

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

**File Ref: F2004144
Decision Ref: D0122006**

Participants:

Zurich Bay Holdings Pty Ltd
Complainant

- and -

City of Rockingham
First Respondent

- and -

Malavoca Pty Ltd
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - tender documents - breakdown of pricing information - policy statements - OH&S handbook - clause 3(1) - personal information about third parties - clause 3(6) - the public interest - clause 4(2) - whether the information and documents have a commercial value to a person - clause 4(3) - information about business, professional, commercial or financial affairs - whether disclosure could reasonably be expected to have an adverse effect - whether disclosure could reasonably be expected to prejudice future supply of information - clause 4(7) - whether disclosure is in the public interest - s.27 - ways in which access can be given - copyright.

Freedom of Information Act 1992 (WA): sections 3(3); 8(1); 10(2); 13(1)(b); 24; 27(1); 27(2)(c); 30; 32; 33; 69(2); 72; 75; 76(1); 76(4); 102(1); 102(2); 102(3); Schedule 1, clauses 3(1); 3(2)-3(6); 4(2); 4(3); 4(7); Glossary.

Interpretation Act 1984 (WA): section 5.

Occupational Health and Safety Act 1984 (WA): section 19(1)(b).

Freedom of Information Act 1982 (Cwth): section 43(1)(b).

Local Government (Functions and General) Regulations 1996: regulation 16.

Privacy Act 1988 (Cwth).

Occupational Health and Safety Regulations 1996 (WA).

Copyright Act 1968 (Cwth): section 10.

Local Government Act 1995.

Freedom of Information Regulations 1993: regulation 9(2).

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

Re E & L Metcalf and Western Power Corporation [1996] WAICmr 23.

Re Precious Metals Australia Ltd and Department of Minerals and Energy [1997] WAICmr12.

Re Jones and Jones and Town of Port Hedland [2000] WAICmr 23.
Information Commissioner of Western Australia v Ministry of Justice [2001] WASC 3.
Minister for Transport v Edwards [2001] WASCA 349.
Re Cannon and Australian Quality Egg Farms Limited (1994) 1 QAR 491.
Re Thwaites v Metropolitan Ambulance Service 9 VAR 427.
Re Byrne v Swan Hill Rural City Council [2000] VCAT 666 (31 March 2000).
Re Wanless Wastecorp Pty Ltd and Caboolture Shire Council and Another (2003) 6 QAR 242.
Re Macrossan & Amiet and Queensland Health (unreported Queensland Information Commissioner, S 116/99).
Re Speno Rail Maintenance Australia Pty Ltd and the Western Australian Government Railways Commission and Another [1997] WAICmr 29).
Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft (1986) 10 FCR 180.
Re Rogers and Water Corporation and Others [2004] WAICmr 8.
Re Maddock, Lonie and Chisholm and Department of State Services [1995] WAICmr 15.
University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch 601.
Roland Corporation v Lorenzo & Sons Pty Ltd (1991) 33 FCR 111.
Meccano Ltd v Anthony Hordern & Sons Ltd (1918) 18 SR (NSW) 606
Re Gahan and City of Stirling [1994] WAICmr 19.
Searle Australia Pty Ltd v Public Interest Advocacy Centre and Another (1992) 36 FCR 111.
Police Force of Western Australia v Winterton (unreported, SCWA, 27 November 1997).

DECISION

The decision of the agency is varied. In substitution, it is decided that:

- the disputed personal information referred to in paragraph 17 of my reasons for this decision, and described in the schedule to this decision, is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*;
- the disputed information referred to in paragraphs 105 and 130 of my reasons for this decision, and described in the schedule to this decision, is exempt under clause 4(3) of Schedule 1 to the *Freedom of Information Act 1992*;
- the remaining disputed information is not exempt;
- it is practicable for the agency to give the complainant access to an edited copy of the requested document from which the exempt matter has been deleted; and
- if the author or authors claim copyright in the attachments described in paragraph 109 of my reasons for this decision, access to them should be given by way of inspection only.

D A WOOKEY
A/INFORMATION COMMISSIONER

12 June 2006

SCHEDULE

Page No.	Section No	Exempt matter	Exemption clause
40	6.1	The name, signature and mobile telephone number of the third party's authorised officer and name and signature of the witness.	Clause 3(1)
41		The name and signature of the third party's authorised officer at the bottom of page 41.	Clause 3(1)
41	6.2.1	Price Schedule – Schedule of rates – Stage 1 Earthworks/clearing - The rates per unit recorded in Column C and the amounts recorded in Column D in relation to Items 6.2.1.1; 6.2.1.2; 6.2.1.3; 6.2.1.4; 6.2.1.5 and 6.2.1.6.	Clause 4(3)
41	6.2.2	Price Schedule – Schedule of rates – Stage 2 Earthworks/clearing - The rates per unit recorded in Column C and the amounts recorded in Column D in relation to Items 6.2.2.1; 6.2.2.2; 6.2.2.3; 6.2.2.4 and 6.2.2.5.	Clause 4(3)
42		The name and signature of the third party's authorised officer at the bottom of page 42.	Clause 3(1)
42	6.2.3	Miscellaneous Items - The rates per unit recorded in Column C and the amounts recorded in Column D in relation to 6.2.3.1; 6.2.3.2; 6.2.3.3; 6.2.3.4; 6.2.3.5; 6.2.3.6; 6.2.3.7; 6.2.3.8; 6.2.3.9; 6.2.3.10; 6.2.3.11; 6.2.3.12; and 6.2.3.13.	Clause 4(3)
42	6.2.4	Provisional Sums - The rates per unit recorded in Column C and the amounts recorded in Column D in relation to Items 6.2.4.2 and 6.2.4.3; the figure quoted in Item 6.2.4.4 of Column D.	Clause 4(3)
43		The name and signature of the third party's authorised officer at the bottom of the page 43.	Clause 3(1)
44	6.3	Schedule of Day Works Labour rates - the rates per hour recorded in the right hand column.	Clause 4(3)
44		The name and signature of the third party's authorised officer at the bottom of page 44.	Clause 3(1)
45	6.4	Schedule of Rates for Plant Hire - The rates per hour recorded in the right hand column.	Clause 4(3)
45		The name and signature of the third party's authorised officer at the bottom of page 45.	Clause 3(1)
46	6.5	The name and signature of the third party's authorised officer at the bottom of page 46.	Clause 3(1)
Org. Chart		The names of all of the third party's personnel in the Organisational Chart attached to page 46 and in the bottom left hand corner of that chart.	Clause 3(1)
47	6.6	The name and signature of the third party's authorised officer at the bottom of page 47.	Clause 3(1)
48		The name and signature of the third party's authorised officer at the bottom of page 48.	Clause 3(1)
Policy Docs & OH&S Hand-book		The name of the third party's employee which is recorded at the bottom left hand corner of the OH&S Policy Statement (1 page); at the bottom left hand corner of the Quality Policy Statement (1 page) and the name in the footnote on each page and the handwritten signature of the third party's authorising officer recorded at the bottom left hand corner of page 2 of the OH&S Procedures and Handbook (27 pages), as attached to page 48 of the tender document.	Clause 3(1)

OH&S Hand-book	10.8	All of section 10.8, including the heading, on page 18.	Clause 4(3)
49	6.8	The name and signature of the third party's authorised officer at the bottom of page 49.	Clause 3(1)
50	6.9	<ul style="list-style-type: none"> • The last three words in line one and the first word in line two of the handwritten information. • The name and signature of the third party's authorised officer at the bottom of page 50. 	Clause 3(1)
51	6.10	The name and signature of the third party's authorised officer at the bottom of page 51.	Clause 3(1)
52	6.11	The name and signature of the third party's authorised officer at the bottom of page 52.	Clause 3(1)
53	6.12	<ul style="list-style-type: none"> • The name and signature of the third party's authorised officer at the bottom of page 53. 	Clause 3(1)
Plant List/Rates		<ul style="list-style-type: none"> • The name of the third party's employee which is recorded at the bottom left hand corner of the list of Plant List/Rates attached to page 53. 	Clause 3(1)
Plant List/Rates		<ul style="list-style-type: none"> • The hourly rates in the column headed "Hourly Rate" in the list of Plant List/Rates attached to page 53. 	Clause 4(3)
54	6.13	The name and signature of the third party's authorised officer at the bottom of page 54.	Clause 3(1)

REASONS FOR DECISION

1. This complaint arises from a decision made by the first respondent, the City of Rockingham ('the agency'), under the *Freedom of Information Act 1992* ('the FOI Act') to refuse Zurich Bay Holdings Pty Ltd ('the complainant') access to a document requested by the complainant under the FOI Act. In this complaint the second respondent, Malavoca Pty Ltd ('the third party'), also opposes the giving of access to the requested document.

BACKGROUND

2. On 8 May 2004, the agency advertised in *The West Australian* newspaper inviting interested firms to submit tenders for Tender No. T03/04-63, Lark Hill Stages 1 & 2 Clearing and Bulk Earthworks, in relation to Stage 1 of the proposed Lark Hill Regional Sporting and Equestrian Complex, being developed by the agency.
3. The agency received eleven tenders by the due date, 2 June 2004. The tenders were then assessed by a Tender Assessment Panel ('the Panel') composed of the Manager, Recreation and Cultural Services, and the Manager, Project and Program Development, of the agency and an independent third person, the Civil Engineering Consultant Project Manager. Following that, the Panel recommended to the Council of the agency ('the Council') that the third party be awarded the contract for Tender No. T03/04-63. The Council accepted the Panel's recommendation and awarded the tender contract to the third party. The complainant is one of the ten unsuccessful tenderers.
4. A detailed summary of the Panel's report to Council and Council's resolution to award the tender contract to the third party is set out at pages 245-247 of the minutes of the meeting of the Council dated 22 June 2004. Copies of those minutes are publicly available from the agency.
5. Following an exchange of correspondence between the agency and the complainant in relation to the third party's successful tender, on 1 July 2004 the complainant lodged an application with the agency for access under the FOI Act to a copy of the tender document that the third party submitted to the agency ('the requested document').
6. The agency's *pro-forma* tender document, a copy of which was provided to all prospective tenderers, consisted of six parts. Parts 1 and 2 (pages 1-9) contained the general and specific conditions of tendering for Tender No. T03/04-63. Parts 3 and 4 (pages 10-28) contained the general and specific conditions applicable to the tender contract. Part 5 (pages 29-39) contained the specifications for the tender contract. Parts 1-5 (pages 1-39) of the agency's *pro-forma* tender document are not in dispute in this matter.
7. The agency's *pro-forma* tender document contained detailed advice to all prospective tenderers, instructing them to complete and return Part 6 (pages 40-54) to the agency by 2 June 2004, after inserting the required information. The

third party completed Part 6, as required, but also attached several of its own company documents, as part of its tender submission to the agency.

