

**OFFICE OF THE INFORMATION
COMMISSIONER (WA)**

**File Ref: F2015379
Decision Ref: D0022017**

Participants:

Alannah MacTiernan
Complainant

- and -

Main Roads Western Australia
Agency

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to the Perth Freight Link project – clause 6 – deliberative processes – clause 6(1)(b) – whether disclosure would, on balance, be contrary to the public interest – clause 10 – State’s financial or property affairs – clause 10(3) – whether disclosure would reveal information that has a commercial value to the agency – clause 10(4) – whether agency engaged in commercial activities – clause 10(6) – whether disclosure would, on balance, be in the public interest – section 24 – whether practicable to edit documents

Freedom of Information Act 1992 (WA): sections 3, 4, 24, 30, 34, 35, 42, 74 and 102.
Schedule 1, clauses 3, 6 and 10; Glossary to Schedule 1 to the FOI Act.

Public Sector Management Act 1994 (WA)

Main Roads Act 1930 (WA)

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

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

DPP v Smith [1991] 1 VR 63

Harris v Australian Broadcasting Corporation (1983) 50 ALR 551 at 561

Health Department of Western Australia v Australian Medical Association Ltd [1999] WASCA 269 at [18]

Jacob v Save Beeliar Wetlands (Inc) [2016] WASCA 126

MacTiernan and Secretary, Department of Infrastructure and Regional Development [2015] AATA 584

MacTiernan and Secretary, Department of Infrastructure and Regional Development [2016] AATA 506

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550 at 556-557

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

Re BGC (Australia) Pty Ltd and Port Hedland Port Authority [2011] WAICmr 38 at [66]

Re Buswell and South West Development Commission [2008] WAICmr 11

Re Edwards and Electricity Corporation t/a Western Power Corporation [1999] WAICmr 13
Re Hemsley and City of Subiaco and Anor [2008] WAICmr 46 at [43]
Re McGowan and Minister for Regional Development, Lands and Anor [2011] WAICmr 2 at [33]
Re McKay and Water Corporation [2009] WAICmr 35 at [36]
Re Ravlich and Minister for Regional Development; Lands [2009] WAICmr 9
Re Ryan and City of Belmont [2000] WAICmr 42
Re Shire of Mundaring and Ministry for Planning [2001] WAICmr 14
Re Slater and State Housing Commission of Western Australia [1996] WAICmr 13
Re Waterford and Department of the Treasury (No. 2) (1984) 5 ALD 588
Re West Australian Newspapers Pty Ltd and Western Power Corporation [2005] WAICmr 10
Re West Australian Newspapers Limited and Another and Salaries and Allowances Tribunal and Another [2007] WAICmr 20 at [115]-[125]
Save Beelihar Wetlands (Inc) v Jacob [2015] WASC 482
Travers and Public Transport Authority [2015] WAICmr 20

Terrill, M. and Danks, L., 2016, Cost overruns in transport infrastructure, Grattan Institute October 2016

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:

- Documents 8, 19, 24, 25, 26, 27, 28, and the disputed information in Documents 17, 52 and 62 described in my Reasons for Decision at paragraph 32 are not exempt under clause 6 of Schedule 1 to the *Freedom of Information Act 1992* (WA).
- Documents 21, 23, 24, 25, 26, 27 and 28, and the disputed information in Documents 2, 17 and 52 described in my Reasons for Decision at paragraph 87 are not exempt under clauses 10(3) or 10(4) of Schedule 1 to the *Freedom of Information Act 1992* (WA).

Sven Bluemmel
INFORMATION COMMISSIONER

25 January 2017

REASONS FOR DECISION

1. This complaint arises from a decision made by Main Roads Western Australia (**the agency**) under the *Freedom of Information Act 1992* (WA) (**the FOI Act**) to refuse Ms Alannah MacTiernan (**the complainant**) access to documents.

BACKGROUND

2. On 18 June 2015 the complainant applied to the agency under the FOI Act for copies of
[d]ocuments 2, 4, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 51, 52, 58, 60, 62, 63, 72, 73, 74, 86, 88 and 89, as referred to in the attached Department of Infrastructure and Regional Development document dated 10 June 2015.
3. By notice of decision dated 11 September 2015 the agency decided to refuse access to some documents claiming that they were exempt under clauses 3, 6, 8 and 10 of Schedule 1 to the FOI Act and provide edited access to others.
4. On 12 October 2015 the complainant applied for internal review of the agency's decision. By letter dated 27 October 2015 the agency confirmed its decision.
5. By letter dated 22 December 2015 the complainant applied to me for external review of the agency's decision.
6. I note that the agency sought four extensions of time to deal with the access application. The complainant agreed to extensions of time on the first three occasions but declined to agree to the agency's fourth request.

REVIEW BY THE INFORMATION COMMISSIONER

7. Following my receipt of this complaint, the agency produced to me the disputed documents together with its FOI file maintained in respect of the complainant's access application.
8. By email dated 12 April 2016 my Principal Legal Officer (**PLO**) sought and obtained the complainant's permission to provide the agency with a copy of her application for external review and invited submissions in response from the agency by no later than 4:00pm on 4 May 2016.
9. My PLO met with the agency on 22 April 2016 to review the disputed documents. Following the meeting the agency agreed to further review its claims in respect of the disputed documents and to report back to my office by no later than 4 May 2016.
10. The agency sought and was given an extension of time until 30 May 2016 in order to conduct a thorough review of the disputed documents.

Conciliation Conference

11. On 15 June 2016 my officers convened a conciliation conference with the parties. At the conference the agency provided the complainant with copies of Documents 4, 11, 13, 15 and 36 and edited copies of Documents 22 and 74, claiming that the deleted information in those documents is exempt under clause 3.
12. By a further notice of decision dated 28 June 2016 the agency also provided edited copies of Documents 18, 47 and 72 to the complainant, claiming that the deleted information is exempt under clause 3.
13. As the complainant indicated that she was satisfied with the access to those documents, they are no longer in dispute and I have not considered them further.
14. Following the conciliation conference, the agency also agreed to provide the complainant with further edited copies of Documents 30, 31, 33, 34, 44, 45 and 46. These documents were provided to the complainant by email and by post on 18 August 2016, some six weeks after agreement at the conference to do so. I understand that, although the complainant received electronic copies of the documents, she did not receive the documents sent by post and arrangements were subsequently made by the agency for her to collect hard copies of the documents from the agency's head office on 21 September 2016.
15. With respect to Documents 30, 31, 33, 34, 44, 45 and 46, the agency claimed that the remaining deleted information is exempt under clause 6 and clause 10.
16. The complainant maintained her complaint for the remainder of the disputed documents and the information deleted from the disputed documents.
17. I issued my preliminary view to the parties on 25 November 2016.
18. By email dated 30 November 2016 to my PLO the complainant withdrew her complaint in respect of personal information in the disputed documents. That information is therefore out of scope and I have not considered it further.
19. By letter dated 12 December 2016 the agency made further submissions to me in response to my preliminary view. It withdrew its exemption claim for documents 6, 9, 10, 12, 14, 16, 29, 30, 31, 32, 33, 34, 35, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 51, 86 and 88. Copies of these documents were provided to the complainant on 20 December 2016, edited only to delete personal information that is out of scope. I therefore consider that documents 6, 9, 10, 12, 14, 16, 29, 30, 31, 32, 33, 34, 35, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 51, 86 and 88 are no longer in dispute and I have not considered them further.

Onus of proof

20. Under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision is justified or that a decision adverse to another party should be made. Accordingly, in this instance, the agency bears the onus of establishing that its decision to refuse the complainant access to the disputed matter is justified.

THE AGENCY'S NOTICES OF DECISION

21. Section 30 of the FOI Act sets out the details that must be included in an agency's notice of decision given to an access applicant. If an agency decides to refuse access to a document, section 30(f) of the FOI Act 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.
22. In this case, neither the agency's initial decision nor its internal review decision complied with the requirements of section 30(f). Apart from citing the exemption clause in respect of the documents generally for which exemption was claimed and giving general reasons for its decision under each clause, neither decision explained how the requirements of each particular exemption provision were satisfied.

