

WIMBRIDGE AND JUSTICE

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

**File Ref: F0171998
Decision Ref: D0081998**

Participants:

Ronald Patrick Wimbridge
Complainant

- and -

Ministry of Justice
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – letter allegedly sent to the Parole Board – section 31 – refusal by agency to give information as to the existence or non-existence of the requested document – clause 5 – whether disclosure of a document of the type requested could enable the existence, or non-existence, or identity of a confidential source of information, in relation to the administration of the law, to be discovered.

Freedom of Information Act 1992 (WA) ss.31, 74(1)(b)Schedule 1 clauses 1, 2, 5.
The Sentence Administration Act 1995

DECISION

The decision of the agency is confirmed. If the requested document were to exist, it would be exempt under clause 5 of Schedule 1 to the *Freedom of Information Act 1992*, and its existence, or non-existence, is neither confirmed nor denied.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

10th March 1998

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 access to a document requested by Mr Wimbridge ('the complainant') under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant is a sentenced prisoner in custody in Canning Vale Prison. By letter dated 6 December 1997, he lodged an application with the agency seeking access under the FOI Act to a document identified by him as being a letter he alleges was sent to the Parole Board by a third party which resulted in him being denied work release in October 1997.
3. The Parole Board is an exempt agency under the FOI Act. However, the agency provides some administrative support to the Parole Board in the performance of its statutory functions. After receiving the access application, an officer of the agency informed the complainant that his right of access to documents under the FOI Act did not extend to documents of an exempt agency such as the Parole Board. Consequently, the agency could only deal with his access application as an application for any such document held by the agency.
4. Without confirming or denying the existence of the requested document, the agency refused access pursuant to s.31 of the FOI Act. The agency informed the complainant that, if such a document existed in the agency, it would be exempt under clause 5 of Schedule 1 to the FOI Act. The complainant sought internal review of the agency's decision, but the initial decision was confirmed following internal review. Thereafter, on 27 January 1998, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. An agency's reliance upon s.31 is not without difficulties for both the external review authority, in this case, the Information Commissioner, and for complainants. Section 74(1)(b) of the FOI Act requires that, when I am dealing with a complaint that involves the use of s.31, I must do such things as I think necessary to avoid the disclosure of information as to the existence or non-existence of a document of the kind requested. This means that my procedures must be tailored for the particular circumstances of the complaint and I am limited to giving my reasons for my decision in general terms only.
6. By letter dated 23 February 1998, I provided the parties with my preliminary view of this complaint, including my reasons. It was my preliminary view that the decision of the agency to refuse access to the requested document pursuant

to s.31 of the FOI Act may be justified. The complainant was given an opportunity to withdraw his complaint, in light of my preliminary view. However, he did not withdraw but provided a further submission.

Refusal of access pursuant to s.31

7. Section 31 of the FOI Act provides:

"Information as to existence of certain documents

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. The terms of s.31 contain the condition precedent to its use. That is, the facts must be such that the requested document, if it were to exist, would contain matter that would be exempt under clause 1, 2 or 5 of Schedule 1 to the FOI Act. In this instance, the agency claims that, if a document of the type described by the complainant were to exist in the agency, the document would be exempt under clause 5 of Schedule 1 to the FOI Act. Clause 5, 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;

- (b) *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;*
 - (c) *enable the existence, or non-existence, or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be discovered;*
 - (d) *prejudice the fair trial of any person or the impartial adjudication of any case or hearing of disciplinary proceedings;*
 - (e) *endanger the life or physical safety of any person;*
 - (f) *endanger the security of any property;*
 - (g) *prejudice the maintenance or enforcement of a lawful measure for protecting public safety;*
 - (h) *facilitate the escape of any person from lawful custody or endanger the security of any prison."*
9. It is clear from the terms of clause 5 that the term "the law" is used in a broad sense and is not limited in its application to the criminal law only. Clause 5(5) of Schedule 1 to the FOI Act defines "the law" to include the law of this State. The *Sentence Administration Act 1995* is clearly a written law of this State and a relevant written law for the purposes of the exemptions in clause 5. That Act establishes the Parole Board and, among other things, describes the functions of the Parole Board.
10. One of the main functions of the Parole Board is to determine the eligibility and suitability of prisoners for parole. That is, it administers the law in respect of parole. It is my understanding that the Parole Board actively encourages input from interested parties on prisoners eligible for release on parole and receives written correspondence on such matters on a confidential basis. The Parole Board is not bound by the rules of natural justice or procedural fairness and is not required to inform a prisoner of the existence of material, nor of the nature of any material, that it may use in its deliberations.
11. Having considered the nature of the requested document, as described in the complainant's access application, I am satisfied that any document of that nature would contain matter that could enable the existence, or non-existence, or identity of a confidential source of information, in relation to the administration of the law, to be discovered. That is, I am satisfied that, if a document of the particular kind described by the complainant in his access application were to exist, it would be an exempt document under clause 5(1)(c). Further, although the exemption in clause 5(1)(c) is limited by the operation of clause 5(4), I do not consider that any of those limits would be likely to apply to a document of the kind described by the complainant, if it were to exist.

Freedom of Information

12. Therefore, without giving any information as to whether such a document exists or does not exist in the agency, I find that such a document would be exempt under clause 5 of Schedule 1 to the FOI Act. Accordingly, I confirm the decision of the agency to refuse access to a document of that kind pursuant to s.31 of the FOI Act.