8. On 7 July 2004, in accordance with ss.32 and 33 of the FOI Act, the agency notified the third party that it had received the access application and sought the third party's advice as to whether or not it considered the requested document was an exempt document under clause 4 of Schedule 1 to the FOI Act. The agency asked for the third party's reply by 30 July 2004. The agency advised the third party that, if it claimed that the requested document was an exempt document, then it was required to identify to the agency the specific clause under which exemption was claimed and also to provide the agency with information, including factual material, to substantiate any claim for exemption.
9. On 8 July 2004, a representative of the third party wrote to the agency, advising the agency that:

“We consider that these documents are exempt under Clause 4 of Schedule 1 of the Freedom of Information Act. The matter is exempt as its disclosure would reveal information that has a commercial value to another party and we expect it to substantially destroy or diminish that value.

If you wish we could refer this matter for legal advice if you deem that further information is required. Should this be necessary we request that details be provided relating to the specific documents required and the reasons for requesting any information that is not on the public record already.”

10. On 9 July 2004, after considering that response, the Manager, Recreation and Cultural Services, made the initial decision on access on behalf of the agency. The Manager refused the complainant access to the requested document, for the following reasons:
 1. *The matter is exempt matter under the provisions of clause 4 of Schedule 1 of the Freedom of Information Act 1992.*
 2. *The matter is exempt matter under the abovementioned provisions as disclosure would reveal information that has a commercial value to a person, and could reasonably be expected to destroy or diminish that commercial value.”*
11. On 29 July 2004, the complainant applied to the agency for an internal review of the decision on access. On 9 August 2004, the Director, Community Development, confirmed the agency's initial decision to refuse the complainant access to the requested document, on the ground it was exempt from disclosure under clause 4(3) of Schedule 1 to the FOI Act, for the following reasons:

“... the Local Government Act 1992 [sic] specifies that submitted tenders are to be held in safe custody and remain confidential;

... the document requested is exempt under clause 4(3) in that the disclosure of information could reasonably be expected to have an adverse effect on the

affairs of Malavoca, as the document contains information on Malavoca's pricing and rate structures, organizational structures, management systems and procedures, business alliances, etc., that if released would diminish that company's competitiveness;

... the disclosure of information could reasonably be expected to prejudice the future supply of information of that kind to the Local Government, particularly with respect to the City of Rockingham's Competitive Tendering process, if company's [sic] were aware that the information they provide may be released to their competitors."

12. On 10 August 2004, the complainant applied to the Information Commissioner for external review of the agency's decision on access.

REVIEW BY A/INFORMATION COMMISSIONER

13. On 11 August 2004, I notified the agency that I had received this complaint and, pursuant to my powers under ss. 72 and 75 of the FOI Act, I required the agency to produce to me, for my examination, the original of the requested document and the FOI file maintained by the agency in respect of the complainant's access application.
14. After examining those documents, my office consulted with the agency, with the complainant and with the third party, in an endeavour to resolve this complaint by conciliation and negotiation between the parties. During that part of the external review process, the third party was advised of its right to be joined as a party to this complaint, in accordance with s.69(2) of the FOI Act. The third party was subsequently joined as a party to this complaint.
15. The agency, the third party and the complainant were also invited to provide me with written submissions in support of their respective positions. In response to that invitation, the agency made submissions to me in which it maintained its claim that the requested document was exempt from disclosure under clause 4(3) of Schedule 1 to the FOI Act. The third party made submissions to me, claiming that the requested document was exempt from disclosure under clauses 4(2) and 4(3). The complainant also made submissions to me to the effect that the requested document was not exempt under clause 4(2) or 4(3) or at all.
16. On 23 December 2004, after considering the evidence then before me, I wrote to the parties, advising them of my preliminary view of this complaint, including my reasons. It was my preliminary view that the agency had not then established a *prima facie* claim for exemption under clause 4(3). It was also my preliminary view that the third party had not then established a *prima facie* claim for exemption for the requested document under clause 4(2) or clause 4(3).
17. However, in my preliminary view, there was a small amount of information recorded in the requested document which consisted of 'personal information' about employees of the third party, including their names, their positions and, in some instances, their handwritten signatures. It was my preliminary view that

that small amount of personal information was *prima facie* exempt under clause 3(1) of Schedule 1 to the FOI Act, but that it could be deleted from the requested document, in accordance with s.24 of the FOI Act, and access to an edited copy of the document given.

18. I invited the parties to reconsider their respective positions on the matter, in light of my preliminary view. I invited the agency and the third party to provide me with further information and submissions in support of their respective claims for exemption under clauses 4(2) and 4(3), if they wished to maintain those claims. I also invited the complainant to provide me with further information or submissions, in the event that it maintained its request for access to the personal information recorded in the requested document which was, in my preliminary view, exempt under clause 3(1) of Schedule 1 to the FOI Act.
19. By letter dated 13 January 2005, the agency advised me that, after reconsidering the matter in light of my preliminary view and after consulting with the third party, it was prepared to give the complainant access to an edited copy of the requested document. By letter dated 27 January 2005, the third party advised that it reluctantly agreed to disclosure of the document edited as proposed by the agency, but otherwise maintained its claims that the requested document was exempt under clause 4(2) and clause 4(3) of Schedule 1 to the FOI Act.
20. By letters dated 31 January 2005 and 3 February 2005, the complainant made submissions to me in support of its request for access to a complete copy of the requested document. The complainant also provided me with copies of several tender documents it had obtained from the Department of Housing and Works, the Shire of Carnamah, the Shire of Derby/West Kimberley and the City of Mandurah which, the complainant submits, support its submission that all public tenders should be open and transparent. The complainant advised me that, in one case, it had been given copies of all of the tender documents which were submitted to a local government agency, in full and without restriction.
21. By letter dated 11 February 2005, the agency advised me that it had given the complainant access to an edited copy of the requested document, including an edited copy of the third party's organisational chart, which was attached to page 46 of the requested document. The agency also gave the complainant full access to the quality accreditation certificates that were attached to page 47 of the requested document; a complete copy of the list of the third party's recent major projects, which was attached to page 49 of the requested document; and the two draft Gantt charts that were attached to page 51 of the requested document.
22. By letter dated 15 February 2005, the complainant notified me that it had received the edited copy of the requested document from the agency. The complainant further advised me that it was not satisfied with being given access to an edited copy of the requested document. The complainant maintained its request for access to a complete copy of the requested document and provided me with additional submissions in support of its request.

23. The complainant also provided me with copies of some additional tender documents which it had obtained from the Shire of Mount Marshall, from the Department of Industry and Resources and from Main Roads WA. The complainant again submitted that all documents submitted to State and local government agencies, in response to public tenders of the kind under consideration in this matter, should be made publicly available. The complainant also submitted that the copy documents it has provided to me are similar to the requested document.
24. Although the complainant has been given access to an edited copy of the requested document, at the conclusion of the conciliation phase of the external review process this complaint could not be resolved by conciliation and negotiation between the parties.

THE DISPUTED INFORMATION

25. Following that process, the information remaining in dispute consists of the information that the agency has deleted from pages 40-54 of the requested document, including names and signatures, detailed pricing information breaking down the total tender price and information relating to the third party's occupational safety and health track record; the personal information the agency has deleted from the third party's organisational chart, a copy of which was attached to page 46 of the requested document; all of the information recorded in the copies of the third party's Occupational Health and Safety Policy ('OH&S Policy') document, Quality Policy Statement and Occupational Health and Safety Procedures Handbook ('OH&S Handbook') attached to page 48 of the requested document; and all of the information recorded in the third party's schedule of Plant List/Rates, a copy of which was attached to page 53 of the requested document. Access to each of those attachments has been refused in full.

THE ONUS

26. 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 was justified or that a decision adverse to another party should be made. Section 102(2) 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. Accordingly, in this complaint, the agency and the third party bear the onus of establishing that the disputed information is exempt under clauses 4(2) and 4(3) as claimed.
27. In my view, neither of the notices of decision provided to the complainant by the agency, pursuant to s.13(1)(b) of the FOI Act, complied with the statutory obligations placed upon the agency's decision-makers by s.30 of the FOI Act. An examination of the initial notice of decision suggests that the agency's decision-maker simply adopted the third party's submissions to the agency, without any attempt having been made to critically analyse the third party's claims for exemption or to explain the agency's reasons for refusing the

complainant access to the requested document. The notice of decision on internal review contained some more detail as to the basis of the refusal of access but insufficient, in my view, to establish the exemption claimed.

THE EXEMPTIONS CLAIMED

Clause 4 – commercial or business information

28. The agency claims that the disputed information is exempt under clause 4(3) of Schedule 1 to the FOI Act. The third party claims that the disputed information is exempt under clauses 4(2) and 4(3) of Schedule 1 to the FOI Act. Clause 4, so far as is relevant, provides:

“4. Commercial or business information

Exemptions

- (1) ...
- (2) *Matter is exempt matter if its disclosure –*
- (a) *would reveal information (other than trade secrets) that has a commercial value to a person; and*
- (b) *could reasonably be expected to destroy or diminish that commercial value.*
- (3) *Matter is exempt matter if its disclosure –*
- (a) *would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
- (b) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*

Limits on exemptions

- (4) ...
- (5) ...
- (6) ...
- (7) *Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest.”*
29. The exemptions in clauses 4(2) and 4(3) are intended to protect different kinds of information from disclosure and the terms of those exemption provisions make it clear that information that may be exempt under clause 4(2) cannot also be exempt under clause 4(3). It is possible that a single document may contain some information that may be exempt under clause 4(2) and other information that may be exempt under clause 4(3). The third party did not specify which information it claimed to be exempt under clause 4(2) and which it claimed to

be exempt under clause 4(3). It was also open to the third party to claim that all the disputed information is exempt under clause 4(2) or, in the alternative, that it is exempt under clause 4(3) and to give reasons why that is the case. However, the third party has not done so.

30. In order to displace the complainant's statutory right of access, the agency and the third party must establish a case for exempting the disputed information 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.”

Clause 4(2)

31. Clause 4(2) is concerned with the protection from disclosure of information that is not a trade secret but which has a 'commercial value' to a person. The definition of the word 'person' in s.5 of the *Interpretation Act 1984* makes it clear that in clause 4 the word 'person' includes bodies corporate or unincorporate as well as natural persons.
32. The former Information Commissioner ('the former Commissioner') expressed the view that information has a 'commercial value' to a person if it is valuable for the purpose of carrying on the commercial activities of a person and, further, that it is by reference to the context in which the information is used, or exists, that the question of whether or not particular information has a commercial value to a person may be determined. The former Commissioner also stated that it is not necessary that the commercial value of the information be quantified or assessed in order to determine whether the information has a commercial value: see, for example, *Re E and L Metcalf Pty Ltd and Western Power Corporation* [1996] WAICmr 23; *Re Precious Metals Australia Ltd and Department of Minerals and Energy* [1997] WAICmr 12 and *Re Jones and Jones and Town of Port Hedland* [2000] WAICmr 23. I agree with that view.
33. In order to establish a *prima facie* claim for exemption under clause 4(2) for the disputed information, the third party must, firstly, establish that the disputed information would, if disclosed, reveal information that has a commercial value

to the third party or to another person. It must then establish that disclosure could reasonably be expected to diminish or destroy that commercial value.

