

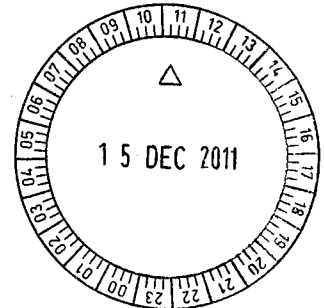


Office of the Information Commissioner

Our Ref: 07/054/00

15 December 2011

Hon. Adele Farina MLC
Chair of the Uniform Legislation
and Statutes Review Committee
Legislative Council
GPO Box A11
PERTH WA 6837



Dear Ms Farina

INQUIRY INTO CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011

I refer to your letters dated 11 November 2011 and 6 December 2011 inviting my written submissions for the purposes of the above-mentioned inquiry generally and, specifically, seeking my views as to the proposed exclusion of the *Freedom of Information Act 1992* ('the FOI Act') under the above Bill or alternatively the exclusion of the FOI Act under the Bill for a specified period.

Please find enclosed my submission to the Committee.

I have no objection to my submission being made public.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Sven Bluemmel'.

Sven Bluemmel
INFORMATION COMMISSIONER

SUBMISSION OF THE INFORMATION COMMISSIONER TO THE INQUIRY INTO THE CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011

Context

1. The Standing Committee on Uniform Legislation and Statutes Review ('the Committee') is conducting an Inquiry into the *Criminal Investigation (Covert Powers Bill 2011* ('the Bill'). This submission is made by the Information Commissioner in response to an invitation by Hon Adele Farina MLC, the Chair of the Committee to make submissions on matters relating to the scope, purpose and structure of the Bill generally and, specifically, to provide the Information Commissioner's views as to the proposed exclusion of the *Freedom of Information Act 1992* ('the FOI Act') or, alternatively, whether the exclusion of the FOI Act should be for a specified period, as is the case with the exemptions in clause 1 of Schedule 1 to the FOI Act in relation to Cabinet and Executive Council documents.

Submission

2. The Information Commissioner does not propose to make submissions on the general scope, purpose and structure of the Bill, as these are considered matters for government and the Parliament.
3. Clause 9 of the Bill provides that neither the *State Records Act 2000* ('the SR Act') nor the FOI Act apply to investigations, operations, activities or records under Part 2 of the Bill. Clause 45 provides that neither the SR Act nor the FOI Act apply to activities or records under Part 3 of the Bill.
4. While ultimately a matter for government and the Parliament, the Information Commissioner **does not support** clauses 9 and 45 of the Bill.
5. The submissions are explained in detail below. Although the Information Commissioner is also a State Records Commissioner, the Information Commissioner understands that the State Records Office is providing a separate submission to the Committee. Accordingly, this submission only relates to the proposed exclusion of the FOI Act.

The Bill

6. In the Second Reading of the Bill in the Legislative Assembly, Hon Rob Johnson MLA, Minister for Police, said that the Bill is part of a national project to develop model laws that aid criminal investigation across state and territory borders. The model law on which the Bill is based was published in November 2003 in the *Cross-Border Investigative Powers for Law Enforcement Report* by the Joint Working Group of the Standing Committee of Attorney's-General and the Australasian Police Ministers Council ('the Model Law').

7. The Model Law does not contain a provision which excludes the operation of freedom of information (FOI) legislation - or its equivalent in other jurisdictions - and does not otherwise refer to the exclusion of FOI legislation. Some but not all of the participating jurisdictions which have enacted laws based on the Model Law have excluded the operation of the FOI Act along the lines proposed by clauses 9 and 45. For example, the Australian Capital Territory's *Crimes (Controlled Operations) Act 2008* and Tasmania's *Police Powers (Controlled Operations) Act 2006* both contain provisions which exclude the operation of those jurisdictions' FOI legislation to investigations, operations, activities and records under each Act¹, whereas Victoria's *Crimes (Controlled Operations) Act 2004* does not exclude the operation of that State's FOI legislation.²
8. The three areas of law enforcement contained in the Bill are controlled operations, assumed identities and witness identity protection and all relate to covert methods of investigation. In his Second Reading speech, the Minister for Police provided the following explanation of these three areas:

"A 'controlled operation' is an undercover operation that authorises an undercover law enforcement officer to engage in unlawful conduct under controlled conditions to investigate serious offences. An 'assumed identity' is a false identity that protects an undercover operative engaged in investigating crimes and infiltrating organised crime groups. 'Witness identity protection' provides for the protection of the true identity of a covert operative and of other protected witnesses who give evidence in court".
9. The Minister noted that Western Australia Police (WA Police) will be the main users of the legislation but that the Bill is drafted so that the Department of Fisheries and the Australian Crime Commission can utilise its provisions.
10. The Bill creates an oversight role for the Western Australian Ombudsman, who will inspect the records of the law enforcement agencies – WA Police, Department of Fisheries and the Australian Crime Commission – at least once every 12 months and report to the Parliament on the work and activities of each agency and the extent to which controlled operations conducted in the previous 12 months complied with the legislation.

