

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

**File Ref: F2016022
Decision Ref: D0142016**

Participants:

Alan Park
Complainant

- and -

City of Nedlands
Agency

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – draft local planning strategy – clause 6(1) – deliberative processes – whether information of a kind described in clause 6(1)(a) – whether disclosure on balance contrary to public interest

Freedom of Information Act 1992 (WA): sections 3, 4, 6, 8(1), 10(2), 15(2) and 25; Schedule 1, clauses 6(1), 6(2), 6(3) and 6(4)

Local Government Act 1995 (WA): sections 5.23, 5.94, 5.95, 5.96 and 5.97

Planning and Development (Local Planning Schemes) Regulations 2015 (WA): Part 3

Channel 31 Community Educational Television Ltd v Inglis (2001) 25 WAR 147

Harris v Australian Broadcasting Corporation (1983) 50 ALR 551

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

Re BGC (Australia) Pty Ltd and Port Hedland Port Authority [2011] WAICmr 38

Re Coastal Waters Alliance of Western Australia Incorporated and Department of Environmental Protection and Anor [1995] WAICmr 37

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

Re West Australian Newspapers Pty Ltd and Western Power Corporation [2005] WAICmr 10

Re Whitely and Curtin University of Technology [2008] WAICmr 24

DECISION

The agency's decision is set aside. In substitution, I find that the disputed document is not exempt under clause 6(1) of Schedule 1 to the *Freedom of Information Act 1992* (WA).

Sven Bluemmel
INFORMATION COMMISSIONER

28 October 2016

REASONS FOR DECISION

1. This complaint arises from a decision made by the City of Nedlands (**the agency**) to refuse Alan Park (**the complainant**) access to a document under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**).

BACKGROUND

2. On 17 November 2015 the complainant applied to the agency under the FOI Act for access to documents as follows:
 1. *A copy of the letter received by the [agency] from the WAPC in October 2015 in response to the [agency's] request for an extension of time for the re-submission of draft Town Planning Scheme 3...*
 2. *A copy of all Draft Local Planning Strategy documents and attachments...which were approved at the Council meeting on 27th October [2015] and sent to the WAPC in early November 2015.*
 3. *A copy of the schedule of modifications required by the WAPC which were attached to the covering letter to the [agency] from the WAPC dated March 2015 which gave approval for the draft [Town Planning Scheme 3] subject to those modifications...*
3. The agency identified three documents within the scope of the complainant's access application, which it described in its notice of decision dated 24 December 2015 as Documents 1, 2 and 3. The agency transferred parts one and three of the access application to the Western Australian Planning Commission (**WAPC**) under section 15(2) of the FOI Act, together with copies of Documents 1 and 3.
4. By its notice of decision dated 24 December 2015 (**initial decision**) the agency advised the complainant that it had identified one document within part two of his access application – which the agency referred to as Document 2 – and that it had decided to refuse him access to that document on the ground that it is exempt under clause 6 of Schedule 1 to the FOI Act. That document is the agency's draft Local Planning Strategy (**LPS**) approved by the Council of the agency at its meeting on 27 October 2015 and subsequently forwarded to the WAPC in early November 2015 (**the disputed document**).
5. On 6 January 2016 the complainant applied for internal review of the agency's initial decision. By letter dated 19 January 2016 the agency varied its decision and decided to grant the complainant access in full to the disputed document but deferred access to that document until 7 March 2016 in accordance with section 25 of the FOI Act.
6. By letter dated 25 January 2016 the complainant applied to me for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. Following my receipt of this complaint, the agency produced to me a copy of the disputed document together with its FOI file maintained in respect of the complainant's access application.
8. On 8 March 2016 my office made inquiries with the agency to establish whether it had given effect to its decision to give access to the disputed document. By letter dated 11 March 2016 the agency advised that it had not yet given the complainant access to the disputed document for the reasons given and undertook to do so 'as soon as practicable after it is received back from the WAPC with approval to proceed to advertising'.
9. On 21 March 2016 the agency advised my office that it had given the complainant a full unedited copy of the disputed document. Based on that advice, my office advised the parties that there was nothing remaining in dispute that I was required to deal with and closed my file. On receipt of that advice, the complainant advised my office that the document disclosed to him was not the document requested in his access application. That is, that the agency had given him the version of that document approved by the WAPC, whereas in his access application he sought the version of that document which was approved at the Council meeting of the agency on 27 October 2015 and sent to the WAPC in early November 2015.
10. Accordingly, the complainant requested that I re-open my file. My office made further inquiries with the agency. By letter dated 24 March 2016 the agency advised that '[i]n effect, on internal review, the City decided to give the complainant access to the **final** WAPC approved and certified version of the requested document and not the requested document' (agency emphasis). The agency confirmed that the document it gave to the complainant on 18 March 2016 was a 'copy of the WAPC approved document', not the disputed document. The agency also advised that it remains of the view that the disputed document is exempt under clause 6 of Schedule 1 to the FOI Act and that '[t]he City stands by its initial decision on access and, given that the City has provided the complainant with the most up-to-date version of the requested document, it does not intend to withdraw from its initial decision on access'.
11. As it was clear that the agency had not given the complainant a copy of the disputed document, I advised the parties that my file was re-opened and that I would be required to determine whether the agency's claim that the disputed document is exempt under clause 6 is justified. I advised the agency that, based on the reasons provided by the agency, I was of the view that it had not provided sufficient reasons to justify its exemption claim. Accordingly, I required the agency to provide additional reasons to support its claim that it is currently contrary to the public interest to disclose the disputed document. The agency provided additional information to my office by its letter dated 4 April 2016.
12. By email dated 27 May 2016, my office advised the agency, having considered the agency's submissions made in its letter dated 4 April 2016 and the material then before me, that I was not persuaded that disclosure of the disputed document would, on balance, be contrary to the public interest; as a result, I was of the view that the disputed document is not exempt under clause 6 as claimed by the agency; and, before I formally wrote to the parties to provide my detailed preliminary view of this matter, the agency

was invited to reconsider its position at that stage of proceedings and advise my office by 3 June 2016 whether or not the agency wished to maintain its exemption claim in light of my view. On 30 May 2016 the agency advised my office that, at that stage of proceedings, the agency was not prepared to withdraw its exemption claim for the disputed document and would await receipt of my preliminary view.