The third party's submissions

34. Initially, the third party submitted that the requested document, as a whole, was exempt under clause 4(2), because it contains:
- detailed information in response to a multi-criteria tender assessment process, showing how the third party arrived at its “bottom line” numbers, including the rates it paid to subcontractors and material suppliers, as well as information about its hiring rates for machines;
 - copies of company policies and documents which take time, money and effort to formulate and implement, but which can be easily copied and adapted; and
 - details of the third party's previous contracts, its previous clients and their contacts, its subcontractors, its company resources and copies of its company policies.
35. The third party also initially submitted that the requested document contained confidential privileged information belonging to the third party, which it provided to the agency in response to a multi-criteria assessment tender process. The third party asserted that the agency was not entitled to release that information to any third party.
36. The third party asserted that the disputed information had “...*an inestimable value (potentially in millions of dollars) to a competitor whilst reducing any advantage we may have*” because its competitors could “...*change the amount of detail, relevance of information, methodology of work etc in future submissions*” and because its competitors could assess the rates that the third party was paying its subcontractors and material suppliers as well as information about its hiring rates. Finally, the third party said that access to contact details could afford its competitors the opportunity to approach its regular clients, possibly affecting existing relationships.
37. The third party claimed that it was not in the best interests of the industry for successful or unsuccessful tenderers to inundate State and local government agencies with requests for access to copies of competitors' tender submissions and that the supply of that kind of information would be prejudiced in the future, because contractors would be reluctant to tender or would just provide minimal information in their tenders. Finally, the third party claimed that the fact that the complainant had applied for access to a copy of its tender document demonstrated its value and, accordingly, that document, as a whole, qualified for exemption under clause 4(2).
38. In its response to my preliminary view, the third party submitted that, whilst specifications and drawings may change from project to project, the multi-criteria assessment formula does not. The third party submitted that the fact that

it could be plagiarised, modified and improved by a competitor is what gives the whole document value and is probably why the complainant is asking for it to be released. The third party said that it was not claiming that its competitors would restructure their businesses if the requested document were to be released but, rather, that they could restructure their tenders. The third party said that it remained concerned that any of the document, if released, could be used by a competitor to prepare future tenders.

39. The third party submitted that it is difficult for it to provide me with “*probative material*” about something that has not happened, but which will happen, sooner or later. The third party asked why it should be forced to provide that opportunity so that such probative material then becomes available, after the event. The third party again asserted that the fact that the complainant has applied for a copy of its tender document is sufficient, of itself, to demonstrate that the requested document has value.
40. On 18 March 2005, my Senior Legal Officer made further inquiries with the third party, in relation to its claim that the requested document could be plagiarised, modified and/or improved upon by one or more of its competitors, given that a full and complete copy of the agency’s *pro-forma* tender document had been provided to all interested tenderers by the agency, including detailed instructions about how Part 6 of that document was required to be completed by a tenderer before its submission to the agency as a tender offer.
41. In response to that inquiry, on 22 March 2005, the third party advised my office that:

“It is acknowledged that the original, pro-forma tender document is a document of the City of Rockingham. However, the completed forms contain information which is commercially sensitive and thus require extensive editing before making available to a third party.

The supporting information and attachments clearly belong to Malavoca and should not be released under any circumstances to a competitor. They can indeed be plagiarised, modified and improved. Just because the same job may never arise again the information could be used for other tenders to other Government and Private Organisations. Why else would a competitor want these documents?”

Consideration

42. I have considered the third party’s claim that the information that it inserted into the requested document and the documents that it attached to the requested document belong to it and, accordingly, that the agency is not entitled to release the requested document to a third party. The agency also made that claim to me in support of its claim for exemption under clause 4(3). I do not accept that submission.
43. Firstly, pursuant to clause 1.14 of the agency’s *pro forma* tender document, the tender documents, including the attachments, submitted by the third party

became the property of the agency when they were submitted. Clause 1.14 provides as follows:

“[A]ll documents, materials, articles and information submitted by the Tenderer as part of or in support of a Tender shall become upon submission the absolute property of the City of Rockingham and will not be returned to the Tenderer at the conclusion of the Tender process PROVIDED that the Tenderer shall be entitled to retain copyright and other intellectual property rights therein, unless otherwise provided by the Contract.”

44. More importantly, however, the right of access under the FOI Act is not concerned with the ownership of a document (see: *Information Commissioner for Western Australia v Ministry of Justice* [2001] WASC 3 at p.7; *Minister for Transport v Edwards* [2000] WASCA 349). The FOI Act creates a right of access, subject to the FOI Act, to documents of an agency. The term “document of an agency” is defined in the Glossary to the FOI Act, so far as is relevant to this matter, as “...a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer.”
45. The definition of the phrase “document of an agency” in the Glossary to the FOI Act makes it clear that the definition is not a reference to the ownership or authorship of a document, or any entitlement to exclusive possession. An agency is in possession of documents, so as to make them documents of the agency, when it actually physically holds those documents: *Information Commissioner for Western Australia v Ministry of Justice* (op cit). Accordingly, the complainant’s right of access to the requested document under the FOI Act does not depend upon who owns the requested document but, rather, whether or not the requested document was in the possession or control of the agency when it received the complainant’s access application. Clearly it was and it still is.
46. Having examined the requested document, I accept that, in the main, it contains information of the kind described in paragraph 34 above. However, given that the agency has now released an edited copy of the third party’s organisational chart and full copies of the third party’s list of previous clients and its draft Gantt charts to the complainant, it is clear that that particular information is no longer in dispute between the parties.
47. I do not accept the third party’s claim that some of the disputed information consists of information about the rates it pays to its subcontractors and/or its material suppliers. Item 6.11 of Part 6 the agency’s *pro-forma* tender document, a copy of which has been released to the complainant with the name and signature deleted, required all tenderers to provide details of all proposed suppliers and/or subcontractors. Although the third party inserted some information into Item 6.11, that information does not identify any subcontractors or suppliers or their rates and, in any event, has already been released to the complainant.

48. There is no information about the rates that the third party paid to its sub-contractors and/or its material suppliers recorded elsewhere in the requested document and none has been identified to me by the third party. Similarly, I have been unable to identify any information that consists of details about the third party's previous contracts, its clients and their contacts or its sub-contractors. The attachment to page 49, which lists some of the third party's previous major projects, has already been released to the complainant. Having examined the requested document, in my opinion, there is no information of that kind recorded in it or in its attachments.
49. I accept that the requested document contains some information about how the third party calculated the prices which it submitted to the agency and information about its rates for machinery. I accept that that information may have had some degree of commercial sensitivity to the third party. However, although being twice invited to do so, the third party has put no probative material before me to establish that the disputed information has a commercial value to it or to another person. The third party has not explained to me how the disputed information, which it submitted to the agency in June 2004, is valuable for the purpose of the third party carrying on its day to day commercial activities. Even if I were to accept that that information has a commercial value to the third party or another person, nothing has been provided to me that goes to establishing that its disclosure could reasonably be expected to diminish or destroy any commercial value it has.
50. The third party has also not put any probative material before me which persuades me that there are real and substantial grounds for its claim that the copies of its policy statements and its OH&S Handbook have a commercial value to it. Again, even if I were to accept that the information is valuable to the third party in its ongoing business operations, it has not been explained to me how its value could be destroyed or diminished by its disclosure.
51. It seems to me that that claim is based upon the unsupported assertion by the third party that its competitors would copy, plagiarise, modify or otherwise improve the third party's policy statements and its OH&S Handbook, to the commercial detriment of the third party. Even if I were to accept that its disclosure might advantage a competitor by allowing it to copy and apply in its own work place, it does not necessarily follow that the value of the information to the third party in carrying out its day to day business would be diminished. Its health and safety measures will still continue to be just as valuable to the third party in the safe and efficient carrying on of its business. The argument that competitors could use the information to improve their future tenders and make themselves more competitive against the third party is an argument that disclosure could have an adverse effect on the business and commercial affairs of the third party – an argument pertinent to the clause 4(3) exemption – and not an argument that any inherent commercial value of the information to the third party would be diminished by disclosure.
52. The third party's policy statements are single page documents containing broad statements of principle about the third party's commitment and policies in relation to quality and occupational health and safety. They appear to me to be

unremarkable documents, containing nothing particularly novel or unique to the third party. Even if they can be considered to have a commercial value to the third party – in the sense that they are valuable for the purpose of carrying on its commercial activities – I am not persuaded that their disclosure would diminish or destroy that value. Their value to the third party in the carrying on of its business would continue undiminished, even if they were copied by other companies.

53. The third party's OH&S Handbook sets out information concerning the third party's workplace practices and procedures as they relate to issues such as workplace safety, and general statements about the third party's obligations and duties to its employees. The OH&S Handbook is a document containing information of the kind that is, I understand, required by s.19(1)(b) of the *Occupational Safety and Health Act 1984* ('the OS&H Act') to be provided by employers such as the third party to their staff. That legislation also requires all employers in Western Australia to maintain safe workplaces, plant and systems of work, which are an important part of the general duty of care imposed upon employers by the OS&H Act. The third party has provided me with nothing to establish that disclosure could reasonably be expected to destroy or diminish any value it may have to the third party in carrying out its business.
54. I have also considered the third party's claim that its policy statements and its OH&S Handbook have a commercial value because they took the third party time, money and effort to formulate and implement. The Queensland Information Commissioner ('the Queensland Commissioner') considered a similar argument in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491. The Queensland Commissioner considered whether the investment of time and money in obtaining information was an indicator that the information had a commercial value. The Queensland Commissioner said, at page 512:

"...I am not prepared to accept that the investment of time and money is a sufficient indicator in itself of the fact that information has a commercial value. It could be argued on that basis that most, if not all, of the documents produced by a business will have a commercial value because resources were invested in their production, or money expended in their acquisition. This surely is too broad a proposition. Information can be costly to produce without necessarily being worth anything. At best, the fact that resources have been expended in producing information, or money has been expended in acquiring it, are factors that may be relevant to take into account in determining whether information has a commercial value for the purposes of s.45(1)(b) of the Queensland FOI Act."

55. I consider the Queensland Commissioner's comments equally applicable to the third party's claim that the disputed information necessarily has a commercial value because the third party spent time and money formulating and implementing its policy documents. I do not accept that submission for similar reasons to those given by the Queensland Commissioner.