Initial notice of decision

23. The initial notice of decision given to the complainant only asserted that certain documents, to which access was refused, were variously exempt under clauses 6, 8 and 10 while other documents were considered partially exempt. However, the material facts – that is, the facts necessary to constitute the exemption claimed and references to the material on which the agency's findings were based – were not included in the notice.
24. A case for exemption is not made out merely by citing an exemption clause or clauses.
25. If an agency fails to give an access applicant the information referred to in section 30(f), the agency has not discharged its obligations under the FOI Act. Simply citing the exemption provision – as the notice did here – does not satisfy the requirements of section 30(f). Unless the agency explains *why* the exemptions it has claimed apply, it is unlikely that applicants will have a clear understanding of the reasons why access is refused or be in a position to provide me with relevant submissions in relation to the agency's decision.

The agency's internal review decision

26. Section 42 of the FOI Act provides that an application for review is to be dealt with as if it were an access application. That means that the requirements of a notice of decision as set out in section 30(f) also apply to an internal review decision. In that regard I note that the internal review decision was a single page letter addressed to the complainant that merely stated:

Decision:

Main Roads confirms its decision as follows:

- *Exempt in full – 38 documents*
- *Partially release – 12 documents*
- *Release in full – 3 documents.*

27. The agency's internal review decision falls well short of what is required by the legislation and consequently in my view the complainant would have been unable, by reading the internal review decision, to have a clear understanding of the agency's position or be confident that a thorough independent review had taken place.

THE DISPUTED MATTER

28. For ease of reference, in referring to the disputed matter I have used the numbering in the complainant's access application, as referred to in the Department of Infrastructure and Regional Development's document schedule dated 10 June 2015, a copy of which was attached to the agency's notice of decision.

29. The documents and information remaining in dispute are:

- Documents 8, 19, 21, 23, 24, 25, 26, 27 and 28; and
- certain information in documents 2, 17, 52 and 62.

SECTION 74 – DISCLOSURE OF EXEMPT MATTER

30. In providing my decision, it is necessary that I describe certain matters in general terms only in order to avoid breaching my obligation under section 74(2) of the FOI Act not to reveal exempt matter.

31. 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. 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.

CLAUSE 6 – DELIBERATIVE PROCESSES

32. The agency claims that Documents 8, 19, 24, 25, 26, 27 and 28 are exempt in full under clause 6 and that certain information in Documents 17, 52 and 62 is also exempt under clause 6. Without disclosing information claimed to be exempt, that information is:

- Document 17 – pages 1, 2, 4, 5, 6 and 7
- Document 52 – pages 1, 2, 6, 7 and 9
- Document 62 – email chain various dates and times between 13 and 14 May 2014 – page 2

33. Clause 6 states, so far as is relevant, that:

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

(a) *would reveal -*

- (i) any opinion, advice or recommendation that has been obtained, 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 the Government, a Minister or an agency; and
- (b) would, on balance, be contrary to the public interest.
- (2) ...
- (3) Matter that is merely factual or statistical is not exempt matter under sub-clause (1).
- (4) ...
34. 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) 5 ALD 588 (***Re Waterford***).
35. The exemption in clause 6(1) is designed to protect the integrity of an agency’s ‘thinking processes’ – especially in circumstances where deliberations have not concluded – so that an agency’s deliberations are not jeopardised by the disclosure of documents. There are two parts to the exemption in clause 6(1) and the agency must establish the requirements of both paragraphs (a) and (b) of that provision.

The agency’s submissions – clause 6

36. The agency’s submissions are contained in its notice of decision dated 11 September 2015 and in its letter dated 12 December 2016 in response to my supplementary preliminary view. The agency’s submissions are summarised as follows.
37. The agency’s deliberative processes are its thinking processes: *Re Waterford*. The documents contain a considerable amount of information obtained for the purposes of deliberation, which is not currently in the public domain. Information in the documents is being used to inform deliberations and decision-making in relation to:
- key project decisions
 - commercially sensitive information relating to current contracts that are out to tender
 - traffic modelling information used to determine the commercial value of a heavy vehicle charge
 - funding decisions and commitments
 - indications of likely contract value and contingency funding, and
 - procurement and commercial processes and strategy.

38. If the information were prematurely released it could compromise the agency's deliberative processes and prejudice the government's ability to make ongoing decisions about the project.
39. Release of the information could compromise the integrity of procurement processes because prospective tenderers would have information not normally available to them and this could result in higher bids being made.
40. Release of the information could give an unfair advantage to individuals or groups that would not usually be entitled to access the information. Disclosure could undermine the competitiveness of the industry and would not represent the best value for the taxpayer.
41. Citing *DPP v Smith* [1991] 1 VR 63 (*DPP*), the agency submits that there is a difference between public interest and what is in the public interest. The agency recognises a significant level of public interest in the documents and has produced and published the 'Perth Freight Link Business Case Executive Summary' to inform and contribute accurate and current information to the public.
42. The premature release of documents of this kind would also encourage 'ill-informed speculation' and may mislead the public as the agency is still conducting an assessment of options and estimates of commercial value. Speculation in the public arena about options that were considered and rejected during tendering is not in the public interest and could impact on the agency's capacity to secure the best value for the taxpayer's dollar.
43. The deliberative processes for Perth Freight Link (**PFL**) are still ongoing. The PFL project is comprised of individual sections as set out in the State Government's 2016/17 Budget Papers as follows:
 - *Section 1 – Roe Highway Stage 8 (Kwinana Freeway to Stock Road): The deliberative processes for this section have largely been completed as the Government has allocated the budget and finalised the procurement processes by awarding the contract for the construction of this section of the PFL project.*
 - *Section 2 – Roe Highway Stage 9 (Stock Road to Stirling Highway): The deliberative processes for this section of the project are far from complete. While a budget has been allocated for this section there is an active procurement process underway that commenced on May 2015 and that has not been concluded. At the time of the original budget allocation it was determined that the procurement process would be used to leverage the private sector's innovative approaches and commercial tensions within the procurement process to explore alternative routes for Section 2. In order to conclude the procurement process requires the conclusion of the deliberations, by Government, of the preferred route to be taken for Section 2 ... This is a fundamental and significant decision that is required for Section 2.*

...

The current deliberative processes include a significant decision by Government on the preferred route option for Section 2. This decision requires Government to

consider each potential route in relation to issues such as the costs of each route option, the benefits and impacts economically, socially, environmentally and from a construction perspective. The choice of route has an immediate impact on people who live on or near the various options and is therefore considered to be a significant and sensitive decision that is still ongoing, as outlined earlier. Further until this decision is taken the procurement process, which commenced in May 2015 and has 2 proponents bidding for the work, for Section 2 with a current budget of \$1 253 million cannot be concluded.

...

The ongoing deliberative process regarding Section 2 relates directly to document 8 which discusses various options for Section 2 and documents 24, 25, 26, 27 and 28 which relate to estimates of various options for Section 2. Parts of document 17 and 52 discuss details of one of the options and estimated cost for section 2.

- *Section 3 – Roe Highway Upgrade (Tonkin Highway to Welshpool Road): The deliberative processes for this section have been completed and construction is currently underway.*
- *Heavy Vehicle Charge Regime (HVC): The introduction of the HVC, a form of road user charging, is a new policy position for the Government. Whilst Government has taken a policy decision to implement the charge, the deliberative processes are still ongoing ... This is the first time such a charge has been implemented in WA and that there is much work required to develop the HVC. Government was advised that the final policy settings (e.g. regulatory settings, enforcement approach, technology, network bans and implications, etc), charges and revenue projections would be developed and submitted to Cabinet for consideration via a Project Definition Plan (PDP) which determines the preferred strategy and approach for the HVC.*

...