13. By letter dated 3 August 2016 I informed the parties of my preliminary view of this matter (**preliminary view letter**). It was my preliminary view that the disputed document is not exempt under clause 6(1) of Schedule 1 to the FOI Act. In light of my preliminary view, I invited the agency to withdraw its claims for exemption and to give the complainant access to a copy of the disputed document. Alternatively, I invited the agency to provide me with further submissions to support its claim that the disputed document is exempt.
14. The agency provided its response by letter dated 17 August 2016. The agency advised that it ‘maintains its view that the disputed document was (and still is) an exempt document under clause 6(1) of Schedule 1 to the FOI Act and that the [agency’s] decision should be affirmed’. The agency did not provide any further submissions and advised that it relies upon the submissions previously made to me in support of its exemption claim. The agency noted ‘[a]s you have formed [your] preliminary view having considered the submissions previously provided to you by the [agency], the [agency] sees no point in devoting additional time, resources and effort providing additional submissions to you in an attempt to dissuade you from that view’. The agency also advised that it does not accept my views as described at [62] of this decision for the reasons given in its letter.
15. In response to my preliminary view letter the complainant provided further submissions to my office by letter dated 17 August 2016 in support of his claim that disclosure of the disputed document is in the public interest.

Onus of proof

16. Under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision is justified or that a decision adverse to another party should be made. Accordingly, in this instance, the agency bears the onus of establishing that its decision to refuse the complainant access to the disputed document was justified. In particular, the complainant is not required to establish that disclosure of the disputed document would be in the public interest.

PRELIMINARY ISSUE

17. In his internal review request dated 6 January 2016, in addition to seeking review of the agency’s initial decision to refuse him access to the disputed document under clause 6 of Schedule 1 to the FOI Act, the complainant also requested a copy of the disputed document pursuant to section 5.96 of the *Local Government Act 1995 (WA)* (**LG Act**), on the basis of his claim that he is entitled to inspect that document under section 5.94(p) of the LG Act.
18. In response, the Chief Executive Officer (**CEO**) of the agency advised the complainant by letter dated 12 December 2016 – which I note should have been dated 12 January 2016 – that the right to inspect documents under section 5.94(p) of the LG Act is

limited by, among other things, section 5.95(3) of the LG Act. The CEO noted that section 5.95 of the LG Act provides that the right to inspect information referred to in section 5.94 does not extend to the inspection of information referred to in paragraph (n) or (p) of that section if the meeting or that part of the meeting to which the information refers... (b) in the CEO's opinion, could have been closed to members of the public but was not closed'. The CEO then stated:

In this instance, I as Chief Executive Officer of the City am of the opinion that the meeting you refer to – being the meeting of the Council of the City held on 27 October 2015 – could have been closed to members of the public but was not closed.

As a result, the limit on the right to inspect local government information under section 5.94(p) of the [LG Act] applies to the [disputed] document and you do not have the right to inspect that document at the City nor do you have a right to be given a copy of that document under the provisions of section 5.94 of the [LG Act].

19. The complainant contended in his external review application to my office that the disputed document should be provided to him pursuant to section 5.94(p) of the LG Act. If that is correct and the disputed document is available for inspection under the LG Act, neither the access rights nor the external review rights in the FOI Act would apply to the disputed document pursuant to section 6(b) of the FOI Act. Section 6 of the FOI Act relevantly provides that 'Parts 2 [Access to documents] and 4 [External review of decisions; appeals] do not apply to access to documents that are... (b) available for inspection (whether for a fee or charge or not) under Part 5 or another enactment.'
20. The complainant submits in his external review application that the limitation in section 5.95(3) does not apply to the disputed document, even if the CEO is of the opinion that the meeting of the Council of the agency held on 27 October 2015 (**the Meeting**) could have been closed but was not closed, because:
 - The only evidence of the CEO's opinion at the time of the Meeting is set out in the agenda for the Meeting, namely that the disputed document was confidential pursuant to section 5.23(e) of the LG Act.
 - Councillors of the agency considered the application of section 5.23(e) to the disputed document during the motion at the Meeting to refer the item regarding the draft LPS behind closed doors for a confidential discussion and voted against that motion.
 - The CEO has not provided any additional information to support the basis of his opinion that the Meeting could have been closed.
21. I note that under section 5.23(2) of the LG Act a council may close a meeting to members of the public, or part of the meeting, if the meeting deals with any of the matters described at (a)-(h) of that provision. Section 5.23(3) further provides that a decision to close a meeting or part of the meeting and the reason for the decision are to be recorded in the minutes of the meeting. However, the limit on the right to inspect local government information in section 5.95(3) merely provides that the right to

inspection does not apply ‘if ... that part of the meeting to which the information refers (a) was closed to members of the public; or (b) in the CEO’s opinion, could have been closed to members of the public but was not closed’. Accordingly, I do not consider that it is open to me to consider the complainant’s submissions as to whether the CEO’s opinion is justified or was open to him under the LG Act. If there is evidence that the CEO is of the opinion that the Meeting could have been closed, I consider that, on its face, the limit in section 5.95(3) will apply.

22. The minutes of the Meeting show that a motion that the item regarding the agency’s draft Local Planning Strategy ‘be referred to go behind closed doors at the end of the meeting for a confidential discussion in accordance with [s]ection 5.23(2)(e) of the [LG Act]’ was lost. However, I have read the CEO’s letter to the complainant dated 12 December 2016 [sic] and he clearly stated in that letter that he is of the opinion that the Meeting could have been closed. In light of that, on its face, it appears that the limit in section 5.95(3)(b) of the LG Act applies and the disputed document is not available for inspection under section 5.94 of the LG Act. Accordingly, in my view, section 6(b) of the FOI Act does not apply and the access rights and external review rights under the FOI Act do apply to the disputed document.
23. In these circumstances, it remains for me to determine whether or not the disputed document is exempt as claimed.

CLAUSE 6 – DELIBERATIVE PROCESSES

24. The agency claims that the disputed document is exempt under clause 6(1) of Schedule 1 to the FOI Act. Clause 6 provides:
 - (1) *Matter is exempt matter if its disclosure –*
 - (a) *would reveal –*
 - (i) *any opinion, advice or recommendation that has been obtained, prepared or recorded; or*
 - (ii) *any consultation or deliberation that has taken place, in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency; and*
 - (b) *would, on balance, be contrary to the public interest.*
 - (2) *Matter that appears in an internal manual of an agency is not exempt matter under subclause (1).*
 - (3) *Matter that is merely factual or statistical is not exempt matter under subclause (1).*
 - (4) *Matter is not exempt matter under subclause (1) if at least 10 years have passed since the matter came into existence.*

25. The deliberative processes of the Government, a Minister or an agency are their ‘thinking processes’, the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action: see *Re Waterford and Department of the Treasury (No. 2)* (1984) 5 ALD 588.
26. The exemption in clause 6(1) consists of two parts. To establish that the disputed document is exempt under clause 6(1), the agency must satisfy the requirements of both paragraphs (a) and (b). If both parts of clause 6(1) are satisfied, the disputed document will be exempt, subject to the limits on exemption contained in clauses 6(2)-6(4).

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

27. The first question for my consideration is whether the requirements of clause 6(1)(a) are satisfied.
28. In its initial decision, the agency submits that:

[T]he [disputed] document is comprised almost entirely of “opinions”; “advice” and “recommendations” that were prepared, assembled and put together by staff of the City for the express purpose, in the first instance, of the deliberative processes of the City.

