OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2014182 Decision Ref: D0032015

Participants:

Mark McGowan
Complainant

- and -

Department of the Premier and Cabinet
Agency

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – documents relating to an inquiry into the conduct of a ministerial officer – disputed documents consist of emails, letters and memoranda – clause 3(1) – personal information – information about the health or wellbeing of third parties outside the scope – clause 3(3) – prescribed details – whether subject matter of disputed documents is prescribed details – clause 3(5) – whether third parties gave consent to release of disputed documents – clause 3(6) – whether disclosure is on balance in the public interest – the nature of the public interest – clause 11(1)(c) – whether disclosure could reasonably be expected to have a substantial adverse effect on the agency's management of its personnel – section 32 – consultation with third parties – section 24 – editing.

Freedom of Information Act 1992: sections 24, 32, 39(3)(a), 101(1) and 101(2); Schedule 1, clauses 3(1)-3(6), 7 and 11(1)(c); Glossary
Freedom of Information Regulations 1993: Regulations 9(1) and 9(2)
Public Sector Management Act 1994: Part 3A, Division 3 and Part 5
Right to Information Act 2009 (Qd): sections 47(3)(b) and 49 and Schedule 4

Albanese and CEO Australian Customs Service [2006] AATA 900
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
'DX' and National Offshore Petroleum Safety and Environmental Management Authority [2014] AICmr 132
G8KPL2 and Department of Health (Unreported, Queensland Information Commissioner, dated 17 June 2013)
Mahony and City of Melville [2005] WAICmr 4
Malik and Public Sector Commission [2010] WAICmr 25
Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550
Police Force of Western Australia and Winterton (1997) WASC 504

Re Ayton and Police Force of Western Australia [1999] WAICmr 8
Re Murtagh and Commissioner of Taxation (1984) 54 ALR 313
Re Ninan and Department of Commerce[2012]WAICmr 31
Re NTEU and Schwarz and others [2001]WAICmr 1
Re Paul and Department for Family and Children's Services [1999] WAICmr 44
Re Post Newspapers Ltd and Town of Cambridge [2006] WAICmr 25
Re Rindos and the University of Western Australia (unreported D02095, dated 10 July 1995)
Wilson and Australian Postal Corporation [1994] AAT 189.

Reports

Report of the Royal Commission into the Commercial Activities of Government and Other Matters 1992, Part II

DECISION

The agency's decision is set aside. In substitution, I find that the disputed documents, edited to delete the excluded information (as defined in my Reasons for Decision), are not exempt under clauses 3 or 11(1)(c) of Schedule 1 to the *Freedom of Information Act 1992*.

Sven Bluemmel
INFORMATION COMMISSIONER

4 March 2015

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of the Premier and Cabinet (**the agency**) to refuse Mr Mark McGowan (**the complainant**) access to documents under the *Freedom of Information Act 1992* (**the FOI Act**).

BACKGROUND

2. On 11 April 2014 the complainant applied to the agency under the FOI Act for access to:

> *A copy of the final report prepared by the Director General of the Department of the Premier and Cabinet and sent to the Public Sector Commissioner into the involvement of employees surrounding the events of 22 and 23 February 2014.*
>
> *All correspondence, including emails, between the Department and the Public Sector Commissioner concerning the investigation and final report.*
>
> *Emails between the DPC and persons interviewed as part of the Director General's investigation.*
>
> *Records of interviews taken as part of the investigation.*
>
> *Statements submitted by employees or persons contacted as part of the investigation.*
>
> *Correspondence between the Department and the State Solicitor's Office concerning the report, the investigation or the conduct of employees.*

3. The complainant paid the $30.00 fee payable under the FOI Act for applications for non-personal information.

4. By notice of decision dated 27 May 2014 the agency decided to refuse the complainant access to all 34 documents identified as falling within the scope of his access application, pursuant to clause 11(1)(c) of Schedule 1 to the FOI Act. The agency also claimed that one document (Document 2c) was exempt under clause 7 of Schedule 1 to the FOI Act.

5. Section 39(3)(a) of the FOI Act provides that where a decision is made by an agency's principal officer, internal review under Division 5 of the Act is not available to an access applicant. The term 'principal officer' is defined in the Glossary to the FOI Act as, among other things 'in relation to a department of the Public Service – the chief executive officer of that department or organisation'.

6. Because the initial decision was made by the Director General of the Department of the Premier and Cabinet, who holds the position of principal officer of the agency, internal review by the agency was not available to the complainant.

7. By letter dated 8 July 2014 the complainant applied to me for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

Scope of the complaint

8. Following my receipt of the complaint, the agency produced to me the original of the disputed documents together with its FOI file maintained in respect of the complainant's access application.

9. The complainant in his application for external review dated 8 July 2014 stated that 'I do agree with the decision maker that information concerning the health and wellbeing of government officers should be withheld.'

10. As a result, any information in the disputed documents relating to the health and wellbeing of government officers is outside the scope of this complaint and I am not required to consider it further.

11. Further, as the complainant did not seek external review of the agency's decision that Document 2c is exempt under clause 7, I have not considered that document.

12. My Principal Legal Officer convened a compulsory conciliation conference with the parties on 5 September 2014. The outcome of the conference was that the agency agreed to review its decision in respect of certain of the documents, and the complainant withdrew his complaint in respect of certain documents.

13. After due consideration, the complainant withdrew his complaint in respect of Documents 2d(viii), 7a, 8, 9, 10, 11, 12 and 13, as those documents consisted of emails and witness statements that contained personal and sensitive private medical and health information about individuals. These documents are no longer in dispute and I need not consider them further.

14. Following conciliation the agency reviewed its initial decision and decided to provide the complainant with edited copies of 11 of the disputed documents, being Documents 1, 2, 2a, 2d(iii), 2d(iv), 2d(v), 2d(vi), 2d(vii), 2d(ix), 4 and 17, edited so as to delete personal information. The complainant subsequently withdrew his complaint in respect of those documents.

15. I provided the parties with my preliminary view on the issues remaining in dispute by letter dated 7 November 2014. My preliminary view was that:

- none of the disputed documents is exempt under clause 11(1)(c) of Schedule 1 to the FOI Act;
- the disputed documents all contain personal information;
- Document 2(d)(i) does not contain any exempt matter and should be released in full;

- the remaining disputed documents all contain some matter that is exempt under clause 3 of Schedule 1 to the FOI Act; and

- it is practicable to edit the remaining disputed documents to delete the exempt matter in the manner previously proposed by the agency in the consultation phase.

