OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2005011 Decision Ref: D0112007

Participants:

Geoff Ninnes Fong and Partners Pty Ltd
Complainant

- and -

Shire of Roebourne
First Respondent

- and -

Donovan Payne Architects Pty Ltd
Third party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to tender process – clause 8(2) – confidential communications – whether information of a confidential nature obtained in confidence – whether disclosure could reasonably be expected to prejudice future supply of that kind of information.

Freedom of Information Act 1992 (WA): sections 30(1)(f), 69(2), 102(1), 102(2); Schedule 1, clause 8(2)

Department of Health v Jephcott (1985) 62 ALR 421
Hayes v Secretary, Department of Social Security [1996] 43 ALD 783
Re Askew and City of Gosnells [2003] WAICmr 19
Ryder v Booth [1985] VR 869
Manly v Ministry of the Premier and Cabinet (1995) 14 WAR 550
Attorney-General's Department v Cockcroft (1986) 10 FCR 180
Re Markham and Ministry of Justice and F[1995] WAICmr 25
Re Veale and Town of Bassendean [1994] WAICmr 4
Re Henderson, Goatley, McHale and Weaver and Education Department of Western Australia [1997] WAICmr 21

DECISION

The decision of the agency is set aside. In substitution it is decided that Documents 1 and 2 are not exempt.

D A WOOKEY
A/INFORMATION COMMISSIONER

13 June 2007

REASONS FOR DECISION

1. This complaint arises from a decision made by the Shire of Roebourne ('the agency') to refuse Geoff Ninnes Fong and Partners Pty Ltd ('the complainant') access to documents requested by the complainant under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. In February 2004, Council of the agency resolved to appoint architects and consultants for the redevelopment of the Karratha Aquatic Centre ('the KAC') based upon documentation prepared by Thomson Marquis Project Management ('the Project Manager'). In March 2004, the agency advertised for tenders for the provision of architectural and consultancy services for the redevelopment of the KAC. Donovan Payne Architects Pty Ltd ('the third party') was one of the nine organizations that submitted a tender to the agency. Tenders closed on 16 April 2004.

3. On 20 May 2004, the agency convened a Tender Evaluation Panel ('the Panel') to assess the tenders received. The Panel was composed of a representative of the Project Manager, three senior officers of the agency and two councillors of the agency.

4. On 21 May 2004, the third party received an email from the Project Manager, advising it that the Project Control Group (which I understand to mean the Panel) had met in Karratha on 20 May 2004 and had made a recommendation that would be presented to the Council of the agency for its approval at the 21 June 2004 meeting of Council. That email, a copy of which has been provided to me by the third party, is not addressed to the third party but to another tenderer. It is not evident whether that email was sent to the third party in error or whether it was an email sent to all nine tenderers by the Project Manager.

5. On 25 May 2004, one of the Panel members, the Director, Technical and Development Services, of the agency ('the Director') sent an email to the Project Manager's representative – who was also a member of the Panel – seeking certain information from the Project Manager.

6. The Project Manager's representative responded to the Director by email on the same day. For the purposes of these reasons, I refer to the emails exchanged between the Director and the Project Manager's representative on 25 May 2004, as Document 3.

7. On the same date, 25 May 2004, a councillor of the agency - who was also a member of the Panel - sent an email to the Director about a matter of concern to that councillor. The Director responded to the councillor by email on a date which is not recorded on that email. In essence, the Director disagreed with the views expressed by the councillor. I refer to that exchange of emails as Document 4.

8. On 4 June 2004, the third party sent a letter to the Chief Executive Officer of the agency under cover of an email. For the purposes of this decision, I refer to the covering email as Document 2. The letter itself is dated 2 June 2004. I refer to the letter as Document 1. Documents 1 and 2 are the documents remaining in dispute.

9. Following receipt of Document 1, the Chief Executive Officer of the agency met with two members of the Panel - the Director and the Manager, Recreation and Community Development ('the Manager') - to discuss Document 1.

10. On 21 June 2004, the Manager submitted a report to the Council on behalf of the Panel. Full details of that report and Council's decision on the preferred tenderer for the redevelopment of the KAC are set out at pages 44-51 of the minutes of the meeting of the Council held on 21 June 2004. Those minutes are publicly available from the agency. The Panel recommended that the tender for the proposed redevelopment of the KAC be awarded to Peter Hunt Architects. However, Council did not adopt that recommendation and, instead, resolved to award the tender to the third party.

The access application

11. On 27 July 2004, the complainant's legal advisers applied to the agency, on behalf of the complainant, for access to:

> "[d]*ocuments … in relation to an issue that was raised during the meeting of the Council of the Shire* [of Roebourne] *on 21 June 2004 when the Council was considering the tenders submitted in response to Request for Tenders (No. G05-03/04) regarding the provision of pool filtration and structures for the redevelopment of the Karratha Aquatic Centre. The issue relates to a perceived conflict of interest between Thomson Marquis Project Management and our client* [the complainant] *and is recorded on page 46 of the meeting minutes under the heading 'Thomson Marquis Project Management.'*
>
> *We understand that correspondence was sent to either an officer or elected members of the Shire regarding the issue.*
>
> *We request access to that correspondence and all other documents including emails, letters, facsimiles, memorandums, reports and file notes relating to the issue."*

12. By email dated 15 September 2004, the agency's FOI Co-ordinator advised the complainant's legal advisers that a response would be provided by 24 September 2004. Following that, by email dated 29 September 2004, the Manager, Executive Services, notified the complainant's legal advisers that the portion of the Council minutes referred to in the complainant's access application appeared to contain an error and that a comprehensive search of

the agency's records did not disclose any documents relating to a *"perceived conflict of interest"* between the Project Manager and the complainant.

13. The complainant's legal advisers responded on the same date, asking the agency to confirm that the records of all of the elected members of the Council of the agency had been searched, as part of the complainant's access application. The complainant's legal advisers also observed that the author of the report to the Council had obviously based his comments at page 46 of the Council minutes on some existing information. As a result, the complainant's legal advisers queried with the agency on what basis the officer who wrote the report to Council could have made the comment that *"…the Project Manager confirmed in writing that there was no financial link between him and the pool filtration consultant"* if that officer did not in fact have, or was advised that there was in existence a document to that effect.

14. On 19 October 2004, the agency notified the third party that it had received the access application and invited the third party to comment on whether or not it objected to the release of Document 1 to the complainant and, if it did, to provide reasons for its *"…opposition to disclosure in terms of the exemptions* [under] *the FOI Act"*.

15. The third party replied on 22 October 2004. The third party claimed that Document 1 was exempt under the FOI Act *"…for reasons of commercial confidentiality"*. It was also the view of the third party that Document 1 did not fall within the scope of the complainant's access application, because it was written after the tender process expired. On those grounds, the third party objected to the release of Document 1.

16. On 28 October 2004, the agency advised the complainant's legal advisers that *"*[a]*n assessment of correspondence received by Donovan Architects dated 2 June 2004 has been made and access to this document is denied as we consider the document exempt under clause 8(2) of Schedule 1 of the FOI Act"*. The complainant's legal advisers sought internal review of that decision on 17 November 2004 and, on 9 December 2004, the agency confirmed its initial decision on internal review.

17. On 10 December 2004, the complainant's legal advisers wrote to the agency, arguing that the agency had refused the complainant access to Document 1 under clause 8(2) without providing any reasons why it had made that decision, as required by the provisions of s.30(1)(f) of the FOI Act. The complainant's legal advisers requested the agency to show that its decision to deny the complainant access to Document 1 was based on real and substantial grounds. The agency responded on 16 December 2004 and advised the complainant's legal advisers that Document 1 was received in confidence and, as a result, the agency was of the view that disclosure of the document would be contrary to the public interest and would prejudice the future supply of information of that kind to the agency.

18. On 21 January 2005, the complainant's legal advisers applied to the Information Commissioner, on behalf of the complainant, for external review of the agency's decision.

REVIEW BY THE A/COMMISSIONER

19. After receiving this complaint, I required the agency to produce to me, for my examination, the FOI file relating to the complainant's access application and the original of Document 1.

20. Following an examination of that material, my Legal Officer (Research & Investigations) advised the agency in writing that, in her view, there was insufficient evidence then before me to enable me to determine whether the agency's decision to refuse the complainant access to Document 1, on the ground that it was exempt under clause 8(2) of Schedule 1 to the FOI Act, was justified. The agency was invited to provide me with further information in support of its claim for exemption under clause 8(2).

