OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2013202 Decision Ref: D0092015

Participants:

West Australian Newspapers Ltd

Complainant

- and -

Department of the Premier and Cabinet
Agency

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents created during the caretaker period – clause 4(2) of the Glossary – whether documents held by the Office of the Premier are 'documents of an agency' – whether documents 'relate to the affairs of another agency' – clause 3 – personal information – clause 3(3) – prescribed details.

Freedom of Information Act 1992: sections 10(1), 23(1) and 102(1); Schedule 1, clauses 3(1) and 3(3); Glossary, clauses 1, 2(4), 4(1), 4(2), 4(3) and 5(1)
Freedom of Information Regulations 1993: regulation 9(1)

Interpretation Act 1984 **(WA): s**ection 18

Apache Northwest Pty Ltd v Department of Mines and Petroleum [No 2] [2011] WASC 282
Fletcher and Prime Minister of Australia [2013] AICmr 11
Minister for Planning v Taweel (Unreported, Supreme Court of WA, Library No 960654, 13 November 1996)
Minister for Transport v Edwards [2000] WASCA 349
Office of the Premier v The Herald and Weekly Times Pty Limited [2013] VSCA 79
Parnell and Prime Minister of Australia [2011] AICmr 10
Parnell and Prime Minister of Australia (No 2) [2011] AICmr 12
Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Lander and Rogers Lawyers [2010] WAICmr 35
Re Kobelke and Minister for Planning [1996] WAICmr 43
Re Ravlich and Attorney General [2010] WAICmr 5
Re Taweel and Ministry for Planning [1996] WAICmr 18

DECISION

The agency's decision is set aside. In substitution, I find that:

- the disputed documents are documents of an agency as defined in clause 4 of the Glossary to the *Freedom of Information Act 1992;*

- the personal information remaining in the disputed documents, after they are edited to delete the excluded information as defined in [26] of my Reasons for Decision, consists of prescribed details which is not exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*; and

- the disputed documents are not otherwise exempt under any of the exemptions in Schedule 1 to the *Freedom of Information Act 1992.*

Sven Bluemmel
INFORMATION COMMISSIONER

18 May 2015

REASONS FOR DECISION

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

BACKGROUND

2. On 2 September 2012, the Premier and the Minister for Transport announced the State Government's commitment to a new light rail system to be called Metro Area Express or MAX. As at 31 August 2012, the website for the MAX project (max.wa.gov.au) noted:

> *The Western Australian Department of Transport (DoT) is the lead agency developing a transformational new light rail system for Perth. It is working in collaboration with a number of other State agencies and local government authorities.*
>
> *A dedicated project team including experienced and committed professionals is working with carefully selected consultants with significant experience in the delivery of similar projects.*

(source: Department of Transport website at http://web.archive.org/web/20120904231745/http://www.max.wa.gov.au/54.html accessed on 7 February 2014)

3. On 6 February 2013, writs were issued for the State election to be held on 9 March 2013. Under the State Government's Caretaker Conventions 2013, '[t]he caretaker period commences from the date of the issue of the writs for elections for the Legislative Assembly and continues until the election result is clear, or, in the event of a change of government, until the new government is formally sworn-in'. Accordingly, the period between 6 February 2013 and 9 March 2013 is referred to as 'the caretaker period'.

4. On 10 February 2013 the Liberal Party announced that 'A Liberal Government, if re-elected, will build a new airport rail link transporting domestic and international passengers to Perth Airport's front door.' (see http://www.wa.liberal.org.au/sites/default/files/plans/Our%20Plan%20for%20Airport%20Rail.pdf)

5. The State election was held on 9 March 2013 and the Liberal Government was re-elected.

6. On 30 April 2013 the complainant applied to the agency under the FOI Act for access to '[a]ll correspondence to and from Premier Colin Barnett relating to the MAX light rail or Airport Rail Link and federal government funding'.

7. Following discussions between the agency and the complainant, the scope of the application was amended to '[a]ll correspondence to and from Premier Barnett and his ministerial staff (including intra-office correspondence) relating to the MAX Light Rail or Airport Link for the timeframe of 26 January 2013 to 9 March 2013'. The complainant also agreed to give the agency an extension of time until 10 July 2013 to deal with the application.

8. By notice of decision dated 10 July 2013 the agency decided to give the complainant access to an edited copy of two documents within the scope of the application, after deleting personal information on the basis that it was exempt under clause 3(1) of Schedule 1 to the FOI Act. The agency also decided that 'documents created in Ministers' offices during the caretaker period will not be a 'document of an agency' when they relate to the party political role of the Minister (or Premier) rather than the affairs of any government agency under the FOI Act'.

9. On 16 July 2013 the complainant applied for internal review of the agency's decision. By letter dated 2 August 2013 the agency confirmed its decision. The internal review decision maker identified 63 documents created during the caretaker period and four documents created before the caretaker period and decided that all of those documents are not 'documents of a ministerial agency'.

10. By letter dated 2 August 2013 the complainant applied to the Information Commissioner for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

11. Following my receipt of this 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.

12. The complainant did not seek external review of the agency's decision to give access to an edited copy of the two documents released to the complainant. Accordingly, this external review is limited to the agency's decision to refuse access to documents on the ground they are not documents of an agency.

13. On 8 January 2014, the parties attended a conciliation conference conducted by this office. As the matter was not resolved at that stage, it was referred to a case officer for formal external review.

14. On 18 June 2014, the Acting Information Commissioner (**the A/Commissioner**) provided the parties with her preliminary view of this matter (**preliminary view letter**). It was the A/Commissioner's preliminary view, for the reasons given, that the disputed documents are documents of an agency as defined in clause 4 of the Glossary to the FOI Act.

15. In light of her preliminary view, the A/Commissioner invited the agency to reconsider its decision. As the agency had not made any claims in the alternative that the disputed documents are exempt under any of the provisions of Schedule 1 to the FOI Act or are outside the scope of the complainant's access application, the A/Commissioner invited the agency to provide her with further submissions on these points. Alternatively, the

A/Commissioner invited the agency to give the complainant access to the disputed documents subject to its obligations under sections 32 and 33 of the FOI Act.

16. In either case, the agency's response was requested by no later than 4.00pm on Thursday 10 July 2014. On 2 July 2014, the agency requested an extension of one week to respond to the A/Commissioner's preliminary view until 4.00pm on 17 July 2014. The extension was granted and, on 17 July 2014, the agency provided further submissions claiming that the disputed documents are not documents of an agency that are potentially accessible under the FOI Act.

