

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

**File Ref: F2015162  
Decision Ref: D0012017**

Participants:

**Bill Johnston MLA**  
Complainant  
  
- and -  
  
**Department of State Development**  
Agency

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – documents relating to a proposed Bunbury to Albany gas pipeline – section 30(f) – the requirements of a notice of decision – clause 1(1)(b) – whether documents contain policy options or recommendations for possible submission to an Executive body – clause 1(1)(d) – whether documents prepared to brief Minister – clause 6(1) – deliberative processes – whether information of a kind described in clause 6(1)(a) – clause 6(1)(b) – whether disclosure would, on balance, be contrary to the public interest – clause 10(1) – whether disclosure could reasonably be expected to have substantial adverse effect on the financial affairs of the State or agency – clause 10(5) – whether disclosure would reveal matters relating to research that is being, or is to be, undertaken and whether premature disclosure would be likely to expose person or agency to disadvantage – clause 10(6) – whether disclosure would, on balance, be in the public interest.

*Freedom of Information Act 1992 (WA)*: sections 30, 74, 76 and 102; Schedule 1, clauses 1, 6 and 10

*Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167

*Attorney-General's Department v Cockcroft* (1986) 10 FCR 180

*Department of State Development v Latro Lawyers* [2016] WASC 108

*Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551

*Health Department of Western Australia v Australian Medical Association Ltd* [1999] WASCA 269

*Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550

*Re Edwards and Minister for Transport* [2000] WAICmr 39

*Re Environmental Defender's Office (Inc) and Ministry for Planning* [1999] WAICmr 35

*Re Hemsley and City of Subiaco* [2008] WAICmr 46

*Re Ravlich and Building and Construction Industry Training Fund Board* [1999] WAICmr 45

*Re Ravlich and Minister for Regional Development* [2009] WAICmr 9

*Re Post Newspapers Pty Ltd and Town of Cottesloe* [2013] WAICmr 27

*Re Travers and Public Transport Authority* [2015] WAIC 20

*Re Waterford and Department of the Treasury (No. 2)* (1984) AATA 67

*Re Western Australian Newspapers Pty Ltd and Western Power Corporation* [2005]  
WAICmr 10

Productivity Commission Inquiry Report on public infrastructure, No 71, 27 May 2014

## DECISION

The agency's decision is set aside. In substitution, I find that the disputed documents are not exempt under clauses 1(1)(b), 1(1)(d), 6(1), 10(1) or 10(5) of Schedule 1 to the *Freedom of Information Act 1992* (WA) as claimed by the agency.

Sven Bluemmel  
INFORMATION COMMISSIONER

24 January 2017

## REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of State Development (**the agency**) to refuse Bill Johnston MLA (**the complainant**) access to documents under the *Freedom of Information Act 1992* (WA) (**the FOI Act**).

### BACKGROUND

2. In a media statement dated 29 November 2000, Hon Colin Barnett, the then Resources Development Minister, announced that the ‘State Government will begin the preliminary work required for developing a gas pipeline between Bunbury and Albany.’
3. In a media statement dated 29 October 2012, Hon Colin Barnett, Premier and Hon Brendon Grylls, the then Minister for Regional Development, announced that:

*The pipeline would be designed, built and operated by a private sector proponent. The State Government, through Verve Energy, would retain an interest in the project in conjunction with the successful proponent ...*

*The Premier said the Government would co-fund the project through a mix of upfront capital and an ongoing subsidy. The cost of the project and the extent of the Government’s financial contribution would be determined as parts of the tender process but early estimates were for a capital cost of \$135 million ...*

4. An amount of \$3.5 million is profiled to be drawn down from the Royalties for Regions fund in 2016-17 in respect to the Bunbury to Albany Gas Pipeline (\$3 million) and the Brand WA project (\$0.5 million) (see: Budget Paper No. 2 Budget Statements No. 1 2016-2017 Page 417).
5. On 20 February 2015, the complainant applied to the agency for access to documents relating to the construction of the Bunbury to Albany Gas Pipeline project. Specifically, the complainant sought access to:

*[a]ny document arising from the consultancy by GHD Pty Ltd pertaining to detailed capital and operating cost estimates for the town based gas distribution and customer connection for the Bunbury to Albany gas pipeline project.*

*My application concerns documents generated for the six month period 30 June 2013 – 31 December 2013.*

6. The application included payment of the \$30 fee for non-personal information under the FOI Act.
7. By letter dated 7 April 2015, the agency sent the complainant a notice of decision dated only March 2015. The agency decided to refuse the complainant access to the requested documents ‘under section 24(2) of the [FOI] Act.’ In its notice of decision, the agency also referred to section 23 of the FOI Act and clauses 6(1) and 12 of Schedule 1 to the FOI Act. The agency only provided a very general description of the documents it had identified as coming within the scope of the access application.

8. On 14 April 2015, the complainant applied for internal review of the agency's decision on the basis that it did not meet the agency's obligations under the provisions of the FOI Act. The complainant also disputed the agency's claims for exemption under clause 6(1) of Schedule 1 to the FOI Act, but did not refer to the agency's claim for exemption under clause 12 of Schedule 1 to the FOI Act.
9. On 6 May 2015, the agency 'decided to confirm the original decision.' However, it appears to me that the agency varied the initial decision because it decided the requested documents were exempt under clauses 1, 6(1) and 10 of Schedule 1 to the FOI Act.
10. By letter dated 8 May 2015, the complainant applied to me for external review of the agency's decision.

