

Participants:

**West Australian Newspapers
Limited**
Complainant

- and -

Western Power
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access - report into executive vehicle scheme - whether the *Tax Administration Act 1953 (Cth)* prevents an application under the FOI Act - clause 6(1) - deliberative processes - whether disclosure contrary to public interest - clause 5(1)(b) - whether disclosure could reasonably be expected to prejudice an investigation - clause 10(1) - whether disclosure could reasonably be expected to have a substantial adverse effect on the financial or property affairs of the State or an agency.

Freedom of Information Act 1992 (WA): sections 30, 30(f), 102(1); Schedule 1, clauses 5(1)(b), 6(1) and 10(1)

Electricity Corporation Act 1994 (WA): section 4(1)

Tax Administration Act 1953 (Cth): section 8XA

Freedom of Information Act 1982 (Cth)

Acts Interpretation Act 1901 (Cth): section 15AB

State Records Act 2000

Re Waterford and Department of the Treasury (No 2) (1984) 5 ALD 588

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550

Re Cumming and Others and Metropolitan Health Service Board and Another [2000] WAICmr 7

Harris v Australian Broadcasting Corporation (1983) 78 FLR 236

Re Healy and Australian National University (Commonwealth Administrative Appeals Tribunal, 23 May 1995, unreported)

Re James and Australian National University (1984) 2 AAR 327 at 341

DECISION

The decision of the agency to refuse access to the disputed information is set aside. In substitution it is decided that the disputed information is not exempt.

D A WOOKEY
A/INFORMATION COMMISSIONER

19 May 2006

REASONS FOR DECISION

1. This complaint arises from a decision made by Western Power Corporation ('WPC') to refuse West Australian Newspapers Limited ('the complainant') access to a document under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. WPC was a corporatised utility, established under section 4(1) of the *Electricity Corporation Act 1994* ('the EC Act') on 1 January 1995. On that date, the former State Energy Commission of Western Australia was split into separate gas and electricity utilities. In 2000, section 4 of the EC Act was amended to change the corporation's name to Western Power Corporation. On 1 April 2006, WPC was disaggregated into four stand-alone businesses as part of the State Government's energy reform program to encourage competition in the electricity market: Synergy, Western Power, Verve Energy and Horizon Power.
3. As WPC is now a defunct agency, its outstanding responsibilities have been taken over by another agency, in accordance with section 99(1) of the FOI Act. In this case, that other agency is the new stand-alone business, Western Power ('the agency'). I understand that the agency maintains the claims made by WPC and wherever these reasons for decision refer to claims made by WPC they are to be understood as claims made by the agency.
4. On 6 August 2004, the complainant applied to WPC for access under the FOI Act to:

 "...all of the following documents relating to:
 1. *The KPMG report into Western Power's executive vehicle scheme.*
 2. *Any ancillary documents, including memorandums [sic] - electronic, written or otherwise - to Energy Minister Eric Ripper from former chief executive Stephen van der Mye in relation to ending the executive vehicle scheme."*
5. I understand that KPMG is a partnership operating nationally which provides audit, tax and advisory services.
6. WPC advised as follows:
 - WPC's Benefit Motor Vehicle Policy ('the Scheme') operated between 1995 and June 2003.
 - KPMG was engaged to review the history of the Scheme, prepare a report on that issue and liaise with the ATO.
 - An investigation by the ATO in relation to the Scheme is still ongoing.

- The ATO has not been provided with, nor was WPC required to provide it with, a copy of the disputed document. However, much of the information contained in the disputed document has been provided to the ATO.
7. On 13 September 2004, WPC advised the complainant that the sole document it had identified as coming within the scope of its application was the KPMG report and it refused access to that document under clauses 3(1) and 5(1)(b) of Schedule 1 to the FOI Act.
 8. The complainant sought internal review of that decision. On 14 October 2004, WPC confirmed its decision but claimed, in addition, that the KPMG report was also exempt under clause 6(1)(a).
 9. On 26 October 2004, the complainant applied to me for external review of that decision.

THE DISPUTED DOCUMENT

10. The disputed document is a covering letter dated 18 September 2003 to the former agency from KPMG, with a report ('the Report') attached. Since the complainant has advised me that it is seeking access only to the Report, it is not necessary to deal with the covering letter.
11. I understand that four 'original' copies of the Report were given to WPC by KPMG but that only one of those 'original' documents was provided to me. Since all of those documents come within the scope of the access application, all four copies of the Report should have been provided to me. However, since the complainant has not indicated that it is seeking access to all of the copies held by the agency, I shall deal only with the copy of the Report produced to me.

