

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

**File Ref: F2008315  
Decision Ref: D0062009**

Participants:

**H**  
Complainant  
  
- and -  
  
**Police Force of Western Australia**  
Respondent

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – application for amendment of personal information under Part 3 of the *Freedom of Information Act 1992* – refusal to amend personal information by way of deletion – whether disputed information is inaccurate, incomplete, out of date or misleading – police video-tapes of interview of person charged with an offence in circumstances where charge subsequently not proceeded with – whether prejudice or disadvantage that the continued existence of the information would cause to the person outweighs the public interest in maintaining a complete record of information.

*Freedom of Information Act 1992 (WA):* – ss.45(1), 48(1), 48(3)

*Criminal Investigation Act 2006: s.123*

*Criminal Code 1913: s.570F*

*Criminal Investigation (Identifying People) Act 2002: ss.3, 11, 67 and 69*

*State Records Act 2000: s.78(3)*

## **DECISION**

The decision of the agency not to amend the information by deleting it is confirmed.

John Lightowers  
A/INFORMATION COMMISSIONER

5 March 2009

## REASONS FOR DECISION

1. This complaint arises from a decision of the Police Force of Western Australia ('the agency') not to amend information in accordance with an application for amendment of personal information made under Part 3 of the *Freedom of Information Act 1992* ('the FOI Act') by 'H' ('the complainant'). Given the personal nature of the issues involved in this matter, I have not identified the complainant by name in order to preserve the complainant's privacy.

## BACKGROUND

2. In May 2001, the complainant was charged with an offence. However, prior to the matter proceeding to court, all charges against the complainant were dropped by the police officer who preferred the charge. It is my understanding that most of the documents relating to the matter were destroyed in or about July 2001 by the agency at the request of the complainant, including sets of fingerprints and photographs taken at the time of the complainant's apprehension, following the decision not to proceed with the charges. The agency has advised me that no record of the evidence obtained by the police officer at the time of the complainant being apprehended has been located within the agency. The only document containing a record of the evidence against the complainant which the agency has not destroyed is the video record of interview made at or around the time of the complainant's apprehension.
3. The complainant applied to the agency under s.45 of the FOI Act for amendment of certain personal information about the complainant recorded in the video record of interview ('the disputed document') held by the agency. The complainant asked the agency to amend that information by destroying or deleting the video record in the presence of the complainant. In the glossary to the FOI Act, "document" is defined to mean, *inter alia*, a record. Further, a "record" is defined to mean, *inter alia*, any record of information however recorded and includes any article or material from which sounds, images or writing can be reproduced.
4. The agency notified the complainant that could not amend the disputed document by destroying it because such action would need certification from the Information Commissioner in accordance with s.48(3) of the FOI Act. In addition, the agency advised the complainant that it could not destroy the disputed document because of internal policies which require that all records of interview must be retained. The agency's decision was confirmed on internal review. The complainant did not accept that and, subsequently, applied to the Information Commissioner for external review of the agency's decision.

## REVIEW BY THE INFORMATION COMMISSIONER

5. I obtained a copy of the disputed document from the agency, together with the agency's file maintained in respect of the amendment application. I examined those documents, including the video record of the interview, and considered the submissions made by the complainant and the reasons given by the agency

for its decision. My office made inquiries with the agency and several other agencies in respect of this matter.

## **AMENDMENT OF PERSONAL INFORMATION**

6. Part 3 of the FOI Act deals with the right of a person to apply to an agency for the amendment of personal information about the person contained in a document of an agency and prescribes the procedures to be followed by an agency in dealing with an application for amendment. Section 45(1) provides that an individual has the right to apply for amendment of personal information if the information is inaccurate, incomplete, out of date or misleading. Section 46(1) provides that the person seeking the amendment must give details of the matters in relation to which the person believes the information is inaccurate, incomplete, out of date or misleading and the person must give reasons for holding that belief.
7. If an agency decides to amend its records, s.48(1) provides that it may do so by alteration, striking out or deletion, inserting information or inserting a note in relation to the information. There are additional constraints placed on the obliteration, removal or destruction of a record. Section 48(3) provides that:

