

BLIGHT AND POLICE

OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)

File Ref: 96061
Decision Ref: D04696

Participants:

Geoffrey Roy Blight
Complainant

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - edited access - internal memorandum of agency - documents relating to preparation of report - clause 5(1)(a) - law enforcement, public safety and property security - impair effectiveness of investigative methods or procedures - whether disclosure could reasonably be expected to impair effectiveness of investigative methods or procedures.

Freedom of Information Act 1992 (WA) ss.72(1)(b); 74(2); 75(1); 76(1); 102(1); Schedule 1 clause 5(1)(a).

Freedom of Information Act 1982 (Cwth) s.37(2)(b).

Freedom of Information Act 1982 (Vic) s.31(d).

Freedom of Information Act 1991 (SA) Schedule 1 clause 4(1)(e).

Freedom of Information Act 1989 (NSW) Schedule 1 clause 4(1)(e).

Freedom of Information Act 1992 (Qld) s.42(1)(e).

Freedom of Information Act 1991 (Tas) s.28(1)(c).

Freedom of Information Act 1989 (ACT) s.37(2)(b).

Re Manly and Ministry of the Premier and Cabinet (Information Commissioner, WA, 16 September 1994, unreported).

Re Lawless and Medical Board of Western Australia and Medical Practitioner 'X' (Information Commissioner, WA, 5 July 1995, unreported).

Re 'T' and Queensland Health (1994) 1 QAR 386.

DECISION

The decision of the agency is confirmed. The disputed matter is exempt under clause 5(1)(a) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

31st July 1996

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 ('the agency') to refuse Mr Blight ('the complainant') access to certain matter contained in a document of the agency requested by the complainant under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 28 December 1995, the complainant lodged an access application with the agency seeking access to documents of the agency, including material concerning post mortem examinations and tests for a particular substance that is of interest to the complainant. The decision on access was made on 14 February 1996, by Acting Inspector R A Timmins, Officer in Charge, Freedom of Information Unit of the agency. The complainant was granted access to two documents and access to an edited copy of a third document from which certain matter had been deleted. The agency claims the deleted matter is exempt matter under clause 5(1)(a) of Schedule 1 to the FOI Act.
3. In a letter received by the agency on 10 March 1996, the complainant sought internal review of the agency's initial decision to grant him access to an edited copy of the third document. On 19 March 1996, Chief Inspector McDonald, the agency's internal review officer, confirmed the agency's initial decision to refuse the complainant access to the matter deleted from the document on the ground that that matter is exempt matter under clause 5(1)(a) of Schedule 1 to the FOI Act.
4. On 9 April 1996, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. On 23 April 1996, I notified the agency that I had received this complaint. Pursuant to my authority under ss.75(1) and 72(1)(b) of the FOI Act, I sought the production to me of the document in dispute, together with the agency's FOI file maintained in respect of this matter.
6. After I received and examined the disputed document and the agency's FOI file, my Investigations Officer met with the complainant and with officers of the agency, on separate occasions, for the purpose of discussing with the complainant and the agency whether this complaint might be resolved by conciliation or negotiation between the parties. During that process, the complainant provided my office with copies of various letters he has written in the past to politicians, the Coroner and other State Government agencies. My Investigations Officer also made some initial inquiries with Dr Cooke, Chief

Forensic Pathologist, at the Forensic Medicine Centre, Queen Elizabeth II Medical Centre.

