

## AYTON AND POLICE

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

**File Ref: F0231998  
Decision Ref: D0151998**

Participants:

**Leslie Donald Ayton**  
Complainant

- and -

**Police Force of Western Australia**  
Respondent

### DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – request for access to documents relating to a review of the investigative practices of the agency – clause 3(1) – personal information about third parties – whether document contains personal information – clause 6(1) – deliberative processes of agency – whether disclosure is contrary to the public interest – clause 8(2) – confidential communications – whether information is information of a confidential nature obtained in confidence – prejudice to future supply – whether disclosure is contrary to the public interest – clause 11(1)(c) and clause 11(1)(d) – whether disclosure could reasonably be expected to have a substantial adverse effect on the management of personnel or on the conduct of industrial relations – meaning of “substantial”.

*Freedom of Information Act 1992 (WA)* ss. 30, 74(2), 102(3); Schedule 1; clauses 3(1), 3(3), 6(1), 8(2), 11(1)(c) and 11(1)(d).

*Freedom of Information Regulations 1993* Regulation 9

*Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236.

*Re Healy and Australian National University* (AAT, 23 May 1985, unreported).

*Re James and Australian National University* (1984) 2AAR 327.

*Re Read and Public Service Commission* (Information Commissioner, WA, 16 February 1994, unreported, D00194).

*Re Collins and Ministry for Planning* (Information Commissioner, WA, 5 July 1996, unreported, D03996).

*Re Waterford and Department of Treasury* (No 2) (1984) 5 ALD 588.

*Ministry for Planning v Collins* (1996) 93 LGERA 69.

*Ryder v Booth* [1985] VR 869

*Re Henderson, Goatley, McHale and Weaver and Education Department of Western Australia* (Information Commissioner, WA, 26 August 1997, unreported, D02197).

*DPP v Smith* [1991] 1VR 63.

*Commonwealth of Australia v John Fairfax and Sons Limited and Others* (1980) 147 CLR 39.

## DECISION

The decision of the agency is confirmed to the extent that the document is exempt under clause 8(2) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

10th June 1998

## 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 Ayton ('the complainant') access to a document requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. I understand that, following public criticism of the standard of investigations conducted by the agency, during 1997 Detective Chief Inspector Ratz (a member of the Victorian Police Service seconded to the National Crime Authority) was asked to design a "project brief" that focussed on the need to review detective training in the agency.
3. In July 1997, the Management Audit Unit of the agency ('the MAU') considered the report of Detective Chief Inspector Ratz and identified a number of other issues that also appeared to have an adverse effect on the investigative practices of the agency. Subsequently, the MAU prepared a scoping paper for the consideration of the Commissioner of Police, Mr Falconer ('the Commissioner'). The scoping paper recommended that an independent assessment of the agency's investigative practices be conducted. The MAU also recommended that the review be conducted in accordance with its *Standard Operating Procedures relating to Performance Examinations* and that the review team draw on the expertise of external experts in investigative practices to identify "best practice". The Commissioner accepted the MAU recommendations and instructed the MAU to proceed with the review.
4. The MAU scoping paper also recommended that, among other things, for the purposes of the review the agency examine existing and proposed initiatives in the subject area in other jurisdictions. I further understand that, during an overseas visit to various police organisations in Great Britain, the Commissioner discussed with the Chief Constable of Strathclyde Police in Scotland the possibility of the secondment of an experienced senior police officer from Strathclyde to assist in the review process. Following further discussions, the Chief Constable authorised the secondment of two senior police officers to the agency for a period of five weeks to participate in the review process. The necessary arrangements were subsequently made.
5. The Strathclyde police officers formed part of the MAU review team, but they returned to Scotland before the report of the review could be finalised. Before their departure, on 11 November 1997, the two Strathclyde police officers handed the Commissioner a report containing their "interim comments". They also gave a copy of that document to each of two senior officers who had been responsible for and involved in the review. In January 1998, the MAU review team presented its final report entitled *Investigative Practices Review - Final Report* ('the Final Report') to the Commissioner for his consideration.

6. By letter dated 24 November 1997, the complainant lodged an application with the agency seeking access under the FOI Act to a copy of any report or reports prepared by the Strathclyde police officers, and given to the Commissioner or to any other senior police officers in the agency.
7. By letter dated 9 January 1998, Mr K J Porter, Acting Deputy Commissioner (Administration), advised the complainant that one such document – the document containing interim comments ('the disputed document') - existed, and refused the complainant access to it on the grounds that it is exempt under clauses 6(1), 8(2) and 11(1)(c) of Schedule 1 to the FOI Act.
8. The complainant sought internal review of Mr Porter's decision. By letter dated 6 February 1998, Mr B J Brennan, Deputy Commissioner (Operations), confirmed the initial decision of the agency to refuse access to the disputed document. Mr Brennan refused access on the grounds that the disputed document is exempt under clauses 6(1), 8(2) and 11(1)(c) and (d) of Schedule 1 to the FOI Act.
9. By letter dated 11 February 1998, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