***“48. Agency may amend information***

*(1)...*

*(2)...*

*(3) The agency is not to amend information under subsection (1) in a manner that –*

*(a) obliterates or removes the information; or*

*(b) results in the destruction of a document containing the information,*

*Unless the Commissioner has certified in writing that it is impracticable to retain the information or that, in the opinion of the Commissioner, the prejudice or disadvantage that the continued existence of the information would cause to the person outweighs the public interest in maintaining a complete record of information.*

*(4)...*”

### **The agency’s submission**

8. The agency submits that it has received instructions from the Director of Public Prosecutions (‘the DPP’) and the Corruption and Crime Commission (‘the CCC’) that video records of interview are to be maintained by the agency indefinitely. Further, the agency submits that there is an overriding public interest in the accountability of police officers and records, such as the disputed document in this matter, must be made available to bodies such as the CCC should questions arise as to the conduct of police officers.

## Consideration

9. I have examined the disputed document and I am satisfied that it contains personal information as defined in the FOI Act about the complainant and therefore may be the subject of an application for amendment under s.45(1) of the FOI Act.
10. I am also satisfied that the information contained in the disputed document is not inaccurate, incomplete, out of date or misleading in the context and circumstances in which it was created, as it is a video recording of the events that took place during the police record of interview with the complainant. While a person charged with an offence may refuse to answer questions upon being interviewed by police, it is my understanding that a person charged with an offence has no right to refuse to have the process of the police interview being video recorded by the agency. There is nothing before me to suggest that the disputed document does not accurately record the events that took place during that interview at that time. The fact that the complainant wants the disputed document destroyed because the matter did not proceed to court, does not, without more, establish that the information contained in the disputed document is inaccurate, incomplete, out of date or misleading.
11. I am satisfied that it is not impracticable to retain the disputed document. Accordingly, pursuant to s.48(3), I am required to consider whether, in my opinion, the prejudice or disadvantage that the continued existence of the information would cause to the person outweighs the public interest in maintaining a complete records of the information.
12. The complainant asserts in support of their access application that there was no crime committed; that they did not want a video tape of the police interview made; and that they were coerced in having the video tape done; that the video tape should not be in existence; and that because at the complainant's request all evidence relative to the charges had been destroyed (including identifying details), therefore the video tape should also be destroyed or deleted or not longer retained.
13. While the agency asserted that the DPP had instructed it to retain all suspect interview recordings indefinitely, the agency was not able to support that assertion by providing to me a copy of such an instruction. Further, and despite repeated requests made to the Office of the DPP, the DPP also did not provide any information to support the position taken by the agency. Nor, following my officer's contact with the CCC, is the CCC aware of any formal instruction given by it to the agency about the indefinite retention of video recorded interviews and was likewise unable to locate any letter from the DPP to the CCC to that effect.
14. The agency cited the agency's policy manual in support of its decision. The relevant policy states:

*“QS-1.1.10 Destruction of audiovisual recorded interview master recordings*

*An audiovisual recorded interview of a suspect master recording shall NOT be erased or destroyed in accordance with recommendations from the Kennedy Royal Commission”.*

Further, in its notice of internal review decision dated 2 September 2008, the agency cited the following in support of its decision:

*“Section 123 of the Criminal Investigation Act 2006 (‘the CI Act’) which outlines the minimum legislative requirements WA Police must comply with in relation to videotaped interviews.*

*“S123 Recordings to be retained by Police and Corruption & Crime Commission (CCC)*

- (1) If an audiovisual recording is made of an interview, the Commissioner of Police or the CCC, as the case requires, must keep the recording or a copy of it in safe custody for at least 5 years.*
- (2) If the Supreme Court is satisfied there is good cause to keep an audiovisual recording of an interview for more than 5 years, it may order the Commissioner of Police or the CCC to keep the recording for an additional period set by the Court.*
- (3) The Commissioner of Police or the CCC, in writing, may authorise a person to erase audiovisual recordings of interviews in accordance with this section.””*