## **REVIEW BY THE INFORMATION COMMISSIONER**

11. Following my receipt of the complaint, the agency produced to me the disputed documents together with its FOI file maintained in respect of the complainant's access application.
12. My office attempted to arrange a mutually convenient time to hold a conciliation conference conducted by this office. However, the parties' availability meant that those attempts did not succeed.
13. Having examined all of those documents, including the agency's notices of decision, there are a number of procedural matters on which I comment below concerning the manner in which the agency dealt with the complainant's application.

### ***The agency's notice of decision***

14. Under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision to refuse access to the requested documents is justified. Applicants are not required to establish that they are entitled to access the requested documents – it is up to the agency to establish a case for exempting a document from disclosure and to demonstrate that it has established the requirements of any exemption in its notice of decision.
15. Section 30 of the FOI Act sets out the details that must be included in an agency's notice of decision to an access applicant. In cases where an agency decides to refuse access to a document, section 30(f) provides that the agency must include the following details in its notice of decision:
  - the reasons for the refusal;
  - the findings on any material questions of fact underlying those reasons; and
  - reference or references to the material on which those findings were based.
16. In this case, the agency's initial decision does not comply with the requirements of sections 30(a) or 30(f). Section 30(a) requires the agency to give details as to the day on which the decision was made. In relation to the agency's obligations under section 30(f), no attempt was made to explain the factual basis underlying the decision to refuse the complainant access to the requested documents. The decision merely said that the

agency had decided to ‘[d]eny access to Documents under section 24(2) of the Act’ and then quoted section 23 of the FOI Act.

17. In addition, the agency’s initial decision stated:

*There are two types of documents arising from the GHD Consultancy report. The deliberative discussions between staff on matters pertaining to the report and agency business which are exempt. Second are written briefings provided for Cabinet Ministers.*

*The Department is not able to provide edited access to either the report or the documented exchanges as the documents contain information that could affect the outcomes of the procurement process for the project. The report directly informs the contents of the State’s procurement documentation, including evaluation strategy with details of estimated project costs, design and other matters that will be used by Government to develop the tender process and input into the tender bid evaluation.*

18. To support its decision to apparently refuse access to the requested documents under clause 6(1) of Schedule 1 to the FOI Act, the agency stated:

*The documents arising from the report will inform advice to Cabinet on the cost of the pipeline and preferred commercial model as well as the final tender process. It is expected all such matters will be determined by Cabinet prior to the project progressing. Documented discussions between staff of the agency and the consulting group examine detailed sections pertaining to the report. This internal consultative decision-making is exempt matter.*

19. The agency then quoted clause 12 of Schedule 1 to the FOI Act.

20. In this instance, the initial decision to refuse access appears to include a claim for exemption based on clauses 6 and 12. However, the notice of decision did not include any material findings of fact in relation to the exemptions claimed. If an agency seeks to invoke any of the exemptions in Schedule 1, it is incumbent on that agency to provide a full explanation to the applicant as to why the decision is justified. To discharge this onus, more is required than simply paraphrasing the wording of the exemption or merely quoting it in full. The decision on internal review dated 6 May 2015, being the decision under review for the purposes of external review, was similarly inadequate, although some additional information was provided to the complainant.

21. Given the inadequacy of the agency’s notices of decision, my Legal Officer required the agency to provide further information in respect of its exemption claims.

22. Following further communications between the parties and my Legal Officer, on 30 June 2015 the agency provided submissions in support of its exemption claims. However, the agency requested the submissions remain confidential and not be disclosed to the complainant. Ultimately, after further communications with my Legal Officer, the agency withdrew the claim to confidentiality for most of its submissions. Those submissions were disclosed to the complainant.

23. Subsequently, the agency also agreed to release edited copies of Documents 6 and 7 to the complainant and an additional document schedule that provided further information about the documents in dispute. The complainant agreed that the edited documents satisfied his request for access to Documents 6 and 7. Therefore, I am not required to consider Documents 6 and 7.
24. On 30 August 2016, I issued my preliminary view of this complaint to the parties. It was my preliminary view that Documents 1 and 2 are exempt under clause 1(1) of Schedule 1 to the FOI Act; and Documents 3, 4 and 5 are not exempt as claimed by the agency.
25. The complainant accepted my preliminary view that Documents 1 and 2 are exempt under clause 1(1). Therefore, those documents are not in dispute and it is not necessary for me to consider them.
26. The agency did not accept my preliminary view on Documents 3, 4 and 5 and provided further submissions on 14 September 2016, 20 October 2016 and 5 December 2016.
27. On 21 December 2016, the State Development Minister announced that, at that stage, he considered that the Bunbury to Albany pipeline was not currently viable. In particular, the Minister commented that:

*Although it's not my role to make election commitments, I'd be surprised if we made this election commitment this particular election. I haven't killed the project, but at the end of the day, it's not stacking up financially at the moment, and to get Cabinet endorsement I'd need to have a major gas user in Albany to make it viable. The demand for gas in Albany means it would still have to be heavily subsidised by the State Government.*

### ***Non-disclosure of exempt matter***

28. Section 74(1) of the FOI Act requires the Information Commissioner to ensure that exempt matter is not disclosed during the course of dealing with a complaint and section 74(2) places a further obligation on the Commissioner not to include exempt matter in a decision on a complaint or in reasons given for a decision.
29. I also consider that the obligation under section 74(2) extends to matter that is claimed to be exempt; *Re Post Newspapers Pty Ltd and Town of Cottesloe* [2013] WAICmr 27 at [42]. Therefore, I am constrained from describing the disputed documents in detail, because to do so may be a breach of my obligations under section 74 of the FOI Act.
30. The Supreme Court in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 556-557 recognised the difficulties faced by complainants and the constraints placed on the Commissioner by such provisions in the FOI Act but took the view that those provisions should be construed strictly according to their tenor.
31. As a result, I am confined to describing the disputed documents in general terms. However, the agency has provided a general description of the disputed documents in its schedule attached to its submissions dated 30 June 2015.

