

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

**File Ref: F2002077
Decision Ref: D0222002**

Participants:

Matthew John Birney, MLA
Complainant

- and -

Attorney General
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access – request for correspondence pertaining to Royal Commission into allegations of police corruption in Western Australia – correspondence to the Minister from exempt agencies – meaning and interpretation of s.10(1) of the FOI Act – whether documents created by exempt agencies accessible under s.10 of the FOI Act – documents of an agency, where agency is a Minister – clause 1(1)(d)(i) – purpose of exemption – limits on exemption – clauses 1(2) and 1(5) – clause 5(1)(b) – whether documents contain exempt matter – section 24 – whether practicable to edit requested documents – scope of access application – whether documents fall within scope of access application – scope of Information Commissioner’s jurisdiction on external review –s.76(10 and (2) of the FOI Act

Freedom of Information Act 1992 (WA) ss. 10(1), 12, 15(1), 15(2), 15(8), 24, 30, 31, 36, 70(3), 74; Schedule 1 clauses 1(1)(b), 1(1)(d)(i), 1(2), 1(5), 3(1), 5(1)(b), 5(2), 7(1), 8(1), 8(2) and 14; Schedule 2, Glossary - clause 4(1).

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129.

Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth) (1981) 147 CLR 297.

Minister for Transport v Edwards [2000] WASCA 349, 17 November 2000, unreported.

Information Commissioner for Western Australia v Ministry of Justice [2001] WASC 3, 17 January 2001, unreported.

DECISION

The Minister's decision is set aside. In substitution, it is decided that:

- (i) the complainant has a right of access under s.10(1) of the *Freedom of Information Act 1992* to Documents 9(v), 13 and that part of Document 18 which consists of the attachment; and
- (ii) edited copies of Documents 9(v) and 13 and that part of Document 18 consisting of the attachment, are not exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

21 June 2002

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Attorney General, the Hon J A McGinty, MLA, ('the Minister') to refuse Mr M J Birney, MLA ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. By letter dated 22 January 2002, the complainant made an application to the Department of the Premier and Cabinet, for access under the FOI Act to documents, described in general terms as being correspondence sent to or received by the Minister for the period 11 February 2001 to 22 January 2002, pertaining to the Royal Commission into allegations of police corruption in Western Australia. The terms of the complainant's access application were subsequently revised to refer only to correspondence sent to or received by the Minister from the Premier, other Ministers and government officials.
3. On 26 February 2002, the Department transferred the application to the Minister, a separate 'agency' for the purposes of the FOI Act, in accordance with s.15 of the FOI Act, because the Department believed that the Minister was in possession of the requested documents. On 8 April 2002, the Minister's Chief of Staff, Mr Cloghan, advised the complainant that 20 documents had been identified in response to his application and he granted the complainant access to fifteen documents, some of which were edited to delete the names of third parties. However, he refused access to five other documents, identified as items 2, 5, 9, 13 and 18 on the schedule given to the complainant. Access to items 2, 9, 13 and 18 was refused because those documents originated with exempt agencies. Access to item 5 was refused because it was exempt. A number of exemption clauses were cited in the notice of decision, but no reasons were given to support the decision or the claims for exemption.
4. On 22 April 2002, the complainant lodged a complaint with me seeking external review of the decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. I obtained Documents 2, 5, 9, 13 and 18 from the Minister, together with the file maintained in respect of the complainant's access application. After obtaining those documents and considering the notice of decision, I sought further information from the Minister to justify the decision to refuse access. I took that step because Mr Cloghan is not authorised to make decisions under the FOI Act (which, in this case, must be made by the Minister) and because the notice of decision given to the complainant did not comply with the requirements of s.30 of the FOI Act. I also informed the Minister that Document 9 actually consisted of five separate documents, Documents 9(i)-9(v). On 20 May 2002, the Minister provided his written response to me, together with his reasons for the refusal of access.

