

AYTON AND POLICE

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

**File Ref: 96168
Decision Ref: D01797**

Participants:

Leslie Donald Ayton
Complainant

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to an assessment of police investigations - whether the requested document is a document of an exempt agency - Schedule 2 list of exempt agencies - document in the possession or control of an exempt agency - whether the document was properly placed in an exempt agency - whether an offence has been committed under s.110 of the FOI Act.

Freedom of Information Act 1992 (WA) ss.10(1), 23(1), 72(1)(a), 110; Schedule 2; Glossary clauses 2(2), 4(1), 6(1).

DECISION

The decision of the agency is confirmed. The requested document is a document of an exempt agency to which there is no right of access under s.10(1) of the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

6th June 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, known as the Police Service ('the agency'), to refuse Mr Ayton ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. As I understand it, following the broadcasting of a television program that alleged police corruption in Western Australia in relation to the agency's investigations into the alleged theft of diamonds from Argyle Diamond Sales Limited ('Argyle'), FBIS International Pty Ltd ('FBIS') offered its services to Argyle. Argyle subsequently engaged FBIS to make an assessment of the various investigations conducted by the agency into the alleged theft. The Commissioner of Police ('the Commissioner') commissioned FBIS to also examine all of the issues raised from a "Western Australia Police perspective" and allowed FBIS to have access to files of the agency for that purpose. He received assessment reports from FBIS detailing its findings.
3. The complainant in this matter is the former Deputy Commissioner of Police. By letter dated 28 August 1996, addressed to the Commissioner, the complainant sought access under the FOI Act to copies of various documents prepared by FBIS relating to the investigation into the Argyle matters.
4. In a notice of decision dated 17 October 1996 addressed to the complainant, the agency refused access to the requested documents on the ground that those documents are not documents of the agency, but documents in the possession and under the control of an exempt agency, namely, the Internal Affairs Unit ('the IAU').
5. By letter dated 22 October 1996, the complainant applied for internal review of that decision and, on 4 November 1996, the internal review officer of the agency confirmed the initial decision. Thereafter, on 19 November 1996, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. Initially, I did not require the production to me of the requested documents but required the Commissioner, the principal officer of the agency, to provide me with certain information in writing in relation to the requested documents. The information I requested included the number of documents that would satisfy the access application; the date of each document and the name of its author and addressee; a brief description of the nature and contents of each document; and

the physical location of each document. I also sought a copy of the FOI file maintained by the agency in respect of this matter and a copy of the report of the investigation conducted by the Australian Federal Police ('the AFP') for the Commissioner following the investigations conducted by FBIS ('the WAPOLINV Report').

7. I received a copy of the agency's FOI file and the WAPOLINV Report from the agency but the Commissioner did not respond to my notice of requirement to give information. Although I received a letter from the agency's FOI Unit which purported to be a response to my formal notice issued under s.72(1)(a) of the FOI Act, that response did not come from the Commissioner nor did it contain the information I required. After a further approach to the Commissioner himself for that information, the Commissioner responded to me by letter dated 9 December 1996 and provided the information required.
8. After considering that information, and after my office had made further inquiries into the matters raised by the complainant, on 17 January 1997, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the requested documents are documents of an exempt agency, the IAU, and, accordingly, the complainant has no right to be given access to those documents under the FOI Act.
9. After receiving my preliminary view and written reasons, the complainant withdrew his complaint in respect of all except one document identified by him as the FBIS Report Volume III ('the requested document'), being a separate report prepared by FBIS and given to the Commissioner around 30 August 1995. The complainant claimed the requested document deals specifically with management issues concerning him, and he made further submissions about the exempt status of that document and about the decision of the Commissioner to place that document in the IAU and beyond the reach of the FOI Act.
10. On 13 March 1997, I met with the Commissioner at my office. The purpose of that meeting was to discuss various matters raised by the complainant in respect of his complaint, and to consider options for the conciliation of this complaint. Thereafter, I informed the complainant, in general terms, of the results of that meeting and of the Commissioner's response to my attempt to conciliate this complaint. However, my attempt at conciliation was unsuccessful. The complainant provided me with a final submission and did not withdraw his complaint.

EXEMPT AGENCIES UNDER THE FOI ACT

11. Pursuant to s.10(1) of the FOI Act, every person has a right to be given access to documents of an agency, other than documents of an exempt agency. Exempt agencies are listed in Schedule 2 to the FOI Act. The sections of the agency known as the Bureau of Criminal Intelligence, Protective Services Unit, Witness Security Unit and IAU are listed in Schedule 2 as exempt agencies.

12. The effect of being listed as an exempt agency in Schedule 2 is to quarantine documents of that body and hence, the activities of that body, from the provisions of the FOI Act. The list of exempt agencies in Schedule 2 includes, but is not limited to, accountability agencies such as the Auditor General, the Director of Public Prosecutions, the Information Commissioner, the Anti-Corruption Commission, and the Parliamentary Commissioner for Administrative Investigations.
13. The sections of the agency which are exempt agencies under the FOI Act are those that are concerned with, *inter alia*, the gathering of information on, and the investigation of, corrupt and illegal activities, and those that are concerned with the safety and protection of certain public figures. The Parliament of Western Australia has decided that the public interest is served by those bodies being designated exempt agencies by inclusion in Schedule 2 to the FOI Act.

