

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

**File Ref: F2004035
Decision Ref: D0122005**

Participants:

Juliet Frances Wills
Complainant

- and -

Department of the Premier and Cabinet
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refuse access to a document – transcript of evidence given in a Royal Commission – clause 3(1) – whether disclosure of document would reveal personal information about third parties – whether disclosure would be in the public interest.

Freedom of Information Act 1992 (WA) ss.24, 71, 74(2), 102(3); Schedule 1, clauses 3, 12; Glossary
State Records Act 2000 s.46(1)

DPP v Smith [1991] 1 VR 63

Attorney-General v Times Newspapers [1974] AC 273

DECISION

The decision of the agency is varied. I find that the disputed document is not exempt under clause 12, but that it is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*.

D A WOOKEY
A/INFORMATION COMMISSIONER

10 June 2005

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of the Premier and Cabinet ('the agency') to refuse Ms Wills ('the complainant') access to a document requested by her under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. In 1975, a Royal Commission of Inquiry was established to inquire into *Matters Surrounding the Administration of the Law Relating to Prostitution* ('the Royal Commission'). The transcript of the hearings and other documents relating to the Royal Commission are held by the agency as "restricted access archives", which will not be generally available until they are 75 years old. Under s.46(1) of the *State Records Act 2000* any right that a person may have to be given access to a restricted access archive is to be determined under the FOI Act.
3. On 3 November 2003, the complainant applied to the agency for access to a copy of pages 1741-1775 of the transcript ('the disputed document') of the evidence given to the Royal Commission by a specific witness whom she named. By letter dated 19 December 2003, the agency refused the complainant access to the disputed document on the basis that it is exempt under clauses 3(1) and 12 of Schedule 1 to the FOI Act. The complainant sought internal review of that decision and, on 15 January 2004, the agency confirmed the initial decision on access, again on the ground that the disputed document is exempt under clauses 3(1) and 12. Subsequently, on 8 March 2004, the complainant made a complaint to the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE A/INFORMATION COMMISSIONER

4. Following receipt of this complaint, I required the agency to produce to me the agency's FOI file maintained for the purposes of the complainant's access application and the original of the transcript of evidence. Various inquiries were made with the agency and the complainant and endeavours were made to resolve the complaint by conciliation between the parties, as permitted by s.71 of the FOI Act. In the event, the complaint could not be resolved by conciliation between the parties.
5. On 23 February 2005, I informed the parties of my preliminary view of this complaint. It was my preliminary view that the agency's claim for exemption under clause 12 had not been established. However, it was also my preliminary view that the disputed document was exempt under clause 3(1) of Schedule 1 to the FOI Act.
6. After considering my preliminary view, the agency withdrew its claim for exemption under clause 12. In an endeavour to conciliate this complaint, I also invited the agency, as a gesture of good will, to consider answering a

particular query which the complainant had indicated was of greatest concern to her – and which, from her submissions, appeared to be her primary reason for seeking access to the document – in relation to the specific witness she had named. The agency agreed and certain information clarifying a particular passage of the Royal Commissioner’s Report relating to the evidence of the witness was provided to the complainant by the agency.

7. Following receipt of that information, the complainant requested that I give her certain assurances as to the nature of the evidence contained in the disputed document, before she would consider withdrawing her complaint. As the assurances requested were beyond the role and jurisdiction of my office and would have been inappropriate for me to give, I was unable to accede to that request from the complainant. As a result, the complainant confirmed that she wished to pursue her complaint against the agency’s decision to refuse access to the disputed document under clause 3(1) of Schedule 1 to the FOI Act.

The Disputed document

8. There is one document in dispute in this matter. That document is pages 1741-1775 of the transcript of evidence given to the Royal Commission by a particular witness.