The [disputed] document was prepared by the City with the clear knowledge that the [disputed] document was required to be prepared in accordance with published criteria and with the clear knowledge that the [disputed] document is also required – by law – to be:

- *submitted to the DoP for its consideration, analysis and, where necessary and/or appropriate, recommendations and potential requisitions to the City, for possible amendments or revisions;*
- *subsequently submitted to the WAPC by the DoP, for consideration by the WAPC in a similar manner; and then, finally*
- *eventually submitted to the Minister by the WAPC, for his or her consideration and approval before the proposed LPS scheme becomes law.*

I am, therefore, satisfied that the [disputed] document contains matter of a kind described in paragraph 6(1)(a).

29. The agency also noted in its initial decision that the deliberative processes to which the disputed document relates are the deliberative processes of the agency, the Department of Planning, the WAPC and the Minister for Planning.
30. In his internal review request, the complainant disputed that the agency has established that the requirements of clause 6(1)(a) have been met. Among other things, the complainant submits that:
 - *[I]t is not correct to characterise the draft local planning strategy adopted by the City at the Meeting as having been prepared for the deliberative process of any government authorities. Rather, the draft strategy is itself a*

legislatively prescribed end-product for the purpose of allowing the WAPC to assess the agency's proposed strategy against state and regional policy.

- The agency has listed the relevant agencies for whose deliberative processes the disputed document was prepared but has not identified any specific deliberative process to which the document is claimed to relate.

Consideration

31. I have examined the disputed document. I accept that it contains opinion, advice or recommendations that has been obtained or prepared by officers of the agency in the course of or for the purpose of the deliberative processes of the agency and the WAPC. For example, pages 13-24 and 164-172 of the disputed document contain information of that kind. I also accept that there are two relevant deliberative processes: first, the Council of the agency's consideration of whether it would adopt the draft LPS and submit it to the WAPC for certification; and, second, the WAPC's consideration of the draft LPS in accordance with regulation 12 of the *Planning and Development (Local Planning Schemes) Regulations 2015 (WA) (the Regulations)*. Accordingly, I accept that information of that kind meets the requirements of clause 6(1)(a). However, I do not accept the agency's contention in its initial decision that the disputed document 'is comprised almost entirely of 'opinions, advice and recommendations'. For example, the information on pages 27 to 56 of the disputed document is clearly not of that kind.
32. To the extent that the disputed document does contain matter that meets the requirements of paragraph (a), the requirements of paragraph (b) of clause 6(1) must also be satisfied in order to establish a valid claim for exemption. Accordingly, the second question for my consideration is whether disclosure of that matter would, on balance, be contrary to the public interest.

Clause 6(1)(b) – contrary to the public interest

33. I consider that the public interest test in clause 6(1)(b) is intended to cover those cases where public disclosure would be prejudicial to the proper operation of government or the proper workings of an agency such that the right of access under the FOI Act is subordinate: see *Re BGC (Australia) Pty Ltd and Port Hedland Port Authority* [2011] WAICmr 38 at [66]. In *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551 at 561, Beaumont J said, concerning the public interest:

In evaluating where the public interest ultimately lies ... it is necessary to weigh the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper working of government and its agencies on the other

34. Unlike the other exemption clauses set out in Schedule 1 to the FOI Act that are limited by a public interest test, in the case of a claim for exemption under clause 6(1), an access applicant is not required to demonstrate that disclosure of the requested matter would be in the public interest. Instead, the onus of establishing that its disclosure would, on balance, be contrary to the public interest rests with the agency: see *Health Department of Western Australia v Australian Medical Association Ltd* [1999] WASCA 269 (*Health Department v AMA*) at [18].

The agency's public interest submissions

35. In its initial decision, the agency made the following claims regarding whether disclosure of the disputed document would, on balance, be contrary to the public interest:

The inaugural Information Commissioner; both of the former A/Commissioners and the current Commissioner have all both consistently expressed the view, when considering the application of the exemption in clause 6(1), that it may be contrary to the public interest to prematurely disclose deliberative process documents while deliberations in an agency are continuing, if there is evidence that disclosure of such documents would adversely affect the agency's decision-making process, or that disclosure would, for some other reason, be demonstrably contrary to the public interest (see: Re Martin and Ministry for Planning [2000] WAICmr 56; Re West Australian Newspapers Pty Ltd and Western Power Corporation [2005] WAICmr 10).

The Commissioner considers, generally speaking, that the public interest is best served by allowing deliberations to occur unhindered and with the benefit of access to all of the material available so that informed decisions may be made (see: Re McKay and McKay and Water Corporation [2009] WAICmr 3.

However, on the other side of the spectrum, there is also a public interest in people such as you being able to exercise your rights of access under the FOI Act and a public interest in more open and accountable government and increased public participation in the planning and development processes of State and local government. That was one of the reasons and purposes for the enactment of the FOI Act.

There is also a public interest in ratepayers in local government shires and cities being informed of the development of local planning scheme proposals being considered by their local government authority and the State Government, which have the potential to significantly affect the future of their particular community.

However, the public interest in community participation in the decision-making process is satisfied, to some extent, by the public consultation process that took place when the City recently undertook the preparation of Our Vision 2030 and the Nedlands 2023 Strategic Community Plan.

Equally importantly, there will be further community consultation, as required by law, when - ultimately - the requested document obtains Ministerial approval and is required to be advertised and submissions accepted from interested members of the public. In my view, the fact that there must be further community consultation and participation in the process of developing the requested document, in the future, means that the public interest in the local community being informed about the proposal under consideration is, to a significant extent, satisfied or will be satisfied.

Whilst there is a public interest in people having access to information, there is also a public interest in the proper functioning of government agencies and in, at this point, the deliberative processes of the government agencies involved in the

process of developing, refining, reviewing and, ultimately approving the requested document [which] in its infancy.

In my view there is a public interest in the agencies involved in the process of developing the requested document being able to make decisions without “... someone looking over their shoulders”.

The nature of the requested document and the lengthy and complex process that followed before the requested document is finalised and before decisions have been reached and whilst revisions, amendments and deliberations continue, would be detrimental to a successful outcome for the deliberative process. The deliberations are 'alive' and ongoing. It is entirely possible that significant changes; amendments or land use development options may be required to be included (or removed) for the requested document and each change, in response to recommendations and/or directions by the DoP, the WAPC or the Minister means that further changes to the requested document are entirely possible and, indeed, more likely than not.

In my view, the early disclosure of the first draft of the requested document which, potentially, require amendment (possibly significant) would mean the disclosure of a document that is, at this early stage of the approval process, a speculative proposal and there is little - if any - public interest that would be served by disclosing the requested documents so early in the deliberative process of formulating and approving the proposed LPS scheme. The deliberative process is, at the time of this decision, still ongoing. It will end when the final decision is made and agreed between Government (through the agency and its Ministers) and the City. That point is nowhere near being reached.

