

Participants:

Troy Raymond Buswell
Complainant

- and -

**South West Development
Commission**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – minutes of Working Group – reports – emails – internal working documents – clause 6 – deliberative processes – advice and opinion obtained and recorded for the purpose of the deliberative processes of the agency – whether contrary to the public interest to reveal the deliberations of the agency.

Freedom of Information Act 1992 (WA): sections 15(1), 30 and 102(1); clauses 1(1), 3(1), 4(3), 6, 7 and 8(1), Schedule 1.

Re Environmental Defenders' Office WA (Inc) and Ministry for Planning [1999] WAICmr 35

Re Highway Construction Pty Ltd and State Supply Commission [2000] WAICmr 25

Health Department of Western Australia v Australian Medical Association Ltd [1999] WASCA 269

Martin and Ministry for Planning and Department of Land Administration [2000] WAICmr 56).

Re Read and Public Service Commission [1994] WAICmr 1

Re West Australian Newspapers Ltd and Western Power [2006] WAICmr 10

Re West Australian Newspapers Ltd and Department of the Premier and Cabinet [2006] WAICmr 23

Re Deacons and Heritage Council of Western Australia [2007] WAICmr 15

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

Ministry for Planning v Collins (1996) 93 LGERA 69 at 72.

Re Ayton and Police Force of Western Australia [1998] WAICmr 15.

DECISION

The decision of the agency is confirmed. The disputed documents are exempt under clause 6(1) of Schedule 1 to the *Freedom of Information Act 1992*.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

16 April 2008

REASONS FOR DECISION

1. This complaint arises from a decision by the South West Development Commission ('the agency') to refuse applications for access to documents made to the agency under the *Freedom of Information Act 1992* ('the FOI Act') by Mr Troy Buswell MLA ('the complainant').

BACKGROUND

2. On 21 September 2005, Hon Mark McGowan MLA, the then Minister for Tourism announced the formation of a taskforce to review the proposed works for the Busselton Jetty Refurbishment Project ('the Project') and to provide him with advice on:
 - the most effective engineering options for the future of the jetty as a tourism icon;
 - opportunities for land development that could be used to support the financing of the restoration or rebuilding of the jetty; and
 - future management options for the jetty including an accountable and transparent maintenance plan to ensure the sustainability of the jetty for the future.
3. The Busselton Jetty Taskforce ('the Taskforce') was to be chaired by Mr S Liaros, the Chairman of the agency. The other members of the Taskforce included Hon Adele Farina MLC, Member for South West Region and representatives of the agency, the Western Australian Land Authority ('LandCorp'), the Department for Planning and Infrastructure ('the DPI') and Tourism Western Australia ('Tourism WA') (see Hansard – Legislative Assembly – Wednesday 21 September 2005 – "Statement by Minister for Tourism" at pages 5743c-5744a).
4. In March 2006, the Taskforce presented a report to the then Minister for Peel and the South West. That report was one of the disputed documents in this matter, but the complainant withdrew his complaint with respect to that document.
5. In April 2006, following consideration of the Taskforce report, the then Minister for Peel and the South West established the Busselton Jetty Working Group ('the Working Group') which consists of equal representation of members from the Shire of Busselton and State government, including LandCorp, the DPI, the agency and Tourism WA. The Working Group is still active. The Working Group was, and still is, jointly chaired by Hon Adele Farina MLC, Member for South West Region, and the Shire President of Busselton Shire, who is currently Cr Wes Hartley.
6. In emails dated 1 May 2007 and 2 May 2007, the agency advised this office that the role of the Working Group was to:
 - review the work of the Taskforce;

- examine in detail all aspects of the proposed jetty refurbishment;
 - explore the land development options identified by the Taskforce;
 - develop concept plans of the land development options and costings associated with the refurbishment of the jetty, which would include the relocation of various leaseholders if the land development options are accepted by government; and
 - consult with the local community.
7. The agency advised this office that the end result of the work of the Working Group would be a submission to Cabinet which would include findings and recommendations so that government can determine whether or not to proceed with the project. The agency in its submissions dated 11 January 2008, says that the Working Group is still active and so there has not been an “end result” as such. The agency also advises me that it, the DPI and LandCorp have prepared a Cabinet submission, in part based on land development decisions of the Working Group and in part based on recommendations of other agencies including the Department of Treasury and Finance.
8. Public announcements and media commentary indicate that there have been at least two public consultation briefings, regarding the proposed land development options, held in the local community.