## THE DISPUTED DOCUMENTS

32. The disputed documents and the exemptions claimed are described by the agency as follows:
- Document 3 – Bunbury to Albany Gas Pipeline proposed commercial structure and financial implications on the State dated 26 July 2013. Exemption claimed under clause 6(1), 10(1) and 10(5).
  - Document 4 – Procurement comparison dated 19 August 2013. Exemption claimed under clause 6(1), 10(1) and 10(5).
  - Document 5 – Draft Invitation for expressions of interest dated 16 October 2013. Exemption claimed under clauses 1(1)(b), (1)(1)(d), 6(1), 10(1) and 10(5).

## POTENTIALLY MISLEADING ASSERTIONS BY THE AGENCY

33. Two significant and concerning matters arise from the agency's responses to my enquiries and enquiries by my officers.
34. First, the agency asserted in several communications to my office that Document 5 had been attached to a draft Cabinet submission or submissions. Further investigations by my office found this was untrue and had the potential to mislead.
35. Secondly, the agency asserted that there is a public information process for the Bunbury to Albany gas pipeline project providing regular updates on the project and expenditure. On further examination, the agency stated that, instead, there would be a public information process at some time in the future. Therefore, the agency's initial assertion was untrue and had the potential to mislead.
36. On 25 November 2016 I wrote to the agency's Deputy Director General advising that as a matter of procedural fairness I was providing the agency with the opportunity to respond to certain observations about its responses to enquiries, as those responses may be subject to adverse comment in my published decision.
37. My letter of 25 November 2016 also observed as follows:

*In summary, it appears that contrary to the claims made in your letters dated 14 September 2016 and 20 October 2016:*

- 1. a Cabinet Submission dated [...] was not submitted to Cabinet;*
- 2. Document 5 was not submitted to Cabinet with a Cabinet Submission dated [...] or any other Cabinet Submission; and*
- 3. there is no 'public information process providing regular updates' on the BAGP project.*

...

*By email of 7 October 2016 my Legal Officer requested further information from the agency, including a reply to Questions 2(i) and 2(iii). Your letter dated 20 October 2016 recites Questions 2(i) and 2(iii). Your reply appears immediately below those questions as follows:*



*Question 2*

- (i) *If the Cabinet Submission dated [...] was submitted to Cabinet and, if so, confirm the date that Cabinet considered that Cabinet Submission.*

The Department can confirm that the Cabinet submission was submitted to Cabinet. The submission was scheduled to be considered by Cabinet on [...]; however the final timing of any discussion is a matter for Cabinet.

- (iii) *What material the agency relies on to support the claim that Document 5 was 'prepared for consideration by Cabinet.'*

The Department of State Development must seek Cabinet approval to undertake an expression of interest process for a project of this scale of financial commitment and level of public interest. Given the project would require [*certain events to occur*]; Cabinet consideration of all documents forming part of the Expression of Interest process is required. **This claim is supported by the inclusion of Document 5 in [a] Cabinet submission [my emphasis].**"

38. In relation to the agency's submission that there is a public information process providing updates on the Bunbury to Albany pipeline project, my letter of 25 November 2016 also observed as follows:

*[The agency's] letter dated 14 September 2016 submitted that 'the Department reiterates that [Document 3] is exempt under clauses 6(1), 10(1) and 10(5) ... It is to be noted that the infrastructure project has a public information process providing regular updates on the project and expenditure'. By email dated 7 October 2016 my Legal Officer requested further information about the 'public information process' referred to in your letter of 14 September 2016. [The agency's] letter dated 20 October 2016 replied as follows:*

The public disclosure of relevant information will occur once Cabinet has made a decision to progress the procurement process (see below). Information relevant to the tendering process, including the parameters of the procurement and any agreed Government contribution, would be made generally available to any interested member of the public via the Government's tender board and the Department's website so that parties have every opportunity to submit their bids on equal terms. The precise nature and timing of that information will be informed by the outcome of the [...] Cabinet decision.

39. By letter dated 5 December 2016 the agency's Director General replied as follows:

*The [agency's] Principal Legal Counsel ... and the FOI Coordinator ... met with your Legal Officer ... on 17 November 2016 to discuss her email of 9 November 2016. That discussion was limited to the questions around Document 5. [The Principal Legal Counsel] indicated that the [...] Cabinet Submission referred to in [the agency's] letter of 20 October 2016 appeared to be the Cabinet Submission of [...]. Document 5 was referred to but was neither attached to that*

*Cabinet Submission nor to any other Cabinet Submission. It appears however that there was a clear intent and likelihood Document 5 would at some stage be forwarded to Cabinet. There was no discussion specifically about the Cabinet Submission of [...] at that meeting. As stated by [the Principal Legal Counsel], the choice of wording in [the agency's] letter of 20 October 2016 in relation to inclusion of Document 5 in a Cabinet Submission was unfortunate in that whilst it was not specifically attached to the Cabinet Submission of [...], the clear intent was always that it would be so submitted and was referred to extensively throughout that Cabinet Submission.*

*As to your second concern, the public information process referred to would be an outcome of the matter being tabled in Parliament by the Minister resulting in information for the public being posted on the Department's website.*

*In closing, the Department has attempted to address the matters raised by you and your Legal Officer in good faith, not only in the spirit of the Freedom of Information legislation but also to ensure that Cabinet processes and protocols are respected. Whether a Cabinet Submission drafted by the Department, and requested by the Minister, is actually signed by the Minister, presented to Cabinet and considered by Cabinet is a matter for the Minister and for Cabinet. What Cabinet actually discusses is a matter for Cabinet. In the case of the Bunbury to Albany Gas Pipeline project a number of Cabinet Submissions have been drafted, deferred, postponed and/or actually submitted to Cabinet.*