I consider that disclosure of the requested document, at this stage, would be premature. The deliberative process is ongoing and cannot be “separated” or “compartmentalised” into distinct components. The process of developing an LPS document is a single and integrated process which evolves in the manner described in the Notice of Decision. While there will be a public interest favouring disclosure, once a decision has been made, that will happen following the requirement for the City to advertise the requested document following Ministerial approval.

In this instance, public interest in participation on the LPS development and approval process will be served when the WAPC and the Minister's deliberative processes are completed and approval to advertise the proposed LPS scheme document made. The deliberative process is still ongoing and should be allowed to be completed whilst ensuring the integrity of the ongoing deliberations at this time.

36. As noted at [11], on 24 March 2016 I asked the agency to provide additional reasons to support its claim that it is currently contrary to the public interest to disclose the disputed document. That additional information is set out in the agency's letter to my office dated 4 April 2016 (**further submissions**). The agency submits as follows:

Background information

1. *The disputed document is the draft Local Planning Strategy prepared by Officers of the City of Nedlands (“the City”).*
2. *A Local Planning Strategy is a high level, strategic document that is intended to set the broad, long-term strategic planning framework for future development of the City over the next ten to twenty years. The disputed document will - when settled, finalised, adopted by the Council of the City and endorsed by WAPC - outline and apply the wide range of applicable State, regional and local planning policies and strategies and guides the decision making of Council. It does not change the zoning or controls that currently apply to any individuals’ property.*
3. *The development of the disputed document is the first stage of a broader process to review the city's Town Planning Scheme No. 2, providing the strategic basis for the new scheme, the Local Planning Scheme No.3.*
4. *By way of contrast between the disputed document and the Local Planning Scheme, a Local Planning Scheme is the 'operational tool' that establishes specific controls for land use and development in the City.*

The development of draft Local Planning Strategy documents

5. *Part 3 of the Planning and Development (Local Planning Schemes) Regulations 2015 (“the Regulations”) requires a local government (in this case, the City) to prepare a local planning strategy in accordance with Part 3 for each local planning scheme that is approved for land within the district of the relevant local government. A copy of Part 3 of the Regulations is attached to these submissions.*
6. *However, of fundamental importance to your consideration of this complaint are the following matters:*
 - *regulation 11 of the Regulations required the City to prepare the disputed document;*
 - *regulation 12(1) of the Regulations required the City to submit the disputed document to the Western Australian Planning Commission (“the WAPC”) - before advertising the disputed document;*
 - *regulation 12(2) of the Regulations required the WAPC to assess the disputed document, as soon as reasonably practicable, for compliance with regulation 11(2) of the Regulations;*
 - *regulation 12(3) of the Regulations empowered the WAPC to require the City to modify the disputed document, in the event that the WAPC was not satisfied that it complied with regulation 11(2) of the Regulations;*

- *regulation 12(4) of the Regulations required the WAPC to certify the disputed document and provide a copy of the certification to the City for the purpose of proceeding to advertise the disputed document in the event that it complied with regulation 11(2) of the Regulations;*
- *once certification under regulation 12(4) of the Regulations was received from the WAPC, regulation 13 of the Regulations required the City to, amongst other things:*
 - (i) advertise the WAPC certified draft Local Planning Strategy in accordance with the provisions of Regulation 13(1) of the Regulations;*
 - (ii) ensure that the WAPC certified draft Local Planning Strategy is made available for public inspection;*
 - (iii) notify all members of the WA public that submissions may be made to the City in relation to the WAPC certified draft Local Planning Strategy, within the specified timeframe.*
- *regulation 14(1) of the Regulations requires the City to review the WAPC certified draft Local Planning Strategy having regard to any submissions made and regulation 14(2) of the Regulations requires the City to either:*
 - (i) support the WAPC certified draft Local Planning Strategy without modification; or*
 - (ii) support the WAPC certified draft Local Planning Strategy with proposed modifications to address issues raised in the submissions;*
- *regulation 14(3) of the Regulations requires the City to complete the review of the WAPC certified draft Local Planning Strategy and submit to the WAPC:*
 - (i) a copy of the WAPC certified draft Local Planning Strategy; and*
 - (ii) a schedule of the submissions received; and*
 - (iii) particulars of any modifications to the WAPC certified draft Local Planning Strategy proposed by the local government.*
- *regulation 15 of the Regulations requires the WAPC to, within 60 days:*
 - (i) endorse the WAPC certified draft Local Planning Strategy with or without modifications; or*
 - (ii) require the City to modify the WAPC certified draft Local Planning Strategy in the manner specified by the WAPC before it is resubmitted to the Commission for endorsement; or*
 - (iii) refuse to endorse the WAPC certified draft Local Planning Strategy.*

- *regulation 16 of the Regulations provides that, if the WAPC has endorsed the City of Nedlands draft Local Planning Strategy, the WAPC must publish that document in any manner it considers appropriate.*

At that point, the draft Local Planning Strategy document will become the City of Nedlands' Local Planning Strategy.

The deliberative processes thus far

7. *At its meeting on 27 October 2015, Councillors of the City deliberated over, amended slightly and then adopted the disputed document. However, it is self-evident that that adoption was just the first [step] in the deliberative processes relating to the disputed document.*
8. *In the next phase of the deliberative process, the WAPC considered the disputed document for the purposes of determining whether or not to issue certification under regulation 12(4) of the Regulations for the purpose of authorising the advertisement of the disputed document.*
9. *In the event, the WAPC exercised its authority under regulation 12(3) of the Regulations and required the City to modify the disputed document, in accordance with the written instructions the City received from the WAPC. At that point in the deliberative process, the disputed document was subject to the modifications required by the WAPC. The disputed document was **modified** by the City in accordance with the WAPC's advice and instructions.*
10. *The **modified version** of the disputed document is the actual document that was released to the complainant by the City.*

Contrary to the public interest

11. *In your recent letter to the City, you invited the City to make written submissions to you as to why it would, on balance, be contrary to the public interest to give the complainant access to a copy of the disputed document.*
12. *In a substantial number of decisions published by Information Commissioners, they have consistently expressed the view – when considering the “deliberative process” exemption in clause 6 of Schedule 1 to the FOI Act that the disclosure of deliberative process documents **may be contrary to the public interest** for a number of reasons, including:*
 - (a) *if there is evidence that such disclosure would adversely affect the agency's decision-making process or that disclosure would, for some other reason, be demonstrably contrary to the public interest;*
 - (b) *where public disclosure would be prejudicial to the proper operation of government or the proper workings of an agency such that the right of access under the FOI Act is subordinate (see: Re BGC*

(Australia) Pty Ltd and Port Hedland Port Authority [2011]WAICmr 38;