The Exemption

9. The agency claims the disputed document is exempt under clause 3(1) of Schedule 1 to the FOI Act.

Clause 3

Clause 3 of Schedule 1 provides:

“3. Personal information

Exemption

- (1). *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*

Limits on exemption

- (2) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.*
- (3) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -*
 - (a) *the person;*

- (b) *the person's position or functions as an officer; or*
- (c) *things done by the person in the course of performing functions as an officer.*
- (4) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to -*
 - (a) *the person;*
 - (b) *the contract; or*
 - (c) *things done by the person in performing services under the contract.*
- (5) *Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.*
- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

Definition of "personal information"

10. In the Glossary to the FOI Act the term "personal information" is defined to mean:

"... information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –

- (a) *whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
- (b) *who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample;"*

11. The definition of "personal information" in the Glossary makes it clear that any information or opinion about a person, from which that person can be identified, is, on the face of it, exempt under clause 3(1).

Clause 3(1) – personal information

12. I have examined the disputed document. The information contained in the disputed document includes not only the name of the witness, but also the names of a number of other third parties. If disclosed, the transcript would reveal information that would clearly identify particular persons, and it would

also reveal personal information, as defined, about a number of people including the witness who gave the evidence. In my view, all of that matter is exempt information under clause 3(1) unless one or more of the limits on exemption in subclauses 3(2) – 3(6) applies.

13. The complainant did not provide any evidence that the witness or any other third party identified in the disputed document consents to the disclosure of personal information about them to the complainant. The limit in clause 3(5), therefore, does not apply in respect of personal information about the witness or the other third parties. The limits in subclauses 3(2) – 3(4) clearly do not apply in this case, as the information contained in the disputed document does not relate to officers of agencies. In this instance the only limit on exemption that might apply is the limit in clause 3(6).
14. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Pursuant to s.102(3) of the FOI Act, the onus is on the complainant to persuade me that the disclosure of personal information about third parties would, on balance, be in the public interest.

The complainant's submissions

15. In response to my preliminary view, the complainant, who says that she is writing a book about the notorious unsolved murder of Mrs Shirley Finn in the 1970s, made the following submissions :

“Without an assurance that the material does not provide evidence of corruption in the prostitution industry in 1975 or that it does not provide material which may be relevant to my investigation into the Finn murder I am not prepared to withdraw my request for access to the material. As much of my interviews with people in relation to the Finn murder are thirty years down the track, published material from that era, is relevant. Furthermore, [a named] Civil Libertarian ...believes [the witness] perjured herself with false testimony about him in relation to allegations made against him during that testimony and he has requested that I add his name to my application as he seeks access to the material for personal reasons. As you stated the transcripts were made available to those with a vested interest at the time. [That person] had a vested interest and requested all the material but was unaware until I perused the material that he had not been provided with all the transcripts that he had requested. He was not advised that some of the material would not be made available to him and [another person] (deceased).

Restrictive defamation laws has [sic] resulted in me being advised that parts of my book about the murder of Shirley Finn cannot be published at this point, however, the family require the information for a coronial inquest they are pursuing. They are relying largely on the new information I have obtained. These laws mean that I am greatly restricted by what I can release into the public arena, laws which will prevent me releasing irrelevant personal material from the information you provide me. I seek to get an overall picture

from the material held within the pages of the transcript and perhaps an understanding of why this material was withheld.

Australia is currently rated at the bottom of press freedoms in the developed world by Reporters without borders [sic], the organisation which monitors press freedoms. Restricting access to investigative material encourages shallow journalism and adds to our rating as a poor democracy.

Lack of Justice [sic] is always in the public interest and when a family has been unable to achieve it as John Button and Darryl Beamish have shown even decades down the track, then it is in the public interest for it to be aired. Shirley Finn's family have not had justice, there is unfinished business and until their mother's killer is found the matter remains unresolved for them. It is in the public interest that government agencies are seen to work towards justice and not withhold material that may be relevant to an investigation sought by an aggrieved family...."

The public interest

16. The term "public interest" is not defined in the FOI Act, nor is it a term that is easily defined. However, it is not merely something that may be of interest to the public; rather, it is something which is of serious concern or benefit to the public. In *DPP v Smith* [1991] 1 VR 63, at 65, the Victorian Supreme Court said:

"The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members ... There are ... several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest".

