

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

**File Ref: F0901999 and F0911999
Decision Ref: D0281999**

Participants:

Julie Hamilton Fry
Complainant

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – request for access to reports, diary entries, journal entries, occurrence book entries and other documents relating to police inquiries – section 31 – refusal by agency to give information as to the existence or non-existence of the requested documents, in accordance with s.31 of the *Freedom of Information Act 1992* – refusal of access – clause 5(1)(b) – law enforcement – limits on exemption – clause 5(4).

Freedom of Information Act 1992 (WA) ss. 20, 31, 74(1)(b), Schedule 1 clauses 1, 2, 5(1)(b), 5(4).

Police Force of Western Australia v Kelly and Another (1996) 17 WAR 9.

DECISION

The decisions of the agency to refuse access without giving information as to the existence or non-existence of the requested documents in accordance with s.31 of the *Freedom of information Act 1992* are confirmed. If the documents existed, they would be exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of information Act 1992*

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

27 August 1999

REASONS FOR DECISION

BACKGROUND

1. These are two applications for external review by the Information Commissioner arising out of decisions made by the Police Force of Western Australia ('the agency') to neither confirm nor deny the existence of documents requested by Ms Fry ('the complainant') in two separate access applications made to the agency under the *Freedom of Information Act 1992* ('the FOI Act'). The agency's decision with respect to each application was on the same basis and the agency dealt with both matters in one internal review. As the issues arising are substantially the same, I have decided to deal with both complaints together.
2. On 7 March 1999, the complainant lodged two applications with the agency seeking access under the FOI Act to various documents of the agency. In general terms, the documents sought by the complainant may be described as follows:
 - Occurrence Book entry for 25/26 August 1982 relating to police attendance at a burnt vehicle at Burns Beach;
 - Report by Sergeant Henning relating to the burnt vehicle;
 - Running sheet, diary entry, journal entry or other document relating to the burnt vehicle;
 - Report by Constable Hatcher relating to police attendance at certain premises on 8 April 1982;
 - Entries in a forensic science book or other document relating to the removal of white tape from a window at those premises on 8 April 1982;
 - Entries in a forensic science book or other document relating to the removal of durex tape from a window at those premises on 13 May 1982;
 - Forensic Science Report prepared in 1982 relating to the white tape and the durex tape.
3. On 11 March 1999, pursuant to s.31 of the FOI Act, the agency gave the complainant written notices neither confirming nor denying the existence of the requested documents and stating that, if the requested documents did exist, those documents would be exempt documents under clause 5(1)(b) of Schedule 1 to the FOI Act.
4. On 21 April 1999 and on 23 April 1999, the complainant made two applications seeking internal review of each of the agency's decisions. On 28 April 1999, the agency's internal reviewer confirmed the initial decisions in respect of both matters. On 23 June 1999, the complainant lodged two complaints seeking external review of the agency's decisions by the Information Commissioner.

REVIEW BY THE INFORMATION COMMISSIONER

5. I notified the agency of these complaints and required the production to me of the FOI files maintained by the agency in respect of the two access applications. Subsequently, one of my officers attended at the agency and obtained further information about the nature of the matters to which the documents requested by the complainant would, if they existed, relate.

Information as to the existence of certain documents – section 31 of the FOI Act

6. A decision of the agency pursuant to s.31 of the FOI Act is, by virtue of s.31(2)(b), regarded as a refusal of access to the requested documents because the documents would, if they existed, be exempt documents. When I am dealing with complaints where an agency has refused under s.31 to give information about the existence or non-existence of documents, s.74(1)(b) of the FOI Act requires that I do such things as I think necessary to avoid the disclosure of information as to the existence or non-existence of documents containing matter exempt under clause 1, 2 or 5 of Schedule 1 to the FOI Act. This obligation means that I must necessarily be circumspect in providing the reasons for my decision.

7. Section 31 of the FOI Act provides as follows.

“31. (1) Nothing in this Act requires the agency to give information as to the existence or non-existence of a document containing matter that would be exempt matter under clause 1, 2 or 5 of Schedule 1.

(2) If the access application relates to a document that includes, or would if it existed include, exempt matter of a kind referred to in subsection (1), the agency may give written notice to the applicant that the agency neither confirms nor denies the existence, as a document of the agency, of such a document but that, assuming the existence of such a document, it would be an exempt document and, where such a notice is given-

(a) section 30 applies as if the decision to give such a notice were a decision referred to in that section; and

(b) for the purposes of this Act, the decision is to be regarded as a refusal of access to the document because the document would, if it existed, be an exempt document.”

8. Section 31 of the FOI Act clearly demonstrates that the Parliament of Western Australia recognised that, in certain circumstances, a decision-maker may be confronted with a request for documents which may be exempt from disclosure but where the character of the document described in the access application is such that the mere acknowledgment of the document's existence, accompanied by a denial of access, would itself reveal exempt matter and thereby cause the damage which the exemption is designed to prevent. It also recognises those circumstances in which merely confirming that documents do not exist would

itself be a disclosure of information which could cause the kind of harm to the public interest that the exemptions are designed to protect.

