| OFFICE OF THE INFORMATION COMMISSIONER (W.A.) | File Ref: F2004158<br>Decision Ref: D0072006 |
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Participants:

**Conservation Council of Western Australia (Inc)**
Complainant

- and -

**Western Power Corporation**
Respondent

## DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to power procurement process – clause 10(4) – commercial affairs of an agency – whether documents concern the commercial affairs of an agency - whether disclosure could reasonably be expected to have an adverse effect on those affairs - clause 10(6) - whether disclosure, on balance, in the public interest.

***Freedom of Information Act 1992 (WA***): sections 74(1), 74(2) and 102(3); Schedule 1, clause 10(4)
***Freedom of Information Act 1982 (Cth***)
***Electricity Corporation Act 1994 (WA)***: Sections 4(1), 7, 28(1), 28(2) and 31; Schedule 7

***Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft*** (1986) 10 FCR 180
***Searle Australia Pty Ltd and Public Interest Advocacy Centre and Another*** (1992) 36 FCR 111
***Manly v Ministry of Premier and Cabinet*** (1995) 14 WAR 550
***Police Force of Western Australia v Winterton*** (1997) WASC 504
***Re Rogers and Water Corporation and Others*** [2004] WAICmr 8
***Re Rindos and University of Western Australia*** [1995] WAICmr 20

## DECISION

The decision of the agency is varied. The requested documents are exempt under clause 10(4) of Schedule 1 to the *Freedom of Information Act 1992*.

D A WOOKEY
A/INFORMATION COMMISSIONER

31 March 2006

## REASONS FOR DECISION

1. This complaint arises from a decision made by Western Power Corporation ('the agency'), to refuse the Conservation Council of Western Australia (Inc) ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act').

## BACKGROUND

2. The agency is a corporatised utility established under section 4(1) of the *Electricity Corporation Act 1994* ('the EC Act') on 1 January 1995 - when the former State Energy Commission of Western Australia was split into separate gas and electricity utilities - and wholly owned by the Western Australian Government. In 2000, section 4(1) of the EC Act was amended to change the corporation's name to Western Power Corporation. The agency is an agent of the Crown but is not part of the public service.

3. The agency's functions, insofar as they are relevant, are described in section 28 of the EC Act, as follows:

> "*(1) The functions of the corporation are -*
>
> *(a) to generate, acquire, exchange, transport, distribute, market and otherwise supply electricity;*
> *(b) to undertake, maintain and operate any works, system, facilities, apparatus or equipment required for any purpose referred to in paragraph (a);*
> …
>
> *(2) It is also a function of the corporation -*
>
> *(a) to use or exploit its fixed assets for profit so long as the proper performance of its functions under subsection (1)(a) and (b) is not affected;*
> *(b) to do anything that the corporation determines to be conducive or incidental to the performance of a function referred to in subsection (1)".*

4. As a part of reforms made to the electricity industry for the purpose of increasing competition in the wholesale electricity market, the agency is currently conducting a Power Procurement Process ('the Process') in two stages, in accordance with the requirements of the EC Act. The Process seeks to competitively source 300MW to 330MW of new generation capacity by late 2008. With the deregulation of the electricity market, generators of energy, other than the agency, are expected to enter the market to supply electricity.

5. In 2002, the agency embarked on Stage 2 of the Process which has three phases. Phase one was the calling of Expressions of Interest from persons

wishing to participate in Stage 2 of the Process and supply electricity to the agency for the South Western Interconnected System ('SWIS'). The SWIS is the agency's fully integrated transmission and distribution systems which range from Perth in the west to Kalgoorlie in the east and from Kalbarri in the north to Albany in the south.

6. Schedule 7 of the EC Act stipulates that, whenever required, the agency must procure substantial new generation through non-discriminatory and open procurement processes. In March 2003, the agency appointed a probity auditor to oversee matters pertaining to fairness and equity between persons proposing to supply the new generating capacity to the agency. On 19 December 2003, the then Minister for Energy announced the formation of a Steering Group to oversee the Process and ensure that it is consistent with the Government's policy and electricity reform objectives.

7. Successful respondents to the Expressions of Interest were invited to participate in the second phase, being the Request for Proposal ('RFP') stage. As I understand it, in July 2003, successful respondents to the Expressions of Interest became 'proponents' on executing an RFP Agreement, after which, on 27 April 2004, the agency issued the RFP to the proponents. Seven proponents qualified to participate in the RFP phase and submit non-binding proposals in response to the RFP.

8. On 8 June 2004, the complainant applied to the agency for access under the FOI Act to:

   (1) A copy of the RFP issued to tender applicants under Stage 2 of the Process.

   (2) A copy of the Terms of Tender for Stage 2 of the Process as finalised at the meeting of the agency's Board of Directors ('the Board') on 15 April, 2004.

   (3) A copy of the reports undertaken for the agency by PricewaterhouseCoopers and Charles River Associates regarding the revision of tender terms to reduce the agency's financial exposure to the winning tenderer's contract.

   (4) The guidelines used by the agency in assessing the tenders in the Process.

9. On 26 July 2004, the agency, without identifying the particular documents that it had located, refused the complainant access to those documents on the basis that all were exempt under clause 4 of Schedule 1 to the FOI Act. The agency did not identify the particular subclause of clause 4 under which the exemption was claimed. With regard to the Terms of Tender, the agency advised the complainant that there had been no Board meeting on 15 April 2004 at which the Process was considered but that it had identified certain documents that could be described as the "Terms of Tender" considered at other Board

meetings that month. The complainant requested an internal review of that decision.

10. On 13 August 2004, the agency confirmed its initial decision and identified the particular subclause relied upon as clause 4(2) of Schedule 1 to the FOI Act. Once again, the agency did not identify the documents the subject of the exemption claim. On 23 August 2004, the complainant applied to the Information Commissioner for external review of the agency's decision.

11. Thereafter the Process continued and by 6 August 2004, the closing date for the lodgement of proposals in response to the RFP, five proponents had lodged proposals.

12. On 26 October 2004, the agency announced publicly the names of the three proponents short-listed on the basis of their responses to the RFP to participate in phase three, or the Final Bid Phase, which would result in the selection of the Preferred Bidder to build the power station.

13. In June 2005, final bids to select a Preferred Bidder closed, at which stage legally binding, fully documented, costed and funded bids were required from the three short-listed Bidders. On 16 August 2005, the agency announced that Wambo Power Ventures Pty Ltd ('Wambo') had been declared the successful bidder. As Preferred Bidder, Wambo - under the trading name of NewGen Power - will ultimately build a 320MW gas fired combined cycle power station to enter commercial service by 30 November 2008 and enter into power purchase arrangements with the agency in accordance with the terms sheets attached to the RFP.