17. On 6 August 2014 my office advised the parties that it was likely that, in the event I was not dissuaded from the A/Commissioner's preliminary view after considering the agency's further submissions, and on the basis that the agency has not made any alternative claims that the disputed documents are exempt or are outside the scope of the access application either in full or in part, I would proceed to finalise this matter by formal published decision on the documents of an agency issue only.

18. After considering the matter further, on 15 August 2014, my office advised the agency that I had decided to issue a supplementary preliminary view on the exemptions and the issue of the extent to which the disputed documents fall within the scope of the complainant's access application (**the scope**), in the event I was not dissuaded from the A/Commissioner's preliminary view. My office invited the agency to provide me with any submissions it cared to make on these points before I issued my supplementary preliminary view, by 4.00pm on Friday 29 August 2014.

19. On 29 August 2014 the agency advised my office that it did not wish to provide further submissions at that time, noting my office's advice that, in the event I issued a supplementary preliminary view on the exemptions and the scope, the agency would be given the opportunity to make further submissions before the matter is finalised by my formal published decision.

20. On 23 February 2015, I provided the parties with my supplementary preliminary view of this matter **(supplementary preliminary view letter)**. For the reasons set out in that letter, it was my supplementary preliminary view that:

    - The disputed documents are documents of an agency as defined in clause 4 of the Glossary to the FOI Act that are potentially accessible under the FOI Act.

    - Document 33 and its attachments (Documents 33a, 33b, 33c, 33d, 33e and 33f) are outside the scope of the complainant's access application.

    - The information in the remainder of the disputed documents as described in that letter, and as shown in the copy documents provided to the agency with that letter, is within the scope of the complainant's access application. All other information in those documents can be deleted by the agency before any access is given to them on the basis that it is out of the scope.

- The information described in Appendix 2 to that letter contained in Documents 1, 2, 6, 7, 8, 10, 11, 12, 14, 15, 17, 18, 19, 21, 23, 24, 25, 26, 29, 30, 31, 32, 34 and 35 is exempt under clause 3(1) of Schedule 1 to the FOI Act. However, apart from that information, the disputed documents are not exempt under any of the exemption provisions in Schedule 1 to the FOI Act.

21. In light of my supplementary preliminary view, I invited the agency to reconsider its decision and give the complainant access to the disputed documents in accordance with my supplementary preliminary view.

22. Alternatively, if the agency did not accept my supplementary preliminary view, I invited it to provide any further submissions relevant to the matters for my determination, including whether the disputed documents are exempt in full or in part under Schedule 1 to the FOI Act or outside the scope of the complainant's access application either in full or in part.

23. In either case, the agency's response was requested by no later than 4:00pm on Tuesday 10 March 2015.

24. I also invited the complainant to accept my view that the matter described in my supplementary preliminary view letter is either exempt under clause 3 or is outside the scope of the complainant's access application.

25. On 27 February 2015 the complainant advised my office that it accepted my supplementary preliminary view in this regard. My office informed the agency accordingly on 27 February 2015.

26. In light of the complainant's advice that it accepts my supplementary preliminary view that the matter described in my supplementary preliminary view letter is either exempt under clause 3 or is outside the scope of the complainant's access application, the agency is entitled to delete all of that information (**the excluded information**) before any access is given to the disputed documents on the basis that it is outside the scope of this complaint. Document 33 and its attachments (Documents 33a, 33b, 33c, 33d, 33e and 33f) are also outside the scope of the complaint on this basis. As all of that matter is no longer in dispute, I have not considered it further.

27. On 6 March 2015, the agency requested an extension of two weeks to respond to my supplementary preliminary view letter until 4.00pm on 24 March 2015 on the basis that it had 'engaged Counsel to consider the proper characterisation of [the disputed documents]'. As I was unavailable that day to formally respond to the agency's request, my office advised the agency on 6 March 2015 that, in the circumstances, it was unlikely that I would grant any extensions of time to respond. On 9 March 2015, the agency advised my office that, in light of that advice, it would provide its submissions 'within the timeframe [I had] imposed'.

28. On 10 March 2015, the agency provided further submissions claiming that the disputed documents are not documents of an agency.

THE DISPUTED DOCUMENTS

29. The disputed documents are the documents identified in the Document Schedule attached to the agency's decision made on 2 August 2013, excluding the excluded information and Documents 33 and its attachments (Documents 33a, 33b, 33c, 33d, 33e and 33f), which, as noted at [26], are no longer in dispute. The disputed documents consist of 59 documents which in the main are emails, including attachments, sent or received by the Office of the Premier between 4 February 2013 and 6 March 2013.

ONUS OF PROOF

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

DOCUMENTS OF AN AGENCY

31. Section 23(1)(b) of the FOI Act provides that an agency may refuse access to a document if the document is not a document of the agency. That is, in effect, what the agency has done on this occasion.

32. The term 'documents of an agency' is defined in clause 4 of the Glossary to the FOI Act, which provides, insofar as it is relevant, as follows:

> *(1) Subject to subclause (2), a reference to a document of an agency is a reference to a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer.*
>
> *(2) Where the agency is a Minister a reference to a document of an agency is a reference to a document that –*
>
> *(a) is in the possession or under the control of the Minister in the Minister's official capacity; and*
>
> *(b) relates to the affairs of another agency (not being another Minister),*
>
> *and includes a document to which the Minister is entitled to access and a document in the possession or under the control of a member of the staff of the Minister as such a member, but does not include a document of an agency for which the Minister is responsible.*

33. The right of access to documents created by section 10(1) of the FOI Act is a right of access to 'documents of an agency (other than an exempt agency) subject to and in accordance with this Act'. Clause 1 of the Glossary to the FOI Act defines 'agency' to include a Minister. Accordingly, the right of access under section 10(1) to documents held by a Minister is governed by clause 4(2) of the Glossary.

34. As I understand it, the agency claims that the disputed documents are held by the Office of the Premier and that the question therefore is whether the documents are 'documents of a Minister' under clause 4(2) of the Glossary to the FOI Act.

35. In *Re Ravlich and Attorney General* [2010] WAICmr 5 (***Re Ravlich***) I noted at [14] that clause 4(2) of the Glossary sets out the following conditions for access:

- The requested documents must be in the possession or under the control of the Minister in his or her official capacity.
- Those documents must relate to the affairs of another agency (except where that agency is another Minister).
- Those documents include documents which the Minister is entitled to access and documents in the possession or under the control of a member of the Minister's staff.
- Those documents do not include documents of an agency for which the Minister is responsible.