9. This can best be illustrated by an example. Suppose a person were preparing to smuggle cigarettes into Western Australia from the eastern states, in contravention of Western Australian taxation laws. Suppose also that, just prior to doing so, that person were to make an access application under the FOI Act to the agency requesting all documents concerning him or her. If the agency replied that it held no documents relating to that person, that response would disclose to the person that his or her activities were not documented as having come to the attention of the police. However, if the agency replied that it held a number of documents but that access was refused on the basis that they were exempt under clause 5(1)(b) of Schedule 1 to the FOI Act (disclosure would reveal the investigation of a possible contravention of the law), that response would convey information to the person that his or her activities may be the subject of investigation and enable that person to respond accordingly.
10. The Parliament of Western Australia limited the application of s.31 to only those documents which would be exempt under clause 1, 2 and 5 of Schedule 1, being those of the kind where it is apparent that disclosure of their very existence may itself cause the harm the exemption is designed to prevent. Clauses 1, 2 and 5 apply respectively to documents relating to Cabinet and Executive bodies; inter-governmental relations; and law enforcement, public safety and property security.
11. The difficulty with the application of s.31 is that it is not limited in its terms to those situations, such as the example given in paragraph 8 above, where disclosure of the mere existence of a document may result in harm. The only criterion for use of s.31 is that the document, if it existed, would be exempt under one of those clauses. Therefore, even in circumstances where it is clear that no harm would follow from revealing whether or not a document exists, access may be refused without confirming or denying the existence of the requested document. In this instance, there is nothing in the material before me to indicate any purpose to be served by the agency refusing to confirm or deny the existence of the documents which have been requested by the complainant. However, if it can be shown that, if they were to exist, the documents would be exempt under clause 1, 2 or 5, then under the FOI Act as it presently stands the agency is entitled to rely upon s.31.
12. In this instance, the agency informed the complainant that, if the requested documents existed in the agency (and they did not state that those documents actually exist), they would all be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.

The complainant's submission

13. The complainant informed me that the requested documents relate to incidents that commenced in 1982. The complainant informs me that both incidents were the subject of evidence given in the trial in 1983 of two people charged with a number of offences that collectively became known as the "Perth Mint

swindle”. The complainant submits that, in August 1982, Sergeant Henning, then the officer in charge of the Fingerprint Bureau, and other officers went to a bush area near Burns Beach, north of Perth, to examine and photograph a burnt motor vehicle. The complainant alleges that the burnt vehicle was a “deliberately fabricated potential exhibit” and that one or more of the police officers who went to that particular bush area intended to use Sergeant Henning’s report and photographs as fabricated evidence at the subsequent trial.

14. The complainant informs me that, in April 1982, a fire occurred at premises in Fitzgerald Street, North Perth and the scene of the fire was subsequently examined by various police officers. The complainant claims that various police officers lied about the circumstances of the fire in the subsequent trial. The complainant informs me that certain police officers deliberately failed to disclose to the Crown Law Department all of the information relating to the Perth Mint swindle and that police also fabricated evidence during the trial relating to the Perth Mint swindle. The complainant claims that clause 5(1)(b) could be used by the agency to cover up the incompetence and corrupt activities of past and present police officers.

Clause 5(1)(b)

15. 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.
16. The application of clause 5(1)(b) has been the subject of three decisions of the Supreme Court of Western Australia. In *Police Force of Western Australia v Kelly and Another* (1996) 17 WAR 9, Anderson J said, at page 13:

“In my opinion the phrase...“if its disclosure could reasonably be expected to...reveal the investigation of any contravention of the law in a particular case...” is apt to include the revelation of the fact of a particular investigation by police of a particular incident involving certain people.”

17. At pages 14 and 15, Anderson J said:

“I do not think it could have been intended that exemption should depend on how much the applicant already knows or claims to know of the matter ...[clause] 5(1)(b) is not limited to new revelations but covers all matter that of itself reveals the things referred to, without regard for what other material might also reveal those things, or when that other material became known, and without regard for the actual state of knowledge that the applicant may have on the subject or the stage that the investigation has reached.”

18. The agency is responsible for, among other things, the investigation of offences against the criminal laws of this State. The incidents in relation to which the complainant sought access to documents involved police attendance and examination of a burnt motor vehicle and police attendance and inquiries into a

fire on private business premises. Clearly, in my view, police inquiries into a matter of the nature of either would be investigations into possible contraventions of the law. Police inquiries into a burnt vehicle will clearly include inquiries into such matters as whether the vehicle has been stolen, whether the vehicle has been used in the commission of offences, whether the vehicle has been deliberately burnt and possible insurance fraud, all criminal offences. Inquiries by police into a fire on business premises will necessarily include inquiries into whether the fire was deliberately lit and, if so, for what purpose and whether the premises were broken into, all contraventions of the criminal law.