THE ACCESS APPLICATIONS

9. In three separate access applications to the agency, Tourism WA and the Minister for the South West (‘the Minister’), the complainant applied for access to documents under the FOI Act relating to:
- the Taskforce;
 - the Working Group;
 - the Busselton Jetty and the proposed refurbishment of the Busselton Jetty; and potential land development options associated with the refurbishment of the Jetty.
10. The Minister and Tourism WA transferred the complainant’s access applications to the agency, under s.15(1) of the FOI Act, and all three applications were dealt with as one by the agency.
11. On receipt of the access application, the agency entered into discussions with the complainant to confirm the ambit of his access application. As a result, the scope of the access application was reduced to documents of the kind described above, but limited to the period January 2004 to August 2006.
12. In a notice of decision dated 25 September 2006, the agency refused the complainant access to all of the documents requested by him, on the ground that all of the requested documents are exempt under clause 6 of Schedule 1 to the FOI Act because the documents are part of a deliberative process “...*where a decision will be made for submission to Cabinet.*” The agency said that it would be contrary to the public interest to release the requested documents, as their release may cause confusion prior to any public consultation process.

13. On 27 September 2006, the complainant sought internal review of that decision. Following that, further consultations took place between the agency and a representative of the complainant. The agency identified some 2000 documents on 16 volumes of files which come within the scope of the application. As a result of those consultations, the complainant identified 10 kinds of key documents to which he sought access. On 7 November 2006, the agency made the decision on internal review. It identified 57 documents which come within the scope of the complainant's access application, as clarified with the complainant.
14. The agency gave the complainant full access to ten (10) documents and access to edited copies of two (2) other documents. It also refused the complainant access to the remaining 45 documents on the ground that those documents are exempt under one or more of clauses 3(1), 4, and 6 of Schedule 1 to the FOI Act. Accordingly, at that stage of proceedings 45 documents were in dispute between the parties.

REVIEW BY THE A/INFORMATION COMMISSIONER

15. The notices of decision given to the complainant by the agency did not comply with the statutory requirements of section 30 of the FOI Act. In particular, they do not give the complainant information about the findings on any material questions of fact underlying the agency's reasons for refusal of access, together with reference to the material on which those findings were based, as required by section 30(f).
16. Accordingly, the former A/Information Commissioner ('the former A/Commissioner') required the agency to provide her with information to support its claims for exemption, information that should have been in its notices of decision in the first instance (25 September 2006) and on internal review (7 November 2006).
17. In response to that requirement, the agency gave the former A/Commissioner information to support its claims for exemption. My Investigations Officer raised a number of further queries with the agency concerning that information and she asked for additional information to be provided to the former A/Commissioner by the agency. The former A/Commissioner also required the agency to produce to her, for her examination, the originals of the disputed documents together with the FOI file maintained by the agency for the purpose of assessing the complainant's access application.
18. In the period between January 2007 and May 2007, my Investigations Officer consulted with a number of third parties identified in the requested documents and made further inquiries with the agency and the complainant, with a view to resolving this complaint by conciliation between the parties.
19. As a result of those consultations, concessions were made by the complainant and by the agency. A significant number of additional documents were released to the complainant by the agency, either in full or in part, and the complainant

withdrew his complaint with respect to those documents. The complainant also withdrew his complaint with respect to the personal information about third parties which may be contained in the documents remaining in dispute and to certain other matter relating to the potential value of properties in the Busselton area, should the land development options then being considered by the Working Group be accepted by government.