16. My preliminary view invited further submissions from the parties by 21 November 2014. The agency requested, and was granted, an extension of time to file its submissions in response, to Friday 5 December 2014. On that date, the agency made further submissions to me, through its legal representative, the State Solicitor's Office.

17. The agency also stated that in order to effect a conciliated outcome to the complaint it was prepared to provide the complainant with copies of 11 of the disputed documents that had been more substantially edited than those first produced by the agency when consulting with third parties. It provided me with further edited copies of documents 2b, 2d, 3, 4a, 4c, 5, 6, 7, 14, 15 and 16.

18. I have reviewed the further edited documents and compared them with the agency's earlier edited versions of the disputed documents, which it provided to third parties when consulting with them.

19. By email dated 27 February 2015, the complainant confirmed to my office that he does not seek access to the information that I was of the preliminary view is exempt under clause 3. That information consists of email addresses, direct telephone numbers including mobile numbers and signatures of officers.

20. As a result, information of that kind, as well as the information concerning the health and wellbeing of officers, is all outside the scope of this complaint (collectively the '**excluded information'**) and I am not required to consider it further. Accordingly, the excluded information should all be deleted from the disputed documents before the complainant is given any access to them.

21. I note that when the agency consulted third parties, as referred to at paragraph 48 of this decision, it provided the third parties with a copy of the disputed documents on which it identified and highlighted the information that it proposed to delete before any of the documents were released to the complainant. I have examined the highlighted information in the copy of those documents held on the agency's FOI file that the agency proposed to delete. I am satisfied that the highlighted information consists of the information that the complainant has agreed during the external review process to exclude from the scope of this complaint (that is, the excluded information).

22. I consider that the agency is entitled to delete from the disputed documents all of the information that is highlighted on the copy of the disputed documents provided to the third parties with its letter dated 19 May 2014 on the basis that it consists of the excluded information. However, that is the extent of the information that I consider comprises the excluded information and I do not consider that the agency is entitled to delete any more information than that.

Onus of proof

23. Under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision was justified or that a decision adverse to another party should be made.

THE DISPUTED DOCUMENTS

24. There are 14 documents remaining in dispute. They consist of:

Document 2b:	Consideration of Inquiring Report
Document 2d:	Chronology of events
Document 2d(i):	Email dated 10 March 2014 and letter attached dated 9 March 2014
Document 2d(ii):	Correspondence between third parties dated 9 March 2014
Document 3:	Email chain between agency and third party dated 29 March 2014
Document 4a:	Correspondence from agency to third party dated 28 March 2014
Document 4b:	Correspondence from agency to third party dated 28 March 2014
Document 4c:	Agency memorandum dated 26 March 2014
Document 5:	Email chain between agency and third party dated 25 March 2014
Document 6:	Email chain between agency and third party dated 25 March 2014
Document 7:	Email from agency to third party dated 24 March 2014
Document 14:	Email chain between agency and third party dated 17 March 2014
Document 15:	Email chain between agency and third party dated 17 March 2014
Document 16:	Email chain between agency and third party dated 17 March 2014

25. The agency initially claimed that all the disputed documents are exempt in their entirety under clause 11(1)(c). During the external review process, the agency has claimed that the disputed documents are also all exempt under clause 3.

CLAUSE 3 – PERSONAL INFORMATION

26. Clause 3(1) provides that matter is exempt if its disclosure would reveal personal information about an individual (whether living or dead). In the Glossary to the FOI Act the term 'personal information' is defined to mean:

> *... information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –*
>
> *(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
>
> *(b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.*

The agency's submissions – clause 3(1)

27. In its notice of decision dated 27 May 2014 the agency submitted as follows:

- the disputed documents all contain personal information which is prima facie exempt from disclosure;

- the documents contain exempt personal information being signatures and contact details of government officers, names of third parties, personal views and opinion, information relating to the health and wellbeing of government officers, medical advice and other personal information that would identify an individual.

Consideration – clause 3(1)

28. The definition of 'personal information' contained in clause 1 of the Glossary to the FOI Act makes it clear that any information or opinion about an individual whose identity is apparent – or whose identity can reasonably be ascertained from the information or opinion – is, on the face of it, exempt matter under clause 3(1).

29. In my view, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies. I consider that clause 3 is recognition by Parliament that State and local government agencies collect and hold sensitive and private information about individuals. The FOI Act is intended to make Government, its agencies and officers more accountable. It is not intended to open the private and professional lives of its citizens to public scrutiny without the consent of the individuals concerned, where there is no demonstrable benefit to the public interest in doing so.

30. In the present case, the broad subject matter of the access application is in the public domain and was reported on many occasions by state and national media. I recognise that some of the individuals involved are known to the complainant and the public generally and therefore could possibly be identified from the disputed documents, even if personal information were deleted. I accept that the disputed documents, edited to delete the excluded information, all contain some personal information, which is prima facie exempt under clause 3(1).

31. The exemption in clause 3(1) is subject to a number of limits which are set out in clauses 3(2)-3(6). Accordingly, I have considered whether any of those limits on exemption apply.

Clause 3(3) – prescribed details

32. Clause 3(3) of Schedule 1 to the FOI Act provides that information is not exempt merely because its disclosure would reveal 'prescribed details' in relation to officers or former officers of agencies or persons who perform or have performed services for agencies under a contract for services. The FOI Act makes a distinction between private information – such as an individual's home address or health details – and information that relates solely to that person's performance of functions, duties or services for an agency. The type of information that amounts to prescribed details is set out in regulations 9(1) and 9(2) of the *Freedom of Information Regulations 1993* (**the Regulations**).

The agency's submissions – clause 3(3)

33. The agency's submissions are summarised as follows:

- *the disputed documents contain personal information about officers of an agency which is not*

  (i) signatures;
  (ii) direct contact details; or
  (iii) things done by the person in the course of performing functions as an officer;

  and, therefore, will be exempt unless another limit to the exemption in clause 3 applies.

- *the limit to exemption in clause 3(3) is only applicable where the disputed matter doesn't contain anything other than prescribed details, that is, it is 'solely' or 'no more than' prescribed details, therefore, the limit in clause 3(3) does not apply to the disputed documents.*

Consideration – clause 3(3)

34. I understand the agency to submit that the disputed documents contain personal information about current and former officers that goes beyond the definition of prescribed details. As the complainant no longer seeks access to the signatures, email addresses and direct telephone numbers of officers contained in the disputed documents, that information is no longer in dispute.

