

**VESELINOSKI AND POLICE**

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

**File Ref: 97011  
Decision Ref: D01097**

Participants:

**Sefedin Veselinoski**  
Complainant  
  
- and -  
  
**Police Force of Western Australia**  
Respondent

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - documents containing information of identity of informant - reliance upon section 23(2) - clause 5(1)(c) - clause 5(1)(d) - requested documents do not exist or cannot be found - section 26 - whether reasonable grounds to believe that documents exist or should exist - sufficiency of searches.

*Freedom of Information Act 1992 (WA)* ss. 12, 23(2), 24, 26; Schedule 1 clause 5(1)(c), 5(1)(d).

*Misuse of Drugs Act 1981 (WA)* s.24.

*Police Act 1892 (WA)* s.9.

*Misuse of Drugs Regulations 1982 (WA)* regulation 6.

*Re "C" and Department for Community Development* (12 October 1994, unreported, D01894).

*Re Town of Cambridge and City of Perth* (24 January 1997, unreported, D00297).

## DECISION

The decision of the agency varied. Access to the requested documents is refused on the ground that those documents either do not exist or cannot be found.

B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

4th April 1997

## 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 Veselinoski ('the complainant') access to documents sought by the complainant, pursuant to the provisions of the *Freedom of Information Act 1992* ('the FOI Act').
2. The events leading to this complaint occurred some two years ago. It is my understanding that, during the latter part of 1994, the complainant and his family were allegedly subjected to a period of harassment by an unknown person or persons. The harassment included the delivery of takeaway food that had not been ordered by either the complainant or his family; the delivery of letters from an anonymous source; several anonymous telephone calls in the early hours of the morning; and a complaint that his sprinkler system was operating during a period of the day when water use was restricted. The complainant claims that he reported the harassment to the local police on several occasions in 1994 and 1995 but the police were apparently unable to assist him.
3. I am further informed by the complainant that the harassment also took the form of a complaint being made to the police which resulted in the police searching his premises for drugs under the authority of a search warrant. It is my understanding that police found no evidence of drugs or the cultivation of prohibited plants and no further action was taken against the complainant in respect of that allegation.
4. On 25 March 1995, the complainant wrote to the agency and requested that he be given information that would identify the person who had made the complaint to the agency which resulted in the execution of a search warrant at the complainant's house in November 1994. The complainant informs me that his request for information pursuant to the provisions of the FOI Act was made in order that he could obtain a restraining order against the person responsible for the harassment of his family.
5. In late March 1995, Chief Inspector M J B Rae, Officer in Charge, Freedom of Information Office of the agency, informed the complainant that all documents within the ambit of his access application, if they existed, would be exempt under clauses 5(1)(c) and 5(1)(d) of Schedule 1 to the FOI Act. Therefore, pursuant to the provisions of s.23(2) of the FOI Act, Chief Inspector Rae refused the complainant access to the requested documents, without having identified any of the requested documents, and without specifying the reasons why any matter in the requested documents was claimed to be exempt.

6. By letter dated 22 August 1996, the complainant made a second request to the FOI Unit of the agency for access to information relating to the search warrant executed on his residence on 7 November 1994. On that occasion he specifically requested information as to the identity of the person who had made the complaint to the police and the grounds which justified the issue and the execution of the search warrant. On 5 September 1996, the complainant was informed that, as his request for information had previously been dealt with by the agency, it did not intend to deal with his second access application.
7. On 25 October 1996, the complainant wrote to the Commissioner of Police, requesting a review of Chief Inspector Rae's decision of March 1995, in respect of his first access application to the agency. The complainant sought an extension of time to lodge a request for internal review because the complainant stated that he had not been properly informed of his rights of review, both internal and external, under the FOI Act. It is my understanding that the agency decided to accept the complainant's request for internal review, notwithstanding the fact that it was received by the agency some 18 months out of time.
8. On 15 November 1996, Acting Inspector Sharkey, Professional Standards, of the agency made the decision on internal review. Acting Inspector Sharkey varied the initial decision of the agency by withdrawing the claim for exemption under clause 5(1)(d) of Schedule 1 to the FOI Act. However, the Acting Inspector confirmed the initial decision to refuse access pursuant to s.23(2) of the FOI Act on the ground that the requested documents are exempt under clause 5(1)(c) of Schedule 1 to the FOI Act. On 8 January 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the decision of the agency.