56. I also do not accept the third party's claim that the fact that the complainant has sought access to the requested document is sufficient to establish that the disputed information has a commercial value to the third party. The fact that the complainant has applied for access to a copy of the third party's tender document does not establish that the disputed information has a commercial value. People – including commercial competitors – may apply for access to documents for any number of reasons. For example, in this case, the complainant's stated reasons for seeking access relate to the accountability of the agency for awarding the tender. It cannot be assumed that, because the complainant is a commercial competitor, it seeks access to the documents for a commercial reason and, therefore, the documents have a commercial value.
57. The third party bears the onus of establishing that the disputed information has a commercial value that could reasonably be expected to be diminished or destroyed by disclosure and simply asserting that it does, without some evidence to support such a claim, does not discharge the onus it bears under s.102(2) of the FOI Act.
58. In that regard, I also note that there is no information recorded in the minutes of the meeting of the Council of 22 June 2004 which indicates that the main factors considered by the Panel in making its recommendation to the Council that the tender contract be awarded to the third party included the quality of its policies and documents. To the contrary, the minutes of 22 June 2004 indicate that the third party was recommended as the preferred tenderer and subsequently awarded the tender contract because of its previous experience in work of the kind in the Warnbro/Port Kennedy area; because it had a fully registered and approved QA system; and because many of the third party's employees lived in the local area, with the result that it scored higher on the "beneficial effects" criterion of the tender, as opposed to the complainant.
59. I have also considered the third party's submission that it is difficult to provide me with probative material about something that has not happened but which the third party asserts will happen, sooner or later. However, freedom of information legislation has been operating in Australian jurisdictions for periods of up to 20 years. In Western Australia it has been operating for more than 12 years. In a number of Australian jurisdictions, including Western Australia, similar documents – whether in their entirety or with some editing – have been disclosed under FOI in the face of similar arguments (see, for example: *Thwaites v Metropolitan Ambulance Service* 9 VAR 427; *Byrne v Swan Hill Rural City Council* [2000] VCAT 666 (31 March 2000); *Re Wanless Wastecorp Pty Ltd and Caboolture Shire Council and Another* (2003) 6 QAR 242; *Re Macrossan & Amiet and Queensland Health* (unreported Queensland Information Commissioner, S 116/99); *Re Speno Rail Maintenance Australia Pty Ltd and the Western Australian Government Railways Commission and Another* [1997] WAICmr 29). In addition, the complainant provided copies of a number of tender submissions disclosed to him from various State and local government agencies (suggesting that some agencies make such documents publicly available as a matter of course).

60. Despite this, to my knowledge, no evidence of any prejudice to the public sector tendering process or the commercial or business interests of those private organisations participating in it has been reported as a result of the documents being disclosed under freedom of information legislation, nor any diminution or destruction of commercially valuable information contained in such documents.
61. It is possible that information about how the third party calculated its bottom line numbers, the rates it was prepared to pay to its subcontractors and to its material suppliers and information about its rates for machinery may have commercial value to the third party. However, as I have said, there is no information about the rates the third party was prepared to pay to its subcontractors and to its material suppliers included in the disputed information. In addition, no probative material has been put before me by the third party to establish that the pricing information about its bottom line numbers for this particular tender, or information about its rates for machinery, has a commercial value to the third party, in the sense required, that is, that it is information that is valuable for the carrying on of the third party's business.
62. Even if that information could be considered to be commercially valuable, I am not persuaded that any value in it would be diminished or destroyed by its disclosure. That is not to say that its disclosure might not have any adverse effect on the third party's business, but as I have said arguments of that nature – which it seems to me the third party's are – are pertinent to the exemption in clause 4(3)(b) and not clause 4(2)(b).
63. In summary, although it may be arguable that the policy documents and the OH&S Handbook have some commercial value in that they are valuable to some degree in the carrying on of the third party's business, I am not persuaded that any value of that kind could reasonably be expected to be destroyed or diminished by their disclosure. I am not persuaded that the pricing information has any commercial value in the sense contemplated by clause 4(2) or, if it does that it could be diminished by its disclosure. Accordingly, I find that that the disputed information is not exempt under clause 4(2) of Schedule 1 to the FOI Act.

Clause 4(3)

64. Both the agency and the third party claim that the disputed information is exempt under clause 4(3). The exemption in clause 4(3) is more general in its terms than that in clause 4(2) and exempts from disclosure information (other than trade secrets or information of a kind described in clause 4(2)) about the business, professional, commercial or financial affairs of a person, in circumstances where disclosure could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.
65. The exemption in clause 4(3) recognizes that the business of government is frequently mixed with that of the private sector and that neither the business dealings of private bodies nor the business of government should be adversely affected by the operation of the FOI Act. The exemption in clause 4(3) is

composed of two parts and both paragraphs (a) and (b) of clause 4(3) must be satisfied before a *prima facie* claim for exemption is established.

66. In addition, if a *prima facie* claim for exemption under clause 4(3) is established by the agency or by the third party, it then becomes necessary for me to consider whether the limit on exemption in clause 4(7) applies to some or all of the disputed information. Clause 4(7) provides that matter is not exempt matter under clause 4(3) if its disclosure would, on balance, be in the public interest.

The agency's submissions

67. The agency initially made a number of submissions to me in support of its claim for exemption under clause 4(3). The agency submitted that:

- it cannot release the requested document because the third party claims that it contains confidential information belonging to the third party and, accordingly, it is not the agency's prerogative to release it;
- it would be in contravention of clause 6.1(f) of the Code of Practice for the Building and Construction Industry for Western Australia ('the Code') if it released the requested document, because clause 6.1(f) states that "[a]ll individuals and parties involved in the administration of contracts shall have a commitment to protecting agreed commercial-in-confidence information";
- the requested document contains detailed pricing schedules for the contract, plus plant, labour and hire rates which, if released to a direct competitor of the third party, could be used to disadvantage the third party in future tenders, because its competitors could use the third party's base rates to work out its overheads and then undercut the third party's rates in order to win a future tender and then make up any losses through 'variations' during the project's implementation;
- the third party has proven its 'worth' to the agency, through the provision of detailed information about the company's features and its internal strengths and weaknesses, which could be used by its competitors;
- the third party has proven that it is the most competitive and capable company to do the project, that it is at the forefront of the industry and, from the report of the Panel, it can be deduced that the unsuccessful tenderers were clearly not able to present to the agency the level of confidence in systems, finances and accreditation;
- the disclosure of the information in the requested document could provide a model upon which another company could build its own business, thereby impacting on the third party's potential to win future tenders;
- the requested document contains detailed information about the third party, including its works programming, its company structure and its company policies, which if obtained by a competitor could disadvantage the third

party in a future tender situation, because the information shows how it works and functions to give it a competitive edge and because it provides a detailed picture of the management and operation of the third party, including detailed costing breakdowns which, if provided to a competitor, could be used by that competitor during future tender processes in structuring and pricing their tender bids, which in turn would place the third party at a significant competitive disadvantage;

- it is usual for companies like the third party to provide company results in their Annual Reports, but more detailed information about how they operate, which enables them to achieve and maintain a competitive edge, is not in the public domain and, accordingly, it would be inappropriate for such information to be divulged by the agency, which has received and holds that privileged information in good faith;
- regulation 16 of the *Local Government (Functions and General) Regulations 1996*, makes the CEO of the agency responsible for keeping any tenders submitted to the agency in safe custody and for ensuring that those tenders remain confidential;
- all tenders submitted for Tender No. T03/04-63 were lodged in the tender box unopened and opened at a public opening, but the only information disclosed at that public opening was each tenderer's name and its lump sum price, in order to ensure that the prescribed level of confidence was maintained in the tender process;
- the report prepared and presented to the Council of the agency contains summaries of the information provided by the tenderers and details of the analysis undertaken by the Panel, but it does not include detailed costing schedules and information regarding works programs, company structure or policy, which is considered confidential;
- the report to Council is available to the public, but there is a strong expectation from the civil construction and building industry that commercially sensitive information provided in a tender submission will remain confidential, which is demonstrated by reference to clause 6.1(f) of the Code;
- disclosure of the requested document would be contrary to industry expectations and have the potential to adversely affect the local government competitive tender process, by discouraging tenderers from tendering for local government projects and by discouraging them from providing suitably detailed information relating to pricing, company policy, and company structure to allow proper tender assessment, which will, in turn, have the effect of reducing the number of tenders submitted;
- a reduction in the number of tenders for this type of work could result in the most competitive and best companies not participating (because their information will assist other companies to know how they achieve their competitive edge); and

- if it discloses the requested document, the agency will earn a reputation as a provider of confidential tender information to competitors, which will, in turn, have the effect that companies are likely to put non-Rockingham projects as their priority for tendering, thereby leaving the agency experiencing difficulty in finding suitable companies with capacity to do the work or paying much higher prices from less competitive tenderers.
68. The agency also submitted that, if the requested document were to be released to the complainant, the agency would not get the best value for Council and ratepayers of the agency and that, in an endeavor to cover the higher prices anticipated to get one tender project done, the agency would need to move its limited resources to that project and would not be able to afford to undertake other planned community projects. The agency says that it is already experiencing difficulty attracting companies to undertake certain projects due to its distance from Perth and the increasing volatility of the building and construction industry and it submits that the impact of disclosing tender information is likely to make this situation worse.
69. In response to my preliminary view, the agency submitted that, from its contacts with the industry in the development of the agency's infrastructure over past years, the agency understands that organizations tendering for bulk earthworks and related industrial projects maintain the type of quantifying and rates information contained within the requested document as part of a library for future tenders. The agency submits that this is demonstrated by the identification at the bottom of some of the third party's company documents, attached to its tender document, which shows that those pages have been extracted from one of the third party's handbooks or library.
70. The agency also submits that organizations that tender for bulk earthworks and related industrial projects have an ongoing process of estimating, into which figures about quantifying and rates information are used to build a body of estimating 'intelligence' and that project outcomes with respect to the preliminary estimations are assessed. The agency submits that such organizations would subsequently use these figures/estimations in constructing their next tender for similar/related works, adjusting rates for changes in the market. The agency submits that it has been advised that companies "*agonise for ages*" over estimates.
71. The agency submits that companies rely on strong estimations for their profitability and viability and their reputations amongst purchasers, who develop confidence in a company based on that company's ability to 'come in' on the price quoted, with fewer variations and fewer problems and delays. The agency says that, therefore, the disputed information, if provided to the third party's competitors, would strengthen the capacity of those competitors to prepare more competitive tenders, thereby threatening the competitiveness of the third party.
72. The agency also submits that observation of, and consultation with, the industry together with review of the agency's tendering process, indicates that the

stronger team put forward in any tender will win the project tender. The agency says that it uses information provided on the personnel to be involved in the project to determine the strength of the project in terms of capacity to achieve the specified project results. The agency says that it has been advised that other companies seeking tenders also use such information in order to assess the strength of a project and that within the industry good personnel are constantly being sought by companies and 'head hunted.' The agency submits that, if a competitor of the third party were to be provided with the names of personnel of the third party who have been identified as having the experience of this bulk earthworks project and others, those competitors would be in a stronger position to seek them out to change employers. The agency also says that disclosure of the names of the third party's staff is inconsistent with the *Privacy Act 1988* (Cwth).

73. The agency submits that both it and the industry consider safety of high importance within industry practice and in being successful in any tendering process. This is demonstrated in the agency's development of the safety criterion in its 'Request for Tender documents' and in the weighted selection of tenders. The agency submits that safety policies and handbooks are complex and extensive documents, which are developed by companies using significant knowledge and time resources and are owned by those companies. Tenders are given a rating on a number of safety dimensions, including safety record and the contents of the company's safety policies. These are then given weighted score following the review of tenders. The agency says that in its tendering process, if a safety plan is not submitted the tender is not considered.
74. The agency submits that company policies and handbooks are highly important in the tender selection process. The agency submits that the third party would submit the same documents as part of all its future tenders and that a competitor of the third party with incomplete, unsatisfactory or non-existent safety policies and documentation, could use the third party's documents to develop their own policies and handbooks, for inclusion in competing tenders, thereby diminishing the third party's chances of winning the tender.

The third party's submissions

75. The third party's submissions in support of its claims for exemption under clause 4(3) are, essentially, the same as those it made in support of its claims for exemption under clause 4(2).