## REVIEW BY THE A/INFORMATION COMMISSIONER

14. In my opinion, the agency's notices of decision to the complainant are deficient because they do not give the details required to be provided by section 30(f) of the FOI Act. Section 30(f) provides:

> "*The notice that the agency gives the applicant under section 13(1)(b) has to give details, in relation to each decision, of -*
>
> …
>
> *(f) if the decision is to refuse access to a document - the reasons for the refusal and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based.*"

15. The material facts are those which are necessary to constitute the exemption claimed. 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 agency did here does not satisfy the requirements of section 30(f). Moreover, the agency's original decision did not differentiate between the separate subclauses of clause 4, all of which relate to discrete exemptions.

16. In the course of dealing with this complaint, I received a number of submissions from the agency explaining why the requested documents are exempt. In my opinion, the agency and the complainant would have been better served had the agency set out those explanations in its notices of decision to the complainant.

17. Unless an agency sets out in its notices of decision 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.

18. As a result of the deficiencies in the agency's notices, I asked the agency to provide me with additional information and material in support of its claim that the disputed documents are exempt under clause 4(2). The agency provided me with that information on 15 September 2004. On 29 September 2004, its solicitors provided me with submissions in relation to additional claims by the agency that the disputed documents are exempt under one or more of clauses 4(2), 4(3), 6(1), 8, 10(1), 10(3), 10(4) and 11(1)(a) of Schedule 1 to the FOI Act.

19. The complainant also made submissions to me in relation to the question of public interest and advised that it was prepared to accept access to the documents from which personal information and information concerning sensitive commercial prices or charges had been deleted.

20. On 14 June 2005, I provided the parties with a letter setting out my preliminary view of this complaint, based on the information before me at that time. My preliminary view was that one document was outside the scope of the access application and that certain documents or parts of documents were exempt under clause 10(4) but that the remaining documents or parts of documents were not exempt as claimed by the agency.

21. The agency provided me with its submissions in response to that letter on 13 July 2005 and the complainant initially accepted my preliminary view. However, on 16 August 2005, the agency announced the name of the Preferred Bidder. Since some of the agency's previous submissions related to the fact that the Preferred Bidder had yet to be chosen, the agency was asked whether it wished to make additional submissions relevant to that matter and the complainant advised that, in light of that development, it wished to pursue access to all of the disputed documents. On 7 October 2005, the agency made further submissions to me which were given in edited form to the complainant, who provided me with its comments on 2 December 2005.

## SCOPE OF THE ACCESS APPLICATION

22. In response to my notice to the agency to produce the originals of each of the documents the subject of the agency's notice of decision on internal review, the agency provided me with 12 documents. However, the agency afterwards

advised that Document 1 does not come within the scope of the complainant's access application but was given to me as background material.

23. Having examined the complainant's access application and the relevant document, I consider that the latter is not one of the four kinds of document specified by the complainant and, thus, is not within the scope of the access application. Consequently, I do not need to deal further with Document 1.

## THE DISPUTED DOCUMENTS

24. **Document 2** is part of the RFP documents issued to tender applicants under Stage 2 of the Process. It is essentially an invitation by the agency for proposals to procure new generation capacity for the SWIS**.**
**Document 3** is a Tradable Purchase Agreement ('TPA') which details the terms under which the agency will be obtaining electricity from the Preferred Bidder.
**Document 4** is an Available Capacity Agreement ('ACA') which details the obligations of the Preferred Bidder.
**Documents 5-11** are copies of reports prepared for the agency by independent consultants PricewaterhouseCoopers ('PWC') and Charles River Associates ('CRA').
**Document 12** is the detailed guidelines used by the agency in assessing the responses of the proponents to the RFP.

## THE AGENCY'S CLAIMS FOR EXEMPTION

25. The agency claims that:

- Documents 2, 3 and 4 are exempt under clauses 4(2), 6, 10(1), 10(3) and 10(4);
- Documents 5-11 are exempt under clauses 4(2), 4(3), 6, 8, 10(1), 10(3) and 10(4); and
- Document 12 is exempt under clause 6, 10(1), 10(3), 10(4) and 11(1)(a).

## CLAUSE 10 - THE STATE'S FINANCIAL OR PROPERTY AFFAIRS

26. The agency claims that Documents 2-12 are exempt under subclauses (1), (3) and (4) of clause 10 of Schedule 1 to the FOI Act.

27. Clause 10 provides, insofar as is relevant:

> *"(1) Matter is exempt matter if its disclosure could reasonably be expected to have a substantial adverse effect on the financial or property affairs of the State or an agency.*
>
> *(2)* …

*(3) 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.*

*(4) 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."*

*(5) …*

***Limit on exemptions***

*(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."*

28. Clause 10 reflects the commercial reality that State and local governments are increasingly engaged in commercial activities and ensures that the business and commercial affairs of government agencies, conducted by those agencies for, and on behalf of, the public of Western Australia, are not jeopardised by the disclosure of documents under the FOI Act containing commercial information, unless there is a public interest that requires the disclosure of such documents.

29. From the specific words of clause 10, it is clear that the exemptions in subclauses (1), (3) and (4) are directed at protecting three different kinds of information from disclosure under the FOI Act. Whilst it is open to an agency to claim exemption for documents or parts of documents under more than one subclause, as a matter of construction the same information, in my view, cannot be exempt under more than one of the subclauses of clause 10.

30. In this case, I understand that the agency claims that the disputed documents are exempt under one of those provisions but has put arguments in the alternative as to which is applicable.

31. Since my preliminary view was that certain documents and parts of documents were exempt under clause 10(4), I have considered that exemption clause first, in light of the additional submissions made by the agency. Although the agency made specific submissions concerning Documents 2, 3, 4 and 12 in response to my letter of 14 June 2005, it advises that those submissions are also relevant in part to Documents 5-11.

## Clause 10(4) - commercial affairs of an agency

32. The exemption provided by clause 10(4) is more general in its terms than that in clauses 10(1) and 10(3). It is directed at protecting the commercial affairs of the State or an agency from adverse effects so that the competitive positions of those bodies are not undermined and so that they are not placed at a commercial disadvantage. Unlike the 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 the "commercial affairs" of the State or an agency. However, in my view, the commercial affairs of an agency may also include its business and financial affairs.

### *The agency's submissions*

33. The agency provided me with information and submissions in relation to its claims for exemption on 15 and 29 September 2004, 14 and 22 October 2004 and - following the receipt of my preliminary view - on 13 July 2005 and 7 October 2005.

