureau of Criminal Intelligence, and therefore not a document of the agency. The complainant sought internal review of the agency's decision. On 10 June 1999, the internal reviewer confirmed the initial decision of the agency. On 24 June 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

4. The right of access in s.10(1) of the FOI Act does not include a right of access to documents of an exempt agency. The Bureau of Criminal Intelligence ('the BCI') is listed as an exempt agency in Schedule 2 to the FOI Act. Therefore, after receiving this complaint, I instituted certain inquiries with the agency and obtained information to enable me to determine whether the requested document is a document of the agency or a document of an exempt agency.
5. On 3 August 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 decision of the agency to refuse the complainant access to the requested document on the ground that it is not a document of the agency but a document of an exempt agency, the BCI, appeared to be justified. I received a response from the complainant's solicitor, but he did not withdraw his complaint.

Exempt agencies

6. Section 10(1) of the FOI Act provides:

“10. (1) A person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with this Act.”

Exempt agencies are listed in Schedule 2 to the FOI Act. Various discrete sections of the agency including the BCI, the Protective Services Unit, the Witness Security Unit and the Internal Affairs Unit are listed in Schedule 2 as exempt agencies.

7. The effect of being listed as an exempt agency in Schedule 2 is to quarantine documents of that body, and hence the activities of that body, from the provisions of the FOI Act. Generally speaking, the sections of the agency which are exempt agencies under the FOI Act are those concerned with, *inter alia*, the gathering of information on, and the investigation of, corrupt and illegal activities, and those concerned with the safety and protection of certain public figures. The Parliament of Western Australia has decided that the public interest is served by those bodies being exempt agencies and, therefore, not subject to the provisions of the FOI Act.

Documents of an exempt agency

8. The term “document of an agency” is defined in clause 4(1) of the Glossary to mean “... a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer.”
9. Clause 2(2) of the Glossary provides that the BCI is to be regarded as a separate agency and is not to be regarded as part of the agency. By virtue of clause 6(1) of the Glossary, a document of the BCI is not to be regarded as a document of the agency.
10. However, the FOI Act recognises that, from time to time, a document originating in exempt agencies may be held by another agency and thus may be accessible under the FOI Act. In those cases, the test is whether the agency receiving the access application has possession or control of the document in question, although the document itself may be exempt for any of the reasons listed in Schedule 1 to the FOI Act. Notwithstanding that, by virtue of clause 5(2) of Schedule 1, a document in the possession of the agency will be exempt from disclosure if it was created by the BCI.

The complainant’s submissions

11. The complainant submits that a copy of the requested document was, or is, in the possession of a police officer who was, at the relevant time, based in Midland. The complainant informs me that he understood that that particular police officer was the officer in charge of the inquiry pursuant to which the warrant was issued and that the warrant in question emanated from the Midland Detective Office.

12. My office made inquiries into this aspect of the matter. From my examination of the agency's FOI file and from information provided by the agency, it is my understanding that the application for the warrant was made at the instigation of the Midland Detective Office, but the warrant was created and retained by the BCI. On the basis of the material before me, it is evident that a copy of the telephone interception warrant is not held at the Midland Detective Office and that the police officer handling the particular investigation is not, nor ever has been, in possession of the requested document.

Telephone interception warrants

13. I understand from information provided by the agency that the Telephone Interception Unit ('the TIU') located in the BCI has responsibility for all matters pertaining to the preparation and coordination of applications for telephone interception warrants and their maintenance and storage. I understand that once the TIU has been advised that a warrant is required, the warrant is drawn up by the TIU. It is then collected by a solicitor from the agency, together with the associated application papers, and presented to an eligible judge in Chambers of the Family Court of Western Australia or to a nominated member of the Administrative Appeals Tribunal, pursuant to section 45 of the *Telecommunications (Interception) Act 1979 (Cth)*. The Court or Tribunal issues the warrant, which is handed by the agency's solicitor to an authorised TIU officer (outside Chambers or the Tribunal). That officer then takes the warrant to the office of the TIU for execution.
14. Information concerning the warrant is recorded in the BCI on a "restricted records" register ('the Register') held at the office from which the inquiry is conducted, pursuant to s.5(1) of the *Telecommunications (Interception) Western Australia Act 1996*. I am informed that information concerning the requested document was in the Register at the Midland Detective Office. That record, which was created and maintained by the TIU, was returned to the TIU (following the preliminary hearing of matters involving the complainant) and retained in order to satisfy the obligations placed on the agency by both Commonwealth and State interception legislation. Information relating to telephone interception warrants is dealt with under the provisions of the *Telecommunications (Interception) Act 1979 (Cth)*.
15. The agency informs me that, for the purposes of court proceedings, certified copies of warrants are included in a brief of evidence, whilst the original documents are retained in the TIU office. As I understand it, other than the Register that is returned to the TIU, all other documents provided as evidence in a preliminary hearing are sent to the Director of Public Prosecutions ('the DPP'). The DPP is also listed in Schedule 2 to the FOI Act as an exempt agency and documents of the DPP are also not accessible under the FOI Act.
16. Those inquiries satisfy me that the requested document is a document of the BCI and not a document of the agency. There is nothing presently before me to suggest that the agency holds, or has ever held, a copy of that document. However, if a copy of the requested document were to be held by the agency – for example, at the Midland Detective Office – it would be open to the agency

to claim exemption for that document under clause 5(2) of Schedule 1 to the FOI Act on the ground that it was created by an exempt agency, the BCI.

17. The complainant submits that access to the requested document and information about the circumstances of its issue is sought to enable his solicitor to verify that its issue and execution were lawful. He submits that clause 5(2) operates to effectively prevent inquiries into the legality of telephone interception warrants in general, and the requested document in particular. The complainant further submits that, if such documents are not accessible under the FOI Act, then there is no mechanism to ensure that the BCI has adhered to the law in the obtaining and executing of such a warrant and therefore no means of making the BCI accountable for its actions in that regard.
18. One of the objects of the FOI Act is to make agencies accountable to the public. However, Parliament has decided that some bodies should not be subject to the accountability requirements of the FOI Act. In respect of exempt agencies listed in Schedule 2 to the FOI Act, other checks and balances may exist to ensure accountability requirements are met. In the case of the BCI, one such check is the legislative requirement that the BCI must persuade a judicial officer that a telephone interception warrant ought to issue. I also understand that there are provisions for supervision by State and Commonwealth Ombudsmen of the legislative procedures relating to the confidentiality and security of documents.
19. On the evidence before me, I am satisfied that the requested document is not a document of the agency, but a document of the BCI, an exempt agency to which there is no right of access under s.10(1) of the FOI Act. Accordingly, I confirm the decision of the agency to refuse access on those grounds.