The complainant's submissions

76. The complainant submits that the agency's tender process was a public and open tender process, which means that all tenders are available to any person to inspect on request. The complainant further submits that the information in the requested document is not privileged; that the third party has no property, patent or confidential information in the requested document; that the third party's pricing rates can be obtained by dividing the lump sum value by the quantity of earth to be moved; that information about the QAQC Management system is publicly available, open for inspection and public audit; that information about

the third party's company structure is publicly available; and, finally, that the agency has little knowledge about how the contracting industry works and has presented a fictitious case in claiming exemption for the requested document.

77. The complainant submits that neither the agency nor the third party has established a case for exempting the disputed information from disclosure under clause 4(3) of Schedule 1 to the FOI Act. The complainant rejects the agency's claim that the third party is at the forefront of the industry. The complainant submits that the Lark Hill works, the subject of the tender, are common works where there are no "special" techniques that give one firm a competitive advantage over another. The complainant submits that the work involved is, in essence, removing soil from the highest point of a cut area and filling in the lowest point of the cut area, which is carried out using basic earthmoving techniques to excavate from the highest level and place in the lowest level.

Consideration

78. I have examined the disputed information. The disputed information consists of, among other things, information about the third party's price schedules and schedules of rates for Stage 1 and Stage 2 earthworks and clearing; price rates for various miscellaneous items; a schedule of day works labour rates; a schedule of rates for plant hire and a schedule of plant and equipment hire rates; some handwritten occupational health and safety data for the years 2001, 2002 and 2003; a copy of the third party's OH&S Policy and its Quality Policy Statement and a copy of its OH&S Handbook. In my opinion, all the disputed information is information of the kind described in clause 4(3)(a) as it is information about the business and commercial affairs of the third party. Accordingly, I am satisfied that the requirements of clause 4(3)(a) are satisfied in relation to the disputed information.
79. However, as I have said above at paragraph 65, that kind of information will only be exempt under clause 4(3) if the requirements of clause 4(3)(b) are also satisfied. Under s.102(1) and (2) of the FOI Act, the onus is on the agency and the third party to establish that access to the disputed information should not be given or that a decision adverse to the complainant should be made.
80. Thus, the agency or the third party must establish that disclosure of the disputed information could reasonably be expected to have an adverse effect on the third party's business or commercial affairs or, in the alternative, that its disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.
81. The words "*...could reasonably be expected to*" in clause 4 should be given their ordinary and natural meaning and require a judgment to be made by the decision-maker as to whether something is reasonable, as distinct from something that is irrational, absurd or ridiculous: (see *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180 at 190). The question in this complaint is whether the agency or the third party has established that it is reasonable to expect that disclosure of some or all of the disputed information would have an adverse effect on the third party's

business or commercial affairs or, in the alternative, that it is reasonable to expect that its disclosure would prejudice the future supply of information of that kind to the Government or to an agency.

Adverse effect

82. The agency and the third party submit that the disclosure of the disputed information would have an adverse effect on the third party's business, professional, commercial or financial affairs because disclosure of the disputed information would allow the third party's business competitors to obtain information about the third party's pricing structure and schedules; the prices at which it was prepared to offer its equipment and services; its works programming methods; its company structure; information about its previous experience and projects it had been involved in; and other information about the third party which gives it its competitive edge within the industry.
83. Both the agency and the third party submit that disclosure of the disputed information would allow the third party's competitors to work out its overheads and then either undercut the third party's prices and rates in order to win future tenders or, in the alternative, to re-structure their future tender submissions in respect of tenders, using information derived from the third party's successful tender submission, to the commercial detriment of the third party in future tender bids of a like kind. Accordingly, both the agency and the third party claim that any competitive advantage, or potential competitive advantage, the third party has gained over its competitors would be eroded and that the disclosure of the disputed information would place the third party at a significant competitive disadvantage in submitting tender bids in respect of future tenders.
84. In essence, the agency and the third party submit that disclosure of the disputed information could reasonably be expected to have an adverse effect on the third party's business, professional, commercial or financial affairs because its ability to compete for future tenders of a similar kind could be expected to be adversely affected by the disclosure of the disputed information, as a result of the third party's competitors obtaining access to detailed information about its pricing rates and charges as well as other information about the third party's company structure, policies and practices, which the agency and the third party submit give the third party a competitive edge over its competitors in the industry.
85. Submissions of a very similar nature were made to me by the respondent agency and by the second respondent in *Re Rogers and Water Corporation and Others* [2004] WAICmr 8. In *Re Rogers*, I dealt with claims for exemption made for a substantial number of documents, which had been submitted to the agency between 1996 and 2002, and which contained information about changes in the third respondent's hourly rates, its charges and its tender prices, over a period of eight years and in relation to various tenders, with different tender criteria and pricing requirements.
86. In *Re Rogers*, I accepted that, having regard to the competitive commercial environment in which the third respondent operated, disclosure of certain

information about the third respondent's hourly rates, its charges and its tender prices relating to its then most recent contracts with the agency could reasonably be expected to have had an adverse effect on the third respondent's business, commercial or financial affairs, in the ways claimed by the agency and by the third respondent in that case, because that information included the most recent and relevant commercial information about the third respondent's pricing structure, costs and rates.

87. Submissions of a similar nature were made to the former Commissioner in *Re Maddock, Lonie and Chisholm and Department of State Services* [1995] WAICmr 15 by the two unsuccessful tenderers in that matter. In *Re Maddock, Lonie and Chisholm*, the former Commissioner accepted that the disclosure of detailed information as to how the unsuccessful tenderers calculated their respective tender prices, detailed descriptions of the systems and equipment proposed by the unsuccessful tenderers and the specific proposals and processes of how that equipment would be used could reasonably be expected to have had an adverse effect on the business, commercial and financial affairs of the unsuccessful tenderers by reducing their competitiveness in any future tender process.
88. In this case, I accept that the disclosure of a complete and unedited copy of the requested document would disclose to the complainant, and to the world at large, including potentially the third party's commercial competitors, detailed information as to the breakdown of the third party's quoted price, including the third party's prices, rates and charges including information as to how the third party calculated its prices and schedules of rates for earthworks and/or clearing; the prices quoted for miscellaneous items; and the provisional sums calculated by the third party by reference to the estimated quantities and figures set out in the agency's tender document.
89. Having regard to the competitive commercial environment within which the third party operates (in that regard, I note that eleven civil engineering and earthmoving firms submitted competing tenders to the agency) I accept as reasonable the submissions of the agency and the third party that it could reasonably be expected that disclosure of specific information about the third party's tender prices – and information about its plant, labour and hire rates – to direct competitors in the industry could be expected to be used by those competitors to the commercial disadvantage of the third party in future tenders, because that information would inform those competitors of the third party's quoted prices, rates and charges and give them a good idea about the third party's base rates, thereby enabling its competitors to work out its overheads and to undercut it in future tenders.
90. Accordingly, I consider that it is not unreasonable to expect that disclosure of the detailed breakdown of the third party's tender prices and its plant, labour and hire rates would place the third party in a position of competitive disadvantage *viz-a-viz* its competitors in the earthmoving and civil engineering industry in preparing and submitting future tender submissions of a like nature for similar future tender contracts, and give unfair advantage to its competitors.

91. I have considered the complainant's claim that the agency's tender process was a public and open tender process which, in the complainant's view, meant that all tenders were available to any person to inspect, upon request. I do not accept that submission. In that regard, I note that Item 1.11 of the agency's tender document provided that tenderers and members of the public were entitled to be present at the opening of tenders but that no discussions would be entered into between tenderers and officers of the agency concerning the tenders submitted. In addition, there is nothing in the tender document itself which provides that a tenderer's tender submission was to be available to any person to inspect, upon request. All documents submitted to government do not become universally publicly available merely by virtue of having been submitted to government and having become a government record. Even the right of access created by the FOI Act is subject to the exemptions provided by the FOI Act, in recognition of the need to balance the public interest in open and accountable government against the public interest in government being able to continue to operate. The latter will, on occasion, require the confidentiality of some information held by government agencies.
92. I am informed by the agency that all the tenders received were opened at a public opening but that the only information disclosed at that public opening was the name of each tenderer and their respective lump sum prices. That information is also recorded in the minutes of the meeting of the Council of the agency for 22 June 2004. However, other than the limited information referred to in the preceding sentence, there is no information before me to support the complainant's claim that all tenders were available to any person to inspect, upon request. It appears to me that the complainant has misunderstood the process relating to the public opening of tenders and, in the absence of any evidence to that contrary, I do not accept the complainant's submission on this point.
93. I also do not accept the complainant's submission that the third party's pricing rates can be obtained from dividing the lump sum value by the quantity of earth moved. Whilst I acknowledge that details of the total price quoted at Items 6.2.1, 6.2.2, 6.2.3 and 6.2.4 and the total contract sum quoted by the third party have been released to the complainant, the details of the rates per unit and the specific amounts calculated for each sub-component of Items 6.2.1, 6.2.2, 6.2.3 and 6.2.4 have not been disclosed to the complainant nor are those details recorded in the minutes of the meeting of the Council agency for 22 June 2004.
94. No evidence has been provided to me by the complainant to establish how the third party's pricing rates and the dollar amounts quoted for the separate elements of Items 6.2.1, 6.2.2, 6.2.3 and 6.2.4 can be obtained by dividing the lump sum value by the quantity of earth to be moved. Similarly, no evidence has been provided to me by the complainant to establish that the rate per hour quoted in the third party's schedule of dayworks labour rates, the rate per hour quoted in the third party's schedule of rates for plant hire and the hourly rate quoted in the plant list/rate attached to page 53 of the requested document is information that is publicly available or which can be calculated from the lump sum figures previously released to the complainant.

95. The agency's and the third party's submission that the disclosure of the disputed information relating to the details of the rates per unit and the specific amounts calculated for each component of Items 6.2.1, 6.2.2, 6.2.3 and 6.2.4 of the tender offer would strengthen the capacity of the third party's competitors to prepare more competitive tenders - thus threatening that company's competitiveness - is, in my view, reasonable and not an expected outcome that can be dismissed as being irrational, absurd or ridiculous.
96. In my opinion, if the information described in paragraph 94 were to be disclosed under the FOI Act, it would disclose to the third party's commercial competitors, and to the world at large, precise details of the prices and rates quoted by the third party in its tender offer to the agency. I am satisfied that the disclosure of that kind of information could reasonably be expected to have an adverse effect upon the business, commercial and financial affairs of the third party by allowing its competitors to undercut the third party in future tenders, thereby reducing its competitiveness in any future tender process. It follows that I am satisfied that the information of that kind contained in the disputed document is *prima facie* exempt under clause 4(3).
97. However, I am not satisfied that either the agency or the third party has established that the disclosure of the remaining disputed information, including the details of the third party's key personnel, the third party's safety and quality policies, the OH&S Handbook or the handwritten occupational health and safety data for the years 2001, 2002 and 2003 recorded in Item 6.7 on page 48 of the requested document could be used by the third party's competitors to its commercial disadvantage.
98. In respect of the names and positions of personnel, I have considered the agency's claim that the third party's competitors within the earthmoving industry actively seek out or 'head hunt' individuals with particular qualifications and skills, especially where those individuals are the key personnel in companies like the third party. The submission is that, if a competitor of the third party were to be provided with the names of the third party's key personnel, who have been identified as having the experience for the relevant earthworks projects, then those competitors would be in a stronger position to seek out those key personnel in an endeavour to persuade them to change employers, to the detriment of the third party.
99. Although that claim was made by the agency, no material has been provided to me by the agency in support of the claim and, in the absence of any such evidence, I consider it no higher than mere speculation. In that regard, I observe that the document that the third party attached to page 46 of its tender submission (an edited copy of which has already been released to the complainant by the agency) consists of a copy of a single page organisational chart taken from the third party's administration handbook. Nothing on the face of that document identifies the third party's key personnel in the manner required by Item 6.5 of the agency's tender document and there is nothing in any other part of the requested document which identifies which of its employees the third party intended to be the key personnel who were to form the Management and Supervisory team for the proposed works. The document

reveals nothing more about each employee than the position he or she held at that time.