21. In response, the agency submitted that Document 1 should not be disclosed to the complainant because it does not fall within the ambit of the complainant's access application or, in the alternative, that it is exempt under clause 8(2) of Schedule 1 to the FOI Act.

22. During the external review process, the third party was notified of its right to be joined as a party to this complaint and invited to provide written submissions to me in support of its claim that Document 1 is an exempt document. The third party, through its legal advisers, applied to be, and was, joined as a party to this complaint. The third party's legal advisers subsequently made submissions to me in which it was claimed that Document 1 is exempt under clause 8(2).

23. During the external review process, the agency produced other documents to me to assist with my dealing with this complaint, including Documents 2 and 3.

24. After considering all of the information then available, my Senior Legal Officer informed the parties, in writing, of his view of this complaint and his reasons, pursuant to his delegated authority under the FOI Act. It was my Senior Legal Officer's view, for the reasons given to the parties, that Documents 1, 2 and 3 fell within the scope of the complainant's access application. It was also my Senior Legal Officer's view that Document 1 may not be exempt under clause 8(2) and that, with the exception of a small amount of information in the disputed documents which consisted of personal information about individuals which may, *prima facie*, be exempt under clause 3, Documents 1, 2 and 3 may not be exempt for any reason.

25. The agency and the third party were invited to reconsider their respective claims that Document 1 is exempt under clause 8(2). In addition, the agency was invited to consider whether it wished to claim exemption for Documents 2 and 3 and the third party was invited to consider whether it wished to claim

exemption for Document 2. As Document 3 does not contain any information about the third party, the views of the third party were sought in respect of Documents 1 and 2 only.

26. The complainant accepted my Senior Legal Officer's view and advised my office that it does not seek access to the personal information contained in the disputed documents. The agency did not make any further submissions, other than to say that *"…the facts presented by* [my] *Office in regards to the timeline of events is a true and accurate representation."*

27. The third party did not accept my Senior Legal Officer's view and made further written submissions to me. The third party asked me to find Documents 1 and 2 exempt and, in particular, to find Document 1 exempt under clause 8(2). However, the third party did not make any submissions as to why Document 2 is exempt and, although it made submissions as to why Document 1 is outside the scope of the complainant's access application, it did not make any submissions about Document 2 being outside the scope of the complainant's access application.

28. During this external review process my office also consulted with another third party about whom Document 1 contains some information and advised that third party of its right to be joined as a party to this complaint. That third party advised me that it consented to the release of information about it contained in Document 1 and did not apply to be joined as a party to these proceedings.

29. As the complaint was not able to be resolved, it was referred to me for a formal decision. I reviewed the file including the submissions made by all the parties, the disputed documents and the agency's FOI file. In the course of that review, it became apparent to me that one document that appeared to me to be within the scope of the access application (Document 4) had not been identified as such either by the agency or by my office. It also appeared to me that Documents 1 and 2 were not within the scope of the access application, but that Documents 3 and 4 were. I directed further inquiries to be made by my office and, following those further inquiries and negotiation between my office, the agency and a third party, Documents 3 and 4 were released to the complainant.

30. I subsequently advised the parties in writing that it was my view that the complainant had then been provided with all the documents that were within the scope of the access its initial application. I advised the parties that it was my view that Documents 1 and 2 were not within the scope of the access application but that I was prepared to accept, although reluctantly, that some information in Document 1 could be argued to be within the scope of the access application. I advised the parties that it was my view that that information was not exempt as claimed and I set out my detailed reasons for that view. I advised the parties that, therefore, it was my preliminary view that the complainant was entitled to access to an edited copy of Document 1 from which all of the text of the letter other than certain information specified by me had been deleted. I also advised the parties that it was my view that

Document 2 contains no information I consider to be within the scope of the access application and that therefore the complainant was not entitled to a copy of it.

31. In response, the agency withdrew its claim for exemption for those parts of the document which, in my view, were not exempt. The complainant made further submissions maintaining that the documents were within the scope of the access application or should be treated as being within the scope of "an amended access application" and that they were not exempt. The third party advised that it maintained its claim for exemption for the whole of Document 1 and Document 2 but made no further submissions. As both the complainant and the third party were not prepared to agree to access in accordance with my preliminary view, the matter was not resolved and the two documents remain in dispute.

32. On 31 May 2007, I wrote to the parties advising them that I proposed to make a decision on the whole of Document 1 and on Document 2, even though I was not persuaded that they fall within the scope of the complainant's initial access application or that I should, as urged by the complainant, do so on the basis of an "amended access application". I also advised the parties that it was my view that the documents were not exempt under clause 8(2) of Schedule 1 to the FOI Act as claimed and that, as all the parties had already had an opportunity to make submissions on that question, I did not consider it necessary to obtain further submissions from the parties. I advised them, however, that any submissions received by me before I made my final decision on this complaint – which I proposed to do by 8 June 2007 – would be considered.

33. My reasons for, firstly, forming the view that I did about the scope of the access application; secondly, deciding nonetheless to make a decision in respect of the whole of Document 1 and Document 2; and, thirdly, finding that those documents are not exempt, are set out below.

THE SCOPE OF THE ACCESS APPLICATION

34. In his letters of 17 February 2006 to the parties, my Senior Legal Officer advised them, among other things, that in his view Documents 1 and 2 were within the scope of the complainant's access application. His view in respect of Document 1 was primarily on the basis of a specific reference in that document and his view in respect of Documents 2 and 3 was on the basis of their "direct relevance to the subject matter of the complainant's access application".

The agency's submissions

35. In its submissions dated 9 March 2005, the agency had said that Document 1 *"… lies outside the scope of the ambit of the application …* [as it] *… does not raise any questions of conflict of interest. It complains about the tendering process but it cannot be construed as a document raising issues of conflict of interest. It therefore squarely is outside the parameters of the application"*.

Third party's submissions

36. In response to my Senior Legal Officer's view, the third party submitted, through its solicitors, that:

> "[t]*here also appears to be an error of fact in the determination, and we refer you to the reference to* [a specified matter]. *The* [specified matter] *referred to in Document 1 did not refer to the relationship between the* [Project Manager] *and* [the complainant] *but to* [another matter]. *As such, in our submission it would appear that the observation by the agency that Document 1 "does not raise any questions of conflict of interest" is correct, given that the issue* [referred to] *does not refer to* [the complainant]*"*.

37. The third party submitted that my Senior Legal Officer's view that Document 1 raises a concern about *"…a perceived conflict of interest between the project manager and a preferred pool filtration consultancy"* is incorrect. The third party submits that the "perceived conflict of interest" related only to the matter referred to in paragraph 36 above. The third party submits that, accordingly, the conclusion that Document 1 falls within the scope of the complainant's access application is *"in error to the extent that it relies on the reference to* [the specified matter]*, given that there is no conflict of interest alleged against the complainant"*.

38. As a result of the submissions received in response to my Senior Legal Officer's view of this complaint and the further inquiries I have since had made, I formed a different view from that of which the parties were advised by my officer.

39. Following my review and further inquiries, I was of the view that the complainant had, following the intervention of my office, been provided with copies of the only documents that were within the scope of the access application and that Document 1 Document 2 were not within the scope of the access application. However, I was reluctantly prepared to accept that a small amount of information in Document 1 could be argued to be within the scope of the access application and I therefore considered the exemption claims of the agency and the third party in respect of those parts of Document 1. My view, for the reasons set out below, was that those parts of the document are not exempt; that the balance of the document is outside the scope of the access application; and that the complainant could be given an edited copy of the document.