REVIEW BY A/INFORMATION COMMISSIONER

12. Following the receipt of the complainant's application for external review, I obtained one of the originals of the Report and WPC's FOI file maintained in respect of the access application.
13. In the course of my dealing with this complaint, the complainant clarified that it was seeking external review in respect of the Report only and not in respect of the ancillary documents requested.
14. In my view, the two notices of decision provided to the complainant by WPC did not comply with section 30 of the FOI Act and were plainly deficient in significant respects, those being, in particular:
 - (a) the reasons for refusal and the findings on any material questions of fact underlying those reasons, together with reference to the sources of information on which those findings were based, were not provided to the complainant as required by s.30(f) of the FOI Act; and

- (b) the internal review decision was not accompanied by a statement setting out the right of external review and the procedure to be followed to exercise that right, as required by section 30(h).
15. Under section 102(1) of the FOI Act, the onus is on the relevant agency to establish that its decision is justified or that a decision adverse to another party should be made. The complainant is not required to establish that it is entitled to access the requested document; it is up to the agency to establish a case for exempting a document from disclosure. The obligation to provide an applicant with a notice of decision that contains all of the information prescribed by section 30 is intended to ensure that the true basis of a decision is clearly explained. Only if applicants understand all of the elements involved in applying a particular exemption and why access is refused are they in a position to decide whether or not the decision is reasonable or to test the decision by way of complaint to the Information Commissioner.
 16. Deficiencies in WPC's notices of decision were brought to its attention in the decisions of the former Information Commissioner ('the former Commissioner') in *Re Edwards and Western Power Corporation* [1999] WAICmr 13 and *Re Ravlich and Western Power Corporation* [2000] WAICmr 17; and have been the subject of similar comment in my letter to WPC dated 24 November 2004, in relation to another complaint which did not proceed to a formal decision and in my decision in *Re West Australian Newspapers Limited and Western Power Corporation* [2005] WAICmr 10. However, WPC advised me that, since the issue of the notices of decision the subject of this application, it had taken steps to ensure that its obligations are met in this regard. WPC did not advise me what those steps might be but I look forward to an improvement in the quality of the notices given to applicants by all four new agencies.
 17. In view of the deficiencies identified in WPC's notices, I required it to provide further information to justify its decision to refuse access to the Report. In response, WPC gave me a letter from its solicitors, dated 10 December 2004, which claimed that the Report is exempt in full under clause 6 or, in the alternative, specific sections of the Report - which it identified to me - are exempt under clauses 3, 5, 6 and 10 of the FOI Act and that access to other sections of the Report is prohibited because of the application of section 8XA of the *Taxation Administration Act 1953* (Cth) ('the Tax Act'). WPC claimed that, as Federal legislation, the Tax Act overrides any inconsistent State legislation - in this case the FOI Act. In addition, WPC claimed that it is not practicable to edit the Report. My office provided a summary of those submissions to the complainant.
 18. On 6 January 2005, in an attempt to obtain more information as to the basis of WPC's claims for exemption, one of my officers met with officers of WPC and its solicitors. Following that meeting, WPC was required to produce additional documents and provide further information in support of its claims.
 19. I note that WPC did not clearly identify what information, if any, in the Report is in the public domain. I understand from the summary of WPC's submissions

of 10 December 2004, which was prepared by WPC and given to the complainant, that it is public information that KPMG was commissioned by WPC to prepare the Report and that the ATO was provided with certain information in the Report for the purpose of a taxation law.

20. In July 2004, *The West Australian* newspaper published an article which said, among other things:
 - In June 2003 the former Chief Executive Officer of WPC, Dr Stephen van der Mye, jettisoned an executive vehicle scheme by means of which senior managers at WPC were able to sell their vehicles every two years for the written down value and keep the profit, which was sometimes about \$10,000. WPC would then replace the sold vehicle with a new one, enabling the process to be repeated.
 - Dr van der Mye became aware of the implications of fringe benefits tax in relation to the executive vehicle scheme.
 - The scheme was investigated by KPMG.
 - After seeking legal advice, Dr van der Mye abolished the scheme and WPC paid \$1.7 million to the ATO, though more than half of that amount was later returned to WPC because axing the scheme before June 30 meant that the actual tax liability for the 2003 financial year had not crystallised.
21. Accordingly that information - although I am unable to comment on its accuracy - is in the public domain.
22. On 7 October 2005, I provided the parties with a letter setting out my preliminary view of this complaint. It was my preliminary view, for the reasons given in that letter, that the complainant is not precluded from seeking access to the disputed information in the Report on the basis that to do so would contravene section 8XA of the Tax Act because, in my view, that provision is open to a different interpretation based on extrinsic materials; nor was the Report, or the disputed information in the Report, exempt as claimed by WPC, with the exception of certain information which, in my preliminary view, was exempt under clause 3(1) of Schedule 1 to the FOI Act.
23. Following the receipt of my letter, the complainant advised me that it accepted my preliminary view that certain information in Appendices 2 and 4 of the Report is personal information that is *prima facie* exempt under clause 3(1) but that it would be practicable to delete that information. WPC also accepted my preliminary view in respect of that matter. In addition, WPC withdrew its claim that certain information on pages 2, 19 and in Appendix 4 of the Report was exempt under clause 3(1). Accordingly, that information, together with the information in Appendices 2 and 3, referred to above, is no longer in dispute between the parties. However, WPC maintained its other claims for exemption and provided me with submissions in response to my letter of 7 October 2005.

