OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2008304 Decision Ref: D0232009

Participants:

City of Subiaco
Complainant

- and -

Subiaco Redevelopment Authority
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access and access in edited form – Board papers – clause 6(1) – whether information of a kind described in clause 6(1)(a) – whether disclosure contrary to the public interest – whether certain information the subject of copyright – s.27(2)(c)

Freedom of Information Act 1992: sections 10(2), 27(1)(a), 27(2)(c), 102(1); Schedule 1, clause 6(1)
Subiaco Redevelopment Act 1994: section 13(3)
***Local Government Act 1995*:** section 3.1
Interpretation Act 1984: Section 5

Re Waterford and Department of the Treasury (No. 2) (1984) 5 ALD 588
Re Shire of Mundaring and Ministry for Planning [2001] WAICmr 14
Re Coastal Waters Alliance of Western Australia Incorporated and Department of Environmental Protection and Anor [1995] WAICmr 37
Re Kobelke and Department of Productivity and Labour Relations [1998] WAICmr 17
Re Precious Metals Australia Ltd and Department of Minerals and Energy [1997] WAICmr 12
Re Cannon and Australian Quality Egg Farms Ltd (1994) 1 QAR 491
Re A and Heathcote Hospital [1994] WAICmr 8
Re Kobelke and Minister for Planning [19094] WAICmr 5
Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others [2006] WAICmr 12

DECISION

The decision of the agency is set aside. The disputed information is not exempt under clause 6(1) or 4(2) of Schedule 1 to the FOI Act. Matter on pp.26-80 of Document 24 is subject to copyright and consequently access is to be given by way of inspection only.

Sven Bluemmel
INFORMATION COMMISSIONER

3 September 2009

REASONS FOR DECISION

1. This complaint arises from a decision made by the Subiaco Redevelopment Authority ('the agency') to refuse the City of Subiaco ('the complainant') access to documents and to give access to edited documents under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 30 May 2008, the complainant applied to the agency under the FOI Act for access to:

> "[t]*he agenda papers and all attachments and supporting documents associated with meetings of the Subiaco Redevelopment Authority Board between 1 January and 30 April 2008."*

3. The *Subiaco Redevelopment Act 1994* ('the SR Act') provides for, among other things, the development and redevelopment of certain land in the local government district of Subiaco and sets out the planning framework for Subiaco. The agency was established under the SR Act to oversee that process and is the responsible authority for administering the Subiaco Redevelopment Scheme ('the Scheme') made pursuant to Part 4 of the SR Act.

4. The agency currently has a Board of five members ('the Board') appointed by, and answerable to, the Minister for Planning. Two of those Board members are councillors of the complainant.

5. The information in dispute in this matter concerns the redevelopment of land known as the China Green project ('the Project'). The Project covers a four hectare area (bordered by Hay Street to the south, Price Street to the north, the complainant's land to the west and Darbon Crescent to the east) and forms part of the 'Subi Centro' development.

6. The agency is working on the Project in collaboration with the complainant in whose area the land falls. I understand from various media reports that the complainant contributed land valued at $14 million to the Project but has concerns about aspects of the redevelopment, including its size and density.

7. The Project's website (www.chinagreen.com.au) states:

> "*The China Green Project will be a benchmark redevelopment for social, economic and environmental outcomes which will be assessed by the* [Subiaco Redevelopment Authority] *and the City of Subiaco."*

8. The agency's initial decision, made on 23 July 2008, was to refuse to deal with the complainant's application under s.20 of the FOI Act, on the ground that the work involved in dealing with it would divert a substantial and unreasonable portion of the agency's resources away from its other operations.

9. Following internal review of that decision, the agency dealt with the application in two stages. On 29 August 2008, the agency gave the complainant access in full or in edited form to 10 documents and refused access to 17 documents. On 5 September 2008, the agency gave the complainant access in full or in edited form to nine documents and refused access to seven documents. The agency claimed that certain documents and information were exempt under clauses 1, 6 and 10 of Schedule 1 to the FOI Act.

10. On 1 October 2008, the complainant applied to the Information Commissioner for external review of the agency's decision.