The access application

40. As I understand it, by letter dated 27 July 2004, the complainant's legal representatives made an application on behalf of the complainant, for access to the documents relating to an issue noted in the minutes of the meeting of the agency's Council on 21 June 2004. The access application was in the following terms:

> *"Documents are sought in relation to an issue that was raised during the meeting of the Council of the Shire on 21 June 2004 when the Council was considering the tenders submitted in response to a Request for Tenders (No. G05-03/04) regarding the provision of pool filtration and structures for the redevelopment of the Karratha Aquatic Centre. The issue relates to a perceived conflict of interest between Thomson Marquis Project Management and our client, and is recorded on page 46 of the meeting minutes under the heading 'Thomson Marquis Project Management'.*
>
> *We understand that correspondence was sent to either an officer or elected members of the Shire regarding the issue.*
>
> *We request access to that correspondence and all other documents including emails, letters, facsimiles, memorandums* [sic], *reports and file notes relating to the issue."*

41. That issue was noted in the minutes as follows:

> "***Thomson Marquis Project Management***
>
> *An issue was raised by one of the evaluation panel members as to whether there was a conflict of interest between the Project Manager and the preferred pool filtration consultancy. This was raised with the Project Manager who confirmed in writing that there was no financial link between him and the pool filtration consultant."*

The agency's responses

42. On 29 September 2004, the agency contacted the complainant's legal representative by email and advised that the particular note in the minutes *"… would appear to contain an error and that a comprehensive search of Council records discloses no documents relating to a 'perceived conflict of interest' between Thomson Marquis Project Management and Geoff Ninnes Fong and Partners Pty Ltd."* In the response on behalf of the complainant two matters of concern arising from that response of the agency were raised. The first of those was that the complainant understood that *"… the document sought was received by either an officer* ***or elected member*** *of the Shire"* and the complainant asked for confirmation that the records of all elected members had been searched in response to the access application.

43. The second concern raised was that *"… the officer who prepared the report to Council obviously based his comments on page 46 of the Shire of Roebourne meeting of Council minutes of 21 June 2004, on some existing information"* and you asked "[o]*n what basis did the officer make the comment that the Project Manager 'confirmed in writing that there was no financial link between him and the pool filtration consultant', if he did not in fact have, or was advised that there was in existence, a document to that effect?"*

44. In response the agency wrote to the complainant and advised that "[a]*n assessment of correspondence received by Donovan Architects* [sic] *dated 2 June 2004 has been made and access to this document is denied as we consider the document exempt under Clause 8(2) of Schedule 1 of the FOI Act."*

45. The complainant subsequently sought internal review of that decision and, on internal review, the agency confirmed its initial decision to refuse access to that document on the basis that it is exempt under clause 8(2) of Schedule 1 to the FOI Act.

The complaint

46. Following a further exchange of correspondence with the agency, the complainant made the complaint to my office. In the complaint, it was confirmed that the complainant had sought access under the FOI Act to documents relating to the issue specified in the minutes of the Council meeting of 21 June 2004 and that the issue *"… relates to a perceived conflict of interest between Thomson Marquis Project Management and* [the complainant] *and is recorded on page 46 of the meeting minutes under the heading 'Thomson Marquis Project Management'."* A copy of the relevant part of those minutes was attached to the complaint.

47. It was clear to me from all of that material that what the complainant sought to access was the material upon which the specified note in the minutes was based. From the inquiries previously made by my office and the inquiries more recently made at my direction, it appears to me that the basis on which that comment was made by the officer and recorded in the minutes was that an issue had been raised by one of the Panel members, Mr David Hay, then a councillor, and that the complainant has now been given the only documents that can be located which relate to that matter – Documents 3 and 4.

The circumstances leading to the note in the minutes

48. As I understand it from my inquiries, the Panel member raised a concern about the relationship between the Project Manager and the complainant in a telephone conversation with the Director some time subsequent to the meeting of the evaluation panel on Thursday, 20 May 2004. As a result of that telephone conversation, on 25 May 2004, the Director contacted the Project Manager and asked for confirmation that there was no financial link between the Project Manager and the complainant. On the same day, the Project Manager replied confirming that there was no financial link or business association between the Project Manager and the complainant. Following negotiations between my office, the agency and the third parties mentioned in that exchange of emails, the complainant has been provided with a copy of that exchange (Document 3).

49. On the same day, after the Director had contacted the Project Manager but before the Project Manager had replied in writing, the Panel member emailed the Director and appears to have clarified the basis of his concern. The

Director replied by email giving his view in response. Again, following negotiations between my office, the agency and relevant third parties, the complainant has been given a copy of that exchange (Document 4).

50. The agency has no written record of the telephone conversation between the Director and the Panel member on that day which led to the Director emailing the Project Manager concerning the relationship between the Project Manager and the complainant.

51. I am advised by the Panel member that what caused him to raise the issue with the Director was that he received an anonymous facsimile detailing an alleged connection between the Project Manager and the complainant. He cannot recall when that fax was received and does not know who it was from. He did not keep a copy of the fax and does not recall whether or not he gave a copy of it to officers of the agency. In its searches for all documents relating to this matter, the agency has found no such document in its records. The Panel member says that he does not recall having been contacted by anyone from the third party or by any of the other tenderers in respect of the matter, although he did have contact with Mr Carl Payne of the third party in the usual course of business as an architect.

52. Mr Payne confirms that the third party had some contact with each of Mr Hay and Ms Dani Nazzari, who were both councillors with the agency at the time, but that the contact with Mr Hay related to a matter other than the KAC tender. Mr Payne says that contact with Ms Nazzari was in relation to her role as landscape designer for the KAC tender and he advises that she declared a conflict of interest and excluded herself from voting on that and related matters. That is confirmed by a note on page 44 of minutes of the Council meeting on 21 June 2004.

Document 1

53. Document 1 was dated 2 June 2004 but sent to the agency by email on 4 June 2004. It details concerns about the tender process. It is the letter referred to on the same page of the minutes as the issue of concern to the complainant but noted under the heading *"**Sub-consultancy Appointments"***. That letter relates to concerns about the tender process.

54. As is noted in the minutes under the item *"**Sub-consultancy Appointments**"*, the focus of that letter is the third party's *"… opposition to the Shire of Roebourne's decision to allow Council the discretion to appoint sub-contractors other than those nominated by them in their tender for the redevelopment of the Karratha Aquatic Centre"* and the possible consequences of such a decision. It was sent to the agency more than a week after the issue referred to in the item of concern to the complainant recorded in the Council minutes had been raised by the Panel member and dealt with by the agency.

55. That letter is clearly not, in my view, what led to the inquiry noted in the item of the minutes specified by the complainant. It is, as I have said, the

correspondence referred to in the separate item recorded below the item of concern to the complainant. As I have also said, it appears to me that the complainant has now been given all the documents that can be found which relate to that item of concern in the minutes. That letter clearly cannot be relevant to that item in the minutes because it was sent more than a week after the events referred to in that item.

56. There is no evidence before me that the third party raised either issue (that is, an alleged connection between the Project Manager and the complaint or its concerns about the tender process) with the Panel member. Mr Payne advises me that his letter raising concerns about the tender process was written to the CEO of the agency as a result of advice from a senior officer of CAMS (Contract and Management Services, as it then was).

57. I am advised by the agency that, when that letter was received, the CEO of the agency discussed its contents with the Director and the Manager, particularly the issue of the potential substituting of sub-consultants, but they decided they were happy that the tender process had been appropriate. No further action in respect of the letter was taken, other than having the third party's concerns submitted to the Council meeting for noting. It would appear to be implicitly confirmed by the recommendation put to the Council on 21 June 2004 that no further action was taken in respect of the contents of the letter.

58. In response to my officer's preliminary view, the third party pointed out, among other things, that my officer had mistakenly construed a particular reference in the letter to be a reference to a conflict of interest between the Project Manager and the complainant. I cannot provide any further information in respect of that matter without breaching my obligation under s.17(4) of the FOI Act not to disclose exempt matter, which prohibition I take to extend to matter that is claimed to be exempt: see my reasons for decision in *Re Post Newspapers Pty Ltd and Town of Claremont* [2005] WAICmr 17 at paragraphs 15-23. However, I accept the third party's submission in that regard. The particular reference clearly does not, in my opinion, refer to a conflict of interest or alleged conflict of interest in relation to the Project Manager and the complainant, and does not refer to the complainant at all.

59. It was primarily on the basis of that misunderstanding that my officer rejected the agency's submission that Document 1 was outside the scope of the access application because it did not raise any questions of conflict of interest but, rather, was a complaint about the tendering process. I accept that submission by the agency. On my reading of Document 1, it does not allege any wrongdoing on the part of the complainant or alleged conflict of interest concerning the complainant.

60. However, given the particular circumstances of this matter, I was, although somewhat reluctantly, prepared to accept that some small parts of the document could arguably be considered to be within the scope of the access application and therefore within the scope of this complaint on the basis that, in the course of describing its concerns about the tender process, the third party had raised an issue that could broadly be said to be similar to the issue

raised by the Panel member, even though it appears to me on the documentary evidence that neither the Panel member nor the third party alleged a conflict of interest between the Project Manager and the complainant.

