

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

**File Ref: F2007029
Decision Ref: D0062008**

Participants:

Magenta Technologies Pty Ltd
Complainant

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access - documents created by an exempt agency - documents of an exempt agency held by a non-exempt agency - clause 5(2) - law enforcement, public safety and property security – whether the words “State Intelligence Division” can be substituted for the words “Bureau of Criminal Intelligence” in clause 5(2)(a).

Freedom of Information Act 1992: Sections 3(3), 10(1), 23(2), 24; Schedule 1: clause 5(2)(a) and 5(4); Schedule 2

Interpretation Act 1984: ss.8 and 18

Re Barndon and Police Force of Western Australia [2006] WAICmr 13

Police Force of Western Australia v Winterton (1997) WASC 504

DECISION

The decision of the agency that Documents 1, 2, 5, 6 and 7 and the information deleted from Documents 8, 9 and 10 are exempt under clause 5(2)(a) of Schedule 1 to the *Freedom of Information Act 1992* is confirmed.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

6 March 2008

REASONS FOR DECISION

1. This complaint arises from a decision made by the Police Force of Western Australia ('the agency') to refuse Magenta Technologies Pty Ltd ('the complainant') access to documents requested by the complainant under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. I understand that, in 2005, the complainant was an unsuccessful tenderer for the supply to the agency of a Multimedia Interception and Analysis System. As a result of the sensitive nature of the tender, the State Supply Commission ('the Commission') granted the agency an exemption from the usual public tender process and approved a restricted tender process. The Commission also granted the agency an exemption from publishing the tender/contract details on the Government Contracting Information Bulletin Board.
3. On 4 October 2006, the complainant applied to the agency under the FOI Act for access to the following documents in relation to that tender:
 - "1. *The completed Evaluation Handbooks (referred to in paragraph 3.2 of the Evaluation Report) including completed copies of scoring sheets.*
 2. *Any written communications, including emails, to or from [the Technical Advisor to the Evaluation Panel] to members of the Evaluation Panel which contain comments regarding Magenta's bid.*
 3. *Any file notes recording discussions between [the Technical Advisor to the Evaluation Panel] and members of the Evaluation Panel which contain comments regarding Magenta's bid.*
 4. *Any document taken into account (or recording oral comments taken into account) by the Evaluation Panel in forming the conclusion set out at paragraph 5.3.1 (page 19 of the Evaluation Report) that 'Magenta's track record and past performance in service and maintenance has been poor with many outstanding issues left unresolved for significant [sic] period of time under the previous contract arrangement, insufficient hours of support and very little onsite support visits undertaken in the past'.*
 5. *Written communications including emails regarding the preparation or acceptance of the Evaluation Report between the Evaluation Panel and the Department of Treasury and Finance or any other WA Department or agency."*
4. On 30 November 2006, the agency refused the complainant access to the disputed documents under s.23(2) of the FOI Act on the basis that documents of the kind described in the complainant's access application - if they existed - would be exempt under clauses 5(1)(a) and 5(2)(a) of Schedule 1 to the FOI

Act. The agency's claim for exemption under clause 5(1)(a) is not specifically stated, but from the terms of the claim, appears to have been implied.

5. The complainant sought internal review of that decision and, on 28 December 2006, the agency confirmed its decision. On 31 January 2007, the complainant applied to this office for external review of the agency's decision.

REVIEW BY THE A/INFORMATION COMMISSIONER

6. On receipt of this complaint, the former A/Information Commissioner ('the former A/Commissioner') required the agency to produce to her the original of its FOI file maintained for the purposes of the complainant's access application and the originals of the requested documents.
7. As a result of negotiations between this office and the agency, the agency withdrew its decision to refuse access to the disputed documents under s.23(2) of the FOI Act. My Investigations Officer made further inquiries with the agency and confirmed that there were 10 documents which come within the scope of the complainant's access application.
8. The complainant confirmed that it sought access to information contained in the disputed documents relevant to it only; that is, it does not seek access to any information contained in the disputed documents relating to the other tenderers.
9. The agency also agreed to release to the complainant copies of Document 3 in full and Documents 4, 8, 9 and 10 in an edited form.
10. Documents 1, 2, 5, 6 and 7 and the information deleted from Documents 4, 8, 9 and 10 remain in dispute in this matter.