24. WPC claimed that access to the Report is prohibited by reason of the operation of the Tax Act. In the alternative, WPC claimed that the Report is exempt in full under clause 6(1) or that certain information it identified to me is exempt under clauses 5(1)(b), 6(1) and 10(1) of Schedule 1 to the FOI Act.

PRELIMINARY ISSUE

25. WPC claimed that certain information in the Report - listed in Appendix A to these reasons - ('the relevant information') is not accessible because of the application of section 8XA of the Tax Act.
26. WPC submitted that section 8XA of the Tax Act regulates access to a person's taxation records and prohibits access other than in accordance with the Tax Act. Section 8XA provides:

"A person must not take action with the intention of obtaining information about another person's affairs that:

- (a) is contained in records in the possession of the Commissioner; and*
- (b) is held or was obtained by the Commissioner under or for the purposes of a taxation law;*

unless the person takes the action:

- (c) under the Freedom of Information Act 1982; or*
- (d) in accordance with the processes of a court or the Tribunal; or*
- (e) in the course of exercising powers or performing functions under or in relation to a taxation law.*

Penalty: \$10,000 or imprisonment for 2 years, or both."

27. WPC contended that, although the Report was not given to the ATO, the relevant information was provided to the Commissioner of Taxation. In consequence, WPC submitted that the complainant is precluded from seeking access to that information and WPC is precluded from giving the complainant that information, since to do so would be a contravention of section 8XA of the Commonwealth WPC Tax Act, which overrides this State's FOI Act.
28. Although WPC claimed that the relevant information was given to the ATO, it initially provided me with nothing other than its assertion that this was so. Accordingly, WPC was required to produce documents in support of that claim.
29. On 18 February 2005, WPC provided me with certain documents (which it identified as Appendices D-J) to show that KPMG, on behalf of WPC, was engaged in negotiations with the ATO prior to its receipt of the complainant's access application - and continues to be engaged in those negotiations - and to support its claim that the relevant information was provided to the ATO.
30. In response to my letter of 7 October 2005, WPC submitted that section 8XA is not ambiguous and contended that the ordinary meaning conveyed by the

provision, taking into account its context and the purpose or object underlying the Tax Act, does not lead to a result that is manifestly absurd or unreasonable. WPC submitted that the ordinary meaning of the words of that provision clearly encompasses the facts at hand and that to suggest that the Tax Act only speaks of obtaining information from the ATO is to read into the section words which are not there.

Consideration

31. WPC submitted that, because the relevant information in the disputed document held by WPC is also contained in records in the possession of the Commissioner of Taxation, section 8XA of the Tax Act applies to prohibit access to the Report by the complainant under the FOI Act. WPC submitted that section 8XA prohibits access to that information other than in accordance with the Tax Act, since Commonwealth legislation overrides State legislation, with the result that the complainant would commit an offence if it sought to access the relevant information under the FOI Act.
32. WPC submitted that the words of the section 8XA are clear and unambiguous and, accordingly, are not open to interpretation. However, in my view, section 8XA is ambiguous because it is open to interpretation in more than one way.
33. WPC contended that section 8XA of the Tax Act means that a person must not take action with the intention of obtaining information about another person's affairs *from any person or body holding that information*, if the same information is also contained in records in the possession of the Commissioner of Taxation and is held or was obtained by the Commissioner under or for the purposes of a taxation law.
34. In my opinion, on its face, section 8XA could also be understood to mean that a person must not take action with the intention of obtaining information *from the ATO* about another person's affairs which is contained in records in the possession of the Commissioner of Taxation, and which is held or was obtained by the Commissioner under or for the purposes of a taxation law. In my view, this is the preferred interpretation for the reasons I have set out below.
35. I consider that the wording of section 8XA, in context, supports that view, since action to obtain access to such information is authorised in certain specified circumstances - set out in paragraphs (c)-(e) of that provision. For example, section 8XA(c) provides that a person may take action with the intention of obtaining such information under the *Freedom of Information Act 1982 (Cth)*. The Commonwealth FOI Act only gives rights of access to documents held by Commonwealth Government agencies, including the ATO which is not an exempt agency under the Commonwealth FOI legislation. Accordingly, paragraph (c) would have no meaning in the context of a person taking action with the intention of obtaining information about another person's affairs from, for example, a private company or a State government agency.
36. There is a statutory basis for referring to extrinsic materials in the interpretation of legislation, which is set out in section 15AB of the *Acts Interpretation Act*

1901 (Cth) ('the Interpretation Act') and which applies to all Commonwealth Acts.

37. Section 15AB of the Interpretation Act provides, insofar as is relevant:

- “(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:*
 - (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or*
 - (b) to determine the meaning of the provision when:*
 - (i) the provision is ambiguous or obscure; or*
 - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.*
- (2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:*
 - ...*
 - (e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;*
 - (f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House”.*

38. WPC submitted that it is not permissible to have regard to such extrinsic material in order to justify my 'preferred interpretation' since the meaning of the words used in section 8XA “...clearly encompass the facts at hand”, by which I understand WPC to mean its own preferred interpretation. In addition, WPC submitted that there are no grounds for relying on section 15AB(1)(b) of the Interpretation Act.