REVIEW BY INFORMATION COMMISSIONER

11. Following the receipt of this complaint, my A/Principal Legal Officer met with the agency and also held discussions with the complainant to see if the matter could be resolved through negotiation. Although the number of documents in dispute was not large, they included numerous attachments so that there were some 1000 folios in total.

12. Both parties provided the former A/Information Commissioner ('the A/Commissioner') with additional information. In addition, the agency was prepared to allow the complainant to inspect the disputed documents and information but the complainant declined that offer on the basis that it was impracticable.

13. In the course of dealing with this complaint, the A/Commissioner pointed out to the parties that s.13(3) of the SR Act provides a mechanism which would allow those members of the Board who are also councillors of the complainant to disclose information acquired in the course of their functions under the SR Act to a closed meeting of the Council of the complainant. However, I am advised that the agency was not prepared to use that particular process to conciliate this matter.

14. As part of the ensuing negotiations, my officer prepared a detailed document schedule, which the agency gave to the complainant. Having reviewed the schedule, the complainant withdrew its complaint in respect of certain documents listed there. The agency also gave the complainant access to one additional document. However, the matter could not be conciliated and, on 11 December 2008, the A/Commissioner provided the parties with a letter setting out his preliminary view of the complaint. On the information before him at that time, the A/Commissioner's preliminary view was that the agency's decision to refuse access to the disputed documents and information was not justified.

15. Since then, there have been continuing and protracted negotiations between the two parties to reduce the number of folios in dispute. At times, the parties have negotiated directly with each other. In addition, my officer contacted a consultant ('the third party') – the author of a report contained in Document 24 (using the numbering scheme adopted in the agency's decision) – seeking submissions and inviting that third party to be joined as a party to the complaint.

16. On 3 July 2009, the third party provided me with submissions by e-mail to the effect that the disputed information in Document 24 is exempt under clause 4(2) of Schedule 1 to the FOI Act, rather than clause 6(1) as claimed by the agency. However, the third party did not seek to be joined to the complaint.

17. By that date, the number of folios in dispute had been reduced from approximately 1000 to 61 folios; however, the parties were not able to conciliate the matter. On 4 August 2009, I provided the agency, the complainant and the third party with a letter setting out my preliminary view of the information remaining in dispute. My preliminary view was that the disputed information was not exempt under either clause 4(2) or 6(1); that part of Document 24 was the subject of copyright; and that a small amount of information was exempt under clause 3(1). I invited all three parties to make further submissions to me by 14 August 2009 and I again invited the third party to be joined as a party to the complaint.

18. The third party made no further submissions and did not apply to be joined as a party to the complaint. Following the grant of an extension of time in which to respond to my letter, the agency provided me with further submissions on 19 August 2009. The complainant advised me that it withdrew its complaint in respect of any personal information contained in the disputed information.

THE DISPUTED INFORMATION

19. The disputed information is as follows:

Document 24: the last two paragraphs on p.22; p.23; paragraphs 1, 2, 5 and 7-9 on p.24; and pp.26-80.

Document 27: paragraph 4 on p.126; paragraph 2 on p.135; p.136; and paragraphs 1-4 on p. 137.

EXEMPTION UNDER CLAUSE 6 - DELIBERATIVE PROCESSES

20. Clause 6, insofar as it is relevant, provides as follows:

> *"(1) Matter is exempt matter if its disclosure –*
>
> *(a) would reveal –*
>
> *(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) any consultation or deliberation that has taken place,*
>
> *in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency; and*

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

Limits on exemption

(2) ...

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

(4) …"

21. There are two parts to this exemption. To establish that the disputed information is exempt under clause 6(1), the agency must satisfy the requirements of both paragraphs (a) and (b) of that provision. If the requirements of both paragraphs (a) and (b) are satisfied, the disputed information will be exempt, subject to the limits on exemption contained in clauses 6(2) – 6(4).

22. Under section 102(1) of the FOI Act the onus is on the agency to establish that its decision was justified. The complainant is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; it is entitled to access unless the agency can establish that disclosure of the disputed information would be *contrary* to the public interest.