61. Further, as the agency – albeit wrongly in my view – identified the document as being within the scope of the access application; as it is clear that the complainant does seek access to that document; and as a substantial amount of submissions have been made concerning the question of whether or not the document is exempt, I considered whether or not those portions of the document that I considered may arguably be within the scope of the access application were exempt.

62. I identified to the parties the only parts of Document 1 that I considered may be argued to be within the scope of the access application on the very broad interpretation I have outlined above and advised them of my preliminary view in respect of those parts of the document only and the reasons for that view. My preliminary view was that those parts of Document 1 were not exempt under clause 8(2) as claimed. It was also my view that Document 2 was not within the scope of the access application.

63. In response to that view, on 2 May 2007 I received submissions on behalf of the complainant arguing that both documents are within the scope of the access application or that, in the alternative, the complainant wished to reframe its access application and that I should determine the complaint on the basis of the *"amended access application pursuant to section 66(6) of the FOI Act"*. A number of submissions were also made as to why the complainant should be given access to the documents. However, they were "public interest" arguments rather than arguments as to whether or not the documents are exempt and are not relevant given my view that the documents are not exempt.

64. The complainant submits that *"… the crux of* [its] *access application was to ascertain the consideration and reasoning of the Council in its resolution on 21 June 2004 to award the tender contrary to the Council officer's recommendation"* and that its access application *"… related to documents 'when the Council was considering the tenders submitted in response to Request for Tenders (No.G05-03/04) regarding the provision of core filtration and structures for the redevelopment of the Karratha Aquatic Centre.'"* The complainant argues that, as part of that request, it referred to the issue noted at page 46 of the minutes of the Council meeting dated 21 June 2004 under the specified heading which made mention of a potential conflict of interest. The complainant argues that the reference to that issue was *"… clearly not intended to limit the scope of the documents being requested but to at least give the Shire some guidance in the type of documents that the access application was intended to cover."*

65. I do not accept those submissions. The complainant's access application was not *"… related to documents 'when the Council was considering the tenders submitted in response to Request for Tenders (No.G05-03/04) …"*. It was specifically for documents *"… in relation to an issue that was raised during*

the meeting of the Council of the Shire on 21 June 2004 when the Council was considering the tenders submitted in response to a Request for Tenders (No.G05-03/04) …" and, as is apparent, from the full terms of the access application as set out in paragraph 40 above, that issue was specifically identified as *"… a perceived conflict of interest between* [the Project Manager] *and* [the complainant] *and is recorded on page 46 of the meeting minutes under the heading 'Thomson Marquis Project Management'."*

66. It is clear from the terms of the access application that it was not for all documents relating to the consideration of the tenders; it was specifically for documents relating to the issue noted at page 46 of the minutes concerning a perceived conflict of interest between the Project Manager and the complainant. That was confirmed in the complaint to my office in which the complainant advised that *"*[b]*y letter dated 27 July 2004 we wrote to the Shire and sought access under the* FOI Act *to documents relating to an issue that was raised during a meeting of the Council of the Shire on 21 June 2004 …"* and specifically identified that issue in the following terms:

"The issue relates to a perceived conflict of interest between [the Project Manager] *and* [the complainant] *and is recorded on page 46 of the meeting minutes under the heading 'Thomson Marquis Project Management'."*

67. I also do not accept the complainant's submissions that the document is within the scope of the access application because the Shire *"… confirmed, in its letter to* [the complainant] *on 29 October 2004, that it had received a letter from* [the third party] *(Document 1) referring to an alleged conflict of interest which fell within the scope of the access application."*

68. The agency's letter of 28 November 2004 to the complainant did not confirm that it had received a letter from the third party … *referring to an alleged conflict of interest …"*. It merely advised that "[a]*n assessment of correspondence received by* [the third party] *dated 2 June 2004 has been made and access to this document is denied as we consider the document exempt under Clause 8(2) of Schedule 1 of the FOI Act."* No reference was made in that letter to the document containing any allegation of a conflict of interest.

69. The complainant submits that the agency and my Senior Legal Officer "… *acknowledged that Document 1 fell within the scope of the access application because the access application evidently was aimed at disclosure of documents relating to the decision on the tender process."* I do not accept that submission. The agency did not state the basis on which it considered the document to be within the scope of the access application and, indeed, in later submissions to me argued that it was not.

70. In his letter to the complainant, advising the complainant of his view that the document was within the scope of the access application, my Senior Legal Officer did not detail the reasons for that view as he could not do so without disclosing something of the contents of the document and he was precluded by s.74 of the FOI Act from doing so. However, I have reviewed his reasons for

considering such a document was in the scope of the access application and, as I had advised the parties, it was primarily on the basis of a misinterpretation of a reference in the letter as applying to the complainant.

71. For the reasons set out in detail in my letter of 31 May 2007 to the complainant, it is apparent to me that the identification of that document as being within the scope of the access application was on the erroneous basis of the misinterpretation of a matter referred to in that letter being a reference to a conflict of interest between the Project Manager and the complainant. As I have said, having inspected the document, it is clear to me that that was an error. That reference does not relate to a perceived, alleged or actual conflict of interest between the Project Manager and the complainant; it does not relate to the complainant at all.

72. Alternatively, the complainant argued that it sought to reframe its access application to the agency in the following terms:

> *"'We request access to all documents relating to the decision of the Shire of Roebourne to pass resolution No.13390 of the Council meeting on 21 June 2004, particularly documents which may reveal the Council's decision to depart from the Council officer's … recommendation.'"*

73. The complainant requests that I *"…determine the complaint relating to this amended access application pursuant to section 66(6) of the FOI Act."* The complainant argues that this is an appropriate case for me to consider and decide such an "amended access application" without the need for the Shire to separately consider and determine it through its internal review procedures, for the following reasons:

- the long delay of more than two years in finalizing the matter by making a decision in relation to the complaint concerning the refusal of access to Document 1 and Document 2;
- the Shire's indication that it considered Document 1 and Document 2 to be within the scope of the access application;
- the "close similarity" between the amended access application and the original access application; and
- the need for finality on this access application after the extraordinary long process.

74. Section 66(6) of the FOI Act empowers the Information Commissioner to allow a complaint to be made even though internal review has not been applied for or has not been completed if the complainant shows cause why internal review should not be applied for or should not be completed. That provision has no application in this matter. The complainant did make an access application, has had an initial decision and has had an internal review decision on it. This is not therefore a case in which I can consider accepting a complaint without internal review as there has, in fact, been internal review.

75. As far as I can see, nothing in the FOI Act allows a complainant to change the terms of its access application once the matter has been through the process

with the agency and has come to me on complaint. To allow that to occur would not generally be fair to the agency concerned as it would not have had the opportunity to deal with the access application in respect of those additional documents either initially or on internal review before the matter became subject to external review. That is clearly against the scheme of the FOI Act. In addition, I do not accept that there is a close similarity between the proposed "amended access application" and the complainant's original access application. For the reasons I have set out at length above, I am of the view that the complainant's access application was very specific and was clearly not for all documents relating to the Council's decision in respect of the tender.

Decision to deal with whole of both documents

76. However, in this case the agency has made both an initial decision and a decision on internal review in respect of the documents and all parties have had ample opportunity to make submissions to me in respect of them and have done so. As I advised the parties in my letter of 31 May 2007, I agree with the complainant that there is a need for finality given: the unusually long process of review in this case and given that both the agency and my office – albeit erroneously in my view, for the reasons I have given – identified Documents 1 and 2 as within the scope of the access application; it is very clear that the complainant seeks access to those documents, whether or not they actually were within the scope of the initial access application; a considerable amount of time and resources has been expended by all the parties to the complaint in making submissions as to whether or not those documents are exempt under the FOI Act; and a considerable amount of time and resources has also been expended by my office in considering those submissions, conducting further inquiries as a result of them and endeavouring to resolve the matter between the parties.

77. From an early stage in the process, the complainant has made it clear that it seeks access to those two documents and the argument between the parties for most of the very long time this complaint has been on foot has been about whether or not they are exempt. Even after being given the further information about the nature of those documents, the complainant maintains strongly that it seeks access to them.

78. In those circumstances, the practical result, if I were to decide the matter on the basis of the view set out in my letter of 23 April 2007 to the complainant, is that – if the complainant wishes to pursue access to those documents, as it clearly does, the complainant would be required to commence the FOI process again by application to the agency specifying that it seeks access to those two documents. If the complainant maintains its objection to disclosure – as it clearly does – then, after going through the required processes in the agency again (that is, consultation, decision, internal review etc), the matter would no doubt become the subject of external review once again.