17. Determining whether or not disclosure of personal information about persons other than the access applicant would, on balance, be in the public interest involves identifying the public interests for and against disclosure, weighing them against each other and deciding where the balance lies.
18. The exemption in clause 3(1) is intended to protect the privacy of individuals. I consider that there is a very strong public interest in maintaining personal privacy which may only be displaced by some other, considerably stronger and more persuasive public interest that requires the disclosure of personal information about one person to another person. The FOI Act is intended to make the Government, its agencies and their officers more accountable. The FOI Act is not intended to call to account or unnecessarily intrude upon the privacy of private individuals in circumstances where there is no demonstrable public interest in doing so.

19. I have considered the complainant's submission in relation to the public interest in the disclosure of the disputed document. I understand that the complainant has a personal interest in the disclosure of the disputed document to her. However, the public interest is not primarily concerned with the personal interests of a particular access applicant, or with public curiosity. Rather, the question is whether disclosure of the information would be of some benefit to the public generally, that is, whether it would be of benefit to the public for the information sought by the complainant – being personal information about other people – to be disclosed to any other person, and whether that public benefit is sufficient to outweigh any public interest in confidentiality being maintained. I note that, although the complainant referred to Mrs Finn's family and a named "civil libertarian", she did not provide me with any evidence, by way of written authority, that she was acting on their behalf; nor did any of them contact my office to indicate that was the case.
20. I have considered the complainant's submission that the family of Mrs Finn requires the information obtained by the complainant to assist them to pursue a request for a coronial inquest into Mrs Finn's death. However, as indicated above, apart from that statement, there is no evidence before me that the complainant represents, or is acting on behalf of any other person. Further it is not clear to me either from the complainant's submissions or the contents of the disputed document itself how disclosure of the document could materially assist in pursuing an application for an inquest. In addition, as I understand it, under the *Coroners Act 1996* the Coroner has quite extensive powers to obtain documents for the purposes of an investigation of a death and an inquest and, if a decision to hold an inquest were made, then it would be for the Coroner to decide whether or not to obtain that document.
21. I have also considered the complainant's submission that she could not release "irrelevant personal information" from the disputed document into the public arena. A decision that a document is not an exempt document means there are no restrictions that can be placed by an agency on the use an applicant may make of a document once access has been provided. Other laws – such as the law of defamation – may constrain a successful applicant from publishing all or some of the information provided. However, neither an agency nor I is in a position to know precisely what information will or will not be protected by law, or whether the person to whom it is released will make themselves aware of, or choose to observe, any legal constraint, or will republish in any event and risk the consequences. Further, the kind of information protected from disclosure by the FOI Act and the kind of information with which the laws of defamation are concerned are not the same. Different considerations arise. Accordingly, it is not relevant to my consideration of the public interest that the complainant may choose to publish all or none of the information contained in the disputed document.
22. In *Attorney-General v Times Newspapers* [1974] AC 273 at 320, Lord Simon of Glaisdale stated:

“The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves.”

