OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2011232 Decision Ref: D0162013

Participants:

Adele Farina
Complainant

- and -

WA Country Health Service – South West
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – business cases for the Busselton Hospital redevelopment – section 30(f) – the requirements of a notice of decision – section 6 – whether documents are available for purchase or free distribution to the public – clause 1(1) – whether disclosure would reveal deliberations or decisions of an Executive body – clause 1(1)(b) – whether documents contain policy options or recommendations for possible submission to an Executive body – clause 1(2) – merely factual, statistical, scientific or technical matter – section 24 – deletion of exempt matter – whether practicable for agency to give access to document with exempt matter deleted – clause 1(5) – whether documents brought into existence for the purpose of submission for consideration by the Executive body.

Freedom of Information Act 1992: sections 6, 24, 30(f); Schedule 1, clauses 1(1), 1(1)(b), 1(2) and 1(5).

Police Force of Western Australia v Winterton (Unreported, WASC Library No 970646, 27 November 1997)
Re Edwards and Minister for Transport [2000] WAICmr 39
Re Environmental Defender's Office (Inc) and Ministry for Planning [1999] WAICmr 35
Re Martin and Ministry for Planning; Martin and Department of Land Administration [2000] WAICmr 56
Re Ravlich and Minister for Regional Development [2009] WAICmr 9
Re Terrestrial Ecosystems and Department of Environment and Conservation [2013] WAICmr 9
Re Watson and Minister for Forestry [2011] WAICmr 8

Hansard, Legislative Assembly, 24 November 1992, pages 7017-7023

DECISION

The agency's decision is confirmed. I find that Documents 1 and 2 are exempt under clause 1(1) of Schedule 1 to the FOI Act.

Sven Bluemmel
INFORMATION COMMISSIONER

31 May 2013

REASONS FOR DECISION

1. This complaint arises from a decision made by the WA Country Health Service – South West ('the agency') to refuse Hon. Adele Farina ('the complainant') access to two documents under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. In 2005, the former State Government of Western Australia proposed to build a new hospital for Busselton in Vasse Newtown and approved the business case for that project in early 2008.

3. Following the state election in September 2008, the current State Government confirmed its support for the building of a new hospital for Busselton. However, the State Government proposed to build the new Busselton Hospital, also known as the new Busselton Health Campus, at the existing hospital site. On 2 December 2010, the State Government announced additional funding for the new hospital with construction scheduled to take place from 2012 to 2014.

4. This matter relates to two access applications from the complainant for various documents relating to the Busselton Hospital redevelopment. Both applications appear to have been dealt with together as one application by the agency.

5. The complainant's first access application was made on 17 January 2011 to the Department of Health, for access to all documents relating to the provision of chemotherapy services for the new Busselton Hospital. In consultation with the Department of Health the complainant agreed to reduce the scope of that application to the following four items:

> "*1. Sinclair Knight Mertz Report – 14/09/06 – WA Department of Health New Busselton Hospital Sub Regional Hospital – Technical Evaluation of Site Options.*
> *2. Price Waterhouse Report – 07/07/06 – New Busselton Hospital/Sub regional Hospital & CHC – Financial Evaluation Report.*
> *3. Business Case for the Busselton Hospital redevelopment dated 21/09/07.*
> *4. Any and all briefing notes and memorand*[a] *to the Minister for Health, the Treasurer and/or Treasury concerning the provision of chemotherapy services as part of the new Busselton Hospital redevelopment."*

('the First Application').

6. The complainant made a second application on 21 February 2011 to the Department of Health for access to *"the business case for the proposed new Busselton Hospital Redevelopment"* ('the Second Application'). This was a different business case from the one requested in item 3 of the First Application.

7. The Department of Health transferred both applications to the agency on 22 February 2011 and advised the complainant accordingly. By email dated 24 February 2011 the complainant agreed to an extension of time to 4 April 2011 for the agency to deal with her application.

8. By notice of decision dated 4 April 2011, the agency advised the complainant that item 1 of the First Application was a public document and provided her with a website link to it. The agency gave the complainant access to edited documents within the scope of items 2 and 4. However, it refused the complainant access, in full, to item 3 – the *"Business Case for the Busselton Hospital redevelopment dated 21/09/07"* – on the ground that it was exempt under clause 1(1) (Cabinet and Executive Council) of Schedule 1 to the FOI Act.

9. The agency gave no notice of decision in relation to the Second Application. Neither was any reference made to it in the agency's decision of 4 April 2011 with respect to the First Application.

10. The complainant applied for internal review of the agency's decision with respect to items 2, 3 and 4 of the First Application. The complainant further queried whether her Second Application had been combined with her First Application. The complainant advised the agency that her Second Application was for a different business case to that requested in item 3 of the First Application and explained that "[t]*he Barnett Government has made substantial changes to the new Busselton Hospital redevelopment since being elected to government, including a decision to change the site of the hospital, this would have impacted on the business case necessitating a new business case to be prepared. My* [Second Application] *sought access to the new Busselton Hospital Business Case prepared under the Barnett Government."*

11. By letter dated 3 May 2011, the agency acknowledged receipt of the complainant's request for internal review and confirmed that it had dealt with both applications together in its notice of decision of 4 April 2011.

12. On 18 July 2011, the agency varied its initial decision. The agency gave the complainant additional material from the edited documents identified in items 2 and 4, but confirmed its decision to refuse access to the business case (item 3) sought in the First Application. The agency also refused access to the business case sought in the Second Application on the ground that it was exempt under clause 1(1) of Schedule 1 to the FOI Act.

13. On 18 August 2011, the complainant applied to me for external review of the agency's decision to refuse access to two documents under clause 1(1) of Schedule 1 to the FOI Act, being the two business cases sought in the First and Second Applications.

REVIEW BY THE INFORMATION COMMISSIONER

14. Following the receipt of this complaint, I obtained the agency's FOI file maintained in relation to the First and Second Applications and the documents the subject of the agency's notices of decision.

15. In her application for external review, the complainant submitted that the agency did not comply with s.30(f) of the FOI Act because it failed to provide reasons for its decision not to release the two business cases and it did not detail or refer to any material on which its findings were based. In addition, the complainant stated that "[t]*he Department advised by email dated 8 April 2011 that* [the Second Application] *had been combined with* [the First Application] *and that the Notice of Decision dated 4 April 2011 related to both Applications, however this is not explicitly or implicitly evident in the Notice of Decision. The matter was not addressed at all in the Notice of Decision."*

16. Section 102(1) of the FOI Act provides that the onus is on the agency to establish that its decision is justified or that a decision adverse to another party should be made. If an agency decides to refuse access to a document, s.30(f) of the FOI Act provides that the agency must include the following details in its notice of decision:

    - the reasons for the refusal;
    - the findings on any material questions of fact underlying those reasons; and
    - reference or references to the material on which those findings are based.

17. In this case, I consider that both the agency's initial and internal review decisions in relation to the First and Second Applications are deficient because they do not comply with the statutory requirements of section 30 of the FOI Act. In particular, they do not state the agency's findings on the material questions of fact or the factual basis underlying its reasons for refusing access to the two business cases. Neither notice explained why the exemption in clause 1(1) applied to the business cases or referred to the sources of information on which those findings were based, as required by section 30(f). It is not sufficient compliance with s.30 solely to cite, as the agency did here, the relevant exemption claimed.

18. The obligation to provide applicants with notices of decision that contain all of the information prescribed by s.30 is intended to ensure that the true basis of a decision is clearly explained to the applicant. An applicant is entitled to reasons for the agency's decision. My office has advised the agency of its obligations that are clearly set out in s.30(f) of the FOI Act.