100. In any event, it seems to me an extraordinary submission that the names of a company's employees are a commercial secret and their disclosure could reasonably be expected to cause the company commercial disadvantage in the manner suggested or at all. Unless the employees are bound never to disclose who they work for – and all those they deal with professionally are similarly bound not to reveal who they work for – to anyone else, I would not imagine it to be particularly difficult for competitors in a particular field to ascertain the identities of others working in their field, particularly those with good reputations.
101. I have also considered the agency's submission that the third party's safety and quality policies and OH&S Handbook are complex documents which have been developed by the third party using significant knowledge and time resources. That submission is similar to the third party's submission in relation to its claim for exemption under clause 4(2). However, having examined those particular documents, I consider that there is little, if any, information or material in those documents which could be classified as particularly complex material.
102. The OH&S Handbook is the third party's response to its statutory obligations under the OS&H Act and the *Occupational Safety and Health Regulations 1996*, among other legislative requirements. There is a considerable amount of information and guidance for employers as to how to meet those obligations provided by the WorkSafe division of the Department of Consumer and Employment Protection, as a perusal of that department's website reveals. Although I accept that the third party's OH&S Handbook is comprehensive and quite detailed, it nonetheless appears to me to contain, in the main, information that would be expected by, and known to, others in the same industry given the detailed information available to them all, both from the legislation and from WorkSafe, as to their obligations. With one exception (discussed below), there does not appear to me to be anything contained in the OH&S Handbook that could be considered particularly innovative or unique to the third party.
103. I have considered the agency's and the third party's submissions about the possible adverse effects they claim would follow from the disclosure of the third party's safety and quality policies and OH&S Handbook. The agency says that the third party would submit those same documents as part of its future tenders and that, if those documents were to be released under the FOI Act, a competitor of the third party which has incomplete, unsatisfactory or non-existent safety policies and documentation could then use the third party's policies and its OH&S Handbook documents to develop their own safety policies and OH&S handbook, for inclusion in competing tenders, thereby diminishing the third party's chances of winning the prospective tender.
104. Having examined the third party's safety policies and its OH&S Handbook, with one exception, I am neither persuaded that they are particularly unique documents nor persuaded that they are documents of the kind that have a definitive quality such that any significant disadvantage to the third party's

business affairs could reasonably be expected to follow from their disclosure even if they were to be copied by a competitor. Accordingly, I am not satisfied that the disclosure of the third party's safety policies and its OH&S Handbook (other than the exception discussed below) under the FOI Act could reasonably be expected to have the adverse effects claimed.

105. That exception is the information set out at point 10.8 on page 18. That information does appear to me to be unique to the third party as a system it has developed to utilise in its operations and I am prepared to accept that its disclosure may advantage a competitor and disadvantage the third party as submitted by the agency and the third party and I therefore consider that part of the document to be *prima facie* exempt under clause 4(3).
106. In respect of the claims that the policy statements and OH&S Handbook could be copied or plagiarised, I would have thought that there is a strong argument that copyright subsists in those documents such that unauthorised copying of them would be a breach of that copyright and therefore the law. Under the agreed terms of tendering (referred to in paragraph 43 above), the documents submitted became the property of the agency but the copyright and other intellectual property rights were retained by the tenderer.
107. The *Copyright Act 1968* (Cwth) ('the Copyright Act') protects, among other things, "literary works". The term "literary work" is not exhaustively define in the Copyright Act but is defined in s.10(1) of that Act to include "a table, or compilation, expressed in words, figures or symbols and a computer program or compilation of computer programs". It is clear, therefore, that the term is not intended to cover only written works containing some literary merit. As stated by Peterson J in *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601:

"[T]he words 'literary works' cover work which is expressed in print or writing, irrespective of the question whether the quality of style is high. The word 'literary' seems to be used in a sense somewhat similar to the use of the word 'literature' in political or electioneering literature and refers to written or printed matter".

108. There is no longer a requirement in Australian law that the work be written to be a "literary work" for the purposes of the Copyright Act. However, it happens that the documents in question are written works so that is not an issue in this case. I note that instruction manuals have been found to be "literary works" and have been protected by copyright: *Roland Corporation v Lorenzo & Sons Pty Ltd* (1991) 33 FCR 111; *Meccano Ltd v Anthony Hordern & Sons Ltd* (1918) 18 SR (NSW) 606. From the submissions of the third party and from my examination of the OH&S Handbook itself, I am prepared to accept that a reasonable degree of knowledge, labour and skill would have been required by the author to prepare the document and it does appear to me that, for the purposes of the Copyright Act, it is an unpublished, original, literary work such that copyright in it subsists. On that basis, it seems to me that its disclosure would not allow competitors to copy or directly plagiarise it, other than

unlawfully. For similar reasons, I am of a similar view in respect of the policy documents.

109. Further, although copyright belonging to a person other than the State is not an exemption under the FOI Act – nor is it a basis on which access to a document can be refused – it does have an effect in terms of the manner in which access to the document may be given. Section 27(2)(c) of the FOI Act provides that, if an applicant has requested that access to a document be given in a particular way, the agency has to comply with the request unless giving access in that way would involve an infringement of copyright belonging to a person other than the State, in which case access may be given in some other way. Section 27(1) sets out the ways in which access can be given and includes by giving a reasonable opportunity to inspect the document. If giving access by way of providing a copy of the document would be an infringement of copyright belonging to the author or authors of the policy statements and OH&S Handbook, then access can be given by way of allowing the applicant to inspect the document rather than by giving the applicant a copy of the document. Therefore, although it is my view that the policy statements and the OH&S Handbook are not exempt, if the author of each claims copyright in them, it may be that the agency should give access by way of inspection only rather than by providing the complainant with copies of those particular documents.
110. Finally, I have considered the agency's and the third party's claims for exemption for the handwritten occupational health and safety data the third party included at page 48 of the requested document under Item 6.7 with copies of its OH&S Policy, Quality Policy Statement and OH&S Handbook. Although the agency and the third party claimed exemption for the OH&S Policy, Quality Policy Statement and OH&S Handbook and made submissions to me as to why those particular documents were claimed to be exempt, neither the agency nor the third party has provided me with any submissions specifically directed at the claim for exemption for the occupational health and safety data at page 48 of the requested document.
111. However, taking into account the fact that the agency and the third party originally claimed exemption under clause 4(3) for all of the information inserted into the requested document by the third party, including the occupational health and safety data information inserted into page 48 at Item 6.7, I have considered whether the disclosure of those data could reasonably be expected to have an adverse effect on the third party's business or commercial affairs or, in the alternative, whether its disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.
112. Although the data consist of information about a certain aspect of the third party's business or commercial affairs, it is not, in my view, information of the kind described in paragraph 95 above which would, if disclosed, strengthen the capacity of the third party's commercial competitors to prepare more competitive tenders - thus threatening the third party's competitiveness. The data are two years out of date and, in my view, do not appear to be information of a kind that would be useful to a competitor in the preparation of future

tenders, thereby diminishing the third party's chances of winning the prospective tender. Accordingly, I am not satisfied that the disclosure of the occupational health and safety data recorded at page 48 of the requested document in Item 6.7 could reasonably be expected to have an adverse effect on the third party's business or commercial affairs.

Prejudice to the future supply of information

113. Both the agency and the third party assert that the disclosure of a complete and unedited copy of the requested document could reasonably be expected to prejudice the future supply of information of the kind contained in the requested document to the Government or to an agency. Both the agency and the third party also claim that, had the third party been aware that the disputed information could be publicly released, then the third party would have limited the extent of the information which it submitted to the agency in support of its tender offer and, further, that other companies in a like position would do the same, with the result that, in the future, the supply of information of the kind recorded in the third party's tender document would be adversely affected and, further, that the agency would have difficulty, in the future, of encouraging the most competitive and best companies to participate in future tenders for this type of work. For the reasons set out below, I do not accept that claim.
114. The phrase "...could reasonably be expected to prejudice the future supply of information of that kind to the Government or an agency" in clause 4(3)(b) is not to be applied by reference to whether the particular confider whose confidential information is being considered for disclosure could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of sources available or likely to be available to the Government or an agency (see: *Re Gahan and City of Stirling* [1994] WAICmr 19).
115. In addition, the former Commissioner observed in several of her decisions that since the commencement of the FOI Act no agency can give any person or organisation express assurances of absolute confidentiality. In *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Another* (1992) 36 FCR 111, at p.127, the Full Federal Court said, in relation to the Commonwealth *Freedom of Information Act 1982*:

"With the commencement of the FOI Act on 1 December 1982, not only could there be no understanding of absolute confidentiality, access became enforceable, subject to the provisions of the FOI Act. No officer could avoid the provisions of the FOI Act simply by agreeing to keep documents confidential. The FOI Act provided otherwise."
116. Similarly, with the introduction of the FOI Act in Western Australia in 1993, companies choosing to do business with government could no longer expect, or be given, an undertaking of absolute confidentiality in respect of those dealings, as they might expect or agree in respect of business in the private sector. Since the introduction of the FOI Act, private organisations doing business with

government must expect greater scrutiny of those dealings than in respect of their dealings in the private sector, because government is accountable to the public for, among other things, its provision of services and facilities to the public and expenditure of public monies, and the FOI Act is one means of facilitating and furthering that accountability. The FOI Act is designed to further government accountability, and not the accountability of private organisations; hence the greater scrutiny private organisations doing business with government must now expect is subject to the protections provided by the FOI Act to prevent any real, identifiable harm to their business being caused by that greater scrutiny.