39. In my view, it is open to consider extrinsic materials in interpreting section 8XA of the Tax Act on all of the grounds set out in paragraphs (a) and (b) of section 15AB(1) of the Interpretation Act.
40. I understand that section 8XA was introduced as part of the Tax File Numbers legislation in 1988 with the purpose of protecting information obtained by the Commissioner of Taxation under law pertaining to income tax.
41. The wording of section 8XA, at the time it was first inserted into the Tax Act by virtue of the *Taxation Laws Amendment (Tax File Numbers) Act 1988*, read as follows:

“8XA A person must not knowingly take action for the purpose of obtaining information held under or for the purposes of a taxation law unless the person takes the action in the course of exercising powers or performing functions under or in relation to a taxation law.

Penalty: \$10,000 or imprisonment for two years, or both.”

42. In 1991, that provision was repealed and the present section 8XA was substituted. In the second reading speech of the *Taxation Laws Amendment Bill 1991* (‘the Bill’), which amended the Tax Act the Minister Assisting the Treasurer noted:

“The law will be changed so that an offence is committed if a person takes action other than in authorised circumstances to obtain access to records containing information about a person’s affairs, but only if those records are in the possession of the Commissioner of Taxation and are held by the Commissioner for the purposes of a Commonwealth taxation law.”

43. In addition, the Explanatory Memorandum for the Bill refers to the substitution of the new section 8XA of the Tax Act, at pp.133-134, as follows:

“Section 8XA was intended to prohibit persons from gaining access to records containing information obtained or held by the Commissioner. However, as it stands, the section is having the unintended consequence of hindering the compliance activities of the State and Territory taxation authorities whose officers are seeking information collected by businesses for the purposes of the ‘taxation law’.

Subject to certain exceptions, the new section 8XA will make it an offence for a person to take action to obtain access to records containing information about a person’s affairs where those records are in the Commissioner’s possession and are held by the Commissioner for the purposes of a taxation law. The section does not apply to prohibit access to records that are in the possession of someone other than the Commissioner.”

44. In this case, I understand that the Report was not given to, and is not held by, the ATO. In view of the explanation of the purpose and intent of section 8XA set out in the explanatory memorandum for the Bill, I am confirmed in my view that the complainant is not precluded from seeking access to the Report held by WPC on the basis that it would be a contravention of section 8XA of the Tax Act.
45. On 13 December 2005, WPC withdrew its claim that the following information is exempt under clause 3(1):
- the second bullet point on page 2 of the Report;
 - paragraph 3 on page 19;
 - the information other than the names of officers and the registration numbers in Appendix 4 of the Report.
46. The following personal information is no longer in dispute:
- the signature on page 3 of Appendix 2 of the Report; and
 - the names of officers and the registration numbers in Appendix 4.
- Other than that information, the whole of the Report remains in dispute.

EXEMPTIONS

Clause 6 - Deliberative processes

47. WPC claimed that the Report is exempt in full under clause 6(1) of Schedule 1 to the FOI Act. In the alternative, WPC claims that certain information in the Report - which is listed in Appendix B - is exempt under clause 6(1).
48. Clause 6 provides:

“6. Deliberative processes

Exemptions

(1) Matter is exempt matter if its disclosure -

(a) would reveal –

- (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or*
- (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency; and*

(b) would, on balance, be contrary to the public interest.

Limits on exemptions

- (2) *Matter that appears in an internal manual of an agency is not exempt matter under subclause (1).*
 - (3) *Matter that is merely factual or statistical is not exempt matter under subclause (1).*
 - (4) *Matter is not exempt matter under subclause (1) if at least 10 years have passed since the matter came into existence."*
49. The deliberative processes of an agency are its 'thinking processes', the process of reflection for example on the wisdom and expediency of a proposal, a particular decision or a course of action: see *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588.
50. In order to establish a *prima facie* exemption under clause 6(1), the requirements of both paragraphs (a) and (b) of clause 6(1) must be satisfied by the agency. If both paragraphs (a) and (b) are satisfied, the Report will be exempt, subject to the limits on exemption set out in clauses 6(2) to 6(4).
51. In the case of the exemption in clause 6(1), the complainant is not required to demonstrate that disclosure of the Report would be in the public interest. The complainant is entitled to access unless the agency establishes that disclosure of the Report would, on balance, be contrary to the public interest.

WPC's submissions

52. In its notice of decision WPC advised the complainant that the Report was exempt under clause 6(1)(a) "*on the basis that the disclosure of the Report could reasonably be expected to reveal an advice obtained in the course of the deliberative processes of WPC*".
53. When required by my office to justify that claim for exemption, WPC, through its solicitors, submitted that the disclosure of the Report or, in the alternative, the information listed in Appendix B, would reveal an opinion obtained for the purpose of, or in the course of, the deliberative processes of the agency.
54. WPC submitted that the disclosure of the Report or the information would not be in the public interest because it "*may dissuade agencies from obtaining written advice from other persons than legal practitioners (in respect of which the exemption in clause 8 [sic] of Schedule 1 of the Act would apply), in particular from taxation practitioners, and adversely impact on the acquisition and accurate dissemination of advice relating to important matters concerning commercial or financial affairs of an agency gained, from professional advisers.*"
55. When asked again by my office to discharge the onus on it under section 102(1) to establish that a decision adverse to the complainant should be made under this provision, WPC's solicitors responded, on 18 February 2005, by providing

me with an explanation of the relevant deliberative process which, WPC advised me, is confidential information which is commercially sensitive.