19. In light of that, my officer made further inquiries with the agency. The agency responded on 23 August 2012 and 11 September 2012, providing me with further information and documents in support of the application of clause 1(1) and, in addition, claimed that the two documents were also exempt under clause 1(1)(b). However, the agency advised that it did not claim an exemption for merely factual, statistical, scientific or technical matter in the two documents, to which the limit in clause 1(2) applied. The agency confirmed that it would arrange for the partial release of the two documents, edited so that they only disclosed the factual, statistical, scientific or technical matter to which clause 1(2) applied.

20. On 20 and 27 September 2012, my officer sought advice from the agency as to whether edited copies of the two documents had now been given to the complainant. On 28 September 2012, the agency advised that it would take some time to edit those documents. It referred to the volume of material in the two documents that it was required to review prior to any editing and review by the Regional Director of the agency.

21. On 23 October 2012, the agency confirmed with my office that it was finalising the review of the two documents for partial release to the complainant. However, by letter dated 5 November 2012, the Regional Director of the agency advised that following a detailed review of the material that might be released, the agency was *"unable to separate out the 'factual, statistical, scientific or technical' matter in the documents, as referred to in Clause 1(2), without revealing the nature of the decision making process. On this basis, I do not believe that it will be possible for us to release redacted versions of Documents 1 and 2 to Ms Farina."*

22. By letter dated 21 February 2013, after considering the material then before me, including the complainant's and the agency's submissions, I informed the parties of my preliminary view of the complaint and my reasons. It was my preliminary view that Documents 1 and 2 were exempt under clauses 1(1) and 1(1)(b) of Schedule 1 to the FOI Act and the agency's decision to refuse access to those documents was justified.

23. In light of my preliminary view, I invited the complainant to withdraw her complaint or provide me with further submissions relevant to the matters for my determination. The complainant did not accept my preliminary view and made additional submissions on 6 March and 21 March 2013.

Procedures for dealing with a complaint on external review – whether agency should be allowed to make additional claims for exemption during external review

24. In her submissions, the complainant took issue with the agency making additional claims for exemption under the FOI Act, during the course of this external review. In particular, the complainant stated:

> *"Agencies should not be permitted to add new exemption claims at the external review stage. Applicants are severely disadvantaged in fighting decisions by agencies to refuse access and the practice of agencies to not specify grounds for refusal and to not specify reasons for their decisions at the appropriate time and then add new exemption claims at the external review stage further compounds the disadvantage for applicants, flies in the face of the spirit of the FOI Act and should not be entertained."*

25. I note the statutory framework for my dealing with a complaint is set out in section 70 of the FOI Act. In order to deal with a complaint, I may obtain information from such persons and sources and make such investigations and inquiries as I think fit: see s.70(1). I also must ensure that the parties to a complaint are given a reasonable opportunity to make submissions to me: s.70(3). In particular, I am not bound by the rules of evidence: s.70(2).

26. In the circumstances, both the complainant and the agency have been advised of the other's claims and given the opportunity to respond and to make submissions to me so that I may properly consider the matters before me. It is open to either party to change its views during that process, particularly where that may lead to conciliation.

27. In addition, section 76(1) of the FOI Act provides that, in dealing with a complaint under the FOI Act, I have the power to decide any matter in relation to the access application that could, under the FOI Act, have been decided by the agency.

28. I recognise the complainant may have concerns with what she considers to be the agency finding means to refuse access. However, in the present case, I note that the agency maintained its original claim for exemption under clause 1(1) and only specified an additional claim under clause 1(1)(b) (which is a sub-set of clause 1(1)) during this external review, for particular matter within the disputed documents. In any event, regardless of any multiple claims for exemption, my role is to determine whether the particular document is, or is not, exempt under the FOI Act, including whether it is exempt under one or more exemptions set out in Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENTS

29. There are two documents in dispute in this matter. They are as follows (together 'the disputed documents'):

- Document 1 is a document entitled *"Business Case for Busselton Hospital for the WA Country Health Service Version 2.5 – 21 September 2007"* comprising 188 pages. This document was identified by the agency as coming within item 3 of the First Application.

- Document 2 is an undated document entitled *"Business Case Analysis for Busselton Health Campus Redevelopment"* comprising 33 pages. This is the only document identified by the agency as falling within the scope of the Second Application, described by the complainant as the 'Business Case for the new Busselton Hospital Redevelopment prepared for the Barnett Government'.

ARE THE DISPUTED DOCUMENTS AVAILABLE TO THE PUBLIC?

30. The complainant has submitted that there was no basis for the agency to deny her access to the disputed documents under the FOI Act because they are 'public documents'. In particular, the complainant claimed that due to certain actions, Documents 1 and 2 were placed into the public domain. In particular, the complainant submitted that Documents 1 and 2 are already in the public domain because:

- At a public meeting of about 200 people, the Member for Vasse held Documents 1 and 2 in his hand and identified each of Documents 1 and 2; read from both Documents 1 and 2 at that public meeting; and invited

people at that meeting to visit his electorate office to view Documents 1 and 2.

- The Member for Vasse is a member of the public. The mere fact that the Member for Vasse had Document 1 in his possession at the public meeting is evidence that Document 1 is a public document. In possessing Document 2 in his capacity as the Member for Vasse and reading from it at a public meeting, the Member for Vasse made Document 2 a public document.

- The Member for Vasse was not a member of the Expenditure Review Committee ('the ERC') or the Cabinet for which Document 1 is alleged to have been prepared. If Document 1 is not a public document, the Member for Vasse should not have the document in his possession.

- As the Member for Vasse is not always present at his electorate office due to other parliamentary commitments, he is not in a position to categorically state that people have not accessed Documents 1 or 2 at his electorate office following his invitation to do so. A statement to this effect by the agency amounts to hearsay. It would be reckless and improper to rely on hearsay in forming my decision.

- The public meeting was not recorded so it is difficult for the complainant to provide evidence of the actions of the Member for Vasse at the meeting. Although she does not have the attendance record for the meeting, the complainant advises that she can identify some of the people in attendance at the meeting and is confident they would support her account. The complainant is willing to approach these people to obtain statements from them and to sign a statutory declaration in support of her account of events.

- The complainant claims that I had not identified any evidence on which I had relied in forming my view that Documents 1 and 2 are not public documents. The complainant refutes the agency's advice that Documents 1 and 2 were not public documents and that those documents had not been made available to members of the public to view at the Member for Vasse's electorate office.

- The former Minister for Health ('the former Minister') responsible for the Busselton Hospital project regularly provided her with briefings and updates over the period of 2005 to 2008 and provided her with a copy of Document 1. Since the complainant is a member of the public, the mere fact that the former Minister provided her with a copy of Document 1 means that Document 1 is a public document and she should not be denied access to that document. The complainant advises that Document 1 has since disappeared from her office around the time a former staff member left her employment, hence her access application.

- I had given greater weight to the claims of the agency over the complainant's claims, which she submits can be substantiated if she is permitted reasonable time. The complainant considers that I should identify and provide her with evidence to show that Documents 1 and 2

were not provided to the Member for Vasse; evidence of the inquiries made by the agency with the Member for Vasse with regard to her claims; evidence that the Member for Vasse denies that Document 1 was made available to him; and evidence that the Member for Vasse denied Document 1 was made available to the public to view at his electorate office.