35. As a result of the deletion of the excluded information the only personal information remaining in the disputed documents is personal information about current or former officers of an agency. For the reasons set out below, I consider that all of this remaining personal information consists of prescribed details under clause 3(3) and regulation 9. In my view, that information consists of the names and job titles of government officers and things done in the course of performing, or purporting to perform, the person's functions or duties as an officer. The identities of some of those public officers are known to the complainant.

36. *Re Malik and Public Sector Commission* [2010] WAICmr 25 concerned a review report about an alleged breach of public sector standards. At paragraphs [29]-[30] the Commissioner said:

> *Having examined the disputed information, I consider that, if disclosed, it would reveal 'personal information' as defined in the FOI Act because that information would identify private individuals, a contractor and officers of government agencies. That information is prima facie exempt under clause 3(1). However, clause 3(1) is subject to the limits on exemption in clauses 3(2)-3(6). In my opinion, the limits in clauses 3(2)-3(4) and 3(6) are relevant to this matter.*
>
> *It is evident that the complainant is aware of the identities of most of the persons referred to in the Report. However, the Supreme Court in* Police Force of Western Australia v Kelly and Smith (1996) 17 WAR 9 *at* 14 *noted that what is under consideration in dealing with an application under the FOI Act is the right of access to particular documents and that their character as exempt documents does not depend on what the applicant knows or claims to know of their content.*

37. Therefore, in determining this matter, it is not relevant what the complainant knows or claims to know about the officers or the content of the disputed documents.

38. In *G8KPL2 and Department of Health* (Unreported, Queensland Information Commissioner, dated 17 June 2013) (**G8KPL2**) at [29] the Queensland Information Commissioner noted that 'agency documents can also contain personal information of public servants which is not *routine* work information.' While I accept that may be true, I note again that in this case the complainant does not seek any personal information about the health and wellbeing of any third party and therefore any such information is out of scope. I consider that simply because some work performed by an officer might be non-routine, this does not automatically place it outside the scope of the definition of prescribed details. Therefore if the agency contends, as I understand it to do, that the disputed documents contain information that is not routine work information, I am still not persuaded that non routine work information cannot amount to prescribed details for the purpose of clause 3 and regulation 9 of the FOI Act. In any event, the legislative regime in *G8KPL2* is different to the regime applicable in the present case. In particular, the FOI Act does not use the term 'routine work information'.

39. Eight of the 14 disputed documents are email chains between public officers scheduling meetings with each other or providing draft notes for review and comment. I consider these documents are plainly documents that have been produced in the course of performing functions as an officer. By way of further example, two documents are reports, one is a chronology of events and three are letters between the agency and a third party.

40. My view is that all of the personal information about current and former officers of an agency in the disputed documents consists of either the names and titles of officers or things done by those officers in the course of performing, or purporting to perform, the person's functions or duties as an officer. Consequently, I am of the view that all of that information amounts to prescribed details which is not exempt under clause 3(1) by virtue of the limit on the exemption in clause 3(3).

41. However, even if it were the case that some of the personal information about officers or former officers does not amount to prescribed details, I consider that the limits on the exemption in either or both clauses 3(5) and 3(6) apply in any event, for the reasons given below.

Clause 3(5) – consent

42. Clause 3(5) provides that:

> *Matter is not exempt matter under sub-clause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.*

The agency's submissions – clause 3(5)

43. In its letter dated 5 December 2014, the agency submitted as follows:

- *There are no grounds for your preliminary view that all 15 third parties **consented** to disclosure of the disputed documents – albeit in an edited form.**[agency's bold type]***

- *Pursuant to section 32 (2) of the FOI Act, in order to discharge its obligation to consult with third parties whose personal information is contained in requested documents, an agency is required to take such steps as are reasonably practicable to obtain the third parties' views as to whether the document contains matter that is exempt matter under clause 3. The absence of grounds to substantiate a claim for exemption under clause 3 of Schedule 1 to the FOI Act can in no way lead to the inference that a particular third party thereby **consents** to the disclosure of disputed documents or matter. It is submitted that such an inference is unreasonable.*

- *Four of those seven third parties communicated directly with the Director General of the Agency and voiced their objection to and/or concerns about the disclosure of their personal information. Those communications were a determinative factor in the Director General's decision to refuse access to the documents.*

Consideration – clause 3(5)

44. While I note that clause 3(5) refers to the applicant providing evidence that the individuals concerned have consented to the disclosure of their personal information, in this case the agency has provided relevant evidence to this effect. I have considered the agency's evidence of consultation and agreement to be relevant to this matter and I have therefore considered it below.

45. Section 32(2) of the FOI Act states, relevantly, that an agency is not to give access to a document to which that section applies unless the agency has taken such steps as are reasonably practicable to obtain the views of the relevant third party.

46. It appears that the agency had considered at an early stage providing the complainant with access to edited copies of some or all of the disputed documents and commenced a consultation process with a number of third parties as it was required to do under section 32(2).

47. On 19 May 2014 the agency consulted 15 individuals whose personal information appears in the disputed documents, providing those individuals with edited copies of the documents it proposed to release, and asked for their consent to release edited copies of those documents. The letters sent to each third party:

    - advised them of the scope of the access application;

    - invited them to review relevant disputed documents with certain personal information deleted;

    - invited them to comment on the release of all or part of the documents on any of the grounds listed in Schedule 1 to the FOI Act. Any additional information

which the third party considered to be exempt was to be substantiated with reasons/proof, specifically outlining what harm would result from its disclosure;

- asked for their response by 12 noon on 23 May 2014; and

- stated relevantly that 'if we do not receive a response by this date, we will presume there is consent to the release of this information and proceed with processing the application accordingly.'

48. Eight people gave the agency their written consent to release documents in the edited form proposed by the agency.

49. Seven people did not respond within the timeframe stipulated, or it seems at all. They were all senior public service officers. This matter is addressed in more detail below.

50. While seven third parties did not respond to the agency's letters, I consider that, as the agency was communicating with senior public servants or ministerial officers, it was reasonable to expect that they understood the import of what was requested of them and the consequences of responding one way or the other, or of not responding at all, as this was plainly set out by the agency in its letters to each of the third parties.

51. The eight third parties who responded all indicated their agreement to the release of edited copies of the documents. The seven officers who did not respond were given information by the agency confirming that it inferred consent to disclosure and that it would continue to process the request.