34. The agency says that it is currently undergoing disaggregation into four new stand-alone energy businesses having responsibility for electricity generation; electricity transmission and distribution; retailing electricity; and providing electricity to regional areas. The corporation responsible for retailing electricity ('Synergy') will assume responsibility for the procurement and will be the body that ultimately enters into the TPA and ACA with the Preferred Bidder. I understand the agency will commence operation in its disaggregated form in April 2006 and that the four new entities, including Synergy, will be agencies for the purposes of the FOI Act. The agency in its current form will, therefore, no longer exist, so any adverse effects that could reasonably be expected to follow from disclosure of the disputed documents could not affect the affairs of the agency as it is today. However, the business of the agency will continue in its new, disaggregated form and, except where specified, I have used the term "the agency" in that context - that is, when discussing the commercial affairs of the agency - to refer to the agency as it is today and as it will be, in its disaggregated form, from April 2006.

35. The agency says that, as a result of the deregulation of the electricity market in Western Australia, 60% of the agency's retail market has already been exposed to competitor retailers and by 2012 100% of that market will be subject to competition between Synergy and its retail rivals. In addition, the agency says that electricity retail markets are typically highly competitive and operate on small margins of revenue above cost (say, up to 3%). In that context, the agency submits that its competitors are other retail sellers of electricity in the market.

36. The agency also advises that none of the disputed documents has been provided to the retail competitors of the agency and explains that, although they have been given copies of Documents 2, 3 and 4, the proponents are bodies that generate but do not, as yet, retail electricity. Consequently, the proponents are competitors in relation to the generation of electricity only.

The agency submits that the commercial information in Documents 2, 3, 4 and 12 is of value to its retail competitors because it discloses the terms upon which the agency acquires electricity which it then retails to customers.

37. The agency says that the announcement of the Preferred Bidder does not change the characterisation of the information contained in the documents as commercially sensitive or valuable information.

38. In brief, as I understand it, the agency submits that the disclosure of Documents 2-12 could reasonably be expected to have an adverse effect on its commercial and financial affairs because:

- they would reveal information concerning the commercial and financial affairs of the agency, which is commercially sensitive and of value to the agency's wholesale competitors, any future retail competitors, other suppliers to the agency and current or future customers of the agency since it could be used to undercut the agency's costs and negotiate better wholesale prices or supply contracts against the agency;

- they would reveal information about the terms on which the Preferred Bidder sells - and the agency purchases - some of its electricity supplies, which would compromise legitimate competition in the electricity market, diminish the commercial value of that information and expose the agency to the risk of obtaining less favourable terms than it otherwise would;

- they may enable competitors in the electricity market to better understand the basis on which the agency seeks to purchase some of its electricity supplies;

- they would give the agency's competitors an advantage if they intend to enter into power procurement contracts because they would have to perform a similar analysis and draft similar RFPs and evaluation reports;

- they would disclose information about the agency's risk analysis in entering into the TPA and the ACA, which could adversely affect its continuing negotiations with the Preferred Bidder; and

- it would be unfair and prejudicial for its competitors to gain access to the agency's commercial know-how - which is contained in those documents - free of charge.

<u>Documents 2, 3, 4 and 12</u>

39. The agency submits that, while Documents 2, 3 and 4 do not contain any financial figures, they do contain commercially sensitive information because of the unique and innovative structure of the agreements. The agency says that, to its knowledge, no other retailer of electricity acquires electricity on those terms.

40. The agency has provided me with information concerning the novel concept set out in those documents which I am unable to disclose since 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. Further, section 74(2) places an obligation on the Information Commissioner "…not to include exempt matter, or information of a kind referred to in subsection (1)(b), in a decision on a complaint or in reasons given for the decision." Consequently, I am constrained from describing that concept in more detail and from discussing in detail the evidence on which my decision is based, because to do so would be a breach of my obligations under section 74(2).

41. In essence, the agency submits that the commercial information in Documents 2, 3, 4 and 12 is of value to its retail competitors because it discloses the terms upon which the agency acquires electricity which it then retails to customers.

42. The agency advises that the common practice for electricity retailers is to acquire energy from electricity generators in long term contracts with fixed capacity payments and a fixed energy price. However, consumer demand for electricity fluctuates over time. To the extent that a retailer sells more energy than it is able to acquire, it must acquire the additional capacity at a spot rate which is frequently more expensive than the fixed price.

43. Conversely, the agency advises, if a retailer sells less electricity than it has acquired, it must bear the cost of the additional capacity it acquires, unless it is able to sell it to another retailer. The agency says that this "market risk" is traditionally borne by the retailers but that the agreements contemplated in Documents 3 and 4 represent a significant innovation and a novel method by which electricity retailers can acquire electricity from electricity generators, for reasons which it has explained to me but which I do not consider I can detail without breaching my obligations under section 74 of the FOI Act.

44. The agency submits that it has spent considerable time and expense in developing this concept, which gives it a competitive advantage over its retail rivals.

45. The agency submits that the commercial sensitivity of Documents 2, 3 and 4 is evidenced by the fact that the agency entered into an agreement with each proponent, which includes mutual confidentiality obligations to protect that commercial information.

46. The agency also submits that the disclosure of Documents 2, 3 and 4 could reasonably be expected to have a substantial adverse impact on the financial affairs of the agency or on the value of the State's ownership of the agency, particularly given the considerable value of the contracts being formed and the long duration of the Terms Sheets, because their disclosure would reveal commercially sensitive and valuable information to the agency's competitors, suppliers and customers, which would enable them to undercut the agency's costs and offer electricity at lower prices, and negotiate better wholesale prices or supply contracts against the agency.

47. The agency has provided me with information to establish that the associated contracts will involve a substantial cost stream to the agency over a period of 25 years. The agency submits that if Synergy were to be adversely affected to even a small extent this would still be a "substantial" adverse effect on Synergy's financial affairs. The agency says that the magnitude of the tender proposal and the long term nature of the contracts mean that even if the impact of disclosing these documents is small in percentage terms, it will nevertheless have a significant adverse monetary impact on Synergy.

48. Document 12 sets out the deliberative processes and criteria used by the agency to select the short-list of proponents to participate in the Final Bid Phase. The agency says: "*It is a one-off document specifically created for this tender and includes pricing information and other commercially sensitive information*" and that its circulation was restricted to the Power Procurement Reference Group for the purpose of approving the plan and to the evaluation team for the conduct of the proposal evaluation.

49. The agency submits that Document 12 reveals not only the evaluation criteria but also the broader policy and market objectives of the agency, so that disclosure to the agency's competitors and customers would be prejudicial to its commercial affairs.