79. Therefore, making a decision now on the basis of the views set out in my letter would only delay the inevitable requirement that I make the decision as

to whether or not those documents are exempt, in a matter that is already taking an inordinate amount of time to reach a conclusion. For that to happen would not appear to me to be reasonable in the circumstances, fair to any of the parties involved or more generally in the public interest, given the lack of finality for the parties and the further time and resources that would have to be expended in revisiting this dispute.

80. That is particularly so, given that it is my view that it has not been established that the documents are exempt under clause 8(2) as claimed. All the parties have been previously advised of the view that those documents are not exempt as claimed and detailed reasons for that view have been given to them. They have all had the opportunity to respond to that view and have availed themselves of that opportunity at length. In those circumstances, I did not consider it necessary to receive any further submissions from the parties although I indicated to the parties that any further submissions received by me before I finalize my decision would be considered. I also advised the parties that I expected to finalize that decision on 8 June 2007, so any further submissions should be received in this office sufficiently before then to allow me the opportunity to consider any.

81. Late on 8 June 2007, I received a facsimile from the third party's representatives seeking an extension of time, but not giving any reasons for seeking such an extension. On Monday 11 June 2007, my office contacted the third party's representatives to inquire as to the reasons for the request. My office was advised that the third party's representatives were awaiting further instructions in respect of whether or not they could respond to my letter of 31 May in the manner they proposed.

82. I refused the request for an extension of time. I was not prepared to delay final resolution of the matter any longer given that this matter has now been on foot for over two years, and I did not consider it necessary to receive further submissions from the parties. All parties have previously been advised of the view that the documents are not exempt as claimed, given detailed reasons for that view and given ample opportunity to make submissions in response to it and have done so.

83. On Monday 11 June I also received further submissions from the complainant in the main reiterating its arguments that the documents were within the scope of either its original access application or its "amended access application".

BURDEN OF PROOF

84. Section 102(1) of the FOI Act provides that, in any proceedings concerning a decision made under the FOI Act by an agency, the onus is on the agency to establish that its decision on access was justified or that a decision adverse to another party should be made. Section 102(2) of the FOI Act further provides that, if a third party initiates or brings proceedings opposing the giving of access to a document, the onus is on that third party to establish that access should not be given or that a decision adverse to the access applicant should be made.

85. Accordingly, in order to displace the complainant's statutory right of access under the FOI Act, the agency and the third party must establish a case for exempting Documents 1 and 2 from disclosure. On this point, I refer to the comments of Owen J of the Supreme Court of Western Australia in *Manly v Ministry of the Premier and Cabinet* (1995) 14 WAR 550, where his Honour discussed a claim for exemption made under clause 4(3) of the FOI Act. His Honour said, at p.573 of that decision:

> *"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."*

86. In this instance, the onus is on the agency and the third party to provide me with some probative material that supports their respective claims that Documents 1 and 2 are exempt.

THE EXEMPTION CLAIMED – CLAUSE 8(2)

87. The agency and the third party claim that Document 1 is exempt under clause 8(2) of Schedule 1 to the FOI Act. Clause 8, so far as is relevant, provides as follows:

> *"**8. Confidential communications***
>
> ***Exemptions***
>
> *(1)* …
>
> *(2)* *Matter is exempt matter if its disclosure —*
>
> *(a)* *would reveal information of a confidential nature obtained in confidence; and*
>
> *(b)* *could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*
>
> ***Limits on exemption***
>
> *(3)* …

> *(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."*

88. There are two limbs to the exemption in clause 8(2). To establish a *prima facie* claim for exemption under clause 8(2), the requirements of both paragraphs (a) and (b) must be met. That is, it must not only be shown that the document the subject of the complainant's access application would, if disclosed, reveal information of a confidential nature obtained in confidence but also that the disclosure of information of the kind under consideration could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

Clause 8(2)(a) - Confidential information obtained in confidence

89. Information is inherently confidential if it is not in the public domain. That is, the information must be known by a small number or limited class of persons only. To have been 'obtained in confidence', the information under consideration must have been both given and received on the basis of either an express or implied understanding of confidence.

90. The question of whether information was obtained on the basis of an express or implied understanding of confidence is one to be decided in all the circumstances of the case: see *Department of Health v Jephcott* (1985) 62 ALR 421, *Hayes v Secretary, Department of Social Security* [1996] 43 ALD 783 and *Re Askew and City of Gosnells* [2003] WAICmr 19.

91. However, merely marking a document as 'confidential', whether by way of a stamp or by inclusion of words to that effect on the face of the document does not of itself establish that a document contains confidential information or that the information was given and received on the basis of either an express or an implied understanding of confidence. Whilst it may be one of a number of factors to be considered, it is not determinative of the issue. It is necessary to consider both the nature of the information and the circumstances in which the information was both given and received: see paragraph 11 of *Re Askew*.

The agency's submissions

92. The agency claimed, on internal review, that it received Document 1 in confidence. However, in its submissions dated 5 March 2005, the CEO of the agency advised that Document 1 was not obtained by the agency on the basis of an express understanding of confidentiality. That submission is consistent with the advice that the CEO of the agency subsequently provided to my office on 6 December 2005, to the effect that he was unable to substantiate the claim made to me by the third party that a representative of the third party contacted the CEO of the agency prior to sending Document 1 to the agency, expressly asking the CEO that Document 1 be treated confidentially by the agency before it was sent to the agency.

93. However, the agency submits that, in this instance, the information recorded in Document 1 is not in the public domain and that it is known only by a small number of officers of the agency.

94. The agency submits that the circumstances in this case are inherently confidential and, further, that comments made by the former Information Commissioner ('the former Commissioner') in *Re Askew* support the agency's views in this regard. However, that submission on the part of the agency overlooks the fact that, in *Re Askew* the former Commissioner found that the claim for exemption under clause 8(2) was not established and that the document the subject of that complaint was not exempt.

The third party's submissions

95. The third party submits that Document 1 contains confidential information obtained in confidence because:

- Document 1 was forwarded to the agency's CEO *"…on the firm understanding that the matters within it would be regarded as strictly confidential by the* [agency] *and its Council*" and its author advised the agency's CEO expressly that he wished the contents of the Document 1 to be treated confidentially before it was sent, and it was stamped, at each page, with the word "Confidential";

- the issues raised in Document 1 relate to specific matters which are very project-specific and the matters debated within are technical and of no interest to the general public; and

- the matters raised with the CEO concern a narrow field of expertise, and were received by the CEO on the clear understanding that the conjectural points being raised were being given in confidence.

96. In support of its submission that Document 1 was sent to the agency on the basis of an express understanding of confidence, the third party has provided me with a copy of an entry dated 2 June 2004 from its author's notebook diary, which it submits was made contemporaneously with the third party's discussion with the agency's CEO on that date. As I understand it, the record in that diary entry to which the third party is referring is the entry that says in part *"Alan Moles – sending confidential letter …"*

97. The third party submits that the contemporaneous diary entry is evidence that supports its claim that it advised the agency's CEO that Document 1 was confidential. The third party submits that "[i]*n view of the CEO's inability to recall the conversation and* [the third party's] *recollection, together with the contemporaneous diary entry, it is our submission that* [the third party's] *position should be preferred and that a positive finding in favour of* [the third party] *should be made on this point"*.

The complainant's submissions

98. The complainant says that the agency did not address the requirements of clause 8(2) and it simply stated that Document 1 was received in confidence, without providing any probative material to support that claim. The complainant submits that giving it access to Document 1 would not reveal any information of a confidential nature that was received in confidence. The complainant says that, whilst information is inherently confidential if it is not in the public domain, the essential nature of the information sought in this case has already been recorded on page 46 of the minutes under the heading ***'Thomson Marquis Project Management'***.

99. The complainant says that the minutes of Council meetings are matters of public record and, hence, any information published in the minutes is in the public domain. The complainant submits that, as a result, any confidentiality that may have attached to Document 1 has been lost as a result of the publication of that information in the minutes.

100. The complainant submits that the agency is required to provide probative material to establish that the information was obtained in confidence, referring me to *Re Askew,* but that it has failed to do so.

Consideration

101. I accept that the diary entry referred to above supports the third party's assertion that its representative advised the agency's CEO that Document 1 was confidential before it was sent. In my view, it is apparent that the third party sent Document 1 to the agency in confidence. Document 2, the third party's covering email, refers to a 'confidential letter' and Document 1 is itself marked "Confidential" on each page. In my opinion, that indicates that Document 1 was considered confidential by the sender, the third party.