40. I accept the agency's submission that what Cabinet discusses is a matter for Cabinet. However, that does not detract from the agency's obligation to ensure that it accurately represents the facts it relies on to support a claim to an exemption under the FOI Act.
41. The agency contends that 'there was a clear intent and likelihood Document 5 would at some stage be forwarded to Cabinet'. However, that is materially different to the agency's earlier representation that Document 5 had been attached to a draft Cabinet submission.
42. It is now also clear that, contrary to the agency's earlier assertions, there is no 'public information process providing regular updates on the project and expenditure'. Rather, the agency expects that such a process would be put in place at some point in the future. Again, this is materially different.
43. I rely on the honesty and accuracy of representations made by officers of an agency in order to discharge my functions under the FOI Act, particularly in this case where the relevant representations were made by a very senior officer of an agency. I trust that the agency will take its obligation in this regard more seriously in the future.

#### **CLAUSE 6(1) – DELIBERATIVE PROCESSES**

44. The agency submits that Documents 3, 4 and 5 are exempt under clause 6.
45. Clause 6 provides as follows:

*(1) Matter is exempt matter if its disclosure –*

- (a) *would reveal –*
- (i) *any opinion, advice or recommendation that has been prepared or recorded; or*
- (ii) *any consultation or deliberation that has taken place,*
- in the course of, or for the purpose of, the deliberative processes of Government, a Minister or an agency; and*
- (b) *would, on balance, be contrary to the public interest.*

### **The agency's submissions – clause 6**

46. In summary, the agency claims that Documents 3, 4 and 5 are exempt under clause 6 because their disclosure:
- *would compromise negotiations for the State awarding contracts and tenders for the project by providing commercial advantage to private sector proponents bidding to supply infrastructure or services;*
  - *would prejudice the integrity of the decision-making processes of Government at senior levels; and*
  - *is likely to be against the public interest as it would mislead and encourage ill-informed speculation.*

### **Consideration – clause 6**

47. As previously observed, section 74(2) places an obligation on me not to include exempt matter in a decision on a complaint or in reasons given for a decision. Given the limitation on disclosing exempt matter, or matter claimed to be exempt, I am constrained in describing the agency submissions in respect of each exemption clause in very general terms.
48. The deliberative processes of the Government, a Minister or an agency are their 'thinking processes', the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action: see *Re Waterford and Department of the Treasury (No. 2)* [1984] AATA 67.
49. In order to establish a prima facie exemption under clause 6(1), the requirements of both paragraphs (a) and (b) of clause 6(1) must be satisfied. The public interest test in clause 6(1)(b) is not a limit on the exemption; it is an element of the exemption. In consequence, unless an agency claiming exemption under clause 6 can establish that disclosure would, on balance, be contrary to the public interest, the documents will not be exempt. If both paragraphs (a) and (b) are satisfied, the disputed information will be exempt, subject to the application of any relevant limit on exemption set out in clauses 6(2) to 6(4).

50. Document 3 is a communication between officers of the agency. Although it is not clearly explained by the agency, I understand that Document 4 is also a document created by the agency. Document 5 is a draft invitation for expressions of interest prepared by the agency.
51. I have examined Documents 3, 4 and 5. I am satisfied that disclosure of those documents would reveal an opinion or advice that has been obtained, prepared and recorded or a consultation and deliberation that has taken place in the course of, and for the purpose of, the deliberative processes of the agency.
52. Therefore, in my opinion, the agency has established the requirements of clause 6(1)(a) for Documents 3, 4 and 5.

### **Clause 6(1)(b)**

53. The second question for my consideration is whether disclosure of Documents 3, 4 and 5 would, on balance, be contrary to the public interest. The public interest test is intended to cover those cases, amongst others, where public disclosure would be prejudicial to the proper operation of government or the proper workings of one or more of its agencies. In *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551 at 561 (**Harris**), Beaumont J said, concerning the public interest:

*In evaluating where the public interest ultimately lies ... it is necessary to weigh the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper working of government and its agencies on the other ...*

54. Unlike the other exemption clauses set out in Schedule 1 to the FOI Act that are limited by a public interest test, in the case of a claim for exemption under clause 6(1), an access applicant is not required to demonstrate that disclosure of the requested matter would be in the public interest. Instead, the onus of establishing that its disclosure would, on balance, be contrary to the public interest rests with the agency: *Health Department of Western Australia v Australian Medical Association Ltd* [1999] WASCA 269 at [18] and [39].
55. Documents 3, 4 and 5 are over three years old. I also observe that Document 5 is a number of many draft proposals for an expression of interest for the pipeline.
56. It may be contrary to the public interest to disclose deliberative process documents prematurely while deliberations in an agency are continuing, if there is material which establishes that such disclosure would adversely affect the agency's decision-making process or that disclosure would, for some other reason, be demonstrably contrary to the public interest: see for example *Re West Australian Newspapers Pty Ltd and Western Power Corporation* [2005] WAICmr 10.
57. The question of whether the deliberations of the agency are continuing is one factor in considering whether disclosure is contrary to the public interest. However, that consideration alone is not a determinative factor. If I accept that the relevant considerations of the agency are continuing, I must still be satisfied that disclosure of Documents 3, 4 and 5 would, on balance, be contrary to the public interest as provided by clause 6(1)(b).