- *While it is acknowledged that the Government has made a policy decision to implement a HVC, the deliberative process is still under way. Issues such as the detailed HVC policy decisions, the rate of the charge, demand and revenue forecasts and estimates (informed by traffic modelling), commercial approach, development of a concept of operation including technology implementation, the enforcement approach and network bans and restrictions are still to be determined and being developed as part of the HVC PDP.*
- *These issues are considered substantive and the choices and decisions that Government makes on these matters will be material to the transport industry regarding how their operations may be impacted or affected by the introduction of the HVC. Document 19 refers to various options to manage the HVC and part of document 62 discusses various restriction options for routes near the HVC network once PFL is constructed.*

- *The signing of a contract for Roe 8 does not signal the conclusion of deliberations for the PFL project as whole. There are substantive ongoing deliberations that have a material effect on the public and the documents for which exemption is sought are pertinent to the deliberations of Government on these matters...*
44. The agency understands that there is a large degree of public interest in this project and has tried to carefully balance the need to inform the public and satisfy their interest, and at the same time, protect information that is commercially valuable and documents that remain vital to informing the deliberative processes of the Government in the best interest of the public.
 45. This balance has resulted in a careful assessment of what is considered important to enable an informed public discussion about the merits of the PFL project, for example some projected traffic volumes that do not compromise the commercial value of the traffic modelling data used to assess the full 85km of the HVC charging network as opposed to the PFL roadworks, or a high level description of how the HVC may operate without detailed options regarding enforcement – given that part of the PFL budget is planned to be derived from the HVC revenue.
 46. The agency has constantly been balancing the acknowledged tension between placing information into the public domain to enable an informed debate to occur while at the same time not disadvantaging or compromising the future commercial value and remaining important deliberations of Government to protect the public's interest.
 47. In *Re Buswell and South West Development Commission* [2008] WAICmr 11 (***Re Buswell***), reference was made to lengthy and complex negotiations and deliberative processes that were not yet concluded. This is the same situation as the PFL project, especially in relation to the deliberations outlined above in relation to the Section 2 route and the HVC details which are still to be finalised. So while the overall policy decision has been made to construct Section 2 and to implement a HVC there are still lengthy, complex negotiations and deliberative processes to be undertaken.
 48. The premature release of information that is still being used to inform ongoing deliberations for Section 2 and the HVC would not in fact, be in the public interest. Premature release would only expose the greater community to discussions and options that have not yet been finalised and around which the Government cannot provide a definitive decision, thus creating undue concern or distress for an option that may not be selected.
 49. The release of information contained within the documents could reasonably be expected to compromise the deliberative processes of the State Government in relation to the following:
 - Both project route options and HVC policy options by having Government's ability to assess the options without the public and sectional interests questioning all of the options prior to a position being adopted. Decision making in this environment, it is argued, does not always deliver what is in the best interest of the public but has the potential to deliver the best interests of the 'loudest' or most strident advocates.

- Decisions of the nature that are still to be taken will have a consequence for many decades into the future both in terms of the Section 2 route and the HVC policy settings.
- Decisions of this magnitude deserve to be given the respect and recognition to enable proper deliberative processes to occur. Once Government has taken a decision it can rightly answer questions as to why certain choices were made and others not taken, and for the Government to be held to account and an informed public debate to occur.
- Potentially compromising the procurement processes by arming prospective tenderers with information that would normally not be available to them. The State's procurement process is structured on prospective contractors preparing and lodging bids and prices based on their own commercial calculations without the benefit of such information. With the current budget for Section 2 at \$1 253 million a one percentage point change equates to \$12 million. Consequently, it is considered in the best interest to let the commercial market place value the works without an insight into Main Roads commercial value of the Section 2 and not place at risk the possibility of detailed cost estimate knowledge influencing the final cost of the project to the public.

50. The agency refers to *Re Buswell* at [67] where the then Acting Commissioner said, '[i]n my view there is a public interest in agencies being able to make decisions without someone "looking over their shoulder"' and in *McKay and Water Corporation* [2009] WAICmr 35 at [36] where I said '[i]n general, I consider that the public interest is best served by allowing deliberations to occur unhindered and with the benefit of access to all material available so that informed decisions can be made.'

The complainant's submissions – clause 6

51. The complainant's submissions are contained in her application for external review dated 22 December 2015 and are summarised as follows:

- Clause 6(3) excludes documents of a statistical nature from the exemption. Documents relating to traffic counts and traffic modelling are excluded from the exemption.
- The agency relies upon *Re Buswell* but that case is readily distinguishable from the current complaint. In the present case Stage 1 has already been decided as a discrete phase to Stage 2 and contracts are being let.

The public interest

- None of the grounds relied upon by the agency apply as disclosure would, on balance, be in the public interest.
- The objects of the FOI Act set out in sections 3 and 4 of the FOI Act should be borne in mind.

- Undoubtedly there is a distinction between what the public is interested in and the public interest. Drawing attention to this distinction is pointless.
- *A genuine public interest is served by understanding the cogency or otherwise of the case for spending taxpayers' money to build a highly controversial road project which was not preceded by any public consultation or disclosure.*
- A critical part of the deliberative process has been completed. Federal and State governments have signed off on the project and are proceeding to let contracts.
- *There is profound disquiet in the community over this project as it appeared literally out of nowhere in the 2014 – 15 Federal Budget. There had been no public discussion of this project prior to appearing in the Budget. A list of documents obtained from the Department of Infrastructure and Regional Development (DIRD) under FOI reveal the first communications between federal and state departments concerning the project only some six weeks before the Budget, and evidence suggests it originated from the offices of the Federal Finance Minister and the State Treasurer a mere three months before the announcement.*
- *The underlying assumptions of the project are contrary to the planning for an Outer Harbour container terminal that has been under way since 1996. It would be folly to invest a minimum of \$1.76 billion on a road project that may be largely obsolete in 10 years. Further, directing massive expenditure to this project will impede the timely development of an Outer Harbour and the road and rail corridors into that facility.*
- *Since the project was announced many other shortcomings have come to light. The project fails to actually reach the port and an earlier unrelated report makes it clear that another \$300 million will be required to replace the Stirling Traffic Bridge if it is to sustain increased numbers through the port. Without that the whole project fails.*
- *There are also very significant concerns about the impact a doubling or more of truck traffic would have on this highly built up area. Significant concerns have been raised over PM2.5 emissions from these trucks, recognised by the World Health Organisation as a carcinogenic.*
- In addition there are deep concerns about the environmental impact of the project on the Beeliar Wetlands and the loss of a RAMSAR listed asset. [Note: The complainant cites *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482 which was overturned on appeal in *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASC 126 and I understand that a Special Leave Application, number P38/2016, made to the High Court of Australia in August 2016, was refused on 16 December 2016].
- In a related FOI application in *MacTiernan and Secretary, Department of Infrastructure and Regional Development* [2015] AATA 584, the Tribunal ruled that release of the documents was in the public interest. [Note: following an

appeal to the Federal Court, the matter was remitted by the consent of the parties to the AAT for re-hearing. At the time of writing the matter has been listed for hearing on 16 February 2017.]

- In *Re Shire of Mundaring and Ministry for Planning* [2001] WAICmr 14 the commissioner held that the public interest was served by disclosure of information that enabled communities to be fully informed about development proposals that directly affect them.
- The agency's PFL Business Case Executive Summary is just a summary, without supporting information on which conclusions were based.
- The decision to invest in the project has been made and a contract for Stage 1 may be signed by the end of the year.

Consideration – clause 6

Clause 6(1)(a) – deliberative process

52. With respect to the first limb of clause 6(1)(a), having carefully reviewed the documents, I am satisfied that disclosure would reveal opinions, advice or recommendations or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency. I therefore consider that the requirements of clause 6(1)(a) are satisfied.

Clause 6(1)(b) – the public interest

53. 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: see *Health Department of Western Australia v Australian Medical Association Ltd* [1999] WASCA 269 at [18].
54. I consider that the public interest test in clause 6(1)(b) is intended to cover those cases where public disclosure would be prejudicial to the proper operation of government or the proper workings of an agency such that the right of access under the FOI Act is subordinate: see *Re BGC (Australia) Pty Ltd and Port Hedland Port Authority* [2011] WAICmr 38 at [66]. In *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551 at 561, Beaumont J said, concerning the public interest:

[I]n 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 ...