6. The Minister made three alternative submissions to me in support of the decision to refuse the complainant access to the documents referred to in paragraph 3 above. The Minister claimed that the requested documents are exempt under one or more of clauses 1(1)(b), 1(1)(d), 3(1), 5(1)(b), 7(1), 8(1) and 8(2) of Schedule 1 to the FOI Act. The Minister submitted, in the alternative, that no right of access arises under the FOI Act to documents originating with an exempt agency, in particular, to the documents listed as items 2, 9(i), 9(iv), 9(v), 13 and 18 on the schedule. It was submitted that access was properly refused because no right of access arises under s.10(1) of the FOI Act to documents of an exempt agency, nor is there a right of access to documents created by or originating with exempt agencies even if the requested documents are in the possession of another agency which is not an exempt agency.
7. Finally, the Minister submitted, in the alternative, that items 9(i), 9(ii), 9(iii) and 9(v), when properly examined, do not fall within the scope of the complainant's access application because none of those documents consists of correspondence sent to or received by the Minister pertaining to the Police Royal Commission.
8. An applicant is entitled to be given reasons for a decision made by an agency to refuse access to documents under the FOI Act. In this instance, the complainant had only been given a schedule of documents, which briefly alluded to claims for exemption, but he was not given the Minister's reasons in the manner required by s.30(f) of the FOI Act. Section 74(1) of the FOI Act requires me to do such things as I think necessary to avoid the disclosure of exempt matter and, under s.70(3), I must also ensure that the parties to a complaint are given a reasonable opportunity to make submissions to me. Mindful of my statutory obligations, I considered whether it would be practicable to edit the Minister's submissions to delete any potentially exempt matter and to provide the complainant with an edited copy of those submissions. I also sought assistance from the Minister's office to identify any matter in that submission, which may be exempt matter.
9. The Minister did not consent to the disclosure of his submission to the complainant because, in his view, it contained exempt matter. He provided me with an edited copy of his submission and agreed to that document being provided to the complainant. However, the degree of editing proposed by the Minister was significant and I considered that providing the complainant with such a heavily edited submission would serve no useful purpose and such a letter would not make the Minister's reasons or his submissions intelligible to the complainant.
10. Having examined the documents to which access was refused and considered the Minister's submissions, on 30 May 2002, I informed the parties in writing of my preliminary view of this complaint, including my reasons. In my letter, I explained to the complainant my understanding of the factual background leading to the creation of the requested documents and my preliminary findings in respect of those documents. It was my preliminary view that Documents 2, 5, 9(i), 9(ii), 9(iv) and 18, and certain matter in Document 9(v), may be exempt under clauses 1(1)(d)(i), 5(1)(b) and 7(1) of Schedule 1 to the FOI Act, but that the attachment to Document 18, an edited copy of Document 9(v) and Document 13 may not be exempt. It was also my preliminary view that Document 9(iii) was not covered by the terms of his access application, but that Documents 9(i), 9(ii) and 9(v) were covered by its terms.

11. I informed the Minister and the complainant that I did not accept the Minister's submission that the complainant has no right of access to Documents 2, 9(i), 9(iv), 9(v), 13 and 18 merely because those documents had been created by, and originated with, exempt agencies. It was my view that those documents are documents of an agency, being the Minister, since the Glossary in Schedule 2 of the FOI Act defines "agency" to include a Minister, and those documents are in the possession of the Minister. Accordingly, it was my preliminary view that there is a right of access under s.10(1) of the FOI Act to documents of the Minister and, in particular, a right of access under the FOI Act to Documents 2, 9(i), 9(iv), 9(v), 13 and 18.
12. The complainant accepted my preliminary view and withdrew his complaint in respect of those documents and parts of documents, which I had indicated might be exempt. He also withdrew his request for access to the handwritten signatures of the authors of Documents 9(v) and 13. However, he did not withdraw his complaint in respect of three documents, being an edited copy of Document 9(v), Document 13 and the attachment to Document 18.
13. The Minister responded in writing, re-iterating the substance of his earlier submissions. The Minister maintains that no right of access arises under s.10(1) of the FOI Act to documents created by, or originating with, exempt agencies. In the alternative, the Minister submits that Document 9(v), and the attachment to Document 18 are not covered by the terms of the access application, albeit for different reasons. The Minister also submits that some information in Documents 9(v) and 13 is exempt matter under clauses 3(1) and 5(1)(b) and that the attachment to Document 18 is exempt under clause 1(1)(d)(i).

