

Mesiti and Police Force

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

**File Ref: F0481999
Decision Ref: D0101999**

Participants:

Amadeo John Mesiti
Complainant

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to the investigation of a criminal offence – reliance upon section 23(2) – whether it is apparent from the nature of the documents as described in the access application that all of the documents are exempt documents – clause 5(1)(b) – scope and meaning of the phrase “reveal the investigation” in clause 5(1)(b) – limits on exemption – clause 5(4).

Freedom of Information Act 1992 (WA) s.23(2); Schedule 1 clause 5(1)(a), 5(1)(b), 5(4).
Criminal Code (WA)

Police Force of Western Australia v Kelly and Anor (1997) 17 WAR 9

DECISION

The decision of the agency to refuse access pursuant to s.23(2) of the *Freedom of Information Act 1992* is confirmed.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

12 May 1999

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Police Force of Western Australia ('the agency') to refuse Mr Mesiti ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant is a sentenced prisoner at Casuarina Prison in Western Australia having pleaded guilty to, and been sentenced for, the offence of "armed robbery". By letter dated 20 January 1999, the complainant lodged an application with the agency seeking access under the FOI Act to certain documents of the agency described by him as witness statements of police officers involved in his arrest, running sheets, surveillance reports and operational sheets relating to the investigation of the offence of armed robbery committed by the complainant, and transcripts of police radio communications on the day of the particular armed robbery for which the complainant was arrested.
3. The complainant also sought from the agency information concerning the name of the operation conducted by it that culminated in his arrest. The agency refused to disclose that information to him.
4. Without identifying any of the requested documents and without specifying the reason why matter in any particular document is claimed to be exempt, the agency refused access under s.23(2) of the FOI Act on the ground that all of the documents described in the complainant's access application are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
5. The complainant sought internal review of the agency's initial decision. The internal reviewer confirmed the initial decision to refuse access pursuant to s.23(2) on the ground that all of the requested documents are exempt under clause 5(1)(b). He also refused access on the ground that some of them are exempt under clause 5(1)(a) of Schedule 1 to the FOI Act. On 12 April 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained the agency's file in respect of this matter. Inquiries were made with the agency to clarify certain matters arising from the contents of that file. On 3 May 1999, after considering the material before me, including the terms of the complainant's access application, I informed the parties in writing of my preliminary view of this complaint including my reasons.

7. It was my preliminary view that the agency's decision to refuse access pursuant to s.23(2) of the FOI Act appeared to be justified. I received a written response from the complainant in which he claimed, amongst other things, that he required the documents for an appeal to the Court of Criminal Appeal and that disclosure of the documents would, on balance, be in the public interest.

REFUSAL OF ACCESS – SECTION 23

8. Section 23(2) of the FOI Act provides:

“23. (2) The agency may refuse access to the requested documents without having identified any or all of them and without specifying the reason why matter in any particular document is claimed to be exempt matter if –

(a) it is apparent, from the nature of the documents as described in the access application, that all of the documents are exempt documents; and

(b) there is no obligation under section 24 to give access to an edited copy of any of the documents.”

9. When an agency relies on s.23(2) to refuse access, the first question I must determine is whether it is apparent from the nature of the documents described in the complainant's access application that they are all exempt.
10. The terms “exempt document” and “exempt matter” are defined in the Glossary in the FOI Act. An exempt document is one that contains exempt matter. Exempt matter means matter that is exempt under Schedule 1. In this instance, the agency claims that the requested documents are all exempt under clause 5(1)(b) of Schedule 1 to the FOI Act, and also that some are exempt under clause 5(1)(a).

Exempt matter - clause 5(1)(b)

11. Clause 5(1)(b) provides:

“5. Law enforcement, public safety and property security

Exemptions

(1) Matter is exempt matter if its disclosure could reasonably be expected to -

(a) ...