- "*In your letter of 21 February 2013 containing your preliminary decision you state at page 5 paragraph 2 that* – "If Document 1 and 2 are available to the public, then it necessarily follows that you do not have a right of access to those documents under the FOI Act". *I assume this statement contains a typographical error and what you meant to say was that if the documents have been made available to the public then I would have a right to access the documents under the FOI Act. I would be obliged if you would confirm if I am correct in my assumption."*

31. I have considered the complainant's submissions. There are a number of issues arising from the complainant's claims. First, if both Documents 1 and 2 are already available to the public this would mean that the access provisions in the FOI Act would not be applicable to those documents: see s.6 of the FOI Act.

32. Section 6(a) of the FOI Act states:

> "***6. Access rights etc. in Parts 2 and 4 do not apply to documents that are already available***
>
> *Parts 2* [access to documents] *and 4* [external review; appeals] *do not apply to access to documents that are –*
>
> *(a) available for purchase by the public or free distribution to the public".*

33. If the disputed documents are available for purchase or free distribution to the public, then it necessarily follows pursuant to s.6(a) of the FOI Act, that the complainant does not have a right of access to those documents under the FOI Act.

34. It is clear from my inquiries that Documents 1 and 2 are not available for purchase by the public. I have therefore considered whether Documents 1 or 2 are available for free distribution to the public. In *Terrestrial Ecosystems and Department of Environment and Conservation* [2013] WAICmr 9 at [55]-[58], I considered the meaning of the term *'free distribution'* in s.6(a) of the FOI Act and concluded at [58]:

> "*The phrase 'free distribution' in s.6(a) of the FOI Act is used in the context of the alternative availability of 'purchase by the public'. The Macquarie Dictionary (5th edition, 2009) defines 'free' in context to mean* "provided without, or not subject to, a charge or payment..." *and 'distribution' and 'distribute' to mean* "the act of distributing; the state or manner of being distributed..." *and* "deal out; allot; to disperse through a space or over an area; spread; scatter". *In my view, the requested*

document is available for'free distribution' to the public if that document is given out at no cost to the public."

35. Based on my inquiries, there is nothing before me that demonstrates that Documents 1 or 2 are currently available for 'free distribution' to the public. That is, if a member of the public were to conduct an online search for a copy of the disputed documents or approach the Department of Health, the agency or any other agency for a copy of those documents, they are not currently given out for free outside of the FOI Act.

36. Further, from my examination of the agency's FOI file, there are documents indicating that the agency had consulted the Member for Vasse with respect to the complainant's claims, who confirmed that Document 1 was not made available to the public. The complainant has provided me with no new material in support of her submissions other than expanding on those claims. Even if it were established that the disputed documents were once quoted from at a public meeting or given some restricted distribution (which I do not accept is the case), I do not consider that automatically equates to those documents being available for free distribution to the public. The relevant question for my consideration under s.6 of the FOI Act is whether the disputed documents are available for free distribution to the public, which connotes the requirement of being available at the present time. From my inquiries, neither Document 1 nor 2 is presently available to the public.

37. In addition, the complainant's submissions that the disputed documents are in the public domain are not relevant to my consideration of whether the disputed documents are exempt under clause 1(1). Matter is exempt under clause 1(1) if it is matter of the kind as described in that exemption. Clause 1(1) is only limited by clauses 1(2)-1(5). Clauses 1(2)-1(5) do not contain a public interest test. Nevertheless, as noted, if the complainant had established that Documents 1 and 2 are available for free distribution to the public, it would not have been necessary for her to have made an access application and I would have no jurisdiction on this issue.

38. In the absence of any evidence to the contrary, it is not apparent to me that either Document 1 or Document 2 is available for purchase or free distribution to the public. I have therefore considered whether the exemption provisions in clause 1 of Schedule 1 to the FOI Act apply, as claimed by the agency.

THE EXEMPTION – CLAUSE 1: CABINET AND EXECUTIVE COUNCIL

39. The agency claims that the disputed documents are exempt under clause 1(1) and, in addition, that specific parts of those documents are also exempt under clause 1(1)(b) of Schedule 1 to the FOI Act.

40. Clause 1 of Schedule 1 to the FOI Act, insofar as it is relevant, provides:

> ***"1. Cabinet and Executive Council, deliberations etc. of***
>
> *(1) Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body, and, without*

> *limiting that general description, matter is exempt matter if it —*
>
> *(a) …*
>
> *(b) contains policy options or recommendations prepared for possible submission to an Executive body;*
>
> *(c)-(f) ….*
>
> *(2) Matter that is merely factual, statistical, scientific or technical is not exempt matter under subclause (1) unless —*
>
> *(a) its disclosure would reveal any deliberation or decision of an Executive body; and*
>
> *(b) the fact of that deliberation or decision has not been officially published.*
>
> *(3) ...*
>
> *(4) ...*
>
> *(5) Matter is not exempt by reason of the fact that it was submitted to an Executive body for its consideration or is proposed to be submitted if it was not brought into existence for the purpose of submission for consideration by the Executive body.*
>
> *(6) In this clause **Executive body** means —*
>
> *(a) Cabinet;*
>
> *(b) a committee of Cabinet;*
>
> *(c) a subcommittee of a committee of Cabinet; or*
>
> *(d) Executive Council."*

41. Clause 1(1) gives a general description of matter that is exempt under clause 1 – that is, the deliberations or decisions of an Executive body. Specific kinds of exempt matter are then set out in paragraphs (a)-(f) of clause 1(1). Paragraphs (a)-(f) of clause 1(1) do not limit the general exemption in clause 1(1). As relevantly put in the debates following the Second Reading of the Freedom of Information Bill 1992 ('the FOI Bill'), the former Minister for Justice with carriage of that Bill said: *"All that is intended by paragraphs (a) to (f) is to make obvious some of what is covered by the exemption"* : see *Hansard,* 24 November 1992, page 7018.

42. In *Re Watson and Minister for Forestry* [2011] WAICmr 8 at [10], I considered that the purpose of the exemption in clause 1 is to protect the confidentiality of the deliberations and decisions of Cabinet and other Executive bodies (as defined in clause 1(6)). The exemption in clause 1(1) is limited by clauses 1(2)-1(5).

Clause 1(1) – reveal the deliberations or decisions of an Executive body

The agency's submissions

43. In its internal review decision dated 18 July 2011, the agency advised the complainant that access to the disputed documents was denied under clause 1(1) as both remain *"part of the supporting documentation for the current Business Case."* The agency provided further information to my office in correspondence dated 23 August 2012, 11 September 2012, 7 December 2012 and 23 January 2013. In brief, the agency submitted as follows:

    - The agency maintains its claim for exemption under clause 1(1) of Schedule 1 to the FOI Act for the disputed documents because, if disclosed, they would reveal the deliberations or decisions of an Executive body.

    - Document 1 was subject of a decision by the ERC on 27 February 2008. The ERC was a committee of Cabinet, an Executive body. The agency provided me with a copy of that decision.

    - Document 2 was subject of a decision by Cabinet on 23 November 2010. The relevant Executive body is Cabinet. The agency provided me with a copy of that relevant Cabinet Submission, which attaches Document 2.

The complainant's submissions

44. In her application for external review to my office dated 18 August 2011 and further letters to me dated 6 and 21 March 2013, the complainant made the following submissions:

    - The agency erred in refusing access to the disputed documents under clause 1(1) and the disputed documents should be released in full. *"Schedule 1 Clause 1(1) exemption applies to documents submitted to an executive body or which contain recommendations prepared for submissions to an executive body. Business cases are not prepared for submission to an executive body, they are prepared as a requirement of Treasury… The Busselton Hospital Business Case is not an exempt matter pursuant to Schedule 1 Clause 1(1)."*

    - *"It is in the public interest to have access to a business case on a project being funded by public monies. The public has a right to scrutinise the expenditure of public money by government. A business case is critical to this scrutiny and should be released to the public, especially after the decision has been made. If business cases are not released, the public are denied the opportunity to effectively scrutinise decisions made by governments. The public interest test favours release of the document in full."*

    - *"Members of the public should not be refused access to business cases. If governments use business cases to assist them to make decisions, these*

documents should be available to the public. Governments cannot be held to account if the public are denied access to these documents. This flies against our democratic system of government and the spirit of the FOI Act."