102. However, for the requirements of clause 8(2)(a) to be established, I must also be satisfied that Document 1 was received by the agency on the basis of either an express or implied understanding of confidence. That is, it must not only have been sent in confidence but also have been received in confidence.

103. In response to the inquiries made by my officers into this complaint, the CEO of the agency has advised me that he neither replied to Document 1 nor acknowledged that he had received it. The CEO of the agency has also advised me that he does not recall having a conversation with the third party prior to receipt of Document 1 or giving the third party any undertakings concerning the confidentiality of Document 1. In addition, the third party's legal advisers have confirmed to me that no correspondence of any kind was received by the third party from the CEO of the agency in response to Document 1. The agency has no file note of a conversation between the CEO and the third party concerning the letter before it was received and the CEO has no recollection of such a conversation. The agency therefore has no record of any undertaking of confidentiality having been given. Accordingly, on the basis of the evidence before me, I do not consider the third party's

claim that Document 1 was received by the agency on the basis of an express understanding of confidence to has been established.

104. Nonetheless, the diary entry provided by the third party does support the claim that there was a discussion between the third party and the CEO before the letter was sent and, in particular, discussion – or at least a comment – about it being treated as confidential. Given the nature of the various diary notes on the page of the notebook provided to me, it appears to me that if the CEO had indicated that he was not prepared to accept the letter on a confidential basis that response would have been noted. The diary note does, therefore, lend some support to there having been at least an implicit understanding of confidentiality when the letter was sent.

105. Further, the material before me indicates that, following receipt of Document 1, the agency dealt with that document in a manner that indicates that the agency understood that it was a confidential document. The CEO of the agency has advised me that he discussed Document 1 with only two other officers of the agency, the Director and the Manager, and there is nothing in any of the material before me to indicate that Document 1 was circulated to any other officer of the agency or councillor or to any other members of the Panel.

106. On the basis of the material presently before me, in my view, the information in Document 1 is inherently confidential, in that it is known only to a very few people. There is some evidence to suggest that it was sent and received on the basis of an at least implicit understanding of confidentiality. After it was received, the document was dealt with by the agency in a manner that indicates that the CEO of the agency understood that Document 1 was a confidential document and it has only been circulated to a very limited number of people within the agency. There is no evidence before me to indicate that Document 1 has been released into the public domain.

107. I have also compared the information recorded in Document 1 with the information recorded in the minutes of 21 June 2004. As I have explained above, none of the information in Document 1 is recorded in the minutes under the heading ***"Thomson Marquis Project Management",*** as the entry under that heading was not a reference to Document 1 or the issues raised by it

108. The only information in the minutes concerning Document 1 is that recorded under the heading ***"Sub-consultancy Appointments"*** and, as I have said, all that is noted is that the third party had expressed its objection to allowing Council a discretion to appoint sub-contractors other than those nominated by them and that allowing it to do so would have a detrimental effect. It does not record any of the detail of the reasons for the third party's objection, what the detrimental effect might be or any of the specific information contained in the letter. Accordingly, I do not consider that any confidentiality that may have attached to Document 1 has been lost due to the publication of that note in the minutes, as claimed by the complainant.

109. I am prepared to accept therefore, that Document 1 contains information of a confidential nature which was obtained by the agency on the basis of an implied understanding of confidence. It follows that, in my view, the requirements of clause 8(2)(a) have been satisfied with respect to Document 1.

Clause 8(2)(b)- prejudice the future supply of information

110. In order to satisfy the requirements of clause 8(2)(b) of Schedule 1 to the FOI Act, the agency and the third party must establish that the disclosure of Document 1 could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

111. The former Commissioner expressed the view in a number of her formal decisions in relation to the exemption in clause 8(2) that paragraph (b) of the exemption in clause 8(2) is directed at the ability of the Government or an agency to obtain the relevant kind of information from the sources generally available to it in the future. Paragraph (b) is not concerned with the question of whether the particular source of a document would refuse to supply that kind of information to the Government or to the agency, in the future (see: para 16 of *Re Askew*). I agree with the former Commissioner's views in this regard.

112. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, at 190, the Full Federal Court said that the words *"could reasonably be expected to prejudice the future supply of information"* in s.43(1)(c)(ii) of the *Freedom of Information Act 1982* (Commonwealth) were intended to receive their ordinary meaning and required a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the relevant kind to the Commonwealth would decline to do so if the documents in question were disclosed.

113. Similarly, in *Ryder v Booth* [1985] VR 869, the Full Court of the Victorian Supreme Court considered whether the Victorian equivalent of clause 8(2)(b) applied to medical reports provided in confidence to the State Superannuation Board. On the question of whether disclosure would be reasonably likely to impair the future supply of similar information, Young C.J. said, at p 872:

> *"The question then is, would disclosure of the information sought impair (i.e. damage) the ability of the Board to obtain similar information in the future. Put in terms of the present appeals this means that the question is, would the disclosure of the information damage the ability of the Board to obtain frank medical opinions in the future. It may be noted that it is the ability of the Board that must be impaired.*
>
> *The paragraph is not concerned with the question whether the particular doctor whose report is disclosed will give similar information in the future but with whether the agency will be able to obtain such information. There may well be feelings of resentment amongst those who have given information "in confidence" at having the confidence arbitrarily*

> *destroyed by the operation of the legislation, but it is another thing altogether to say that they or others will not provide such information in the future. It is not sufficient to show that some people may be inhibited from reporting so frankly if they know that their report may be disclosed. More is required to satisfy the onus cast upon the agency by s.55(2) of the Act."*

The agency's submissions

114. In support of its submission that the disclosure of Document 1 could reasonably be expected to prejudice the future supply of information of that kind, the agency says:

> "[t]*he comments contained in* [Document 1] *primarily focus on the tendering process. It is critical in the extreme … Nevertheless it represents pithy comment on such issues and from time to time the receipt of such commentary is salutary for tendering bodies like the Shire. It is submitted that if documents containing this sort of commentary were revealed then the flow of such useful commentary would cease".*

115. The agency also submits that "…*just as in the* Askew *case it is reasonable to expect that such commentary would not be available to local governments if the source expected such documents to be revealed under the* [FOI Act]".

The third party's submissions

116. The third party submits that it sent Document 1 to the agency after it received notification that the Project Control Group had made a decision on the tender, and that a recommendation was to be put to Council.

117. It was submitted on behalf of the third party that:

> *"*[the third party] *believed it was in the interest of their tender to explore, with the CEO, the range of specific issues raised. Whilst being very project specific, some were important matters of principle, ethics and the rules and fairness of the tendering process".*
>
> *This two-way information flow between tenderers and government agencies is a vital part of the lawful government/commercial tendering procedure.* [Document 1] *provided them with an opportunity to raise issues with the CEO that they believed may have had some influence on the approach taken by Council in making its final selection".*

118. It was also submitted for the third party that:

> *"…had points made in* [Document 1] *not been raised with Council, then a review of the probity issues concerning the transposing of sub-consultants and their fees would not have been made…This information flow, therefore, resulted in an ethical and fair approach to all tenderers. The release of*

[Document 1] *would prejudice the future supply of information to government agencies and lessen positive and important two-way information flow"*.

119. In response to my officer's view, it was further submitted that:

> *"the emphasis on the* "commercial interest" *as a factor for not accepting its claim that a tenderer in this situation would be unlikely to make further claims in the future is misplaced. But for the commercial relationship, the tenderer would not have been involved in the project in the first place, nor would it have had knowledge of the concerns that it sought to raise with the CEO.* [The concerns raised in Document 1] *necessarily must come from someone who is involved and is likely to have a commercial interest. In the circumstances, the reliance on the fact of the "commercial interest" has led to a misapplication of the test for exemption and … should be reconsidered in favour of the third party"*.

120. The third party contends that requiring some supporting evidence for a claim of a reasonable expectation of a prejudice to the future supply of information misconceives the test to be applied when considering the reasonableness of such a claim. The third party has referred me to the comments made by the Federal Court in *Attorney General's Department v Cockcroft* (1986) 10 FCR 180 at 190, when considering the words *"could reasonably be expected to prejudice the future supply of information"*, that the words were intended to receive their ordinary meaning and required a judgement to be made by the decision maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth would decline to do so if the documents in question were disclosed.

