

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

**File Ref: F2010307
Decision Ref: D0082011**

Participants:

Hon Giz Watson MLC
Complainant

- and -

Minister for Forestry
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – report - clause 1(1) – clause 1(1)(b) and the operation of clause 1(5) – whether ss.3(3) and 23(1) apply – s.24 – whether possible to edit – the meaning of ‘contains’ in clause 1(1)(b).

Freedom of Information Act 1992: sections 3(3), 23(1) and 24 ; Schedule 1, clauses 1(1), 1(1)(b), 1(5) and 1(6)

Forest Products Act 2000

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

DECISION

The respondent's decision is confirmed. I find that the Report is exempt under clause 1(1)(b) of Schedule 1 to the FOI Act.

Sven Bluemmel
INFORMATION COMMISSIONER

5 April 2011

REASONS FOR DECISION

1. This complaint arises from a decision made by the Minister for Forestry ('the Minister') to refuse Hon Giz Watson MLC ('the complainant') access to a document under clause 1 of Schedule 1 to the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 25 August 2010, the complainant applied under the FOI Act to the Minister for access to the "*Haydn Lowe report on the review of the Forest Products Commission, completed in 2009.*" I understand that Mr Lowe is a management consultant. The complainant included the \$30 application fee payable under the FOI Act for non-personal information.
3. The Forest Products Commission ('the FPC') is a Government trading enterprise established under the *Forest Products Act 2000* to develop and market the State's renewable timber resources. The FPC, in a media statement dated 30 June 2009, referred to the completion of a review of that agency being conducted at that date by Mr Haydn Lowe.
4. On 7 September 2010, the Minister provided the complainant with his decision on her access application, which was to refuse access to the requested document on the ground that it was exempt under clause 1(1)(b) of Schedule 1 to the FOI Act.
5. Since there can be no internal review of a Minister's decision, on 23 September 2010, the complainant applied directly to me for external review of the Minister's decision.

THE DISPUTED DOCUMENT

6. The document in dispute is a report dated August 2009, entitled "*Review of the Forest Products Commission and the forest policy in Western Australia*", written by Mr Lowe ('the Report').

REVIEW BY INFORMATION COMMISSIONER

7. Following the receipt of this complaint I required the Minister to produce the original of the Report to me, together with his FOI file maintained in respect of the complainant's access application. I also obtained further information from the agency about the creation of the Report, including correspondence initiating the review undertaken by Mr Lowe.
8. By letter dated 22 March 2011, I provided the parties with my preliminary view of the complaint, which was that the Minister's decision to refuse access to the Report under clause 1(1)(b) was justified. I invited the complainant to withdraw her complaint or provide me with written submissions in support of her view that the Report was not exempt.

CLAUSE 1 – CABINET AND EXECUTIVE COUNCIL

9. The Minister claims that the Report is exempt under clause 1(1)(b). Clause 1, insofar as it is relevant, is as follows:

“1. Cabinet and Executive Council

(1) *Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body, and, without limiting that general description, matter is exempt matter if it –*

(a) ...

(b) *contains policy options or recommendations prepared for possible submission to an Executive body;*

...

(f) ...

...

(5) *Matter is not exempt by reason of the fact that it was submitted to an Executive body for its consideration or is proposed to be submitted if it was not brought into existence for the purpose of submission for consideration by the Executive body.*

(6) *In this clause “Executive body” means –*

(a) *Cabinet;*

(b) *a committee of Cabinet;*

(c) *a subcommittee of a committee of Cabinet; or*

(d) *Executive Council.*

10. Clause 1(1) contains a general description of matter that is exempt under clause 1 – that is, the deliberations or decisions of an Executive body – and paragraphs (a)-(f) of clause 1(1) relate to specific kinds of documents or information included within that general description but not limiting that description. The purpose of the exemptions in clause 1 is to protect the confidentiality of the deliberations and decisions of Cabinet and other Executive bodies, as listed in clause 1(6).