- (c) in certain circumstances, where there is a public interest in agencies carrying out their deliberations on particular issues without those deliberations being undermined by the premature disclosure of relevant documents;*
- (d) where disclosure would not assist public debate as it would lead to confusion and may prejudice future negotiations;*
- (e) where disclosure of the requested documents would invite public scrutiny when the deliberative processes are ongoing and the State and local government agencies involved has not completed their consideration of draft policy documents;*
- (f) where the public interest is not served by the premature generation of debate on matters that may or may not eventually become a relevant part of the decision making process;*
- (g) where premature disclosure of deliberative process documents could potentially undermine essential processes involved in the administration of government - in this case, the confidentiality of the process of formulating; certifying and confirmation of the draft Local Planning Strategy document - that will to set the broad, long-term strategic planning framework for future development in the City over the next ten to twenty years;*
- (h) where the public interest would be best served by allowing deliberations to occur unobstructed (without a person or organisation "looking over the shoulders" of either the WAPC or the City), so that decisions can be properly undertaken without endeavouring to "second guess" what should or should not be included in a draft Local Planning Strategy document.*

Further consideration

- 13. The City accepts that an access applicant is not required to demonstrate that disclosure of the disputed document would be in the public interest but, rather, that the City bears the onus under the FOI Act of establishing that its disclosure would, on balance, be contrary to the public interest.*
- 14. The City also accepts that a conclusion that disclosure of the disputed document would, on balance, be contrary to the public interest cannot be made until the City has identified the public interest reasons that favour disclosure as well as the public interest reasons that weigh against disclosure and then weigh them against each other, to determine where the balance of the public interest lies.*

Public interest factors weighing in favour of disclosure

15. *The City acknowledges that there is a clear public interest in:*

- (a) *individuals and organisations being able to exercise their rights of access under the FOI Act, as the FOI Act is expressly intended to enable the public to participate more effectively in governing the State;*
- (b) *individuals and organisations having access to information about the processes of government decision-making;*
- (c) *State and local government agencies being accountable - and being seen to be accountable - for the manner in which they discharge their obligations on behalf of the general public in WA;*
- (d) *informing the public, wherever possible, of the basis upon which decisions directly affecting the public have been made and of members of the public having access to the material considered relevant to the decision-making process; and*
- (e) *the transparency of State and local government decision-making processes and in enabling interested parties to contribute to those processes where possible.*

Public interest factors weighing against disclosure

*The public interest factors **weighing against disclosure** consist of all of the factors described in sub-paragraphs (a) to (h) of paragraph 12 of these submissions.*

The City submits that when the public interest factors for and against disclosure are weighed and balanced, it is abundantly clear that it would, on balance, be contrary to the public interest to disclose the disputed document to the complainant - and to the world at large - for the following reasons.

*The City submits that - when Part 3 of the Regulations is carefully read – the structure of Part 3 makes it is clear that the Parliament of Western Australia intends that **all** of the public interest factors which weigh in favour of disclosure and accountability (as described in paragraph 15 of these submissions) are and will be fully addressed, met and satisfied.*

*Part 3 of the Regulations clearly evidences that it was - and is the express intention of the Regulations that all members of the public - including the complainant - **must** be consulted during the process of the development of draft Local Planning Strategy documents. That is their legal right and entitlement under the Regulations.*

However, in the City's submission, the Regulations also clearly manifest Parliament's intention that public participation in the preparation and development of draft Local Planning Strategy documents is intended to take place

only after the principal Western Australian planning authority, the WAPC, has certified that a draft Local Planning Strategy that has been drafted by a local government authority - complies with the requirements of regulation 11(2) of the Regulations.

*Once WAPC certification of a draft Local Planning Strategy is given, all members of the public have **the legal right** to:*

- *obtain copies of the WAPC certified draft Local Planning Strategy;*
- *make submissions to the relevant local government authority in relation to matters relevant to the WAPC certified draft Local Planning Strategy;*
- *expect the relevant local government authority to comply with its statutory obligations to review the WAPC certified draft Local Planning Strategy and to consider all submissions it receives and to support the draft Local Planning Strategy, with or without modification; and*
- *expect the relevant local government authority to further comply with its statutory obligations, following completion of its review of the WAPC certified draft Local Planning Strategy - to submit to the WAPC -*
 - (a) a copy of the advertised WAPC certified draft Local Planning Strategy; and*
 - (b) a schedule of the submissions received; and*
 - (c) particulars of any modifications to the advertised the WAPC certified draft Local Planning Strategy proposed by the local government.*

The disputed document – and the document released to the complainant by the City – are defined in regulation 77(g) of the Regulations as being a “planning instrument”.

Both the disputed document and the document released to the complainant comprise pieces of "subsidiary legislation" as that term is defined in section 5 of the Interpretation Act 1984 because they are planning instruments made under a written law of the State of Western Australia and they also have legislative force and effect.

The City observes that the Government of Western Australia regularly releases draft legislation (for example, the recent Planning and Development Legislation Amendment (Western Trade Coast Protection Area) Bill 2015) into the public arena for public comment and submissions, in virtually the same manner as the public consultation process set out in Part 3 of the Regulations.

The City submits that the process of drafting and settling subsidiary legislation is a confidential process, as it was in the process of preparing the disputed document for submission to the WAPC.

The disputed document was distributed to all Councillors of the City, in confidence, and whilst it was considered at the meeting of the Council on 27 October 2015, the disputed document was not tabled at that meeting and was annexed to the Minutes of the meeting as a Confidential Attachment. In effect, that means that whilst the minutes of the Council Meeting held on 27 October 2015 are available to the public, the disputed document is not.

The City submits that it is self-evident that there are no public interest factors which weigh in favour of disclosing the disputed document to the complainant – or to the public generally because:

- *the disputed document had not then and has not been certified by the WAPC as complying with the requirements of regulation 11(2) of the Regulations;*
- *the disputed document was assessed by the WAPC as not complying with the requirements of regulation 11(2) of the Regulations;*
- *because the disputed document was the subject of a direction by the WAPC to the City for several minor modifications, in order to ensure that the disputed document complied with the requirements of regulation 11(2) of the Regulations.*

The City submits that it is in the public interest for all members of the public to be given access to the draft Local Planning Strategy documents that have been certified by the WAPC.

In that regard, the City also notes that the complainant has been given a complete copy of the WAPC certified draft Local Planning Strategy, well in advance of any other member of the public and, in any event, prior to that document being advertised.

Summation

The deliberative processes of both the City and WAPC are still on foot as regards the finalisation of the draft Local Planning Strategy. Whilst the deliberative processes have concluded as regards the disputed document, that specific document is not, and will not become the WAPC endorsed City of Nedlands Local Planning Strategy.