- *"… there exists precedent for the release of business cases. This precedent should not be ignored. Due regard and appropriate weighting should be given to this precedent."*

- Document 1 is not exempt under clause 1(1) because if disclosed it would not reveal the deliberations or decisions of an Executive body.

- Document 1 does not and cannot reveal 'decisions' of the ERC, only the ERC decision sheet can disclose the decision of the ERC.

- Document 1 does not and cannot reveal the 'deliberations' of the ERC for the following reasons:

    - The decision to build the new Busselton Hospital and the services to be provided at the new facility was announced by the former Minister for Health ('the former Minister') on 24 October 2005, some two years before Document 1 was produced.

    - The October 2005 decision was reaffirmed by the former Minister on 4 September 2006 some 12 months before Document 1 was produced. In that statement the former Minister identified the location of the new Hospital would be at Vasse.

    - The October 2005 decision, reaffirmed in September 2006, was again reaffirmed by the former Minister on 29 May 2007 some four months before Document 1 was produced and some nine months before the ERC meeting.

    - Over the period of the October 2005 and 29 May 2007 statements there was no variation to the services to be provided at the new facility. These decisions had already been made and remained consistent throughout the period.

    - The 29 May 2007 statement by the former Minister announced the detailed business case had been completed; architectural drawings would begin later in the year; and planning approval was expected by August 2007. The former Minister reaffirmed the Vasse Newtown site as the location for the new facility.

    - There was no announcement by the former Minister following the ERC meeting in February 2008, suggesting no variations or at least no significant variations were made by the ERC at the meeting to warrant a further statement by the former Minister.

- The 26 June 2008 statement by the former Minister announced the appointment of architects; reaffirmed earlier statements in relation to services to be provided; and announced an increase in funding allocation for building the new facility.

- If the ERC meeting in February 2008 considered and decided on an increase in funding for the new facility, this was made public on 26 June 2008 and therefore should not be the basis on which access to the document is denied. In any event, this information could have been redacted from Document 1.

- Document 2 is not exempt under clause 1(1) because if disclosed it would not reveal the deliberations or decisions of an Executive body.

- Document 2 does not and cannot reveal 'decisions' of Cabinet, only the Cabinet decision sheet can disclose the decision of Cabinet.

- Document 2 does not and cannot reveal the 'deliberations' of Cabinet for the following reasons:

  - The decision to relocate and build the new Busselton Hospital on the current site as opposed to the Vasse site was an election promise which was made before Document 2 was prepared. Even if Document 2 provides an analysis of the various sites and recommendations, the fact is the decision had already been made.

  - In a story in the Busselton Dunsborough Mail titled "*The hospital stays put*" (edition 10 December 2008) it was reported that the decision to build the new hospital on the current site was made by the Minister for Health ('the Minister') on recommendation of the Department of Health, not by Cabinet or based on any business case. The story was based on answers provided by the Minister to questions asked in Parliament the previous week.

  - The decision to build the new hospital on the current site was not a Cabinet decision; it was an election promise which was given effect by a decision of the Minister.

  - The Cabinet decision to allocate additional funds from the Royalties for Regions Fund towards the project was announced by the Minister on 2 December 2010.

  - In the unlikely event that Document 2 contained other information that had not been made public by the Minister this information could have been redacted from Document 2 before its release.

  - *"The mere fact that a document was attached to* [a Cabinet] *submission is not proof that the document was considered by* [Cabinet] *in making its decision."*

Consideration

45. First, I note the complainant has made a number of submissions that disclosure of the disputed documents would be in the public interest. Many exemptions in Schedule 1 to the FOI Act incorporate a public interest test which specifically requires a consideration of the public interest in disclosure. However, clause 1 is not subject to a public interest test. Therefore, there is no scope for me to consider the complainant's arguments as to whether disclosure of the disputed documents would be in the public interest.

46. The exemption in clause 1 is considered as protecting an essential public interest in maintaining the confidentiality of Cabinet discussions, among other things, which is a fundamental part of the Westminster system of Government: see *Re Edwards and Minister for Transport* [2000] WAICmr 39 at [23]. Extracts from the debates following the Second Reading of the FOI Bill outline the consideration given to the overriding public interest that clause 1 is designed to protect. In those debates, as recorded in *Hansard* on 24 November 1992, the former Minister for Justice considered the purpose of clause 1 and said at page 7022:

> *"... We must ensure that discussions at Cabinet and minutes, or comment sheets which go to Cabinet, should be as strong as they can possibly be and that we do not encourage a situation where Ministers or agencies feel constrained in commenting about another Minister's minute because they might be available under FOI. That is not the objective. Discussions at Cabinet level should be as robust as we all want them to be and as well informed as we want them to be. That is the reason for the exemption and why the greater public interest in having those robust discussions and the documentation required to enable Cabinet to reach the best decision. That is of bigger public interest than giving people the opportunity to know what goes on in Cabinet."*

47. The intention that emerges from those debates is that clause 1 recognises the greater public interest in protecting the ability of Cabinet to maintain robust discussions and that public interest overrides the interest in providing members of the public the opportunity to know the deliberations of Cabinet. As noted earlier, clause 1 is only limited by clauses 1(2)-1(5).

48. The complainant has further submitted that there are precedents for the release of business cases and that I should have due regard to those precedents. However, I do not agree that the release of a particular business case in one instance creates a precedent for *all* business cases. Each matter before me is subject to the particular circumstances of the case. In the present case, I have considered whether the disputed documents are exempt under clause 1(1) as claimed.

Would disclosure of the disputed documents reveal the deliberations or decisions of an Executive body?

49. Clause 1(1) of Schedule 1 to the FOI Act provides that "*Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive*

body." The term 'Executive body' is defined in clause 1(6) to mean Cabinet; a committee of Cabinet; a subcommittee of a committee of Cabinet; or Executive Council.

50. In short, the complainant submits that the disclosure of the disputed documents would reveal neither the deliberations nor the decisions of an Executive body. The complainant submitted, among other things, that this was because the decision to build the new hospital was not an ERC or a Cabinet decision, but was an election promise given effect to by a decision of the former Minister. The complainant also submitted that the disputed documents would not reveal the 'decision' of an Executive body because only the relevant decision sheet can disclose the decision.

51. In considering the complainant's submissions, it is necessary to understand the terms in clause 1(1) and what kinds of documents are captured by the provision. The terms 'deliberations' and 'decisions' in clause 1(1) are not defined in the FOI Act. In *Re Environmental Defender's Office (Inc) and Ministry for Planning* [1999] WAICmr 35 and in *Re Edwards and Minister for Transport* [2000] WAICmr 39, the former Commissioner took the view that the general description "*deliberations or decisions*" in clause 1(1) meant, respectively, 'active discussion or debate' and 'formal decisions made in Cabinet'.

52. The meaning of the word 'deliberations' in clause 1(1) was further considered by the former Acting Information Commissioner in *Re Ravlich and Minister for Regional Development* [2009] WAICmr 9. In that case, the former A/Commissioner at [45] took the view that the word 'deliberations' extends to matter that discloses that an Executive body has gathered information on, considered, analysed or looked at strategies in relation to, a particular issue.