58. I recognise that in some circumstances, there is a public interest in agencies carrying out their deliberations on particular issues without those deliberations being undermined by the disclosure of relevant documents at a particular point in time. In this particular case, I recognise a public interest in the agency maintaining its ability to develop options for a major infrastructure project which will ultimately be considered by the Minister without the integrity of those deliberations being undermined. However, on the information before me, I am not persuaded that disclosure of Documents 3, 4 and 5 would undermine or adversely affect those deliberations, or prejudice the integrity of the decision-making processes of Government at senior levels as the agency claims.
59. The agency also contends that disclosure would compromise negotiations for the State awarding contracts and tenders for the project by providing commercial advantage to private sector proponents bidding to supply infrastructure or services.
60. In its report to Government titled ‘Public Infrastructure – Productivity Commission Inquiry Report’ dated 27 May 2014 (**the Report**), the Productivity Commission considered transparency and accountability and specifically discussed cost benefit analyses. At page 104 the Report concluded:

*[p]ublicly released analyses are available to private entities that bid for the delivery of projects. While such entities will inevitably need to do their own analysis, public disclosure of the government’s analysis can avoid the need to duplicate some aspects. Disclosure can also help bidders to develop more accurate estimates ...*

*It is sometimes argued that there are commercial-in-confidence reasons for not making cost-benefit analyses public ... [e]ven where data are provided by private participants, the normal presumption of transparency should prevail as a condition of involvement in government-backed projects.*

*The Victorian Government [in its submission to the Productivity Commission] argued that there were occasions where public disclosure of cost-benefit analyses could jeopardise a government’s ability to optimise value for money through competitive tender processes. The concern appears to be that disclosure might prompt firms to ‘bid-up’ to the cost estimates included in the analyses.*

*However, if the bidding process is truly competitive this is unlikely to occur because firms will have an incentive to bid based on their true willingness to enter into a contract. The benefits created through transparency are likely to be substantial and significant effects on bids are unlikely, provided there is effective competition in procurement.*

61. I find the analysis of the Productivity Commission persuasive and relevant. In the present case, I am not persuaded that disclosure of Documents 3, 4 and 5 would provide a commercial advantage to private sector proponents and therefore compromise negotiations for the State awarding contracts and tenders as the agency claims. In addition, I consider that a commercial advantage to particular private sector proponents could only arise as a consequence of disclosure if disclosure were limited to certain

proponents. This could easily be avoided by ensuring that all potential proponents are given access to the documents.

62. Following my preliminary view dated 30 August 2016, the agency submitted that current market conditions differed from the conditions prevailing at the time of its earlier submissions. As a result, the agency submitted that the findings of the Productivity Commission cited in my preliminary view were not persuasive.
63. I have also noted at paragraph 27 that on 21 December 2016 the Minister for State Development announced that he did not consider that the Bunbury to Albany gas pipeline was currently viable and to get Cabinet endorsement would require a major gas user in Albany. The demand for gas in Albany means that the pipeline would still have to be heavily subsidised by the State Government.
64. In any event, I do not accept the agency's claim that disclosure of Documents 3, 4 and 5 would be contrary to the public interest. The agency claims that disclosure would be contrary to the public interest because it would mislead the public. That argument has consistently been rejected by this office, see: *Re Ravlich and Building and Construction Industry Training Fund Board* [1999] WAICmr 45 (***Re Ravlich***) at [25] where the former Commissioner said:

*I reject the claim that disclosure of the disputed matter would be contrary to the public interest because it would serve to mislead, rather than inform, the public. It is always open to any agency to release additional information and to explain ... the agency's thinking processes behind such proposals in order to dispel and clarify any misconceptions that might arise.*

65. In *Re Ravlich* the disputed information related to the notional proposals and budget for the second half of the financial year. The Commissioner did not accept that the document in that case was exempt under clause 6 and noted at [27]-[28]:

*I recognise a public interest in the accountability of agencies and that public interest is enshrined in s.3(1) of the FOI Act. Access laws are generally designed to open the decision-making processes of government agencies to scrutiny by the public, and to allow the public to effectively participate in those processes and in government itself. In my view, effective public participation requires that the public has access to relevant and timely information. I consider that there is a public interest in the disclosure of information that would explain priorities, clarify resource allocations, and prompt debate and discussion about the operations of a government agency.*

*I do not consider that it is necessarily contrary to the public interest to disclose strategies and budgets formulated at an early stage in the planning process simply because those earlier strategies have been discarded or remodelled as part of a process following consultation and refinement. If anything, disclosure of that kind of information should assist the public and relevant stakeholders to understand how agencies function and how decisions are made. In my view, disclosure of information of that kind serves the public interest rather than detracts from it.*

I agree with those views.

66. It is public knowledge that it is contemplated that the proposed Bunbury to Albany gas pipeline will be a significant, substantial and expensive infrastructure project, proposed to be funded, at least in part, by the State government. There is a strong argument for the public, as a whole, to be informed about major public infrastructure projects.
67. In favour of disclosure, I consider that there is a strong public interest in the disclosure of a document that is fundamental to the agency's accountability for the performance of its functions and expenditure of public funds relating to the development of a major infrastructure project of this nature.
68. I consider that members of the public have an interest in evaluating the decisions of the agency and in assessing for themselves that decision-making process. This clearly accords with one of the objects of the FOI Act, which is to promote public participation in the processes of government. In my opinion, such information includes an understanding of how decisions are made and the matters taken into account.
69. I also recognise that there is a public interest in the accountability of agencies for the manner in which they discharge their obligations on behalf of the public in Western Australia. In my view, such accountability includes informing the public, wherever possible, of the basis for decision-making and of the material considered relevant to that process. I consider that informed debate and discussion about such matters can only occur if the public has access to relevant information.
70. Responsible government also requires an appropriate degree of transparency and capacity for public scrutiny of important projects and government decisions. This approach has been supported by the Productivity Commission in its Report.
71. While referring generally to governance arrangements on large projects and in particular to tendering and contract arrangements, the Productivity Commission argues that greater transparency and public disclosure are necessary preconditions to accountability for major projects. It also notes that it leads to improved project outcomes.
72. At page 271 of the report the Commission notes under the heading Lack of Transparency:
- Some participants have suggested that greater transparency around project selection is key to improved outcomes in public infrastructure. For example ... there are several gains that arise from open and transparent evaluations. These include that analysis can be independently tested, key assumptions can be debated and additional studies may be commissioned to improve understanding of the underlying policy problem. Transparency can also be considered necessary to demonstrate that stakeholders have been consulted and that value is seen to be delivered to the public. (Institute of Value Management, sub DR 125)*
73. In *Re Travers and Public Transport Authority* [2015] WAICmr 20 I considered the application of clause 6 to documents regarding the potential extension of the Thornlie railway line to Cockburn Central. In that case at [52] the Public Transport Authority claimed that disclosure would impact on ongoing deliberative processes, cause property speculation along the proposed route and stated that:

*There is always the danger through the premature release of information, of stimulation of community opposition (or support) purely out of sectional and private interests [or] political opportunism.*

74. At [72] I said:

*The agency essentially argues that sectional interests may use the information to support or undermine options according to the alignment of particular options to their own interests. While such behaviour may well be likely, sectional interests are not going to disappear or start behaving altruistically if the disputed documents are withheld. It is surely part of the role of government to make project decisions which are in the best interests of the public, even in the face of various lobbying efforts.*

75. While the agency has not directly made such a claim in this case, I am mindful that there has been political debate on the project at State level in the recent past.

76. Following my preliminary view dated 30 August 2016, the agency submitted that current market conditions differed from the conditions prevailing at the time of its earlier submissions. As a result, the agency submitted that the findings of the Productivity Commission cited in my preliminary view were not persuasive because those findings were based on different market conditions.

77. I accept that if the market is not competitive it may initially favour a dominant tenderer. This could possibly result in that tenderer making an expression of interest on terms that are not favourable to the State. However, it is always open to the State to reject those terms and develop an alternative approach or to make a decision not to go ahead with a project that is not favourable to the State.

78. In my view, the agency has not established that, on balance, disclosure would be contrary to the public interest as required by clause 6(1)(b). Consequently, I am not satisfied that Documents 3, 4 and 5 are exempt under clause 6(1).

#### **CLAUSE 10 – THE STATE’S FINANCIAL OR PROPERTY AFFAIRS**

79. The agency claims that Documents 3, 4 and 5 are exempt under clause 10(1) and 10(5) of Schedule 1 to the FOI Act.

80. To the extent it is relevant, clause 10 provides:

(1) *Matter is exempt matter if its disclosure could reasonably be expected to have a substantial adverse effect on the financial or property affairs of the State or an agency.*

...

(5) *Matter is exempt matter if its disclosure -*

(a) *would reveal information relating to research that is being, or is to be, undertaken by an officer of an agency or by a person on behalf of an agency; and*



- (b) *would be likely, because of the premature release of the information, to expose the officer or person or the agency to disadvantage.*
- (6) *Matter is not exempt matter under subclause (1), (2), (3), (4) or (5) if its disclosure would, on balance, be in the public interest.*

### **The complainant's submissions – clause 10**

81. The complainant's submissions are set out in his application for internal review dated 14 April 2015 and his application for external review dated 8 May 2015.
82. The complainant provided submissions about the agency's original decision to rely on clause 10, without specifying the particular sub-paragraph on which it relied. However, the agency has subsequently explained that it relies on clauses 10(1) and 10(5).
83. In summary, the complainant submits as follows:
- *While I appreciate that the agency, and this project, operates alongside industry, the agency has not provided any information to convince me that disclosure of the documents will have a substantial adverse effect on the financial or property affairs of the State or the agency. In fact, in its first Notice of Decision clause 10 was not mentioned. It is my view that, if disclosure would be so substantial and detrimental, the agency ought to have relied on the exemption at first instance.*
  - *I contend that there is a high public interest in making the documents publically available. My application concerns information pertaining to the operating costs for town based gas distribution and connection. These costs will likely be worn by the consumer, being members of the Western Australian community. The connection and distribution directly impacts Western Australians and, in particular, residents residing in the South West. In my view the agency did not properly consider public interest under clause 10(6).*

### **The agency's submissions – clause 10(1)**

84. In summary, the agency submits that disclosure of Documents 3, 4 and 5 would:
- *compromise negotiations for the State in awarding contracts and tenders for the project, by providing commercial advantage to private sector proponents bidding to supply infrastructure or services;*
  - *result in taxpayers or customers bearing more cost and risk for the project;*
  - *be detrimental to the State's economy, resulting in a greater fiscal burden for the government and taxpayers;*
  - *result in more expensive infrastructure and service costs; and*
  - *be against the public interest.*

85. The agency submits that it is essential that a fair and open procurement is negotiated to ensure project costs result in the best outcome for the State.
86. The agency also claims that disclosure of Documents 3, 4 and 5 would reveal the estimated costs of the project to potential tenderers; and the preferred or desired legal and commercial structure of the project would also be disclosed.
87. In relation to the ‘prejudice of future procurement processes, impact on commercial advantage and negotiations’, the agency submits as follows:

- *The Bunbury to Albany Gas Pipeline is a major project that will attract significant interest from major gas supply and construction companies. As such, it is essential to the public interest that the State is able to conduct a fair and open procurement process as well as to ensure that the project costs and deliverables can be negotiated to ensure the best outcome for the State.*
- *The release of the documents would impact on the tender process in the following ways:*

*The release of the documents without Cabinet approval would potentially enable some interested bidders to gain a significant commercial advantage by having access to the information. The ability of the State to operate a fair and open tender process would be completely undermined if not rendered impossible.*