Documents created by or originating with exempt agencies

14. Essentially, the Minister submits that no right of access arises under s.10(1) of the FOI Act to documents created by, or originating with, exempt agencies and made a number of claims in support of that proposition.
15. Firstly, the Minister submits that s.10 of the FOI Act does more than simply preclude applications being made for access to documents held by exempt agencies. He submits that the right of access in s.10(1) does not apply to documents created by, or originating with, exempt agencies even if the documents are in the possession of some other agency that is not an exempt agency. The Minister considers that the precise words of s.10(1) of the FOI Act indicate that some documents are excluded from the general right of access and those are referred to in an abbreviated form in the brackets in s.10(1). Accordingly, the Minister submits that s.10(1) should be understood as effectively providing that:

“A person has a right to be given access to the documents of an agency (other than **the documents of** an exempt agency) subject to and in accordance with this Act.”
16. The second point the Minister makes is that, although the phrase “documents of an agency” is defined in the Glossary, the phrase “documents of an exempt agency” is not defined. Therefore, the Minister claims that it is not possible to say that an “exempt agency” is simply a sub-category of the word “agency”, as defined in the Glossary.

17. In order to understand the meaning of s.10(1), the Minister submits that it is necessary to ascertain what are “documents of an exempt agency”. As the FOI Act does not define that term, the Minister submits that that question must be approached using the ordinary and natural meaning of the words. Adopting that approach, the Minister submits that the phrase “documents of an exempt agency” can properly be understood to include documents created by an exempt agency; documents originating with an exempt agency; documents in the possession of an exempt agency; and documents in the control of an exempt agency.
18. The third point made by the Minister is that it is not surprising that Parliament would have intended that documents of an exempt agency (whether in the possession of the exempt agency or in the possession of another agency) be excluded from the general right of access given by s.10(1), in the manner proposed by him. The exempt agencies listed in Schedule 2 to the FOI Act are bodies which are likely to create, or to have in their possession, documents of a highly sensitive nature for which confidentiality is essential and the Minister takes the view that the protection afforded to exempt agencies would be entirely thwarted if it were the case that documents of exempt agencies are potentially accessible under the FOI Act once they are in the hands of non-exempt agencies.
19. Following on from that point, the Minister submits that it can readily be envisaged that documents of a highly sensitive nature may be sent from an exempt agency to a non-exempt agency and that it is imperative for such documents to remain confidential. By way of example, the Minister claims that the Police Royal Commission may send him documents containing highly sensitive material and that the public disclosure of such documents might be prejudicial to the investigations of the Royal Commission. The Minister submits that it would be contrary to the public interest for such documents to become accessible under the FOI Act once they reach his office. The Minister asserts that it is no answer to his concerns that documents of an exempt agency may be found to be exempt under the FOI Act. Although the Minister recognises that there may be cases where documents received from an exempt agency may not be exempt, he nevertheless considers that the public disclosure of such documents may have very serious implications.
20. The fourth point made by the Minister is that the construction of s.10(1) of the FOI Act, which he proposes, would not be detrimental to the principles of open government. He submits that such a construction would not extend the range of documents excluded from the FOI process. Rather, that it would make it clear that all documents created by, or originating with, exempt agencies, are excluded, regardless of which agency is actually in possession of those documents.

Consideration

21. I have considered the Minister’s submission and the points he makes, but I do not accept his proposition that s.10(1) should be interpreted by reading into that section the additional words he proposes. As I understand the rules of statutory interpretation, the intention of Parliament is to be found by examining the language of the statute as a whole (see: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129). Further, in *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (Cth) 1981 147 CLR 297 at 304, Gibbs CJ said “...*It is only by considering*

the meaning of the words used by the legislature that the court can ascertain its intention. And it is not unduly pedantic to begin with the assumption that the words mean what they say.”

22. I have not found any authority for the Minister’s proposition to me that I should read into s.10(1) of the FOI Act the additional words and phrases he has referred to, in support of his preferred interpretation, when the plain words of the section are, in my opinion, clear and unambiguous. I am not persuaded by his arguments that I should take that course of action when the Supreme Court has indicated otherwise.
23. In any event, it seems to me that the inclusion of the additional words proposed by the Minister does not necessarily alter the meaning of clause 10(1). The FOI Act defines the terms “documents of an agency” by reference to the concepts of possession or control and I consider that the term “documents of an exempt agency” should also be understood by reference to the concepts of possession or control, rather than by reference to the source or creation of those documents.
24. Section 10(1) of the FOI Act states:

“A person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with this Act.”