20. The agency withdrew its claims for exemptions under clause 4(3) and clause 8(1) of Schedule 1 to the FOI Act and its claim for exemption under clause 6(1) for Document 50. However, the agency then claimed that Document 50 is exempt under clause 1(1)(d)(ii) of Schedule 1 to the FOI Act.
21. On 25 July 2007 the Premier and the Minister for the South West released media statements announcing a Government decision to contribute funds to refurbish the jetty, subject to conditions.
22. The complainant withdrew his request for access to three documents which the agency claimed to be exempt under clause 7 of Schedule 1 to the FOI Act and his request for access to a draft Cabinet submission. As a result, the number of documents remaining in dispute between the parties was reduced considerably.
23. During that phase of the external review process, my office consulted with the third parties identified in the disputed documents. Even though the majority of those third parties are officers of various State and local government agencies, members of Parliament, both Federal and State, (and therefore it is unlikely that the personal information, as that term is defined in the FOI Act, about them will be exempt information under clause 3(1) of Schedule 1 to the FOI Act), the FOI Act nonetheless requires that those individuals be consulted before a decision to release information about them can be made.
24. All but one of the third parties consulted by my office consented to the personal information about them recorded in the disputed documents being disclosed to the complainant. One third party applied to be joined as a party to this complaint but later withdrew that application. The third party however maintained their objection to the disclosure of their personal information. That third party also submits that the disclosure of the disputed documents would be to the detriment of the community and not in the public interest. However, as I have found the disputed documents to be exempt, I do not need to consider the third party's submission in this regard, further.
25. My office also consulted with the Shire of Busselton which, although not a party to this complaint, objected to Document 27 being disclosed to the complainant.
26. On 10 December 2007, I provided the parties with my written preliminary view of this complaint. On the information before me at that time, it was my preliminary view that Document 50 was not exempt under clause 1(1)(d)(ii) and that the balance of the disputed documents are not exempt under clause 6(1) of Schedule 1 to the FOI Act. It was also my preliminary view that one sentence in Document 52 is exempt under clause 7 of Schedule 1 to the FOI Act. The complainant accepted my preliminary view with respect to that sentence in

Document 52. Therefore that matter is no longer in dispute. However, the agency did not accept my preliminary view and made further written submissions and provided further information in support of its claims for exemption.

27. After further inquiries by my office, evidence was put before me which establishes that Document 50 was prepared from the outset for submission to Cabinet and was in fact submitted to Cabinet. On that basis, Document 50 is exempt under clause 1(1)(d)(ii) of Schedule 1 to the FOI Act (see *Re Environmental Defenders' Office WA (Inc) and Ministry for Planning* [1999] WAICmr 35 and *Re Highway Construction Pty Ltd and State Supply Commission* [2000] WAICmr 25). That evidence was put to the complainant, who withdrew his complaint with respect to Document 50. Therefore, that document is no longer in dispute in this matter.

THE DISPUTED DOCUMENTS

28. There are 13 documents remaining in dispute between the parties. The disputed documents are described as follows:

- Documents 13-20 - minutes of various meetings of the Working Group – those documents have been specifically described to the parties previously;
- Document 27 - copy of a report dated 17 July 2006 – Order of Probable Costs Relocation of Sport and Recreation Facilities from Central Foreshore Precinct Barnard Park Churchill Park for the Busselton Jetty Refurbishment Project;
- Document 32 - two emails between Phil Slater (LandCorp) and Don Punch and Danny Nimbalker dated 18 October 2005 with 5 attachments;
- Document 37 – copy of a letter dated 21 October 2005 from Hon Adele Farina MLC to Hon Mark McGowan MLA;
- Document 52 - copy of various emails between Don Punch and Phil Slater, Ron Pumphrey and Val Cartwright (19 January 2006); Ron Pumphrey to Don Punch copied to Phil Slater (19 January 2006); Don Punch to Ron Pumphrey copied to Phil Slater and Val Cartwright (19 January 2006); Phil Slater to Don Punch and copied to Ron Pumphrey, Ross Holt, Debra Shorter and Danny Nimbalker (19 January 2006); Phil Slater to Don Punch copied to Ron Pumphrey, Ross Holt, Debra Shorter and Danny Nimbalker (20 January 2006); and
- Document 55 – copy of undated 3 pages that appear to be response to Document 54, which document is not in dispute between the parties.