121. The third party also submits that requiring some supporting evidence imposes a requirement that is additional to the ordinary meaning of the words in clause 8(2)(b) and that a requirement that the claim be supported by probative material to establish there are real and substantial grounds is one that could never be satisfied, given that it relates to a consideration relating to the future supply of information. The third party submits that a *"requirement of this kind would deprive the exemption of any effect"* and that "[c]*learly, this could not have been intended by parliament"*.

122. The third party claims its submission is strengthened by the reasoning in *Manly v Ministry of the Premier and Cabinet* (1995) 14 WAR 550, specifically the following observation of Owen J:

> *"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"*.

123. The third party submits that, although noting it, my officer did not expressly consider the submission that the issues in Document 1 are very project-

specific, concern one very limited area and are technical and of no interest to the general public.

124. The third party submits that, if its submission that the information is inherently confidential is accepted, *"… it follows, given the very limited interest in the issues disclosed, that disclosure could reasonably be expected to prejudice the future supply of information, as there is a potential for disharmony in a closed and confined environment, given the very limited interest of the issues, and would therefore be a strong disincentive for members of that environment to provide that kind of information in the future if Document 1 were disclosed"*. The third party submits that, in that sense, the claim for exemption is analogous to *Re Markham and Ministry of Justice* [1995] WAICmr 25 *" which upheld an exemption on this ground"*.

125. The third party submits that it would be a rare situation where paragraph (a) of clause 8(2) is satisfied, and paragraph (b) is not, and that *"… once it is accepted that the information in Document 1 was of a confidential nature obtained in confidence, it would appear trite to say that it could reasonably be expected to prejudice the future supply of information of that kind to the government or to an agency in the future by anyone else. It follows that, if the disclosure occurred, it would constitute a breach of confidence"*.

126. The third party submits that the inclusion of the words *"of that kind"* in 8(2)(b) is significant. The third party contends that the inclusion of those words in paragraph (b) relates to the quality of the information described in paragraph (a), namely information that is of a confidential nature obtained in confidence. The third party says that, if this is correct, *"… it makes it extremely likely that disclosure could reasonably be expected to prejudice the future supply of information that was information of a confidential nature obtained in confidence"*.

127. In support of its submission that the requirements of clause 8(2)(b) are satisfied, the third party provided, with its submissions to me dated 23 March 2006, a copy of a letter from a consulting firm. The third party asked me to consider the letter as evidence of the fact that disclosure of Document 1 could reasonably be expected to prejudice the future supply of information of that kind to the government or to an agency. The third party claims that the letter *"…is written by a reputable and established firm"* and that *"it emphatically records the firm's view that they would not venture an opinion or raise concerns if that would lead to some action being taken as a result of the disclosure of those opinions"*. The third party submits that the letter stands as independent proof of a prejudice to the future supply of information of that kind to the government or to State or local government agencies.

The complainant's submissions

128. The complainant submits that the agency has not adequately addressed the requirements of paragraph (b) of clause 8(2).

129. The complainant referred to the decision in *Cockcroft*'s case, and to several of the former Commissioner's decisions relating to the meaning and interpretation of clause 8(2)(b), including *Re Veale and Town of Bassendean* [1994] WAICmr 4 and *Re Henderson, Goatley, McHale and Weaver and Education Department of Western Australia* [1997] WAICmr 21, in support of its contention that the agency must show that its ability to obtain information of the same class or character as that which is in dispute in this matter would be impaired if Document 1 were to be disclosed.

130. The complainant submits that the requirement is not concerned with the question of whether the third party would refuse to supply information of that kind to the agency in future but, rather, whether the ability of the agency to obtain such information from any of the sources generally available to it would be adversely affected. The complainant submits that information 'of that kind' in the present case is information that would reveal the concerns of tenderers regarding the propriety of other tenderers and the veracity of competing tenders.

131. The complainant submits that it is unlikely that the disclosure of Document 1 would deter future tenderers from expressing their concerns with the agency because it would be in their best interests to inform the agency of any 'untoward behaviour' of another tenderer, in order to increase the likelihood of winning the tendered work over their competitors. The complainant submits that it follows that there is no reasonable basis to expect that granting access to Document 1 would prejudice the future supply of information of that kind.

Consideration

132. The question in respect of clause 8(2)(b) is whether the disclosure of Document 1 could reasonably be expected to prejudice the ability of the Government or an agency to obtain information of a similar kind in the future from the sources available to it.

133. Firstly, Document 1, on my reading of it, does not, as suggested by the complainant, contain any information that could be characterized as *"concerns of tenderers regarding the propriety of other tenderers and the veracity of competing tenders"* or *"untoward behaviour"* of other competing tenderers. As is noted in the relevant part of the minutes, Document 1 contains information that, in my view, is properly characterized as a tenderer's concerns about a particular aspect of the tendering process – or more particularly, the structure of the tender – and its potential detrimental effect on that tenderer. It does not allege wrongdoing by any competing tenderers or their consultants. Parts of the document contain information illustrating a possible adverse effect on its tender which the third party speculates may arise out of a particular concern about the tender process.

134. The question is whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that tenderers in a similar position to that in which the third party found itself would decline to provide to a State or

local government agency information of the kind provided by the third party, if the disputed information were to be disclosed.

135. I do not agree with the third party's submission that the term "information of that kind" in clause 8(2)(b) refers merely to information of a kind that is confidential in nature and obtained in confidence. In each case, the "information of that kind" will be the particular confidential information obtained in confidence. Each case turns upon its unique facts and the question is always whether the exemption claimed applies to the particular information for which it is claimed. In my opinion, in this case, the "information of that kind" is concerns raised by a tenderer about a tender process in which it was participating.

136. I do not agree with the third party's submission that it necessarily follows that the disclosure of 'information of that kind' makes it *"extremely likely"* that the future supply of information of that kind would be prejudiced. Nor do I agree with the third party's submission that it would be a rare situation that the requirements of 8(2)(a) would be satisfied and 8(2)(b) is not. If that were the case, there would be little or no need for paragraph (b) of the exemption.

137. As I have said, clause 8(2) consists of two limbs and both must be satisfied for the exemption to *prima facie* apply. There will be occasions when the requirements of clause 8(2)(a) will be satisfied but clause 8(2)(b) is not: see, for example, the decisions in *Re Veale and Town of Bassendean* [1994] WAICmr 4; *Re Askew*; *Re Kimberley Diamond Company NL and Department of Resources Development and Argyle Diamond Mines Pty Ltd* [2000] WAICmr 63; and *Re Sideris and City of Joondalup and Another* [2001] WAICmr 37. In my view, if Parliament intended information contained in documents of government agencies to be exempt merely on the basis that it is of a confidential nature obtained in confidence, clause 8(2)(b) would not have been included in the exemption.

138. I also do not accept the third party's submission that, once it is accepted that information is of a confidential nature obtained in confidence, *"it would appear trite to say that it could reasonably be expected to prejudice the future supply of information of that kind to the government or to an agency in the future by anyone else"* and that *"*[i]*t follows that, if the disclosure occurred, it would constitute a breach of confidence".*

139. It seems to me that, in the latter part of that submission, the third party may be confusing the requirements of clause 8(2) with that of clause 8(1) of Schedule 1 to the FOI Act. Clause 8(1) provides that matter is exempt matter if its disclosure (otherwise that under the FOI Act or another written law) would be a breach of confidence for which a legal remedy could be obtained. Whether or not disclosure would be a breach of confidence is not relevant to the clause 8(2) exemption.

140. Other than the above-mentioned submission referring to a breach of confidence, the third party has not specifically submitted that Document 1 is exempt under clause 8(1) nor provided any evidence to me support any

assertion that the disclosure of Document 1 would constitute a breach of confidence for which a legal remedy could be obtained. In any event, on the information before me, there is nothing to suggest that the disclosure of Document 1 would be a breach of confidence for which a legal remedy could be obtained and that Document 1 is exempt under clause 8(1).

141. Having considered all of the material before me, I do not accept the agency's and the third party's claims that the disclosure of the disputed information could reasonably be expected to prejudice the future supply of information to the Government or agencies.

142. The third party wrote to the CEO of the agency for the express purpose of bringing to his attention the concerns it held about the agency's tender processes for the redevelopment of the KAC. The third party was a tenderer for that project and it clearly had a commercial interest in being selected as the preferred tenderer. In that regard, the third party submitted that it believed that it was in the interests of its tender to explore the issues raised with the CEO of the agency and that sending Document 1 to him provided it with an opportunity to raise issues which it believed may have had some influence on the approach taken by Council in making its final decision.