36. I understand that the agency accepts that the conditions at the first, third and fourth bullet points above are satisfied in this case. However, the agency contends that the condition at the second bullet point is not satisfied on the basis that the disputed documents do not relate to the affairs of another agency, not being another Minister.

The complainant's submissions

37. The complainant's submissions are set out in its letter to the agency dated 16 July 2013 seeking internal review of the agency's decision. In summary, the complainant submits as follows:

- It is nonsensical to argue that whilst documents may deal with matters within the functions of another agency, they do not concern that agency's operations.
- There is no justification for refusing access to any documents created before the caretaker period.
- The agency's consideration of the 'essential nature' of the documents to determine whether the documents relate to the affairs of an agency applies 'an unnecessarily complicated filter over the question, which is really rather straightforward. The documents relate to another agency because they are related to two major rail projects. It is inconceivable that documents about the MAX Light Rail or Airport Rail Link would not be related to government agencies including, but not limited to, the Department of Transport, Department of Treasury and Office of Strategic Projects'. The agency conceded as much when it stated at paragraph 38 of the initial decision that '[the documents] may deal with matters within the functions of another agency…'.

- It does not accept the agency's claim that documents created by a sitting Government during the caretaker period, even for party political purposes, have no relation to other agencies. Until a governing political party is unseated, it is the Government. Decisions and plans of a governing political party have implications for the departments which will act on these decisions and plans, until the party is unseated from Government.

- *During the election campaign, ministerial officers were issuing media statements from Liberal Party email accounts. If ministerial officers wanted to keep discussions related to party political election commitments from public disclosure, they could have used these email accounts. The very fact they created Liberal Party email accounts during the election campaign demonstrates the fact they understood that their @dpc.wa.gov.au email addresses were for government purposes, and therefore exposed to the FOI Act.*

- The MAX Light Rail project is a government policy decision and not a party political commitment as claimed by the agency. The Liberal National Government committed to the project in September 2012 in its media release at http://www.mediastatements.wa.gov.au/Pages/StatementDetails.aspx?StatId=6361&listName=StatementsBarnett. As Cabinet had 'signed off' on the MAX project, it is a government decision and the 'fact the Liberal Party later re-announced MAX during the election campaign does not change that fact'.

- MAX also featured in the Government's 'The Bigger Picture' advertisements, which screened in the months leading up to January, which the Government said was necessary to educate the public about its activities. The agency's media adviser advised the complainant in an email on Friday 12 July 2013 that the MAX project was a 'State Government announcement'. '[The agency] cannot refuse access to documents relating to MAX on the grounds it was not a commitment of Government but a party political election commitment, and then in the same week advise that it was in fact a decision of Government'.

- '[T]here is no provision for caretaker provisions in the FOI Act and … [the agency's] assertion that a different set of rules apply during the caretaker period is without foundation'.

- The former Premier Carmen Lawrence, who '… ushered in the [FOI] Act as Premier in 1992 …', has stated that '[i]t seems extraordinary that that (party political) claim should be made as grounds for exemption from the Act and it wasn't envisaged that such a justification could be made': page 7 of The West Australian published 12 July 2013.

- Governments form their policy platforms to take them through the forthcoming terms during the lead-up to elections. In light of the object of the FOI Act set out in section 3 – of enabling the public to participate more effectively in governing the State and making the persons and bodies that are responsible for State and local government more accountable to the public – it is inconceivable that the most intensive period of policy formulation underpinning the governing of the State would be exempt from the objects of the FOI Act.

- *The State Government's decision to commit $3.7 billion of public money to its two rail projects carries a high degree of public interest. It is not an unreasonable expectation that the public be allowed to participate in this decision through greater understanding and make the Government accountable for the expenditure of such a large sum of money. No business case, cost-benefit analysis or expected patronage figures have ever been provided by the Government to explain its decision to undertake these projects, and* [the complainant] *seeks a better understanding of the circumstances and discussions leading to the committal of these funds in the public interest.*

The agency's submissions

38. The agency's submissions are set out in its notice of decision dated 2 August 2013, in its letter to my office dated 17 July 2014 and in submissions attached to an email dated 10 March 2015 to my office from the State Solicitor's Office (**SSO**).

39. In its notice of decision dated 2 August 2013, the agency submits, in summary, as follows:

- The disputed documents must be looked at on a document by document basis to determine if they relate to the affairs of another agency (not being another Minister).

- The disputed documents can be categorised as follows:

  - documents which deal with election policy development and election related media matters exchanged between ministerial officers and people employed within the Liberal Party;
  - documents which deal with election policy development and election related media matters exchanged between ministerial officers;
  - draft and final media statements concerning election related announcements; and
  - documents setting out an event plan relating to an election announcement by the Premier or another Minister.

- The disputed documents consist of emails between ministerial offices and, on occasion, the Liberal Party and were not communicated to another public sector agency such as the Department of Transport. The categories of the documents show that the documents were created as part of the party political activities of the Premier's Office or other Ministerial Offices that arose from the fact that the Ministers were engaged in an election campaign and are not **'**related to the affairs of another agency', as required under clause 4(2) of the Glossary to the FOI Act. The disputed documents do not concern the business or operations of another agency as they directly relate to election commitments and activities at the time. It is unlikely that the disputed documents will relate to the affairs of another agency such as a public sector department because they are concerned with party political election period matters and public sector agencies do not generally become involved in those activities during the period of an election campaign.

- The four documents that fall outside the caretaker period, as described in the Document Schedule attached to the agency's internal review decision, consist of emails between Ministerial Offices on media matters that do not relate to a public sector agency and do not meet the requirements of clause 4(2) of the Glossary to the FOI Act.

- The disputed documents are not communications between a minister's office and a public sector agency. They are communications between ministerial officers about party political election related announcements of both the Liberal and Labour parties made during an election campaign. They do not go to the normal business of government and consequently do not involve public sector agencies or their operations.

- It is accepted that during the caretaker period ministerial officers are permitted to be involved in matters of a party political nature when undertaking functions specified by the political office holder (the Minister). Therefore, the disputed documents, created by their ministerial officers, are quite clearly of a party political nature.

- The disputed documents refer more to matters concerning the announcement of such party political election commitments rather than the detail of election policy development.