## **REVIEW BY THE INFORMATION COMMISSIONER**

10. I notified the agency that I had received and accepted this complaint and I required the production to me of the disputed document. In my view, neither the notice of decision signed by Mr Porter nor the notice of decision signed by Mr Brennan comply with the requirements of s.30 of the FOI Act. Whilst both notices contain the decision-makers' reasons for refusal of access, they do not, in my opinion, contain sufficient reasons to justify a refusal of access according to the terms of the FOI Act, nor do they contain the decision-makers' findings on the material questions of fact underlying the reasons given. Therefore, I also required the production to me of certain other documents related to the visit of the Scottish police officers and to the MAU investigative practices review. Those documents were delivered to my office on 26 February 1998.
11. By letter dated 10 March 1998, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the agency had not established that the disputed document was exempt as claimed. Subsequently, meetings and discussions were held with various representatives of the agency. I also sought and obtained information from one of the authors of the disputed document in respect of this matter.
12. On 27 March 1998, I received a further written submission from the agency signed by the Commissioner. The Commissioner maintains the claim that the document is exempt under clauses 3(1), 6(1), 8(2), 11(1)(c) and (d). The agency objected to a copy of its submission being given to the complainant on the basis

that, among other things, its disclosure would reveal matter claimed by the agency to be exempt. Therefore, rather than providing a copy of the submission, I provided the complainant with a summary of the agency's submission, including the public interest factors identified by the agency, so that he was as fully informed as possible of the reasons for the agency's refusal of access. The complainant provided a further written submission for my consideration, and my office provided a copy of that submission to the agency for comment.

## THE DISPUTED DOCUMENT

13. The disputed document, dated 11 November 1997, is entitled "*Investigative Practices Review, Interim Comments for the Information of Commissioner Falconer*". The document bears the words "In Confidence". It is unsigned.

## THE EXEMPTIONS

### (a) Clause 3 – Personal information

14. Clause 3, so far as is relevant, 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)...

(3) *Matter is not exempt matter under subclause 3(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)...

(5)...

(6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

15. In the Glossary in the FOI Act, “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”.

17. The agency claims that the disputed document is exempt in total because it contains matter which reveals that a person holds a particular viewpoint about a particular issue, namely, the personal views and opinions of each of the Strathclyde police officers about certain matters. The agency claims that that matter constitutes personal information about the Strathclyde police officers and is, therefore, *prima facie*, exempt under clause 3(1) of Schedule 1 to the FOI Act.

17. Paragraph (a) of the definition of personal information requires that the information or opinion must be about a particular individual whose identity is apparent or can reasonably be ascertained from the information or opinion. The disputed document is unsigned and does not mention the authors of that document by name or otherwise. There does not appear to me to be anything contained in the information and opinions in the document from which the authors of the document could be identified. Further, none of the opinions in the disputed document is about its authors. The only information about them that might be revealed by the disclosure of the document is that at that time they held those opinions.

18. The names of the Strathclyde police officers have been published in the Final Report and in the media. Although their identities may be ascertained by means of extrinsic materials, in my opinion, their identities are not apparent or reasonably ascertainable from the contents of the disputed document. Therefore, I reject the claim that the document contains personal information about those police officers as that term is defined in the FOI Act.

19. The agency also claims exemption under clause 3(1) for some matter in the disputed document that identifies a former officer of the agency by name and position held. I accept that that matter may, *prima facie*, be exempt under clause 3(1). However, I consider that the limit on exemption in clause 3(3) applies to that matter so as to render it not exempt.

20. Clause 3(3) provides that certain information is not exempt under clause 3(1) where it consists of certain prescribed details about a person who is or has been an officer of an agency. The prescribed details referred to in clause 3(3) are set out in regulation 9 of the *Freedom of Information Regulations 1993* (‘the Regulations’). Regulation 9, so far as is relevant, provides:

*“9.(1) In relation to a person who is or has been an officer of an agency, details of-*

- (a) the person’s name;*
- (b) any qualifications held by the person relevant to the person’s position in the agency;*
- (c) the position held by the person in the agency;*
- (d) the functions and duties of the person, as described in any job description document for the position held by the person; or*
- (e) anything done by the person in the course of performing or purporting to perform the person’s functions or duties as an officer as described in any job description document for the position held by the person.”*

21. Having inspected the particular information in the disputed document concerning a former officer of the agency, I am of the view that it clearly falls within paragraphs (a), (c) and (e) of regulation 9(1). Therefore, I consider that the limit on exemption in clause 3(3) applies to that information so that it is not exempt under clause 3(1). I also consider that the disputed document contains matter that is personal information as defined in the FOI Act about the Commissioner. However, for similar reasons I consider that the limit on exemption in clause 3(3) applies to that matter as well.

22. Accordingly, it follows that I reject the applicability of the exemption in clause 3(1) to the disputed document. There is simply no information of a personal and private nature in that document that warrants protection from disclosure. Therefore, I find that the disputed document is not exempt under clause 3(1) of Schedule 1 to the FOI Act.