THE DISPUTED DOCUMENTS

11. The documents and information in dispute are described as set out below.
 - Document 1: folios 1-5 - e-mail dated 6 October 2005.
 - Document 2: folios 6-11 - e-mail dated 21 September 2005.
 - Document 4: folio 13 - undated A4 sheet containing comments released in edited form with deleted information outside the scope of the complainant's access application.
 - Document 5: folios 14-16 - internal e-mail dated 4 August 2005.
 - Document 6: folio 17 - internal e-mail dated 4 August 2005.
 - Document 7: folios 18-36 - undated technical review of tender responses.

- Document 8: folios 37-60 - undated Evaluation Handbook - edited to delete information that is claimed as exempt under clause 5(2)(a).
- Document 9: folios 61-80 - undated Evaluation Handbook - edited to delete information that is claimed as exempt under clause 5(2)(a).
- Document 10: folios 81-103 - undated Evaluation Handbook - edited to delete information that is claimed as exempt under clause 5(2)(a).

OUTSIDE THE SCOPE OF THE APPLICATION

12. I have examined Document 4. The information deleted from Document 4 relates to the other tenderers and not to the complainant. As the complainant has confirmed that it does not seek access to that information, I consider the information deleted from Document 4 to be outside the scope of the complainant's access application and I do not intend to deal with it further.

CLAUSE 5(2)

13. The agency claims that Documents 1, 2, 5, 6 and 7 and the information deleted from Documents 8, 9 and 10 are exempt under clause 5(2)(a) of Schedule 1 to the FOI Act.

14. Clause 5 provides, insofar as it is relevant, as follows:

"(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;

(b)...

(c)...

(d)...

(e)...

(f)...

(g)...

(h)...

(2) Matter is exempt matter if it was created by –

(a) the Bureau of Criminal Intelligence, Protective Services Unit, Witness Security Unit or Internal Affairs Unit of the Police Force of Western Australia; or

(b) the Internal Investigations Unit of Corrective Services.

(3) ...

Limits on exemptions

- (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.”*

The agency’s submissions

15. In its notice of decision dated 28 December 2006, the agency referred to the sensitive nature of the requested information and noted that it was considered to be information of the State Intelligence Division (‘the SID’). In that regard, the agency said:

“In addressing [the complainant’s] submission concerning the business name change from the Bureau of Criminal Intelligence (BCI) to the State Intelligence Division (‘SID’), I advise that this occurred under the auspices of Commissioner Matthews. The decision to change the name was opportune during the re-structure of the Crime Investigation and Intelligence Services Portfolio of WA Police

This is the legal position as accepted by the Freedom of Information Commissioner in “Jason Phillip BARNDON and Police Force of Western Australia, Re [2006] WAICmr 13 (16 June 2006) PI,” which has now been expanded to the full meaning of State Intelligence Division (as opposed to Service).

A request has been progressed to the State Attorney General seeking amendment to the Act to reflect the name change ... Irrespective of the current status of the proposed amendment to the Act, it is apparent the Information Commissioner is satisfied the nature of the work undertaken by SID has not materially altered from that undertaken by BCI.”

16. In that letter, the agency also advised as follows:

“... to reinforce safeguards to protect SID information, the panel members were seconded onto the selection panel as SID members and agreed to abide by the confidential framework of working with and managing SID information and procedures which is [sic] normally exempt from access under the FOI Act.”

17. I understand from that explanation, that the agency considers the former A/Commissioner’s decision in *Re Barndon and Police Force of Western Australia* [2006] WAICmr 13 to mean that she accepted that a reference to the SID can be accepted in substitution for the reference to the BCI in clause 5(2)(a) of Schedule 1 to the FOI Act.

The complainant’s submissions

18. The complainant, in its letter to the agency of 21 December 2006 seeking internal review, and in its letter of 31 January 2007 to the former A/Commissioner seeking external review, made the following submissions:

- The exemption in clause 5(2)(a) of Schedule 1 to the FOI Act applies to the BCI and not the SID and that “[i]t is not possible to change the operation of the legislation except by amending legislation.” The decision in *Re Barndon* cannot serve as a precedent because, in that case, “the complaint in respect of documents allegedly falling under the exemption was withdrawn.”
- With regard to the question of editing, the original notice of decision relied on the decision of Scott J in *Police Force of Western Australia v Winterton* (1997) WASC 504. However, the facts in that case are different from the present case. In *Re Winterton*, *The West Australian* newspaper sought access to an investigation concerning the possible criminal conduct of a citizen. Scott J characterised that investigation as “police work” and said that it was of critical importance that any documents edited under section 24 of the FOI Act should not be misleading. In that case, the court found that editing would be misleading and, therefore, it was impracticable to edit the relevant documents. However, in this case, the complainant is seeking documents relating to a tender process. That is not “police work” of the type referred to in *Re Winterton* and the issue of edited documents being misleading - and therefore unfair to a citizen or citizens - does not arise.
- The agency’s interpretation of the decision in *Re Winterton* leads to an unfair result and defeats the purpose of the legislation by unnecessarily denying access to documents, even in an edited form.
- Since the complainant has been given access to an edited version of the Evaluation Report, further editing should be viewed in that context.