117. Both the agency and the third party claim that the requested document was submitted to the agency in circumstances where there was a strong expectation from the third party, and in the civil construction and building industry generally, that commercially sensitive information provided in a tender submission would remain confidential. In support of that claim, both referred me to clause 6.1(f) of the Code which states that “*All individuals and parties involved in the administration of contracts shall have a commitment to protecting agreed commercial-in-confidence information.*” The agency and the third party claim that the agency would be in breach of clause 6.1(f) if the agency gave the complainant access to the requested document.
118. The agency also claims that regulation 16 of the *Local Government (Functions and General) Regulations 1996* makes the Chief Executive Officer of the agency responsible for keeping any tenders submitted to the agency in safe custody and for ensuring that those tenders remain confidential. The agency submitted that disclosure of the requested document would be contrary to industry expectations of confidentiality and would have the potential to adversely affect the local government competitive tender process, by discouraging tenderers from tendering for local government projects and by discouraging them from providing suitable detailed information relating to pricing, company policy, and company structure to allow proper tender assessment.
119. I have considered those submissions. I do not consider that the requirements of regulation 16 of the *Local Government (Functions and General) Regulations 1996* raise any issues of inconsistency or conflict between the provisions of the FOI Act and those of the *Local Government Act 1995* or the *Local Government (Functions and General) Regulations 1996*. The FOI Act creates a general right of access to documents of State and local government agencies. Section 8(1) of the FOI Act expressly provides that access to documents is to be given under Parts 2 and 4 of the FOI Act despite any prohibitions or restrictions imposed by other enactments on the communication or divulging of information, whether enacted before or after the commencement of the FOI Act, unless there is an express statement in the other enactment to the contrary.
120. There is no such statement in the *Local Government Act 1995* and I do not consider it to be inconsistent for the Local Government legislation to require confidentiality of documents which may be accessible under the FOI Act. What it means is that the question of access to those documents must be determined in

accordance with the provisions of the FOI Act and they cannot otherwise be made available.

121. I have also considered the claim that the agency would be in breach of clause 6.1(f) of the Code if it allowed access to the requested document. However, no evidence has been put before me by the agency or by the third party that the Code is an enactment or that it otherwise has the force of law. The Code is, on its face, nothing more than an industry code of practice. Nothing in the Code can, therefore, override the requirements of the law. Further, clause 6.1(f) of the Code states that all individuals and parties involved in the administration of contracts shall have a commitment to protecting “...*agreed commercial-in-confidence*” information. No evidence has been provided to me by either the agency or by the third party which establishes that the requested document contains any information of a kind that the agency and the third party had previously agreed is “*commercial-in-confidence*” information. In those circumstances, I do not accept the claim that clause 6.1(f) of the Code has any relevance to this matter.
122. I have also examined the agency’s complete tender document, a copy of which was provided to all prospective tenderers, by the agency. Part 1 of the agency’s tender document sets out the General Conditions of Tendering. Clause 1.12 of Part 1 of the tender document is headed “Confidentiality of Tenders”. Clause 1.12 states as follows:
- “1.12 *In addition to the requirements for public openings, tender assessment reports will be presented and discussed at Committee and Council meetings, for which the minutes are available to the public. As such, and also because of the provisions of the Freedom of Information Act, any tenderer submitting a tender does so on the understanding that the tender proposals may not remain confidential.*”
123. The opening paragraph on the first page of each tenderer’s Tender Offer (page 40 of the agency’s tender document) to the agency contains a statement, certifying that the tenderer agreed to undertake the relevant works at the prices set out in the Price Schedule/s and in strict accordance with the agency’s Special Conditions of Tendering and Contract, General Conditions of Tendering and Contract, Drawings, Samples, Specifications and Annexes. Each tenderer’s authorized representative was required to sign the first page and have that signature witnessed by another person, certifying that the tenderer acknowledged that the tenderer’s authorized representative had read and understood all of the terms and conditions of the tender offer document, including the agency’s General Conditions of Tendering.
124. Both the agency and the third party claim that clause 1.12 states that tender assessment reports and not tender documents will be presented to Committee and Council meetings. The agency also claims that any tenderer submitting a tender did so on the understanding that the tender proposal may not remain confidential if the Information Commissioner determines that documents are not exempt and should be made public. However, given the language of clause 1.12, I do not accept the claims that there was an expectation that tender

documents would necessarily remain confidential. To the contrary, it clearly states that tender proposals may not remain confidential. In my opinion, all tenderers who submitted a tender proposal to the agency were on notice that their tender proposals were submitted to the agency in the knowledge that their tender proposals may not remain confidential. Accordingly, in my opinion, the claim that there is an expectation within industry that tender submissions, and the information recorded in them, would be kept and retained in confidence is unsubstantiated.

125. In that regard, I note also that several of the “Request for Tender” documents that the complainant has obtained from the Department of Housing and Works, from the Department Industry and Resources, from the City of Mandurah and from the Shire of Mt Marshall contain statements under the heading “Disclosure of Contract Information and Documents” as follows: “*Documents and other information relevant to the contract may be disclosed when required by law under the Freedom of Information Act 1992...*”. Those documents also indicate to me that there is a level of public awareness in both State and local government agencies that tender documents of the kind under consideration in this matter may be the subject of access applications under the FOI Act, and that tenderers are put on notice of that.
126. I also do not accept the third party’s claim that it would have limited the extent of the information it gave to the agency, had it been aware that the disputed information could become publicly available under the FOI Act. It is not to the point, in any event, that one tenderer – in this case the third party – claims that it would not provide the information in question in the future. To establish the exemption, it must be shown that the agency’s ability to obtain such information in the future could reasonably be expected to be prejudiced. That is, it must be shown that disclosure of the document could reasonably be expected to have the effect that tenderers generally will not provide that kind of information in the future. Equally, I do not accept the agency’s claim that potential tenderers would, in the future, refuse to provide information of the relevant kind to the agency, to the Government or to another agency. The requested document appears to me to contain only information of a kind which each tenderer (including the third party) was required to provide to the agency, in order to submit a conforming tender.
127. Throughout the agency’s tender document, at the top of each page, the words “*Tenderers shall list below*” or “*Tenderers shall provide*” appear. All tenderers were required to provide the agency with detailed information about such things as hourly labour rates; hourly rates for all types of constructional equipment (including allowances for an experienced operator, fuel, consumable stores, maintenance and profit); their key personnel; their Australian Standard or ISO Standard accreditation; documented OH&S policy and safety management systems and track record; a schedule of previous experience on similar relevant projects (including description, date, value, duration, clients, role on project); and a detailed statement of the potential social and economic effects of the tender on the local community.

128. Clearly, that kind of information was required to be provided to the agency by all of the tenderers. It is my understanding (and nothing has been put before me by either the agency or the third party to correct any errors in my understanding on this point, either before or after I provided my preliminary view to the parties) that, if all of the information required to be provided to the agency by a tenderer were not so provided, then the relevant tender offer would not have complied with the agency's tender specifications, thereby leading to the tender being rejected for non-compliance. Clause 1.13 of the agency's tender document states that "[A]ny tender that is submitted at the place, and within the time specified, but fails to comply with any other requirement specified may be rejected without considering the merits of the tender."
129. In those circumstances, I do not accept either the agency's or the third party's claim that tenderers in a like position would refuse to provide that kind of information to the agency in the future and that it could, therefore, be expected that the disclosure of the disputed information in this instance could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the third party or to prejudice the future supply of information of that kind to the Government or to an agency. If contractors wish to obtain the government contract in question, they have no option but to provide that information. Further, I am not persuaded by the agency's submission that, if tender information of the kind in question is disclosed, contractors will be deterred from tendering for government contracts. As I have said above, tender documents have been subject to the FOI Act since 1993 and have been released on numerous occasions. No evidence has been put before me of any diminution of the quality or quantity of information provided in tender documents for government contracts in that period or, indeed, of any diminution in the competitiveness for government contracts.

Conclusion re clause 4(3)

130. For the reasons given above, on the basis of the evidence before me, I am satisfied that the agency and the third party have established the requirements of clause 4(3) with respect to the disputed matter that consists of the details of the rates per unit and the specific amounts calculated for each component of Items 6.2.1, 6.2.2, 6.2.3 and 6.2.4 and the hourly rates for plant hire, as listed in the attachment to page 53 of the requested document, and for that part of the OH&S Handbook specified in paragraph 105 above. Accordingly, I find that that disputed matter is *prima facie* exempt under clause 4(3).
131. However, for the reasons given above, I am not satisfied that either the agency or the third party has established the requirements of clause 4(3) with respect to the remaining disputed information, being the details of the third party's key personnel, the third party's safety and quality policies, the balance of the OH&S Handbook and the handwritten occupational health and safety statistical information recorded in Item 6.7 at the top of page 48 of the requested document. Accordingly, I find that that disputed matter is not exempt under clause 4(3) of Schedule 1 to the FOI Act.

Limit on exemption – clause 4(7) – the public interest

132. As I am persuaded that the requirements of clause 4(3) are satisfied in relation to the disputed information described in paragraphs 105 and 130, it remains for me to consider whether the limit on exemption in clause 4(7) applies to that portion of the disputed information. Clause 4(7) provides that matter is not exempt matter under clause 4(3) if its disclosure would, on balance, be in the public interest. In other words, matter that is *prima facie* exempt under clause 4(3) may not be exempt and may be disclosed under the FOI Act if it is established that it would, on balance, be in the public interest to do so. Pursuant to the provisions of s.102(3) of the FOI Act, the complainant bears the onus of establishing that disclosure would, on balance, be in the public interest.

The complainant's submissions

133. The complainant submits that it is clearly in the public interest for it to be given access to a complete copy of the third party's tender document, including the disputed information described in paragraph 130, and that to give it access to a copy with information deleted would result in it being given access to an incomplete document, contrary to the complainant's understanding that the agency's tender process was intended to be an open and fully transparent process.

134. The complainant claims that the third party's tender submission did not fully comply with the agency's tender criteria and that the agency should have rejected it as a non-complying tender. The complainant submits that it is in the public interest for a complete copy of the requested document to be disclosed to it, so that it can be established whether or not the third party's tender offer complied with the advertised tender criteria and so that the agency's decision-making process in respect of Tender No. T03/04-63 is seen to be completely open and fully transparent.

135. The complainant says that it provided the agency with full access to its tender document and that all of the other tenderers, including the third party, were required to provide the agency with that kind of information, as part of the tender process. The complainant says that it is in the public interest for all of the information submitted to the agency by the third party to be disclosed, as part of an open and accountable public tender process.

Consideration

136. I agree with the complainant's submission that it is in the public interest for the agency's tender process to be as open and as fully transparent a process as possible and that it is also in the public interest for the tender process to be seen to be an open and fully transparent process. I also agree with the complainant that it is in the public interest to establish, so far as is possible, that the third party's tender offer complied with the advertised tender criteria and that the agency's decision-making process in respect of Tender No. T03/04-63 can be seen to have been discharged in a fair and proper manner.

137. I consider that there is a strong public interest in State and local government agencies being accountable for the decisions they make to award contracts for the performance of services undertaken for the benefit of the public - and at public expense - and I also consider that there should be as much transparency as possible in the awarding of contracts. I consider it to be in the public interest for both tenderers for government contracts, and the public generally, to have confidence that such transactions are dealt with properly by the State and local government and its agencies.
138. However, in this instance, I consider that those particular public interests have been adequately served by the disclosures that have already been made by the agency to the complainant and will be further served by the disclosure of the disputed information that I have found is not exempt. I do not consider that the disclosure of the disputed matter described in paragraphs 105 and 130 would provide the complainant, or any other person, with any information about the agency's decision-making processes in relation to the awarding of the tender or further the public interest in the accountability of the agency for its tender evaluation processes.
139. Weighing against disclosure, I recognise that there is a public interest in the agency receiving (and keeping confidential) certain sensitive commercial information received from private companies that provide tender submissions to government agencies and, thus, maintaining their ability to attract competitive and competent tenderers, in order to enable local government agencies to discharge their obligations to the community at large by having public works carried out competently and at competitive rates.
140. Although I consider that commercial organisations undertaking business with government - and being paid for that work from the public purse - must necessarily expect to be subject to a higher degree of scrutiny and accountability in respect of that work, I do not consider it to be in the public interest that commercial organisations should be exposed to commercial disadvantage or detriment in competing for future tenders because of their participation in tender processes such as that conducted by the agency in relation to the Lark Hill Regional Sporting and Equestrian Complex. Clearly, that is what the exemptions in clause 4 are designed to avoid.