The term ‘documents of an agency’ is defined in clause 4 of the Glossary in Schedule 2 to the FOI Act. Clause 4(1) of the Glossary states that a reference to a document of an agency is a reference to a document in the possession or under the control of the agency concerned. Further, where the agency is a Minister, clause 4(2) states that a reference to a document of an agency is a reference to a document that is in the possession or under the control of a Minister in the Minister’s official capacity, rather than in his or her capacity as an ordinary Member of Parliament.

25. In my view, s.10(1) of the FOI Act should be read as stating that a person has a right to be given access to documents in the possession or under the control of an agency (other than documents in the possession or under the control of an exempt agency) subject to and in accordance with the FOI Act. I consider that my interpretation of s.10(1) is in accordance with the comments of Hasluck J in *Minister for Transport v Edwards* [2000] WASCA 349, (17 November 2000, unreported), when he said “...the right of access [under the FOI Act] is concerned with documents, not information, and not with ownership or with responsibility for creating of the document in question. Access depends upon identifying the party in possession of the documents.”
26. As I understand it, the general right of access in s.10(1) of the FOI Act does not include a right of access to documents in the possession or under the control of exempt agencies. Ordinarily, that limitation means that access applications under the FOI Act directed to any of the exempt agencies listed in Schedule 2 to the FOI Act must fail. However, the FOI Act recognises that documents of an exempt agency may, from time to time, be located in another agency. If that occurs at the time that an application for access is made to them, then those documents are the documents of the agency in possession of them and the access application must be dealt with by that agency in accordance with the procedures prescribed by the FOI Act.

27. Further, the view of Hasluck J was followed by Wheeler J in the matter of *Information Commissioner for Western Australia v Ministry of Justice* [2001] WASC 3 [17 January 2002, unreported], when Her Honour decided a question of law referred to the Supreme Court by me under s.78(1) of the FOI Act. I consider that the situation, which prompted that reference to the court on a Case Stated, is directly relevant to the point raised by the Minister in this complaint. I was then dealing with a complaint concerning a decision by the Ministry of Justice to refuse an applicant access to documents. The Ministry of Justice claimed that the applicant, a prisoner, had no right of access to documents created by the Parole Board, an exempt agency listed in Schedule 2 of the FOI Act, but which were in the actual possession and under the control of the Ministry.

28. The specific question, which I referred for the opinion of the court on a Case Stated, was:

“Are the two documents located with the respondent and to which the complainant seeks access in the possession or under the control of the respondent for the purposes of the definition of ‘documents of an agency’ in clause 4(1) of the Glossary in Schedule 2 to the Act?”

In answer to the question stated for the opinion of the court, Her Honour answered “Yes”.

29. Further, Wheeler J said *“It is important to note that the structure of the [FOI] Act is that, as Hasluck J noted in Minister for Transport v Edwards [2000] WASCA 349 at [53], the [FOI] Act is not concerned with ownership or authorship of a document, nor with the entitlement to exclusive possession. So, although agencies may be exempt, documents do not remain forever exempt on the basis of their agency of origin or the agency with which they have the closest connection; once they leave an exempt agency, they fall to be dealt with under Schedule 1 of the [FOI] Act which defines what constitutes “exempt matter” and if they do not fall within that definition then they are no longer protected.”*

30. In my view, except for the specific and limited exemption in clause 5(2) (which arises because the exempt agencies mentioned in that clause are actually part of other agencies), the FOI Act is not concerned with the source of documents or with their creation, but with their possession. That is, as long as documents are in the possession or under the control of an agency, then those documents are documents of that agency, regardless of where they originated or were created. In my view, s.10 of the FOI Act provides a right of access to documents in the possession or under the control of an agency, but not to documents in the possession or under the control of an exempt agency. I consider that it is immaterial to the exercise of that right whether the documents were in fact created by an exempt agency. However, that does not mean that documents created by an exempt agency, but in the possession of another agency, are not exempt. They might well be. It only means that an applicant has a right to apply to a non-exempt agency for access to documents and if that non-exempt agency holds documents covered by the terms of the access application, then it must deal with those documents and process the request according to the provisions of the FOI Act.