19. In this instance, in relation to the latter incident, the complainant provided me with a copy of a report of one of the investigating officers which confirms that the incident was investigated by the police as possible arson. Further, the complainant informs me that both incidents were the subject of evidence given in the 1983 trial relating to the Perth Mint swindle. Without here going into the detail of the events of that matter, I am satisfied that the investigations of those two incidents became part of the investigation of the Perth Mint swindle. Inquiries with the agency have confirmed that, if documents of the kind described in the access applications existed, they would be located with the documents relating to that larger investigation. Investigations with the agency have also revealed that there are a great number of documents relating to that investigation.
20. In my opinion, the kinds of information recorded in occurrence books, reports by officers, running sheets, diary entries or forensic science books or other similar documents would contain something of the substance of those investigations and would if disclosed, in my view, reveal the investigation by the police into those particular matters and something of the substance of the larger investigation. In my view, therefore, if documents of the kind described by the complainant in the access applications existed, they would contain matter which, if disclosed, could reasonably be expected to reveal the investigation of possible contraventions of the law in a particular case. Accordingly, I am satisfied that, if such documents were to exist, they would be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
21. As I understand the complainant's submissions, the argument in respect of the burnt vehicle is that documents relating to it could not reveal the investigation of a contravention or possible contravention of the law because the officers who attended at the vehicle were not investigating the circumstances of its burning but, rather, were participating in the fabrication of false evidence. On the basis of the material before me, I do not accept that submission. The other matters of submission by the complainant concerning her allegations that police officers gave false evidence in relation to the two matters and that the agency has engaged in a cover-up of corrupt activities are matters which may possibly have some relevance were I considering whether or not it would be in the public interest that the documents be disclosed. Even then, on the material presently before me, they would carry little weight as they are merely unsupported allegations.

22. However, whether or not disclosure of the documents would, on balance, be in the public interest arises for my consideration only if they are documents of a kind described in paragraph (a) of clause 5(4) of Schedule 1 to the FOI Act. Clause 5(4) provides that:

“(4) Matter is not exempt matter under subclause (1) or (2) if -

(a) it consists merely of one or more of the following -

(i) information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by the law;

(ii) a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law; or

(iii) a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law;

and

(b) its disclosure would, on balance, be in the public interest.”

23. Clearly, the documents as described would not, if they existed, be of a kind described in subparagraph (ii) or (iii) and there is nothing in the material provided to me by the complainant that suggests to me that they would contain matter merely of a kind described in subparagraph (i). The documents as described by the complainant in her access applications would, if they existed, contain information about matters that are properly the subject of investigation by police in order to determine whether or not there has been an offence or offences committed.

24. Accordingly, I find that the limit provided by clause 5(4) on the operation of clause 5(1) does not apply in this instance. Therefore, without giving any information as to whether or not the documents exist, I find that the documents would, if they existed, be exempt under clause 5(1)(b) of Schedule 1 to the FOI Act and the agency's decisions to refuse access in accordance with s.31 were justified.

Section 20

25. In its notices of decision in respect of the two access applications, the agency referred to the provisions of s.20 of the FOI Act and appears to have purported to rely on that section as an alternative justification for its decisions. Section 20 provides that an agency may, after taking reasonable steps to help change an access application appropriately, refuse to deal with the access application if the

agency considers that to do so would divert a substantial and unreasonable portion of the agency's resources away from its other operations. In its notices of decision, the agency referred to having dealt with numerous access applications over the past six years concerning the matters the subject of these access applications and informed the complainant that it would refuse to deal with any future access applications.

26. Given the number of documents held by the agency relating to the investigation of the Perth Mint swindle, it may be that dealing with the access application would have diverted a substantial and unreasonable portion of the agency's resources. However, as that matter was not pursued before me, given my preliminary view that the agency's decision to refuse access in accordance with s.31 was justified, it has not been necessary that I investigate that aspect of the agency's decisions.
27. However, by way of comment, the material before me is not sufficient to establish that the agency would have been justified in refusing to deal with these access applications on the basis of s.20. The agency's files maintained in respect of the access applications do not evidence any steps having been taken to assist the complainant to change the access applications in order to reduce the amount of work that would be required to deal with them and there is nothing to indicate the portion of the agency's resources that would have been required to deal with them.
28. Furthermore, the number of previous access applications relating to the matter that have been dealt with by the agency, the outcomes of those access applications and the number and nature of documents relating to the matter released through other legal avenues may be relevant to a consideration of whether or not an unreasonable portion of the agency's resources would be required to deal with the particular access application. However, those factors do not, of themselves, justify reliance on s.20 in respect of the particular access application then being considered. Further, each access application must be considered and dealt with on its own merits and the agency is not entitled to inform the complainant in advance that no further access applications concerning the matters will be dealt with. I make it clear that I do not confirm this aspect of the agency's decisions and nothing in my decisions on these complaints nor these reasons for my decisions is to be taken to do so.