**(b) Clause 11 – Effective operation of agencies**

23. The agency also claims exemption for the disputed document under clause 11(1)(c) and (d) of Schedule 1 to the FOI Act. Clause 11, so far as is relevant, provides:

*“11. Effective operation of agencies Exemptions(1) Matter is exempt matter if its disclosure could reasonably be expected to -*

- (a)...*
- (b)...*
- (c) have a substantial adverse effect on an agency’s management or assessment of its personnel; or*
- (d) have a substantial adverse effect on an agency’s conduct of industrial relations.*

***Limit on exemptions***

(2) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.*”

24. To establish an exemption under clause 11(1)(c) or (d) the agency must show that disclosure could reasonably be expected to result in either a "*substantial adverse effect*" on the management or assessment of its personnel or on an agency's conduct of industrial relations. Clearly, the interests protected by the exemptions are those relating to, *inter alia*, personnel management and industrial relations. That is, the focus seems to me to be on matters of administration, not operational activities.
25. The requirement that the adverse effect must be "substantial" is an indication of the degree of gravity that must exist before a *prima facie* claim for exemption is established: *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236. In the context of the exemption in clauses 11(1)(c) and (d), I accept that "substantial" is best understood as meaning "serious" or "significant": *Re Healy and Australian National University* (AAT, 23 May 1985 unreported); *Re James and Australian National University* (1984) 2 AAR 327 at 341.

#### **Clause 11(1)(c)**

26. The agency claims that the disclosure of the disputed document could reasonably be expected to have a substantial adverse effect on the management of its personnel. The Commissioner submits that disclosure would have a significant impact on morale and confidence in the agency at a time when the agency is experiencing considerable organisational change. The Commissioner contends that the potential effect of disclosure on morale and confidence could be expected to make the implementation of change in the agency more difficult.
27. From my understanding of the agency's submission, it appears that the personnel management issues identified by the Commissioner as being those most likely to arise if the disputed document were to be disclosed are essentially those related to the directing and controlling of the activities of subordinates and those of maintaining the morale of senior managers during the reform process.
28. I recognise the fact that the agency, like so many others in the public sector, operates in an environment of uncertainty and change. I also understand that the process of organisational reform in the agency known as "Delta" is ongoing. However, it seems to me that the personnel management issues identified by the agency, if they are already occurring or might occur, may be attributable to the change process itself. I am not persuaded that they could reasonably be expected to be increased or exacerbated by the disclosure of the disputed document to the extent of constituting a "substantial" adverse effect attributable to the disclosure.
30. I accept that the disclosure of the disputed document may be expected to have an adverse effect on the agency's management of its personnel. I do not consider that the difficulties identified, however real they may be, could be described as constituting a "substantial adverse effect" within the terms of clause 11(1)(c).

Therefore, I find that the disputed document is not exempt under clause 11(1)(c) of Schedule 1 to the FOI Act.

**Clause 11(1)(d)**

30. Clause 11(1)(d) is directed at the conduct of industrial relations. There are few decided cases dealing with this exemption and its equivalents in other jurisdictions. The Commissioner submits that if the disputed document is disclosed then the Western Australian Police Union of Workers ('the Police Union') will be concerned about the extent to which he agrees with or relies upon the views expressed in that document. The Commissioner contends that the fact that he has not released the document sooner nor disclosed its contents has the potential to engender distrust and suspicion in the Police Union and its members about his views on the comments in the disputed document. As an example of how the suspicion might manifest, the Commissioner claims that the contents of the disputed document may be perceived to "colour" decisions made about promotions or transfers in the future, and that such suspicion will aggravate the relationship between the Police Union and its members and the management of the agency.
31. As I have said before, I consider that it is always open to an agency to release other information to ensure that the contents of a document are not misunderstood or taken out of context. In this case, I also consider that it would be open to the Commissioner to make his views about the matter in the disputed document known to the Police Union and to its members to minimise or eliminate the potential for distrust and suspicion. In any event, I am not satisfied that the potential for some distrust and suspicion amounts to a serious or significant adverse effect on the conduct of industrial relations as required by the exemption. It seems to me that the degree of gravity of harm encompassed in a *prima facie* claim for exemption under this subclause requires more than the mere potential for distrust and suspicion.
32. I also note that the agency operates under a staff selection system known as *Advance* that is based on merit and incorporates independent assessors and panel members. In those circumstances, I consider it unlikely that decisions made about promotion could be said by the Police Union to have been influenced by the comments and personal views in the disputed document. I also note that the Annual Report of the agency for 1996/97, at page 53, reports the existence of performance agreements and an assessment system for commissioned officers in the agency. Given those facts, I consider that decisions concerning promotions and transfers, at least at management level, are more likely to be made objectively based on performance and competence rather than on anything contained in the disputed document.

33. Based on the information before me, I am not persuaded that any substantial adverse effects on the agency's conduct of industrial relations could reasonably be expected to follow from the disclosure of the disputed document. Accordingly, I find the disputed document is not exempt under clause 11(1)(d) of Schedule 1 to the FOI Act.