THE EXEMPTION CLAIMED

Clause 6 – Deliberative processes

29. The agency claims that all of the disputed documents are exempt under clause 6 of Schedule 1 to the FOI Act. Clause 6 provides as follows:

“6. Deliberative processes

(1) Matter is exempt matter if its disclosure –

(a) would reveal –

- (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or*
- (ii) any consultation or deliberation that has taken place,*

in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency; and

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

Limits on exemptions

(2) Matter that appears in an internal manual of an agency is not exempt matter under subclause (1).

(3) Matter that is merely factual or statistical is not exempt matter under subclause (1).

(4) Matter is not exempt matter under subclause (1) if at least 10 years have passed since the matter came into existence.”

30. In order to establish a *prima facie* claim for exemption under clause 6(1), the requirements of both paragraphs (a) and (b) of clause 6(1) must be satisfied by the agency.
31. If the requirements of paragraphs (a) and (b) of clause 6(1) are satisfied, the application of the limits on exemption set out in clauses 6(2) to 6(4) must also be considered. In the case of the exemption in clause 6(1), the complainant is not required to demonstrate that disclosure of the disputed documents would be in the public interest but, rather, the agency is required to establish that disclosure of the disputed documents would, on balance, be contrary to the public interest (see: *Health Department of Western Australia v Australian Medical Association Ltd* [1999] WASCA 269 and *Martin and Ministry for Planning and Department of Land Administration* [2000] WAICmr 56).
32. In this instance, the onus of establishing that the disputed documents are exempt under clause 6(1) lies, as I have said, with the agency. The complainant is

entitled to be given access to the disputed documents unless the agency establishes, on balance, that the disclosure of those documents would reveal any opinion, advice or recommendation that has been obtained, prepared or recorded; or any consultation or deliberation that has taken place, in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency **and** would, on balance, be contrary to the public interest (emphasis added).

33. The purpose of the exemption in clause 6 and the meaning of the phrase “deliberative processes” have been considered in a number of decisions – see for example, *Re Read and Public Service Commission* [1994] WAICmr 1 and, most recently, in *Re West Australian Newspapers Ltd and Western Power* [2006] WAICmr 10; *Re West Australian Newspapers Ltd and Department of the Premier and Cabinet* [2006] WAICmr 23; and *Re Deacons and Heritage Council of Western Australia* [2007] WAICmr 15. I agree with those views.
34. I also agree with the description of this head of exemption as expressed by the AAT in *Re Waterford and Department of the Treasury (No.2)* (1984) 5 ALD 588 that the “deliberative processes” of an agency are its thinking processes – the processes of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action; see also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69 at 72.
35. In *Re Waterford*, the AAT said, at paragraphs 58-60:

"58. As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. 'Deliberation' means 'The action of deliberating; careful consideration with a view to decision': see the Shorter Oxford English Dictionary. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Deliberations on policy matters undoubtedly come within this broad description. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play.

59. It by no means follows, therefore, that every document on a departmental file will fall into this category...Furthermore, however imprecise the dividing line may first appear to be in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency...

60. It is documents containing opinion, advice, recommendations etc relating to the internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption

under s.36 only attaches to those documents the disclosure of which is 'contrary to the public interest'..."

