

**Decision D0112012 - Published in note form only**

***Re Keating and Department of Corrective Services [2012] WAICmr 11***

**Date of Decision: 26 April 2012**

***Freedom of Information Act 1992: sections 26 and 74; Schedule 1, clause 5(1)(h)***

In August 2010 the complainant, a prisoner, applied to the agency for access under the *Freedom of Information Act 1992* ('the FOI Act') to certain documents relating to him, including documents about his placement and management in the Special Handling Unit ('the SHU') of Casuarina Prison. The agency refused the complainant access to some of the requested documents under s.26 of the FOI Act on the ground that the agency did not hold them and gave access in edited form to other documents after deleting information that was outside the scope of the application and information that was exempt under clause 3(1) of Schedule 1 to the FOI Act. On internal review, the agency varied its initial decision and gave access in edited form to an additional document. In all other aspects the agency confirmed its original decision.

In October 2010, the complainant applied to the Information Commissioner for external review of the agency's decision. Following receipt of the complaint, the agency produced to the Commissioner the originals of the disputed documents, as well as its FOI file maintained in respect of the access application. In the course of dealing with the matter, the Commissioner's office made various inquiries with the agency in relation to the complaint and identified additional documents that were within the scope of the application. The agency submitted that those documents were exempt under clause 5(1)(h) of Schedule 1 to the FOI Act.

The disputed documents are the edited documents released to the complainant and the additional documents identified during the external review process. The disputed information is the matter the agency deleted from the edited documents.

In March 2012, after considering the information before him, the Commissioner provided the parties with a letter setting out his preliminary view of the complaint. In relation to the agency's s.26 decision, the Commissioner considered the agency's record keeping procedures and the searches it had conducted. The Commissioner was satisfied that the agency had taken all reasonable steps to find the requested documents and that further documents could not be found or do not exist.

Since the complainant did not pay the \$30 application fee payable under the FOI Act for applications for non-personal information, and the agency clearly advised the complainant that it proposed to deal with his request as an application for personal information about him only, the Commissioner considered that the agency was justified in deleting non-personal information as outside the scope of his application.

The agency claimed that the remainder of the disputed information was exempt under clause 3(1) and that all of the additional documents were exempt under clause 5(1)(h). Clause 5(1)(h) provides that matter is exempt if its disclosure could reasonably be expected to facilitate the escape of any person from lawful custody or endanger the security of any prison. Having considered the disputed information claimed to be exempt under clause 3(1); the

nature of the additional documents; the information provided by the agency concerning this application; and the agency's management of prisoners in the SHU, the Commissioner's view was that the remaining disputed information and the additional documents are exempt under clause 5(1)(h) of Schedule 1 to the FOI Act.

Section 74(1) of the FOI Act requires the Commissioner to ensure that exempt matter is not disclosed during the course of dealing with a complaint and section 74(2) places a further obligation on the Commissioner not to include exempt matter in a decision on a complaint or in reasons given for a decision. In the particular circumstances of this case, the Commissioner was constrained from providing the complainant with either the detailed reasons for his decision or the evidence which supported those reasons, because to do so would breach section 74(2) of the FOI Act.

In light of his preliminary view in relation to clause 5(1)(h), the Commissioner did not need to consider whether the disputed matter was also exempt under clause 3(1).

The Commissioner invited the complainant to provide further submissions or to withdraw his complaint by a set date. However, the complainant did not respond to the Commissioner's invitation or to a further reminder.

Having reviewed all of the material before him, the Commissioner was not dissuaded from his preliminary view. The Commissioner found that the agency's decisions that part of the disputed information is outside the scope and that further documents cannot be found or do not exist pursuant to s.26 of the FOI Act are justified. The Commissioner also found that the additional documents identified in the course of the external review process and the remainder of the disputed information are exempt under clause 5(1)(h) of Schedule 1 to the FOI Act.