The complainant's submissions

23. By letter dated 2 December 2008, the complainant made the following submissions, in brief:

- The disputed information concerns development and planning matters that would ordinarily be dealt with by a local government authority and as such should be dealt with by the agency in a way commensurate with the intentions of the *Local Government Act 1995* ('the LG Act').

- The incompleteness of information relevant to the development of large parcels of land within Subiaco is a hindrance to proper and adequate planning for the area.

- It is in the public interest that:

  - discussion of material already in the public domain or elicited from the public should be on the public record in order to maintain transparency and probity;

  - the complainant is kept adequately informed about matters that impact on the future of Subiaco in relation to the land being developed by the agency; and

- the complainant is provided with relevant information to enable it to make appropriate representations to the agency on behalf of the Council of the complainant and its constituents concerning the Project.

THE AGENCY'S SUBMISSIONS

24. The agency's submissions are contained in its notices of decision and in correspondence to this office dated 13 October 2008, 19 January 2009, 5 June 2009 and 19 August 2009. In brief, the agency submits:

- Documents 24 and 27 contain opinion, advice and recommendations.

- The relevant deliberative process "*…involves collating a number of input sources of information such as technical reports, market analysis, public and stakeholder consultation and Board input. The final version is one that culminates in Board endorsement to go the Minister for Planning for final approval. All of these stages can require variations to occur in arriving at the final version."*

- Documents 24 and 27 relate to ongoing projects *"… of which these versions were an early iteration and underwent several subsequent versions."*

- The disputed information in Document 24 deals with a report on a community consultation concerning the Project, together with a summary of that report's findings but, because changes have been made to the content of the report, release of the disputed information could be taken out of context leading to ill-informed speculation and confusion.

- The disputed information in Document 27 relates to the Scheme Amendment and the agency is currently taking legal advice "*on certain elements of the scheme. Releasing the draft information at this stage, when it is still subject to legal confirmation could lead to confusion and ill-informed speculation. The anticipated date for confirmation on this advice and subsequent release of the amended scheme is the 3rd quarter of the 2009 calendar year."* The agency "*will provide the Scheme Amendment upon finalisation of the content*" and "*remains concerned that the release of the earlier version (the subject of the complaint) at this time would lead to further confusion on the matter in the eyes of the public and stakeholders, and as such would not be in the public interest."*

- There is a public interest in the transparency of an agency's decision-making but, in this case, the public interest is best served by allowing the agency's deliberations on the Project and the Scheme Amendment to occur unhindered and without the need for delays caused by the agency having to explain and justify its

reasoning in relation to superseded information. Such action would affect "*the economical conduct*" of the agency.

- Section 10 of the FOI Act provides that a person's right to be given access (or denied access) is not affected by any reasons the person gives for wishing to obtain access or the agency's belief (or the Information Commissioner's belief when 'standing in the shoes' of the agency) as to what those reasons are. As a result, such reasons or beliefs are not relevant to the consideration of whether disclosure of the disputed information would be contrary to the public interest and should not be relevant whoever the applicant is.

- It is in the public interest that interaction and the exchange of information between the complainant and the agency is undertaken in accordance with the SR Act, subject to the provisions of the FOI Act.

CONSIDERATION

25. I agree with the view of the Commonwealth Administrative Appeals Tribunal in *Re Waterford and Department of the Treasury (No. 2)* (1984) 5 ALD 588 that 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.

26. I consider that the exemption in clause 6 is designed to protect the integrity of those "thinking processes" - especially in circumstances where deliberations have not concluded - so that an agency's deliberations are not jeopardised by the disclosure of documents.

27. However, the two parts to this exemption make it clear that there is no presumption that because a document is found to be a deliberative process document, it would be contrary to the public interest to disclose it. If a document is found to come within paragraph (a) of clause 6(1), the effects of its disclosure must still be examined.

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

28. The first question for my determination is whether the disputed information in Documents 24 and 27 is in the nature of opinion, advice, recommendation, consultation or deliberation. In the present case, Documents 24 and 27 are part of the Board's papers for its meeting held in April 2008. The disputed information in those documents relates, respectively, to the Project and to the Scheme Amendment.

