

BRINCAT AND JUSTICE

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

**File Ref: 97058
Decision Ref: D02097**

Participants:

Victor Brincat
Complainant

- and -

Ministry of Justice
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal to amend personal information under Part 3 by way of destruction - internal report re incident in prison - whether information is inaccurate or misleading - factual information - requirements of s.48(3) - certification by Information Commissioner - whether prejudice or disadvantage to complainant outweighs public interest in maintaining record.

Freedom of Information Act 1992 (WA) ss. 45(1), 48(1), 48(3); Part 3; Glossary.
Freedom of Information Act 1982 (Vic)

DECISION

The decision of the agency not to amend the information by removal and destruction of the document is confirmed.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

7th July 1997

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Ministry of Justice ('the agency') not to amend information in accordance with an application for amendment made under Part 3 of the *Freedom of Information Act 1992* ('the FOI Act') by Mr Brincat ('the complainant').
2. The complainant was formerly incarcerated in prison in Victoria. In June 1994, he was transferred to this State to answer further charges of armed robbery and is serving a sentence of imprisonment in Casuarina Prison. As I understand it, he is eligible for parole on 10 October 1997.
3. The complainant's file was transferred to the agency following his incarceration in this State. Whilst he was a prisoner in Victoria, a document entitled "Office of Corrections Initial Investigation Report" ('the Report'), dated 27 May 1991 was placed on the complainant's prison file. The complainant's name appears in the Report in connection with an alleged incident which occurred in the particular prison. The Report was included in the documentation transferred to the agency from Victoria.
4. In a letter dated 13 February 1997, the complainant applied to the agency for amendment of personal information about him contained in the Report. In particular, the complainant sought amendment by the removal of the Report from his file.
5. In a notice of decision dated 25 February 1997, the agency informed the complainant that it was not satisfied that the Report contained information that was inaccurate, incomplete, out of date or misleading. Accordingly, the agency refused the application for amendment of the information by the removal of the Report. The agency's decision was confirmed on internal review. On 15 April 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained a copy of the Report from the agency, together with the agency's file maintained in respect of the amendment application. I examined those documents and considered the submissions made by the complainant. After discussions with my office, the agency agreed to place on the file containing the Report a detailed notation prepared by the complainant specifying his concerns about the content of the Report. The agency also agreed to endorse the Report with a suitable notation which would direct the reader of it to the notation prepared by the complainant.

7. On 9 June 1997, I informed the parties, in writing, of my preliminary view of this complaint including my reasons. On the information then before me, it was my preliminary view that the complainant had not satisfied me that amendment by removal of the document was justified. Accordingly, I informed the complainant that the agency's offer to make a note on the Report and to attach a detailed notation prepared by him was, in all the circumstances, most appropriate and I strongly suggested that the complainant agree to the proposal.
8. The complainant did not agree to the proposal and maintained that he required the removal of the Report and its destruction, and he did not withdraw his complaint.

PRELIMINARY ISSUE

9. The complainant contends that the agency must justify retaining the document on his file, given a decision made in 1996 under the Victorian *Freedom of Information Act 1982* ('the Victorian FOI Act') by the Victorian Department of Justice to remove a copy of the Report from its files and destroy it, and that the agency is obliged to comply with that decision.
10. The Victorian FOI Act was enacted by the Parliament of Victoria and it applies to agencies in that State only. It has no effect on agencies in Western Australia and decisions made under it are not binding on agencies in Western Australia, nor am I bound by decisions made by review bodies under that Act. Applications to Western Australian agencies for access to, and amendment of, documents held in Western Australian agencies must be dealt with under the FOI Act of this State. Each application must be dealt with on its merits and on its own particular facts. An application for amendment made under Part 3 of the FOI Act must be dealt with in accordance with that Act.
11. For the reasons given above, I reject the complainant's claim that the agency must justify its retention of the Report given the decision by an agency in another jurisdiction to remove and destroy a copy of the same document, and that the agency is bound to act in accordance with that decision. An agency may of course inform itself - as did the agency in this matter - of such a decision made in another jurisdiction and consider the reasons for that decision, but is not bound by it. The agency was bound to deal with the application in accordance with the provisions of the FOI Act of this State.

AMENDMENT OF PERSONAL INFORMATION

12. Part 3 of the FOI Act deals with the right of a person to apply to an agency for the amendment of personal information about the person contained in a document of an agency and prescribes the procedures to be followed by an agency in dealing with an application for amendment. Section 45(1) provides that an individual has the right to apply for such an amendment if the information is inaccurate, incomplete, out of date or misleading. The person seeking the

amendment must give details of the matters in relation to which the person believes the information is inaccurate, incomplete, out of date or misleading and the person must give reasons for holding that belief.