(c) **Clause 6 – Deliberative processes**

34. Clause 6 provides:

**"6. Deliberative processes**

***Exemptions***

*(1) Matter is exempt matter if its disclosure -*

*(a) would reveal -*

*(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or*

*(ii) any consultation or deliberation that has taken place,*

*in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency;*

*and*

*(b) would, on balance, be contrary to the public interest."*

35. Clearly, the requirements of both paragraphs (a) and (b) must be satisfied in order to establish a valid claim for exemption under clause 6(1). I have discussed and considered the purpose of the exemption in clause 6 and the meaning of the phrase "deliberative processes" in a number of my formal decisions (see, for example, *Re Read and Public Service Commission* (16 February 1994, unreported, D00194) and *Re Collins and Ministry for Planning* (5 July 1996, unreported, D03996)).

36. I agree with the view of the Commonwealth Administrative Appeals Tribunal ('the Tribunal') in *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 that the deliberative processes of an agency are its "thinking processes", the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action: see also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69 at 72.

37. I also agree with the Tribunal's view that:

*It by no means follows, therefore, that every document on a departmental file will fall into this category...Furthermore, however imprecise the*

*dividing line first may appear to be in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency...*

*It is documents containing opinion, advice, recommendations etc. relating to the internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption under s 36 only attaches to those documents the disclosure of which is "contrary to the public interest"..."*

38. In my view, it would be contrary to the public interest to prematurely disclose documents while deliberations in an agency are continuing, if there is evidence that the disclosure of such documents would adversely affect the decision-making process, or that disclosure would, for some other reason, be contrary to the public interest. In either of those circumstances, I consider that the public interest is served by non-disclosure. I do not consider that it is in the public interest for any agency to conduct its business with the public effectively "looking over its shoulder" at all stages of its deliberations and speculating about what might be done and why. I consider that the public interest is best served by allowing deliberations to occur unhindered and with the benefit of access to all of the material available so that informed decisions may be made.
39. I accept the agency's claim that the disputed document contains advice and opinion prepared and recorded in the course of the investigative practices review conducted by the agency to determine what action it may take to improve its processes and performance. I consider that review process to be a deliberative process of the agency. Accordingly, I am of the view that the disputed document contains matter of the kind described in clause 6(1)(a) of Schedule 1 to the FOI Act.
40. To substantiate a claim for exemption under clause 6, the agency must establish that disclosure would, on balance, be contrary to the public interest. The agency submits that, as I have acknowledged in previous decisions, there is a public interest in preserving the integrity of an agency's deliberative processes, at least to the extent that the disclosure of documents relied upon by an agency during those deliberations would adversely affect those processes. The agency argues that its deliberative processes in the relevant matter are continuing and that the successful conclusion of those deliberations requires that the agency be able to consider all options for change without being subjected to pressure from persons or groups within the agency who, if the document is released, will become concerned about the potential impact on their personal interests should the opinions expressed in the document be accepted.
41. As I have indicated in paragraph 38 above, I consider that there is a public interest in protecting the integrity of the deliberative processes of agencies in order that agencies may effectively and properly operate, and it would be contrary to the public interest to prematurely disclose documents while deliberations in an agency are continuing if it can be seen that such disclosure

would adversely affect the decision-making process. Relevant to that aspect of the public interest, therefore, is whether or not the particular deliberative process in the course of which the document was prepared is still on going or has concluded.

42. In this instance, following the completion of the review and the presentation of the Final Report to the Commissioner, the agency has indicated that it accepts the recommendations contained in that report and has publicly released a copy of it. That deliberative process is, therefore, at an end, having concluded with the agency's decision to accept the final report and its recommendations. In that circumstance, disclosure of the disputed document now could not have any effect, deleterious or otherwise, on that deliberative process as it has finished.
43. Nonetheless, the agency claims that its deliberations are continuing and that the completion of the review is only one stage in its deliberations about how to improve its investigative practices and performance. The agency claims that it is still deliberating about the next stage in that process, which involves the formation of a working group to identify the recommendations to be implemented and how the implementation process is to be achieved.
44. I accept that a working group in the agency is deliberating about the implementation of the recommendations in the Final Report, but I consider that deliberative process to be a separate discrete process and altogether distinct from the earlier review by the MAU. The MAU review was a deliberative process to determine what should be done to improve the investigative practices of the agency. As I have said, that deliberative process ended when the decision was made to accept the Final Report and implement its recommendations.
45. The working group is undertaking the deliberative process of determining how those recommendations may be implemented. That deliberative process will end when the final decision, or decisions, have been made as to how those recommendations should be implemented. I do not consider that the disputed document was prepared in the course of, or for the purpose of, the deliberative processes of that group. Clearly, the disputed document was prepared before the deliberative processes of that group began and it is my understanding that the disputed document has not been, and will not be, made available to that working group. That suggests to me that the disputed document is not relevant to the deliberations of the working group and does not form part of its deliberative process. There is nothing to persuade me that the disclosure of the disputed document would have an adverse effect on the deliberative process being undertaken by the working group.
46. It is also submitted that the disputed document relates to the ongoing deliberative processes of the Commissioner concerning his management of the agency. I am informed by one of the authors of the document that its purpose was to provide the Commissioner with a confidential opinion and evaluation of the strategic issues of which he alone might take cognisance when considering the Final Report and how it would be implemented.