The Freedom of Information Act 1992

11. The objects of the FOI Act are to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and local government more accountable to the public.

¹ Section 7(5) and 7(8) respectively

² See in particular section 4

12. The FOI Act gives every person a general right of access to the documents of State and local government agencies (other than an exempt agency) subject to and in accordance with the FOI Act. That right of access is subject to a range of exemptions - set out in clauses 1 to 15 of Schedule 1 to the FOI Act - which are designed to protect significant public interests that compete with the public interest in the openness and accountability of government and its agencies.
13. The Information Commissioner's main function under the FOI Act is to deal with complaints about decisions made by State and local government agencies under the FOI Act in respect of access applications and applications for amendment of personal information. In dealing with a complaint, the Information Commissioner has the power to review decisions made by agencies and make a decision which confirms, varies or sets aside an agency's decision. Most commonly the Information Commissioner deals with complaints involving an agency's decision to refuse access to documents on the basis that the documents are exempt (or contain information that is exempt) from disclosure under one or more of the 15 exemption clauses set out in Schedule 1 to the FOI Act. This requires the Information Commissioner to interpret and apply the exemption clauses.

Proposed exclusion of the FOI Act

14. Clause 9 of the Bill provides that neither the SR Act nor the FOI Act apply to investigations, operations, activities or records under Part 2 of the Bill, which relates to controlled operations. In relation to this clause, the Explanatory Memorandum to the Bill states *"The nature of controlled operations makes it imperative that specific information relating to individuals not become public knowledge. To provide the necessary protection the [SR Act] and the [FOI Act] do not apply to investigations, operations, activities or records under this Part"*.
15. Clause 45 of the Bill provides that neither the SR Act nor the FOI Act apply to activities or records under Part 3 of the Bill, which relates to assumed identities. In relation to this clause, the Explanatory Memorandum states *"This clause specifies that the [SR Act] and the [FOI Act] do not apply to activities and records of Part 3 of the Bill. The Government is of the view that the public interest in protecting the identity of police, operatives, the assumed identities and agencies authorised by this Part outweighs the public interest in disclosing information under the Acts listed"*.
16. The need to keep the exclusion of the operation of the FOI Act to a minimum is reflected in the Second Reading debates on the FOI Bill in Hansard (10 November 1992) where Dr Elizabeth Constable MLA said: *"To be effective, freedom of information legislation must be based on the premise of openness. There should be very few exceptions to freedom of information"*.
17. In general, and in keeping with the objects and intent of the legislation, the Information Commissioner does not support additional exemptions from access to

information under the FOI Act, or the exclusion of the operation of the FOI Act, except in very limited circumstances. First, it must be demonstrated that the particular documents for which exemption or exclusion from the operation of the FOI Act is sought are of a kind that require protection from disclosure. Second, the Information Commissioner must be satisfied that the current provisions in the FOI Act including the existing range of exemptions are not adequate to protect such documents from disclosure.

18. The Information Commissioner accepts that the kind of information sought to be protected by clauses 9 and 45 of the Bill is of a highly sensitive nature and should be protected from disclosure. However, for the reasons set out below, the Information Commissioner considers that the existing provisions in the FOI Act are adequate to protect from disclosure the information sought to be protected by clauses 9 and 45 of the Bill.

Existing provisions of the FOI Act

19. As noted at paragraph 12 of this submission, the right of access under the FOI Act does not apply to documents of an exempt agency. Various discrete sections of the WA Police are exempt agencies under Schedule 2 to the FOI Act. Those sections are the Bureau of Criminal Intelligence, now known as the State Intelligence Division; the Protective Services Unit, now known as the Tactical Protection Division; the Witness Security Unit, which I understand is now known as the Witness Protection Unit, and the Internal Affairs Unit. Those agencies are collectively referred to in this submission as 'the Exempt Agencies'.

20. In *Re MacKenzie and Police Force of Western Australia* [1999] WAICmr 27 the former Information Commissioner noted as follows at [7]:

"The effect of being listed as an exempt agency in Schedule 2 is to quarantine documents of that body, and hence the activities of that body, from the provisions of the FOI Act. Generally speaking, the sections of the [WA Police] which are exempt agencies under the FOI Act are those concerned with, inter alia, the gathering of information on, and the investigation of, corrupt and illegal activities, and those concerned with the safety and protection of certain public figures. The Parliament of Western Australia has decided that the public interest is served by those bodies being exempt agencies and, therefore, not subject to the provisions of the FOI Act".

21. Clause 2(2) of the Glossary to the FOI Act provides that the Exempt Agencies are to be regarded as separate agencies and are not to be regarded as part of the WA Police. Clause 6(1) of the Glossary provides that a document of one of the Exempt Agencies is not to be regarded as a document of the WA Police.
22. In addition, clause 5(2) of Schedule 1 to the FOI Act provides that documents created by the Exempt Agencies are exempt from disclosure under clause 5(2).

Therefore, documents which are created by one of the Exempt Agencies but which come to be in the possession or under the control of another agency – for example, a ‘non-exempt’ part of the WA Police – are exempt from disclosure under clause 5(2).