53. In reaching that view, the former A/Commissioner took guidance from the decisions of the Commonwealth Administrative Appeals Tribunal which considered the equivalent provision to clause 1 in the *Freedom of Information Act 1982* (Cth). The former A/Commissioner said at [36]-[38] in *Re Ravlich*:

> *"36. The meaning of* 'deliberation or decision' *in s.34(1) of the* Freedom of Information Act 1982 *(Cth) ('the Commonwealth FOI Act') – which is an equivalent provision to clause 1 – was considered by the Administrative Appeals Tribunal of Australia ('the Tribunal') in* Re Toomer and Department of Agriculture, Fisheries and Forestry *[2003] AATA 1301; (2003) 78 ALD 645. In that case, Deputy President Forgie reviewed the legislative framework and the authorities and accepted that the correct approach to determining the meaning of words such as 'decision' and 'deliberation' is to have regard to the ordinary meanings of those words; their context; and the policy considerations underlying the provision, citing the decision of the High Court in* Australian Broadcasting Tribunal v Bond *([1990] HCA 33; 1990) 170 CLR 321.*
>
> *37. In taking that approach, the Tribunal concluded that the Commonwealth FOI Act expressed competing policy considerations in relation to access to information but that the balance to be*

achieved between those competing interests is that the right of access to documents is specifically limited by the exemptions and exceptions contained in the Act. The Tribunal said at [88]:

> "The protection of Cabinet documents of the type specified has been seen as the protection of an essential public interest and so all its deliberations and decisions are protected as provided by s.34(1)(d). Taking its deliberations first, this means that information that is in documentary form and that discloses that Cabinet has considered or discussed a matter, exchanged information or discussed strategies. In short, its deliberations are its thinking processes be they directed to gathering information, analysing information or discussing strategies. They remain its deliberations whether or not a decision is reached. Its decisions are its conclusions as to the courses of action that it adopts be they conclusions as to its final strategy on a matter or its conclusions as to the manner in which a matter is to proceed. If a document discloses such deliberations or decisions then, as Deputy President Hall said in Anderson and Department of Special Minister of State No.2 *[1986] AATA 79; (1986) 11 ALN N239:*
>
> > *'It is not necessary that the decision or deliberation should be quoted verbatim. To construe s.34(1)(d) otherwise would be to place a premium upon verbal accuracy and to require a precision of expression in government documents that could only frustrate rather than promote the proper and efficient conduct of government. Whether, in a particular case, disclosure of a document would involve the disclosure of a decision or deliberation of Cabinet is a question of fact to be decided in the light of all the circumstances.'* (paragraph 27)."

38. I agree with the views expressed by the Tribunal in Re Toomer *with regard to the approach to be taken to the interpretation of clause 1 and also with the comments of Deputy President Hall in* Anderson and Department of Special Minister of State No.2 *[1986] AATA 79; (1986) 11 ALN N239."*

54. The former A/Commissioner then considered the ordinary meaning of the words in clause 1(1) and the policy reasons underlying clause 1. In ascertaining the meaning of the clause, the A/Commissioner considered the debates following the Second Reading of the FOI Bill and said at paragraphs [44]-[46]:

*"44. The extracts from the Debate on the Bill cited here indicate that Parliament intended the meaning of 'deliberations' to include not only its ordinary meaning of consideration, discussion or debate by a particular Executive body – the Australian Concise Oxford Dictionary, 4th edition, 2004 defines 'deliberation' as: "**1** careful*

*consideration. **2 a** the discussion of reasons for and against. **b** a debate or discussion...") – but also information that discloses that certain matter was put to the Executive body at that meeting for its information or consideration as well as particular categories of matter. The intention that emerges from the Debate is that Ministers and their advisers should be able to engage in unconstrained exchanges of opinion which, if disclosed, could reveal the deliberations or decisions of an Executive body.*

45. Although I agree with the view of the former Commissioner in Re Edwards *that the word 'deliberations' in clause 1(1) includes active discussion and debate by an Executive body, I do not consider that it is limited to that concept. Having reviewed the authorities; the ordinary meaning of 'deliberations'; the policy reasons underlying clause 1; and the context of the whole of clause 1, I consider that the word 'deliberations' extends to matter that discloses that an Executive body has considered, gathered information on, analysed or looked at strategies in relation to a particular issue.*

*46. With regard to the meaning of 'decisions' in clause 1(1), the ordinary dictionary meaning of the term 'decision' is: "*1 the act or process of deciding. 2 a conclusion or resolution reached, esp. as to future action after consideration" (Australian Concise Oxford Dictionary). *In light of that, and taking into account its context and the underlying policy considerations, I consider that the term 'decisions' in clause 1(1) means the formal decisions of an Executive body."*

55. I agree with the views as expressed above by the former A/Commissioner in *Re Ravlich*. Therefore, the question under consideration in clause 1(1) is whether the disclosure of the disputed documents would reveal the deliberations of an Executive body – that is, reveal that an Executive body has considered or discussed a matter, exchanged information or discussed strategies in relation to a particular issue – or would reveal the formal decision of an Executive body. Hence, despite whether the building of the new Busselton Hospital was an election promise or was subject to some other deliberation by the former Minister before the creation of the disputed documents, all that is required to be established under clause 1(1) is that the disclosure of the disputed documents would reveal the deliberations or decisions of an Executive body.

56. I accept the complainant's submission that it is not sufficient to conclude that there was a deliberation in respect of matter contained in a document merely because the document was taken to a Cabinet or an ERC meeting or used in a submission to Cabinet or the ERC: see *Re Edwards* at [25]-[26]. The documents must contain matter of the kind described in clause 1(1).

57. As noted, Document 1 is a business case for the construction of a new Busselton Hospital. I have examined Document 1 and considered the material provided by the agency and the complainant's submissions. I accept the agency's evidence that Document 1 was considered, and a decision made, by the ERC at its

meeting on 27 February 2008. Cabinet endorsed the ERC's decision in March 2008.

58. Having reviewed the material before me, I consider that the disclosure of Document 1 would reveal the deliberations of an Executive body, because that document discloses the particular issues considered by the ERC. I accept that the ERC (a committee of Cabinet) is an Executive body, as set out in clause 1(6). Accordingly, I find that Document 1 is *prima facie* exempt under clause 1(1).

59. Document 2 is a business case analysis for the Busselton Hospital redevelopment, which was prepared following the State election in September 2008. Having examined Document 2 and from my consideration of the material before me, I accept that the disclosure of Document 2 would reveal the deliberations of an Executive body. In this case, Document 2 was submitted to Cabinet and directly refers to matters in a Cabinet submission. I have been able to confirm this from my examination of a copy of the Cabinet Submission dated 23 November 2010, which contains a summary of Document 2 and shows that Document 2 was submitted to Cabinet for consideration. In my view, the disclosure of Document 2 would reveal particular matters considered by Cabinet. Accordingly, I find that Document 2 is *prima facie* exempt under clause 1(1).

Clause 1(1)(b) – contains policy options or recommendations prepared for possible submission to an Executive body

60. Since I find that the disputed documents are *prima facie* exempt under clause 1(1), it is not strictly necessary for me to consider whether those documents are also exempt under clause 1(1)(b). However, in this case, there is sufficient material before me to be satisfied that clause 1(1)(b) would also apply for the following reasons.