## **REVIEW BY THE INFORMATION COMMISSIONER**

9. On 15 January 1997, I notified the agency that I had received a complaint against its decision and, pursuant to my powers under the FOI Act, I required the agency to produce to me the documents the subject of this complaint, together with the FOI files maintained by the agency in respect of the complainant's access applications. However, the agency was unable to produce the requested documents because, according to the agency, those documents could not be found. Therefore, I required the agency to provide me with certain information in respect of the searches undertaken by its officers in order to locate those documents.
10. Although the agency had conducted an internal review of the complainant's first request for information under the FOI Act, it appears that the second request dated 22 August 1996, for which an application fee of \$30 was paid on 29 August 1996, constituted the only valid access application made by the complainant under the FOI Act. The agency decided not to deal with that application on the ground that it had previously been dealt with and access had been refused. I consider that the second application was, in effect, a new access

application under the FOI Act and that it should have been dealt with by the agency on that basis.

11. However, the complainant has not complained to me in respect of the agency's decision to refuse to deal with his access application of August 1996 and, in any event, because of the circumstances and reasons detailed in paragraphs 24-31 below, I consider that there is nothing to be gained by referring the complainant back to the agency to make yet another access application, nor by requiring the agency to deal with the access application of August 1996.
12. There is nothing in the FOI Act to prevent an access applicant from making a new application for access to documents for which he or she has previously applied. That is not to say that it is acceptable for an access applicant to make numerous repeat applications for access to the same documents. However, there may be very good reason why an access applicant may reapply at a later date for access to documents for which he or she has previously applied. An access applicant is entitled to do that under the provisions of the FOI Act and an agency is not entitled to refuse on that basis to deal with such an application.
13. In this instance, the subsequent access application was made almost a year and a half after the earlier application. Further, I consider that the complainant's application of August 1996 was not merely another application for access to the same information requested in his previous application. In the access application of August 1996 the complainant requested access not only to matter that would identify the person who had complained against him to the police but also matter that would inform him of the grounds upon which the search warrant was issued. Clearly, in my view, that is a broader application than the earlier application in which the complainant sought access only to matter that would identify the informant.
14. Although the access application of March 1995 was not a valid access application because it was not accompanied by the prescribed application fee required under s.12, the agency accepted and dealt with that application and subsequently accepted and dealt with an application for internal review. In those circumstances, I consider the complaint to me to be properly made. Therefore, it is the agency's internal review decision of 15 November 1996 which is the subject of external review in this instance.
15. On 10 March 1997, after considering the material provided by the agency and the results of the inquiries into this complaint conducted on my behalf, it became apparent to me that the documents requested by the complainant could not be found in the agency. Therefore, I informed the parties in writing that it was my preliminary view that the agency had taken all reasonable steps to locate the requested documents, but that those documents either did not exist or could not be found. Accordingly, I invited the complainant to reconsider his complaint but no further submissions were received from him.

### The agency's use of section 23

16. I am not persuaded that the agency was justified in refusing access to the requested documents pursuant to s.23(2) of the FOI Act. Section 23(2) provides that, in specified circumstances, an agency may refuse access to the documents that have been requested without having identified any or all of them and without specifying the reason why matter in any particular document is claimed to be exempt. Those circumstances are, firstly, that it is apparent from the nature of the documents as described in the access application that all of the documents are exempt documents and, secondly, that there is no obligation under s.24 to give access to an edited copy of any of the documents.
17. The complainant specifically requested that the identity of the person who gave the agency the information that led to a search warrant being executed on his premises be disclosed to him under the FOI Act. Although the complainant requested particular information, rather than documents, the agency clearly - and in my view properly - treated the request for information as an application for access to documents that would contain that information and, more particularly, as an application for access only to those parts of any relevant documents which contain that information. That is, the agency treated the application as being for that matter contained in any documents of the agency which would identify the person who gave that information to the agency.
18. Clause 5(1)(c) of Schedule 1 to the FOI Act provides that matter is exempt if its disclosure could reasonably be expected to enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be discovered. As I have said previously, to establish that a document is exempt under clause 5(1)(c) an agency must establish, firstly, that the source of the information to the agency is confidential; secondly, that the information relates to the enforcement or administration of the law; and, thirdly, that disclosure could reasonably be expected to enable the existence or identity of that source to be discovered (see *Re "C" and Department for Community Development* (12 October 1994, unreported, D01894)).
19. In my opinion, the matter requested by the complainant in his access application satisfies the latter two of those three criteria. Clearly, information leading to the execution by police of a search warrant on a person's premises will be information relating to the enforcement or administration of the law. Any part of a document that contains information identifying the source of the information will, if disclosed, enable the identity of that source to be discovered. However, the agency has not provided me with sufficient material in this instance to determine whether or not the source of such information to the agency must necessarily be confidential nor, accordingly, whether the source of the relevant information in this instance was confidential.

20. In those circumstances, therefore, I am not persuaded from the nature of the description in the access application that the particular parts of the documents requested were necessarily exempt. Accordingly, I am not persuaded that the agency was justified in refusing access without identifying them. Therefore, I required the production to me of the documents that would contain the information sought by the complainant in order to determine whether those documents - or any part of those documents - are exempt from disclosure under the FOI Act. As I have said, however, the documents were not produced by the agency because they could not be found.