52. For the reasons given above, I consider that personal information about the eight individuals who gave their written consent to the release of edited copies of the disputed documents is not exempt by virtue of the limitation in clause 3(5). I also think it is arguable that the three individuals who neither responded to the agency's request nor contacted the Director General informally, effectively consented. However given my views on clause 3(6) below, I do not need to express a final conclusion on this issue.

Clause 3(6)

53. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest.

The complainant's submissions – clause 3(6)

54. In his application for external review dated 8 July 2014 the complainant stated:

> [T]*he public interest considerations in this particular matter strongly override the grounds for refusal under these two clauses, and also that there was a conflict of interest in Mr Conran being both the investigator and decision maker.*
>
> *The public interest relates to the actions of government officers on and after the events of 22 – 23 February 2014 and ensuring that a comprehensive level of scrutiny was applied in investigating these actions.*

This goes to the heart of government accountability to the Western Australian public.

55. The complainant further submitted that:

- he did not pursue information concerning the health and wellbeing of government officers;
- the information, given the public interest in the matter, could be released in edited form; and
- the information, rather than impact on the management of the agency, 'would enhance the public's awareness of the operations of the agency and government processes. It would give the public confidence that any potential misconduct has been adequately addressed'.

The agency's submissions – clause 3(6)

56. In its notice of decision dated 27 May 2014 the agency stated that I had maintained in my previous decisions that the FOI Act is not intended to open the private lives of its citizens to public scrutiny in circumstances where there is no demonstrable public benefit in doing so.

57. The agency has made extensive submissions concerning the public interest. The agency submits in its letter dated 5 December 2014 as follows:

> *4.4 It is submitted that it is crucial in the circumstances of this matter that you distinguish between the events which relate to a former Minister and the inquiry into the conduct of the officers of the Agency which is the subject to which the access application is directed.*
>
> *4.5 Whilst it is acknowledged that some events concerning the above two matters are temporally or causally related it is important that you should, in evaluating the public interest factors in this complaint, distinguish matters of public interest and mere curiosity in matters where the 'public' wish to obtain details of a salacious or prurient nature.*
>
> *4.6 In that regard it is unclear from your statement on page 13 of the preliminary view letter, namely that the issue to which the disputed documents relate attracted significant media attention at the time of the relevant events and was the subject of much public discussion on television, radio, in print media and online(emphasis added) that you have differentiated between the media attention in, and public discussion of, the events which relate to a former Minister and the entirely distinct inquiry undertaken by the Director General of the Agency into a matter concerning the performance of a staff member arising out of but distinct from those events.*

4.7 It is submitted that the relevant public interest consideration in favour of disclosure which carries the greatest weight is in relation to whether or not the inquiry was undertaken robustly with integrity rather than a determination of the material which was revealed in the course of the inquiry.

4.8 The public has neither a duty nor responsibility to sit in judgment on the actions taken by the person or persons the subject of the inquiry and, therefore, there is no public interest in the public having access to the content of the material which was revealed in the course of the inquiry.

4.9 The question of whether or not the person or persons the subject of the inquiry should have been more accountable is again a distinct public interest from the public interest at issue in this matter, namely the conduct of the inquiry and its integrity.

4.10 You have failed to identify and, therefore, appear to have failed to consider:

(i) that the complainant is neither the person the subject of the inquiry nor a third party who participated or was otherwise involved in the inquiry. In fact, there is no personal information about the complainant in the disputed documents. Therefore greater weight should be given, in those circumstances, to maintaining the privacy of individuals referred to in the disputed documents;

(ii) that the particular interest of the complainant (in his role as leader of an opposing political party) is distinct from the wider public interest which ought to be considered under clause 3(6). As a member of an opposing political party the complainant's interest is in obtaining an advantage for the purpose of his political party which is not necessarily in the wider public interest;

…

(iv) the public interest against disclosure in relation to the protection of the privacy of a person subject to a complaint where there is no formal finding (and no disciplinary proceedings instituted following the inquiry) against that person (ref Ninan and Department of Commerce [2012]WAICmr 31 at [80];

(v) The public interest against disclosure for the person who was the subject of, and the persons who participated in, the inquiry to have that matter finalised and not continually open to further scrutiny, particularly in circumstances where no adverse finding was made in respect of the person the subject of the inquiry;

(vi) that given the agreement between the parties to the complaint that certain information is outside the scope of the complaint, there is a public interest against disclosure of edited copies of the disputed documents in a form that cannot disclose the full reasons for the

decision which are likely to produce a false impression of the integrity of the decision making process;

(vii) that the events in question have been raised with a law enforcement agency and, therefore, to the extent to which there may be a public interest in the accountability of the person or persons the subject of the inquiry, this has been satisfied;

(viii) the extent to which the public interest factors in favour of disclosure have already been satisfied by information already in the public domain and through the disclosure of edited copies of documents by the agency in the course of this complaint;

(ix) the extent to which the public interest factors in favour of disclosure have already been satisfied by the independent integrity tests undertaken by the Solicitor General and the Public Sector Commissioner in respect of the inquiry; and

(x) that 'the events' which gave rise to the inquiry occurred over nine months ago and therefore, the amount of media attention and public discussion at the time of the agency's decision (27 May 2014) and currently have lessened and, accordingly, less weight should be accorded to that as a factor in the balancing of the public interest.

4.11 As you have viewed the unedited versions of the disputed documents you will be aware that there is nothing to suggest that the inquiry has not been conducted with integrity.

4.12 It is submitted that you have not attributed sufficient weight to the public interest factor against disclosure of maintaining personal privacy.

4.13 You have consistently acknowledged that there is a very strong, not just a strong, public interest in maintaining personal privacy. As previously indicated, the complainant sought access to documents related to an inquiry undertaken by the Director General principally about the actions of one individual. Whilst it is acknowledged that the individual was an officer of the Agency, the inquiry remains intensely personal to that individual, and, in the circumstances of this matter, the other individuals whose personal information would be disclosed through disclosure of the disputed documents. Through the complainant's acceptance that information relating to health and wellbeing of government officers is outside the scope of this complaint, it is common knowledge between the parties to the complaint that the inquiry considered issues beyond merely government processes.

4.14 You have consistently held that the fact that the complainant is likely to be aware of the identities of third parties referred to in the documents sought in an access application is not relevant to the determination of their character as exempt documents but is relevant to the operation of clause 3(6). In the circumstances of this matter, it is not possible to merely de-identify the individuals by removing

their names as you have already acknowledged, given the amount of media attention, the individuals are already known or can be readily identified.

