

**Decision D0272011 - Published in note form only**

***Re Nine Network Australia Pty Ltd and Western Australia Police* [2011] WAICmr 27**

**Date of Decision: 30 August 2011**

***Freedom of Information Act 1992:*** Section 76(1)(b); Schedule 1, clauses 5(1)(b), 5(1)(d), 12(b).

In December 2010, the complainant applied under the *Freedom of Information Act 1992* ('the FOI Act') to Western Australia Police ('the agency') for access to "a copy of the voice recordings made to WA Police from people on board an asylum boat which crashed onto rocks at Christmas Island on 15<sup>th</sup> December 2010. The calls were made at 6.59am, 7.03am & 7.09am."

The agency decided to refuse access to the requested voice recordings ('the disputed documents') on the ground that they were exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. At that time, the disputed documents were part of an inquiry under the *Coroners Act 1996*. For the purposes of the FOI Act, an audio recording is regarded as a record or document which is potentially accessible under the legislation.

The complainant applied for internal review of the agency's decision and the agency varied its decision and claimed exemption under clauses 5(1)(b) and 5(1)(d). In March 2011, the complainant applied to the Information Commissioner for external review of the agency's decision.

Having considered the information before him, on 9 August 2011, the Commissioner advised the parties, in writing, of his preliminary view. As the Commissioner is empowered on external review to 'stand in the shoes' of an agency's decision-maker under s.76(1) of the FOI Act, the Commissioner considered that the disputed documents were exempt under clause 12(b) of Schedule 1 to the FOI Act for the reasons set out in his letter to the parties.

Clause 12(b) relevantly provides that matter is exempt matter if its public disclosure would, apart from the FOI Act and any immunity of the Crown, contravene any order or direction of a person or body having power to receive evidence on oath.

The complainant submitted that the disputed documents had been played in open court before the State Coroner on 18 May 2011 and their content published by major media outlets. However, the Commissioner obtained additional information from the agency, including a letter dated 27 May 2011 from the Coroner to the Commissioner of Police which contains a clear direction concerning all evidence obtained by the agency in respect of deaths being investigated in accordance with the *Coroners Act 1996*.

In *Re Corse and Ministry of Justice* [1996] WAICmr 64, the former Information Commissioner said, in relation to the application of clause 12(b):

*"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"*.

Consequently, once it is established that such disclosure would contravene an order or direction of a person or body having power to receive evidence on oath, the exemption is made out.

In the present case, the Coroner has the power to receive evidence on oath, pursuant to s.46(1)(d) of the *Coroners Act 1996*. Having read the Coroner's letter of 27 May 2011, the Commissioner was satisfied that it contains a direction from the Coroner that prevents the agency from giving the complainant access to the disputed documents, which is evidence obtained by the agency in respect of deaths being investigated in accordance with the *Coroners Act 1996*. Accordingly, the Commissioner was of the view that the exemption under clause 12(b) is made out in this case.

The parties were invited to provide the Commissioner with submissions in response to his preliminary view letter of 9 August 2011. The agency did not respond and the complainant advised that it wished to pursue the matter but made no further submissions.

Having reviewed all of the material before him, the Commissioner was not dissuaded from his preliminary view. The Commissioner varied the agency's decision and found the disputed documents exempt under clause 12(b) of Schedule 1 to the FOI Act.

In light of the Commissioner's finding in respect of clause 12(b), he considered it unnecessary for him to consider whether the disputed documents were also exempt under clauses 5(1)(b) or 5(1)(d), as the agency claimed.