50. The agency submits that the disclosure of Document 12 would:

- give its competitors information about the basis on which the agency seeks to make decisions about the purchase of some of its electricity supplies, which could compromise the Process and diminish the commercial value of that information;

- reveal sensitive information concerning the agency's opinions on its market risk; information about its pricing structures and certain other information which the agency has described to me; and

- give its competitors an understanding of the agency's commercial position which could be used against the agency in negotiations with the Preferred Bidder and which could also be used by competitors, existing suppliers or wholesale customers to undercut the agency's costs or negotiate better prices from the agency.

51. The agency also submits that it is currently continuing its negotiations with the Preferred Bidder and those negotiations may be adversely affected by the release of Document 12 because it discloses information about the agency's risk analysis in entering into the TPA and ACA.

52. In the alternative, in the event that I do not find that Documents 2, 3, 4 and 12 are exempt in full, the agency submits that particular information in those documents, which it has identified to me, is exempt.

53. The agency submits that, for the reasons given here, disclosure of the disputed documents could reasonably be expected to have an adverse effect on the commercial affairs of the agency.

### *Consideration*

54. I am satisfied that the agency is in the business of producing and selling electricity in line with its primary functions as set out in section 28 of the EC Act and that those activities are part of its commercial affairs. Having examined Documents 2-12, I accept that they relate directly to the carrying on of those activities and that the disclosure of those documents would reveal information concerning the commercial, business and financial affairs of the agency. Consequently, I consider that the requirements of paragraph (a) of clause 10(4) are satisfied, in this case.

55. The next question is whether the disclosure of the disputed documents could reasonably be expected to have an adverse effect on the agency's commercial affairs.

56. The phrase 'could reasonably be expected' appears in a number of exemption clauses in the FOI Act. In *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180 at page 190, the Full Federal Court said that the words "*could reasonably be expected*" in the *Freedom of Information Act 1982* (Cth) were intended to receive their ordinary meaning and require a judgment to be made by a decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the stated consequences to follow if the documents in question were disclosed.

57. The meaning of the phrase was also considered by the Full Federal Court in *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Another* (1992) 36 FCR 111. In that case, the court held that, on an objective view of the evidence, there must be real and substantial grounds for expecting certain consequences to follow from the disclosure of documents. I consider that *Cockcroft* and *Searle* correctly state the test to be applied when considering the phrase "*could reasonably be expected*" in clause 10(4).

58. I also consider that the standard of proof required does not have to amount to proof on the balance of probabilities but must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision-maker: see the comments of Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at page 573.

59. I accept that the agency is required, wherever possible, to return a profit to the State and, ultimately, to the people of Western Australia. I also accept that the agency is in competition with the private sector to supply power at competitive rates and that the deregulation of the electricity market will result in increased competition in retailing electricity.

60. Based on the additional information now provided to me by the agency, I also accept that the structure of the TPA and the ACA represents a significant innovation in the area of power procurement.

61. I have examined Documents 2-12. Document 2 is the invitation to the proponents to submit a proposal for the purpose of compiling a short-list from which the agency selected the Preferred Bidder. It is marked "confidential" throughout and it appears to me to contain primarily factual and technical information, some of which is information that is in the public domain, for example, information concerning the Process and the statutory framework.

62. I note that clause 4 of Schedule 7 to the EC Act obliges the agency to make a description publicly available - upon payment of the prescribed fee - of the process to be adopted in the procurement of any particular substantial new generation. The description for the Process is contained in a document entitled "SWIS POWER PROCUREMENT - Overview Document - STAGE 2 - 300MW - 330MW Baseload Capacity" ('the Overview Document'), which provides a general background to - and overview and outline of - the Process.

63. In relation to the RFP (Document 2), the Overview Document states:

"*The RFP will require responses from the Proponents in the following areas:*

*(a) A more detailed list of questions relating to matters such as power plant design, construction and development experience, power plant operating experience, satisfactory corporate and compliance standards and capability, financial capability and financing plans and fuel supply. These are to be supported, where relevant, with appropriate documentation.*

*(b) A review of the Terms Sheets for the Project Agreements setting out any major changes to the terms and conditions as requested by the Proponents.*

*(c) Indicative bids on the major financial parameters of the project and the operating characteristics of the proposed plant."*

64. Accordingly, the information set out in (a)-(c) above, is information that is publicly available. I acknowledge the agency's submissions that this is only general information and does not include the specific detail contained in Document 2 but the agency has not explained to me how, for example, the disclosure of the more detailed list of questions relating to power plant design is commercially sensitive and could reasonably be expected to have an adverse effect on its commercial affairs.

65. In its letter to me of 13 July 2005, the agency identified, in points 5.6 and 5.7 of that letter, the information in Document 2 which it considered to be particularly commercially sensitive, in the event that I was not persuaded that Document 2 was exempt in its entirety.

66. Having examined Document 2, I accept that the disclosure of the information identified to me by the agency would reveal the agency's pricing structure,

acquisition arrangements and other sensitive quantitative information. I accept that the disclosure of that information could reasonably be expected to disadvantage the agency if obtained by its retail competitors since it could be used to undermine its competitive position based on the particular arrangements contemplated. I consider that the requirements of paragraph (b) of clause 10(4) are satisfied in respect of that information and I find that it is *prima facie* exempt. I am not persuaded, however, that the balance of the document is exempt.

67. However, in my view, having considered the information remaining in Document 2 - which includes some information that is clearly in the public domain - I have concluded that it is not practicable to edit that document in order to delete the information which, in my view, is *prima facie* exempt under clause 10(4), for the reason set out below.

68. Section 24 of the FOI Act provides:

"*If -*

*(a) the access application requests access to a document containing exempt matter; and*

*(b) it is practicable for the agency to give access to a copy of the document from which the exempt matter has been deleted; and*

*(c) the agency considers (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to an edited copy,*

*the agency has to give access to an edited copy even if the document is the subject of an exemption certificate."*

69. The application of section 24, and particularly the qualification contained in paragraph (b), was discussed by Scott J in *Police Force of Western Australia v Winterton* (1997) WASC 504 at page 16, as follows:

"*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, s.24 should not be used to provide access to documents which have been so substantially altered as to make them either misleading or unintelligible."*

70. In the present case, I consider that, if Document 2 were edited to delete the information that I consider to be *prima facie* exempt, although the document

would not be totally meaningless - it would provide information, for example, about the Process and its background - it would lose its context in that the structure of the arrangements would not be disclosed. In my view, Document 2 is one of a suite of interrelated documents setting up a particular process, based on a specific set of arrangements. In light of my findings in respect of Documents 3 and 4, below, I consider that to provide the complainant with an edited copy of Document 2 would be to give access to a document that is essentially misleading or unintelligible in context, as described in *Re Winterton.*

71. Documents 3 and 4 are the agreements entered into by the proponents, which set out the terms of tender for Stage 2 of the Process. I understand that those proponents entered into an RFP Agreement with the agency which covered all of the information provided by the agency and that the intellectual property in that information vests with the agency.