The City submits that:

- *the deliberative processes in relation to the preparation of the Local Planning Strategy document should be allowed to continue without interruption and to be completed in accordance with the Regulations without the need to disclose the disputed document before that process is completed;*
- *there are no “good” public interest reasons why two versions of a draft Local Planning Strategy document should be in circulation in the public domain especially when the first version is an uncertified draft Local*

Planning Strategy document that has been amended and the second version is the WAPC certified and “correct” version of the draft Local Planning Strategy document, especially now that the public consultation and submission process in relation to the draft Local Planning Strategy is on foot;

- *the disclosure of the disputed document to the complainant and, in effect, to the world at large will not, in any way, assist public debate or the public consultation and submission process now on foot in relation to the WAPC certified draft Local Planning Strategy;*
- *the possibility exists that the disclosure of the disputed document could lead to confusion in the community about the process of finalising the draft Local Planning Strategy; and*
- *individuals who came into possession of a copy of the disputed document (in the event that it is released) may not understand how or why there are differences between the disputed document and the “correct” document and that, in itself, may prejudice some members of the public in preparing submissions to the City, in response to the public consultation process.*

Finally, the City submits that the complainant's FOI application and his subsequent appeal to the Information Commissioner are an unfortunate waste to the limited time and resources of your Office and of the City.

The City accepts that the complainant has his rights under the FOI Act. However, the City says that the provisions of Part 3 of the Regulations clearly provide that the complainant, and every other member of the WA public, have an unrestricted and unfettered right of access to copies of draft Local Planning Strategy documents that are being prepared for enactment but only after the proposed draft Local Planning Strategy has been certified by the WAPC as complying with the requirements of the relevant planning legislation.

In this instance, in the City's view, the complainant's interest in seeking a copy of the disputed document is a private interest, which is inconsistent with the public access and consultation process set out in Part 3 of the Regulations. The City submits that, with a little patience on the part of the complainant and a willingness to use his rights under Part 3 of the Regulations rather than resorting to the FOI process would, clearly, have saved an unnecessary diversion of time, money and resources.

The complainant's public interest submissions

37. The complainant provided public interest submissions in his letter to the agency dated 6 January 2016 seeking internal review of the agency's decision. In summary, the complainant submits as follows:

- *The [initial decision] fails to articulate why disclosure of the requested document would be prejudicial to the proper operation or the proper workings of City or any other governmental authorities such that the right of access under the FOI Act should be subordinate. Accordingly, [the*

initial decision-maker] *has not discharged the City's onus of establishing that disclosure of the requested document would, on balance, be contrary to the public interest.*

- *[A]ny deliberative processes of the City in respect of the approval process for the draft local planning strategy are complete, as the requested document has been formally adopted by the City Council. Any further deliberation or 'thinking' in respect of the local planning strategy (such as in relation to modifications required by the WAPC or considering submissions following the advertising period) will be separate and distinct deliberative processes.*
- The initial decision does not attempt to put forward any evidence that disclosure of the disputed document would adversely affect the agency's decision-making process or that disclosure of the disputed document would, for some other reason, be demonstrably contrary to the public interest.
- The initial decision selectively references *Re Martin and Ministry for Planning and Department of Land Administration* [2000] WAICmr 56, and omits significant elements of that decision. For example, paragraphs [38] and [48].
- *[The initial decision-maker's view] that the disclosure of the document 'at this stage' (i.e. following adoption by the City but prior to the certification by the WAPC) is contrary to the public interest is diametrically opposed to the [WAPC Local Planning Manual 2010].*
- *It is disingenuous for the City to claim that informing the community regarding the draft local planning strategy is contrary to the public interest when the guidelines which have been prepared to provide information and advice to local governments and others who are involved in preparing local planning strategies expressly encourages community engagement and consultation prior to submission to the WAPC.*

38. As noted at [15], the complainant provided further submissions to me in his letter dated 17 August 2016 in support of his claim that disclosure of the disputed document is in the public interest. In summary, the complainant relevantly submits that:

- *While the [Planning and Development Act 2005 (WA)] may be silent on the timing of disclosure of a LPS to the community, it is clear from the WAPC Planning Manual that it is not a 'confidential' process and suggests that it is best practice to initiate community involvement before preparation of the LPS...*
- The public interest in community participation in the decision-making process has not been satisfied by the public consultation process that took place when the agency prepared 'Our Vision 2030', as the agency claims, because the public consultation process for Our Vision 2030 is far more limited than for an LPS.

- The agency's objective has been to delay scrutiny. Public scrutiny of the agency's actions is long overdue.

Consideration

39. I consider that it may be contrary to the public interest to prematurely disclose documents while deliberations in an agency are continuing, if there is material which establishes that such disclosure would adversely affect the agency's decision-making process, or that disclosure would, for some other reason, be demonstrably contrary to the public interest: see for example, *Re West Australian Newspapers Pty Ltd and Western Power Corporation* [2005] WAICmr 10.
40. Having reviewed Part 3 of the Regulations, I accept that the statutory process in relation to the preparation and finalisation of a local government's local planning strategy is as set out at [6] of the agency's further submissions.
41. The agency accepts in its further submissions that the deliberative processes in relation to the disputed document have concluded. However, the agency claims that the deliberative processes of both the agency and WAPC are still on foot in relation to the finalisation of the draft LPS. While I accept that appears to be the case, none of the information presently before me persuades me that disclosure of the disputed document would adversely affect the integrity or otherwise of any future deliberations or decision-making of either the agency or the WAPC in relation to the LPS. The agency claims that 'the deliberative processes in relation to the preparation of the [LPS] should be allowed to continue without interruption' but has not explained, nor is it apparent to me, how any ongoing deliberations of either the agency or the WAPC in relation to the finalisation of the LPS will be interrupted by disclosure of the disputed document. From the information presently before me, it does not follow that disclosure of the disputed document will have any adverse effect on any future or ongoing deliberations in relation to the finalisation of the LPS.
42. I understand from the information on the agency's website that, in addition to the events described at [7]-[10] of its further submissions, the agency's draft LPS certified for advertising by the WAPC on 16 March 2016 (**the WAPC certified draft LPS**) was advertised by the agency for a six week period from 29 March 2016 until 6 May 2016; that the WAPC certified draft LPS is still publicly available on the agency's website (<http://yourvoice.nedlands.wa.gov.au/>); that the community consultation period to provide submissions to the agency in relation to the WAPC certified draft LPS ended on Friday 6 May 2016; that the agency has assessed the submissions received and, on 9 August 2016, recommended to Council modifications to that document; and that, on 16 August 2016, Council of the agency adopted the modified LPS – referred to by the agency as 'version 4' – for forwarding to the WAPC for endorsement. I note that version 4 of the modified LPS was attached to the Minutes of the Special Council Meeting held on 16 August 2016 and is publicly available at http://www.nedlands.wa.gov.au/sites/default/files/2016%20Special%20Council%20Meeting%20Minutes%20-%202016%20August_0.pdf.
43. Accordingly, as I understand it, the statutory process in relation to the preparation and finalisation of the agency's LPS is at the stage described at the eighth bullet point of [6] of the agency's further submissions. Consequently, to the extent that the agency has

made claims relating to the public consultation and submission process still being on foot, I have given little weight to those claims.