55. The term 'public interest' is not defined in the FOI Act. In my view, it is best described in the decision by the Supreme Court of Victoria in *DPP*, at page 75, where the Court said, in distinguishing between the public interest and a matter of public interest:

The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals ... There are ... several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community, events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest.

56. Determining whether or not disclosure would be in the public interest, involves a process of identifying the public interest factors for and against disclosure of information and then carefully weighing those competing factors, in order to determine where the balance lies.
57. This office has consistently expressed the view that it may be contrary to the public interest to prematurely disclose deliberative documents whilst deliberations in the agency are continuing, if there is material which establishes that such disclosure would adversely affect the decision-making processes 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.

Factors against disclosure

58. On 20 October 2016 the Government announced that a contract for Stage 1 of the PFL had been signed and an edited copy of the contract, entitled *Project Alliance Agreement Roe 8 Project, contract No 98/14*, was tabled in Parliament (paper 4800).
59. The agency claims that the deliberative process in the present matter has not yet concluded and that stage 2 and the heavy vehicle user charge are yet to be finalised, stating at page 8 of its submissions dated 12 December 2016:

[W]hile the overall policy decision has been made to construct Section 2 and to implement a HVC there are still lengthy, complex negotiations and deliberative processes to be undertaken.

60. The agency referred me to *Re Buswell* which concerned the Busselton Jetty Refurbishment project in 2005. In that case, the Acting Commissioner said at [67], ‘[i]n my view there is a public interest in agencies being able to make decisions without someone “looking over their shoulder”.’ He was satisfied that, because there had been lengthy and complex negotiations that were not yet concluded, and because ‘the issue of the jetty refurbishment and associated costs and land development potential have not been agreed to by all the parties involved – the Shire and the Government’, the relevant deliberative processes were essentially ongoing.
61. I accept, in light of the agency’s further detailed explanation of the deliberative process, that while Stage 1 of the project is now under way, there may yet be more deliberation to be undertaken in respect of other stages of the project and I have taken this into account. However, this is but one factor. The fact that a particular deliberative process

is still continuing does not mean that disclosure of documents relating to that deliberative process will necessarily be contrary to the public interest.

62. The agency's arguments that disclosure is contrary to the public interest can be divided into three categories. The first category relates to the impact of disclosure on the decision making process of the agency and government. The second category considers the impact on procurement processes. The third category concerns the impact on public discourse. I will now address each category in turn.

Impact on the decision making process

63. The agency argues that disclosure could compromise the agency's deliberative process and prejudice the government's ability to make ongoing decisions about the project in the best interests of the public, especially in relation to required policy decisions about route options for section 2 of the project and the HVC. It asserts that public and sectional interests questioning all of the options prior to a position being adopted results in a decision making process that does not always deliver what is in the best interests of the public. Instead, it has the potential to deliver in the best interests of the 'loudest' or most strident advocates.
64. I dealt with a similar argument in *Travers and Public Transport Authority* [2015] WAICmr 20, where 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 agency claimed that disclosure would impact on ongoing deliberative processes, cause property speculation along the proposed route and stated that:

[T]here 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.

65. 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.

66. I consider that similar considerations apply in the present case. It is the role of government, supported by advice and analysis from professional and ethical public servants such as those in the agency, to make and effectively communicate project decisions that are in the best interests of the public.

Impact on the procurement process

67. The agency further claims that disclosure will compromise the integrity of the procurement process and may lead to higher bids from prospective tenderers.

68. To the extent that the agency's argument is that disclosure could compromise fairness between competing tenderers by allowing some to have access to more information than others as a result of disclosure of the disputed documents, this could easily be addressed by ensuring that all of the disputed documents are made available to the market or the public.
69. However, it appears that the agency's argument in relation to the procurement process is primarily concerned with the impact of disclosure on government's ability to achieve best value for money. It argues that disclosure could arm prospective tenderers with information that would not normally be available to them. It claims that the State's procurement process is structured on prospective contractors preparing and lodging bids and prices based on their own commercial calculations without the benefit of such information. Consequently, the agency argues that it is in the best interest of the public to let the commercial marketplace value the works without an insight into the agency's commercial value of Section 2, and not place at risk the possibility of detailed cost estimate knowledge influencing the final cost of the project to the public. The agency argues that, with the current budget for Section 2 at \$1,253 million, a one percentage point change equates to \$12 million. I agree that a small percentage point change in the value of a bid would be significant on such a large project.
70. The agency essentially argues that disclosing its own detailed cost estimates to the market could lead to higher bids as the market 'bids up' to what it knows the agency is prepared to pay. However, it is my understanding that this is unlikely to occur where there is a genuinely competitive market. In any event, as outlined above, government's overall budget estimates for the PFL project, up to and including section 2 (or Roe Highway Stage 9), are on the public record.
71. In its Report No 71 dated 27 May 2014 on public infrastructure (**the Productivity Commission report**), the Productivity Commission considered transparency and accountability and specifically discussed cost benefit analyses. At pages 104-106 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...

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 analysis.

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. ...

[T]he benefits created through transparency are likely to be substantial and significant effects on bids are unlikely, provided there is effective competition in procurement.

72. While I am not bound to apply it, I find the analysis of the Productivity Commission relevant and persuasive. Provided there is a competitive market and a competitive procurement process, and there is nothing before me to indicate that this is not the case, I am not persuaded that the agency's or government's ability to obtain value for money would be negatively affected by disclosure of the disputed documents.
73. Further, I note that the Grattan Institute's report on *Cost overruns in transport infrastructure (the Grattan Report)*, published in October 2016, traverses similar ground in respect of its emphasis on the importance and significance of transparency and disclosure of key information about major infrastructure projects to the public.
74. Recommendation 2 at page 7 of the Grattan Report states:

The Commonwealth should enable and facilitate better public understanding of infrastructure commitment by:

(a) Requiring Infrastructure Australia to publish

- (i) summaries of all transport infrastructure projects funded by the Commonwealth within the previous quarter, completed to the extent that Infrastructure Australia has the information to do so and otherwise left blank; and*
- (ii) business cases and cost benefit analyses for all transport infrastructure proposals receiving Commonwealth funding during the previous quarter, if these have not already been published by a state government;*
- (b)...*

and at page 22:

The best incentive for high quality disinterested project analysis is detailed, timely publication. Although some will be concerned that publication may reduce the competitiveness of tenders by anchoring expectation, the cost of poor project selection is likely to far outweigh a marginal reduction in tendering competitiveness.

While this report has been prepared by a particular independent policy institute, and I am not in any way bound by its findings or recommendations, I consider its arguments and conclusions both cogent and persuasive.

Impact on public discourse

75. The agency argues that the premature release of documents of this kind would encourage 'ill-informed speculation' and may mislead the public as the agency is still conducting an assessment of options and estimates of commercial value. It would

‘expose the greater community to discussions and options that have not yet been finalised and around which the Government cannot provide a definitive decision ... [t]hus creating undue concern or distress for an option that may not be selected.’

76. I do not find this argument persuasive. Speculation about the PFL project, including those aspects on which the agency or government has yet to make a final decision, will occur regardless of whether the disputed documents are released. Whether such speculation can properly be characterised as ill-informed will often be a matter of subjective judgment. However, I consider that releasing the disputed documents would, if anything, increase the quality of information available to the public upon which any debate is based.