40. In response to the A/Commissioner's preliminary view letter dated 18 June 2014, the agency made further submissions to my office by letter dated 17 July 2014. In summary, the agency submits as follows:

- In response to the complainant's claim that Ministerial officers were not issuing media statements from Liberal Party email accounts, the agency submits that:

> *During the election campaign, ministerial media officers emailed media statements announcing Liberal Party election commitments to the WA Liberal Party who then issued media statements from a Liberal party email account (media@wa.liberal.org.au). The Liberal Party did not create any new email accounts for ministerial officers during the election campaign. Ministerial media officers were listed as a contact on the media release, but they did not have Liberal party email addresses.*

- The A/Commissioner's preliminary view 'establishes new ground and goes beyond the intention of the Parliament'.

- The question of the proper interpretation of clause 4(2)(b) was authoritatively decided by Parker J in *Minister for Planning v Taweel* (Unreported, Supreme Court of WA, Library No 960654, 13 November 1996) (***Taweel***), and that decision remains good law in Western Australia.

  In *Taweel*, Parker J 'makes the following decision' concerning the words 'relates to the affairs of an agency':

> *The words "relates to", somewhat notoriously, depend heavily on their subject, and their immediate context and object to determine their scope and reach. Like many phrases to similar effect, "relates to" is capable of meanings which range from a narrow, particular, direct and immediate relationship, to one which can be extremely broad and indiscriminate in reach and scope such as would include any adjectival or indirect relationship to any subject having any relevance to an agency. As already indicated the specific provisions of the FOI Act relevant to documents in the possession or control of Ministers, do not indicate a policy of generous access, to say the least, which tells against a view that any wide meaning and operation is intended in cl 4(2)(b) of the Glossary. [at p9].*
>
> *Given the way it is expressed, there is no particular justification in its context for reading the exception in a particularly narrow or limited sense. The best that can be done, it seems to me, is to apply an everyday, common sense approach to the ordinary understanding of the words used, avoiding any strained limitation or expansion of the ordinary meaning [at p15].*

- In *Re Ravlich* the Information Commissioner adopted the views of the previous Information Commissioner expressed in 1996 (including in *Re Taweel and Ministry for Planning* [1996] WAICmr 18) concerning the scope of the phrase 'relates to' in clause 4(2)(b).

- [The above] *position seems to have been taken on the basis that the decision of Hasluck J in* [*Minister for Transport v Edwards* [2000] WASCA 349 (***Edwards***)] *categorises the views of Parker J in* Taweel *concerning the phrase 'relates to' as* obiter dicta. *It is our submission that this is not the correct interpretation of Hasluck J's comments which expressly state that the decision (ie the* ratio decidendi*) is related to the interpretation of clause 4(2)(a) and (b) and the decision is not binding (and he therefore did not depart from the decision of Parker J) in the Edwards decision because it related to the meaning of the final sentence of clause 4(2).*

  … As such…the decisions of the previous Information Commissioner quoted on pages 7 and 8 of the preliminary view are, insofar as they are inconsistent with the views expressed by Parker J in [Taweel], *no longer correct and should not be relied upon.*

- The material portion of *Re Taweel and Ministry for Planning* [1996] WAICmr 18, which was omitted from the preliminary view letter, is paragraph 22 which states:

  > *It is my view that clause 4(2) of the Glossary in Schedule 2 to the FOI Act is intended to exclude from the operation of the FOI Act documents which relate to a Minister's activities in his electorate "When those documents do not involve the affairs of an agency;* ***documents which involve the Minister's activities as a member of a political party****; and personal documents of a Minister. In my view, a document relating only to electoral matters, for example, would not be a document of a Minister under clause 4(2) of the Glossary. Subjecting documents of that type to a right of access*

> *under the FOI Act would not, in my view, promote the objects of the FOI Act* [emphasis added by the agency].

- *Re Ravlich* did not deal with the question of what an 'affair of an agency' is, as it was not relevant in that matter. However, in *Re Taweel and Ministry for Planning* [1996] WAICmr 18, the Information Commissioner considered this question and concluded at [24] that:

> *The phrase* [relates to the affairs of] *is not defined in the FOI Act. However, the Concise Oxford Dictionary (Eighth Edition) defines the word "relate (followed by to)" as meaning, inter alia, "have reference to; concern". "Affair" is also defined to mean "a concern; a business; a matter to be attended to; ordinary pursuits of life; business dealings; public matters".*

Therefore, paragraph [24] in *Re Taweel and Ministry for Planning* [1996] WAICmr 18 'identifies that, to be related to an 'affair' of an agency, the document must be 'a concern, a business, a matter to be attended to'' (my emphasis).

- The law in relation to the interpretation of clauses 4(2)(a) and 4(2)(b) of Schedule 2 to the FOI Act was clearly set out by Parker J in *Taweel* and he held (in effect) that:

  a. the term 'relates to' should be given its ordinary meaning and avoid any straining limitation or expansion of that term; and

  b. in order for a document to relate to 'an affair' of an agency it must relate to 'a concern, a business, a matter to be attended to'.

- The disputed documents which 'involve the Minister's activities as a member of a political party', do not 'relate to', in the ordinary sense of those words, 'a concern, a business, a matter to be attended to' of another agency. As such, they are not documents of an agency for the purposes of the FOI Act. The agency has advanced this position on the basis of the Caretaker Conventions in place in Western Australia at the time of the creation of the disputed documents.

- The decisions from other jurisdictions referred to in the preliminary view letter provide some guidance as to what amounts to an 'affair of an agency'. However, 'they should not be taken to expand the scope of that term beyond its ordinary meaning given the decision in *Taweel'*.

- *Whichever formulation of the phrase 'relates to the affairs' is applied, …the Caretaker Conventions in force in Western Australia prior to the 2013 State Election* (***the Caretaker Conventions***) *fundamentally alter the nature of the business of agencies and the decision making authority of Ministers so that many, if not most, of the documents created in Ministerial Offices during the period in which the Conventions are in force do not 'relate to the affairs of an agency'.*

- [The agency] *accept*[s] *that such a submission has not previously been put before the Information Commissioner, nor have comparable officeholders in other States and the Commonwealth considered the impact of caretaker conventions on the operations of government for the purposes of freedom of information legislation.* [The agency] *submit*[s] *that, because of this, while the legal principles remain unaltered, the facts of the matters which gave rise to decisions such as that in* Re Ravlich *are not comparable to the circumstances which prevail in Government during a caretaker period.*

- The preliminary view does not contain an analysis of the effect of the Caretaker Conventions on the operations of agencies and Ministerial Offices. While the A/Commissioner may have considered the agency's submissions in this regard and *'formed views not recorded in the preliminary view…the application of the Caretaker Conventions is fundamental to the decisions made by the agency and should be given detailed consideration. The agency offers the further submissions below (some of which have previously been put before the Information Commissioner) to aid in that analysis'.*

- The Caretaker Conventions fundamentally alter how Ministers and agencies interact during the period for which the Caretaker Conventions are in force.