56. WPC also submitted that the limit on the exemption in clause 6(3) does not apply in this case since the information in the Report is not merely factual or statistical.
57. In response to my letter of 7 October 2005, WPC submitted that its claim that disclosure of the Report would dissuade government agencies from obtaining written advice from persons other than legal practitioners - in particular, from taxation practitioners - does not readily lend itself to proof by evidence and that the issue is rather *“whether, by its nature, the consequence we have identified is one which may be inferred to reasonably flow from compelling agencies to disclose professional written advice.”* WPC submitted that it is.
58. WPC made further comments in respect of certain negotiations with the ATO, which again I am unable to describe on the basis that that information is claimed to be commercially sensitive. For me to disclose it in these reasons would prejudice any future claim for exemption the agency may seek to make in respect of documents containing that information. However, the essence of WPC’s claim is that disclosure of the Report would hinder its ability to negotiate with the ATO. WPC submitted that, in view of its advice and its other submissions, none of the matters of public interest that may weigh in favour of disclosure, identified in my letter of 7 October 2005, outweighs the detriment to which it has referred.

The complainant’s submissions

59. In its letter to me, seeking external review, the complainant said that the Report investigated a scheme which operated in the agency for many years, in which senior managers were able to sell their government vehicles every two years for the written down value and personally pocket the profit, sometimes as much as \$10,000. WPC then replaced the sold vehicle with a new one, enabling the process to be repeated. After seeking legal advice, the former CEO of WPC was forced to abolish the scheme, which ended up costing a significant amount of taxpayers’ money in fringe benefits tax.
60. The complainant submits that it would not, on balance, be contrary to the public interest to disclose the Report because all government agencies should be accountable for the use, and possible abuse, of public funds. The complainant also contends that disclosure would assist in revealing WPC’s decision-making process which led to the scrapping of the Scheme.
61. The complainant submits that if, as WPC submitted in relation to its claim for exemption under clause 10(1) of Schedule 1 to the FOI Act, disclosure of the Report could reasonably be expected to have a substantial adverse effect on the financial or property affairs of WPC (or as I understand it, its successor agency or agencies), then it is very much in the public interest that that document be disclosed.

Consideration

62. I do not accept WPC's claim - in its notice of decision given to the complainant - that, because the Report contains advice obtained in the course of WPC's deliberative processes, it is exempt. Even if the document contains material of that nature, that satisfies only one of the requirements of clause 6(1) which are set out in paragraphs (a) and (b). Both must be established for the exemption to be made out.
63. I have examined the Report and I am satisfied that, on its face, it contains opinion that has been obtained in the course of, or for the purpose of, the deliberative processes of WPC. I am also satisfied that the relevant deliberative process is as described to me by WPC. Accordingly, I consider that the agency has satisfied the requirements of paragraph (a) of clause 6(1).
64. A number of exemptions provided by the FOI Act are limited by a 'public interest test'. In those cases, the onus is on the complainant to establish that disclosure of what would otherwise be an exempt document would, on balance, be of some public benefit. With regard to paragraph (b) of the clause 6 exemption, however, the onus is on the relevant agency to establish that disclosure would, on balance, be of detriment to the public interest or the document in question will not be exempt. In either case, applying the test involves identifying those public interests that favour disclosure and those that favour non-disclosure, weighing them against each other and determining where the balance lies.
65. Weighing against disclosure, I accept that it may be contrary to the public interest to prematurely disclose documents while deliberations in an agency are continuing, if there is evidence that the disclosure of those documents would adversely affect the decision-making process. In those circumstances, I accept that it may not be generally in the public interest for any agency to have to conduct its business with the public effectively 'looking over its shoulder' at all stages of its deliberations and speculating about what might be done and why. In my view, the public interest may often be best served by allowing deliberations to occur unhindered and with the benefit of access to all of the material available so that informed decisions may be made. However, in this case, the Report was completed in September 2003 and I consider that the relevant deliberative process is at an end. Therefore, it could not be prejudiced by disclosure of the document.
66. WPC submitted that there is a public interest in government agencies not being dissuaded from obtaining written advice from professional advisers - in particular, taxation practitioners. If agencies were dissuaded from obtaining such written advice, WPC contended that it would "*adversely impact on the acquisition and accurate dissemination of advice relating to important matters concerning commercial or financial affairs of an agency, gained from professional advisers.*" WPC submitted that it is reasonable to infer that such a consequence will flow from "*compelling agencies to disclose professional written advice*".

