

Decision D0452011 - Published in note form only

Re Keating and Department of Corrective Services [2011] WAICmr 45

Date of Decision: 30 December 2011

Freedom of Information Act 1992: sections 26 and 74; Schedule 1, clauses 3(1) and 5(1)(h)

In April 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 in relation to his placement and management in the Special Handling Unit 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 those documents but gave edited access to most of the requested documents after deleting some information on the basis that it was outside the scope of the application or was exempt under either clause 3(1) or clause 5(1)(h) of Schedule 1 to the FOI Act. The agency confirmed its decision on internal review.

In August 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.

In September 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 agency's decision under s.26 of the FOI Act is justified; the agency's decision to delete information from the requested documents as outside the scope of the application is justified; some information which the agency deleted as exempt under clause 3(1) is outside the scope of the application; some information which the agency deleted as exempt under clause 3(1) is not exempt under clause 3(1); and some information is exempt under clause 3(1).

In this matter, 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. As the complainant did not refute that advice, the Commissioner considered that the agency was entitled to deal with his application on that basis and was justified in deleting all of the information it deleted as outside the scope of his application, as well as a small amount of information which the agency had deleted as exempt under clause 3(1).

Some of the information which the agency deleted from the disputed documents consisted of personal information about the complainant which was inextricably intertwined with personal information about other individuals ('third party information'). Although third party information was outside the scope of the application, the Commissioner considered that it was not possible for the agency to disclose the personal information about the complainant without also disclosing third party information. Accordingly, the Commissioner considered whether all of that information is exempt from disclosure under clause 3. In doing so, the Commissioner noted that the fact that the complainant was not seeking to access third party information was irrelevant.

In balancing the competing public interests for and against disclosure, the Commissioner considered that those favouring non-disclosure - including the strong public interest in personal privacy and the public interest in the maintenance of the security of prisons and the safety of those within them, both prisoners and staff - outweighed those favouring disclosure in this case. Accordingly, the Commissioner considered that the limit on exemption in clause 3(6) did not apply and that all of that information was exempt under clause 3(1).

In relation to the agency's s.26 decision, the Commissioner did not consider that there were reasonable grounds to believe that further documents exist or should exist or are or should be held by the agency.

The complainant was invited to provide the Commissioner with further submissions or to withdraw the complaint. The complainant did not withdraw the complaint and made further submissions. However, those submissions did not dissuade the Commissioner from his preliminary view.

The Commissioner invited the agency to disclose to the complainant certain information in one additional document within the scope of the complainant's application, as well as the information which the Commissioner considered was not exempt under clause 3(1) (together the 'disputed information') or, alternatively, to provide the Commissioner with further submissions as to why the latter information is exempt under clause 3(1).

The agency provided the Commissioner with further submissions and claimed that the disputed information is exempt under a number of the exemption clauses in clause 5(1) of Schedule 1 to the FOI Act. In December 2011, after considering the agency's further submissions, the Commissioner provided the parties with a letter setting out his supplementary preliminary view of the complaint, which was that the disputed information is exempt under clause 5(1)(h) of Schedule 1 to the FOI Act. 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.

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 that some of the disputed information was exempt under clause 5(1)(h), or the evidence before the Information Commissioner which supported those reasons, because to do so would breach section 74(2) of the FOI Act.

The complainant was invited to provide the Commissioner with further submissions in response to his supplementary preliminary view, but did not do so.

The Commissioner was not dissuaded from his view and found that the deleted information was either outside the scope of the complainant's access application, exempt under clause 3(1) or exempt under clause 5(1)(h) of Schedule 1 to the FOI Act and varied the agency's decision accordingly. The Commissioner also found that the agency's decision to refuse access to documents under s.26 was justified.