72. Having examined those documents, I accept that they contain information concerning the terms under which the agency will acquire electricity from the Preferred Bidder and terms under which the Preferred Bidder will supply electricity to the agency. I am satisfied that the disclosure of that information could reasonably be expected to have an adverse effect on the commercial affairs of the agency because it would disclose the arrangements under which it acquires some of its electricity, thus undermining its competitive edge, particularly given the novelty of the arrangement. In my view that information in Documents 3 and 4 satisfies the requirements of clause 10(4)(b).

73. Although both documents contain a certain amount of information which could be described as "nuts and bolts" terms, I consider that it would not be practicable to delete the information which, in my view, is *prima facie* exempt under clause 10(4) because the remainder of the information in those documents would not be intelligible in context.

74. Documents 5-11 relate to the financing of the project and examine issues relevant to the Process. Document 5 is marked "Confidential Draft". Documents 9 and 10 are marked "Draft for Discussion". Approximately 10% of the information in Document 5 - which the agency has identified to me - is information that is publicly available. Documents 6, 7, 8, 9, 10 and 11 examine various aspects of, and issues relevant to, the Process.

75. The agency advises that, in order to assist it in preparing the RFP and the terms sheets, the agency engaged Charles River Associates ('CRA') and PricewaterhouseCoopers ('PWC') on a confidential basis to consider various financial aspects of this deal. For example, PWC produced an Initial Bankability Report (Document 5) to determine whether the proposed deal was structured in a way that is commercially viable for both the agency and the Preferred Bidders. Documents 6-11 are various papers and drafts prepared by CRA. Those documents contain various issues raised by CRA relating to the structure of the terms sheets.

76. Having considered those documents, I accept that their disclosure – other than the information in Document 5 which is already publicly available and which the agency has identified to me – could reasonably be expected to have an adverse effect on the agency's commercial and financial affairs because they give an insight into its approach to risk allocation and financing.

77. I accept that the disclosure of this information could reasonably be expected to undermine its negotiations with the Preferred Bidder and could adversely affect its commercial dealings with its competitors and suppliers, because they contain discussion of financing, approaches to risk allocation and options and strategies relevant to the Process, which could be used by the Preferred Bidder to tailor its responses and by its competitors to gain an insight into the options open to, and the limits on, the agency and enable those competitors to copy the agency's approaches or better them. Accordingly, I find that the requirements of paragraph (b) of clause 10(4) are satisfied in respect of Documents 6-11 and those parts of Document 5 which do not contain information that is already publicly available.

78. The information in Document 5 which is already publicly available cannot be exempt in my view. It cannot logically be argued that any adverse effect could be expected to follow from making available information that is already available. I find, therefore, the requirements of clause 10(4)(b) are not made out in respect of that information. However, having viewed the small amount of information in Document 5 (approximately 10%) which is publicly available, I consider that it would not be practicable, in this instance, to give access to it since, without the greater part of Document 5 which comprises the remainder of that document, it would be meaningless.

79. The agency advises that Document 12 is an internal document but that information on pages 1-2 and 11 of Document 12 has been given to the proponents in the form of Addendum #1 to the RFP (Document 2), which describes certain contents of the evaluation plan.

80. In relation to Document 12, the Overview Document states:

"*The proposals at the RFP Phase will be evaluated on the following broad criteria:*

*(i) The capabilities demonstrated in the response to the questions in (a) above, especially to the extent to which they indicate the risk profile of the Proponents. Particular emphasis will be placed on issues such as deliverability and commitment of resources to the project, supported by a credible financing and development plan. In forming a view of the risk profile of Proponents, account will be taken of the number and severity of the changes requested to the Terms Sheets for the Project Agreements and any associated impact on Western Power.*

*(ii) Proponents will be ranked on the basis of their indicative bids on the major financial parameters of the Project.*

*The Proponents will be short-listed based on a combined evaluation of the response to criteria (i) and (ii). In this process, recognition will be given to the likely inverse relationship between Proposals offering a better risk profile and those offering better prices."*

Accordingly, the information set out in (i) and (ii) is public information.

81. The agency has identified to me information in Document 12 which relates to the novel structure of its agreements as set out in the TPA and the ACA, its risk analysis and its pricing structure. The agency claims that that information could be used by competitors, suppliers or customers to undercut the agency's costs or negotiate better prices from the agency because it contains information about the broader policy and market objectives of the agency which goes beyond merely establishing the evaluation criteria for selecting the Preferred Bidder.

82. Having examined Document 12 in light of the additional information provided to me by the agency, I accept that it contains sensitive commercial information, the disclosure of which could reasonably be expected to have an adverse effect on the agency's commercial affairs. In my view, the information relating to the TPA, the ACA, its risk analysis and its pricing structure is information which could be used by the agency's competitors to understand the basis of its decision-making concerning its procurement of electricity and to expose the agency to commercial disadvantage by undermining its ability to obtain the best commercial terms it can in a competitive market.

83. Again, I have considered the possibility of editing Document 12. In my view, it would not be practicable to edit that document in such a way that it would remain meaningful in context.

84. Accordingly, I find that Documents 6-11, and parts of Documents 2, 3, 4, 5 and 12, are *prima facie* exempt under clause 10(4) and that it is not practicable to delete the *prima facie* exempt information from the latter and provide the complainant with edited copies of those documents.

**Public interest**

85. Clause 10(6) provides that matter is not exempt under clause 10(4), among others, if its disclosure would, on balance be in the public interest. The question that next arises therefore is whether the disclosure of Documents 2-12 would, on balance, be in the public interest. Under s.102(3) of the FOI Act, the complainant bears the onus of establishing that disclosure would, on balance, be in the public interest.

### *The complainant's submissions*

86. The complainant says that it is seeking access to the disputed documents to ensure that the State's long-term energy planning and decision-making is carried out in a transparent and accountable manner with the best long-term financial and environmental interests of both the Western Australian and global communities in mind, rather than the short-term financial interests of either the agency or its existing or potential competitors.

87. Further, the complainant advises that it is also seeking access to the disputed documents in line with the obligation under its Constitution "*to promote conservation and environmental protection throughout the State of Western Australia*" and that it is committed to ensuring that:

    (a) Western Australians meet their ethical obligations to reduce greenhouse gas emissions, which are causing global warming; and
    (b) Australia meets its legal obligations under the United Nations Framework Convention on Climate Change ('UNFCCC') to contribute towards the stabilisation of concentrations of greenhouse gas emissions in the atmosphere at a level that would prevent dangerous interference with the climate system (UNFCCC, Article 2).