29. In my view, all of the information put before the agency at its Board meetings can be categorised as 'advice' that has been obtained, prepared and recorded for the purpose of the agency's consideration of the issues placed before it. The *Australian Concise Oxford Dictionary* defines 'advice' to mean: "***1*** *words given or offered as an opinion or recommendation about future action or behaviour.* ***2***

archaic *information given; news. **3** formal notice of a transaction."* I consider that the disputed information in Documents 24 and 27 is 'advice' in the sense that it is matter provided to inform the agency of what has taken place or will take place. Further, I consider that the disputed information in Document 24 would, if disclosed, reveal consultation that has taken place with members of the community.

30. The second question for my consideration is whether such advice was obtained, prepared or recorded - or whether such consultation took place – in the course of, or for the purposes of, the deliberative processes of the Government, a Minister or an agency. I understand the relevant deliberative process to be the Board's consideration of the Project, including the Scheme Amendment. Such consideration forms part of the functions of the agency. In the present case, I am satisfied that the advice was obtained, prepared and recorded – and the consultation took place – in the course of, and for the purpose of, the agency's deliberative processes. Consequently, I accept that the requirements of paragraph (a) of clause 6(1) are satisfied in relation to the disputed information.

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

31. Clause 6(1) requires that, for matter of a kind described in clause 6(1)(a) to be exempt, the agency must also establish that its disclosure would, on balance, be contrary to the public interest, pursuant to clause 6(1)(b). In order to do that, the agency must identify relevant public interests for and against disclosure and make a reasoned judgment as to where the balance lies between those opposing public interests.

32. Favouring non-disclosure, the agency refers to the fact that the finalisation of the Project - which includes the adoption of the Scheme Amendment - is still ongoing. The agency submits that the disclosure of the disputed information could lead to ill-informed speculation, confusion and delay since both the report on pp.26-80 of Document 24 and the proposed Scheme Amendment referred to in Document 27 have undergone subsequent changes.

33. The Project's website gives an indicative timeline for the planning and delivery of the Project, as follows:

October 2007	Forward works program commenced.
December 2007 - February 2008	Community comment period for Scheme Amendment and draft Design Guidelines
February - March 2008	Collate community comments & review
April 2008	Scheme Amendment and Design Guidelines finalised and forward works complete
June 2008	First land release
Mid 2008	Infrastructure and subdivision works begin
April 2010	Last land release
2013	Redevelopment complete

34. From this timeline, it can be seen that community comments on the Project were reviewed and considered early in 2008. I understand, however, that the Scheme Amendment is not finalised and the Project itself will not be completed until approximately 2013. Version 3 of the Scheme Amendment, dated 4 December 2007, is obtainable from the Project's website.

35. I consider that it may be contrary to the public interest prematurely to disclose deliberative process documents whilst the deliberations of the Government, a Minister or an agency are continuing, if there is evidence before me to establish that disclosure of such documents would affect the integrity of the decision-making process or that disclosure would, for some other reason, be demonstrably contrary to the public interest. In either of those circumstances, I consider that an aspect of the public interest is served by preserving the integrity of the agency's deliberative processes.

36. In this instance, I understand that the report prepared by the third party has been finalised and was intended to be made public, although I also understand that this has not yet occurred. With regard to the Scheme Amendment, the agency advises me that it is currently the subject of legal advice and has not yet progressed to the final stage of approval by the responsible Minister.

37. The agency submits that the disclosure of the disputed information, which has since undergone alteration, could lead to ill-informed speculation and confusion if taken out of context. However, no probative evidence has been placed before me to support that submission. In *Re Coastal Waters Alliance of Western Australia Incorporated and Department of Environmental Protection and Anor* [1995] WAICmr 37, the former Information Commissioner ('the former Commissioner') commented on a similar claim made in relation to the disclosure of draft documents and said:

> "*I consider paternalistic and simplistic the view that the public is unable to understand the difference between a draft document and a final report. I also reject as fanciful the claim that the public is likely to be misled by the disclosure of documents that reveal a process of editing, correcting and refinement of written material produced by an agency.*"

38. I agree with those observations that it is not sufficient to claim exemption on the grounds that the disclosure of draft documents or superseded documents would lead to ill-informed speculation and confusion. Not only is there no material before me in this case to support such a claim, it is within the scope and power of the agency to release other information to confirm that the disputed information does not represent a concluded position or that the agency has now moved on from such a position, in order to counter any confusion or uncertainty that may exist following disclosure under the FOI Act. The agency's explanation may itself result in better information being provided to the community. The agency has provided me with no information as to how the disclosure of the disputed information would affect its "*economical conduct*".