13. If an agency decides to amend its records, s.48(1) provides that it may do so by alteration, striking out or deletion, inserting information or inserting a note in relation to the information. However, s.48(3) provides that an agency is not to amend information in a way that obliterates or removes the information, or results in the destruction of a document containing the information, unless the Information Commissioner certifies in writing that it is impracticable to retain the information or that, in the opinion of the Information Commissioner, the prejudice or disadvantage that the continued existence of the information would cause to the person outweighs the public interest in maintaining a complete record of information.

First question - Does the Report contain personal information concerning the complainant?

14. 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”.

15. I have examined the Report and I am satisfied that it contains personal information as defined in the FOI Act about the complainant. The document is located on the complainant’s file and its contents, in my view, reveal personal information about the complainant including his name, that he was a prisoner in Victoria on the date recorded in the Report, that he was in a particular part of the prison involved in a particular activity on that day, and that he was in the near vicinity of a particular incident that occurred. The Report is located on a file relating to the complainant and its contents are clearly capable of being interpreted as suggesting that the complainant was involved in the incident described in the Report. Therefore, I am satisfied that the Report, a document of the agency, contains personal information about the complainant and that that information may be the subject of an application for amendment under s.45(1) of the FOI Act.

Second question - Is the information inaccurate, incomplete, out of date or misleading?

16. The Report is headed "Office of Corrections Initial Investigation Report" and contains a prison officer's brief account of the facts of an incident that had taken place and related details. Two prisoners, including the complainant, are named as being in the vicinity of the incident.
17. The complainant contends that the Report contains misleading information with respect to the incident because the Report contains the headings "OFFENCE" and "COMMITTED AT" and he submits that any person reading that document would gain the impression that he was implicated in the commission of an offence whilst he was in prison in Victoria.
18. The complainant does not dispute the facts as recorded in the Report. However, it is my understanding that the complainant claims the Report is misleading because it gives the impression that the complainant was involved in the commission of an offence whereas, the complainant claims, he was never convicted, charged or investigated in respect of the matter. Essentially, the complainant's contention is that the account given in the document is misleading in this way because it is incomplete. The complainant claims that it does not name the other prisoners who were also in the vicinity of the incident; it does not record that there was a considerable distance between the complainant and the other prisoner named in the document; the police should have been involved in the investigation concerning the matter and they were not; the matter should have been brought to the attention of all prisoners present on that day and it was not; and the document does not record the outcome of any inquiries conducted in respect of the incident.
19. The agency submits that the document contains a factual account of an event that occurred in the Victorian prison and the complainant has not demonstrated that it is anything other than that or that the account is inaccurate. The agency submits - and I agree - that the complainant's assertions that the police and all prisoners present should have been involved in inquiries are merely the complainant's views as to what ought to have occurred as a result of the incident and are not relevant to whether or not the account in the Report is inaccurate, incomplete, out of date or misleading.
20. Based on the material before me, I accept that the information contained in the Report may be misleading. In my view, it does not present a complete picture of the entirety of the incident on the day in question. It does not record any ensuing action taken by the authorities, nor the outcome of that action. To my knowledge, there is no other record of such matters anywhere else on the complainant's file. I accept, therefore, the claim that a document which on its face purports to be a record of an "offence" committed in a prison and implicates the complainant in that offence, and records only one person's brief summary of the event and does not record the result of inquiries made into the complainant's involvement in that offence, if any, is misleading within the terms of s.45(1) of

the FOI Act. Accordingly, I consider that the complainant's application for amendment in some form is justified.

Third question - Is certification under s.48(3) warranted?

21. The obliteration, removal or destruction of a document by an agency is only authorised in the circumstances outlined in s.48(3) of the FOI Act. Information may only be amended by an agency in any of those ways if the Information Commissioner is of the opinion that it is impracticable to retain the information, or the prejudice or disadvantage that its continued existence would cause to the complainant outweighs the public interest in maintaining a complete record of information, and certifies that opinion in writing.
22. In this instance, I do not consider that it is impracticable to retain the information. The Report is filed on the complainant's file and there is no practicable impediment to it remaining there. The question, therefore, is whether its continued existence would cause any prejudice or disadvantage to the complainant and, if it would, whether that prejudice or disadvantage is enough to outweigh the public interest in maintaining a complete record.
23. The complainant claims that his treatment as a prisoner in Western Australia is being adversely affected by the continuing existence of the Report on his file. He submits, as proof that the continued existence of the Report on his file is affecting his treatment, the following: that he is subjected to ongoing urine tests for prohibited substances; his telephone calls are constantly monitored; he receives no visits from his family members; and, during an appearance in the Supreme Court of Western Australia this year, he was made to wear leg-irons.
24. I have caused inquiries to be made into the claims made by the complainant concerning his treatment as a prisoner. Firstly, I am informed that the Report is located on one file only within the agency and that file is kept at the central office of the agency and is not kept at the prison. The agency informs me that the prison in which the complainant is incarcerated does not have a copy of the document, nor does the agency's Information Analysis Unit. There is nothing before me to suggest that staff at the prison are aware of the existence of the Report or of its contents. Further, an Assistant Superintendent of the prison said that, in any event, given the age of the document, it would have no influence over any assessments of the complainant or his management as a prisoner.
25. The agency informs me that a prisoner may be subjected to urine tests either because the prisoner has been targeted for testing or as part of the prison's ongoing practice of random testing. On a regular basis, prisoners whose prisoner numbers are randomly selected by a computer are subjected to a test. The agency has informed me that the complainant is not a prisoner targeted for urine testing. There is no evidence before me to suggest that the complainant has been subjected to continued requests for urine samples, nor is there anything to suggest that he has been treated differently to other prisoners in this respect. The material provided to me by the complainant in support of his claim indicates