23. I agree with the principle stated by Lord Simon, but I do not consider that the public interest in freedom of discussion requires the disclosure of the personal information in question in this case. That particular public interest has been furthered by the enactment of FOI legislation in this State and the creation of a right of access to government documents. However, the right of access created by the FOI Act is not an absolute right. The right is subject to a number of exemptions which are designed to protect a range of public interests and which, in my view, recognize the broad and competing public interests in open and accountable government on the one hand and the effective and efficient ongoing operation of government on the other. In this case, as I have said, it is a matter of identifying and weighing against each other those competing public interests for and against disclosure.
24. Clearly, there is a public interest in persons such as the complainant being able to exercise their right of access under the FOI Act. In the circumstances of this matter, the complainant submitted that there is a public interest in the release of the disputed document in order to allow proper public scrutiny of the facts surrounding the prostitution industry in Western Australia. In addition, the complainant claims that it is in the public interest for the disputed document to be disclosed so that a murder, and the subsequent police investigation, can also be properly scrutinised, with a view to the murderer or murderers being apprehended.
25. Based upon my examination of the disputed document, it is not clear to me how either of those outcomes could be achieved by its disclosure. While I agree that there is a public interest in justice being done, particularly in respect of such a serious crime as murder, I am not persuaded that the disclosure of the disputed document would significantly contribute to furthering that particular public interest. The complainant's submissions are no more than that it might or might not assist; she does not contend that it would assist but rather that she wants to see it to make that assessment. Further, in respect of the former, it seems to me that any public interest in the scrutiny of the prostitution business in 1975 was satisfied by holding a Royal Commission of Inquiry into it, the proceedings of which were reported by the media at the time and a report of which was made publicly available at the time, and remains publicly available as I understand it. Given that the information recorded in the disputed document is almost 30 years old, it is difficult to see how it could be of relevance to the prostitution business today, other than being of historical interest.
26. In favour of disclosure in this case it might also be argued that the information concerned cannot be considered private or confidential as it appears to have been given in evidence in an open hearing and some of it was reported in the media at the time and, therefore, has already been made public. However, as I understand it, the transcript itself has never been made publicly available, in

the sense that any member of the public could purchase a copy of the transcript. I understand that, at the time, only those parties who could demonstrate a particular interest and need for it – for example, witnesses who may have sought to make submissions to the Royal Commission – could purchase a copy of the transcript.

27. Further, while it may have been in the public interest at the time to have a public airing of the issues the subject of the inquiry, which thereby involved the public airing of sensitive personal information – and, in some cases, allegations – about individuals, I am not persuaded that it is in the public interest outside that context, almost 30 years later, for that sensitive personal information to be released into the public domain. Further, in the absence of any evidence that they consent to its disclosure, I accept the agency's submission that its public disclosure now may well be a matter of some concern to the people named in the disputed document. It must also be acknowledged in that regard that no restrictions on the use or further dissemination of documents released under FOI can be imposed by the agency disclosing them. With the advances in information technology that have occurred since 1976 – such as the advent of the internet – disclosure today could potentially result in dissemination of that sensitive personal information to a far greater audience than was possible in 1976.
28. I agree with the complainant's submission that there is a public interest in ensuring that government agencies are seen to work toward justice and not withhold material that may be relevant to an investigation sought by an aggrieved family. However, there is no evidence put before me by the complainant, other than unsupported assertions, that there would be a denial of justice if the disputed document were not disclosed to the complainant. Under s.102(3) of the FOI Act, the complainant bears the onus of establishing that disclosure of the disputed document would, on balance, be in the public interest. On the basis of the submissions made to me, I am not persuaded that the complainant has established that there are any significant public interest factors in favour of disclosure sufficient to outweigh the public interest in the protection of personal privacy, particularly given that the majority of the information contained in the disputed document does not relate to the murder or the murder victim.
29. Therefore, in balancing the competing public interests, and based on the material presently available to me, it appears to me that the strong public interest in protecting the personal privacy of individuals is not outweighed by the public interests favouring disclosure in this instance. Accordingly, I find that the disputed document is exempt under clause 3(1) of Schedule 1 to the FOI Act.

Editing to remove exempt matter

30. Section 24 of the FOI Act provides that, if an access applicant requests access to a document containing exempt matter and it is practicable for the agency to give access to a copy of the document from which the exempt matter has been deleted and the agency considers from the terms of the access application or

from consultation with the applicant that the applicant would wish to be given access to an edited copy of the document, the agency has to give access to an edited copy. I have considered whether it would be possible to give the complainant access to an edited copy. However, although it may have been possible to edit the transcript so that the identities of many of the third parties could not be ascertained and thereby avoid the disclosure of personal information about them, the complainant specifically requested that she be given access to the evidence of a particular witness. Accordingly, in my opinion, the obligation set out in s.24 of the FOI Act does not arise as it is not possible to edit the transcript in such a way that it could be disclosed without revealing personal information about that particular individual.