39. In *Re Shire of Mundaring and Ministry for Planning* [2001] WAICmr 14, the complainant applied for access to copies of submissions made by members of

the public in relation to proposed amendments to the Metropolitan Region Scheme ('the MRS'). The respondent agency claimed that those documents were exempt under clause 6(1) because, among other things, the deliberative process – which was the consideration by the Western Australian Planning Commission ('the WAPC') of the proposed amendments to the MRS – was still ongoing and also that the applicant in that case was likely to subject the agency to pressure by agitating or lobbying for acceptance of a particular point of view.

40. In that case, the former Commissioner found that there was no material to establish that the WAPC's deliberative process would be adversely affected by further relevant information being made available to the applicant and that it could not be contrary to the public interest for an agency to use its resources, which are paid for out of the public purse, to respond to concerns raised by sectional interests or to general public concerns about planning issues, before any final decision is made on a matter of such importance to the local community.

41. In my view, it is not contrary to the public interest for the material obtained from the community consultations in Document 24 to be placed on the public record, so that all stakeholders may be informed concerning the issues raised by the development of the Project. I accept that the public interest in allowing the public to participate in the decision-making process of the agency is satisfied to some extent by the community consultation process which was undertaken. However, I do not consider that to be determinative of the question before me here. In my view, it is arguable that the agency's decision-making would be enhanced by a greater degree of transparency being afforded to one of its key stakeholders. Such disclosure may work to resolve difficulties by providing a better insight into, and understanding of, the agency's views, consistent with the objects of the FOI Act. I agree with the complainant that the public interests in transparency and probity would be furthered by the disclosure of the community consultation material.

42. I consider that it would be in the public interest to disclose information concerning the Scheme Amendment contained in Document 27 so that stakeholders are informed of what has been considered in the course of refining the content of the Scheme Amendment and, consequently, have the opportunity to make submissions on those matters to the agency or the Minister.

43. I agree with the former Commissioner in *Re Shire of Mundaring* that it could not be contrary to the public interest for an agency to use its resources to respond to concerns raised by one of its key stakeholders or to general public concerns about planning issues involving the Project, before any final decision is made, even where some delay might ensue.

44. In favour of disclosure, the agency recognises a public interest in the transparency of government decision-making. The stated objects of the FOI Act in s.3(1) are 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. I recognise a public interest in the disclosure wherever possible of documents that inform the public of the basis

for decision-making and of the material considered relevant to the decision-making process because such disclosure enhances accountability.

45. In particular, I recognise that there is a public interest in a local community being fully informed about development and redevelopment proposals which have the potential to affect the lifestyle and amenity of that community. Related to that, I consider that there may well be a public interest in the provision of such information occurring before, rather than after, any conclusions are reached and that this particular public interest is enhanced by the disclosure of relevant and timely information, so that the complainant - and through it, the community - can participate in the decision-making processes of government. In *Re Shire of Mundaring*, the former Commissioner said at [35]:

> "*… if public participation is to have any meaning, it should allow input into the planning process at an early stage and well before a decision is made. Further, the public is only able to participate in such democratic processes if it has access to relevant and timely information."*

46. I do not accept the agency's submission that the complainant's reasons for seeking access to the disputed information are irrelevant to a consideration of the public interest in this case. Pursuant to s.10(2) of the FOI Act, a person's right of access is not affected by any reasons given for wishing to obtain access or an agency's belief as to what those reasons might be. In other words, an access applicant's motives for seeking access to documents under the FOI Act are not relevant to that person's right to be given access, subject to and in accordance with the Act. However, when I am balancing the public interest factors for and against disclosure, that it is a different matter and an applicant's reasons for wishing to obtain access may become relevant at that point: see, for example, *Re Kobelke and Department of Productivity and Labour Relations* [1998] WAICmr 17 at [31].