- The documents are likely to contain a considerable amount of information sourced from outside the SID. The tender process involved people outside the SID such as the Department of Treasury and Finance and those people are likely to have produced original work. In addition, it is anticipated that a substantial amount of the information contained in the disputed documents would relate only to the complainant.
19. In response to my preliminary view, the complainant made the following submissions:
- The agency should provide the complainant, through my office, with documentary evidence establishing that the SID is the former BCI.
 - It is: *“unfair and contrary to the intention of the FOI Act for an agency to be able to release documents at its discretion and on the basis of considerations that may not relate to law enforcement. This is all the more reason to examine closely the factual and legal basis of the agency’s claim under Schedule 1, clause 5(2)(a).”*
 - That additional documents exist which come within the scope of the complainant’s access application which have not been identified.
 - That the disputed documents were created by SID rather than the WA Police Service.
 - The agency’s notice of decision records that panel members on the evaluation team were *“seconded as SID members”*, which implies that those panel members became officers or functionaries of the SID on a temporary basis. The complainant wishes to be satisfied that the secondment *“was done in a formal way.”*

CONSIDERATION

20. Clause 5(2)(a) provides that matter created by certain named organisational units of the agency, including the BCI, is exempt.
21. Clause 2 of the Glossary to the FOI Act provides that the BCI is to be regarded as a separate agency for the purposes of the FOI Act and is not to be regarded as part of the agency.
22. Schedule 2 to the FOI Act lists the BCI as an exempt agency. However, although a person may not apply under the FOI Act for access to documents held by an exempt agency, applicants may apply to other agencies for documents held by them which were created by, originated with, or received from, exempt agencies.

23. Section 10(1) of the FOI Act provides that 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, the FOI Act. Documents of exempt agencies are not accessible under the FOI Act.
24. In its notice of decision of 28 December 2006, the agency submits that the disputed documents were created by the SID as the successor to the BCI, which no longer exists.
25. Clause 5(2)(a) still refers to the BCI rather than to the SID.
26. In that regard, I note that, on 7 March 2003, the agency advised the former Information Commissioner that, following a review of the Crime Investigation Support Portfolio, a decision was made to change the name of the BCI to “State Intelligence Services” (‘SIS’) and that the new SIS would mirror the role previously performed by the BCI. I understand that, since then, the name of that unit has changed again, to the SID, but that its role has not changed. I accept that the roles of the BCI and the SID are substantially the same.
27. Section 8 of the *Interpretation Act 1984* provides as follows:
- “A written law shall be considered as always speaking and whenever a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to every part of the law according to its true spirit, intent and meaning.”*
28. Section 18 of the *Interpretation Act 1984* provides:
- “In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.”*
29. I understand s.18 of the *Interpretation Act 1984* to mean, among other things, that a purposive approach should be taken when interpreting legislation. Applying this approach to the interpretation of clause 5(2)(a), a unit named in this clause should be construed to mean and include the equivalent unit with the same functions and roles operating under a new administrative title.
30. The reference to the BCI in the FOI Act is to the administrative name of a functional unit of the agency that deals with sensitive criminal intelligence work. This has a functional meaning, in that the name of the administrative unit is inextricably linked to its functions. It is also clear that there is no longer a BCI operating under that name. To take a literal interpretation of the reference to the BCI in clause 5(2)(a) would mean that the clause would have no operation or effect insofar as the reference to the BCI as an exempt agency is concerned. A change of administrative name is an eventuality that clause 5(2)(a) in its literal form fails to give effect to. The clear purpose of the clause, which is to exempt matter created by the administrative unit with the

function of the BCI, is best achieved by an interpretation that accommodates the change of name of the BCI to the SID.