67. I accept that there is a public interest in agencies obtaining advice from specialists in respect of important matters beyond the expertise of an agency's staff. However, I am not persuaded that the disclosure of the Report could reasonably be expected to dissuade government agencies from obtaining professional advice, in writing, when needed.
68. WPC offered nothing in support of that assertion other than to claim that the proposition does not readily lend itself to proof by evidence. With regard to that, I refer to the comments of Owen J, in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at page 573, in relation to a claim for exemption under clause 4(3) of the FOI Act, when he expressed the nature of the onus an agency bears in the following way:

“How can the Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had “real and substantial grounds for thinking that the production of the document could prejudice that supply” or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it 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.”
69. Although not raised as a submission by WPC, I note that, in the past, it has been put to this office that professional people and organisations who are in the business of providing professional advice for a fee will stop doing so, or will provide advice of a diminished quality, merely because it may become public but this office has never been given evidence of that being so. It might equally be speculated that the prospect of some or all of it possibly being made public will ensure that even greater care is taken to provide top quality advice.
70. Similarly, I do not accept that senior public officers would be dissuaded from obtaining written professional advice merely because it could be disclosed in circumstances where there was no demonstrable harm to the public interest in doing so. For one thing, the *State Records Act 2000* requires agencies to keep records that properly and adequately record the performance of their functions and failure by a public officer to do so is an offence, the penalty for which is a \$10,000 fine. Further - aside from the fact that it would be an unprofessional manner in which to operate and highly unethical, in my view, for officers to resort to seeking only oral advice and not documenting it for the express purpose of avoiding the FOI accountability mechanism established by the Parliament and denying members of the public their legal right of access where no harm to the public interest could follow from disclosure - it is clearly in the interests of an agency and the officers concerned to have a record of any advice on which they have acted or purported to act.

71. For those reasons, in my opinion, it is not reasonable to conclude that a decision to disclose the Report under the FOI Act on the basis that it is found not to be exempt under that Act would result in government agencies being dissuaded from obtaining written professional advice from persons such as taxation practitioners.
72. In addition, I do not accept WPC's claim that the disclosure of the Report would hinder its ability to negotiate with the ATO. WPC provided me with no evidence in support of that claim. Since WPC advised me that the information listed in Appendix A has already been provided to the ATO, it cannot be the case that that information would have the effect claimed and there is nothing before me to establish that the disclosure of the remaining information in the Report, or the information listed in Appendix B, would hinder WPC or its successor agency in its negotiations with the ATO or how it would have that effect.
73. In this case, WPC made no attempt to identify any public interests that may weigh in favour of disclosure or to weigh those against the public interests that it has identified, as clause 6(1)(b) requires.
74. The complainant refers me to the public interest in holding government agencies accountable for the use and possible abuse of public funds and to the public interest in revealing WPC's decision-making process. I recognise that there is a public interest in the accountability of agencies for their actions and for the way in which public money is spent. In my view, that accountability includes informing the public, where possible, of the basis for decision-making and the material considered relevant to the decision-making process.
75. I consider that it is in the public interest that there should be public awareness of agencies' policies and practices to facilitate the accountability of the public sector for actions taken by it and to enable the public to scrutinise the operations of government agencies. That is one of the main purposes of FOI legislation. I also recognise a public interest in the complainant being able to exercise its right of access under the FOI Act.
76. In balancing the public interests in this case, I am not persuaded that the disclosure of the Report, in full or in part, would be contrary to the public interest. Accordingly, I consider that the Report is not exempt under clause 6(1) or that, in the alternative, the information referred to in Appendix B to this letter is exempt under that provision.

Clause 5(1)(b) - prejudice an investigation

77. WPC claimed that the information listed in Appendix B to these reasons is exempt under clause 5(1)(b) of Schedule 1 to the FOI Act.
78. Clause 5(1)(b) was amended in 2004, shortly after WPC made its decision on internal review, and now provides as follows:

"5. Law enforcement, public safety and property security

Exemptions

- (1) *Matter is exempt matter if its disclosure could reasonably be expected to -*

...

- (b) *prejudice an investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted”.*

79. Clause 5(5) provides that ‘contravention’ includes a failure to comply and that ‘the law’ means, among other things, the law of this State and the Commonwealth.

WPC’s submissions

80. In its notice of decision WPC advised the complainant that the Report was exempt in full under clause 5(1)(b) on the basis that *“the disclosure of the Report could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law.”*
81. When required by my office to justify its claim for exemption, in light of the amendment to clause 5(1)(b), WPC, through its solicitors, submitted that the disclosure of the information listed in Appendix B would be prejudicial to the ongoing investigation between WPC and the ATO. WPC also said:
- “It is further submitted that disclosure of such information would not be in the public interest as to make such information liable to disclosure may dissuade agencies from obtaining written advice on important matters concerning the commercial or financial officers [sic] of an agency.”*
82. On 18 February 2005 and on 4 November 2005, WPC’s solicitors made further submissions that I consider I am constrained from disclosing on the basis that it would reveal commercially sensitive information about the content of the ATO’s investigation and which I do not consider necessary to disclose for the purpose of dealing with this matter.
83. In support of those submissions WPC provided me with certain documents - which it identified as Appendices D-J - to show that there is an ongoing investigation by the ATO.