88. The complainant advises that it is primarily seeking access to the criteria used for assessing tenders and it is prepared to accept documents edited to remove:

    - references to the potential of tenderers to meet those criteria;
    - sensitive commercial prices or charges, except to the extent that they would reveal a distortion of the agency's decision-making that favoured one fuel over another in contravention of Schedule 7 of the EC Act; and
    - personal information.

89. In its letter to me of 23 August 2004 seeking external review of the agency's decision, the complainant submitted that the agency is a statutory authority and, therefore, in carrying out the procurement of new power generation as required by Schedule 7 of the EC Act, the agency is carrying out a public function. Accordingly, the complainant submitted that the transparency and accountability of the Process are critical.

90. The complainant acknowledges that the agency is not legally required to include an assessment of greenhouse gas emissions but says that it has an interest in ensuring that the Process fulfils its legal obligations, set out under Schedule 7 of the EC Act.

91. The complainant considers that the minutes of the Board - which is a statutory authority - should be on the public record. The complainant says that the Process is overseen by the SWIS Power Procurement Steering Group, whose Charter states that "*The Steering Group therefore has a review and advisory role and will not be involved in the conduct of the Process, the evaluation of proponent responses or the selection of preferred proponent(s).*" The complainant submits that, since there has been some suggestion that the

Steering Group may have more influence than allowed by the Charter, the agency's Board decisions need to be able to be reviewed and compared with actual outcomes.

92. With regard to Documents 5-11, the complainant says that, on 23 March 2003, *The West Australian* newspaper published an article by Mark Drummond which stated that:

*"Some time over the next week, Western Power will tell Wesfarmers and Rick Stowe's Griffin Group – along with Transfield and at least three other interested parties – that the contract to build a new base-load power station …will go to the consortium prepared to take the biggest commercial risk.*

*Under the revised terms of tender drawn up by Western Power and its consultants, PriceWaterhouseCoopers and Charles River Associates, the bidders will be required to come up with proposals which effectively reduce Western Power's financial exposure to the contract.*

*After a litany of false starts, Western Power will call for official tenders to build the new base-load station next month, provided the revised tender terms are endorsed by the corporation's directors at a scheduled April 15 board meeting"*.

93. The complainant submits that this article implies that Mr Drummond had access to the documents that it is seeking under its FOI application. The complainant considers that, if such information has been provided to the media, it should be provided to community stakeholders, including non-government organisations such as the complainant which wish to scrutinise the Process to ensure that it is being undertaken in the best interests of the West Australian community.

94. The complainant says that the agency is proposing that no information is preferable to information for which the agency or other interested parties could provide context and background. The complainant argues that it is incumbent on the agency and the Government to ensure that the public is adequately informed regarding State energy issues and not to suppress information on the basis that the public is too ill-informed to interpret it correctly.

95. The complainant acknowledges that the disclosure of records which do not fairly disclose the reasons for a decision may be unfair to the decision-maker and prejudice the integrity of the decision-making process. However, in this case, the complainant notes that its intention is precisely to avoid this circumstance and seek to have the reasons for a decision fairly disclosed.

96. The complainant says that the Process is a function that the agency's competitors will not undertake and says that it is self-evident that those competitors would not have to release the disputed documents because the agency's responsibility for the Process arises from its unique circumstances as a State-owned vertically-integrated electricity supplier.

97. The complainant submits that the agency's submissions that disclosure of the disputed documents may lead to unwarranted criticism of consultants or that government agencies would have difficulty commissioning consultants are speculative and notes that the interests of the agency in being able to secure consultants is not synonymous with the public interest.

98. The complainant also contends that the following public interests support the disclosure of the disputed documents and makes the following submissions in relation to those public interests:

- *The right of the public to have access to information*

. The power supply is one of the crucial issues facing any community and it is in the public interest for the community to have access to information on which major long-term planning decisions are made. The decision in relation to the Process will affect the energy system of Western Australia for the next 30-40 years and yet the public is excluded from decision-making and refused access to vital information regarding how energy planning decisions are being made.

- *The public interest in transparency and accountability with regard to the agency's decision-making process concerning the Process*

  The complainant says that choice of generation fuel and location of generator in the Process is a highly politicised issue - as has happened in the past - and there will be a great deal of pressure on the Government to instruct the agency to award Stage 2 of the Process to a tenderer offering a coal fired generator, even though for cost, efficiency and environmental reasons gas will most likely be the preferred fuel. The complainant refers to my decision in *Re Rogers and Water Corporation and Others* [2004] WAICmr 8 in which I said, at paragraph 34: "*… there is a strong public interest in government agencies being accountable for, and being seen to be accountable for, their decision-making processes … and in the observance by agencies of statutory requirements.*"

. In that decision, at paragraph 80, I said:

  *"…there is a strong public interest in State and local government agencies being accountable for the decisions they make to award contracts for the performance of services undertaken for the benefit of the public … and I also consider that there should be as much transparency as possible in the awarding of contracts. I consider it to be in the public interest for both tenderers for government contracts, and the public generally, to have confidence that such transactions are dealt with properly by the Government and its agencies."*

  The complainant acknowledges that the Process is slightly different in that the capital costs of the contract will be borne by the proponents rather than the Government but says that the contracts between the

successful proponent and the agency will still, in effect, be paid for by the taxpayer.

The complainant submits that it is critical that the public has confidence that political pressure does not interfere with the statutory functions of the agency and that history has shown that political considerations can overtly influence decision-making in the crucial area of energy systems planning, in particular where the marginal State electorate of Collie-Wellington is concerned. The public can only have confidence that the legal requirements of the Process have been observed through the disclosure of the disputed documents.

- *The public interest in the public being better informed and more competent to contribute to the public debate on issues of long-term energy systems planning for Western Australia*

  The complainant says that energy-systems planning is a vital component of society and choices made have not only local but global ramifications. The disclosure of documents pertaining to the Process - which has a real impact on the Western Australian community - will contribute to increasing the level of public knowledge on these issues. While many stakeholders take on a lobbying role, a genuine public debate in which all of the facts and issues are known and understood has not occurred with regard to the Process.

- *The public interest in ensuring democratic control to the greatest extent possible over a decision that will have a direct environmental, economic and social impact on the affairs of several generations of ordinary citizens*

  The complainant says that the Process will be the last one to be undertaken under the EC Act and that the agency's decision on that matter will impact on electricity prices, security of supply and greenhouse gas emissions for the next three to four decades. Consequently, given that energy supply issues will subsequently be left to "the market", it is essential that the last major energy decision over which statutory processes have any role is undertaken in a manner consistent with democratic values and intentions. The documents the complainant is seeking will enable the public to be certain that legal requirements regarding the Process have been met and that political pressure did not interfere with the Process.