THE AGENCY'S SUBMISSIONS

36. In an email letter dated 4 January 2007, the agency submitted that the disputed documents are exempt under clause 6(1) because:

"They form part of the deliberative process (decision making) of the working group in preparing a cabinet submission to be presented to cabinet that entailed a decision on how the Busselton Jetty could be refurbished from land development proceeds.

Part of the decision making was to determine various options for the redevelopment and refurbishment of the jetty that could be presented to the public during a consultation phase. It was considered that pre-release of this type of information that could contain options considered, discarded and discussed through the decision making process prior to a public consultation period, and a decision being presented to cabinet, could lead to incorrect information being misleading and thereby confusing to the public during the consultation and reporting phase.

Information is still currently being collected and the decision is still being deliberated for presentation to Cabinet via the Minister South West and Minister for Planning and Infrastructure."

37. In an email dated 16 February 2007, the agency further submitted that the disputed documents are exempt under clause 6(1) because:

"[They] contain opinions, recommendations and advice that are being deliberated upon from a wide range of sources and will lead to the presentation of a Cabinet Submission. The information is being gathered from a number of agencies and if their opinions, advice and recommendations are released prior to a decision, it may influence the quality and quantity of information being provided in the future. Each participant in the Busselton Jetty Working Group gathering information and providing advice signed a confidentiality agreement and would be expecting that their information would not be made public until final recommendations went to Cabinet.

These deliberations are still ongoing and final recommendations have not yet been submitted. The release of these documents (at this stage) is not in the best interest of the public or the State Government due to the Commercial [sic] nature of the proposal."

38. In response to my preliminary view, the agency submitted on 11 January 2008 that the disputed documents are exempt under clause 6(1) because the Taskforce, the various Ministers, the Working Group, the agency and the State government are all engaged in the one deliberative process to determine whether the Busselton Jetty can be refurbished, how that refurbishment should

take place and how that refurbishment should be funded. The agency claims that that deliberative process is not completed because no decision has been made in relation to those three issues relating to the proposed refurbishment.

39. The agency also submitted in response to my preliminary view that it is contrary to the public interest to disclose the disputed documents because the decision making process has not been completed.

THE COMPLAINANT'S SUBMISSION

40. The complainant was provided with an edited copy of the agency's response to my preliminary view. In summary, the complainant submitted on 4 April 2008 that:

- the public is entitled to access to the disputed documents in order to be made aware of the basis for the agency's decision in relation to the jetty refurbishment;
- to date, the public have not been provided with opportunities to adequately participate in the decision making process regarding the jetty refurbishment;
- the disputed documents deal with a matter of vital importance to the local community.

41. The complainant also asked that in light of the timeframe on a decision from the State Government that I make a determination on this complaint urgently.

THE SHIRE OF BUSSELTON'S SUBMISSION IN RELATION TO DOCUMENT 27

42. The Shire of Busselton claims that Document 27 is exempt because it is part of the early deliberative processes of the Working Group and that its disclosure would "...give a very misleading impression of what could have occurred with respect to the relocation of sporting clubs" and that "[t]he release of the later Part 2 [Document 28 – which has been released in full by the agency to the complainant] report is far more informative to the public in this regard as it gives detailed information into the relocation issue but that information is specific to circumstances where relocation is a real possibility as opposed to a hypothetical possibility."
43. The Shire of Busselton also claims that it would be contrary to the public interest to release Document 27 because "...the public interest does not support the release of the document as the release of the document could in fact mislead the public and there are other documents, such as document 28 in an edited form, which could be released which provide more reliable information to the public as to the scope and possibilities of relocations associated with the Jetty project."