- Caretaker conventions operate as a check on executive power in circumstances where there is no Parliament to which it can be held accountable; they help to preserve the 'status quo' while the electorate considers who to elect to govern for the upcoming term of Government; and they protect the public sector's funds and officers from being used to further the political agenda of the governing party.

- *WA has formalised guidance during the caretaker period in the Premier's Circular Guidance on Caretaker Conventions 2013 which guides Ministers, Ministerial officers and public servants on the handling of Government business during a State election campaign* (***the Premier's Circular***).

- The Governance arrangements for the State are fundamentally altered during the period that the Caretaker Conventions apply.

- *While the question of how caretaker conventions are enforced is a vexed one…, the application of Premier's Circulars is a lot clearer. Premier's Circulars are to be complied with by Chief Executive Officers and are to be circulated to, and complied with by, public sector officers. A failure to comply with a Premier's Circular could amount to a breach of discipline under the* Public Sector Management Act 1994.

- *Generally speaking, during the caretaker period, agencies operate at arms-length from political activity while the on-going business of government continues.*

- *Caretaker Conventions deal specifically with the dissemination of information during a caretaker period. Different States take different approaches to the dissemination of information (such as media statements) but all agree that party*

political information has to be separated and disseminated differently from that relating to government information campaigns in the public interest.

- The official dissolution of the coalition of the National Party and Liberal Party is another example of how the caretaker period fundamentally changes the nature of the governance arrangements. This dissolution 'clearly shows that a policy of one party cannot be taken to be the policy of the Government as, at that stage, the coalition required to implement that policy no longer exists'.

- *… the application of the Caretaker Conventions during the period to which the Convention applied fundamentally alters the relationship between a Minister and his agency. It changes the matters about which the Minister might make decisions, it alters the way in which information is disseminated by Ministers and their officers and effects the conduct of the public sector in how it performs its duties.*

- '[D]ocuments produced in Minister's Offices during the course of the Caretaker period are of a different character as they are produced subject to the Caretaker Conventions'.

- '[A]dopting the language in [*Re Taweel and Ministry for Planning* [1996] WAICmr 18], in order to be 'related to an affair of an agency', the document must be 'related' in the ordinary meaning of that word and an 'affair' is 'a concern, a business, a matter to be attended to'.

- [T]*he change in relationship between the Minister (and Ministerial offices) and the relevant Government during Caretaker period means that much of what occurs in Ministerial Offices no longer 'relates' to the agency in any way because the Minister no longer adopts an unfettered decision making position in relation to how the agency conducts its business during that period.*

- *Further, the disputed documents cannot be "a concern, a business or a matter" to be attended to because the role of Ministers and Ministerial Officers during the Caretaker period excludes them from making decisions in relation to matters such as Max Light Rail and the Airport Link. These matters were inherently political and the documents themselves solely concern presenting and publicis*[ing] *the Liberal Party policies in relation to these matters. They do not address the role of the agencies (being the Department of Transport and Public Transport Authority) in the implementation of the policies nor do they suggest that the Minister is making a decision as to how the Department of Transport is to act. Rather they set out the policy the Liberal Party will seek to implement if they are to form Government after the election* (my emphasis).

- Looking at whether the documents deal with the 'activities' of an agency, the documents only concern what activities the agency might be asked to undertake if the Liberal party was returned to Government.

- *The fundamental change to the nature of the relationship between the Minister (being the Premier) and Government departments during the Caretaker period means that the documents produced during that period in a Ministerial Office are*

usually of a different character than those produced during other times in the electoral cycle. The disputed documents are 'exactly those type of documents'. As such, they do not 'relate to the affairs of an agency' and are therefore not 'documents of an agency' for the purposes of the FOI Act.

41. By email dated 10 March 2015, the SSO, on behalf of the agency, provided further submissions in response to my supplementary preliminary view letter. In summary, the SSO submits as follows:

- It 'disagrees with my conclusion' that *'I do not accept that it follows that the disputed documents or many, or most, of the documents created in Ministerial Offices during the period in which the Conventions are in force, do not 'relate to the affairs of an agency'…The nature of the Caretaker Conventions is such that they expressly alter the manner in which Ministerial Offices function and, as a consequence, the documents which are created in Ministerial Offices during that time'.*

- *However, it is correct to say that each document which falls within the scope of this application must be considered individually and assessed as to whether it relates to the affairs of the agency.*

- [I]*n* [Taweel], *in the course of his reasons for decision in that case, Justice Parker discussed how it could be determined whether a document "related to" the affairs of another agency. At pages 10-11 of his decision, his Honour said:*

  > "… it seems most likely that it was assumed that a process of categorisation which identified the essential nature of the document was to be undertaken... . A variety of considerations might need to be considered to determine the essential nature of the document such as its primary purpose, its author, its intended addressee, its subject matter and, where more than one subject is covered, whether one or more was the primary subject and others merely incidental. ... In such a process some documents might well be properly seen as having more than one essential nature in which event it would seem to be necessary to apply cl 4(2)(b) to each of the essential natures identified. While that would lead to some arbitrary results, the incidence of these would be far more limited than if a document were to be categorised for the purposes of cl 4(2)(b) according to every subject or agency to which it might have some connection or relevance".

- *With respect, an observation that the documents which fall within the scope of the application "reference" MAX light rail or the Airport Link is not sufficient to satisfy the categorisation process envisaged by Justice Parker. In fact, it would seem to fall into the trap he identifies of categorising documents for the purposes of clause 4(2)(b) according to every subject or agency to which it might have some connection or relevance.*

- *It certainly is correct to say that there are references to Max light rail and the Airport link in each document (without such references the documents would not fall within the scope of the application). However, when the documents are*

categorised as envisaged by Justice Parker it is our submission that they do not relate to the affairs of an agency.

- *We have considered the criteria identified by Justice Parker as relevant to the categorisation process in our examination of the documents. The primary purpose of the documents were as communication between the Premier's Office, Ministers' Offices and the Liberal Party concerning making liberal party policy announcements and responding to media queries during the election period about MAX light rail and the Airport Link. The addressees are ministerial officers and officers of the Liberal Party, at no time is the Department of Transport or the PTA a recipient*[.]