99. Weighing against disclosure, the complainant acknowledges that it would not be in the public interest to disclose the disputed documents if their release could influence the outcome of the Process. However, the complainant says that, since the Process must be undertaken in accordance with Schedule 7 of the EC Act, this type of information should not be prejudicial to the outcome.

100. The complainant also says that it is possible that the disputed documents would reveal that political influence is contaminating the decision-making

relevant to the Process and, if that were so, this could have a negative impact on public confidence in the Government and in the legitimacy of statutory processes.

101. The complainant submits that, on balance, the public interests that favour the disclosure of the disputed documents outweigh those that do not and that, therefore, the disclosure of those documents would not be contrary to the public interest.

102. Finally, the complainant advises that it has not requested access to draft or working documents but to final versions.

***The agency's submissions***

103. The agency submits that - given that disclosure under the FOI Act is considered as disclosure to the public at large - any public interest in favour of release of the disputed documents, such as the accountability of government agencies, is outweighed by the public interests in ensuring that:

- State-owned corporations such as the agency are able to canvass all possible options and seek the help of external consultants - and, in this case, the proponents - in a fearless and frank manner and without concerns that draft and working documents will be later subject to public scrutiny;

- State-owned corporations are not subject to undue prejudice as a result of disclosure requirements under the FOI Act and can compete effectively with private organisations. In that regard, the agency notes that its major existing and potential competitors do not have to reveal any information such as the disputed documents to the public at large;

- State-owned corporations can conduct a tender process without disclosing the "model response" to the tenderers;

- public debate is not misinformed, which is likely to be the case if Documents 2-12 are disclosed without context or background, since there are still some details that are subject to change. For example the agency submits that such disclosure may lead to unwarranted criticism of consultants such as PWC and CRA and may inhibit the agency's ability to obtain consultation services in future; and

- there has been extensive public consultation on environmental matters between the three bidders and various public bodies. The bidders seeking to advance three coal-fired power station proposals participated in an eight-week public review and the gas bidder engaged in a similar, although less extensive, public review process. The agency also notes that the complainant was actively involved in those processes.

104. The agency submits that the public interest in the provision of full and accountable decisions and frank and open tenders is adequately dealt with by

the obligations imposed on the agency in its reporting requirements and in Schedule 7 of the EC Act and by the engagement of a probity auditor.

105. With regard to the complainant's submissions on the public interest in transparency and accountability, the agency denies any suggestion that it has been influenced by any political pressure and points to its engagement of a probity auditor and the dissemination of a large amount of information through its website and elsewhere, to ensure the transparency and integrity of the Process.

106. The agency rejects the complainant's contention that its decision-making in this matter is being made for its short term financial interests and notes that contract length is a minimum of 25 years. Consequently, it is in the public interest not to disclose this information because it has a potential long- term impact on the agency.

107. With regard to the complainant's assertion that the bid process arises from the agency's unique circumstances as a state-owned vertically-integrated electricity supplier, the agency notes that with the anticipated deregulation of the electricity market, electricity retailers who will compete with the agency's "retail arm" may want to enter into a similar tender process.

108. The agency states that it does not operate with public money, in the sense that it is funded from its own revenues primarily from sales of electricity, and does not receive public funding. It notes that the agency borrows monies from the Western Australian Government but pays interest to its creditors on monies borrowed like any commercial entity would do. The agency also submits that it provides a dividend to the Government and, therefore, there is a public interest in ensuring that it is profitable and able to compete with its retail competitors so that it can provide a greater dividend. The agency observes that it has a statutory obligation under section 31 of the EC Act to endeavour to make a profit.

109. The agency submits that, even if the process by which the Preferred Bidder is selected has been completed, the public interest still favours that the documents not be released for the reasons set out here and also because of the public interest in allowing a publicly-owned corporation to retain any competitive advantage it has in its commercial negotiations with its suppliers and customers.

### *Consideration*

110. I recognise that there is a public interest in an applicant, such as the complainant, being able to exercise its rights of access under the FOI Act. I also recognise that there is a public interest in the accountability of agencies for the manner in which they discharge their obligations on behalf of the Western Australian public. In my view, that accountability includes informing the public, wherever possible, of the basis for decision-making and the material considered relevant to the decision-making process.

111. I also recognise that there is a public interest in government agencies and members of the private sector being able to enter into business and commercial enterprises with each other and being able to exchange information in the course of such arrangements. I accept that there is a public interest in maintaining the confidentiality of some sensitive financial or commercial information which is in the hands of government agencies in certain circumstances. Against those interests must be balanced the public interests in the accountability of government agencies for their decisions, the exercise of their powers and their expenditure of public monies.

112. With regard to the agency's submissions concerning draft documents, I note the complainant's advice that it has not requested access to draft documents and that, insofar as it is aware, all the disputed documents are final versions. However, I also note that Documents 5 and 10 are marked, respectively, as "confidential draft" and "draft for discussion". The agency advises that to the best of its knowledge no 'final' versions of Documents 5 and 10 were made and that the copies of those documents provided to me are the latest or 'final' versions in the agency's possession.

113. The complainant submits that it is in the public interest for the community to have access to information on a major decision affecting the supply of energy and that transparency and accountability in the conduct of the Process are critical public interests. I agree.

114. The agency refers me to the obligations imposed on the agency under Schedule 7 of the EC Act and the engagement of a probity auditor to monitor the Process as adequately meeting the public interest in accountability for the conduct of the Process. Clause 4 of Schedule 7 obliges the agency to make a description of the Process publicly available upon payment of the prescribed fee. That description is contained in the Overview Document, which provides a general background to, and overview and outline of, the Process.

115. I also note that the agency has a section on its website dedicated to the Process, which provides regular updates on progress. The website stated that the agency intended to undertake a series of consultations to ensure public involvement and feedback and to display each proposal at relevant regional centres. As in my decision in *Re Rogers*, I accept that there are strong public interests in government agencies being accountable for their decisions and in being as transparent as possible in awarding contracts. However, I consider that the agency's provision of general information on the Process, the appointment of a probity auditor and the holding of public consultations are examples of transparency and accountability for the Process and that those actions go some way to satisfying those public interests.

116. I accept that there is a public interest in the agency being able to canvass all options and to seek the help of external consultants and others "*in a fearless and frank manner*". However, I do not accept the agency's apparent submission that there is a public interest in its doing so without having concerns as to whether its draft or working documents will later be subject to public scrutiny.