Documents of an exempt agency

14. The term “document of an agency” is defined in clause 4(1) of the Glossary to mean “... *a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer.*”
15. Clause 2(2) of the Glossary provides that the IAU is to be regarded as a separate agency and is not to be regarded as part of the agency. By virtue of clause 6(1) of the Glossary, a document of the IAU is not to be regarded as a document of the agency.
16. Initially, the complainant did not dispute the fact that the requested document is in the possession or under the control of the IAU. However, the complainant claimed that, following the restructuring of the agency under a reform program known as the Delta Program, the IAU no longer existed as a separate unit and had, therefore, ceased to be an exempt agency under the FOI Act.
17. My office made inquiries in respect of that issue. I formed the preliminary view that the IAU does still exist and is an exempt agency. After being informed in writing of my view and, in detail, my reasons for that view, the complainant accepted that the IAU continues to exist as an exempt agency and that issue is no longer in dispute.

THE COMPLAINANT’S SUBMISSION

18. In his application for internal review, the complainant claimed that the documents initially requested were neither prepared by, nor for, the IAU, but for the Commissioner. The complainant alleged that those documents had formed the basis of a subsequent inquiry conducted for the Commissioner by the AFP and that that inquiry was allocated an IAU file number for the purposes of protecting

its documents from the FOI Act. The report of the AFP to the Commissioner, the WAPOLINV Report, was subsequently tabled in the Parliament of Western Australia. Accordingly, the complainant was of the view that there was no longer any need for the agency to keep secret those documents requested by him under the FOI Act.

19. The complainant accepts that the IAU is an exempt agency under the FOI Act. However, he submits that, while the requested document may be physically held at the IAU, its retention there is wrong and against the spirit and intention of the FOI Act. The complainant submits that no person has ever alleged any unlawful conduct by him or suspected corrupt conduct by him. In those circumstances, the complainant claims there is no justification for the requested document being lodged at the IAU and for him thereby being unable to access that document.
20. The complainant contends, therefore, that the Commissioner has erred in exercising his power to lodge and retain the requested document at the IAU. It is the complainant's contention that a decision by the Commissioner to both lodge and retain the requested document in an exempt agency such as the IAU should be a decision that is reviewable by the Information Commissioner, whether as a breach of s.110 of the FOI Act or otherwise.

CONSIDERATION

21. Under s.23(1), an agency may refuse access to a document if, *inter alia*, the document is not a document of the agency. Clearly, if the requested document is a document of the IAU and not a document of the agency, the complainant does not have a right of access under the FOI Act to that document. The question for my determination is whether the agency's decision to refuse access on the basis that the document is not a document of the agency was justified. In this instance, that involves consideration of the agency's claim that it is a document of an exempt agency, the IAU.
22. In dealing with a complaint against a decision to refuse access on the basis that the requested document is a document of an exempt agency, my function is to determine whether the document is a document of the relevant agency in accordance with the definition of "document of an agency" in clause 4(1) of the Glossary. If it is established that the requested document is a document of an agency as defined in clause 4(1), and the agency concerned is an exempt agency, then there is no right to access it.
23. It is clear from the definition in clause 4(1) that a document need only be in the possession or under the control of an exempt agency to be a document of the exempt agency and not accessible under the FOI Act. However, a document of a non-exempt agency may not be deposited in an exempt agency for the purpose of preventing the non-exempt agency from having to deal with an access application in respect of it. To do so may amount to an offence under s.110 of the FOI Act.

24. I am informed by the Commissioner that, when he initially received the FBIS reports on the Argyle matter, he decided that the issues raised in those reports were of such a nature that they should be dealt with by the IAU because the allegations essentially involved criminality and corruption by officers of the agency, either independently or in collusion and concert with non-police.
25. The Commissioner has informed me that the allegations concerning non-police personnel were investigated by a joint task force comprised of officers of the agency and the AFP who reported to the Assistant Commissioner (Crime Operations). Matters relating to police officers were investigated by an AFP task force under the command of Commander (as he then was) Bill Stoll. The AFP officers under the command of Mr Stoll were sworn in as Special Constables for Western Australia, attached to the IAU, and Mr Stoll reported directly to the Commissioner.
26. The Commissioner informs me that the original of the requested document was sent by him to the then Official Corruption Commission, now the Anti-Corruption Commission. Initially, one copy of the requested document was given to the AFP task force attached to the IAU, for the purposes of its investigation. Another copy was given in strictest confidence to the Assistant Commissioner (Crime Operations). I am also advised that the copy of the requested document held by the AFP officers attached to the IAU was a working copy and it was destroyed at the conclusion of the AFP investigation. The copy given to the Assistant Commissioner (Crime Operations) was subsequently sent by him to the IAU. That document was retrieved from the IAU by the Commissioner for the purpose of our meeting on 13 March 1997. I am assured by the Commissioner that that document is one of the only two remaining copies still in existence and held by the IAU. I am told by the agency that both those copies are physically located at the offices of the IAU. The agency also informs me that the documents are in the custody and control of a particular task force within the IAU. The agency maintains that there are no copies of the document held in the agency.
27. In view of the information provided by the agency and, in particular, by the Commissioner, and in the absence of any evidence to the contrary, it is my view that the requested document is a document in the possession of an exempt agency, namely, the IAU, and I find accordingly. It is, therefore, a document of an exempt agency and is not a document which is accessible under the FOI Act. Therefore, I find that the agency's decision to refuse access, on the basis that the document is not a document of the agency because it is a document of an exempt agency, was justified. I consider the complainant does not have a right of access to the requested document because that document is not a document of an agency to which the FOI Act applies.
28. Although that finding formally determines the complaint before me, the complainant maintains his position that the Commissioner has inappropriately placed the requested document in the IAU and submits that I have been given inaccurate information which relates in part to the decision of the Commissioner to place the document in the IAU. The complainant maintains his claim that it is