4.15 Again, to the extent to which any reliance was placed on your consideration that 'possibly all 15 third parties consented to the disclosure of the disputed documents' in balancing the public interest, it is clear on our instructions that four of the third parties objected to disclosure that the maintenance of personal privacy should be accorded greater weight than that which you have given in your preliminary view letter.

4.16 In light of the above, it is submitted that the public interest factors in favour of disclosure have already been satisfied and the weight of the public interest factors against disclosure are greater than that which you have appeared to attribute in your preliminary view letter. Accordingly, it is submitted that disclosure of the disputed documents would not, on balance, be in the public interest in this matter.

4.17 The above submission is reinforced beyond doubt (in respect of the remaining information in the disputed documents) with the provision of the edited copies of the disputed documents demonstrating the process *by which the investigation was undertaken for the purpose of effecting a conciliated outcome to this complaint.*

4.18 If there is a public interest in this subject matter at all it is in the process *not the* content and result *of the investigation. That interest has now been satisfied by the conceded disclosure.*

Consideration – clause 3(6)

58. The term 'public interest' is not defined in the FOI Act. It is described in the decision by the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63, at page 75, where the Court said:

> *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.*

59. Tamberlin J, in the Full Court of the Federal Court decision in *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 at [11] said that

> *the indeterminate nature of the concept of 'the public interest' means that the relevant aspects or facets of the public interest must be sought by reference to the instrument that prescribes the public interest as a criterion for making a determination. In this respect, the well-known observations of Deane J in* Sean Investments Pty Limited v Mckellar (1981) 38 ALR 363 at 375 *are apposite. In that case, his Honour was considering the different process of determining the relevant considerations to take into account in the exercise of a broad statutory*

> *discretion, however the approach is relevant in the present case. His Honour said:*
>
> > In a case such as the present, where relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards.

60. Tamberlin J then explained at [12] the process of determining where the public interest lies as follows:

> *the public interest is not one homogeneous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where the public interest resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that the public interest can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable.*

61. Determining whether or not disclosure of personal information about one person to another would, on balance, be in the public interest, involves identifying the relevant competing public interests – those favouring disclosure and those favouring non-disclosure – weighing them against each other and making a judgment as to where the balance lies in the circumstances of the particular case.

62. I have carefully reviewed and considered all of the submissions made by the agency concerning the public interest test in clause 3(6).

63. I agree with the agency's submission that the public interest is not primarily concerned with the personal interests of the particular access applicant or with public curiosity. I also agree that the FOI Act is not intended to open the private lives of its citizens to public scrutiny in circumstances where there is no demonstrable public benefit in doing so.

64. In favour of disclosure, I recognise that there is a public interest in applicants being able to exercise their rights of access under the FOI Act.

65. I also consider that there is a public interest in informing the public, where possible, of the basis for government decision-making and the material considered relevant to the decision-making process and a public interest in the accountability of agencies for their actions and decisions.

66. The disputed documents concern an investigation undertaken at the most senior levels by a key central government agency into the conduct of other senior government officers following events which relate to a former Minister. I consider that there is a strong public interest in ensuring that such investigations are conducted fairly, robustly and with integrity. Disclosure of the disputed documents would further that public

interest. My view does not rely on the fact that the events relating to a former Minister – which are distinct from but related to the investigation – attracted significant public curiosity and media attention.

67. The agency has made submissions to me about the type of inquiry that it says was undertaken, whether there was a formal finding or not, whether there was any finding of misconduct or not, and whether senior persons reviewed the process undertaken by the agency. While I have attached significant weight to the principles of accountability and transparency that underpin the FOI Act, in particular the legislative objects expressed in section 3(1), I do not consider that it is necessary for there to be any evidence or even suggestion of impropriety for these principles to carry significant weight in favour of disclosure.

68. The complainant's submission concerning enhancing public confidence and awareness of the operations of the agency and government processes is a strong and closely related argument in favour of disclosure.

69. I agree with the agency that the complainant is neither the person the subject of the inquiry nor a third party who participated in or was otherwise involved in the inquiry. The agency is correct in its assertion that there is no personal information about the complainant in the disputed documents. However, the factors in favour of disclosure which I have identified above are dependent neither on the complainant being in any way involved in the inquiry nor on his personal information appearing in the disputed documents.

70. I do not accept the agency's submission that the public interest factors in favour of disclosure have already been satisfied by the information already in the public domain and through the disclosure of edited copies of documents by the agency in the course of this complaint. The information already disclosed may go some limited way towards satisfying the public interest in disclosure. However, disclosure of the disputed documents would go significantly further in satisfying the public interests identified above.

71. The agency also claims that the public interest has been satisfied by the Solicitor General and the Public Sector Commissioner reviewing the process themselves and applying their own 'integrity tests' in respect of the inquiry. However, while the Solicitor General and the Public Sector Commissioner played indirect roles in relation to the inquiry, I consider that their roles did not amount to applying an 'integrity test' as the agency asserts.

72. The agency argues that the events in question have been raised with a law enforcement agency and, therefore, to the extent to which there may be a public interest in the accountability of the person or persons the subject of the inquiry, this has been satisfied. If the public interest in favour of disclosure were limited to ensuring transparency and accountability around any decision on the commencement or otherwise of criminal proceedings, this argument may have been persuasive. However, the public interest factors identified above are much broader than this and I am not persuaded that the public interest in disclosure has been satisfied in this way.

73. The agency submits that, as the events in question occurred over nine months ago, the amount of media attention and public discussion have lessened and less weight should be accorded to this as a factor in the balancing of the public interest. However, the public interest factors identified above are not dependent on the level of public curiosity or media attention.

74. In considering the relevant factors of the public interest to be taken into account I have therefore also had regard to, among other things, the *Report of the Royal Commission into the Commercial Activities of Government and Other Matters 1992*, (**the Report**). Although it is now some 23 years old, it laid down important principles for government and the public sector for the conduct of their activities that remain current, and which have led to, among other things, the establishment of the FOI Act, the creation of the *Public Sector Management Act 1994*, a Public Sector Standards Commissioner and today's Public Sector Commission.

75. Part 2 of the Report relevantly addresses topics that include Open Government, Accountability and the administrative system. In particular at Part 2, Chapter 2 – Open Government at paragraph 2.1.2, the Commissioners spoke about the importance, to the democratic process, of public access to information and referred to *Commonwealth of Australia and John Fairfax & Sons Ltd (1980)* 32 ALR 485 at 493 in which the then Chief Justice said, speaking of Australia's common law:

> *It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice in that information is that it enables the public to discuss, review and criticise government action.'*

76. At [1.2] the Commissioners identified 'two complimentary principles [that] express the values underlying our constitutional arrangements.' The second of those, also known as the trust principle, states that 'the institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public.'