31. I cannot accept the inference made by the Minister that highly sensitive documents in his possession, which might have been created by an exempt agency, such as the Police Royal Commission, would become accessible under the FOI Act. There are three answers to that suggestion. Firstly, there is a difference between a right to apply for access to documents and disclosure of documents pursuant to the exercise of such a right. The words “subject to and in accordance with this Act” in s.10(1) make it clear that the right of access is qualified by any exemptions which may apply to the documents in question. The second point is that, if the Minister is in possession of documents that would be exempt under clause 1, 2 or 5 of Schedule 1 and there are good reasons not to make public the existence of such documents, s.31 of the FOI Act provides a means of protecting the public interest in non-disclosure. Thirdly, the Premier has the power under s.36 of the FOI Act to issue an exemption certificate to protect certain kinds documents from disclosure.
32. Considering the structure of the FOI Act as a whole, it seems to me that the FOI Act recognises that, from time to time, copies of documents created by exempt agencies are likely to be found in other agencies and the FOI Act deals with that fact by including the notification requirement in s.15(8). If documents are sent by an exempt agency to another agency and they are in the possession, or under the control, of that other agency when an access application is made, then I consider that there is a right of access to them under s.10(1) of the FOI Act, subject to any exemptions that might apply. If that were not the case, then ss.15(1), (2) and (8), and the exemptions in clauses 5(2) and 14 of Schedule 1 to the FOI Act would be meaningless.
33. A non-exempt agency cannot transfer documents back to an exempt agency for the purpose of avoiding dealing with them under the FOI Act. However, the non-exempt agency must comply with s.15(8) of the FOI Act and notify the exempt agency that the access application has been made. In my view, the purpose of that notification requirement is to enable the non-exempt agency to obtain advice about the nature of the documents from the exempt agency, before deciding whether to grant access to them. The exempt agency is in the best position to know whether the documents are exempt and why they should not be disclosed, if that is the case. For example, routine correspondence created by exempt agencies, dealing with administrative issues such as budget, accommodation or staffing levels, might conceivably be held by other agencies in the public sector. The mere fact that administrative documents originated with an exempt agency does not, of itself, necessarily mean that such documents are exempt or that they should not be disclosed. However, if I were to accept the Minister’s arguments, then such routine and innocuous documents would automatically be inaccessible under the FOI Act. In my view, that outcome would clearly be detrimental to the principles open government, contrary to the Minister’s claims, because it would extend the range of documents excluded from the FOI process.
34. In this instance, the Minister identified documents in his possession that are covered by the terms of the complainant’s access application, even though those documents originated with certain exempt agencies. In my view, those documents are the documents of the agency in possession of them. In this instance, they are the documents of the Minister, and are not documents of an exempt agency. Having examined Documents 9(v), 13 and 18, I am satisfied that those documents concern the Minister in his official capacity. I am also satisfied that there is a right of access to them under s.10 of the FOI Act and I so find.

Identifying documents covered by the terms of an access application

35. It is the Minister's submission that Document 9(v) is outside the scope of the complainant's access application. The Minister submits that my "... *jurisdiction on external review is confined to the question whether the refusal to give access to this document was warranted, on the basis that the document does not fall within the scope of the access application*".
36. Although the Minister's submission is not entirely clear to me, I understand it to mean that the Minister considers that I only have jurisdiction under the FOI Act to decide whether a decision to refuse access to Document 9(v) is justified (because it is claimed to fall outside the scope of the access application) and that I do not have jurisdiction to decide whether that document is exempt, notwithstanding the fact that alternative submissions have been made to me about Document 9(v).
37. In answer to that proposition, it is my understanding that the decision to refuse access to Document 9(v) was made on the grounds that it, and indeed the whole of the documents comprising item 9 on the schedule, is exempt. However, as indicated earlier, no reasons were given for that decision. The claim that the document is not covered by the terms of the access application was only made to me after I required the Minister to give me his reasons to justify the decision to refuse access to it. In any event, I consider that access has been refused to Document 9(v). Clearly, it is unnecessary for any agency to make decisions about access to documents, which an applicant does not want and has not requested access to.
38. Section 76(1) of the FOI Act provides that, in dealing with a complaint the Information Commissioner has, in addition to any other power, power to review any decision that could have been made by an agency in respect of the access application and power to decide any matter in relation to the access application that could, under the FOI Act, have been decided by the agency. That is, the Information Commissioner 'stands in the shoes' of the original decision-maker and conducts a merits review of the case. When a request for access to a document is received, preliminary decisions have to be made about, amongst other things, the extent and manner of searches to be undertaken and the documents covered by the terms of the access application.
39. In my view, when I am conducting an external review of a complaint, as I am in this instance, the FOI Act gives me wide powers, including the power to confirm, vary or set aside an agency's decision and to substitute my own. Having regard to the powers conferred upon me by ss.76(1) and (2) of the FOI Act, I do not consider that my jurisdiction is limited in the manner suggested by the Minister. In my opinion, I have the power to determine whether a document is covered by the terms of an access application and, if it is, whether or not that document is exempt and the reasons why. I consider that the expression "decide any matter in relation to the access application" in s.76(1)(b) is very broad and includes a preliminary decision about which documents are included. If that were not the case, the objects and intent of the FOI Act could clearly be frustrated: see *Re Anti-Fluoridation Association of Victoria and Secretary, Department of Health*, 8 ALD 163, at 168.