The agency's submissions

61. The agency claimed that certain matter in Documents 1 and 2 is also exempt under clause 1(1)(b). In particular, the agency submits:

- Specific sections of Document 1 are also claimed as exempt under clause 1(1)(b) as they contain policy options and recommendations that reveal the deliberations of an Executive body (the ERC). Those sections are pages 13-15, 18, 69-84 (up to 3.4.2.2), 85 (from 3.4.2.3) - 92 (up to 4.1.1), Appendices 9-16, pages 152-154 and 158-186.

- Specific sections of Document 2 are also claimed as exempt under clause 1(1)(b) as they contain policy recommendations that reveal the deliberations of an Executive body (Cabinet). Those sections are 1.0, 1.2 (including Table 1), 1.3, 1.4, 2.1, 2.3, 2.10, 2.10.1, 2.11, 2.13, Table 6, 2.16, 4.0 and Appendix 1.

The complainant's submissions

62. The complainant submitted that Document 1 was not exempt under clause 1(1)(b) because if disclosed, it would not reveal policy options and recommendations that disclose the deliberations of an Executive body (the ERC) in that:

    - As detailed in the complainant's submissions made above with respect to clause 1(1), regular media statements by the former Minister kept the community fully informed of government deliberations and decisions.

    - Over the two year period before the development of Document 1 and before the ERC meeting in question, there was no variation in the publicly announced services to be provided at the new facility or location of the new facility.

    - The only factors to change after the ERC meeting in question were:

        - the funding allocation for the new facility, being an increase in funding from $65 million to $77.4 million. This was made public by the former Minister in his statement dated 26 June 2008;

        - later commencement of construction date;

        - co-located 95 bed aged care residential facility and medical centre; and

        - the appointment of architects. This was publicly disclosed by the former Minister in his statement dated 26 June 2008.

63. The complainant also submitted that Document 2 was not exempt under clause 1(1)(b) because if disclosed, it would not reveal policy options and recommendations that disclose the deliberations of an Executive body (Cabinet) in that:

    - As detailed in the complainant's submissions made above with respect to clause 1(1), the policy decision to build the new hospital on the current site was made as an election commitment. Further, the Minister gave effect to this policy option, not Cabinet.

    - It was publicly known that the policy decision to build the new hospital on the current site would necessitate additional funding for the project.

    - The Minister announced the funding decision on 2 December 2010.

64. The complainant further submitted that the mere fact that a document was attached to an ERC/Cabinet submission is not proof that the document was developed to identify policy options in order to gain a decision by an Executive body.

65. Finally, the complainant submitted that in the unlikely event that Document 1 and Document 2 contained other information that had not been made public by the former Minister, this information could have been redacted from those documents before its release.

Consideration

66. I note that both the agency's and the complainant's submissions with respect to this exemption are framed in terms of a combination of clause 1(1) and clause 1(1)(b). Both have made arguments as to whether the disputed documents contain *"policy options and recommendations that would reveal the deliberations of an Executive body."* In essence, the complainant submitted that the disclosure of the disputed documents *"would not reveal policy options and recommendations that reveal the deliberations of an executive body"* because they are government deliberations and decisions, not an Executive body's.

67. Clause 1(1)(b) is an exemption relating to a specific kind of document. The question under consideration in clause 1(1)(b) is whether the disputed documents *contain* policy options or recommendations and whether those policy options or recommendations were *prepared for possible submission* to an Executive body.

68. I accept that the mere fact that a document was attached to an ERC/Cabinet submission is not proof that the document contains policy options or recommendations or that those policy options or recommendations were prepared for possible submission to an Executive body. There must be probative material to support the claim that the disputed documents contain matter of the kind described in clause 1(1)(b).

69. In *Re Martin and Ministry for Planning; Martin and Department of Land Administration* [2000] WAICmr 56 at [21], the former Information Commissioner considered a claim made under clause 1(1)(b) and took the view that the plain meaning of 'policy', according to its dictionary definition, is "*a course or principle of action adopted or proposed by a government, party, business or individual etc".*

70. Having examined Document 1, I accept that it contains policy options and recommendations relating to the construction of a hospital in Busselton. The next question is whether those policy options and recommendations were prepared for possible submission to an Executive body.

71. I do not accept the complainant's contention that simply because the commitment to build a new Busselton Hospital was made prior to the preparation of the disputed documents, the disputed documents do not contain policy options or recommendations, or they were not prepared for possible submission to an Executive body. To understand whether the policy options and recommendations in the disputed documents, being business cases, were *prepared for possible submission to an Executive body*, it is necessary to understand the background to the Government health reforms of 2004, which led to the commitment to build the Busselton Hospital, and the subsequent development of the business cases (the disputed documents).

72. In March 2003, the State Government appointed the Health Reform Committee ('the HRC'), reporting through the Minister for Health and the Treasurer, to the ERC of Cabinet, to conduct a review of the Western Australian health system. The HRC was chaired by Professor Michael Reid. The Terms of Reference for the review required the HRC to develop a vision for the WA health system while ensuring that the growth of the health budget was sustainable: see the March 2004 *"Report of the Health Reform Committee, A Healthy Future for Western Australians"* ('the Reid Report'). The Reid Report put forward a comprehensive long-term vision and blue print for strategic reform of the State health system.

73. Consistent with the recommendations of the Reid Report, in 2004 the Government committed to expend $1.7 billion over the next 13 years to significantly increase health infrastructure to implement the government's Health Reform Agenda. This included $167 million for Rural and South West multi-purpose sites and hospital redevelopments: see 2004-05 Budget Papers.

74. However, the Department of Health's access to the Health Reform Agenda funds for these capital works was made subject to it submitting business cases and planning details for Government approval: see 2004-05 Budget Paper No.2 page 147, footnote (d). As a matter of law the access restriction meant the funds were to be withheld at the Treasurer's discretion until the Department of Health complied with this requirement. As per Treasury's advice, the discretion is exercised by Cabinet on advice from the ERC, now known as the Expenditure and Economic Reform Committee ('the EERC'). Therefore, the submission of business cases for 'government approval' was ultimately for approval by Cabinet, on the recommendation of the ERC, both of which are Executive bodies within the meaning of clause 1(6).

75. In a media statement on 24 October 2005, the former Minister for Health announced the rebuilding of the Busselton Hospital. The business case for that project (that is, Document 1) was subsequently prepared by the agency in consultation with Treasury, to provide the business justification including, among other things, financial components of the project proposal. In order to receive any appropriation of funds for the project to build a new Busselton Hospital, it was a requirement of the Department of Health to submit a business case to the ERC for ultimate approval by Cabinet.

76. On the information before me and the background leading up to the preparation of the disputed documents, I accept that the policy options and recommendations in Document 1 were prepared for possible submission to an Executive body, namely the ERC. In this case, Document 1 was considered and approved by the ERC. Therefore I find that Document 1 is exempt under clause 1(1)(b).

77. I am also satisfied, on the information before me, that Document 2 contains policy options and recommendations prepared for possible submission to Cabinet. Consequently, I find that Document 2 is also exempt under clause 1(1)(b).

