

VAN TONGEREN AND JUSTICE

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

**File Ref: 97121
Decision Ref: D03397**

Participants:

Peter Joseph van Tongeren
Complainant

- and -

Ministry of Justice
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to reasons for transferring a prisoner – scope of complaint – clause 5(1)(h) – whether documents contain matter which could if disclosed be reasonably expected to facilitate the escape of any person from lawful custody or endanger the security of any prison – section 74(2) – obligation not to disclose certain matter.

Freedom of Information Act 1992 (WA) ss.26, 74(1), 74(2), 76(5), 76(8); Schedule 1 clause 5(1)(h), 5(4), 6.

DECISION

The decision of the agency is confirmed in so far as Document 1 and the matter deleted from Document 2 are exempt under clause 5(1)(h) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

8th December 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') to refuse Mr van Tongeren ('the complainant') access to certain documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. In 1990, the complainant was convicted, in the Supreme Court of Western Australia, of a number of very serious offences and was sentenced to an aggregate of 18 years imprisonment, which he is presently serving. As I understand it, the complainant is not eligible for parole.
3. On 24 February 1997, the complainant was transferred from Bunbury Regional Prison to Albany Regional Prison. By letter dated 5 April 1997, the complainant sought access under the FOI Act to documents of the agency relating to his transfer. In particular, he sought the reasons for his transfer to Albany Regional Prison. Subsequently, the agency provided the complainant with access to three documents.
4. The complainant sought internal review of the agency's decision because the documents given to him by the agency did not appear to contain the explanation that he sought. Therefore, he was of the view that more documents should exist. However, the agency confirmed that it had provided the complainant with access to all documents considered falling within the ambit of his access application. The result of that decision was, effectively, to deny access to any additional documents in accordance with s.26 of the FOI Act on the ground that those additional documents either do not exist or cannot be found. Thereafter, on 3 July 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

Scope of the complaint

5. Although the complainant's complaint to my office did not clearly state the grounds to establish my jurisdiction, a member of my professional staff made inquiries with the agency in that regard. The agency produced for my inspection a copy of the file maintained by it for the purpose of dealing with the complainant's access application. I also inspected the "Offender in Custody" file and the "Unit Management" file pertaining to the complainant. From those files, I identified two documents that appeared to me to be within the scope of the complainant's access application.
- 6.

After considering those documents and the material before me from both the complainant and the agency, the agency was informed of my view that two additional documents are within the ambit of the access application. After further discussions on that point, the agency claimed exemption for those documents under several paragraphs of clause 5(1) and clause 6(1) of Schedule 1 to the FOI Act.

7. In the circumstances of this complaint, the only issue for my determination concerns the exempt status or otherwise of those two documents. Having considered the material before me, I then informed the parties in writing of my preliminary view of this complaint and my reasons.
8. It was my preliminary view that one document (which I shall refer to as Document 1) may be exempt under clause 5(1)(h) and that parts of the other document (which I shall refer to as Document 2) may be exempt under clause 5(1)(h) and clause 6(1) of Schedule 1 to the FOI Act. However, in respect of Document 2, it was also my view that it was practicable for the exempt matter to be deleted from that document and access given to an edited copy of it.
9. Subsequently, the agency provided the complainant with access to an edited copy of Document 2 in accordance with my preliminary view, but maintained its exemption claims for the matter deleted from that document and for Document 1. The complainant responded to my preliminary view and informed me that he sought access to complete copies of Document 1 and Document 2 but, for the reasons discussed at paragraphs 10-13 below, he was unable to provide any material of substance to assist me in my deliberations. In any event, he did not withdraw his complaint.

Non-disclosure of certain matter

10. Section 76(5) of the FOI Act requires that, in dealing with a complaint, the Information Commissioner has to include in the decision the reasons for that decision, the findings of any material questions of fact underlying those reasons and reference to the material on which those findings were based. In addition, s.76(8) of the FOI Act requires that the Information Commissioner publish her decisions “...in order that the public is adequately informed of the grounds on which such decisions are made.”
11. However, s.74(1) of the FOI Act enjoins the Information Commissioner to ensure that exempt matter is not disclosed during the course of dealing with a complaint. Further, s.74(2) places an obligation on the Information Commissioner “...not to include exempt matter, or information of a kind referred to in subsection (1)(b), in a decision on a complaint or in reasons given for the decision.”
12. Taking into account the provisions of ss.76(5) and 76(8), as set out above, I have endeavoured in the difficult circumstances of this matter to provide the complainant with clear reasons for my decision and the evidence before me which

supports those reasons to the extent that I am able, bearing in mind the mandatory obligations under s.74(2). I am thereby constrained from describing one of the disputed documents in these reasons for decision, and from discussing in detail the evidence on which my decision is based, because to do so would be a breach of my obligations under s.74(2) of the FOI Act.

13. I appreciate the difficult position that complainants generally find themselves in when called upon to present arguments to support their claims that documents claimed to be exempt by agencies may not be exempt. In this particular instance, the complainant is in a particularly difficult position in that, because of my statutory obligations, I have been limited in the amount of information I can give to him.

THE DISPUTED DOCUMENTS

14. The nature of Document 1 and the exemption claim in respect of it is such that I find myself in the position of not being able to describe it with any particularity for the reasons stated above. Document 2 is a letter dated 18 February 1997 from the Superintendent Bunbury Regional Prison to the Manager, Information Analysis Section, Metropolitan Prison Complex.

THE EXEMPTION

Clause 5(1)(h)

15. Clause 5(1)(h) provides that matter is exempt matter if its disclosure could reasonably be expected to facilitate the escape of any person from lawful custody or endanger the security of any prison.
16. I have considered the contents of Document 1 and I have taken into account other material provided to me by the agency in relation to its management of the complainant within the prison system. I am satisfied that the disclosure of Document 1 could reasonably be expected to materially affect the capacity of the agency to develop effective strategies for the management and safe custody of all prisoners, including the complainant. In my view, effective management strategies are vital for the good order and security of the prison system.
17. Accordingly, I am satisfied that the disclosure of Document 1 could reasonably be expected to endanger the security of a prison. I do not consider that any of the limitations in clause 5(4) applies to that document. I find that Document 1 is exempt under clause 5(1)(h) of Schedule 1 to the FOI Act.
18. The complainant has been given access to an edited copy of Document 2. Document 2 contains a reference to Document 1 and certain other information about the complainant to which access has been refused. That information is contained in paragraphs 3-7 inclusive on page 1, and paragraphs 1 and 2 on page

2. For similar reasons to those given in relation to Document 1, I am of the view that the matter in Document 2 to which access has been refused is matter the disclosure of which could reasonably be expected to endanger the security of a prison. I find that paragraphs 3-7 on page 1 and paragraphs 1 and 2 on page 2 of Document 2 are exempt under clause 5(1)(h) of Schedule 1 to the FOI Act.
19. The agency also claims exemption under clause 6(1) for the deleted parts of Document 2. As I have found those parts of that document to be exempt under clause 5(1)(h), I need not consider the claims under clause 6. In my letter to the parties informing them of my preliminary view I discussed the application of that exemption in the circumstances of this matter and, in particular, the competing public interests.