7. In the course of my dealing with this matter, the agency located additional documents relevant to the complainant's access application, including extracts from published text books and journals, together with documents provided to the agency in 1995 by an officer of the Forensic Science Laboratory of Western Australia. The agency subsequently provided full copies of each of those documents to the complainant. In addition, following the discussions between my Investigations Officer and Dr Cooke, I received a letter from Dr Cooke confirming his previous contact with the complainant. Dr Cooke further informed me that, as a result of the complainant's initial communication with him, certain investigative procedures have been strengthened. Dr Cooke approved a copy of his letter to me being provided to the complainant and it was.
8. On 24 May 1996, after examining the disputed matter; the information contained in the additional documents released to the complainant by the agency and the information set out in Dr Cooke's letter; and taking into account the submissions of the agency and the complainant, I provided the parties to this complaint with my preliminary view and reasons for that view. Based upon the material then before me, it was my preliminary view that the agency had not discharged the onus it bears under s.102(1) of the FOI Act of establishing that the matter is exempt and that its decision to deny the complainant access to that matter was justified. Thereafter, I received a further submission from the agency, based upon advice sought by the agency from the Crown Solicitor's Office, in response to my preliminary view.
9. After considering the further submission of the agency, I remained dissatisfied with the adequacy of the material provided by the agency to establish a basis for the exemption claimed. However, by virtue of s.76(1) of the FOI Act, I have the power to review any decision that has been made by an agency on an access application and the power to decide any matter that could, under the FOI Act, have been decided by the agency. In my view, I have a statutory obligation to consider all the evidence available; to examine carefully the matter claimed to be exempt; and I may also carry out my own investigations in order to make a decision upon a complaint.
10. Consequently, I conducted my own investigation and my office made further inquiries with Dr Cooke regarding this matter. Following those inquiries, I was satisfied that there is sufficient material before me to find that the disputed matter constitutes exempt matter under clause 5(1)(a) of Schedule 1 to the FOI Act. The complainant was informed of my reasons and he was given the opportunity to make further submissions to me, but he chose not to do so.

THE DISPUTED MATTER

11. The disputed matter consists of 4 sentences contained in a report dated 31 July 1995 from Acting Detective Inspector P Saxon, No 1 Division, CIB Perth, to the Officer in Charge "B" Region. The report of Acting Detective Inspector Saxon was prepared in response to a letter addressed to the agency by the complainant in 1995.

THE EXEMPTION

12. The agency claims the disputed matter is exempt matter under clause 5(1)(a) of Schedule 1 to the FOI Act. In considering the application of this exemption, I face the difficulty of discussing the agency's claims and explaining my reasons and conclusions in general terms only. Pursuant to my obligations under s.74(2) of the FOI Act I must ensure that I avoid disclosing exempt matter in my reasons for decision.
13. Clause 5(1)(a), so far as is relevant provides:

"5. Law enforcement, public safety and property security

Exemptions

(1) Matter is exempt matter if its disclosure could reasonably be expected to:

(a) impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law;"

14. Similar provisions in the FOI legislation of other jurisdictions require only that the effectiveness of methods or procedures be "*prejudiced*" by disclosure to attract an exemption: s.37(2)(b), *Freedom of Information Act 1982* (Commonwealth); s.31(1)(d), *Freedom of Information Act 1982* (Victoria); cl. 4(1)(e), Schedule 1, *Freedom of Information Act 1991* (SA); cl.4(1)(e), Schedule 1, *Freedom of Information Act 1989* (NSW); s.42(1)(e), *Freedom of Information Act 1992* (Q'ld); s.28(1)(c), *Freedom of Information Act 1991* (Tas); and s.37(2)(b), *Freedom of Information Act 1989* (ACT).
15. The Concise Oxford Dictionary, Eighth edition, defines "impair" as meaning "*to damage or weaken*", and defines "prejudice" as meaning, *inter alia*, "*harm or injury that results or may result from some action or judgement*".
16. I have previously discussed the meaning and application of the exemption in clause 5(1)(a) in *Re Manly and Ministry of the Premier and Cabinet* (16 September 1994, unreported), at paragraphs 28-31, and in *Re Lawless and Medical Board of Western Australia and Medical Practitioner 'X'* (5 July 1995, unreported). As I have said in previous decisions, in my view, the word "impair"

has a similar meaning to the word “prejudice” in s.42(1)(e) in the Queensland FOI Act and, accordingly, in my view, clause 5(1)(a) is similar to s.42(1)(e) of the Queensland FOI Act.

17. The meaning of s.42(1)(e) was considered by the Queensland Information Commissioner in *Re “T” and Queensland Health* (1994) 1 QAR 386. In *Re “T”*, after concluding that the s.42(1)(e) was capable of applying to any law which imposes an enforceable legal duty to do or refrain from doing some thing, and not merely to a contravention of the criminal law, the Queensland Information Commissioner made the following comments, at paragraph 32, which I consider to be relevant to the interpretation of the exemption in clause 5(1)(a):

“Disclosure of methods and procedures adopted by law enforcement agencies which are obvious and well known to the community (e.g. interviewing and taking statements from witnesses to a crime) is not likely to prejudice their effectiveness, for the purposes of s.42(1)(e) of the Queensland FOI Act. In respect, however, of methods and procedures that are neither obvious nor a matter of public notoriety, the mere fact that evidence of a particular method or procedure has been given in a proceeding before the courts would not preclude an agency from asserting, in the appropriate case, that disclosure under the FOI Act could reasonably be expected to prejudice the effectiveness of that method or procedure in the future...If, however, the revelation of a law enforcement method or procedure in open court in a particular case has been so widely reported as to become a matter of public notoriety, there may be a real question as to whether its disclosure under the FOI Act could be capable of prejudicing its effectiveness.”