78. The complainant submits that she should be given access to an edited copy of the disputed documents. In *Re Watson and Minister for Forestry* [2011] WAICmr 8 at [22]-[27], I considered a similar claim in which the complainant submitted that she should be given access to an edited copy of a report with all policy options and recommendations deleted. In considering that matter, I noted the decision of *Re Ravlich* at [43] in which the former A/Commissioner referred to the following extract from the debates following the Second Reading of the FOI Bill where the former Minister for Justice with carriage of that Bill said, in relation to clause 1(1)(b):

> *"Paragrah (b) states -*
>
> *contains policy options or recommendations prepared for submission (whether submitted or not) to an Executive body;*
>
> *That covers what often happens when one gets one's agenda or minutes and lodged with that minute will be a range of reports or policy options for consideration by Cabinet in conjunction with the minute. I do not think we could exclude any of those matters under the amendment moved by the member for Floreat ... Therefore, the existing clause would mean that, if documents had been prepared to accompany a minute and for some reason did not accompany the minute, they would also be exempt ...*
>
> *One of the things we must ensure is that when people are preparing documents which may or may not accompany Cabinet minutes they should feel unconstrained in what they say in those drafts. My view is that, if they have been prepared for the purposes of submission ... and are not submitted, not to exempt them would defeat the primary objective which is to prevent the disclosure of deliberations or decisions because, if the document is not submitted, it would still reveal the fact there was a Cabinet minute and basically what the Cabinet minute was about and some discussion about what it contained."*

79. In light of the above, I said in *Re Watson* at [23]-[27]:

> *"23. The decision in* Re Ravlich *concluded that the meaning of 'deliberations' includes not only active discussion and debate but also information that discloses that an Executive body has considered, gathered information on, analysed or looked at strategies in relation to a particular issue. I agree with that view.*
>
> *24. I consider that it would not be feasible to provide the complainant with an edited copy of the Report because even if all policy options and recommendations were deleted, the 'deliberations' of Cabinet would still be disclosed in the sense that it would reveal information gathered and matter analysed in relation to particular issues.*
>
> *25. I also note that clause 1(1)(b) refers to matter being exempt matter* "if it contains policy options or recommendations" *(my emphasis) rather than matter being exempt matter because it is or consists of*

policy options or recommendations. The word 'contain' is defined in the Macquarie Dictionary *(5th edition, 2009) to mean amongst other things* "1. to have within itself; hold within fixed limits. 2. *Geometry* to form the boundary of. 3. to be capable of holding; have capacity for".

26. In my view, the reference in clause 1(1)(b) to exempt matter is a reference to the document that 'contains' or has within it policy options or recommendations prepared for possible submission to an Executive body, which in the present case is the Report. I consider that the Report is the matter which is exempt matter and not just those parts of it that comprise the policy options or recommendations.

27. In light of that, I consider that the whole of the Report is exempt under clause 1(1)(b) and that, therefore, it is not possible to give the complainant access to an edited copy, pursuant to s.24 of the FOI Act."

80. My position has not changed since my decision in *Re Watson.* As I am satisfied that Documents 1 and 2 contain policy options and recommendations prepared for possible submission to Cabinet, I consider that the whole of those documents are exempt under clause 1(1)(b).

81. As I find that the disputed documents are *prima facie* exempt under one or more exemptions in clause 1(1), I have considered whether any of the limits on the exemption in clauses 1(2) to 1(5) of Schedule 1 to the FOI Act applies. In the present case, I have considered the limits in clauses 1(2) and 1(5).

Clause 1(2) – limit on exemption – merely factual, statistical, scientific or technical matter

82. Although the decisions of Cabinet and other Executive bodies are protected from disclosure under clause 1(1), the content or substance or effect of those decisions is often published after the decisions are made. In such cases, the limit on exemption in clause 1(2) may apply. Clause 1(2) provides that matter that is 'merely factual', among other things, is not exempt under clause 1(1) unless its disclosure would reveal any deliberation or decision of an Executive body *and* the fact of that deliberation or decision has not been officially published.

The agency's submissions

83. The agency advises that the exemption in clause 1 is not claimed for factual, statistical, scientific, or technical matter in the disputed documents where clause 1(2) applies, except where that matter is part of the deliberation or decision-making in relation to policy options or recommendations prepared for submission to an Executive body. However, the agency is *"unable to separate out the "factual, statistical, scientific or technical" matter in the documents, as referred to in Clause 1(2), without revealing the nature of the decision making*

process. On this basis, I do not believe that it will be possible for us to release redacted versions of Documents 1 and 2 to Ms Farina."

The complainant's submissions

84. The complainant submitted that the limit on the exemption in clause 1(2) applied to Document 1 and therefore access should have been provided to Document 1, because:

- The Minister made regular statements on the project, keeping the public informed of the government's deliberations and decisions.

- "*The fact that the various factors, deliberations and decisions were made public by the Minister means that content of Document 1 was in fact, factual, statistical, scientific or technical even if it appeared in the form of policy options or recommendations as these decisions had either already been made and made public or were announced and made public following the ERC meeting and subsequent Cabinet meeting."*

85. With respect to Document 2, the complainant submits that the limit on the exemption in clause 1(2) also applied because:

- Any content in Document 2 concerning the site assessment was not covered by clause 1(1) as this decision had already been made. It was an election commitment which was ratified or given effect by the Minister, not Cabinet.

- Any content in Document 2 relating to the provision of additional funding for the project should be accessible as the decision had been published by the Minister's statement of 2 December 2010.

- "*The fact that the deliberations and decisions were made public by the Minister means that the content of Document 2 was in fact, factual, statistical, scientific or technical even if it appeared in the form of policy options or recommendations as these decisions had either already been made and made public or were announced and made public following the Cabinet meeting."*

Consideration

86. I have considered whether the limit on exemption in clause 1(2) applies to matter in the disputed documents. The first question for my determination in relation to clause 1(2) is whether the information contained in Documents 1 and 2 is 'merely factual, statistical, scientific or technical'. As noted by the former A/Commissioner at [59] in *Re Ravlich*, the ordinary dictionary meaning of 'mere' or 'merely' is "*solely"* or "*no more than what is specified"* and the ordinary meaning of 'factual' is "*based on or concerned with fact or facts"* and *"actual, true"* (Australian Concise Oxford Dictionary).

87. Based on my examination of the disputed documents, I consider that much of the information contained in both documents consists of opinion rather than statements of fact, statistics or scientific or technical matter. Accordingly, in my view, that information in the disputed documents is not 'merely factual' and I consider the limit on exemption in clause 1(2) does not apply to that matter.

88. The complainant has submitted that the fact that various *"deliberations and decisions were made public by the Minister means that content of Document 1 was in fact, factual, statistical, scientific or technical even if it appeared in the form of policy options or recommendations as these decisions had either already been made and made public or were announced and made public following the ERC meeting and subsequent Cabinet meeting."* The complainant made similar submissions with respect to Document 2. It is not clear whether the complainant submits that the entire content of the disputed documents are all 'merely factual' because the deliberations or decisions were those of the Minister and not an Executive body, or whether she claims that the contents of the disputed documents, including opinions (be they in the form of policy options or recommendations) are all 'merely factual' because they have been made public. In either case, I do not agree with the former or latter contention.

89. Clause 1(2) recognises that the disclosure of some merely factual matter might reveal the deliberation or decision of an Executive body. If it does, the proviso is that such matter is only exempt if the relevant deliberation or decision of the Executive body has *not* been officially published. Therefore, I do not accept the complainant's submission that the entire contents of the disputed documents are 'merely factual' on the basis that there was some prior deliberation by a non-Executive body or on the basis that only particular deliberations and decisions of the ERC and Cabinet have been officially published.

90. In this case, there is a small amount of information in Documents 1 and 2 that I consider is merely factual, statistical, scientific or technical. Some of that information would reveal the deliberation or decision of an Executive body, and the fact of that particular deliberation or decision has been officially published in various media statements, as noted by the complainant. I consider that the limit in clause 1(2) applies to that small amount of information. The agency has also acknowledged that it does not claim an exemption for that information.