143. Document 1 was sent to the CEO not only, as submitted by the third party, in order to ensure the propriety of that and future tender processes, but also to advance the third party's commercial interests in the tender and its desire to ensure that its tender submission was fully considered in an appropriate manner, in circumstances where it was clearly in the third party's commercial interests to bring those issues to the CEO's attention. Given that I do not accept that the third party, or any tenderer in a like position, would not do the same again, in a similar situation.

144. I have considered the contents of the letter from the consulting firm which the third party claims supports its assertion that the future supply of information will be prejudiced by the disclosure of Document 1. Relevantly, that letter states:

> *"While not privy to* [Document 1] *our concerns relate to advice provided to* [the third party] *in good faith that may have been related to the* [agency] *therein.*
>
> *If, through offering advice to* [the third party]*…we found that some action was taken against* [the firm] *or* [the third party]*, we can categorically state that we would not venture such an opinion, or raise our concerns when subsequently confronted with a similar situation. Clearly this would be a deterrent to the supply of potentially important information relating to tendering activities".*

145. It seems to me that the concerns expressed by the firm are based on an assumption that its advice to the third party is contained in Document 1. Having considered the contents of Document 1, it is not apparent to me that the firm's advice is contained in that document.

146. I do not accept the third party's submission that the commercial interest of the provider of information is not a factor when considering the likelihood of such information being provided to government in the future. I accept that it is possible that only persons who had or have a commercial interest in a project such as the KAC project may have the requisite knowledge or inclination to raise such matters with a State or local government agency. I also accept that it is possible that the third party itself may be deterred from providing information of the kind in question to the CEO of a State or local government agency in the future.

147. However, the question is not whether the third party would be so deterred but, rather, whether other tenderers in a like position would decline to do so in similar circumstances. On the basis of the evidence presently before me, I am not persuaded that the disclosure of the disputed information could reasonably be expected to deter other tenderers in a like position from voicing their concerns about such issues in the future. The tenderer's commercial interests are clearly a motivating factor in such circumstances and therefore relevant to consideration of the likelihood of tenderers being deterred from raising concerns in the future.

148. The agency and the third party also claim that there would be a prejudice to the "two-way flow" of information between tenderers and government agencies in relation to tendering processes if Document 1 were to be disclosed. Given that the third party's letter was neither acknowledged nor responded to by the CEO of the agency and there was no exchange of correspondence or information between the agency and the third party following the receipt of Document 1, I find it difficult to accept that there is any basis for that claim, as there appears to have been only a one-way flow of information in this instance.

149. I also do not accept the third party's submission that the claimed "information flow" resulted in *"a review of the probity issues concerning the transposing of sub-consultants and their fees"* or *"an ethical and fair approach to all tenderers"*. The evidence of the agency is that, following discussion between the CEO, the Director and the Manager, no action was taken in respect of the concerns raised in the letter and it is apparent from the documentary evidence that it did not cause any change to the tender process or the recommendation put to the Council.

150. The third party's submission that the matters raised in Document 1 are *"of no interest to the general public"* is not relevant to whether or not the document is exempt. That submission may have been relevant if it had been established that the document were *prima facie* exempt and therefore the limit in clause 8(4) – that matter is not exempt under clause 8(2) if its disclosure would, on balance, be in the public interest – were being considered. That is not the case. Every person has a right to apply for access under the FOI Act and the reasons for seeking access are irrelevant (s.10). It is sufficient that the document sought is of interest to the applicant.

151. In respect of the third party's submission that, if it is accepted that the information is inherently confidential, it follows that disclosure could reasonably be expected to prejudice the future supply of information, *"… as there is a potential for disharmony in a closed and confined environment, given the very limited interest of the issues…"* it seems to me that the third party has merely paraphrased paragraph 23 of the former Commissioner's decision in *Re Markham*.

152. In that case, the Ministry of Justice, as it then was, refused the applicant – who was a prison officer – access to two reports submitted to the superintendent of the prison by another prison officer, which contained a number of allegations against the applicant, on the basis those reports were exempt on a number of grounds. In finding that the disclosure of the disputed documents could reasonably be expected to prejudice the future supply of that kind of information to the agency - and ultimately that the disputed documents were exempt under clause 8(2) - the former Commissioner made the following comments at paragraph 23:

> *"I recognise that there exists a potential for disharmony between prison officers who work in a very closed and confined environment, and that disharmony may potentially disrupt the operation of the prison. I accept that this fact would be a strong disincentive to officers to provide that kind of information in the future if the disputed documents were to be disclosed, and if it were also to become known to prison officers that such documents had been disclosed".*

153. I cannot see that an analogy can be drawn between the consequences of the disclosure of reports containing allegations against a prison officer by another prison officer, both of whom work in the closed and confined environment of a prison, and the circumstances of this complaint. The third party referred to a potential for disharmony in a "closed and confined environment" but has not explained what that submission means and, in particular, to what "closed and confined environment" it is referring.

154. In my view, the claim that disclosure of the disputed document could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency is unsupported by any probative material to establish that there are real and substantial grounds for it.

155. I agree to an extent with the complainant's submission that future tenderers would not be likely to be deterred from expressing their concerns to an agency because it would be in their commercial interests to inform an agency of any 'untoward behaviour' of another tenderer in order to increase the likelihood of their winning the tendered work over their competitors. As I have said, the concerns raised in Document 1 are not about 'untoward behaviour' by a competing tenderer, but I agree that tenderers are unlikely to be deterred from raising any serious concerns they may have about a tender process because it is in their direct interests to do so.

156. I do not accept the third party's submission that any requirement that a claim under clause 8(2) be supported by probative material to establish that there are real and substantial grounds to reasonably expect disclosure to prejudice the future supply of information imposes an additional requirement to that set out in clause 8(2); could never be satisfied; would render the exemption ineffective; and could not have been intended by Parliament. The third party claims that submission is strengthened by the reasoning in the *Manly* case, specifically the following observation of Owen J:

> *"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"*.

157. However, the third party's submission omits the comments made by Owen J earlier in the same paragraph in the *Manly* case. In that case, Owen J considered, among others, a claim for exemption under clause 4(3). Clause 4(3)(b) exempts certain matter if its disclosure could reasonably be expected to have an adverse effect on the business, commercial, professional or financial affairs of a person or to prejudice the future supply of information of that kind to the Government or to an agency. The wording of the latter part of clause 4(3) is in the same terms as clause 8(2)(b). Therefore, I consider his Honour's comments have equal application to a claim for exemption under clause 8(2).

158. His Honour's comments in full were as follows:

> *"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."*

159. I respectfully agree with that opinion and therefore reject the third party's submissions that probative material to support the claimed expected effect of disclosure cannot and should not be required.

160. On the basis of the material presently before me, neither the agency nor the third party has discharged the onus imposed by ss.102(1) and 102(2) of the FOI Act of establishing that Document 1 is exempt under clause 8(2). For the reasons given above, I am not persuaded that the requirements of paragraph (b) of clause 8(2) are satisfied. As a *prima facie* exemption under clause 8(2) has not been established, it is unnecessary for me to consider whether the "public interest test" limit on the exemption in clause 8(4) applies to the

disputed information. Accordingly, I find that Document 1 is not exempt under clause 8(2).

161. No other exemption claim was made by the agency or the third party and it is not apparent to me that Document 1 is exempt for any other reason. Therefore, subject to the deletion of a small amount of personal information about individuals other than the complainant which is *prima facie* exempt under clause 3(1) of Schedule 1 to the FOI Act – and to which the complainant does not seek access in any event – the complainant is entitled to be given access to it.

162. By way of comment, given that the Project Manager has consented to the disclosure to the complainant of any information concerning it in Document 1, I need not consider whether the disputed information is information concerning the business, commercial or professional affairs of the Project Manager which may be exempt. Had the Project Manager not consented, I would have been obliged to consider that question.

Document 2

163. The agency did not respond to my Senior Legal Officer's invitation to consider whether it wishes to claim exemption for Document 2. Other than asking me to find Document 2 exempt, the third party did not make any submissions to me as to why Document 2 is exempt.

164. Having examined Document 2, subject to the deletion of a small amount of personal information about individuals other than the complainant – which is *prima facie* exempt under clause 3(1) of Schedule 1 to the FOI Act and to which the complainant does not seek access in any event – I do not consider that it has been established that Document 2 is exempt under the FOI Act for any reason.

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