77. At [2.1.10] of the Report, the Commissioners stated that information is the key to accountability. To fulfil its purpose, four information conditions must be satisfied. I consider that the first two conditions are particularly relevant:

> *(a) Information of, or about, government must be made optimally available or accessible to the public. We emphasise 'optimally' since, as we have said, official secrecy has its proper place in the conduct of government. Secrecy, however, should not be the norm, with openness the exception. Rather the contrary must be the case.*
> *(b) information must have integrity. It must give a proper picture of the matter to which it relates. It must not aim to mislead or to create half-truths.*
> *(c)* …
> *(d)* …

78. For the reasons given above, I consider that there are very strong public interest factors in favour of disclosure of the disputed documents. As noted above, the complainant does not seek access to information about the health and wellbeing of individuals

contained in the disputed documents and information of that kind will be deleted from the documents.

79. Weighing against disclosure, I recognise a strong public interest in maintaining personal privacy. That public interest is acknowledged by the inclusion in the FOI Act of the exemption in clause 3(1) and, in my view, that public interest may only be displaced by some other, considerably stronger, public interest that requires the disclosure of private information about another person.

80. I also note that disclosure under the FOI Act is potentially disclosure to the world at large and there can be no limits imposed on publication of the documents or the use to which they are put by the complainant.

81. In *Re Paul and Department for Family and Children's Services* [1999] WAICmr 44 at [17]**,** the Commissioner noted as follows:

> *As no conditions (other than those imposed by other laws) can be attached to the use – including the further dissemination of documents disclosed under the FOI Act, disclosure generally has to be considered as though it were disclosure to the world at large. Therefore, whether the complainant is entitled to be given access to an unedited copy of the disputed document depends on whether it is in the public interest to disclose, not merely to the complainant but to the world at large, personal information about third parties.*

82. I have carefully considered the detailed submissions of the agency and given particular consideration to the impact on individuals of the release of edited copies of the disputed documents.

83. The agency refers me to *Ninan and Department of Commerce* [2012] WAICmr 31 (***Ninan***) at [80]. In *Ninan*, I noted that 'where parties have made allegations to government agencies and the ensuing investigations have not resulted in formal findings against the subject of the complaint, I consider that there is a strong public interest in protecting the privacy of those persons the subject of the complaint'. However, as I noted in *Ninan* at [77], in that case the relevant agency had advised the access applicant that it had closed the file on that complaint; gave a description of the information considered by the agency in dealing with the complaint; an analysis of that information; and the outcome of the investigation. In light of that, I considered that those particular public interests had been largely satisfied by the agency. The facts in the present case are distinguishable. In any event, I agree that there is a strong public interest in protecting personal privacy in the present case. The matter turns on whether that public interest is outweighed by the public interests in favour of disclosure.

84. The agency also argues that there is a public interest in the matter being finalised and not continually open to further scrutiny, particularly where no adverse finding was made against individuals identified in the disputed documents.

85. The agency also claims that editing the disputed documents to remove information about the health and wellbeing of individuals is likely to produce a false impression of the decision making process. I consider the issue of editing in a later part of this decision. However, I also take this to be a submission by the agency that disclosure of

the disputed documents in edited form is contrary to the public interest. However, having reviewed a copy of the disputed documents with the excluded information – including the information about the health and wellbeing of individuals – deleted , I do not consider that they would produce a false impression of the decision making process.

86. While I consider that there are strong public interest factors against disclosure, I consider that the weight of these is somewhat lessened in the particular circumstances of this matter because the disputed documents concern the actions of senior current or former public officers in influential positions.

87. For the reasons given above, I consider that the public interest in the disclosure of the disputed documents, edited to delete the excluded information, outweighs the public interest in non-disclosure. Accordingly, I find that the disputed documents are not exempt under clause 3 of Schedule 1 to the FOI Act.

CLAUSE 11 – EFFECTIVE OPERATIONS OF AGENCIES

88. The agency also claims that the disputed documents are all exempt under clause 11(1)(c).

89. Clause 11(1) provides, so far as is relevant:

> *(1) Matter is exempt matter if its disclosure could reasonably be expected to -*
> *(a) …*
> *(b) …*
> *(c) have a substantial adverse effect on an agency's management or assessment of its personnel*
> *(d) …*
>
> *(2) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.*

The complainant's submissions – clause 11

90. The complainant in his application for external review submitted that 'public interest considerations strongly override the grounds for refusal of access under both clause 3 and clause 11'.

91. However, the complainant also stated that he agreed with the decision-maker that 'information concerning the health and wellbeing of government officers should be withheld.'

The agency's submissions – clause 11(1)(c)

92. The Director General of the agency, in the notice of decision dated 27 May 2014, stated at [35]-[37] with respect to clause 11, that:

> *I have significant concerns with the release of this information even in a redacted form. Behind the investigation were some very difficult and deeply personal information regarding government officers. I was considering the responses and*

behaviour of individual staff members to the events and received the required level of cooperation, as expected from my inquiries. I received this level of cooperation due to the information received being held in a manner that respected the sensitivity and confidentiality of the material provided.

This was a very high profile matter and involved my responsibilities as the Director General to manage staff and assess behaviour fairly. I am concerned that if issues of this nature are released to the general public then the willingness of staff to cooperate fully with voluntary inquiries on any similar matters in the future will be substantially compromised.

I note that under past governments high profile incidents have occurred involving Ministers and Departmental staff and the Department has always sought to maintain the confidentiality of any investigations concerning Departmental staff. It is possible that high profile incidents may occur in the future and the cooperation of staff in an investigation is paramount in allowing future Directors General to determine any instances of misconduct.

93. In its further submissions dated 5 December 2014, the agency maintained its claim that disclosure of the disputed documents could reasonably be expected to have a substantial adverse effect on the agency's management or assessment of its personnel and is therefore exempt under clause 11(1)(c). It submitted as follows:

- The adverse effect which could reasonably be expected should be significant or serious.

- The expressions 'management' and 'assessment' are not defined in the FOI Act. The inquiry the subject of the access application may be characterised as either a tool for the agency's management or a tool for the agency's assessment of its personnel, or both.