47. From my examination of the document, I accept the claim that it relates to strategic management issues in the agency. Whether or not it was taken into account by the Commissioner in the course of him deciding to accept the recommendations in the Final Report, as I have said, that deliberative process is now at an end and disclosure of the document could not affect that process adversely or otherwise.
48. I understand that the working group will, in due course, make its recommendations to the Commissioner about such matters as the process, cost and timing of implementing the various recommendations in the Final Report. Ultimately, the decision is that of the Commissioner. There is nothing before me from the agency that explains how, if at all, the integrity of the Commissioner's decision-making process could be affected by disclosure of the disputed document.
49. For the reasons given, I am not persuaded that disclosure of the disputed document would affect the integrity of any deliberative process of the agency and I do not consider that the public interest in the protection of the integrity of those processes requires, in this instance, that the disputed document be withheld. Further, I do not consider that, in respect of its claim for exemption of the disputed matter under clause 6, the agency has identified any other public interest to which disclosure of the disputed document would be adverse.
50. In the case of this exemption, the complainant is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; he is entitled to access unless the agency can establish that disclosure of the particular deliberative process matter would be contrary to the public interest. I am not satisfied that the agency has discharged the onus of establishing that its decision to refuse access under clause 6(1) is justified. In any event, some consideration would also need to be given as to whether the limit on exemption in clause 6(3) applies. It seems to me that some of the material in the disputed document has already been disclosed in the Final Report. Other matter may be described as comprising "merely factual" matter that is not exempt matter under clause 6(1). However, I need not take that point any further considering my finding that a *prima facie* case has not been established in respect of this exemption. Accordingly, I find that the document is not exempt under clause 6.

**(d) Clause 8(2) – Confidential communications**

51. Clause 8(2) provides as follows:

**"8. Confidential communications**

***Exemptions***

(1)...

(2) *Matter is exempt matter if its disclosure -*

- (a) *would reveal information of a confidential nature obtained in confidence; and*
- (b) *could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*

*Limits on exemption*

- (3)...
- (4) *Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."*

52. There are two limbs to the exemption in clause 8(2). To establish a *prima facie* claim for exemption under that clause, the requirements of both paragraph (a) and paragraph (b) must be met. That is, it must be shown that the document would, if disclosed, reveal information of a confidential nature obtained in confidence, and also that disclosure could reasonably be expected to prejudice the future supply to the agency of information of the kind under consideration. If the requirements of paragraphs (a) and (b) are satisfied then the limit on exemption in clause 8(4) must be considered.

*8(2)(a) - confidential information, obtained in confidence*

- 53. Information is inherently confidential if it is not in the public domain. That is, it must be known only by a small number or limited class of persons. Information is obtained in confidence where the evidence establishes that the information was both given and received on the basis of either an express or implied understanding of confidence.
- 54. Based upon my examination of the disputed document, I consider that it contains information that is inherently confidential because it is information that is only known to a limited number of people and, although much of it relates to matters covered in the Final Report, is also information consisting of comments and opinions that are not contained in the Final Report.
- 55. Further, although the complainant's access application was sent to the agency's FOI Unit, the manager of that unit who is usually responsible for such matters did not make the decision on access. I also understand that the manager of the FOI Unit has not seen the disputed document. The Commissioner informs me that the disputed document was given to him at a private meeting between its authors and him. I am also informed by one of the authors of that document that, as a matter of courtesy, one copy was given to the Assistant Commissioner (Professional Standards) and another copy was given to the Director of the MAU as those officers were responsible for the review.
- 56. After receiving the complainant's access application, a copy of the document was given to the initial decision-maker and the internal reviewer. However, the Commissioner informs me that the recipients of the disputed document clearly

understood that it was confidential and its contents have not been disclosed to any other person save for the purpose of dealing with the access application. The Commissioner informs me that his copy of the disputed document is kept in his personal safe and the other copies are kept in the safe of the Assistant Commissioner (Professional Standards).

57. There is also material before me from one of the authors of the document that confirms the circumstances in which it was given to the Commissioner and that it was given by the Scottish officers, and received by the Commissioner, on the understanding that it was confidential. I am satisfied, therefore, that the document consists of confidential information obtained by the agency in confidence and that the requirements of clause 8(2)(a) have been established.