The Minister’s submissions

11. In his notice of decision the Minister submits that the Report “*contains policy options or recommendations prepared for possible submission to an Executive body.*” In support of that statement the Minister said:

“The Terms of Reference for the review state that the review should address:

- *The role of the State in timber and forest products;*
- *The need for the State to be a supplier of forest products (wood included) to industry;*
- *The State's appropriate interest and responsibilities in plantation and far forestry;*
- *The State's role in encouraging and regulating private sector investment in commercial tree crops, for the accrual of social environmental and economic benefits;*
- *The appropriate policy, regulatory and institutional arrangements to support sustainable and developing forest product industries;*
- *The State's national and international obligations with regard to forests and plantations;*
- *The need for [the] Forest Products Act 2000 and any recommended amendments to the Act.*

It is clear from the Terms of Reference that the report was brought into existence to provide recommendations to the Government on an important policy area, and that those recommendations would have to be considered by Cabinet."

The complainant's submissions

12. The complainant's submissions are set out in her letters to me of 23 September 2010 and 31 March 2011. In summary, the complainant submits as follows:

- The following statement made by the Minister in Parliament and recorded in *Hansard* at p.8375b-8377 (21 October 2009) suggests that the document was created for the purpose of informing the Minister or assisting the Minister in setting government policy positions and was not brought into existence for the purpose of consideration by Cabinet:

"It is my intention to keep the Haydn Lowe review as an internal report. It was used to inform me about some of the issues and challenges within the business. It has now gone out to a number of agencies, including Treasury, for comment, and I will respond to it internally when setting government policy positions. I hope to roll it out before the end of the year" (the complainant's emphasis).

- It is not clear whether the Minister has considered the following matters:
 - what is likely to happen if the document is disclosed and why those consequences can reasonably be expected to result from disclosure;
 - why the expected consequences of disclosure are so important as to warrant a refusal of access; and
 - what public interests favour non-disclosure and why those were given more weight than the public interests that favour disclosure.

- The object and intent of the legislation in section 3(3) of the FOI Act are relevant and, under section 23, the Minister still has discretion to give access to a document whether it is exempt or not.
- Since the terms of reference for the Report were wide ranging and multifaceted, there are likely to be parts of the document that are not policy options or recommendations (such as research, background information or observations). Section 24 of the FOI Act provides for the right to gain access to parts of a document that are not exempt and access should be given to an edited copy of the Report from which policy options and recommendations have been deleted.

CONSIDERATION

13. Clause 1(1)(b) provides that matter is exempt if its disclosure would reveal the deliberations or decisions of an Executive body, including matter that “*contains policy options or recommendations prepared for possible submission to an Executive body.*”
14. On the information before me, the Report was commissioned by the Minister through the Department of the Premier and Cabinet for the purpose of preparing recommendations to Government. The Report contains policy options and recommendations.
15. The limit on the exemption in clause 1(5) makes it clear that matter that was submitted to an Executive body for its consideration, or was proposed to be submitted, will not be exempt under clause 1 unless it was brought into existence for the purpose of submission for consideration by the Executive body.
16. Having examined the Report and the supporting documentation provided to me by the Minister’s office, I am satisfied that the Report was brought into existence to provide policy options and recommendations for submission or possible submission to Cabinet. Cabinet is an Executive body as defined in clause 1(6).
17. I note the Minister’s comment in *Hansard* about keeping the Report as an internal report but do not consider that undermines the relevant consideration, which is the purpose for which it was brought into existence. If that primary purpose is satisfied, the fact that the disputed document was used for other, secondary, purposes does not undermine the application of clause 1(1)(b).
18. In my view it is not inconsistent for the Report to have been brought into existence for the purpose of submission for consideration by Cabinet and, at the same time, to have been used by the Minister to inform him of various issues. I do not consider the Minister’s statement as recorded in *Hansard* is sufficient to establish that the Report was not brought into existence for the relevant purpose set out in clause 1(5). As noted in paragraph 16, there is evidence on both the face of the Report and in additional documents provided to me by the Minister’s

office that satisfies me that the limit on the exemption in clause 1(5) does not apply.