both inappropriate and wrong for the requested document to remain in the IAU and that the decision of the Commissioner to deal with the document in that manner is a matter that the Information Commissioner should review, whether as a breach of s.110 of the FOI Act or otherwise.

Further consideration

29. Section 110 of the FOI Act provides:

“110. A person who conceals, destroys or disposes of a document or part of a document or is knowingly involved in such an act for the purpose (sole or otherwise) of preventing an agency being able to give access to that document or part of it, whether or not an application for access has been made, commits an offence.

Penalty: \$5000 or imprisonment for 6 months.”

30. At my meeting with the Commissioner, he informed me that he did not ask FBIS to prepare a separate report concerning the complainant. The Commissioner informed me that the decision to create the requested document was made by Mr Glare, a former Commissioner of Police and principal of FBIS, who did so in deference to the rank of the complainant. The Commissioner informed me that Mr Glare was of the view that matters concerning a Deputy Commissioner of Police required a higher degree of confidentiality in the agency than might otherwise have been afforded to the FBIS reports.
31. The Commissioner informs me that, whilst the requested document does not specifically allege any corrupt conduct by the complainant, it was his decision for “operational/functional” reasons, that the IAU was the appropriate unit of the agency to have possession of that document since it related to matters which were then under investigation by the AFP task force established for that purpose.
32. I am informed by the Commissioner that that document was referred to the IAU because “...it was a part of a lengthy saga concerning previous crime investigations which were the subject of allegations of criminality and/or corruption by police.” The Commissioner further informed me that “[f]or operational/functional reasons the whole of the saga and all allegations concerning police went quite properly to the relevant investigative unit, the IAU.” As I understand the Commissioner, the document was referred to the IAU as part of the totality of the material relating to the matters being investigated by the IAU.
33. At my meeting with the Commissioner on 13 March 1997, I was shown a copy of the requested document. From my brief reading of the requested document, I am satisfied that its contents relate to the manner in which the Police Service and its officers handled the Argyle investigation and that, amongst other things, it identifies inconsistencies between oral statements and documentary evidence

- which have given rise to various allegations of mismanagement involving the complainant.
34. Having briefly examined the disputed document, I am satisfied that it does not deal solely with the complainant's management practices, in so far as those matters are able to be separated from the wider issues surrounding the Argyle investigation. Rather, my brief reading of the document suggests that it highlights a number of matters which may be described in general terms as management issues, but in the context of broader issues concerning possible criminal and corrupt conduct by other parties.
35. Based upon the evidence currently before me, I am satisfied that the requested document is, in the particular circumstances of this matter, of a kind that would normally be referred to and kept at the IAU. As I have already informed the parties to this complaint, it appears to me that matters involving allegations of possible corruption on the part of police officers are matters of a kind that would normally be dealt with by the IAU. I do not consider it to have been unreasonable for the requested document to have been referred to the IAU as part of the totality of the material related to the subject of the investigation even if, as the complainant claims and the agency does not dispute, it concerns primarily the complainant's conduct and does not contain any allegations of corruption or illegal conduct on his part.
36. If, for example, there were no investigations being undertaken by the IAU into Argyle matters and the requested document alone had been referred there for filing, I would consider that to be an unusual circumstance that may suggest that the document had been deposited there for some other purpose such as preventing the agency being able to give access under the FOI Act. However, having considered the information provided to me by the Commissioner as to the circumstances of that document being referred to and retained in the IAU, I am of the view that those circumstances do not suggest that the document was referred to the IAU for other than genuine purposes. On the material currently before me, there is no probative evidence to support a claim that the document was deposited in the IAU in order to avoid the operations of the FOI Act in respect of it.
37. I have carefully considered the issues drawn to my attention by the complainant in his final submissions to me on this matter. In my view, those submissions do not raise any new issues which affect my determination of this matter. Accordingly, I do not consider there to be any probative evidence before me that an offence under s.110 of the FOI Act has been committed.