44. I do not agree with the agency's contention that the Regulations 'clearly manifest Parliament's intention that public participation in the preparation and development of draft [LPS] documents is intended to take place **only after**' the WAPC has certified that a draft LPS complies with regulation 11(2) (agency emphasis). The Regulations clearly require a local government to advertise a WAPC certified draft LPS but they appear to be silent on the disclosure of a draft LPS before its submission to the WAPC.
45. In any event, I do not accept that the absence of any requirement in the Regulations for a local government to publicly disclose a draft LPS before it has been submitted to the WAPC for certification, or the community consultation process under those Regulations, precludes access being given to such documents under the FOI Act other than in the circumstances as prescribed in the Regulations.
46. Although the agency states that it accepts that the complainant 'has his rights under the FOI Act', it seems to me that the agency, in effect, contends that the complainant's right of access, or the right of any member of the public, to access the disputed document under the FOI Act, or the draft LPS of any local government, is subordinate to the right of access under Part 3 of the Regulations.
47. Even if I were to accept the agency's claim that a draft LPS is subsidiary legislation, I do not accept that the process of drafting and settling subsidiary legislation is necessarily a confidential process. However, even if that is the case, I do not consider that the process of preparing and settling the agency's draft LPS is a confidential process. The WAPC certified draft LPS has now been publicly disclosed, as has the version of the modified LPS forwarded to the WAPC for endorsement. I acknowledge that the disputed document was not tabled at the Meeting and was annexed to the Minutes of the Meeting as a confidential attachment. However, even so, and even if the disputed document is not available for inspection to the public under the provisions of the LG Act, that does not mean that it is precluded from access under the FOI Act.
48. The FOI Act creates a general right of access to documents of State and local government agencies. Division 7 of Part 5 of the LG Act deals, among other things, with a limited right of the public to inspect records of the agency. However, section 5.97 specifically provides that nothing in Division 7 of Part 5 of the LG Act affects the operation of the FOI Act. Further, 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 the enactment is expressly stated to have effect despite the FOI Act. The LG Act contains no such express statement.
49. I accept that both my predecessors and I have recognised in previous published decisions that disclosure of deliberative process documents may be contrary to the public interest in the circumstances described at (a)-(c) of [12] of the agency's further submissions. However, in relation to the agency's claim that previous decisions of this office have recognised the public interests factors against disclosure described at (d)-(g) of [12] of the agency's further submissions, I have been unable to identify any such decisions, apart from observing that the public interest factors described at (d)-(g) of

[12] are almost identical to the public interest submissions made by the Public Transport Authority as described at [56] of my decision in *Re Travers and Public Transport Authority* [2015] WAICmr 20.

50. While I accept that the public scrutiny that may result from the disclosure of documents may not be in the public interest when the relevant deliberations in an agency are ongoing or have not been completed, I consider that is only the case when disclosure will undermine, hamper or adversely affect those continuing or future deliberations. I am not persuaded on the material before me that is the case here. Nor do I consider that the agency's claim that disclosure of the disputed document will result in the 'premature generation of debate on matters that may or may not eventually become a relevant part of the decision making process' has any application in the facts of this matter. As the agency acknowledges, its deliberations in respect of the disputed document have concluded – it adopted the disputed document and submitted it to the WAPC for certification. That document was subsequently modified, at the request of the WAPC; has been certified by the WAPC; and advertised to the public. Submissions in relation to that document have been received and assessed by the agency, the document has been modified by the agency and forwarded to the WAPC for endorsement. Most of the information in the disputed document is already in the public domain. I consider that disclosure of the disputed document will better inform the community and enable it to see for itself the statutory process relating to the finalisation of the draft LPS. In my view, disclosure will facilitate, rather than hinder, any future debate in the community.
51. Despite acknowledging the public interest factors that weigh in favour of disclosure at (a)-(e) of [15] of its further submissions, the agency claims that it is 'self-evident that there are **no** public interest factors which weigh in favour of disclosing the disputed document to the complainant ... or to the public generally' for the reasons given (my emphasis). I reject that claim and do not accept that the facts described at the three bullet points at the top of page 17 of this decision weigh against disclosure. Rather, I consider that there is a public interest in the community seeing the version of the draft LPS that Council of the agency approved and submitted to the WAPC for certification under regulation 12 of the Regulations.
52. In favour of disclosure, I agree with the agency, as it acknowledged in its initial decision, that there is a public interest in ratepayers in local government shires and cities being informed of the development of local planning scheme proposals being considered by their local government authority and the State Government which have the potential to significantly affect the future of their particular community. The agency also claimed in its initial decision that the public interest in the local community being informed about the proposal under consideration would be satisfied, to a significant extent, by the completion of the community consultation process set out in Part 3 of the Regulations. While I accept that the public interest in community participation in the decision-making process is satisfied to some extent by the public consultation process set out in Part 3 of the Regulations and the public consultation process that has already taken place in relation to the WAPC certified draft LPS, I do not consider that fact to be determinative of the question before me.
53. In relation to the agency's claim that there are 'no "good" public reasons why two versions of a draft [LPS] document should be in circulation to the public', I take that to mean that the agency considers that it would not be in the public interest for the draft LPS that was approved by the Council of the agency for submission to the WAPC for

certification under the Regulations (that is, the disputed document) and the modified version of that document as certified by the WAPC (that is, the WAPC certified draft LPS) to be in the public domain. I do not agree. In my opinion, there is a public interest in the public and, in particular, the ratepayers of the agency being able to see the differences between the two documents and knowing what modifications were made to the draft LPS after it was approved by the Council of the agency and submitted to the WAPC for certification under the Regulations, and the agency being accountable to the community for the modifications that were made to the draft LPS. In my view, the public interest in the transparency of the agency and accountability to its ratepayers for the draft of the LPS it submitted to the WAPC for certification under the Regulations will be furthered by the disclosure of the disputed document.