*Disclosure of the documents would provide private industry with the estimated costs of the project to Government and to industry; and also the preferred or desired commercial and legal structure for Government. This would be detrimental to the public interest by effectively transferring to the private sector crucial details on the State's negotiating position. This would completely undermine the Government's ability to negotiate to seek lower cost bids and to have competitive tension in the bidding process.*

*The release of the documents would also reveal the State's preferred position on land assembly for the project including what the State was prepared to pay for land acquisition, preferred tenure models and likely approval requirements. This would significantly undermine the State's ability to negotiate on behalf of the public interest.*

*The release of documents would also provide future bidders with the details of Government strategy on the procurement process; how it intends to potentially run the process and how it intends to ensure the best value for the State. This would fundamentally undermine the public interest by jeopardizing the tender and negotiation process with any future party.*

- *The draft tender document does not represent the final version; it may be significantly altered or adjusted before finalisation. As such, it may create*

*a false and misleading expectation for interested bidders and the general public.*

- *Release of the documents is subject not only to Cabinet, but also to approval by the Synergy Board (formerly Verve Energy Board). Aside from potentially being a commercial partner in a future Bunbury to Albany Gas Pipeline, Synergy (formerly Verve) is legislatively required to act in a commercial manner. Release of such documents would be detrimental to the commercial operations of that organisation.*
- *The release of these documents may establish a significant precedent for major project procurement and negotiation, whereby the State is permanently disadvantaged in such cases by having to disclose commercially-sensitive information prior to the approved bidding and negotiation process.*

### **Consideration – clause 10(1)**

88. To establish an exemption under clause 10(1), the agency must show that the disclosure of Documents 3, 4 and 5 could reasonably be expected to have a ‘substantial adverse effect’ on the financial or property affairs of the State or an agency. The requirement that the adverse effect must be ‘substantial’ is an indication of the degree of gravity that must exist before a prima facie claim for exemption is established: *Harris*.
89. In the context of clause 10(1), I accept that the word ‘substantial’ is best understood as meaning ‘serious’ or ‘significant’: *Re Hemsley and City of Subiaco* [2008] WAICmr 46 at [46].
90. A number of the exemptions in Schedule 1 to the FOI Act, including those under consideration in this matter, provide that matter is exempt if its disclosure ‘could reasonably be expected to’ have the effect described in the exemption.
91. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 the Full Federal Court of Australia said, at 190, that the words ‘could reasonably be expected to’ in the Commonwealth FOI Act were intended to receive their ordinary meaning. That is, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the relevant outcome. That approach was accepted as the correct approach by the Court of Appeal (WA) in *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167.
92. The agency submits that disclosure could reasonably be expected to have a substantial adverse effect on the financial or property affairs of the State or an agency, as described in clause 10(1). That submission is based on the premise that disclosure of Documents 3, 4 and 5 ‘will enable some interested bidders to gain a significant commercial advantage by having access to the information. The ability of the State to operate a fair and open tender process would be completely undermined if not rendered impossible’.
93. However, as previously observed, the analysis of the Productivity Commission does not support that submission and I find that analysis persuasive. Again, I consider it follows

that a commercial advantage to particular private sector proponents could only arise if disclosure were limited to certain proponents.

94. If the analysis of the Productivity Commission does not apply in the current market, as previously observed in my consideration of the agency's claims under clause 6, it is open to the State to reject any expressions of interest from a tenderer.
95. Having considered the agency's submissions, I am not persuaded that disclosure of Documents 3, 4 and 5 could reasonably be expected to have a serious, significant or substantial adverse effect on the financial affairs of the State or the agency. Consequently, I am not satisfied that Documents 3, 4 or 5 are exempt under clause 10(1).
96. Even if I were persuaded that the agency has made out the requirements of clause 10(1), that clause is qualified by clause 10(6) which provides that matter is not exempt under clause 10(1) if its disclosure would, on balance, be in the public interest.
97. For the reasons set out in my discussion of the public interest in relation to clause 6, I also consider that disclosure of the documents would, on balance, be in the public interest. I recognise that clause 6(1)(b) involves a different test where disclosure is 'contrary to the public interest'. However, the factors I set out under my consideration of clause 6(1)(b) also illustrate why I consider that disclosure would, on balance, be in the public interest.

#### **Consideration – clause 10(5)**

98. To make out a claim under clause 10(5) the agency must show that disclosure would reveal information relating to research that is being, or is to be, undertaken by an officer of an agency or by a person on behalf of an agency, as set out in clause 10(5)(a). In addition, the agency must show that disclosure would be likely, because of the premature release of the information, to expose the officer or person or the agency to disadvantage, as described in clause 10(5)(b).
99. The agency has not satisfied me that matter in Documents 3, 4 and 5 is information relating to 'research that is being, or is to be, undertaken by an officer of an agency or by a person on behalf of an agency'. In particular, the agency has not identified what research is being, or is to be, conducted by a person or the agency in respect of the subject matter in Documents 3, 4 and 5.
100. Therefore, I am not satisfied that the agency has satisfied the onus on it to make out the matters described in clause 10(5)(a).
101. Even if I were persuaded that the agency has made out the matters set out in clause 10(5)(a), on the material before me I am not persuaded that a person or the agency would be likely to be exposed to disadvantage because of the premature release of the information as set out in clause 10(5)(b).
102. Clause 10(5) is also qualified by clause 10(6) which provides that matter is not exempt under clause 10(1) if its disclosure would, on balance, be in the public interest. For the reasons set out in relation to clause 10(1), I also consider that disclosure would, on balance, be in the public interest.