19. Although the complainant notes that it is unclear whether the Minister considered the questions listed in her submissions, none of those questions is relevant to the question for my determination, which is whether the requirements of clause 1(1)(b) are satisfied in this case. I note that provision does not contain any public interest test so that the Minister was not required to assess competing public interests.
20. Section 3(3) of the FOI Act provides, in brief, that nothing in the Act is intended to prevent or discourage the publication of information, or the giving of access to documents – even documents containing exempt matter – if that can properly be done outside the FOI Act. In other words, it is always open to an agency to provide or publish information without requiring that individuals apply for access to that information under the FOI Act. In this case, that is not an option since the complainant has formally applied for access under the FOI Act.
21. Section 23(1) of the FOI Act is worded in such a way as to give agencies the discretion to either give or refuse access to exempt documents, by stating:

“... the agency may refuse access to a document if -

(a) the document is an exempt document” (my underlining).

That is, an agency can exercise its discretion to give access to a document even if that document is exempt. However, in this case, the Minister did not choose to exercise his discretion to give access to the Report. Under section 76(4) of the Act, I do not have the power to make a decision to the effect that access is to be given to an exempt document.

22. The complainant submits that she should be given access to an edited copy of the Report. In *Re Ravlich and Minister for Regional Development; Lands* [2009] WAICmr 9, the former A/Information Commissioner considered the meaning of clause 1, including clause 1(1)(b). In *Re Ravlich* at [43], the A/Commissioner referred to the following extract from the debates following the Second Reading of the Freedom of Information Bill 1992 where the former Minister for Justice in charge of that Bill said, in relation to clause 1(1)(b):

“Paragrah (b) states -

contains policy options or recommendations prepared for submission (whether submitted or not) to an Executive body;

That covers what often happens when one gets one’s agenda or minutes and lodged with that minute will be a range of reports or policy options for consideration by Cabinet in conjunction with the minute. I do not think we could exclude any of those matters under the amendment moved by the member for Floreat ... Therefore, the existing clause would mean that, if documents had been prepared to accompany a minute and for

some reason did not accompany the minute, they would also be exempt ... One of the things we must ensure is that when people are preparing documents which may or may not accompany Cabinet minutes they should feel unconstrained in what they say in those drafts. My view is that, if they have been prepared for the purposes of submission ... and are not submitted, not to exempt them would defeat the primary objective which is to prevent the disclosure of deliberations or decisions because, if the document is not submitted, it would still reveal the fact there was a Cabinet minute and basically what the Cabinet minute was about and some discussion about what it contained.”

23. The decision in *Re Ravlich* concluded that the meaning of ‘deliberations’ includes not only active discussion and debate but also information that discloses that an Executive body has considered, gathered information on, analysed or looked at strategies in relation to a particular issue. I agree with that view.
24. I consider that it would not be feasible to provide the complainant with an edited copy of the Report because even if all policy options and recommendations were deleted, the ‘deliberations’ of Cabinet would still be disclosed in the sense that it would reveal information gathered and matter analysed in relation to particular issues.
25. I also note that clause 1(1)(b) refers to matter being exempt matter “*if it contains policy options or recommendations*” (my emphasis) rather than matter being exempt matter because it is or consists of policy options or recommendations. The word ‘contain’ is defined in the *Macquarie Dictionary* (5th edition, 2009) to mean amongst other things “1. to have within itself; hold within fixed limits. 2. Geometry to form the boundary of. 3. to be capable of holding; have capacity for”.
26. In my view, the reference in clause 1(1)(b) to exempt matter is a reference to the document that ‘contains’ or has within it policy options or recommendations prepared for possible submission to an Executive body, which in the present case is the Report. I consider that the Report is the matter which is exempt matter and not just those parts of it that comprise the policy options or recommendations.
27. In light of that, I consider that the whole of the Report is exempt under clause 1(1)(b) and that, therefore, it is not possible to give the complainant access to an edited copy, pursuant to s.24 of the FOI Act.

CONCLUSION

28. I find that the Minister’s claim for exemption is justified and that the Report is exempt under clause 1(1)(b) of Schedule 1 to the FOI Act.