- The inquiry undertaken by the Director General of the agency was not a review, special inquiry or investigation under Division 3 of Part 3A of the *Public Sector Management Act 1994* (**PSM Act**) where there is explicit power to direct an employee to answer questions. Rather the inquiry was conducted in the performance of the Director General's general function of administration of the agency and, as such, there is no statutory power or binding common law authority upon which the Director General could rely to compel officers of the agency to provide information. That is, in inquiries such as these, the Director General is reliant upon voluntary statements being made by officers of the agency about themselves and others to discharge his functions under the PSM Act.

- The inquiry itself was undertaken pursuant to Part 5 of the PSM Act and was an inquiry into the conduct of officers of the agency. It was not an inquiry into the conduct of a former Minister, albeit that some events were related (temporally or causally) to the conduct of a former Minister. It was not an inquiry into relevant or related government processes. It was an inquiry principally about the actions of one individual. The matter concerned very senior public servants in a central government agency.

- Because of the very nature of the position of the officers of the agency, there were very few officers of the agency who knew of any information which was relevant to the inquiry. Given the significant consequences, both personally and governmentally, it could reasonably be expected that officers of the agency experienced reluctance to provide information. The information provided was given confidentially and it was understood that, unless compelled by law, it would not be disclosed to the public. The third parties interviewed during the inquiry were aware that the purpose of providing the information was for management or assessment of personnel within the agency and provided the information voluntarily on that basis for that specific purpose. To require the Director General to undertake a review, special inquiry or investigation under Division 3 of Part 3A of the PSM Act to determine preliminary issues such as whether or not there appear to be grounds for such an inquiry is contrary to the intention of the scheme contained within the PSM Act.

- The disclosure of the content of the disputed documents could reasonably be expected to impact detrimentally on the morale of officers of the agency.

- It is important for the management or assessment of senior public servants in a significant central government agency, particularly at the initial or informal inquiry stage, that officers of the agency are encouraged to provide full and frank disclosure in order to determine whether further action or investigation is warranted.

- No evidence contradicting the prospect of the above adverse effects has been provided by the complainant.

- In *G8KPL2* at [44] the Queensland Information Commissioner accepted that disclosure in similar circumstances could reasonably be expected to have a substantial adverse effect.

- In *DX and National Offshore Petroleum Safety and Environmental Management Authority* [2014] AICmr 132 (**DX**) at [34] and [36] the Australian Information Commissioner accepted that *'disclosure of recollections of witnesses to an incident would reduce the quality and quantity of information provided as part of internal investigations and, furthermore, that it was reasonable to expect that third parties may not be forthcoming and frank about incidents at work if their recollections of the incident may be disclosed and used for a purpose other than ensuring similar incidents do not occur. Ultimately the Australian Information Commissioner held that as the recollections were the only first hand knowledge of the incident and the investigator could not likely have obtained the information by other methods, the disclosure of the recollections of the witnesses would have a substantial adverse effect on the agency's management of its personnel.'*

Consideration – clause 11(1)(c)

94. 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.

95. In *Re Ayton and Police Force of Western Australia* [1999] WAICmr 8 (***Re Ayton***) the former Commissioner said at [19]:

> *To justify its decision to refuse access to the disputed document based on clause 11(1)(c) or (d), the agency must show that disclosure could reasonably be expected to result in either a* "substantial adverse effect" *on the management or assessment of its personnel or on an agency's conduct of industrial relations. As I have stated before, 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 v Australian Broadcasting Corporation *(1983) 78 FLR 236* (***Harris***). *In the context of the exemption in clauses 11(1)(c) and (d), I accept that "substantial" is best understood as meaning "serious" or "significant":* Re Healy and Australian National University *(AAT, 23 May 1985 unreported)*; Re James and Australian National University *(1984) 2 AAR 327* at *341*.

96. At [24] the former Commissioner also noted:

> *… personnel issues between managers and subordinates can and do occasionally surface in any large organisation. They are simply administrative issues that managers must deal with as part of their working responsibilities, and may be viewed by contemporary managers as opportunities for change and improvement, rather than as organisational threats.*

97. *Re NTEU and Schwarz and others* [2001]WAICmr 1 concerned an application by the National Tertiary Education Union for documents relating to senior academic staff salaries and benefits. The former Commissioner was not persuaded that disclosure of the information would result in a substantial adverse effect on the management or assessment of its personnel noting at [86]:

> *I consider that it is equally likely that transparency and openness about such matters could create a better understanding of the real issues between those involved rather than fostering the ongoing speculation and deepening of the divisions which both parties acknowledge presently exist.*

98. In claiming an exemption the agency must do more than simply assert that a set of events is likely to come to pass. The agency submits that 'it is possible that high profile incidents may occur in the future' and further that it is 'concerned that if issues of this nature are released to the general public then the willingness of staff to cooperate fully with voluntary inquiries on any similar matters in the future will be substantially compromised'.

99. In *Re Rindos and the University of Western Australia* (unreported D02095, dated 10 July 1995) the former Commissioner said at [66]:

> *A valid claim for exemption is not established by a mere recitation of the words of an exemption clause, nor by bald statements of belief about the alleged effects of disclosure. To discharge the onus an agency bears under s.102(1) of the FOI Act, and to persuade me that the effects it is claimed could reasonably be expected to follow if the particular document were to be released, the agency must provide some material to support those claims.*

100. The agency in its submissions dated 5 December 2014 referred me to the cases of *G8KPL2* and *DX* as authorities for the proposition that staff would be reluctant to raise or discuss issues or co-operate with agency investigations or be forthcoming and frank about incidents at work if their recollections about incidents were disclosed.

101. As noted in *G8KPL2*, the *Right to Information Act 2009 (Qld)* at sections 47(3)(b) and 49 and Schedule 4 contains factors (not an exhaustive list) for deciding whether disclosure would, on balance, be in the public interest. In that case I understand that the disputed documents related to a grievance made by the applicant against other staff of the agency. Those other staff were asked to provide information as to how they felt about the applicant, team morale and incidents involving the applicant among other things.

102. *DX* concerned the recollections of witnesses to an occupational health and safety incident.

103. The agency has not provided me with any probative evidence to support its assertion that disclosure of the disputed documents could reasonably be expected to have a substantial adverse effect on staff morale or the agency's management or assessment of its personnel. In its submissions the agency has expressed its significant concerns, but the agency must provide evidence beyond mere assertions that a particular circumstance could come to pass.