40. Section 12 of the FOI Act describes the procedures for making an access application. Among other things, an applicant is required to give enough information to enable the requested documents to be identified. Further, if an applicant is unable to identify the requested documents, or if the circumstances of an application require it, an agency must take reasonable steps to help a person make an application that complies with the FOI Act.
41. Applicants generally are not in a position to know precisely the kind of documents held by an agency and access applications should not be construed by agencies so narrowly that the intent and purpose of the FOI Act is frustrated. Having regard to the objects and intent of the FOI Act, in my view, it is appropriate for an agency to give a generous interpretation to an application and to locate all documents that appear to satisfy such a request. After taking the initial step of finding the relevant documents, it may then be necessary to consult the applicant to identify with more precision, those documents most likely to be covered by the request and to eliminate those that are not.
42. In this case, in response to the complainant's access application, the Minister's office initially identified 20 "items" and listed and described those items on a schedule. Document 9(v) was not listed separately, but it is one of the five documents that make up the document listed and described as item 9 on that schedule. The Minister submits, in the alternative, that although Document 9(v) is correspondence sent to him, it does not pertain to the Police Royal Commission and therefore, is not covered by the terms of the complainant's access application.
43. However, the documents and material provided to me by the Minister's office make it clear to me that there was an exchange of correspondence between the Minister and the State Ombudsman during the relevant period, which related in a general sense to the Royal Commission and, in the course of exchanging letters on that subject, various documents were sent to the Minister. Document 9(v) is the last in that series of correspondence. I am satisfied that Document 9(v) is covered by the terms of the complainant's access application and I so find.
44. The task of deciding which documents are the subject of an access application would be made simpler for agencies and, ultimately, for me, if documents were described by reference to a file number, series or title. For example, there is no way of knowing the file series or file number or title from which Document 9(v) was extracted. However, as it was initially identified by the Minister's office as being subject to the request for access, and access to it has been refused, the question of whether or not that document is exempt as claimed is now a matter for me to decide.

THE DISPUTED DOCUMENTS AND THE EXEMPTIONS

Document 9(v)

45. Document 9(v) is a letter, dated 27 September 2001, to the Minister from the former State Ombudsman. Initially, the Minister claimed exemption under clause 3(1) for a name in the heading and for the hand-written signature of the former State Ombudsman. However, the complainant no longer seeks access to that matter and he has indicated to me that he is prepared to accept access to an edited copy of Document

9(v) with that matter deleted. Accordingly, the name of the third party and the signature are no longer in dispute.

46. Notwithstanding that, the Minister also claims exemption for the whole of the heading to Document 9(v) under clause 5(1)(b) of Schedule 1 to the FOI Act and he submits that it is not practicable to delete the heading, in accordance with s.24 of the FOI Act, because to do so renders the remaining text in the document meaningless.
47. Clause 5(1)(b) provides that matter is exempt matter if its disclosure could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted (my emphasis). In this instance, if the name of the third party is deleted from the heading, because the complainant does not seek access to it, I do not consider that disclosure of an edited version of Document 9(v) could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case. There would, quite simply, be nothing left in the document pertaining to any particular investigation, which would be revealed by its disclosure. Accordingly, I find that the first four words in the heading are not exempt under clause 5(1)(b).
48. Further, I consider that it would be practicable to delete the name of the third party and the signature from the document and to then provide the complainant with access to an edited copy of Document 9(v). I do not accept that deleting the name and the signature would render the remainder of that document meaningless. In my view, the deletions would not detract from the balance of the document, which would remain intelligible to any reader of it.