Finding

141. In balancing the competing interests, I consider that, in respect of the disputed matter described in paragraphs 105 and 130 the public interest factors weighing against disclosure outweigh those for disclosure, for the reasons given above. Accordingly, I find that the disputed matter described in paragraphs 105 and 130 – and detailed in the schedule of this decision – is exempt matter under clause 4(3).

Clause 3 – personal information

142. Although neither the agency nor the third party claimed exemption for any of the disputed information under clause 3(1) of Schedule 1 to the FOI Act, it was my preliminary view that the requested document and its attachments contained a small amount of personal information that was, on its face, exempt under clause 3.
143. Section 76(1) of the FOI Act provides that in dealing with a complaint I have, in addition to any other power, power to review any decision that has been made by the agency in respect of the access application and power to decide any matter in relation to the access application that could have been decided by the agency. Section 76(4) of the FOI Act further provides that, if it is established that a document is an exempt document (a document containing exempt matter), I do not have the power to make a decision to the effect that access is to be given to the document. In some cases it will be apparent on its face that particular information in a document is exempt matter, without anything more required to establish it to be so.
144. Clause 3 of Schedule 1 to the FOI Act provides as follows:

“3. *Personal information*

Exemption

- (1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*

Limits on exemption

- (2) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.*
- (3) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -*
- (a) *the person;*
 - (b) *the person’s position or functions as an officer; or*
 - (c) *things done by the person in the course of performing functions as an officer.*
- (4) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed services for an agency under a contract for services, prescribed details relating to -*
- (a) *the person;*
 - (b) *the contract; or*

- (c) *things done by the person in performing services under the contract.*
- (5) *Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.*
- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

Definition of “personal information”

145. The term ‘personal information’ is defined, in the Glossary in Schedule 2 to the FOI Act, to mean:

“... information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –

- (a) *whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
- (b) *who can be identified by reference to an identification number or other identifying particular such as a finger print, retina print or body sample”.*

Clause 3(1)

146. In my view, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies. The definition of the term “personal information” in the FOI Act makes it clear that the exemption in clause 3(1) applies to any information or opinion about a person from which the identity of that person is either apparent or can reasonably be ascertained from the information or opinion.
147. The exemption in clause 3(1) is recognition by Parliament that State and local government agencies collect and hold sensitive and private information about individuals, which should not ordinarily be made publicly accessible without the consent of the individuals concerned or in circumstances where the disclosure of such personal information would, on balance, be in the public interest.
148. Disclosure of the disputed document would reveal, among other things, the name, position, handwritten signature and mobile telephone number of the third party’s authorised officer who signed the requested document on behalf of the third party; the name and handwritten signature of the third party’s employee who witnessed the authorised officer’s signature; and the names and positions of a number of other employees of the third party who are identified in the requested document and in the attachments to the requested document.

149. In my view, that particular information is clearly “personal information” as defined in the FOI Act about those individuals, each of whom can be identified from the information. It is, therefore, information of a kind that is *prima facie* exempt under clause 3(1) of Schedule 1 to the FOI Act. That being the case, I am required to consider whether one or more of the limits on exemption set out in clauses 3(2)-3(6) of Schedule 1 to the FOI Act applies to any of that information.
150. The limit on exemption in clause 3(2) does not apply because none of the personal information about the third party’s employees consists of personal information about the complainant. Similarly, the limit on exemption in clause 3(3) does not apply to the relevant personal information because there is no evidence before me that that information consists of prescribed details in relation to a person who is, or who has been, an officer of an agency.
151. Clause 3(4) provides that prescribed details relating to a person who performs, or has performed, services for an agency under a contract for services, are not exempt under clause 3(1). The relevant prescribed details are set out in regulation 9(2) of the *Freedom of Information Regulations 1993* (‘the Regulations’).
152. However, the personal information recorded in the requested document about the third party’s authorised officers and employees was information submitted to the agency before the Council of the agency awarded the tender contract to the third party. In those circumstances, in my view, it cannot be said that the relevant information about those individuals, at that stage, consists of prescribed details about persons who are performing, or who have performed, services for the agency under a contract for services.
153. At the time when the requested document was submitted to the agency by the third party, the tender in respect of Tender No. T03/04-63 had not then been awarded to the third party and no contract had been entered into by the agency and the third party. There is no material before me to establish that any of the individuals who are identified in the requested document were then performing services for the agency under a contract for services. Accordingly, in my view, the limit on exemption in clause 3(4) does not apply to the disputed personal information about the employees of the third party in the document in question.
154. The limit on exemption in clause 3(5) does not apply to the disputed personal information about the employees of the third party who are identified in the requested document and in its attachments because there is nothing before me which indicates that the complainant provided any evidence to the agency – and none has been provided to me – to establish that those employees consent to their personal information being disclosed to the complainant.
155. In my view, therefore, the only limit on exemption which may apply in this instance is the limit on exemption in clause 3(6). Clause 3(6) provides that matter is not exempt matter under clause 3(1) if its disclosure would, on balance, be in the public interest. Section 102(3) of the FOI Act provides that if, under a provision of Schedule 1 to the FOI Act, matter is not exempt if its disclosure

would, on balance, be in the public interest the onus is on the access applicant to establish that disclosure would, on balance, be in the public interest. Accordingly, in this matter, the onus falls upon the complainant to establish that disclosure of the personal information about the employees of the third party who are identified in the attachments to the requested document would, on balance, be in the public interest.

Clause 3(6) – public interest

The complainant's submissions

156. In support of its claims on this issue, the complainant referred me to the copies of the tender documents referred to in paragraphs 20 and 23 above, because those documents contain details of the names, positions, contact telephone and fax numbers of the key personnel of other companies which submitted tender offers to State and local government authorities in 2004. The complainant's submissions in support of its request for access to the disputed personal information about the third party's employees are otherwise the same as those set out in paragraphs 133-135 above.

Consideration

157. I have considered the complainant's submissions. I recognise that there is a public interest in the complainant being able to exercise its rights of access under the FOI Act. However, in this instance, I consider that that public interest has been satisfied, to some extent, by virtue of the agency's decision to give the complainant access to an edited copy of the requested document, and will be further satisfied by disclosure of the additional information I have found not to be exempt. I have also taken into account the fact that a certain amount of information about the Panel's recommendation to the Council, and the Council's decision to award the tender contract to the third party, is publicly available from the agency in the minutes of the Council Meeting of 22 June 2004.
158. As I have said above, I recognise that there is a strong public interest in State and local government agencies being accountable for, and being seen to be accountable for, their decision-making processes (particularly where, as here, the tender process leads to the expenditure of public monies) and in ensuring that all tenders received by the agency complied with all of the advertised tender selection criteria. I also agree with the complainant's submission that such tender processes should be as open and accountable as possible.
159. However, in this case, I am not persuaded that disclosing the personal information about the third party's employees would cast any light on the Panel's evaluation of the competing tenders submitted to the agency or upon the Council's decision to award the tender contract to the third party. Similarly, I am not persuaded that disclosing that personal information would serve to make the agency more accountable for its decision-making, so as to tilt the balance in favour of disclosing that personal information to the complainant, in this instance.

160. I accept that the complainant has obtained copies of similar tender documents from other State and local government agencies, one of which contains personal information of the kind under consideration in this matter. However, it is not apparent to me, from my examination of those documents, whether the complainant obtained access to those tender documents as a result of making access applications under the FOI Act or whether the documents were given to the complainant outside the FOI process.
161. In any event, the fact that the complainant has obtained access to copies of several tender documents from other State and local government agencies, either inside or outside the FOI process, which contain personal information about private individuals, does not mean that the personal information which is in dispute in this complaint is not exempt information under clause 3(1) of Schedule 1 to the FOI Act. An agency always has a discretion to release information even if it is exempt unless otherwise legally constrained (FOI Act s.3(3)). I have no such discretion. In this case, the complainant applied to the agency for access to the requested document under the FOI Act. Accordingly, I am required to deal with this complaint on its particular facts and I am also required to determine whether the relevant personal information is exempt information in accordance with the requirements of the FOI Act. If it is, as explained in paragraph 143 above, I do not have the power to make a decision to the effect that it be disclosed
162. Finally, for the reasons given at paragraphs 91 and 92 above, I do not accept the complainant's claim that the agency's tender process was supposed to be a full and open and that the tender documents are meant to be available to all members of the public.
163. In my view, there is a strong public interest in maintaining personal privacy, which is recognised by the inclusion of the exemption in clause 3(1) in the FOI Act. I consider that that public interest will only be displaced by some other significantly stronger countervailing public interest which requires the disclosure of personal information about another person. I do not consider the personal information in this case to be the kind of private information generally requiring protection from disclosure on the ground of personal privacy. Nonetheless, it is personal information as defined in the FOI Act and *prima facie* exempt.
164. The public interest in preserving the personal privacy of individuals may not weigh as strongly as it does in respect of other kinds of personal information contained in documents of agencies. However, it is a facet of the public interest which weighs against disclosure and, in this instance, I am not persuaded that the complainant has established that there is a compelling public interest which requires the personal information about the employees of the third party to be disclosed to the complainant or that any of the public interests in disclosure identified by the complainant overrides the public interest in protecting personal privacy. Therefore, in balancing the competing interests, on the basis of the evidence before me, I do not consider that the public interests in disclosure in this instance outweigh the public interest in protecting the privacy of the third party's employees.

165. Accordingly, I find that the disputed personal information about the employees of the third party who are identified in the requested document and the attachments to the requested document is exempt matter under clause 3(1) of Schedule 1 to the FOI Act.

Editing

166. Section 24 of the FOI Act provides that, if the access application requests access to a document containing exempt matter, and it is practicable for the agency to give access to a copy of the document from which the exempt matter has been deleted, and the agency considers that the applicant would wish to be given access to an edited copy, the agency has to give access to an edited copy. I am empowered by s.76(1)(b) of the FOI Act to decide any matter in relation to the access application but could, under the FOI Act, had been decided by the agency. Accordingly, I have considered whether access to an edited copy of the document, with exempt matter deleted, could be given.

167. In *Police Force of Western Australia v Winterton* (unreported, SCWA, 27 November 1997), Scott J said the following in respect of the requirements of s.24:

“It seems to me that the reference in s24(b) to the word “practicable” is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context. In that respect where documents only require editing to the extent that the deletions are of a minor and inconsequential nature and the substance of the documents still make sense and can be read and comprehended in context, the documents should be disclosed”.

168. It seems to me that it would be practicable, in the sense described by Scott J above, for the agency to provide the complainant with a copy of the document edited by deleting the matter I had found to be exempt and which is set out in the schedule to this decision.