- Documents 6, 7 and 20 are examples of this for the reasons provided in the agency's submissions.

- *It is our submission that the categorisation process undertaken by the Office of the Information Commissioner as evidenced by the supplementary preliminary view does not follow the categorisation process set out in* Re Taweel. *Furthermore, if the categorisation process were properly undertaken in accordance with the process outlined by Justice Parker (which in effect requires a decision maker to consider the essential nature of the document) then the conclusion would be that the documents in question do not relate to the affairs of the agency as discussions concerning Liberal Party policy announcements and media comments between ministerial officers and officers of the Liberal Party are not 'a concern, a business, a matter to be attended to' by the Department or the PTA.*

Consideration

42. The issue in dispute for my determination is whether the disputed documents 'relate to the affairs of another agency (not being another Minister)'.

43. In the preliminary view letter, the A/Commissioner noted as follows at pages 7 and 8:

> *The Commissioner considered the operation of clause 4(2) of the Glossary in* Re Ravlich. *For the reasons set out in paragraphs [20]-[25] of that decision, the Commissioner took the view that, provided the document in question relates to the affairs of another agency (not being another Minister), it will meet the requirements of clause 4(2)(b) of the Glossary to the FOI Act. The Commissioner expressed the view at [20] that the words 'relate to' are not qualified by degree or in any other way. That view is supported by two previous decisions of this office. In* Re Taweel and Ministry for Planning *[1996] WAICmr 18* (Re Taweel), *the former Commissioner stated, at* [23]:
>
> > In my view, it is not a requirement of clause 4(2) of the Glossary that a document held by a Minister relate exclusively to the affairs of some other agency in order for it to be accessible under the FOI Act. Were that the case, very few, if any, documents held by a Minister in his official capacity would be "documents of an agency" and subject to the

> operation of the FOI Act. That result would clearly not accord with the objects and intent of the FOI Act.

The former Commissioner also said at [26]:

> Applying the ordinary meaning to the words in clause 4(2), and having regard to the objects and intent of the FOI Act, I consider that the phrase "relates to the affairs of another agency" means that documents in the possession or under the control of a Minister must be documents that can be properly characterised, in a general sense, as documents relating to the business (in the broad sense of that word) of another agency in the performance of its functions, in order for those documents to be accessible under the FOI Act.

In Re Kobelke and Minister for Planning *[1996] WAICmr 43* (Re Kobelke)*, the former Commissioner, in considering clause 4(2)(b), said at [18]:*

> In my view, the phrase "relates to the affairs of" in clause 4(2) denotes a relationship between two or more things. I consider that those words should be interpreted in the context in which they are found and in accordance with the object and intent of the FOI Act set out in s.3 of that Act. Taking into account those objects and intent and the fact that Parliament clearly intended certain documents held by a Minister to be accessible under the FOI Act, I am of the view that the phrase "relates to the affairs of" should be given a broad interpretation: see *Re Wiseman and Department of Transport* (1985) 4 AAR 83.

I agree with those comments in Re Taweel *and* Re Kobelke *and consider that, provided the documents in question relate to the affairs of another agency (not being another Minister) it is not relevant whether or not it also relates to the affairs of a political party or whether it relates more to the latter than the former.*

44. Having carefully considered the agency's submissions dated 17 July 2014, I accept that the Supreme Court decision in *Taweel* remains good law and that the term 'relates to' in clause 4(2) of the Glossary to the FOI Act should be given its ordinary meaning, avoiding any straining limitation or expansion of that term.

45. In the preliminary view letter, the A/Commissioner noted that, having reviewed decisions in other jurisdictions that have considered the meaning of the term 'relates to the affairs of an agency' subsequent to my decision in *Re Ravlich – Parnell and Prime Minister of Australia* [2011] AICmr 10, *Parnell and Prime Minister of Australia (No 2)* [2011] AICmr 12, *Fletcher and Prime Minister of Australia* [2013] AICmr 11 and *Office of the Premier v The Herald and Weekly Times Pty Limited* [2013] VSCA 79 – she agreed with the views expressed in those cases.

46. In light of my view at [44], I agree with the agency's submission that, while the above decisions from other jurisdictions provide guidance as to what amounts to an 'affair of an agency', they should not be taken to expand the scope of that term beyond its ordinary meaning.

47. As I understand it, since the MAX project was first announced by the State Government in September 2012, it has at all times been a project administered by the Department of Transport. This includes the period before, during and after the caretaker period. In relation to the Airport Link, I understand that the Liberal Party announced on 10 February 2013 its proposal to build an airport rail link, in the event it was re-elected. On the information before me, it appears that no government decision to build the Airport Link had been made prior to the State election on 9 March 2013. However, the agency has advised my office that:

> *The* [Public Transport Authority] *has been involved in preliminary, high level or conceptual planning processes or studies for an airport rail line for a number of years. This can be evidenced through State Government planning documents available* [publicly] *such as* [the] *Department of Planning's 'Directions 2031' released in 2010 and the Department of Transport's draft 'Public Transport for Perth in 2031' plan released in 2011.*

48. Consequently, I consider that the MAX Light Rail and the Airport Link projects are an 'affair of an agency'. Based on the agency's submissions, I understand that the agency does not dispute this. I also note that the Department of Transport and the Public Transport Authority had commenced some work on these projects before the writs for the State election were issued on 6 February 2013.

49. As noted at [40], in its letter dated 17 July 2014, the agency submits that to be related to an affair of an agency, a document must be 'a concern, a business, a matter to be attended to' and that the disputed documents cannot be 'a concern, a business or a matter to be attended to' because the role of Ministers and Ministerial Officers during the caretaker period excludes them from making decisions in relation to matters such as MAX Light Rail and the Airport Link (my emphasis). In my view, these submissions are misconceived. The question for my consideration is whether a document relates to the affairs of another agency, not whether a document is an affair of another agency.

50. For the reasons given in its submissions dated 17 July 2014, as set out at [40], the agency submits that 'much of what occurs in Ministerial Offices during the caretaker period no longer relates to an agency'. Even if that were so, the relevant issue in this case is whether the disputed documents themselves relate to the affairs of another agency.