91. However, although the limit on exemption in clause 1(2) applies to that information and it is not exempt, I consider that, pursuant to s.24 of the FOI Act, it is not practicable to edit the disputed documents to give access to only that information. In my view, the deletion of the exempt information in Documents 1 and 2 would leave only a small amount of information that is not exempt. In *Police Force of Western Australia v Winterton* Unreported, WASC, Library No 970646, 27 November 1997, Scott J considered the meaning and interpretation of s.24 of the FOI Act and said, at page 16:

> "*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.*"

92. In light of *Winterton*, I do not consider that it is practicable for the agency to give access to edited copies of the disputed documents. To do so would require extensive editing that would result in the loss of both the meaning and the context of the disputed documents.

Clause 1(5) – limit on exemption – brought into existence for the purpose of submission for consideration by the Executive body

93. I have also considered whether the limit on the exemption in clause 1(5) of Schedule 1 to the FOI Act applies. Clause 1(5) provides that "*Matter is not exempt by reason of the fact that it was submitted to an Executive body for its consideration or is proposed to be submitted if it was not brought into existence for the purpose of submission for consideration by the Executive body.*"

The complainant's submissions

94. The complainant submitted that the limit on exemption in clause 1(5) applies to the disputed documents for the following reasons:

- Document 1 was not specifically developed to identify policy options in order to gain a decision by an Executive body, in that:
    - The former Minister had already announced, on a number of occasions before the development of Document 1 and before the ERC meeting in question, the government's decision to build a new Busselton Hospital, the services to be provided, the location for the new facility and the funding allocation.
    - The Minister, on 26 June 2008, announced the matters considered and determined by the ERC meeting in question.
    - The document was not specifically developed to identify policy options as most of the policy decisions or those of significance in relation to the new Busselton Hospital had already been made, the only deliberation and determination by the ERC not previously announced was the increase in funding allocation and this was subsequently announced. In any event detail of policy options in relation to funding could have been redacted from Document 1 before providing access to the document.
- Document 2 was not specifically developed to identify policy options in order to gain a decision by an Executive body, in that:
    - The policy decision was made during the election as an election commitment.
    - The Minister had given effect to the election commitment, not Cabinet.

- It was publicly understood that the election commitment would necessitate the allocation of additional funding for the project.

- The Minister, on 2 December 2010, announced the matters considered and determined by the Cabinet meeting in question.

- The document was not specifically developed to identify policy options as the policy decision – to build the new hospital on the current site – had been made as an election commitment, the only deliberation and determination by Cabinet not previously announced was the increase in funding allocation, which was an accepted consequence of the policy decision and was subsequently publicly announced. In any event detail of policy options in relation to funding could have been redacted from Document 2 before providing access to the document.

- The mere fact that a document was attached to an ERC/Cabinet submission is not proof that the document was considered by the ERC/Cabinet in making its decision.

- The disputed documents were not prepared for submission to an Executive body, but rather, was prepared as a requirement of Treasury.

- "*The primary purpose for the development of* [Documents 1 and 2] *was to guide and assist the Department of Health in its duty to seek appropriate additional funds from the ERC and Cabinet for the project. The fact that* [Documents 1 and 2] *may have informed the ERC or Cabinet in its decision making is a secondary purpose, not the documents' primary purpose or reason for its development."*

The agency's submissions

95. The agency claims that the limit on the exemption in clause 1(5) does not apply because the disputed documents were both *"specifically developed to identify policy options in order to gain a decision by an Executive body."* In response to the complainant's assertion that business cases are not prepared for Cabinet, the agency advised the following:

> *"*[B]*usiness cases in the Department of Health are initiated after a service need has been identified (with or without an identified funding stream). The business case documents the need, context, options, option assessment etc. and recommend an option for approval. Therefore, the purpose of the business case (the reason that it was brought into existence) is to identify options and seek approval of the recommended option. In the case of Documents 1 and 2 the approving bodies were ERC and Cabinet, as previously confirmed."*

96. The agency submitted that Document 1 was clearly developed for decision by the ERC, a committee of Cabinet. In support, the agency attached a copy of a letter dated 30 July 2007 from the then Minister for Health to the then

Treasurer; copies of Minutes of Meeting of the Health Infrastructure Steering Group dated 7 May and 8 October 2007; and copies of Action Updates of the Health Infrastructure Subcommittee dated 19 October 2007, 27 November 2007 and 27 March 2008.

97. The agency submitted that Document 2 was developed for submission to Cabinet, as illustrated by the enclosed Cabinet submission provided to my office. Document 2 was brought into existence in order to seek approval from Cabinet for funding under the Royalties for Regions program.

Consideration

98. I have examined the disputed documents and considered the parties' submissions. I note that Documents 1 and 2 were both prepared by the Department of Health, of which the agency is a part. Both documents relate to the construction of a hospital in Busselton.

99. The agency advises that Documents 1 and 2 were brought into existence for the purpose of submission for consideration, and approval, by the ERC and Cabinet, respectively, and provided material in support. The complainant submitted to the contrary.

100. In considering the purpose for which the disputed documents were brought into existence, I have made inquiries with the agency and reviewed the historical background leading to the preparation of the disputed documents.

101. As outlined in paragraphs 72-75 of this decision, the health reforms of 2004 ultimately led to the commitment to build a new Busselton Hospital and the development of the business cases (the disputed documents) for that project. Those reforms arose as a result of a review by the HRC, which was appointed to report through the Minister for Health and the Treasurer, to the ERC of Cabinet.

102. As indicated in the 2004-05 Budget Papers, in order to receive any appropriation of funds for the project to build a new Busselton Hospital, it was a requirement of the Department of Health to submit a business case to the ERC for ultimate approval by Cabinet. Treasury's Strategic Projects area assists agencies with the preparation of business cases and manages the State Government's high-risk infrastructure projects. Such projects are assigned to Treasury as directed by the ERC. As indicated on the Department of Treasury's website, the Busselton Hospital (or Busselton Health Campus) is one such project. Hence, prior to any submission of a business case, the Department of Health sought advice and assistance from Treasury in preparing the business case for submission for consideration by the ERC. The ERC then made a recommendation to Cabinet, with Cabinet making the final expenditure decision.

103. The agency has provided me with evidence to demonstrate that the above process was followed with respect to Document 1. Document 2 appears to be a supplement to Document 1 and I note that Document 2 was also submitted for consideration by Cabinet. It is evident from my inquiries that the disputed documents would have to be considered by the ERC and/or Cabinet.

Specifically, it was a requirement of the Department of Health to submit a business case on the Busselton Hospital project for consideration by the ERC and/or Cabinet. Based on the information before me, I am satisfied that Documents 1 and 2 were brought into existence for the purpose of submission for consideration by an Executive body, namely the ERC and Cabinet.

104. I do not accept the complainant's claim that the disputed documents merely informed the ERC or Cabinet in its decision-making and that the submission of those documents for consideration by the ERC and Cabinet was only a secondary purpose. Nor do I accept the complainant's submission that the disputed documents were prepared only as a requirement of Treasury. Information on the process and the requirement on the Department of Health to submit business cases for approval by the ERC and Cabinet do not support that view. In any event, if the primary purpose is satisfied, the fact that the disputed documents was used for other, secondary purposes does not undermine the application of clauses 1(1) or 1(1)(b): see *Re Watson* at [17]-[18]. It is not inconsistent for the disputed documents to have been brought into existence for the purpose of submission for consideration by Cabinet and, at the same time, to have been used for another purpose, for example, informing the Minister and the Department of Health.

105. Based on the material before me, I am satisfied that the limit on the exemption in clause 1(5) has no application.

CONCLUSION

106. For the reasons provided above, I find that Documents 1 and 2 are exempt under clause 1(1) of Schedule 1 to the FOI Act and the agency's decision to refuse access is justified.

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