- that only one such test has been performed on him during his present period of incarceration in Western Australia.
26. The complainant also submits that due to the continued existence of the Report on his file, he is subjected to random strip searches and cell searches. It is my understanding that all prisoners and visitors, including official visitors, may be subjected to random strip searches. In addition, it is my understanding that all prisoners are subjected to random searches of their cells.
 27. I am informed by prison authorities in the agency that, with the exception of emergency calls or calls from prisoners' lawyers, incoming external telephone calls are not generally put through to prisoners. Rather, a message is taken and passed to the prisoner who may then return the call. All such calls made by prisoners are recorded. I understand that a recorded message is activated when the recipient answers the telephone call. That message informs the recipient that the call is being made by a prisoner and that the call is being recorded. The recipient then decides whether to accept the call or not. Similarly, outgoing external calls initiated by prisoners are recorded. On that basis, I do not accept the complainant's claim that he is being treated differently from other prisoners in this respect.
 28. I am further informed by the prison authorities that the complainant received contact visits in January, February and April of 1997. There is no material before me which supports the complainant's claim that he is being denied visits by his family. The complainant himself provided information that he has received no visits because his family and friends reside in Victoria.
 29. The information provided by the agency in respect of the complainant being shackled is that a decision to shackle a prisoner in leg irons for an appearance in court depends on the security rating of that prisoner and whether the court itself is considered to be secure. In respect of the complainant's appearance in the Supreme Court, I am informed that the prison authorities do not consider the courts within the Supreme Court complex to be secure and, accordingly, a prisoner appearing in those courts would normally appear in leg irons if the security of that prisoner was in doubt. Therefore, I do not accept that the complainant was treated differently from other prisoners in this respect.
 30. It is clear from the foregoing that I do not consider that it has been established that the complainant is treated any differently - in particular, more harshly - to other prisoners generally. Accordingly, I am not persuaded that the continued existence of the document causes or would cause any prejudice or disadvantage to the complainant in terms of his treatment as a prisoner by prison staff and management.
 31. The complainant also contends that the Report will be considered by the Parole Board when deciding the complainant's suitability for parole and that its existence will adversely affect the Parole Board's assessment of him.

32. My office made inquiries with the Parole Board as to the kinds of information and documents it considers to be relevant to the question of whether to grant a prisoner parole. I am informed that matters which the Parole Board may consider include reports from prison officers, psychiatric reports, sentencing reports and reports concerning the general behaviour of a prisoner in prison.
33. There is no evidence before me to suggest that the Report would be relevant to any deliberations by the Parole Board with respect to the complainant's suitability for parole. The Report is some six years old. It merely places the complainant in the vicinity of an incident and nothing more. It does not concern his behaviour as a prisoner in the Western Australian prison system. It is also the complainant's claim - and I have been given no evidence to the contrary - that no charges were brought against him in respect of the matter recorded in the Report. It is also my understanding that the complainant has not been charged with any offences committed within the prison system during his incarceration in Western Australia.
34. In summary, I do not consider there is any evidence presently before me which persuades me that the continued existence of the Report would prejudice or disadvantage the complainant. Clearly, therefore, I do not consider that the prejudice or disadvantage that the continued existence of the information would cause to the complainant outweighs the public interest in maintaining a complete record of information. Accordingly, I do not consider that there are grounds for me to so certify and thereby authorise the removal of the Report and its destruction. For the reasons given, I confirm the agency's decision not to amend the information in the manner requested by the complainant.

Notation

35. However, as I have said, I accept that the Report may be misleading and that amendment of it may therefore be justified. In the course of my dealing with this matter, the agency agreed to amend the record in the manner described in paragraph 6 above. That appears to me to be the most appropriate way of dealing with complainant's concerns and, once again, I strongly recommend that the complainant avail himself of that avenue of redress.