### SUFFICIENCY OF SEARCH

21. Section 26 of the FOI Act deals with the requirements of an agency in circumstances in which it is unable to locate the documents sought by an access applicant. That section provides:

*“26. (1) The agency may advise the applicant, by written notice, that it is not possible to give access to a document if -*

*(a) all reasonable steps have been taken to find the document;*  
*and*

*(b) the agency is satisfied that the document -*

*(i) is in the agency's possession but cannot be found; or*

*(ii) does not exist.*

*(2) For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document.”*

22. I have discussed my view of the requirements of s.26 in previous decisions involving the sufficiency of the searches conducted by an agency under the FOI Act (most recently in my decision in *Re Town of Cambridge and City of Perth* (24 January 1997, unreported, D00297). I remain of the view that, when dealing with such an issue, there are two questions which must be answered. The first question is whether there are reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency. In circumstances where the first question is answered in the affirmative, the next question, in my view, is whether the agency has taken all reasonable steps to find those documents.

23. As I have said before, I do not consider it is my function to physically search for the requested documents on behalf of the complainant. Provided I am satisfied that the requested documents exist, or should exist, I take the view that it is my responsibility to inquire into the adequacy of the searches conducted by the agency in a particular instance, and to require further searches if necessary.

**Do the documents exist, or should they exist?**

24. Section 24 of the *Misuse of Drugs Act 1981* ('the Misuse of Drugs Act') prescribes the requirements for the issue by a justice of the peace of a warrant authorising a police officer to search any vehicle, premises or other place for any thing with respect to which an offence has been or is suspected to have been, or may be committed; any thing which has been, or is suspected to have been, or may be used for the purpose of committing an offence; or any thing which may provide evidence in respect of an offence under the Misuse of Drugs Act. That section requires that information be given on oath that there are reasonable grounds for suspecting that any thing used in the commission of offences may be found in any such vehicle, premises or place. Further, regulation 6 of the *Misuse of Drugs Regulations 1982* ('the regulations') provides that the information on oath shall be given orally, or in writing in the form prescribed by the regulations.
25. The Commissioner's Orders and Procedures Manual ('the Manual'), issued by the Commissioner of Police pursuant to s.9 of the *Police Act 1892*, contains the rules that guide police officers in the performance of their various duties. The Manual is also published by the agency as a public document pursuant to the requirements of Part 5 of the FOI Act. Part S300 of the Manual details the procedures applicable to various warrants. Parts S301 and S302 specifically deal with the issue of search warrants, the execution of search warrants and the filing of search warrants after execution. The procedures state that endorsed warrants and the complaints relating to those warrants are to be filed at the station or office of origin.
26. Inquiries by my office have established that certain information was received by detectives stationed at the Nollamara Police Station from an anonymous source. The officer concerned has a recollection of that incident, although it appears that there is no document recording the receipt of that information at the Police Station. My inquiries have also established that the officer concerned recalls that he gave information in writing on oath before a justice and obtained a search warrant, in accordance with the requirements of the Misuse of Drugs Act. The officer also recalls that he executed a search warrant upon the house of the complainant but nothing was found.
27. A copy of the search warrant authorising the search of the complainant's house was given to the complainant by the police officers at the time of that search. The complainant has made a copy of that search warrant available to me for the purpose of my dealing with this complaint. In the circumstances outlined above, therefore, I am satisfied that the written information on oath containing the grounds to issue the search warrant and the original of the search warrant with an

endorsement as to its execution should exist in the agency. Further, in accordance with the procedures contained in the Manual, that those documents should be filed at the Nollamara Police Station.

### **The searches**

28. The complaint in the form of Form M.D. 7 under the Misuse of Drugs Act is the document most likely to contain the information sought by the complainant. I am informed by the officers of the agency stationed at Nollamara Police Station that searches conducted at the Police Station have failed to locate that document or the original of the search warrant containing the endorsement as to its execution.
29. With the concurrence of the Officer in Charge of Nollamara Police Station, my Legal Officer inspected the document storage facilities at that Police Station and further searches of the files containing executed search warrants and associated papers were conducted. Those files contain a significant number of executed search warrants, together with associated papers, which have been filed in accordance with the procedures described in the Manual. However, the requested documents were not among those on file. The relevant records prior to November 1994 and after that date were also searched in case the documents had been misfiled, but nothing was found.
30. None of the officers of the agency who were involved in the search of the complainant's house can offer any explanation as to why the requested documents are not on file at Nollamara Police Station. I am informed that those officers have searched all relevant files relating to search warrants at the location but those searches have been fruitless. The complainant has been fully informed, both in person and in writing, of the result of those searches.
31. I am satisfied that the requested documents should exist and should be filed in the agency. However, I am satisfied that the agency has taken all reasonable steps to locate the documents but that those documents either do not exist or cannot be found.

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