Factors in favour of disclosure

77. The PFL is a significant and substantial infrastructure project, proposed to be funded by Commonwealth and State governments, and currently budgeted to cost in the order of \$1.9 billion. Its development has been, and continues to be, a contentious issue in the community, it has a high profile as a major State and Commonwealth funded infrastructure project and has been the subject of significant media reporting and discussion in the public domain.
78. Information in the public domain indicates that the community generally is interested in the project and I accept the agency’s submission that a large number of stakeholders has been consulted by the agency through a variety of media, together with community consultation meetings, exhibitions and guided decision making processes. The project has also been the subject of litigation as referred to above.
79. There is a strong public interest in the public, as a whole, being informed about the costs and benefits of major public infrastructure projects and how they are to be delivered. Responsible government also requires an appropriate degree of transparency and capacity for public scrutiny of important projects and government decisions.
80. The first object of the FOI Act, as outlined in section 3(1)(a) of the Act, is to enable the public to participate more effectively in governing the State. It is difficult to conceive of a legislative object more central to a democratic system of government.
81. The agency’s submissions recognise the importance of accountability and informed public debate. Those submissions note that ‘once Government has taken a decision, it can rightly answer questions as to why certain choices were made and others not taken, and for the Government to be held to account and an informed public debate to occur.’ However, if the public is only to be informed about the analysis underpinning major projects after decisions have been made and contracts signed, then the ability for the public to engage in genuinely effective and informed participation is reduced.
82. While referring generally to governance arrangements on large projects and in particular to tendering and contract arrangements, the Productivity Commission report 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.

83. Page 271 of the Productivity Commission report under the heading Lack of Transparency states:

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)

84. Also at pages 284-85:

The normal expectation in the future should be that tendering for a Government contract will result in the public release of full cost-benefit information. This includes full details of cost-benefit assessments used by IA (Infrastructure Australia) which support a funding request by a state or territory Government and all relevant underlying assumptions and methodologies used in the estimation of wider economic benefits.

and

In addition to the disclosure of cost-benefit information, the practice of publishing benchmark costs based on the performance of similar projects should be encouraged, similar to initiatives introduced in the United Kingdom (chapter 9). In the Commission's view, greater public sector scrutiny of projects compares with cost benchmarks would facilitate competition between tenderers and improve the public's understanding of the very expensive nature of some investments.

85. The complainant has also made a number of arguments that relate to the overall merits of the PFL project. While I consider that the scale and nature of the project mean that some of the above factors in favour of disclosure carry even more weight than they otherwise would, I do not consider that it is my role to form a view on the merits of the project in reaching my conclusion on whether disclosure is contrary to the public interest.

Conclusion – the public interest

86. For the reasons given above, and having carefully weighed up the factors for and against disclosure, I consider that disclosure would not, on balance, be contrary to the public interest. Instead, I consider that disclosure would, on balance, be in the public interest. Accordingly, I do not consider that the agency has made out its claim for exemption for the disputed matter under clause 6.

CLAUSE 10 – THE STATE'S FINANCIAL OR PROPERTY AFFAIRS

87. The agency contends that Documents 21, 23, 24, 25, 26, 27 and 28 and certain information in Documents 2, 17 and 52 are exempt under clause 10. The information that the agency considers is exempt, without disclosing exempt matter, is identified as the following:

- Document 2 – two tables at pages 126 and 127
 - Document 17 – pages 2, 5, 6, 7, 8, 9, 10 and 11
 - Document 52 – pages 2, 7, 8, 9, 10, 11 and 12
88. In its submissions dated 12 December 2016, the agency reiterated its exemption claim for the above documents and identified both clauses 10(3) and 10(4) as applying to all the above disputed matter.
89. I have therefore considered the applicability of both clauses 10(3) and 10(4) to the disputed matter.
90. Clause 10(3) states that:
- Matter is exempt matter if its disclosure –*
- (a) *would reveal information (other than trade secrets) that has a commercial value to an agency; and*
 - (b) *could reasonably be expected to destroy or diminish that commercial value.*
91. Clause 10(4) provides that:
- Matter is exempt matter if its disclosure-*
- (a) *would reveal information (other than trade secrets or information referred to in subclause (3)) concerning the commercial affairs of an agency; and*
 - (b) *could reasonably be expected to have an adverse effect on those affairs.*
92. Clauses 10(3) and 10(4) are also subject to a limit on exemption set out in clause 10(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.*
93. In *Re Hemsley and City of Subiaco and Anor* [2008] WAICmr 46 at [43], the A/Information Commissioner noted that the specific subclauses of clause 10 are each directed at protecting different kinds of information from disclosure under the FOI Act. Whilst an agency may claim exemption for documents under more than one subclause of clause 10, clauses 10(3) and 10(4) are mutually exclusive exemption clauses. Accordingly, I understand the agency to claim that the disputed information is exempt under clause 10(3) or, in the alternative, under clause 10(4).

The agency's submissions – clause 10

94. The agency's submissions are set out in its notice of decision dated 11 September 2015 and in its further submissions in response to my preliminary view dated 12 December 2016. I have chosen to set out the agency's submissions for clause 10(3) and 10(4) in

some detail below, noting that they now only apply to documents 21, 23, 24, 25, 26, 27 and 28 and parts of documents 2, 17 and 52:

- *Information contained within the exempted documents contains indications of the agency's analysis about*
 - *project costs estimates*
 - *financial forecasting*
 - *traffic modelling scenarios and financial forecasting related to the heavy vehicle charge.*
- *Release of internal opinions of estimated costs that are the subject of commercial tendering processes could reasonably be expected to have an adverse effect by influencing the commercial tendering process which has the potential to diminish the commercial value for not only the agency but also for the taxpayer.*
- *The documents contain information that reveal the commercial affairs of the agency such as:*
 - *Information that is material connected to the heavy vehicle charge and the commercial value of the charge*
 - *Project construction estimates*
 - *Heavy vehicle volume forecasting*
 - *Reveal potential areas of interest for competitors working in the private sector*
 - *Detailed financial data*
 - *Planning assumptions that support potential future commercial strategies that if revealed, will have an impact on the commercial affairs of this agency by giving competitors information that gives them a commercial advantage to the detriment of the agency.*
- *In general terms, the disclosure of information of the kind exempted in the documents would impair the effective operations of the agency if future commercial opportunities are revealed prematurely into the marketplace before the tendering and proper deliberative processes are completed. This information could reasonably be expected to potentially alter the behaviour of prospective proponents by arming them with information that they would usually not have access to and may be used out of context for a commercial purpose it was not designed or prepared for. In both instances it would give them a commercial advantage, arguably to the agency's commercial detriment.*
- *The revelation of potential options, strategies and commercially valuable data relating to both the internal project estimates and the heavy vehicle charging regime would be expected to interfere with the agency's decision making processes and would prejudice the agency in the commercial space. Both the project delivery and heavy vehicle charging regime are the subject of current and future commercial procurement processes. Therefore, the release of detailed traffic modelling, financial estimates and planning assumptions into the public space would likely have an adverse effect on its commercial affairs by arming prospective proponents with information that*

they would usually not be entitled to or information not expressly prepared for the purposes of seeking a commercial bid.

- *In relation to the heavy vehicle charging regime the Government's deliberative process is still in progress.*

Clause 10 – Public Interest Test

- *Given that deliberative processes are still in progress concerning the [HVCR], the release of traffic modelling and financial assumptions into the public domain would allow prospective private sector proponents to develop an understanding of the emerging business opportunity... There is a significant risk that early modelling could be interpreted as the Government's view of heavy vehicle charging potential.*
- *This would undermine a potential future decision of Government to offer the rights to the private sector and may alter the commercial outcome that could be derived for the State.*
- *In addition, having information in the public domain prior to the complete examination of the issues relating to the heavy vehicle charge regime could impact on, or improperly restrict the Government's deliberative process in arriving at the most appropriate commercial approach for the State ...*
- *The release of detailed financial and commercial information ... does not favour disclosure as the information would be misleading in isolation, would misinform the public without explanatory memoranda and would hinder the effective operations of this agency in terms of securing the most optimal commercial outcome for the State.*
- *[T]he efficient and economical operation of the agency will be significantly affected by the release of commercial information at this stage of the project.*

95. The agency's further submissions dated 12 December 2016 includes the following:

- *The agency's submission for exemption under clause 10(3) and 10(4) is on the basis that information contained within the documents contains the following commercial information –*
 - *Detailed project cost estimates that include Main Roads' estimation of quantities and rates as well as Main Roads' allowance for contingency and risk as indicated by the P50 and P90 estimate values.*

Clause 10(3) – Basis for Exemption

- *I do not agree with your reasoning that the statutory functions and powers of Main Roads WA as set out in the Main Roads Act 1930 (WA) necessarily*

lead to the conclusion that the agency does not engage in commercial activities.