CONSIDERATION

44. The Shire of Busselton is not a third party for the purposes of the FOI Act. However, advice was sought from it in order to assist in dealing with this matter. I have considered the Shire of Busselton's submission made in this matter.
45. The submissions from the agency, and the terms of reference of the Working Group, confirm that the Working Group was established by the former Minister for Peel and the South West for the purposes of, among other things, reviewing the recommendations of the Taskforce, developing concept plans of the land development options and costings associated with the refurbishment of the jetty with a view to a Cabinet submission ultimately being prepared, based on the recommendations of the Working Group, in order for Government to determine whether or not it will proceed with the Project.
46. I have considered whether on the submissions and on the face of the disputed documents, there have been separate deliberative processes in place in relation to the deliberations of the Minister, the Task Force and the Working group. The documents reveal iterative processes with various elements. However, these are aimed at common outcomes of jetty refurbishment and sources of funds (including Government grants and land development) to deliver these funds. The processes are therefore integrated. I therefore find that there is in this case a single deliberative process in place.
47. The Minister for Tourism at the time was then engaged in the deliberative process of determining whether to accept the recommendations of the Taskforce. The function of the Working Group was to review the work of the Taskforce; explore land development options identified by the Taskforce; develop concept plans of the land development options and costings associated with the refurbishment of the jetty; and consult with the local community in order to form a submission to Cabinet containing findings and recommendations so that government can determine whether or not to proceed with the refurbishment project.
48. Evidence has been provided to me in the form of submissions and supporting documents that establish to the relevant probative standard that the Working Group has identified land development options; it has developed concept plans (they have been put to the community and made public at public forums); it has consulted with the local community; and a submission has been prepared and submitted to Cabinet. A proposal has been put to the Busselton Shire, but this proposal has not been accepted by the Shire. The Shire has added conditions which have been submitted by the Shire to the Government. Those additional conditions have not been accepted by Government. Therefore, negotiations between the Government and the Shire are continuing.
49. I have examined the disputed documents. The first question is whether, if disclosed, the information in the disputed documents would reveal any opinion, advice or recommendation that has been obtained, prepared or recorded, or any consultation or deliberation that has taken place, in the course of, or for the

purpose of, the deliberative processes of the Government, a Minister or an agency.

Clause 6(1)(a) – the nature of the information

50. Having examined the disputed documents, I am satisfied that each of the disputed documents would, if disclosed, reveal information of the kind described in clause 6(1)(a). The disputed documents contain opinion and advice that has been obtained, prepared and recorded in the course of, and for the purposes of, the deliberative processes of the Taskforce and the deliberative processes of the Working Group in discussing and considering the various planning alternatives, options and issues relating to the Project, identified by the Taskforce and the Working Group, prior to formulating their respective advice to the Minister and to the agency. I also accept that disclosure of the disputed documents would reveal that opinion and advice.
51. In my opinion, it is also clear from the nature of the information recorded in Documents 13-20, 27, 32 and 52, that that information was obtained in the course of, and for the purpose of, firstly, the deliberative processes of the Working Group in determining recommendations it should make and, subsequently, the deliberative processes of Government in determining what action to take in respect of those recommendations.
52. Documents 37 and 55 contain detailed comments of the Member for South West Region in relation to the Taskforce Report. In my opinion, Documents 37 and 55 are each a deliberative process document – records opinion, advice or recommendation that has been obtained, prepared and recorded for the Minister when considering the Report. This is a deliberation that has taken place in the course of, or for the purpose of, the deliberative processes of the Government and the Minister.
53. Accordingly, I consider that the disputed documents contain information of the kind described in paragraph (a) of clause 6(1). However, it does not necessarily follow from a finding that a document comes within clause 6(1)(a), that its disclosure would be contrary to the public interest. It is, therefore, necessary for me to also consider whether under clause 6(1)(b), disclosure would be contrary to the public interest.