54. In relation to the agency's claim that disclosure of the disputed document could lead to confusion, I agree with the former Commissioner's view in *Re Coastal Waters Alliance of Western Australia Incorporated and Department of Environmental Protection and Anor* [1995] WAICmr 37 at [34] that 'the view that the public is unable to understand the difference between a draft document and a final report' – or in this case, the draft LPS submitted to the WAPC (the disputed document) and the draft LPS certified by the WAPC (the WAPC certified draft LPS) – is 'paternalistic and simplistic.' In my view, it is evident from the two documents that they are published on different dates and that they are different versions of the draft LPS. I also consider that it is clear that the disputed document is the version of the draft LPS considered by Council of the agency in October 2015 and that the WAPC certified draft LPS is the version of the draft LPS certified by the WAPC on 16 March 2016: see page (i) of the disputed document, page i of the WAPC certified draft LPS, and the information in the 'Schedule of Modifications' table on the next unnumbered page of the WAPC certified draft LPS published on the agency's website.
55. I do not accept the agency's claim that disclosure of the disputed document could lead to confusion in the community about the process of finalising the draft LPS. There is considerable information already available on the agency's website about the process and steps involved in finalising the draft LPS: for example, in the report relating to the draft LPS in the Minutes of the Meeting published at <http://www.nedlands.wa.gov.au/sites/default/files/2015%20Council%20Minutes%2027%20October.pdf>; the media release published by the agency in October 2015 after the Council adopted the draft LPS at the Meeting on 27 October 2015 at <http://www.nedlands.wa.gov.au/media-release/council-adopts-draft-local-planning-strategy>; and the information about the LPS published by the agency at <http://yourvoice.nedlands.wa.gov.au/local-planning-strategy1>.
56. In any event, it is within the agency's control to make additional information available to the community, for example on its website, to further explain and clarify the different versions of the draft LPS if necessary.
57. The agency also claims that 'the complainant's interest in seeking a copy of the disputed document is a private interest, which is inconsistent with the public access and consultation process set out in Part 3 of the Regulations'. Under section 10(2), a person's right to be given access is not affected by any reasons the person gives for wishing to obtain access or the agency's belief as to what are the person's reasons for wishing to obtain access. Nor do I accept that disclosure of the disputed document is

inconsistent with the public access and consultation process set out in Part 3 of the Regulations.

58. I do not accept the agency's submission that 'with a little patience on the part of the complainant and a willingness to use his rights under Part 3 of the Regulations rather than resorting to the FOI process would, clearly, have saved an unnecessary diversion of time, money and resources'. The complainant has exercised his legal right under the FOI Act to apply for access to a copy of the draft LPS considered by the Council of the agency at the Meeting and submitted to the WAPC for certification. By the agency's own submissions, the complainant does not have an express right to access that particular document under Part 3 of the Regulations. And although the agency has given the complainant a copy of the WAPC certified draft LPS, that is not the document to which the complainant sought access under the FOI Act.
59. I agree that the public interest factors acknowledged by the agency at (a)-(e) of [15] of its further submissions weigh in favour of disclosure in this case.
60. I consider that there is a general public interest in persons being able to obtain access to information held by the government – in this case, local government – and in the exercise of their rights of access under the FOI Act. As Hasluck J of the Supreme Court of Western Australia said in *Channel 31 Community Educational Television Ltd v Inglis* (2001) 25 WAR 147, '[i]t is apparent from [section] 3, that the objects of the Freedom of Information Act are to be achieved by creating a general right of access to State and local government documents'.
61. The agency confirmed in its letter to my office dated 24 March 2016 that it 'accepts that, in his FOI application, the complainant requested a copy of the draft [LPS] document that was approved by Council on 27 October 2015 and sent to the WAPC in early November 2015 ("the requested document").' As noted at [10], the agency also confirmed in that letter that '[i]n effect, on internal review, the City decided to give the complainant access to the final WAPC approved and certified version of the requested document and not the requested document'. In any event, the document to which the agency decided to give the complainant deferred access – the WAPC certified draft LPS – is a document that the agency is statutorily obliged to advertise to the public pursuant to the Regulations. Further, despite Council of the agency voting in October 2015 against closing the part of the Meeting that dealt with the draft LPS, the CEO advised the complainant in January 2016 – in response to his contention in his internal review request in January 2016 that the disputed document was available for inspection under the LG Act – that in the CEO's opinion, the Meeting could have been closed to members of the public such that the right of inspection to that document under section 5.95(3) of the LG Act would not apply.
62. I consider that the approach taken by the agency in dealing with the complainant's access application in this matter is inconsistent with the objects and intent of the FOI Act and the agency appears to have given little, if any, weight to promoting the purposes and objects of the FOI Act. In my view, the agency's actions in dealing with this matter are contrary to its obligation under section 4 of the FOI Act to give effect to the FOI Act in a way that assists the public to obtain access to documents.

63. As noted at [14], the agency advised me in its letter dated 17 August 2016 that it did not accept my views described in the above paragraph which I included in my preliminary view letter. The agency advised:

In the City's view, it is entitled to decide whether or not to give or refuse access to a document, in response to an access application made under the FOI Act, in circumstances where the City forms the view that a document is an exempt document.

For the reasons previously given, the City maintains its view that the disputed document was and is an exempt document. The City made its decision on access accordingly. The fact that you clearly hold a different view on the exempt status of the disputed document does not mean, nor could reasonably be interpreted to mean that the manner in which the City dealt with the complainant's access application was inconsistent with sections 3 and 4 of the FOI Act.

64. The agency also referred to a number of Supreme Court decisions that it claims 'provide clear guidance about the "objects and intent" of the FOI Act'.
65. I agree with the agency that it is entitled to decide whether or not to give or refuse access to a document, in response to an access application made under the FOI Act, in circumstances where the agency forms the view that a document is an exempt document. My views expressed at [62] above are based on the matters set out in [61] above, not on my finding that the disputed document is not exempt as claimed by the agency.
66. While I accept that some of the public interests in favour of disclosure have been satisfied to some extent by the public disclosure of the WAPC certified draft LPS, I do not consider that to be an argument for refusing access to the disputed document. As the former A/Commissioner said at [92] of *Re Whitely and Curtin University of Technology* [2008] WAICmr 24:

Since the introduction of the FOI Act, people are no longer entitled only to whatever information an agency chooses to disclose because as McKechnie J said at paragraph 84 of [Health Department of WA v AMA] life under the FOI Act is "...very different from life before it. If an agency fails to resolve a dispute with an applicant, the matters must be determined by the Information Commissioner". The FOI Act is intended to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and local government more accountable to the public.

67. As I have already observed, most of the information in the disputed document is already in the public domain.
68. I am not persuaded by the agency's claim that it is 'abundantly clear' that disclosure of the disputed document would, on balance, be contrary to the public interest for the reasons given by the agency.
69. I am not satisfied on the information before me that the disclosure of the disputed document would adversely affect the deliberative processes of the agency or the WAPC or that any other public interest would be harmed or adversely affected by disclosure of

the disputed document such that it would, on balance, be contrary to the public interest to disclose it. Nor am I persuaded that disclosure of the disputed document would be prejudicial to the proper operation of government or the proper workings of an agency such that the right of access under the FOI Act is subordinate.

70. In my view, the agency has not established that the disclosure of the disputed document would, on balance, be contrary to the public interest. Accordingly, I find that the disputed document is not exempt under clause 6(1) of Schedule 1 to the FOI Act.
71. In light of that finding, it is not necessary for me to consider whether any of the limits on exemption in clauses 6(2)-6(4) apply to the disputed document. However, if I were required to consider those limits, based on my examination of the disputed document, I am of the view that a considerable amount of matter in the document either appears in the internal manual of an agency or is merely factual or statistical. Accordingly, I consider that the limits on exemption in clauses 6(2) and 6(3) respectively would apply to that matter and it would not, in any event, be exempt under clause 6(1).