*8(2)(b) Prejudice to the future supply of that kind of information*

58. Paragraph (b) is directed at the ability of agencies and the Government to obtain in the future the kind of information contained in the document under review. It is not concerned with the question of whether the particular author or authors of a document would refuse to supply that kind of information to the agency in the future. Rather, the question is directed at the ability of the agency to obtain the relevant kind of information from the sources generally available to it. To answer that question, it is necessary to characterise the information in dispute.
59. In considering the requirements of clause 8(2)(b), I have previously referred to the comments of Young C.J. of the Victorian Supreme Court in *Ryder v Booth* [1985] VR 869. In that case the Full Court of the Victorian Supreme Court considered the interpretation of s.35 (1) of the Victorian FOI Act, the Victorian equivalent of clause 8(2)(b), in relation to medical reports provided in confidence to Victoria's State Superannuation Board. On the question of whether disclosure would be reasonably likely to impair the future supply of similar information, Young C.J. said, at p 872:

*"The question then is, would disclosure of the information sought impair (i.e. damage) the ability of the Board to obtain similar information in the future. Put in terms of the present appeals this means that the question is, would the disclosure of the information damage the ability of the Board to obtain frank medical opinions in the future. It may be noted that it is the ability of the Board that must be impaired. The paragraph is not concerned with the question whether the particular doctor whose report is disclosed will give similar information in future but with whether the agency will be able to obtain such information. There may well be feelings of resentment amongst those who have given information "in confidence" at having the confidence arbitrarily destroyed by the operation of the legislation, but it is another thing altogether to say that they or others will not provide such information in the future. It is not sufficient to show that some people may be inhibited from reporting so frankly if they know that their report may be disclosed. More is required to satisfy the onus cast upon the agency by s.55(2) of the Act."*

60. In this instance, I would characterise the information in the disputed document as comprising the unsolicited personal views about investigative procedures, staffing and management issues voluntarily given to the agency by external reviewers. The Commissioner considers that the characterisation of the information should be more limited. He informs me that the Scottish police officers brought a unique blend of experience and expertise to the MAU review. Both officers are experienced police officers who brought a fresh and independent perspective to that review and were able to secure the cooperation of agency staff and to obtain candid feedback from them because of their independence. The Commissioner claims that the unique blend of experience and perceived independence of the officers concerned is unlikely to be found in many, if any, other police officers within Australia and in relatively few from overseas. The Commissioner submits that it is not realistic to expect the expertise of those particular police officers to be obtained from the services of private consultants.
61. In this instance, I accept the claim that the Scottish police officers brought policing skills, management experience and independence to the MAU review. However, I do not consider it reasonable to claim that the ability of the agency to obtain unsolicited and personal views about such issues is limited to the capacity of two Scottish police officers to provide that kind of information. Clearly, the blend of policing skills, management experience and independence is not unique. In my view, there are other police officers in Australia and elsewhere who would be in a position to provide that kind of management information to the agency, including former and retired police officers with experience and qualifications in management and organisational change that could be of assistance in that regard.
62. The Commissioner describes the information in the document as critical feedback about the agency and its operations. I would accept that general description on the understanding that the critical feedback to which he refers concerns management issues, not operational ones. Therefore, in the terms of the exemption in clause 8(2)(b), I consider the question is whether disclosure could reasonably be expected to prejudice the ability of the agency in future to obtain unsolicited, personal observations about management issues in the agency from people who are in a position to provide that kind of information.
63. I have no doubt that, when reviewing the operations of an agency, some reviewers, whether they are police officers or otherwise, may choose to confine their report to the precise terms of reference of the review, if any. However, I am equally confident that other reviewers would feel obliged to provide comments on views formed by them that may be outside the scope of a particular review, but relevant, nonetheless, to the agency concerned: see my decision in *Re Henderson, Goatley, McHale and Weaver and Education Department of Western Australia* (26 August 1997, unreported, D02197).
64. The material before me establishes that the interim comments to the Commissioner were unsolicited by him and they were entirely voluntarily given by the Scottish police officers on their own initiative. They were under no requirement or duty to provide such comments as part of the task for which they were seconded. Their task was to bring their particular experience, knowledge

and skills to the review and to participate in the review as part of a team. The team was required to report its findings and recommendations to the Commissioner which it did. The role of the Scottish police officers did not require them to provide any more advice or to have any further input than the review team had in that process.

65. The comments in the disputed document appear to me to be the authors' personal observations that were not appropriate for inclusion in the Final Report, but which they wished to bring to the attention of the Commissioner. Clearly, the authors' considered that their personal observations might be of assistance to the Commissioner when considering his response to the recommendations in the Final Report.
66. I accept that the cloak of confidentiality enables some people to feel confident about expressing opinions that they might otherwise not express. Due to the frankness of the observations and comments in the disputed document and the fact that the Scottish police officers were not under any duty or obligation to make their personal views known to the Commissioner, I am satisfied that it is reasonable to expect that some external reviewers would refrain from providing such comments in the future if they were to be available under FOI to anyone who sought access to them.
67. It follows, therefore, that I am satisfied as to the requirements of clause 8(2)(b). Accordingly, the exempt status of the document depends on whether its disclosure would, on balance, be in the public interest. The answer to that question depends on the nature and relative weight of the conflicting interests that are relevant in this particular case. Pursuant to s.102(3) of the FOI Act, the complainant bears the onus of persuading me that disclosure would, on balance, be in the public interest.