Clause 6(1)(b) – the public interest

54. Determining whether or not disclosure would be in the public interest, involves a process of identifying the public interest factors for and against disclosure of information and then carefully weighing those competing factors, in order to determine where the balance lies. Pursuant to section 102(1) of the FOI Act, the onus is on the agency to establish that it would, on balance, be contrary to the public interest.
55. The public interest is not defined in the FOI Act, or in any other similar legislation. When the terms appears in the FOI Act as a limit on exemptions, it is used to balance competing interests, specifically the public interest in

applicants being able to exercise their rights of access under the legislation and the public interests contained in the exemption clauses. Whilst there is a public interest in people having access to information, there is also a public interest in the proper functioning of government agencies and in protecting, *inter alia*, the privacy of individuals and the commercial interests of government agencies and business organizations.

56. In applying the public interest test, the difference between matters of general public interest and those of private concern only must be recognized. The public interest is an interest that extends beyond what the public may be interested in today or tomorrow depending on what is newsworthy. In *DPP v Smith* [1991] 1 VR 63, the Victorian Supreme Court recognized this difference and said, at p. 65:

"The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members...There are...several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest."

57. In *Re Murtagh and Commissioner for Taxation* (1984) 54 ALR 313, the President of the AAT outlined the general principle applying to the public interest test under s.36(1)(b) in the *Freedom of Information Act 1982* (Commonwealth), the equivalent to clause 6(1), and said, at p.323:

"It is clear that the public interest is not to be limited by the prescription of categories or classes of documents the disclosure of which to the public would be contrary to the public interest. The public interest is not to be circumscribed. All documents must be examined to ascertain whether, having regard to the circumstances, their disclosure would be contrary to the public interest."

58. The public interest test in Freedom of Information legislation is used to balance competing public interests for and against disclosure. In favour of disclosure there is a public interest in Ministers and government agencies, charged with the responsibility of considering and approving proposals involving the expenditure of public money and which will significantly affect the amenity of the local area, such as those associated with the Busselton Jetty refurbishment, being open to scrutiny, so far as is possible.
59. I also consider there to be a public interest in the Government and its agencies, in this case, the Working Group and the agency, and the local authority, being seen to have discharged their respective responsibilities properly and fully in considering the various options and proposals, including their strengths and weaknesses and costs and benefits particularly where those proposals are

contentious, in order that public confidence in the decision making process of government is maintained.

60. As I have said, the onus is on the agency to establish, under clause 6(1)(b), by providing real and substantial grounds, that disclosure would on balance, be contrary to the public interest. The agency has made submissions as to why it is contrary to the public interest to disclose the disputed documents. It submits that because the deliberative process is on-going, and negotiations with relevant parties remain on-going, the public interest is best served by allowing this process to proceed unhindered.
61. The agency asserts that it would be contrary to the public interest to disclose the disputed documents because such disclosure would be confusing and misleading for the public to have the information contained in the disputed documents prior to any public consultation taking place. However, in my opinion, some weight favouring disclosure should be given to the fact that the local community in Busselton has been widely consulted about the Project and at least four public briefings were held in the local community, prior to the agency making a decision on the access application.
62. The complainant submits that the community has not been fully informed of the decision making process to date in relation to the proposals to refurbish the jetty.
63. My office has obtained from the Shire of Busselton's website a copy of a document titled 'Busselton Foreshore Revitalisation Community Consultation Report November 2006' ('the Community Consultation Report'). It is my understanding, based on my examination of that report, that on 7 October 2006 two stakeholder briefings were held at Churchill Park Hall. According to the Community Consultation Report, the purpose of the briefings "*...was to raise awareness of the Busselton Foreshore Revitalisation, and to provide opportunity for stakeholder input and feedback.*" The stakeholders who attended those briefings are listed in Appendix A to the Community Consultation Report.
64. It is also my understanding based on my examination of the Community Consultation Report, that two community workshops were held, also at Churchill Park Hall, on 8 and 9 October 2006, prior to the agency's internal review decision which is dated 7 November 2006.
65. According to the Community Consultation Report, the purpose of the community workshops was "*...to raise awareness of the Busselton Foreshore Revitalisation and to provide an opportunity for stakeholders and community members to informed [sic] comment and feedback on the concept plan.*" The participants in the community workshops were randomly selected based on age, gender and location. I also understand there have been two public display sessions where copies of the concept plans have been on public display for the general community to view. Both those public displays took place on 8 and 9 October 2006, again prior to the agency's determination of the access application on internal review.