103. As a result, I do not consider that Documents 3, 4 or 5 are exempt under clause 10(5) as claimed by the agency.

#### CLAUSE 1 – CABINET AND EXECUTIVE COUNCIL

104. To the extent it is relevant, clause 1 provides as follows:

- (1) *Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body, and, without limiting that general description, matter is exempt matter if it –*
- (a) *is an agenda, minute or other record of the deliberations or decisions of an Executive body;*
  - (b) *contains policy options or recommendations prepared for possible submission to an Executive body;*
  - (c) *...*
  - (d) *was prepared to brief a Minister in relation to matters –*
    - (i) *prepared for possible submission to an Executive body; or*
    - (ii) *the subject of consultation among Ministers relating to the making of a Government decision of a kind generally made by an Executive body or the formulation of a Government policy of a kind generally endorsed by an Executive body;*
- ...
- (2) *Matter that is merely factual, statistical, scientific or technical is not exempt matter under subclause (1) unless –*
- (a) *its disclosure would reveal any deliberation or decision of an Executive body; and*
  - (b) *the fact of that deliberation or decision has not been officially published.*
- ...
- (5) *Matter is not exempt by reason of the fact that it was submitted to an Executive body for its consideration or is proposed to be submitted if it was not brought into existence for the purpose of submission for consideration by the Executive body.*
- (6) *In this clause **Executive body** means –*
- (a) *Cabinet;*
  - (b) *a committee of Cabinet;*
  - (c) *a subcommittee of a committee of Cabinet; or*
  - (d) *Executive Council.*

### **The complainant's submissions – clause 1**

105. The complainant refers to the decisions in *Re Environmental Defenders Office (Inc) and Ministry for Planning* [1999] WAICmr 35 (*Re Environmental Defenders Office (Inc)*) and *Re Edwards and Minister for Transport* [2000] WAICmr 39 (*Re Edwards*). The complainant submits that those decisions defined deliberations or decisions in clause 1(1) as 'active discussion or debate' and 'formal decisions made in Cabinet'. The complainant also submits that 'it is not sufficient for the agency to form this conclusion if a document was merely taken to Cabinet.'

### **The agency's submissions – clause 1**

106. The agency submits that Document 5 is exempt under clauses 1(1)(b) and 1(1)(d) of Schedule 1 to the FOI Act.
107. To support its claim for exemption under clause 1, the agency submits that Document 5 was prepared for possible consideration by Cabinet and it contains financial and technical options that will directly inform the procurement process for the project. The agency also submits that disclosure of Document 5 would reveal matters subject to ongoing deliberations by Cabinet and the Government.
108. In addition, the agency submits that Document 5 was prepared for consideration by the Minister in relation to matters for possible consideration by Cabinet.

### **Consideration – clause 1**

109. Clause 1(1) protects from disclosure the deliberations and decisions of Cabinet and other Executive bodies as defined in clause 1(6). It also protects from disclosure matter of the kind described in paragraphs (a)-(f) of clause 1(1). Paragraphs (a)-(f) do not limit matter that may be exempt under the general description in clause 1(1). That is, matter may be exempt under the general description in clause 1(1) without being of a kind described in paragraphs (a)-(f). In effect, clause 1(1) contains seven separate and stand-alone exemptions.
110. Clause 1(1) of Schedule 1 to the FOI Act provides that matter is exempt 'if its disclosure would reveal the deliberations or decisions of an Executive body'. The term 'Executive body' is defined in clause 1(6) to mean Cabinet; a committee of Cabinet; a subcommittee of a committee of Cabinet; or Executive Council.
111. The terms 'deliberations' and 'decisions' are not defined in the FOI Act. I agree with the complainant's submission that in *Re Environmental Defender's Office (Inc)* and in *Re Edwards*, the former Commissioner took the view that the general description 'deliberations or decisions' in clause 1(1) meant, respectively, 'active discussion or debate' and 'formal decisions made in Cabinet'.
112. The meaning of the word 'deliberations' in clause 1(1) was further considered by the Information Commissioner in *Re Ravlich and Minister for Regional Development* [2009] WAICmr 9. In that case, the Commissioner at [45] considered that the word 'deliberations' is not limited to the concept of active discussion and debate by an Executive body but extends to matter that discloses that an Executive body has gathered

information on, considered, analysed or looked at strategies in relation to, a particular issue.

113. Document 5 is described by the agency as a Draft invitation for expressions of interest dated 16 October 2013 and it is titled 'Invitations for Expression of Interest'.
114. On its face, I consider that Document 5 was prepared for the purpose inferred by the title of that document, that is, it is an invitation to third parties for expressions of interest to provide services for the construction of the pipeline and its associated works. Therefore, it is a document prepared to provide prospective tenderers with information about the project for which they are tendering.
115. I understand that in some circumstances, such a document could be considered by an Executive body. However, I am not persuaded that Document 5 contains policy options or recommendations prepared for possible submission to an Executive body or was prepared to brief a Minister in relation to matters prepared for possible submission to an Executive body.
116. On the material currently before me, I am not satisfied that Document 5 contains policy options or recommendations prepared for possible submission to an Executive body as described in clause 1(1)(b).
117. On the material currently before me, I am also not persuaded that Document 5 was prepared to brief a Minister as described in clause 1(1)(d)(i). That is, that it was prepared to brief a Minister in relation to matters of a certain kind, being matters prepared for possible submission to Cabinet.
118. As a result, I do not consider that Document 5 is exempt under either clause 1(1)(b) or 1(1)(d) as claimed by the agency.

## CONCLUSION

119. For the reasons given in this decision, I find that the disputed documents are not exempt under clauses 1(1)(b), 1(1)(d), 6(1), 10(1) or 10(5) of Schedule 1 to the FOI Act as claimed by the agency.

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