## **THE PUBLIC INTEREST**

68. The public interest is not defined in the FOI Act. In my view, the term is best explained in the decision by the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63, at 75, when the 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. The interest is therefore the interest of the public as distinct from the interests of an individual or individuals.”*

69. Taking into account the objects of the FOI Act contained in s.3, I consider that the public interest embraces the goals of openness, accountability and integrity that were recognised by the Royal Commission into Commercial Activities of Government and Other Matters ('the Royal Commission') as being necessary to safeguard public trust and confidence in our system of government: see the Report of the Royal Commission, 1992, Part II, paragraph 1.2.8.

70. The goal of open government finds expression in FOI legislation, but the practice of open government can only be achieved if the culture of secrecy in the public sector gives way to a different mindset. That fact was also recognised by the Royal Commission when it said, at paragraph 2.1.7:

*“...the practice of open government requires the good faith commitment of the officials who are at the heart of the action. The public and the public’s accountability agents...depend upon this commitment for information. To be a reality, open government must be a habit, a cast of mind. It is an attitude which must be encouraged at all times. Importantly, it requires a willingness to expose miscalculation and failure as well as to publicise innovation and achievement.”*

71. I accept, of course, that open government does not require complete disclosure of all government documents at any time, and that there is a need for non-disclosure in some circumstances in order to preserve the capacity of the Government and its agencies to effectively carry out their functions and to protect other vital public interests. Information, for example, about the personal affairs of citizens, police intelligence, and cabinet business should, as a matter of public policy, be confidential. Doubtless there are other kinds of information that, according to prevailing circumstances, should also remain confidential. That is the reason for the various exemptions provided in the FOI Act, each designed to protect a particular public interest. Nonetheless, I also consider that there is a case for treating other government information differently.

72. In the case of the *Commonwealth of Australia v John Fairfax and Sons Limited and Others* (1980) 147 CLR 39, the issue of the confidentiality to be afforded to government information arose for consideration by the High Court of Australia in the context of an application for an interlocutory injunction to restrain publication of a book containing certain government information. The High Court considered the question of the detriment that needed to be established by executive government in order for equity to protect the information from disclosure. Mason J (as he then was) said, at p.52:

*“...it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action...”*

*The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects...There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public’s interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality.”*

*The agency's submission*

73. The agency recognises that there is a public interest in applicants being able to exercise their rights of access under the FOI Act. The agency has also identified a public interest in members of the public being reassured that intra-agency management reviews and inquiries have resulted in thorough and critical examinations of an agency's practices and procedures and that the views of all members of a review team have been taken into account in the formulation of the conclusions and recommendations of those reviews.
74. However, the agency submits that the latter public interest has less weight in this instance because the Final Report canvasses in detail all of the steps taken in the review and the basis upon which the conclusions and recommendations of the review were reached. The agency submits that the latter public interest has been satisfied by the release of the Final Report. In addition, the agency argues that the disputed document covers a number of areas which are outside the scope of the review and that, therefore, much of the content of the report would not contribute to an assessment by the public of the adequacy of the review conducted. Further, the agency submits that, to the extent that the disputed document deals the subjects within the scope of the review, the Final Report represents the collective views of the whole review team, including those of the authors of the disputed document.
75. The agency also identified a public interest in being informed about the views held by "experts" in a particular field concerning the operations of an agency so that the public can assess whether adequate steps have been taken by the agency to address any concerns raised about such issues. However, the agency submits that this public interest has less weight because the views of the "experts" were offered as part of a review that culminated in the public disclosure of the results of that review.
76. Weighing against those factors, argues the agency, is a public interest in agencies being able to effectively carry out their functions and operations. As I understand the agency's argument, it is that its ability in that regard would be adversely affected by disclosure of the disputed document because its disclosure might have the effect of distracting the staff of the agency from the conduct of their duties with concerns about whether any, and if so which, of the views expressed in the document may have the support of the Commissioner. The agency argues that, at a time when considerable change is already being implemented throughout the agency, the comments contained in the disputed document would have a destabilising effect on the staff of the agency. The agency submits that, given the essential nature of the law enforcement functions performed by it, the public interest in the agency being able to effectively carry out its functions and operations must carry considerable weight.

### ***The complainant's submission***

77. The complainant submits, among other things, that there is no factual basis for a finding that a *prima facie* claim for exemption has been established by the agency. The complainant is, of course, at a disadvantage because he has not seen the disputed document. He is also not aware of the exact contents of the material submitted to me by the agency, having been given only a summary.
78. In respect of the potential effect of disclosure, the complainant submits that there is a public interest in accountability and that that public interest favours disclosure of the disputed document. The complainant, a former Deputy Commissioner in the agency, relies on the principles of openness and accountability as factors in favour of disclosure. In his letter to the agency seeking internal review, he stated:

*“Senior members of the agency’s administration have of recent time made healthy public declarations of embarrassment about Police performance and the mismanagement of Police resources. These are matters of great public interest.*

*The public interest is served by such openness. It is further served by advising the public true state of the agency’s management and administrative performance. Accountability is the result.”*

*“...the change process now known as Delta, has as its core principle the need for open management and accountability...”*

*Many millions of dollars of public money has been expended in the implementation of Delta and to improve the Police agency’s performance.*

*It is a matter of great public interest if the change management principles of openness and participation have been discarded for the implementation of change by secrecy and stealth.”*

79. The complainant submits that the disputed document has been “superseded” by the Final Report, and that access to a document is not precluded because a later, final document comes into existence. The complainant also argues, as I understand it, that the agency’s ongoing deliberative processes could not be adversely affected by disclosure of the disputed document because that document forms no part of those deliberations, which are concerned only with the Final Report.