66. In a letter dated 12 October 2006 from the agency's CEO to the complainant, the CEO confirmed that as: "...the public consultation phase has now started there will be documents that you will have access to as part of that process when attending the workshops and forums that are being held and therefore the decision for exemption under Clause 6 can be reviewed."
67. In my view there is a public interest in agencies being able to make decisions without someone "looking over their shoulders". It is apparent from the submission of the agency and from the Shire, and from the nature of the disputed documents, and the surrounding circumstances and from the lengthy and complex negotiations that have formed the context with which the disputed documents have been created, that their premature disclosure, before decisions have been reached and while negotiations continue, would be detrimental to a successful outcome for the deliberative process. I have found that the deliberations are still 'alive' and ongoing. Clearly, negotiating positions of the parties and the conditions and contingencies and development options each puts forward have changed in response to the positions and submissions of the other. Based on those facts, further change to those negotiating positions is possible and indeed more likely than not. Early disclosure of possible changing negotiating positions would pose a real and not merely remote or speculative risk of interfering with those deliberations.
68. I consider that much depends on the way that the term 'deliberative process' is characterised. In this case, the agency has characterised the relevant deliberative processes as being essentially on-going because, as I understand the agency's submissions, the issue of the jetty refurbishment and associated costs and land development potential have not been agreed to by all the parties involved – the Shire and the Government. This position is confirmed by submissions from the Shire.
69. I am of the view that the deliberative process is ongoing and in this particular case cannot be readily separate or compartmentalised into distinct components. It is a single and integrated process in this case. While there will be a public interest favouring disclosure, once a decision has been made, for the documents that form the basis of the deliberative processes lead to the decision, this public interest turns largely on the issue of timing and whether the deliberative process is complete and a decision made. In this case, there is cogent and persuasive evidence that the deliberative process is still ongoing.
70. This is not a case that is akin to the deliberative processes that were considered by the former Information Commissioner in *Re Ayton and Police Force of Western Australia* [1998] WAICmr 15. There a deliberative process concerning a review of police investigative practices was found to have been concluded. A subsequent working Group was established to implement the review conclusions. The agency there claimed the review was merely one stage of an ongoing deliberative process, and that the working group was merely the next stage in that process. There the former Commissioner found that the deliberative process by the working group was a separate and discrete process altogether distinct from the earlier review.

71. In the case of the Busselton Jetty disputed documents on the other hand, the Task Force and the Working Group are both part of an integrated and connected deliberative process aimed at restoration and maintenance of the Busselton Jetty and in identifying sources to fund that restoration and maintenance work. That process is at the time of this decision still ongoing. It will end when the final decision is made and agreed between Government (through the agency and its Ministers) and the Shire, or when those parties find that they are unable to reach agreement or when genuine negotiations cease. On the material before me that point has not been reached.
72. Disclosure at this stage would be premature. The agency and the Shire have provided persuasive evidence that convinces me that early disclosure while negotiations are continuing would adversely affect the likelihood of a successful-that is, an agreed – outcome to the deliberations that I have found are still ongoing.
73. In this particular case, in light of the evidence and the surrounding circumstances, I therefore give more weight to the public interest in ensuring the integrity of the ongoing deliberations and less weight to the public interests served by disclosure at this time.
74. I am persuaded that the agency has discharged the onus placed on it by s.102(1) of the FOI Act that disclosure of the disputed documents would, on balance, be contrary to the public interest. Accordingly, I find that the disputed documents are exempt under clause 6(1), as claimed by the agency.