- *As you have identified, the functions of Main Roads WA and the powers of the Commissioner for Main Roads are concerned with the construction, maintenance and supervision of highways and other roads. Whilst the agency may not compete with the private sector in these activities, it nonetheless fulfils its functions through commercial means and operates in a commercial environment.*
- *For example, Main Roads WA contracts private sector entities for the fulfilment of its statutory functions, and a specific provision in the Main Roads Act 1930 (WA) which authorises the Commissioner for Main Roads to do so. The fact that Main Roads is engaged in other commercial activities such as the letting of contracts worth hundreds of millions of dollars is indicative of the everyday commercial activities that the agency is involved in.*
- *To take the view that a Government agency requires specific statutory authority to engage in commercial activities is to take an unnecessarily restrictive view. Many agencies engage in general commercial activities, for example, by way of contracting with the private sector without having an express statutory authority to do so.*

...

- *As acknowledged in Re Slater and State Housing Commissioner of Western Australia [1996] WAICmr 13 at [11], the Collins English Dictionary (Aust Ed) defines “commercial” as meaning “of, connected with or engaged in commerce; mercantile,” and “commerce” as meaning “the activity embracing all forms of purchase and sale of goods and services”. Whilst Main Roads’ primary role is not to generate revenue, it is considered short sighted to not consider that Main Roads is still involved in commercial activities even if each individual transaction could in isolation be considered a ‘one off’ commercial transaction.*
- *Main Roads is of the view that the detailed cost estimates, for which exemptions are being claimed, have a commercial value to the Agency and Main Roads places a great deal of effort to protect the commercial value through the probity processes undertaken within Main Roads.*
- *The release of the cost estimates ... could reasonably be expected to destroy or diminish that commercial value.*

...

- *[T]he private sector’s knowledge of Main Roads’ internal costs and allowances would enable the private sector through a back calculation of the State Government Budget Paper values to understand what allowance, within an overall project budget, is expected as the contract price or is Main Roads’ benchmark price by which we assess value for money on behalf of the public (in their best interest).*

- Knowledge of this information by the private sector changes the commercial considerations from their assessment of quantities, unit rates and pricing of risk to be successful to win a tender to one of determining how far from the Main Roads' benchmark price they may be prepared to bid to be successful. The commercial value in this scenario of the Main Roads internal costings is therefore lost.
- This is not ... an issue just for the PFL project but for all of the billions of dollars of road investment to be undertaken by Main Roads in the current and future years. Given the significance of the information being considered it is also appropriate to consider the implications or loss of commercial value over time – in a different economic environment to which we are currently in today.
- During the mining boom when Main Roads advertised tenders for work it was not uncommon for there to be only a handful of tenders bidding for works – a situation that has also occurred previously prior to the most recent mining boom. In this scenario the knowledge of Main Roads allowances and pricing of risk changes the balance of the commercial advantage clearly in the hands of the tenderers and against Main Roads and the best interests of the public. When considered in light of the large sums of works contracted out each year there is a reasonable expectation that the loss of value would be significant.
- In considering this issue it may be instructive to apply a 'reasonable person' test to the concept of either maintaining the commercial value of what as the purchaser you may be prepared to pay to 'yourself' versus the concept, as it would appear was suggested in the preliminary view, to foreshadow in advance what you are prepared to pay and in great detail and explicitly outline your valuation of risk. It is suggested that the 'reasonable person' would not divulge what they are willing to pay as they see this as having a value and that by making it known they would lose value in a transaction. It is therefore suggested that the taxpayer would not want nor expect a Government agency to give away the commercial value, on their behalf, of the agency's internal and detail estimates.

Clause 10(4)

- To the extent that clause 10(4) deals with information concerning the commercial affairs of the agency, my submissions above as to the meaning of the phrase "commercial affairs" are equally applicable here.
...
- [A] contract for Section 1 (Roe 8) of the PFL involving an alliance of six contractors has been executed and was tabled in Parliament on 20 October 2016. ... [T]he tabled contract documentation was not released in full and ... it contained redactions of commercially sensitive information such as contractual dollar values.
- The reason for the redactions was that both Main Roads and the six alliance contractors know that the contract values could, if made public, reveal information concerning the commercial affairs of themselves just as

it would the commercial affairs of Main Roads as part of the Alliance arrangements.

- *Furthermore, it is not just the fact that the release of the redacted information would reveal the commercial affairs but that it would by nature of the fact that it was made public could reasonably be expected to have an adverse effect on those affairs by alerting the six alliance contractors competitors exactly to the values they have individually agreed to as part of the contract thereby weakening their competitive position into the future.*
- *Just in the same way the six alliance contractors could reasonably anticipate an adverse effect on their affairs, they therefore requested the information not be made public, so too is the case for Main Roads. This is because the release of the contract values, and those in the documents where an exemption is being claimed, materially damages the agency's ability to act commercially on behalf of the public to obtain the best outcome and within the financial parameters agreed to by Government when approving budget allocations for projects.*
- *To lose the ability to act commercially through the public disclosure of the project estimates and detailed breakdown of internal valuations by Main Roads could reasonably be expected to have an adverse effect on the negotiating position of Main Roads when the agency enters into contract negotiations with a preferred proponent. This is because the preferred proponent can derive our position from the detailed project estimates, for which exemptions are being sought, with the adverse effect of Main Roads not being able to negotiate as strongly - resulting in the real possibility of paying higher costs for projects which in turn translates to higher than is required project budgets which has an adverse effect on the agency's budget.*
- *The preliminary view puts the proposition forward ... that releasing the disputed information could enhance the agency's bargaining position in future negotiations by giving the complainant and the public an understanding of the basis on which such projects may be considered viable. This assertion is disputed as Main Roads is not attempting to maintain a commercial negotiating position with the Complainant or the public but in fact the private sector ... When the economic environment changes and there is a deficit in the competitive environment, with regard to the number of tenderers, the ability of Main Roads to protect the interests of the public and obtain best value will be severely diminished. When the value of the annual capital investment is taken into account...the effects could reasonably be expected to be large in dollar terms – for every percentage point change equating to \$10 million for an annual \$1 billion capital works program.*
- *In past cycles when the competitive environment has been weak Main Roads has experienced escalation rates of 10% plus per annum – therefore weakening our negotiating position is not in the best interests of the public by releasing the material for which exemptions are being claimed.*

Clause 10(6) - Public Interest

...

- *[T]he release of the documents for which an exemption is sought under clause 10 goes to the ability of Main Roads to tender works and to negotiate on behalf of the public to ensure we obtain the best value for money. To suggest that the internal valuations of contract values, quantities and risk valuations being placed in the public domain for the competitive market to have access to enhances our negotiating position, with respect, defies the 'reasonable person' test.*
- *On considering the public interest issue, consideration is also required as to what public interest is served by releasing the detailed quantities, rates, internal project management / contract management estimates and contingencies for sections of the PFL. The public debate has not centred around the rates applied for items such as retaining walls or 'cut to fill' volumes or rates or the value of principal controlled insurances. The public debate has been on the merits or otherwise of the project and in some instances the overall budget allocation (which is known publically in the Government's published budget statements – by Section).*
- *Therefore, on balance, the risk of losing the ability to obtain the best value for money not just for PFL but for future road projects through the release of the documents for which an exemption is being sought versus providing very detailed cost estimate information for which most of the public has little interest in is not in Main Roads opinion justified.*

The complainant's submissions – clause 10

96. The complainant's submissions are set out in her letter to me seeking external review dated 22 December 2015. The complainant submits as follows:

- *The argument against disclosure appears to be that release of modelling data may affect the private sector understanding of tolling potential, when the Government may change its view on that potential.*
- *On any privatisation process, the Government would be required to release up to date information on forecasts and modelling. While the current thinking of the Government may be of interest to potential participants, such knowledge would not in any way impede the Government from changing or refining its thinking. Nor would this affect the tender process, as the tenders will be based on the policy settings contained in the tender document.*

Consideration - clause 10(3)

97. Clause 10(3) is concerned with the protection of information which is not a trade secret but which has a 'commercial value' to an agency. In order to establish a prima facie claim for exemption under clause 10(3), the agency must satisfy the requirements of both paragraphs (a) and (b). That is, the relevant information must have some commercial value. It must also be shown that disclosure could reasonably be expected to destroy or diminish the commercial value of the information in question. If the

requirements of both of those paragraphs are satisfied, the disputed information will be exempt, subject to the application of the limit on exemption in clause 10(6).