(b) *reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted;*

12. The Supreme Court of Western Australia has determined the scope and meaning of the phrase “reveal the investigation” in clause 5(1)(b). If disclosure of the disputed matter could reasonably be expected to reveal that there has been a police investigation, the identity of the person being investigated and the subject matter of the investigation then it will be exempt: *Police Force of Western Australia v Kelly and Anor* (1996) 17 WAR 9 at 13. In that case both witness statements and running sheets, *inter alia*, were considered to be documents to which clause 5(1)(b) applied. His Honour considered that “...*The phrase “if its disclosure could reasonably be expected to...reveal the investigation of any contravention of the law in a particular case...” is apt to include the revelation of the fact of a particular investigation by police of a particular incident involving certain people” (ibid).*
13. Clearly, the complainant is aware of the fact of the particular investigation having pleaded guilty and been sentenced for an offence. However, the exemption in clause 5(1)(b) can apply regardless of the actual state of knowledge of the complainant about the particular matter, or the stage the investigation has reached (*ibid* at 14-15). In *Kelly’s* case, Anderson J made it clear that documents can “reveal an investigation” even when the fact of the investigation has been revealed through other materials or the investigation has concluded (*ibid*). His Honour considered that the same state of affairs could be separately revealed in separate documents and that the separate disclosure of each separate document reveals that state of affairs (*ibid* at 14).
14. The complainant requested access to specific types of documents, being witness statements, various operational documents including running sheets and surveillance reports, and radio transcripts of police communications concerning his arrest for armed robbery. The complainant argues, among other things, that the transcripts of police radio communications and the operational running sheets would not reveal the fact or content of the investigation. In my opinion, they clearly would. The transcripts, if disclosed, could reasonably be expected to reveal something of the substance of the investigation as they would contain details of the particular incident as it unfolded and the earliest stages of investigation into what had occurred. The running sheets would reveal details of the steps taken by the police in investigating the incident and may also reveal something of the information gleaned by those inquiries.
15. In my view, the documents described in the complainant’s access application would form part of the police operational files that culminated in his arrest and subsequent conviction. I consider that the disclosure of those documents could reasonably be expected to reveal the fact of that investigation, the subject matter of the investigation and the identity of the person or persons under investigation. Each one will reveal something of the police investigation into the particular incident involving the complainant and another person, which led to the complainant’s conviction.

16. The complainant also submits that the police witness statements are normally provided to defendants as part of the prosecution brief, but claims that he did not receive the statements identified in his access application. He contends that, therefore, the witness statements are not exempt, although the basis for that contention is not clear. The question of whether or not the complainant has been given all the documents he should have been given in the hand-up brief is a matter for him to take up with the Director of Public Prosecutions. It does not affect the question I must determine which is whether or not the documents are exempt from disclosure under the FOI Act.
17. In my view, all the requested documents, as described in the access application, will contain matter that is, *prima facie*, exempt under clause 5(1)(b). They are all exempt documents as defined in the FOI Act. Further, I do not consider that it would be practicable to edit any of those documents or that the agency is under any obligation to give access to edited copies of any of them in this instance.
18. The complainant submits that the documents are not exempt because it would, on balance, be in the public interest to disclose them and, therefore, the limit in clause 5(4) applies. The complainant claims that police operate with a settled and deliberate policy of allowing persons armed with dangerous weapons to commit armed robberies – rather than preventing them - for the sole purpose of preferring more serious charges against the offenders. He contends that police knew the robbery was going to occur but “*intentionally and recklessly endangered the public*” by allowing it to occur in order to be able to prefer more serious charges. He claims that that action by the police is unlawful and submits that such policies and behaviour by police should be exposed and subject to judicial review and that disclosure would, on balance, be in the public interest.

Clause 5(4)

19. Clause 5(4) provides:

“Limits on exemptions

(4) *Matter is not exempt matter under subclause (1) or (2) if -*

(a) it consists merely of one or more of the following -

- (i) information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by the law;*
- (ii) a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law;*
or

(iii) *a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law;*

and

(b) *its disclosure would, on balance, be in the public interest.”*

20. The question of whether or not disclosure of a document that is, *prima facie*, exempt under clause 5(1)(b) would, on balance, be in the public interest arises for my consideration only if the document contains merely information of the kind described in subparagraph (i), (ii) or (iii) of paragraph (a) of clause 5(4). This is made clear by the conjunctive “and” between paragraphs (a) and (b).
21. I have considered whether the limit on exemption in clause 5(4) applies in this instance, but I am not persuaded by anything before me from the complainant that it does. I am in possession of a newspaper clipping from *The West Australian* newspaper dated 4 September 1998 provided to me by the complainant. It appears from that article that the complainant’s claim of entrapment and incitement by the police was raised by the complainant’s defence lawyer at his sentencing and rejected by the sentencing judge.
22. The complainant has provided no probative evidence that the matter contained in the requested documents is matter of the kind described in clause 5(4)(a)(i), (ii) or (iii) and nothing before me suggests that it is. Therefore, the question of whether or not disclosure would be in the public interest does not arise for my consideration.
23. For the reasons given, I am satisfied that all of the documents described by the complainant in his access application are exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. Accordingly, it is unnecessary for me to consider whether some of them are also exempt under clause 5(1)(a).