18. Further, at paragraph 24 of “*Re T*”, the Queensland Information Commissioner discussed the onus on agencies to establish the elements of the exemption. I endorse the comments of the Queensland Information Commissioner when he said:

“There may be cases where the disclosure of particular matter will so obviously prejudice the effectiveness of law enforcement methods or procedures that the case for exemption is self-evident, but ordinarily in a review under Part 5 of the FOI Act it will be incumbent on an agency to explain the precise nature of the prejudice to the effectiveness of a law enforcement method or procedure that it expects to be occasioned by disclosure, and to satisfy me that the expectation of prejudice is reasonably based.”

19. In my view, the exemption in clause 5(1)(a) is concerned with protecting from disclosure the means employed by agencies to investigate, detect, prevent and deal with contraventions or possible contraventions of the law. Further, the investigative methods and procedures concerned must themselves be lawful to attract the exemption.

The claims of the agency

20. In its notice of decision to the complainant, the agency stated that the deleted material is a description of a method employed to detect certain substances, including the particular substance of interest to the complainant. The agency said:

“This material is considered to be exempt under clause 5(1)(a) of the Freedom of Information Act because it explains a method used to detect a possible contravention of the law. This agency does not consider it wise to reveal the methods used to detect possible breaches of the law as it would enable any person involved in an illegal activity, the opportunity to circumvent this method. In particular case, a person who was involved in using this particular chemical would be able to determine how this agency would detect [the poison] and could plan an effective strategy to avoid detection.

21. In its most recent submission to me, the agency claims that the disputed matter reveals “...an investigative policy which sets out the procedure and method...”. Nowhere in its correspondence with the complainant, its documents produced to me nor its submissions to me did the agency identify the particular method or procedure to which the exempt matter is claimed to relate, nor did it identify the relevant law concerned. According to the submission of the agency, those facts should be evident from the exempt matter itself. However, I do not consider that to be the case.
22. Based upon my examination of the disputed matter, it does not explain a method used to detect a possible contravention of the law. However, in my opinion, the disputed matter describes in a general sense a forensic procedure that may be applied in the course of investigating a contravention or possible contravention of the law. In my view, the disputed matter records the substance of the information provided by Dr Cooke to Acting Detective Inspector Saxon about forensic procedures in general.

Dr Cooke’s submission

23. In a letter to me dated 8 July 1996, Dr Cooke describes a forensic procedure for detecting a contravention or possible contravention of the criminal law of this State. I am unable to describe that procedure, having regard to the requirements of s.74(2) of the FOI Act. However, I am satisfied that the procedure described by Dr Cooke is lawful within the terms of clause 5(1)(a).
24. Dr Cooke also outlined to me in detail the operation of the coronial system of investigation into deaths in this State, including his views of the precise nature of the likely impairment to that system if the disputed matter were to be disclosed. The material provided to me by Dr Cooke includes information that is neither obvious nor a matter of public notoriety concerning the operation of the coronial

system and the effectiveness of that system in this State. Based on the material provided to me by Dr Cooke, I am satisfied that disclosure of the disputed matter to any person, including the complainant, could reasonably be expected to impair the effectiveness of the coronial investigation system. However, because of the nature of the material provided to me by Dr Cooke, I am constrained by the requirements of s.74(2) from providing detailed reasons for my reaching that conclusion.

25. I am satisfied that disclosure of the exempt matter could reasonably be expected to impair the effectiveness of a lawful forensic procedure for detecting, investigating or dealing with any contravention or possible contravention of the criminal law of this State. Accordingly, I find the disputed matter is exempt matter under clause 5(1)(a) of Schedule 1 to the FOI Act.