47. In my view, there is a public interest in the complainant being able to exercise its rights of access under the FOI Act. In that regard, I consider that it is relevant that two of the agency's Board members are also councillors of the complainant and that the agency's work has a direct connection to the functions of the complainant as a local government entity. The LG Act provides in section 3.1 that the general function of a local government is to provide for the good government of persons in its district and also that:

> "[t]*he scope of the general function of a local government in relation to its district is not limited by reason only that the Government of the State performs or may perform functions of a like nature"* (s.3.2).

48. Although I do not accept the complainant's submission that the agency should deal with the disputed information in a manner commensurate with the LG Act, because different considerations apply under the FOI Act, I consider that the complainant's functions under the LG Act and the fact that it is a key stakeholder in the development of the Project carry some weight in any consideration of the public interest in the disclosure of information concerning the Project.

49. In weighing the public interest factors for and against disclosure, I have found that the public interests served by disclosure under the FOI Act outweigh the public interests in ensuring the integrity of ongoing deliberations by the agency, because I do not consider that the agency has established that disclosure could have an adverse effect on its ongoing deliberations or that any other public interest would be harmed by the disclosure of the disputed information. Accordingly, I am not persuaded that disclosure of the disputed information would, on balance, be contrary to the public interest. I find that the agency has not satisfied the requirements of paragraph (b) of clause 6(1) and that the disputed information in Documents 24 and 27 is not exempt under that provision.

50. Pages 26-80 of Document 24 comprise the report prepared for the agency by the third party. As noted, the third party claimed that the disputed information in Document 24 is exempt under clause 4(2) but did not elect to be joined as a party to this complaint. While the third party has no standing, as it is not a party to the complaint, section 76(1) of the FOI Act gives me the power to *"… decide any matter in relation to the access application … that could, under this Act, have been decided by the agency."* To this end, I have chosen to consider whether pages 26-80 of Document 24 are exempt under clause 4(2).

EXEMPTION UNDER CLAUSE 4(2) – COMMERCIAL OR BUSINESS INFORMATION

51. Clause 4(2) provides as follows:

> *"(2) Matter is exempt matter if its disclosure –*
>
> *(a) would reveal information (other than trade secrets) that has a commercial value to a person; and*
>
> *(b) could reasonably be expected to destroy or diminish that commercial value."*

52. Clause 4(2) is concerned with the protection of information that has a commercial value to a 'person' (which term includes an organisation: section 5 of the *Interpretation Act 1984*). Clause 4(2) has two parts and the requirements of both paragraphs (a) and (b) of clause 4(2) must be satisfied before the exemption is established.

53. With regard to paragraph (a), I consider that matter has a commercial value if it is valuable for the purpose of carrying on the commercial activities of a person and it is only by reference to the context in which the information is used or exists that the question of whether it has a commercial value to a person may be determined: see *Re Precious Metals Australia Ltd and Department of Minerals and Energy* [1997] WAICmr 12 at [22]. I agree with the view of the Queensland Information Commissioner in *Re Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 at [513] that information may be valuable because it is important or essential to the profitability or viability of a business.

54. Paragraph (b) requires that the disclosure of matter could reasonably be expected to destroy or diminish its commercial value. I agree with the former Information Commissioner that the term 'could reasonably be expected' in the exemptions to the FOI Act indicate that, on an objective view of the evidence, there must be real and substantial grounds for expecting certain consequences to follow from the disclosure of the relevant documents: see *Re A and Heathcote Hospital* [1994] WAICmr 8 at [27]. I consider that those words require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the stated consequences: *Re Kobelke and Minister for Planning* [1994] WAICmr 5 at [75].