51. I understand that the Caretaker Conventions ceased to have effect when the caretaker period ended (that is, when the 2013 State election result was clear). According to the agency's website, the Premier's Circular (number 2013/01) was rescinded on 3 April 2013 and is no longer available on the agency's website: see http://www.dpc.wa.gov.au/GuidelinesAndPolicies/PremiersCirculars/Pages/Default.aspx

52. However, I note that a copy of the Premier's Circular including the Caretakers Conventions is still publicly available online including on Parliament's website at http://www.parliament.wa.gov.au/parliament/commit.nsf/%28Evidence+Lookup+by+Com+ID%29/7A9001CF2A85588E48257C2A00254BBC/$file/ef.aar12.140130.aqon.001.Premier+and+Cabinet+2.pdf (at page 20).

53. The Caretaker Conventions, in so far as is relevant, provide as follows:

> ***1. Introduction***
>
> *1.1 By convention, the Government assumes a 'caretaker' role in the period immediately before a State General Election as it is recognised that every general election carries the possibility of a change of government.*
>
> *1.2 The caretaker period commences from the date of the issue of the writs for elections for the Legislative Assembly and continues until the election result is clear, or, in the event of a change of government, until the new government is formally sworn-in.*
>
> *1.3 In the caretaker period, efforts are made to ensure that decisions are not taken that would bind an incoming government and/or limit its freedom of action. The guidelines are applicable to all decisions made during the caretaker period, not just politically contentious issues.*
>
> *1.4 The practices associated with the caretaker role are also directed at protecting the apolitical nature of the public sector and avoiding the use of government resources in a manner to advantage a particular party. The arrangements also aim to prevent controversies about the role of the public sector during an election campaign.*
>
> *1.5 Generally, the arrangements are intended, wherever possible, to ensure that:*
>
> *1.5.1 significant appointments are not made;*
>
> *1.5.2 major policy decisions are not taken which would be likely to commit an incoming government (including the implementation of new policies or approval of major projects within government agencies);*
>
> *1.5.3 no commitments are made to major contracts or undertakings;*
>
> *1.5.4 electioneering is not undertaken through government advertising, publications or electronic communications;*
>
> *1.5.5 Members of Parliament do not undertake air travel at public expense for electioneering purposes; and*
>
> *1.5.6 public sector officers are not involved in party political activities.*

1.6 These guidelines are intended to explain the conventions and practices in more detail and to provide guidance for the handling of business during the caretaker period. The conventions are neither legally binding nor inflexible rules…

…

1.8 It is important to note that the conventions are directed to the taking of decisions. They do not apply to new policy promises that a government or opposition may announce as part of its election campaign.

1.9 Public sector officers are expected to comply with the conventions. The conventions build on principles of conduct set out in the Public Sector Management Act 1994*; the Public Sector Commissioner's Instruction No. 7: Code of Ethics; and agency codes of conduct, which are applicable to public sector officers at all times.*

…

7. Operations of Public Sector Agencies and Relationships with Ministers

7.I The normal business of government should continue but public sector agencies should avoid partisanship and ensure the impartiality of the public sector. Communication arrangements between Ministerial offices and agency officers should continue to be in accordance with section 74 of the Public Sector Management Act 1994.

7.2 Material concerning the day-to-day business of public sector agencies should be supplied to Ministers in the usual way.

7.3 Ministers should sign only the necessary minimum of correspondence during the caretaker period. Departmental officers or Ministerial staff can respond to some correspondence normally signed by Ministers.

…

14. Political Participation by Public Sector Officers

…

14.4 It is recognised that Ministerial officers, appointed under the Public Sector Management Act 1994 *to assist political office holders, may become involved in activities of a party political nature when undertaking functions specified by the political office holder.*

14.5 Public sector officers should refrain from making public comments in their official capacity about the policy commitments of any political party or candidate. Officers are required to uphold the apolitical nature of the public sector at all times but this is particularly important during the caretaker period.

…

16. Public Records

16.1 All official documents are to be maintained in accordance with the provisions of the State Records Act 2000. *The provisions of the* Department of the Premier and Cabinet Records Keeping Plan 2010 *also apply to the handling of Ministerial office records.*

54. The agency submits that, during the period that the Caretaker Conventions are in force, those Conventions may alter or affect:

- the nature of the business of agencies and the decision-making authority of Ministers;
- how Ministers and agencies interact;
- the relationship between a Minister and his agency;
- the matters about which a Minister might make decisions;
- the way in which information is disseminated by Ministers and their officers; and
- the conduct of the public sector in how it performs its duties.

55. Even if I accepted those submissions, I do not accept the agency's claim that documents produced during the caretaker period are necessarily of a different character than those produced during other times in the electoral cycle. In my view, there is nothing in the Caretaker Conventions to support that claim.

56. Similarly, I do not agree that it follows that the disputed documents or 'many, if not most, of the documents created in Ministerial Offices during the period in which the Conventions are in force', do not 'relate to the affairs of an agency', as the agency submits. As noted at [41], the agency disagrees with my conclusion in this regard and contends that '[t]he nature of the Caretaker Conventions is such that they expressly alter the manner in which Ministerial Offices function and, as a consequence, the documents which are created in Ministerial Offices during that time'.

57. However, having considered all of the material before me, including the Caretaker Conventions and the agency's submissions, I am not persuaded that the application of the Caretaker Conventions to the particular facts of this matter results in the disputed documents failing to be documents of an agency.

58. I have considered the agency's submissions that I have not followed the categorisation process set out in the Supreme Court decision in *Taweel*. The agency submits that 'if the categorisation process were properly undertaken in accordance with the process outlined by Justice Parker (which in effect requires a decision maker to consider the essential nature of the document) then the conclusion would be that the documents in question do not relate to the affairs of the agency'.

59. As I understand it, the agency now contends that the question of whether a document relates to an affair of an agency requires a categorisation process to be applied to the document 'which in effect requires a decision maker to consider the essential nature of the document'.

60. I do not accept the agency's submissions. In *Edwards*, Hasluck J noted at [44] that, in his view, '… much of what was said in *Taweel* was *obiter dicta'*. With respect, I consider that the comments made by Parker J at pages 10-11 of *Taweel*, referred to by the agency, are *obiter dicta* that I am not bound to follow.

61. In *Apache Northwest Pty Ltd v Department of Mines and Petroleum [No 2]* [2011] WASC 283 the Supreme Court (per Edelman J) determined an appeal which arose out of my decision in *Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Lander and Rogers Lawyers* [2010] WAICmr 35. One of the issues that arose on appeal was whether or not I applied the correct test to the phrase 'could reasonably be expected' in that matter in relation to clause 4(2)(b), clause 4(3)(b) and clause 5(1) of Schedule 1 to the FOI Act.