98. Information may have a commercial value if it is valuable for the purpose of carrying on the commercial activities of an agency and it is by reference to the context in which the information is used or exists that the question of whether it has a commercial value may be determined: see *Re Slater and State Housing Commission of Western Australia* [1996] WAICmr 13 (*Re Slater*); *Re Edwards and Electricity Corporation t/a Western Power Corporation* [1999] WAICmr 13 (*Re Edwards*).

99. In *Re McGowan and Minister for Regional Development, Lands and Anor* [2011] WAICmr 2 at [33], citing the applicable legal principles set out in *Re West Australian Newspapers Limited and Another and Salaries and Allowances Tribunal and Another* [2007] WAICmr 20 at [115] – [125], I summarised the following criteria for assessing whether information has a commercial value:

- Information may have a commercial value if it is valuable for the purposes of carrying on the commercial activities of a person or organisation. That is, information may be valuable because it is important or essential to the profitability or viability of a continuing business operation or a pending ‘one-off’ commercial transaction.
- Information may have a commercial value if a genuine ‘arms-length’ buyer is prepared to pay to obtain that information.
- It is not necessary to quantify or assess the commercial value of the relevant matter.
- It is by reference to the context in which the matter is used or exists that the question of whether it has a commercial value can be determined.
- The investment of time and money is not, in itself, a sufficient indicator of the fact that the information has a commercial value.
- Information that is aged or out-of-date has no remaining commercial value.
- Information that is publicly available has no commercial value that can be destroyed or diminished by disclosure under freedom of information legislation.

100. While these criteria were identified with reference to consideration of clause 4(2), I consider that they are relevant in an assessment of the commercial value of disputed information under clauses 10(3) or 10(4).

101. I accept the agency’s earlier submission that the disputed documents contain information about traffic modelling, information about proposed heavy vehicle charges, financial data and planning assumptions. However, I also note that the agency has submitted that with the passage of time some of that information no longer has the commercial value initially claimed by the agency and it has withdrawn its exemption claim in respect of some documents.

102. I note that the disputed documents were created by the agency for its own purposes, and also to comply with federal government requirements for funding a large infrastructure project of national significance.

103. The information in the disputed documents is now at least two years old, and the Government has publicly committed on several occasions to building the PFL. I do not accept the agency's submission that the remaining disputed documents and information have a commercial value to the agency; that disclosure could alter a commercial outcome for the Government; nor that

[t]he information would be misleading in isolation, would misinform the public without explanatory memoranda and would hinder the effective operations of this agency in terms of securing the most optimal commercial outcome for the State.

104. It is open to the agency to provide the public with any further information it considers necessary in order to ensure that the public fully understands the issues.

105. The information in the disputed documents is of a kind that any government agency, advising the government before embarking upon a major project, would be expected to prepare.

106. The complainant submits that the Government would need, at the time of tenders being called, to release up to date information on forecasts and modelling. Any tenders would be based on the current information at the time of calling for tenders. The complainant stated:

On any privatisation process, the Government would be required to release up to date information on forecasts and modelling. While the current thinking of the Government may be of interest to potential participants, such knowledge would not in any way impede the Government from changing or refining its thinking. Nor would this affect the tender process, as the tenders will be based on the policy settings contained in the tender document.

I agree with this submission.

107. The agency contends that it is engaged in commercial activities and states:

[T]o take the view that a Government agency requires specific statutory authority to engage in commercial activities is to take an unnecessarily restrictive view. Many agencies engage in general commercial activities, for example, by way of contracting with the private sector without having an express authority to do so.

and

Whilst Main Roads' primary role is not to generate revenue, it is considered short sighted to not consider that Main Roads is still involved in commercial activities if each individual transaction could in isolation be considered a 'one off' commercial transaction.

and further

[I]t may be instructive to apply a ‘reasonable person’ test to the concept of either maintaining the commercial value of what as the purchaser you may be prepared to pay to ‘yourself’ versus the concept, as it would appear is being suggested in the preliminary view, to foreshadow in advance what you are prepared to pay and in great detail and explicitly outline your valuation of risk. It is suggested that the ‘reasonable person’ would not divulge what they are willing to pay as they see this as having a value and that by making it known they would lose value in a transaction. It is therefore suggested that the taxpayer would not want or expect a Government agency to give away the commercial value on their behalf, of the agencies internal and detail estimates.

108. The agency states that while it ‘may not compete with the private sector in these activities, it nonetheless fulfils its functions through commercial means and operates in a commercial environment.’
109. I do not consider, on the information presently before me and the reasons given above, that the disputed matter has a commercial value to an agency.
110. The agency asks me to apply a ‘reasonable person’ test ‘*to the concept of either maintaining the commercial value of what as the purchaser you may be prepared to pay to ‘yourself’ versus the concept, as it would appear is being suggested in the preliminary view, to foreshadow in advance what you are prepared to pay and in great detail and explicitly outline your valuation of risk*’ to my consideration of clause 10(3).
111. The test in clause 10(3) is whether the disclosure of the disputed documents would reveal information that has a commercial value to an agency and whether disclosure could reasonably be expected to destroy or diminish that commercial value. The onus is on the agency to provide me with information to support its contention that the disputed documents have a commercial value to the agency and that disclosure would destroy or diminish that commercial value. Beyond stating that in its view it would have difficulty negotiating the best outcome for taxpayers, and asserting that there is a small number of potential tenderers and the agency would lose an advantage in negotiating if potential tenderers knew what the agency was prepared to pay for a project, the agency has not persuaded me of its claims.
112. The total value of the project is already discernible in budget papers and the agency’s own statements to the public, for example it is common knowledge that the project is currently valued at \$1.9 billion. The amounts expected to be provided by State and federal governments respectively are known. The amounts allocated for particular stages of the project are known.
113. For the reasons given above, I am not persuaded that disclosure of the disputed documents would reveal information that has a commercial value to an agency or, even if it did, that disclosure could reasonably be expected to destroy or diminish any such value. In any event, as outlined below, I consider that disclosure of the disputed documents is in the public interest under clause 10(6).

Consideration – Clause 10(4)

114. The agency also claims that the disputed information is exempt under clause 10(4) of Schedule 1 to the FOI Act.
115. The exemption provided by clause 10(4) is directed at protecting the ‘commercial affairs’ of an agency from adverse effects. Unlike the clause 4 exemption and FOI legislation in other jurisdictions, in which the term ‘business, professional, commercial or financial affairs’ is used, the exemption in clause 10(4) is concerned only with information relating to the commercial affairs of an agency.
116. As is the case with clause 10(3), the agency must establish that the requirements of both paragraphs (a) and (b) of clause 10(4) are met in order to establish a prima facie claim for exemption. That is, the agency must show that disclosure of the disputed information would reveal information concerning the commercial affairs of an agency and that disclosure of that information could reasonably be expected to have an adverse effect on those affairs. If the requirements of both of those paragraphs are satisfied, the disputed information will be exempt, subject to the application of the limit on exemption in clause 10(6).
117. The first question for my determination is whether, if disclosed, the disputed information would reveal information concerning the commercial affairs of an agency. In *Re Slater* 13 at [30], the former Commissioner said:

[T]he mere fact that there are commercial aspects to the agency’s operations is not sufficient, in my view, to conclude that a document acquired to assist the agency in making commercial decisions necessarily contains information ‘concerning the commercial affairs of the agency’. Whether a particular document is one that concerns the commercial affairs of the agency depends on a proper characterisation of the contents of the document.