The third party's submissions

55. The third party made the following submissions with respect to the report at pp.26-80 of Document 24:

> "*1. The report is actually a draft report that was submitted to* [the agency] *prior to subsequent contextualistion, discussion and iteration. Release of this draft report would therefore reveal commercial and professional information about* [the third party] *and the parties to the consultation that could prejudice further supply of such information to* [the agency].
>
> *2. The report contains information and enables inference regarding the methodology, questionnaire design and analysis techniques that is the intellectual property of, and has a commercial value to,* [the third party]. *Release of this information would diminish the commercial value of this intellectual property."*

56. Following the receipt of that information, my officer asked the third party to expand on those claims and, on 6 July 2009, the third party provided further information, as follows:

> "*1 – the information relates to both* [the third party's] *analysis of verbatim consultation outcomes, and the verbatims themselves. The report was a draft submitted prior to full contextualization and final consultation with* [the agency], *and so if read in this draft format there would be the risk of misinterpretation and a misunderstanding regarding the nature of our analysis. If this happened then our position as information and service provider in good standing to* [the agency] *would be prejudiced.*
>
> *2 – while in general the broad methodologies of consultants performing this type of work are similar,* [the third party] *utilizes qualitative and quantitative experts to formulate the sample structures, discussion guides, questionnaire formats and analysis and presentation frameworks that are our intellectual property and remain so throughout the entire project. Each consultant would have a different approach to these, and the quality of thinking that goes into them determines the end value of the project. Public release of this document would enable both direct and inferred*

examination of our IP in these areas which would devalue our commercial offering."

Consideration

57. I have examined the report set out on pp.26-80 of Document 24. I note that it contains a copyright notation and a statement concerning the provision and use of that material. For my comments concerning copyright see paragraphs 62 and 63 below. The report arises from the requirement under the SR Act for a period of community comment on the proposed amendments to the Scheme to enable the development of the Project. In effect, the report sets out what actions the agency undertook to engage the community in consultation and findings in relation to the submissions made by members of the community during the comment period.

58. From the third party's submissions, I understand that the commercial value lies in the "*methodology, questionnaire design and analysis techniques"* used in the preparation of its report. The third party acknowledges that, generally speaking, the approach of consultants to the type of work analysed here would be similar but, as I understand it, claims that the quality of the thought applied to the approaches used by its particular experts and the different approaches used in the report impart the particular commercial value in this case.

59. I can find no information in the report on "questionnaire design" or "questionnaire design and analysis techniques". I understand that certain feedback forms were distributed but it does not appear on the information before me that those forms were designed by the third party. Pages 71-75 of Document 24 contain some market research results based on interviews but once again it is not clear that the questions asked in those interviews were compiled by the third party.

60. Having examined the report, it seems to me that it is essentially a factual statement of the steps taken by the agency to involve the community and the key issues that formed the subject matter of the community submissions. Although I accept that that particular information could be presented in a variety of ways, I do not consider that the third party's methodology or analysis techniques in respect of that material as set out in the report are so individual or unique as to confer 'commercial value' on them. Nor is it evident to me that the thought processes applied to the factual material in the report are qualitatively different to what might be expected to apply. In my view, there is nothing in the report that would operate to differentiate the third party markedly from any potential competitors and which would have commercial value to the third party.

61. I am not satisfied that pp.26-80 of Document 24 would, if disclosed, reveal information that has a commercial value to the third party. I find that the requirements of paragraph (a) of clause 4(2) are not satisfied in this case and, accordingly, pp.26-80 of Document 24 are not exempt under clause 4(2).

COPYRIGHT

62. I accept that the report set out in pp.26-80 of Document 24 is the subject of the third party's copyright and that issue was not disputed by the complainant. Although copyright belonging to a person other than the State is not a ground of exemption under the FOI Act – nor is it a basis on which access to a document can be refused – it does have an effect in terms of the manner in which access to the document may be given: see *Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others* [2006] WAICmr 12 at [109].

63. Section 27(2)(c) of the FOI Act provides that, if an applicant has requested that access to a document be given in a particular way, the agency has to comply with the request unless giving access in that way would involve an infringement of copyright belonging to a person other than the State, in which case access may be given in some other way. In the present case, I find that giving access by providing the complainant with a copy of pp.26-80 of Document 24 would involve an infringement of copyright belonging to a person other than the State and that access should be by way of inspection in accordance with s.27(1)(a) of the FOI Act.

CONCLUSION

64. I find that the disputed information is not exempt under clause 6(1) or clause 4(2) of Schedule 1 to the FOI Act. The report set out at pp.26-80 of Document 24 is the subject of copyright and, consequently, access should be by way of inspection only.

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