104. Even if the agency could persuade me that disclosure of the disputed documents could reasonably be expected to have an adverse effect on the agency's management or assessment of its personnel, I do not believe it would be the case that in any event such an adverse effect would be substantial in the *Harris* and *Re Ayton* sense. Such effects, while potentially inconvenient and difficult to deal with, appear to me to fall into the category of the sorts of matters which very senior public servants in a central government agency are expected to address as part of their leadership and management responsibilities.

105. The agency has drawn a distinction in its submissions between inquiries conducted under Division 3 of Part 3A of the *Public Sector Management Act 1994* and Part 5 of that Act, and says that the agency's Director General carried out the inquiry in the performance of his general administrative function, under which he has no express legislative power to compel officers of the agency to provide information.

106. However, I am not persuaded that if the disputed documents were disclosed, public servants' willingness to co-operate with inquiries would substantially be compromised. This amounts to a 'candour and frankness' argument that has been consistently rejected in this jurisdiction, for examples of which see *Re Rindos* at [37], *Mahony and City of Melville* [2005] WAICmr 4 at [41] and also by the Commonwealth Administrative

Appeals Tribunal in *Re Murtagh and Commissioner of Taxation* (1984) 54 ALR 313 at [316] with reference to similar provisions in the Commonwealth FOI Act:

> *the candour and frankness argument is not new. It has achieved pre-eminence at one time but now has been largely limited to high level decision-making and to policy-making…no cogent evidence has been given to this Tribunal either in this review or, so far as we are aware, in any other, that the enactment of the FOI Act 1982 has led to an inappropriate lack of candour between officers of a department or to a deterioration in the quality of work performed by officers. Indeed the presently perceived view is that the new administrative law, of which the FOI Act 1982 forms a part, has led to an improvement in primary decision-making.*

107. In *Re Rindos* at [38] the Commissioner said:

> *If I were to accept the agency's arguments based on 'candour and frankness', that would mean that I acknowledge as reasonable its claim that professional academic members of the agency, and other like agencies, will only make honest but adverse comments and criticisms about other members of their profession if they can do so behind the cloak of confidentiality. In my view, such a claim is inconsistent with the ethical standards expected of professionals in the academic world and elsewhere. Further it is not supported by any credible evidence before me.*

108. I agree with this view and consider that as public officers – in addition to their contractual obligations as employees – are bound by a public sector code of ethics and a code of conduct, the agency's claim that officers would be reluctant to provide information in the future is inconsistent with the standards and values contained in those codes.

109. The agency asserted that no evidence contradicting the prospect of those adverse effects has been provided by the complainant. It is not a requirement under the FOI Act that the complainant provide such evidence. The onus of proof pursuant to section 102(1) rests squarely with the agency to establish that its decision was justified.

110. I am not satisfied that the agency's claim under clause 11(1)(c) is made out. I am not convinced on the evidence before me that disclosure of the disputed documents could reasonably be expected to have a substantial adverse effect on the agency's management or assessment of its personnel. Accordingly, I find that the disputed documents are not exempt under clause 11(1)(c) of Schedule 1 to the FOI Act.

111. Since I am not satisfied that clause 11(1)(c) is made out, I do not need to consider whether the limit on the exemption in clause 11(2) applies and whether disclosure of the disputed documents would, on balance, be in the public interest. However, for the reasons given earlier in this decision, I consider that the public interest favours disclosure of the disputed documents in any event.

SECTION 24 – EDITING

112. Section 24 of the FOI Act provides that if an applicant seeks access to a document containing exempt matter, the agency must give the applicant a copy of the document from which the exempt matter has been deleted if it is 'practicable' to do so.

Agency submissions – section 24

113. The agency submitted in its notice of decision dated 27 May 2014 that:

- in *Re Post Newspapers Ltd and Town of Cambridge* [2006] WAICmr 25 (***Post Newspapers***) at [65] it was considered that when an applicant applied for information about known individuals, it would generally not be possible for any documents to be edited in any way so as not to disclose personal information about those individuals; and

- the documents are inextricably intertwined with very sensitive information relating to the health and wellbeing of government officers, medical advice and the personal views and opinions of third parties who voluntarily provided information to the agency's investigation.

114. The agency submitted on 5 December 2014 that:

- *The inquiry related to unusual and uncommon events and also to issues concerning the health and safety of individuals which were, to a large extent, outside the performance of the functions of an officer of the agency. As a result it is submitted that the editing of the disputed documents is not as easily undertaken as you have suggested in your preliminary view letter. The editing undertaken by the agency for the purpose of the third party consultation was undertaken on the basis that the majority of the third parties consulted were, in fact, already privy to the information in the disputed documents. As disclosure under the FOI Act is 'at large' it cannot be said that the public 'at large' is in the same position as those particular third parties.*

- *Careful and precise editing of the disputed documents may allow a reader to gain some information which may be categorised as intelligible, in the circumstances of this matter it is submitted that the disputed documents would be so substantially altered as to make them misleading.*

115. I have already considered these submissions in my analysis of clause 3(6) above. However I now turn to whether it is practicable for the agency to edit the disputed documents to remove information which is out of scope.

Consideration – section 24

116. In *Police Force of Western Australia and Winterton* (1997) WASC 504, Scott J said:

> *It seems to me that the reference to the word 'practicable' is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way*

> *that the document does not lose either its meaning or its context. In that respect, where documents only require editing to the extent that the deletions are of a minor and inconsequential nature and the substance of the document still makes sense and can be read and comprehended in context, the documents should be disclosed. Where that is not possible, however, in my opinion, section 24 should not be used to provide access to documents which have been so substantially altered as to make them either misleading or unintelligible.*

117. The information that is proposed to be deleted from the disputed documents consists of the excluded information as described at paragraph 21 of this decision, which includes information about the health and wellbeing of individuals. The reason for this deletion is to remove information which is out of scope, rather than information which is exempt. For this reason, I consider that section 24 of the FOI Act is not directly applicable. However, I have in any event considered whether it is practicable to delete information which is out of scope.

118. I consider that, after the excluded information is deleted, the disputed documents will still retain their meaning and context. In my view, the agency demonstrated that it was practicable to delete this information when it consulted with third parties as noted at paragraph 48 of this decision. Accordingly, I am of the view that it is practicable for the agency to give the complainant access to edited copies of the disputed documents, edited to delete the excluded information.

CONCLUSION

119. I find that the disputed documents, edited to delete the excluded information, are not exempt under clauses 3 or 11(1)(c) of Schedule 1 to the FOI Act.

****