23. Accordingly, to the extent that documents in relation to investigations, operations, activities or records under the Bill are held, or are created by, one of the Exempt Agencies, those documents will not be accessible under the existing provisions in the FOI Act. The Information Commissioner notes that the State Intelligence Division, which is one of the Exempt Agencies, is the division of WA Police responsible for controlled operations under the Bill.³
24. The Information Commissioner considers that, in addition to the above provisions, the range of exemptions contained in clause 5(1) of Schedule 1 to the FOI Act - which relate to law enforcement, public safety and property security - provides adequate protection from disclosure of information of the kind sought to be protected by clauses 9 and 45 of the Bill. For example, clause 5(1)(a) provides that information is exempt if its disclosure could reasonably be expected to impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law; clause 5(1)(b) provides that information is exempt if its disclosure could reasonably be expected to prejudice an investigation of any contravention or possible contravention of the law; clause 5(1)(c) provides that information is exempt if its disclosure could reasonably be expected to 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; clause 5(1)(e) provides that information is exempt if its disclosure could reasonably be expected to endanger the life or physical safety of any person; clause 5(1)(f) provides that information is exempt if its disclosure could reasonably be expected to endanger the security of any property; and clause 5(1)(g) provides that information is exempt if its disclosure could reasonably be expected to prejudice the maintenance or enforcement of a lawful measure for protecting public safety.
25. The Information Commissioner is also of the view that clause 3(6) of Schedule 1 to the FOI Act - which provides in effect that personal information will not be exempt under clause 3(1) if its disclosure would, on balance, be in the public interest - would operate to prevent disclosure of the identities of individuals that are sought to be protected in clauses 9 and 45. The Information Commissioner considers it is highly unlikely that public interests favouring disclosure would be found to justify the disclosure of the identities of those individuals.
26. Further, there are a number of other exemptions in Schedule 1 to the FOI Act that may also apply, for example, clause 6(1), clause 8(2) and, possibly, clause 2.

³ Page 17 Explanatory Memorandum

Other matters

27. In its letter 6 December 2011 inviting the Information Commissioner's submissions, the Committee noted that "*the exclusion of normal accountability provisions under the Bill, which would otherwise require the limited release of certain information, are not excluded under the Corruption and Crime Commission Act 2003 and their exclusion is not part of a Model Law on which the Bill is based*".
28. Although the *Corruption and Crime Commission Act 2003* does not exclude the operation of the FOI Act, the Corruption and Crime Commission ('the CCC') is an exempt agency under Schedule 2 of the FOI Act. Accordingly, the right of access under the FOI Act does not apply to documents in the possession or under the control of the CCC.
29. The Committee also noted in its letter to the Information Commissioner of 6 December 2011 "*the dubious security of using means such as telephone, videophone, Skype or Yahoo Messenger for an urgent application for a controlled operation when considering the proposed exclusion of the [SR Act] and the [FOI Act]*".
30. The right of access under the FOI Act applies to documents, as that term is defined in the Glossary to the FOI Act. 'Document' is defined to include 'record' and 'record' means, among other things, "any record of information however recorded". In the event the Bill does not exclude the operation of the FOI Act, the right of access under the FOI Act would only apply to documents, subject to and in accordance with the FOI Act. Consequently, the FOI Act would apply to urgent applications for a controlled operation by the means described only to the extent that a document in that regard is created or exists. The Information Commissioner notes that in the case of an urgent application for an authority to conduct controlled operations, the applicant must as soon as practicable, make a written record of the oral application and give a copy of it to the chief officer of the relevant law enforcement agency.⁴ In the case of an urgent application for an authority to acquire or use assumed identity, the applicant must make a record in writing of the application and give a copy to the chief officer who grants the authority.⁵
31. In conclusion, the Information Commissioner accepts that the kind of information sought to be protected by clauses 9 and 45 of the Bill is of a highly sensitive nature and should be protected from disclosure. However, the Information Commissioner considers that the existing provisions in the FOI Act are adequate to protect this information from disclosure and that the proposed exclusion of the FOI Act from the Bill is neither necessary nor desirable. In particular, the Information Commissioner considers that the strong public interest in protecting the identity of individuals involved in controlled operations under Part 2 of the Bill and the

⁴ Clause 10 of the Bill

⁵ Clause 47 of the Bill

identity of police, operatives, assumed identities and agencies authorised by Part 3 of the Bill is satisfied by the current provisions in the FOI Act. The Information Commissioner considers that there is no valid reason for further increasing the means by which documents can be withheld from the public.

32. The Information Commissioner does not support the exclusion of the FOI Act for a specified period of time. The Information Commissioner considers that the information sought to be protected by clauses 9 and 45 of the Bill is of such a sensitive nature that the inclusion of a provision in the Bill permitting its potential disclosure after a specified period of time would be problematic.

Summary

33. While ultimately a matter for government and the Parliament, the Information Commissioner **does not support** clauses 9 and 45 of the Bill.