15. I have considered the relevant recommendations of the interim report and the final report of the Royal Commission Into Whether There Has Been Corruption or Criminal Conduct By A Western Australian Police Officer, by Commissioner the Hon. G A Kennedy AO, QC, dated December 2002 and January 2004 respectively. Those reports led, among other things, to changes in the law in relation to the retention and disposal of video-taped records of interview.
16. The predecessor to s.123 of the CI Act is s.570F of the *Criminal Code 1913*, which contained provisions in substantially similar terms to s.123 of the CI Act. Notwithstanding that both these provisions set a minimum of 5 years for retention of videotapes of interviews, and not indefinite retention as reflected in the agency’s policy manual, I accept that those provisions support the existence of a strong public interest in the retention of videotapes of interviews for purposes of accountability of the agency. I am of the opinion that there is a very strong public interest in ensuring the accountability of the agency.
17. In support of the complainant’s request, I have noted that ss.67 and 69 of the *Criminal Investigation (Identifying People) Act 2002* (‘the CI (IP) Act’) provide that a charged suspect may request the destruction of identifying information if the matter, the subject of the charge, is finalised without a finding of guilt. In the event of such a request, then, subject to the CI (IP) Act, the identifying information must be destroyed. The CI (IP) Act defines in s.11 the term ‘identifying information’ to mean, among other things, any identifying

particular and an ‘identifying particular’ to mean, among other things, a photograph of a person. Section 3 of that Act defines the term ‘photograph’ to include video recordings and a digital image. There is an arguable case therefore that the CI (IP) Act would require the destruction, on request, of a videotape of a charged suspect, and an apparent incompatibility between the two Acts.

18. I am advised by the CCC that:

*“...the Commission does have a strong preference that, as a general rule, video recorded interviews be retained indefinitely. This is because such evidence can aid the Commission in conducting investigations, particularly historical investigations. A classic example is the Commission’s Mallard investigation. In that case the police interview from 1994 was an invaluable piece of evidence.*

*In relation to the matter at hand, the Commission would make the point that if the videotape is destroyed any subsequent investigation into the police treatment of this individual would be adversely affected. This is because any objective record of [that person’s] treatment would be lost.”*

I accept the advice of the CCC and find that it further supports the strong public interest in the retention of video recordings of interviews as a means of ensuring the accountability of the agency.

19. Section 48(3) of the FOI Act recognises the strong public interest in an agency retaining a complete record of information. That public interest is also evidenced by s.78(3) of the *State Records Act 2000*, which provides that it is an offence for a government organisation employee to destroy a record created or received, unless the destruction is authorised by the record keeping plan of the organisation.
20. I consider that there is a strong public interest in the agency retaining a record of its investigations. I accept that in the circumstances of this matter, the alleged offence committed by the complainant is at the lower end of criminal matters that may potentially proceed to court. I also accept that all charges against the complainant have been dropped, that all other records (including identification details of the complainant’s apprehension) relating to the alleged offence have been destroyed or deleted by the agency or evidence gathered returned to the apparent owners and that more than 5 years has passed since the charges against the complainant were dropped. These factors weigh in favour of the complainant’s application.
21. I consider that there is a strong public interest in the officers of the agency being held accountable for their actions. I accept that there is a public interest in the retention of video records of interview in order to ensure that any future concerns regarding the actions of police officers can be properly investigated. Having regard to all the circumstances, I consider that this public interest outweighs any prejudice or disadvantage to the complainant that the continued existence of the video record of the interview would cause to the complainant.

22. Accordingly, I do not consider that there are grounds made out by the complainant for me to certify and authorise the obliteration, removal or destruction of the disputed document. For the reasons given, I confirm the agency's decision not to amend the information in the manner requested by the complainant.

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