

Decision D0422011 - Published in note form only

Re I and Western Australia Police [2011] WAICmr 42

Date of Decision: 30 November 2011

Freedom of Information Act 1992: section 10; Schedule 1, clause 5(2); Schedule 2, Glossary, clause 2(2)

In December 2010, the complainant, a former operative for the Covert Operations Unit of the State Intelligence Division ('the SID') of the agency, applied to the agency for access under the *Freedom of Information Act 1992* ('the FOI Act') to the notes made by another officer of certain interviews between that officer and the complainant. The agency refused the complainant access to the requested documents on the ground that they were documents of an exempt agency to which there is no right of access under s.10 of the FOI Act. In addition, the agency claimed that if the requested documents were held by the agency those documents would be exempt under clause 5(2) of Schedule 1 to the FOI Act, which provides that matter is exempt if it was created by certain exempt agencies. The agency confirmed its decision on internal review.

In February 2011, 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 its FOI file maintained in respect of the access application. The Commissioner's office also obtained further information from the agency to determine whether the requested documents were documents of the agency – which are potentially accessible under the FOI Act – or documents of an exempt agency.

In November 2011, after considering the information before him, the Commissioner provided the parties with a letter setting out his preliminary view of the complaint, which was that the requested documents are not documents in the possession or under the control of the agency but rather are documents of an exempt agency.

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 term 'exempt agency' is defined in the FOI Act to mean "*a person or body mentioned in Schedule 2 and includes staff under the control of the person or body*". Accordingly, the effect of being listed as an exempt agency in Schedule 2 to the FOI Act is to quarantine documents of that body, and hence the activities of that body, from the provisions of the FOI Act: *Re MacKenzie and Police Force of Western Australia [1999] WAICmr 27*.

Various discrete sections of the agency, including the Bureau of Criminal Intelligence of the agency ('the BCI'), are listed in Schedule 2 as exempt agencies. The name of the BCI was changed some years ago to the SID and the roles of the BCI and the SID are substantially the same. For the reasons given in *Re Magenta Technologies Pty Ltd and Police Force of Western Australia [2008] WAICmr 6*, the Commissioner was satisfied that the references to the BCI in the FOI Act should be construed as references to the SID. Clause 2(2) of the Glossary provides that the BCI (and, thus, the SID) is to be regarded as a separate agency and is not to be regarded as part of the agency. Accordingly, the Commissioner was satisfied on the information before him that the SID is an exempt agency for the purposes of the FOI Act.

The Commissioner accepted that the author of the requested documents was a staff member under the direction of the SID and that the requested documents are in the possession or under the control of that officer as an officer of the SID. Further, the Commissioner was satisfied that neither the requested documents, nor copies of them, are in the possession or under the control of the agency. Consequently, the Commissioner considered that the requested documents are documents of the SID and are not documents of the agency.

The Commissioner also noted that even if the requested documents, or copies of them, were held by the agency, it would be open to the agency to claim exemption for them under clause 5(2) on the ground that they were created by the SID.

The complainant was invited to provide the Commissioner with further submissions or to withdraw the complaint. The complainant did not withdraw the complaint but made no further submissions. As there was no new material before him, the Commissioner was not dissuaded from his preliminary view. Accordingly, the Commissioner confirmed the agency's decision to refuse access to the requested documents on the ground that those documents are not documents of the agency but rather are documents of an exempt agency, to which there is no right of access under s.10 of the FOI Act.