### **Balancing the competing public interests**

80. In my view, this is a case where the competing interests are finely balanced. Although the public interest in maintaining the confidentiality of certain kinds of information voluntarily given to government agencies is strong, it is not absolute. For example, I do not consider that the cloak of confidentiality should be used to shield bad advice or unsubstantiated opinions from external scrutiny and evaluation. In my view, the likelihood of disclosure of material that may

otherwise be confidential can tend to ensure that correct and defensible advice and opinions are given to agencies and that there is supporting material to substantiate the advice or opinions offered, whether favourable or adverse.

81. The fact that the disputed document was a private communication between the Commissioner and the Scottish police officers in circumstances where there was clearly an expectation of confidentiality must, in my view carry some weight. However, there is also evidence before me that the Scottish police officers were specifically informed about the operation of the FOI Act in this State. Given that fact, it seems to me that the expectation of confidentiality is not one that I should consider as absolute.
82. I am constrained in my discussion of the public interest factors by the obligation imposed on me by s.74(2) of the FOI Act that requires me to avoid the disclosure of exempt matter in my reasons for decision. However, I need to make some general observations about the contents of the disputed document, to give substance to my reasons. I do not consider that I would be in breach of my obligations to state that the disputed document contains the unsolicited personal views of the Strathclyde police officers about the progress of the Delta reform process in the agency; associated issues linked to the MAU review; command observations; and critical success factors. Further, I do not consider that I would be breaching my obligations to state that the document contains frank comments and observations about those issues and critical feedback on general management issues for consideration by the Commissioner.
83. I recognise, as the agency does, that there is a public interest in being informed about the views held by “experts” in a particular field concerning the operations of an agency so that the public can assess whether adequate steps have been taken by the agency to address any concerns raised about such issues. It seems to me that that aspect of the public interest is inherent in the concept of accountability. I also consider that accountability in the public sector includes accountability for “means” as well as “ends”. To some extent, the public interest in accountability has been satisfied by the disclosure of the Final Report, at least so far as that document deals with the same issues that are in the disputed document.
84. However, there are other matters in the disputed document that do not appear in the Final Report, including comments and observations about aspects of the Delta reform process. The Commissioner has publicly emphasised the importance of the Delta reform process to the agency and, ultimately, to the safety and security of the community of Western Australia. Given that fact, I consider that there is a public interest in the disclosure of independent advice and assessments made about aspects of that reform process.
85. The complainant also recognised this fact in his submission when he said:

*“The Police Commissioner has sought positive media exposure both at the instigation of the Scottish officers work and the completion of their report. Through this action he brought the matter into the public domain.*”

*Disclosure of the results of their findings is, on balance, in the public interest.”*

86. However, I accept the claim that the disputed document was intended to be private advice to the Commissioner on those and other management issues. I am informed by one of its authors that it was anticipated that the document would be read by the Commissioner *“from the perspective of a Command Team Leader”*. I am not sure precisely how a Command Team Leader in Strathclyde would deal with such a document. The material before me indicates that the disputed document has been held in a private safe and that it has only been used for the limited purpose of enabling the decision-maker and the internal reviewer to deal with the complainant’s access application. To my knowledge, its contents have not been discussed with commissioned officers in the agency who are responsible for the implementation of the Delta reforms.
87. Under ordinary circumstances, the public interest in the accountability of agencies in the public sector might outweigh the public interest in non-disclosure, and I would be unlikely to consider that the public interest in the efficient functioning of the agency requires that the disputed document should not be disclosed. It contains only the personal opinions of two external officers on some strategic management issues. It would no doubt be of interest to some members of the public and to those working within the agency – but not a cause of, or contributor to, serious distraction from their duties such that the agency could not function effectively.
88. However, the agency is in a phase of substantial reform including changing the culture in the agency. Such a process of profound change necessarily involves a certain degree of destabilisation, and disquiet in many of the police officers likely to be affected. Against that background, certain actions of the Commissioner in dealing with some recent matters have been the subject of intense media publicity. The Police Union, on behalf of its members, has publicly expressed its dissatisfaction with certain outcomes and the processes employed by the Commissioner in respect of those matters and has raised the possibility of industrial action by its members. I accept, therefore, that present circumstances are of some sensitivity.
89. In my view and in those circumstances, I consider that disclosure of the disputed document has the potential to create, or to contribute to, further disaffection between management and staff in the agency and there is a possibility that parts of the document could be misinterpreted and misused. Therefore, I am not persuaded that disclosure at the present time, would, on balance, be in the public interest. Accordingly, I find that the document is exempt under clause 8(2) of Schedule 1 to the FOI Act.

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