Document 13

49. Document 13 is a letter, dated 12 November 2001, from the Chairman of the Anti-Corruption Commission to the Minister. Initially, the Minister claimed exemption under clause 3(1) for the hand-written signature of the author of this document. However, the complainant has withdrawn his request for access to the signature and that matter is no longer in dispute.
50. The Minister also claims, in the alternative, that there is no right of access under s.10 of the FOI Act to Document 13 because it originated with an exempt agency. However, I have dealt with that claim in paragraphs 14-34 above and decided that there is a right of access to such documents. The Minister makes no other claims for exemption for Document 13.
51. I consider Document 13 to be a routine administrative document. It does not appear to me to contain sensitive material and, as no other claims for exemption have been made in respect of this document, I find that Document 13, with the signature deleted, is not exempt.

Document 18

52. Document 18 is a letter dated 15 January 2002 from the Commissioner of the Royal Commission to the Minister. It consists of a covering letter of three pages and an

attachment of three pages. The complainant has withdrawn his complaint in respect of the covering letter, but not the attachment. The Minister makes several submissions in respect of the attachment.

53. The Minister submits that, if the attachment is considered to be a stand-alone document, then it does not fall within the scope of the access application because, on its own, the attachment is not correspondence sent to or received by him pertaining to the Police Royal Commission. Further, if it is considered a separate document, then the access procedures under the FOI act do not apply as it is a document of a kind referred to in s.6 of the FOI Act.
54. The Minister submits, in the alternative, that if I accept that the attachment to Document 18 and the covering letter should be considered as one document then, as it was my preliminary view that the covering letter was exempt under clause 1(1)(d)(i), then I should also find the attachment exempt under clause 1(1)(d)(i). Finally, the Minister also submits that because the attachment to Document 18 (like Document 18 itself) was created by, or originated with, an exempt agency, there is no right of access to the attachment under the FOI Act.

Consideration

55. I do not take the view that the attachment to Document 18 is a stand-alone document. I consider that the covering letter and the attachment are one document for the purpose of deciding the question of access. However, I consider that the one document, Document 18, is comprised of two separate documents for the purpose of identifying and describing Document 18 to the complainant. Accordingly, I need not consider this submission further.
56. Clause 1 of Schedule 1 to the FOI Act, so far as is relevant, provides:

“1. Cabinet and Executive Council

(1) Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body, and, without limiting that general description, matter is exempt matter if it –

(a) ...

(b) ...

(c) ...

(d) was prepared to brief a Minister in relation to matters –

(i) prepared for possible submission to an Executive body; ...

...

Limits on exemption

(2) Matter that is merely factual, statistical, scientific or technical is not exempt matter under subclause (1) unless –

- (a) *its disclosure would reveal any deliberation or decision of an Executive body; and*
- (b) *the fact of that deliberation or decision has not been officially published.*

...

(5) Matter is not exempt by reason of the fact that it was submitted to an Executive body for its consideration or is proposed to be submitted if it was not brought into existence for the purpose of submission for consideration by the Executive body.”

57. Treating the letter and the attachment as one document, I am unable to find the attachment to Document 18 exempt under clause 1(1)(d)(i) because I consider that it is subject to the limit on exemption in clause 1(2). The attachment to Document 18 is an extract taken from a public document and it is, to my knowledge, on the public record. As part of a public document, I consider that the attachment consists of merely factual matter and that its disclosure would clearly not reveal any decision or deliberation of an Executive body.
58. The Minister’s third submission is that, because the attachment to Document 18 (like Document 18 itself) was created by or originated with an exempt agency, then there is no right of access to that attachment. However, as I have dealt with that argument in paragraphs 14-34 above, I need not deal with it here. In any event, I do not consider that it is correct to claim that the attachment was created by, or originated with, an exempt agency. Clearly, it was not created by an exempt agency and it originated with an altogether different interstate public body. Accordingly, for the reasons given above, I find that the attachment to Document 18 is not exempt.
