

CORSE AND JUSTICE

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

**File Ref: 96108
Decision Ref: D06496**

Participants:

Barry Corse
Complainant

- and -

Ministry of Justice
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents the subject of orders of a Royal Commission - clause 12 - orders that documents not to be published - whether public disclosure of documents would contravene order of person or body having power to take evidence on oath.

Freedom of Information Act 1992 (WA) ss.32, 69(4); Schedule 1 clause 3(1), 12(b).
Royal Commission Act 1968 (WA) ss.11, 19B.

DECISION

The revised decision of the agency is confirmed. Documents A and D are exempt under clause 12(b) of Schedule 1 to the FOI Act.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

13th December 1996

REASONS FOR DECISION

BACKGROUND

- . This complaint arises out of a decision of the Ministry of Justice ('the agency') to give access to edited copies of certain documents to Mr Grant, the former Director General of the agency ('the access applicant') under the provisions of the *Freedom of Information Act 1992* ('the FOI Act'). In this instance, Mr Corse ('the complainant') is a third party who objects to the disclosure of certain matter to the access applicant. The complainant is also a former officer of the agency.
2. At the request of the access applicant, the agency did not disclose his identity to the complainant in the course of its dealing with this matter. Further, I did not disclose the identity of either the access applicant or the complainant in the course of my dealing with this complaint. However, when the parties were notified that this matter would be determined by a formal decision, neither party requested to remain anonymous and I did not receive any submissions objecting to my usual practice of identifying the parties to a decision.
3. By letter dated 13 March 1996, the access applicant sought access under the FOI Act to certain documents of the agency written by the complainant. Before making a decision on access, the agency consulted with the complainant in accordance with s.32 of the FOI Act and provided him with a copy of each of the disputed documents to enable him to give his view as to whether those documents contain any matter that is exempt matter under clause 3(1) of Schedule 1 to the FOI Act.
4. The complainant objected to the disclosure of any of the disputed documents to the access applicant. However, on 15 April 1996, the agency decided to provide the access applicant with access to edited copies of all 5 documents from which certain matter had been deleted. The agency did not claim exemption for the matter deleted, but claimed that that matter was outside the ambit of the access application because it did not contain personal information about the access applicant. However, the complainant objected to the agency's decision to provide access to those documents and sought internal review of the agency's decision.
5. On 10 June 1996, the agency's internal reviewer confirmed the initial decision to release the documents in edited form to the access applicant. However, the agency deferred the giving of access to allow the complainant to exercise his rights of review under the FOI Act. Consequently, on 9 July 1996, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained copies of the disputed documents from the agency. In the complainant's submissions, he referred to the disputed documents being the subject of inquiry by other law enforcement and review agencies. Contact was made with those organisations to determine whether the subject matter of the disputed documents related to any on-going investigations. Inquiries were also made with Counsel Assisting the Royal Commission into the City of Wanneroo ('the Royal Commission'), as the complainant claimed that some of the documents had been produced in evidence to the Royal Commission and were the subject of "suppression orders".
7. On 21 October 1996, after considering the material before me, including the contents of the disputed documents, I informed the parties in writing of my preliminary view of this complaint. It was my preliminary view that two documents which the agency had decided to release in edited form to the access applicant may be exempt documents under clause 12 of Schedule 1 to the FOI Act, as they were subject to suppression orders made by the Royal Commission. However, it was also my preliminary view that the agency's decision to provide the access applicant with access to edited copies of the other three documents may have been correct. Accordingly, I sought submissions from the access applicant pursuant to s.69(4) of the FOI Act, as I was satisfied that he might be affected by a decision made on the complaint. I subsequently received submissions from the access applicant.
8. After being informed of my preliminary view, the agency agreed that the two documents may be exempt under clause 12 and decided that it would not give access to those documents. The complainant withdrew his complaint. On that basis, the complaint before me involving the complainant and the agency was resolved. However, the access applicant informed my office that he required access to all the disputed documents in order that he could pursue his legal rights, and wished to pursue the matter. After discussions with my Investigations Officer and following correspondence between my office and the access applicant he was formally joined as a party to this complaint.
9. Therefore, the only outstanding issue in this complaint concerns the exempt status or otherwise of the two documents to which the agency has now decided to refuse access under clause 12 of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENTS

10. The two documents to which access is refused under clause 12 of Schedule 1 to the FOI Act are:

Document A Copy submission dated 22/2/95 to Official Corruption Commission outlining a chronology of events and accusations against various persons.

Document D Copy letter dated 26/1/95 to a Minister containing various allegations about the activities of a person, with attachment.

THE EXEMPTION

11. Clause 12 of Schedule 1 to the FOI Act provides:

“12. Contempt of Parliament or court

Exemptions

Matter is exempt matter if its public disclosure would, apart from this Act and any immunity of the Crown -

- (a) be in contempt of court;*
- (b) contravene any order or direction of a person or body having power to receive evidence on oath; or*
- (c) infringe the privileges of Parliament.”*

12. In response to my preliminary view that publication of either document may be a breach of an order of a body of the kind referred to in clause 12(b), the access applicant submitted that, if by “publication” it is meant “to make the information available to a third party”, I should consider the following. Firstly, the access applicant has no intention of making the contents of the documents public and offered an undertaking to that effect. Secondly, as an interested party and witness in respect of the Royal Commission, the access applicant is not a third party and should be given access to the documents.

13. However, clause 12 exempts matter from disclosure under the FOI Act if its public disclosure would contravene an order of a relevant body. It does not exempt matter only if its disclosure to the access applicant would contravene such an order; nor does it exempt matter only if the access applicant intends to publicly disclose it. In my view the exemption is made out if it is established that public disclosure of the matter would, if it were to occur, and were to be effected by any person, contravene such an order. There does not, in my view, need to be any likelihood of actual public disclosure for the exemption to be made out.

14. My inquiries with the Royal Commission have established that Document A and Document D described in paragraph 10 above are the subject of orders made by the Royal Commissioner under s.19B of the *Royal Commission Act 1968*. Section 19B provides:

“(1) A commission may direct that any evidence given before it or the contents of any documents, books or writings produced at the inquiry shall not be published.

(2) *A person who, without permission of the Governor, makes any publication in contravention of any direction under subsection (1) may be dealt with on the motion of the Attorney General as if he were in contempt of the Supreme Court and the Supreme Court has jurisdiction accordingly.”*

15. I have examined a copy of parts of the transcript of evidence taken at the Royal Commission. The orders with respect to Document A and Document D respectively are contained on pages 399 and 381 of that transcript. Copies of the relevant pages of transcript have been provided to me by the Royal Commission. With respect to Document A, the order prohibits its publication by any person. With respect to Document D, the order was made during the hearing of evidence in private by the Royal Commission, and, accordingly, I do not reproduce its terms in these reasons. However, I have inspected the relevant section of the transcript recording the order.
16. I have considered the relevant section of the *Royal Commission Act 1968*, advice provided by Counsel Assisting the Royal Commission, and the terms of the orders made by the Royal Commission in respect of the two documents. Accordingly, as the Royal Commissioner is a person empowered by s.11 of the *Royal Commission Act 1968* to receive evidence on oath, I am satisfied that the public disclosure of those documents would contravene an order of the Royal Commission. Therefore, I find that Document A and Document D are exempt under clause 12(b) of Schedule 1 to the FOI Act.