The complainant’s submissions

84. The complainant submits that the disclosure of the Report would not be prejudicial to an investigation into the matter between WPC and the ATO since both are independent authorities which are unlikely to be influenced by the release of this information to *The West Australian* newspaper.

85. The complainant further submits that it is not a valid argument to suggest that maybe in the future there is a possibility other Government agencies will not seek independent advice on matters relating to the financial operations of their business. The complainant says that it is seeking an existing - and not a hypothetical - document which is likely to contain information pertinent to the finances of a public company and about which the taxpayers of this State have a right to learn.

Consideration

86. Two questions arise from the terms of the exemption set out in clause 5(1)(b). Those are, firstly, whether there is, has been, or is going to be an “*investigation of any contravention or possible contravention of the law*” and, secondly, whether the disclosure of the requested documents could reasonably be expected to ‘prejudice’ that investigation.
87. On the material before me, I am satisfied that the relevant law identified by WPC, which I consider I am constrained from disclosing to the complainant on the basis that to do so may reveal potentially exempt information, is a ‘law’ for the purposes of clause 5(1)(b) of Schedule 1 to the FOI Act.
88. I understand WPC’s submission to confirm that the ATO’s investigation it refers to has concluded, but that related ongoing negotiations amount to an investigation.
89. In *Re Cumming and Others and Metropolitan Health Service Board and Another* [2000] WAICmr 7, at paragraphs 20-21, the former Commissioner said, at paragraphs 21- 22:
- “... an inquiry might involve nothing more formal than seeking a report about a particular matter (being a contravention or possible contravention of the law) as the basis for action or decision ... I consider that it is enough that there was an inquiry for the purpose of determining whether there was a failure to comply with the provisions of the PSM Act or the public sector standards to establish that the agency conducted an investigation.”*
90. Clause 5(1)(b) refers to “*an investigation of any contravention or possible contravention of the law in a particular case*”. In my view the preposition ‘of’ in that phrase denotes a relationship between the nouns ‘investigation’ and ‘contravention’. That is, the reference is not to an open-ended investigation into any and all matters relating to a contravention or possible contravention of the law but a reference to an investigation into a particular matter (being a contravention or possible contravention of the law) as the basis for action or decision and that such investigation is for the purpose of determining whether there was a failure to comply with the provisions of a law.
91. Accordingly, I am not persuaded by WPC’s submission that the disclosure of the Report could reasonably be expected to prejudice the ATO’s consideration of the particular matter of negotiation identified to me by the WPC. I do not

consider that the matter identified can properly be characterised as an investigation into a contravention or possible contravention of the law, for reasons that I have given to WPC, and now in the possession of the agency. In my view, the ATO's investigation into whether there had been a contravention of the law or not is concluded and, accordingly, the disclosure of the Report could not prejudice that investigation.

92. Moreover, in the event that that is not correct (which, in my view, it is), I am not persuaded that the disclosure of the Report could reasonably be expected to prejudice any investigation by the ATO in relation to the matter of ongoing negotiation identified by WPC, for the reasons given below.
93. The term 'prejudice' is not defined in the FOI Act. The Concise Oxford Dictionary (8th edition) defines '*to prejudice*' as meaning, among other things, "*impair the validity or force of*". It is also of assistance to consider the definitions of '*prejudice*' ("*harm or injury that results or may result from some action or judgment*") and '*prejudicial*' ("*causing prejudice; detrimental*"), to reach the view that the term "*to prejudice an investigation*" in clause 5(1)(b) means to impair the progress or effectiveness of an investigation. I consider that this is the meaning of 'prejudice' in the context of clause 5(1)(b).
94. Having inspected the Report and considered the information given to me by WPC, I consider that the disclosure of the Report could not reasonably be expected to prejudice any investigation conducted by the ATO on the basis that there is nothing before me to show how or in what way the wider disclosure of the information in the Report which was given to the ATO - as listed in Appendix A to these reasons - could prejudice any investigation by the ATO, and nothing before me to establish that disclosure of the information in the Report which was not given to the ATO could impair any investigation it may be conducting. To the contrary, I would have thought that having access to all available information could only be helpful, rather than harmful, to an investigation.
95. Since clause 5(1)(b) is not subject to a 'public interest test' other than in the limited circumstances of clause 5(4) - which are not applicable to this matter - the complainant's submission in that regard is not relevant.
96. Consequently, on the information before me, I am not satisfied that WPC established the requirements of clause 5(1)(b) in respect of the information in Appendix B as it appears in the Report.

Clause 10 - The State's financial or property affairs

97. WPC claimed that the information listed in Appendix B to these reasons is also exempt under clause 10(1). Clause 10, insofar as it is relevant, provides as follows:

"10. The State's financial or property affairs

Exemptions

- (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.*

...