117. Since the commencement of the FOI Act, no agency can give any person or organisation express assurances of absolute confidentiality. In *Searle*'s case, at p.127, the Full Federal Court said, in relation to the Commonwealth FOI Act: "*With the commencement of the FOI Act on 1 December 1982, not only could there be no understanding of absolute confidentiality, access became enforceable, subject to the provisions of the FOI Act. No officer could avoid the provisions of the FOI Act simply by agreeing to keep documents confidential. The FOI Act provided otherwise.*"

118. I consider that this view applies equally to the FOI Act, which became operative in Western Australia in November 1993. Since then the Government - and persons dealing with it - have had more than 12 years to become familiar with the workings of the FOI Act. In my opinion, there is no general public interest which requires that documents be protected from public scrutiny for no reason other than that they are used or created by a government or its agencies. I consider that the very existence of the FOI Act supports this proposition.

119. Moreover, I do not consider that the fact that documents passing between the agency and its external consultants and others might come under public scrutiny could reasonably be expected to prevent professional advisers from expressing themselves freely and frankly. For example, I am not aware of any evidence that demonstrates that professional information provided by and to the Government has declined in quality since the FOI Act came into operation.

120. It appears to me that the agency's submissions in relation to Documents 2-12 amount to a 'candour and frankness' argument, which has been the subject of comment by the former Information Commissioner ('the former Commissioner') in a number of decisions. In *Re Rindos and University of Western Australia* [1995] WAICmr 20 the former Commissioner said, at paragraph 37:

> *"That argument has been consistently rejected by the Commonwealth Administrative Appeals Tribunal and I have also rejected it ... In* Re Murtagh and Commissioner of Taxation *(1984) 54 ALR 313, at 326, the Commonwealth Tribunal said:*
>
> *'The candour and frankness argument is not new. It 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 the 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.'"*

121. Those comments were made in reference to officers of an agency but I consider that they are equally relevant to external consultants. 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 external consultants, paid to give advice and consider options, will only provide full and frank advice under the cloak of confidentiality. I do not accept that disclosure could reasonably be expected to prejudice the agency's - or any other agency's - ability to obtain professional advice from external consultants who are in the business of providing professional advice for a fee. In the 12 years that the FOI Act has been operating in this State, that speculative argument has been raised on many occasions but no evidence of it occurring has been provided. I agree with the complainant that the agency's claim, with nothing further, that the disclosure of Documents 5-11 may inhibit its ability to obtain consultation services in future, is merely speculative.

122. The agency also claims that it is in the public interest that public debate is not misinformed, which is likely to be the case if the disputed documents are disclosed without context or background since there are some details which are subject to change. However, I agree with the complainant that it is incumbent on the agency to take steps to ensure that the public is adequately informed and not simply refuse access to information on the basis that the public - because it lacks context and background - would misinterpret it. It is always open to an agency to disclose information additional to the documents requested. Clearly, it is in the agency's power to disclose documents with context and background in order to ensure that public debate is not misinformed.

123. I accept the agency's submission that it should not be subject to undue prejudice as a result of the disclosure requirements of the FOI Act but should be able to compete effectively with private organisations, which are not required to publicly disclose information such as the disputed documents. However, I consider that the exemption provisions of the FOI Act operate for the purpose of preventing undue prejudice to the State and its agencies. I note the complainant's comments on the agency's unique circumstances. I also note that, unlike the agency, private organisations do not operate with public money and for public purposes and, therefore, are not subject to the disclosure requirements of the FOI Act. For those reasons, the agency is in a different position to private organisations and is required to be accountable to the public.

124. However, I do recognise a public interest in the agency not being commercially disadvantaged in a competitive market place by virtue of its accountability obligations. Therefore, I recognise a public interest in protecting the confidentiality of commercial information that could reasonably be expected to have an adverse effect on the agency's commercial affairs if disclosed. That is the purpose of the clause 10(4) exemption and, for the reasons I have given above, I am persuaded on this occasion that an adverse effect on the agency's commercial affairs, as it enters into a deregulated and increasingly competitive market, could reasonably be expected to follow from disclosure of the information in question. I consider that there is a public

interest in the agency maintaining its ability to return a significant financial dividend to the State.

125. I also recognise a public interest in parties involved in negotiations being able to maintain - to an extent reasonably and fairly necessary - the confidentiality of their negotiating position while discussions are on foot. Where the party is a government agency, however, the extent to which confidentiality is reasonably and fairly necessary will be affected by the particular - and sometimes competing - duties of public accountability which apply to such bodies.

126. With regard to the complainant's assertion that a journalist from *The West Australian* newspaper may have had access to the documents that it is seeking under its FOI application, the agency has made inquiries and advises me that it is confident that the disputed documents were not disclosed and that no commercially sensitive information was released to that newspaper by the agency. In addition, my Legal Officer made inquiries with Mr Drummond - the journalist in question - and he advises me that he did not have access to any documents relating to the Process as the source of the relevant article.

127. I note the complainant's comments on its interest in ensuring that the agency fulfils its legal obligations, as set out in Schedule 7 of the EC Act but I do not consider that the disclosure of Documents 2-12 would further that particular public interest. I also understand that to be the purpose of engaging an independent probity auditor and consider that public interest to thereby be satisfied to a large extent.

128. With regard to the complainant's submissions concerning the minutes and decisions of the Board, none of the disputed documents is a document of that description and, consequently, those submissions are not relevant to the matters for my determination.

129. I consider that there is a public interest in the public being informed and competent to contribute to public debate on important issues such as the Process and, thus, to participate in government decision-making. However, I also consider that this should be balanced against the public interest in the efficient and effective conduct of government functions.

130. The complainant submits that there is a public interest in the community being satisfied that the legal requirements of the Process have been met and that political pressure did not interfere with the Process and that that public interest can only be satisfied by the disclosure of the disputed documents. I accept that there is a public interest in the public being able to scrutinise the operations of the agency and to make its own judgment as to whether it is discharging its functions properly. However, having examined the relevant documents, I am not satisfied that they would assist in any such assessment. In addition, as I have said, I consider this public interest to have been satisfied to a large extent by the appointment of an independent probity auditor.

131. In balancing the competing interests identified above, I am not persuaded that disclosure of Documents 2-12 would be in the public interest. I consider that the public interests favouring disclosure are satisfied to a large extent by the dissemination of relevant information by the agency through its website and elsewhere, by its consultation with the public, and by the appointment of an independent probity auditor. I am also not persuaded that the disclosure of these particular documents would further those public interests to any significant degree. In the circumstances of this complaint, I consider that the public interests in maintaining the integrity of the Process and the ongoing negotiations with the Preferred Bidder and in protecting the agency's sensitive commercial information is not outweighed by any other public interest.

132. I find that Documents 2-12 are exempt under clause 10(4) and that it is not practicable to edit Documents 2-5 and 12 in order to give the complainant edited access to those documents. In view of my finding it is unnecessary for me to consider the agency's additional claims for exemption.

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