31. In light of that, and the information provided to this office concerning the name change of the BCI by the agency, I accept that the reference to the BCI in clause 5(2)(a) should be construed as a reference to the SID. In the former A/Commissioner's reasons for decision in *Re Barndon*, cited by the complainant, the former A/Commissioner adverted to the fact that some of the disputed documents in that case were created "*by the State Intelligence Services ('the SIS'), formerly known as the Bureau of Criminal Intelligence....*" While the claim for exemption under clause 5(2)(a) was withdrawn in that case, the question of whether or not the SID could be substituted for the BCI was by inference, accepted by the former A/Commissioner.
32. The complainant claims that it is "*...unfair and contrary to the intention of the FOI Act for an agency to be able to release documents at its discretion...*" Section 3(3) of the FOI Act provides agencies with discretion to disclose a document even though it is an exempt document. I do not have such discretion. The issue raised by the complainant was considered by the Parliament and it is clear from the intention of s.3(3) that it was the intention of Parliament for agencies to have discretion to release exempt documents.
33. The complainant says that if the members of the evaluation panel were seconded to the SID, then there must have been a formal secondment process. Based on my inquiries, I understand that none of the members of the evaluation panel was 'seconded' to the SID in the sense of having their employment transferred from outside the SID but rather those members of the evaluation panel who are officers of the agency are currently serving officers of the SID. They were 'seconded' in the sense of being temporarily reassigned from their ongoing work at the SID to participate as members on the evaluation panel.
34. Therefore, the status of the members of the evaluation panel does not detract from the conclusion that the documents are exempt documents because they were created by an exempt agency.
35. All of the members of the evaluation panel were officers of the SID engaged in work for the SID, except for some members who are officers of the Department of Treasury and Finance ('the DTF'). The documents created by the members of the evaluation panel, who are officers of the DTF have been released to the complainant. Only those documents created by the officers of the agency who are officers of the SID, in their capacity as members of the evaluation panel, are claimed to be exempt documents under clause 5(2)(a) of Schedule 1 to the FOI Act. It is only those documents, or parts of documents which remain in dispute in this matter.
36. The complainant's submissions as to where information may have originated from, and whether or not it relates solely to the complainant, is not relevant to a consideration of whether clause 5(2)(a) applies in this case. The only

relevant issue with regard to clause 5(2)(a) is whether or not matter was created by an exempt agency.

37. The complainant submits that the agency cannot rely on the decision of Scott J in *Police Force of Western Australia v Winterton* (1997) WASC 504 because that case dealt with documents relating to “police work” and this case relates to tender documents concerning the complainant.

38. I do not agree with the complainant’s submission. Section 24 of the FOI Act provides, among other things, that access should be given to edited copies of documents if it is “*practicable*” to do so. In *Winterton*’s case, Scott J considered the application of s.24 of the FOI Act and said, at p.16:

“It seems to me that the reference in s.24(b) to the word “practicable” is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context. In that respect, where documents only require editing to the extent that the deletions are of a minor and inconsequential nature and the substance of the documents still makes sense and can be read and comprehended in context, the documents should be disclosed. Where that is not possible, however, in my view, s24 should not be used to provide access to documents which have been so substantially edited as to make them either misleading or unintelligible.”

39. I agree with that view. Scott J did not distinguish, what type of documents to which a decision under s.24 can be made. In my view, having examined the disputed documents, the agency has edited the documents and provided the complainant with the information about it contained in those documents, other than the disputed documents.

40. The complainant claims that the agency has misinterpreted the decision of the former Information Commissioner in *Re Winterton*. In the circumstances of this case, the agency decided that the disputed documents are exempt under clause 5(2)(a) because those documents are created by the SID. I do not accept the complainant’s submission in this regard.

41. The complainant also submits that a substantial amount of information in the disputed documents will relate to it. I do not consider this submission to be relevant to my determination of whether the disputed documents are exempt under clause 5(2)(a) of Schedule 1 to the FOI Act.

42. Having examined the disputed documents, and having considered the information provided to me by the agency, I am satisfied that the disputed matter was created by the SID. I also find that the SID is the successor unit to the BCI and should be read in place of the BCI in clause 5(2)(a), so that effect may be given to that provision according to its true spirit, intent and meaning.

43. Further, based on my examination of the disputed matter, I am satisfied that none of the limitations in clause 5(4) applies in this case.

CONCLUSION

44. For the reasons given above, I find that Documents 1, 2, 5, 6 and 7 and the information deleted from Documents 8, 9 and 10 are exempt under clause 5(2)(a) of Schedule 1 to the FOI Act. As I have found the agency's claim for exemption under clause 5(2)(a) to be justified, it is not necessary for me to consider the agency's claim for exemption under clause 5(1)(a) of Schedule 1 to the FOI Act.