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."*

98. Clause 10 of Schedule 1 to the FOI Act reflects the commercial reality that the State and local governments are increasingly engaged in commercial activities and is intended to ensure that the commercial and business affairs of government agencies - conducted by those agencies for and on behalf of the Western Australian public - are not jeopardised by the disclosure of documents under the FOI Act unless there is a public interest that requires such disclosure.
99. To establish an exemption under clause 10(1), the agency must show that the disclosure of the Report could reasonably be expected to result in a "*substantial adverse effect*" on the financial or property affairs of the State or an agency. The requirement that the adverse effect must be 'substantial' is an indication of the degree of gravity that must exist before a *prima facie* claim for exemption is established: *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236.
100. In the context of the exemption clause 10(1), I accept that 'substantial' is best understood as meaning 'serious' or 'significant': *Re Healy and Australian National University* (Commonwealth Administrative Appeals Tribunal, 23 May 1995, unreported); *Re James and Australian National University* (1984) 2 AAR 327 at 341.

WPC's submission

101. WPC, through its solicitors, submitted that the disclosure of certain information in the Report:

"... could reasonably be expected to have a substantial adverse effect on the financial and property affairs of WPC."

102. WPC provided me with additional information in that regard which it claimed is commercially sensitive and should not be disclosed.

The complainant's submission

103. The complainant submits that, if the disclosure of the Report could reasonably be expected to have a substantial adverse effect on the financial or property affairs of WPC, then that is a powerful public interest argument for its

disclosure. The complainant says that WPC was a public-owned utility and it must be accountable to taxpayers for the state of its finances and, in particular, how an adverse situation relating to its finances may have eventuated.

Consideration

104. I have examined the Report and considered the submissions made by the parties. In my view, WPC's submissions amount to nothing more than a recitation of the exemption claimed and a tentative supposition as to the potential outcome of disclosure. WPC provided me with no findings on the material questions of fact underlying its reasons for relying on clause 10(1). For example, WPC made no attempt to estimate the impact of the Report's disclosure on its profitability or how the adverse effect claimed would be 'substantial' in the context of its overall financial affairs.
105. Pursuant to section 102(1) of the FOI Act, the onus is on the agency to establish that WPC's decision was justified or that a decision adverse to another party should be made. I refer again to the comments of Owen J, in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at page 573, as quoted in paragraph 68 above.
106. In the absence of any probative material from WPC or the agency in support of their claims for exemption, I find that the information in the Report - listed in Appendix B - is not exempt under clause 10(1).

CONCLUSION

107. I find that:
- the complainant is not precluded from seeking access to the disputed information on the basis that it would be a contravention of section 8XA of the Tax Act;
 - the Report is not exempt under clause 6(1) nor, in the alternative, is the information listed in Appendix B exempt under that provision;
 - the information listed in Appendix B is not exempt under clauses 5(1)(b) or 10(1); and
 - it would be practicable to delete the personal information which is not in dispute between the parties and give the complainant an edited copy of the Report.

APPENDIX A

The agency claims that the following information in the Report is not accessible under the FOI Act by virtue of the application of section 8XA of the Tax Act:

- the second sentence in bullet point 4 and bullet points 7 and 10 on page 1;
- bullet points 5 and 9 on page 3;
- paragraph 3 under section 3.1 on page 6;
- paragraph 8 on page 7;
- paragraph 2 under bullet point 2 on page 8;
- paragraph 3 on page 9;
- paragraph 1; the last 17 words in paragraph 2 and paragraph 4 on page 10;
- the material in quotation marks in paragraph 1 and words 12-15 in the third dash point in paragraph 5 (bullet point 2) on page 11;
- everything except paragraphs 1 and 2 on page 12;
- paragraphs 1-3 and the first sentence in paragraph 4 on page 13;
- everything except paragraphs 1 and 2 on page 16;
- pages 17-18, except for the second last sentence on page 18;
- paragraph 4 on page 19;
- paragraph 1 under the page headings; bullet points 1 and 3 under the heading “Background”; and the last paragraph on page 24;
- paragraph 4, including all bullet points, on page 25;
- everything except for the first sentence following the heading “The applicable legislation” on page 26;
- pages 27-31 except for the last sentence on page 31;
- paragraph 4 on page 2 and point 3 at the end of page 3 of Appendix 2; and
- Appendices 3 and 4, in full.

APPENDIX B

The agency claims that the following information in the Report is exempt under clauses 6(1) and 5(1)(b) of Schedule 1 to the FOI Act:

- the first sentence in bullet point 4; and bullet points 5, 6, 8 and 9, on page 1;
- bullet point 1 on page 2;
- bullet points 3 and 4 on page 3;
- the second sentence in paragraph 1 on page 5;
- the first, third and fourth paragraphs under section 3.2 on page 10;
- the last five words in the heading on line 1; paragraphs 2, 3 and 4 under bullet point 1; and the whole of the section under bullet point 2 except the third point, on page 11;
- the heading on line 1 and paragraphs 1 and 2 on page 12;
- the last sentence in paragraph 4 and paragraphs 5 and 6 on page 13;
- the third sentence in the last paragraph on page 18;
- pages 21-22; and
- the last sentence on page 31.