118. In *Re Ryan and City of Belmont* [2000] WAICmr 42, the former Commissioner noted that, under section 3.1(1) of the *Local Government Act 1995*, the general function of a local government is to provide for the good government of the persons in its district and said at [42]:

Whilst I do not accept that the agency’s functions are primarily commercial in character, I accept that there may be certain activities of the agency which can be characterised as commercial activities, for example, the deriving of revenue from the provision of various community services, the hiring of plant or equipment and the leasing of buildings.

The Public Sector Management Act 1994 (WA)

119. Sections 34 and 35 of the *Public Sector Management Act 1994* (WA) provide for the establishment of departments of the Public Service and SES organisations. SES organisations are those where any positions in them belong to the Senior Executive Service. Main Roads WA is such an organisation – see Schedule 2.

The Main Roads Act 1930 (WA)

120. The functions of the organisation are set out in the *Main Roads Act 1930 (WA)* (**the Main Roads Act**).

121. The short title of the Act is

To consolidate and amend the law relating to and making provision for the construction, maintenance, and supervision of highways, main and secondary roads, and other roads, the control of access to roads and for other relative purposes.

122. The Main Roads Act sets out the objectives of the agency and the powers of the Commissioner for Main Roads and the relevant Minister.

123. Section 7 provides that, for the due administration of the Act, the Governor may appoint a person to be Commissioner for Main Roads.

124. Section 9 establishes the Commissioner as a body corporate with the power to acquire, hold, and dispose of real and personal property, to sue and be sued, and to do and exercise all acts and powers as are necessary or convenient to carry into effect the objects and purposes of the Act.

125. Section 9A gives the Commissioner power, subject to the Minister's approval, and with the prior written approval of the Treasurer, to borrow money.

126. The powers of the Commissioner are set out in section 16 and include constructing highways or main roads, and the proper management of the same.

127. Section 18B provides that the Commissioner may enter into a contract with any person to do work, 'whether or not connected with the functions of the Commissioner under this Act' but contracts valued at more than \$500 000 require the Minister's written consent.

128. Section 19 lists other duties of the Commissioner, which include constructing or supervising roads and works as desired by the minister, and supervising the construction of highways, main roads and secondary roads, and other works carried out under the Act.

129. The agency submits that it carries on commercial activities because it contracts with private sector entities and lets contracts worth hundreds of millions of dollars to deliver services. The agency states that this 'is indicative of the everyday commercial activities that the agency is involved in.'

130. The agency is not required by legislation to act on commercial principles or to make a profit. In my view it is not sufficient to claim that an agency is engaged in commercial affairs by reason of its purchasing services or goods under contract. If every agency that procured or purchased goods or services claimed that disclosure of such transactions or information relating to them would reveal information concerning the commercial affairs of the agency this would lend an interpretation to clause 10 that in my view was not contemplated or intended by the legislation.

131. I understand from the agency's advice that the documents were prepared to determine the viability for the agency – including commercial and financial viability among other things – of developing the PFL. Having examined the disputed information, I accept that it contains certain information concerning costings, traffic modelling and financial analyses, but I am not persuaded that disclosure would reveal information concerning the commercial affairs of an agency under clause 10(4), when according to the Main Roads Act the agency's primary function is to construct, maintain and supervise roads, using a budget allocated by the Parliament for that purpose. I do not consider that any future vehicle user charging, either by the agency or a private sector organisation, would change this conclusion.
132. Since I am not persuaded that the requirement of clause 10(4)(a) is met, I do not need to consider whether disclosure could reasonably be expected to have the effects set out in clause 10(4)(b). However, the agency has made submissions to me relating to the potential adverse effects of disclosure under clause 10(4)(b) and I deal with those now.
133. The agency contends that the disclosure of the disputed information could reasonably be expected to have an adverse effect on the commercial affairs of the agency in that it may impact on the future bargaining power of the agency in its contractual negotiations with prospective tenderers. In that regard, the agency submits that the release of the disputed information has the potential to adversely impact the commercial and other terms of a bid, should the agency decide to seek expressions of interest or tenders for the building of the road in the future.
134. However, as noted at paragraph [58] above, a contract for Stage 1 of the project involving an alliance of six contractors has been executed and an edited version was tabled in Parliament on 20 October 2016. I note the agency's submission that the contract was tabled without its accompanying schedules or annexures, which I acknowledged in my preliminary view letter.
135. However, the agency has further claimed that,

when the economic environment changes and there is a deficit in the competitive environment with regard to the number of tenderers, the ability of Main Roads to protect the interests of the public and obtain best value will be severely diminished.

136. The agency submits that it has experienced escalation rates of 10% plus per annum. However, the current market is significantly different, the mining boom has ended, and I consider it likely that the market is more competitive than it used to be. In this regard, I note that the former Transport Minister informed Assembly Estimates Committee B on 24 May 2016 that bids for building of transport infrastructure being received are:

*in the vicinity of 30 to 40 per cent under budgets at the moment. We are also seeing up to 50 per cent under but some have come in on budget recently. I cannot categorically say that will apply across the board all the time. We are constantly reviewing the budget allocation but based on what they were three years ago when we set some of these budgets that were unfunded at the time, they are coming in at around 30 to 40 per cent under.*¹

¹ Hansard, Assembly Estimates Committee B – Tuesday 24 May 2016, p. E123

137. Release of the disputed documents could not therefore be understood to impact on the future bargaining power of the agency or its contractual negotiations. I therefore do not accept the agency's contention that disclosure could reasonably be expected to have the effects it claims.

138. In addition, I note the comments of the former Commissioner in *Re Edwards* at [74] and [78]:

Whilst the agency operates in a commercial environment and on a commercial footing, it is not in the same position as a private enterprise. Its primary function is to provide an essential service to the people of the State and, in order to enable it to do that, it has resources and powers available to it that are not available to private enterprise...

...

Whilst the agency is operated on a commercial footing, for the benefit of the State, it is nevertheless required to comply with certain public accountability requirements that do not apply to the private sector.

139. In the circumstances of this case, I do not consider that the disclosure of the disputed information could reasonably be expected to compromise the agency's ability to act prudently in accordance with its obligations under the Main Roads Act. I do not consider that being both accountable and transparent will have an adverse effect on the affairs of the agency.

140. In light of that, if I were persuaded that the agency had satisfied the test in clause 10(4)(a), which I am not, I would not be persuaded that the agency has satisfied the onus it bears of establishing the requirements of paragraph (b) of clause 10(4) with respect to the disputed information and I do not consider that information is exempt under clause 10(4).

Consideration - clause 10(6)

141. As I consider that the documents are not exempt under clause 10(3) or 10(4), I am not required to consider the public interest test in clause 10(6). However, if I were required to do so, I would consider that the public interest factors in favour of disclosure outweigh those against disclosure for the reasons set out in paragraphs [53] – [86] above.

PERSONAL INFORMATION

142. The complainant does not require personal information about third parties, therefore that information is out of scope.

143. I consider that some of the documents which I have decided are not exempt contain personal information. I have identified personal information in the documents as follows:

Document 2 – page 89, name of the author of a cited paper
Document 21 – two names and signatures on page 2
Document 62 - email names and addresses.

As this information is out of scope, I consider that the agency should delete it before giving access to the documents.

CONCLUSION

144. I find that:

- Documents 8, 19, 24, 25, 26, 27, 28, and the disputed information in Documents 17, 52 and 62 described in my Reasons for Decision at paragraph 32 are not exempt under clause 6 of Schedule 1 to the *Freedom of Information Act 1992* (WA).
- Documents 21, 23, 24, 25, 26, 27 and 28, and the disputed information in Documents 2, 17 and 52 described in my Reasons for Decision at paragraph 87 are not exempt under clauses 10(3) or 10(4) of Schedule 1 to the *Freedom of Information Act 1992* (WA).