62. In considering this issue, Edelman J said at [44]:

> [I]*t would be more accurate to focus upon the words of the statute ('could reasonably be expected to') rather than a paraphrase of those words ('real and substantial grounds'; 'realistic or material possibility'). The words of the statute are at least as clear as those potential pleonasms. It will 'seldom be helpful, and it will often be misleading, to adopt some paraphrase of [statutory words]':* McKinnon v Secretary, Department of Treasury *[2006] HCA 45; (2006) 228 CLR 423, 445 [60] (Hayne J referring to a paraphrase of 'reasonable grounds' as 'not irrational, absurd or ridiculous').*

63. His Honour also said at [50] that ' [t]he best approach to provisions such as cl 4(2)(b) [of Schedule 1 to the FOI Act] is simply to ask whether disclosure 'could reasonably be expected to' have the relevant effect'.

64. Likewise, I consider that in the present case the best approach to clause 4(2)(b) of the Glossary to the FOI Act is simply to ask whether the disputed documents relate to the affairs of another agency (not being another Minister). In my view, this approach is consistent with the ratio decidendi of *Taweel* that I am bound to follow, of giving the term 'relates to' its 'ordinary meaning, avoiding any straining limitation or expansion of that term'.

65. I agree with the complainant's submission that requiring an agency to consider the essential nature of a document, as the agency submits, applies 'an unnecessarily complicated filter over the question…' of whether the disputed documents are documents of an agency as defined in the FOI Act.

66. I also note that in considering the meaning of the phrase 'documents of an agency', specifically the final words of clause 4(2) of the Glossary, Hasluck J noted at [48] of *Edwards* that 'section 18 of the *Interpretation Act 1984* (WA) requires preference to be given to the construction of a written law that would promote the purpose or object underlying the law to a construction that would not promote that object'.

67. His Honour said at [49]-[50]:

> *It is apparent from s 3 that the objects of the FOI Act are to be achieved by creating a general right of access to State and local government documents. The*

> *right of access is constituted by s 10 in respect of the documents of an agency and later provisions of the Act, especially s 23, allow for an exemption in respect of various kinds of governmental documents.*
>
> *It is true that many of the exemptions apply to documents of a kind likely to come into the possession of Ministers of the Crown, such as policy documents and briefing materials bearing upon the deliberations of cabinet…the presence of the various exemptions in respect of ministerial documents strongly suggests that, prima facie, the right of access is generally available in respect of such documents, with the result that there is a need to allow for exemptions in respect of certain categories of sensitive documents.*

68. I have reviewed each of the disputed documents and considered their contents. I am satisfied that the documents all relate to either the MAX Light Rail or the Airport Link. As noted at [48], the agency does not appear to dispute that these projects are 'an affair of an agency'.

69. Applying the ordinary meaning to the words in clause 4(2) and having regard to the objects and intent of the FOI Act, I am of the view that the disputed documents each relate to the affairs of another agency (not being a Minister). Accordingly, I find that the disputed documents are documents of an agency as defined in clause 4 of the Glossary to the FOI Act.

70. During my consideration of this matter, I also considered whether the disputed documents are documents of an agency other than a Minister. Under the *Freedom of Information Regulations 1993* (**the FOI Regulations**), the Office of the Premier is a related agency to the Department of the Premier and Cabinet. Consequently, under clause 2(4) of the Glossary to the FOI Act, the Office of the Premier is not to be regarded as a separate agency but is to be regarded as part of the Department of the Premier and Cabinet for the purposes of the FOI Act.

71. In this case, the complainant initially made and addressed its access application to the 'Department of Premier and Cabinet', not the 'Office of the Premier'. That is, the application was for documents held by the Department of the Premier and Cabinet, not the Office of the Premier. On that basis, I consider it is arguable that the issue of whether the disputed documents are documents of a Minister does not arise, on the basis that the disputed documents are documents of the Department of the Premier and Cabinet and, consequently, are documents of an agency within clause 4(1) of the Glossary to the FOI Act.

72. However, as I understand it, following negotiations with the complainant to reduce the scope of the application, the agency proceeded on the basis that the application was for documents held by the Office of the Premier only. In light of my finding at [69], it is unnecessary for me to make a finding in this regard.

ARE THE DISPUTED DOCUMENTS EXEMPT?

73. In light of my finding that the disputed documents are documents of an agency, I have also considered whether they contain matter that is exempt under Schedule 1 to the FOI Act.

74. Notwithstanding my office's invitations to do so, and noting the agency's onus under section 102(1) to establish that its decision to refuse access to the disputed documents is justified, the agency has made no submissions to me claiming that the disputed documents, or any information in the disputed documents, are exempt under any of the exemption clauses in Schedule 1 to the FOI Act.

75. However, based on my examination of the disputed documents, it is apparent that, once edited to delete the excluded information, they still contain some personal information, as defined in the FOI Act. Personal information is prima facie exempt from disclosure under clause 3(1) of Schedule 1 to the FOI Act, subject to the application of the limits on exemption in clauses 3(2)-3(6).

76. Clause 3(3) provides that information is not exempt merely because its disclosure would reveal 'prescribed details' in relation to officers or former officers of agencies. The type of information that amounts to prescribed details is set out in regulation 9(1) of the FOI Regulations. The prescribed details covered by the limit include the name and title of an officer and things done by an officer or former officer of an agency in the course of performing their functions as an officer.

77. In this case, the personal information remaining in the disputed documents, after the documents are edited to delete the excluded information, consists of the names, job titles and things done by officers or former officers of an agency in the course of performing their functions as an officer. Consequently, I consider that information consists of prescribed details that are not exempt under clause 3(1) pursuant to the limit on the exemption in clause 3(3). Accordingly, I find that information is not exempt under clause 3(1) of Schedule 1 to the FOI Act.

78. On the information presently before me and based on my examination of the disputed documents, I am not persuaded that the disputed documents are otherwise exempt for any reason. Consequently, I find that the disputed documents, edited to delete the excluded information, are not exempt under any of the exemptions in Schedule 1 to the FOI Act.

CONCLUSION

79. The agency's decision is set aside. In substitution, I find that:

- the disputed documents are documents of an agency as defined in clause 4 of the Glossary to the FOI Act;
- the personal information remaining in the disputed documents, after they are edited to delete the excluded information, consists of prescribed details which is not exempt under clause 3(1) of Schedule 1 to the FOI Act; and
- the disputed documents are not otherwise exempt under any of the exemptions in Schedule 1 to the FOI Act.

****