| OFFICE OF THE INFORMATION COMMISSIONER (W.A.) | File Ref: F2007210<br>Decision Ref: D0242008 |
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Participants:

**Martin Paul Whitely**
Complainant

- and -

**Curtin University of Technology**
Respondent

## DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to deliberative processes of agency – clause 3(1) – personal information about third parties – clause 4(3) - information about business, professional, commercial or financial affairs – whether disclosure could reasonably be expected to have an adverse effect – whether disclosure could reasonably be expected to prejudice future supply of information – clause 6(1) – deliberative processes – whether disclosure would be contrary to the public interest – clause 8(2) – confidential communications – whether disputed documents given and received in confidence – confidential information – whether disclosure could reasonably be expected to prejudice future supply of information to Government or to an agency – clause 10(5) – the State's financial property or property affairs – whether documents contain information relating to research that is being, or is to be undertaken by an officer of an agency or by a person on behalf of an agency – whether disclosure would be likely to expose the officer or persor or the agency to disadvantage – clause 11(1)(a) and (b) – effective operations of agencies – whether disclosure could reasonably be expected to impair the effectiveness of any method or procedure for the conduct of tests, etc. - whether disclosure could reasonably be expected to prevent the objects of any test, audit or examination from being attained.

***Freedom of Information Act 1992 (WA***): ss.10(1), 13(1), 13(3), 15(2), 15(5), 3, 72; 75; Schedule 1, clauses 3(1), 4(3), 6, 8(2), 10(5) and 11; Schedule 2, Glossary.

***Re WA Newspapers Ltd and Civil Service Association of WA Inc and Salaries and Allowances Tribunal and Mercer (Australia) Pty Ltd*** [2007] WAICmr 20
***Manly and Ministry of Premier and Cabinet*** (1995) 14 WAR 550
***Police Force of Western Australia v Winterton***, unreported; SCt of WA (Scott J) Library Number 970646;
***Re Kimberley Diamond Company NL and Department of Resources Development and Argyle Diamond Mines Ltd*** [2000] WAICmr 51
***Ministry for Planning v Collins*** (1996) 93 LGERA

***Re Waterford and Department of the Treasury (No.2)*** (1984) 5 ALD 588;
***Re Martin and Ministry for Planning*** [2000] WAICmr 56;
***Re Western Australian Newspapers Pty Ltd and Western Power Corporation*** [2005] WAICmr 10;
***Re Kobelke and Minister for Planning*** [1994] WAICmr 5;
***Re Taylor and Ministry of the Premier and Cabinet*** [1994] WAICmr 26
***Searle Australia Pty Ltd v Public Interest Advocacy Centre*** [1992] FCA 241;
***Re Read and Public Service Commission*** [1994] WAICmr 1
***Re Murtagh and Commissioner for Taxation*** (1983) 6 ALD 112;
***Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others*** [2006] WAICmr 12;
***Re H and Graylands Hospital*** [1996] WAICmr 50;
***Re Simonsen and Edith Cowan University*** [1994] WACmr 10;
***Re 'Q' and Graylands Selby-Lemnos and Special Care Health Service*** [2003] WAICmr 33

# DECISION

The decision of the agency is set aside.

In substitution, I find that, with the exception of the personal information relating to third parties, as described in paragraph 150 of my reasons for decision, the disputed documents are not exempt under clauses 4(3), 6(1), 8(2), 10(5) or 11(1) of Schedule 1 to the *Freedom of Information Act 1992* ('the FOI Act').

I also find that the personal information described in paragraph 150 of my reasons for decision is exempt matter under clause 3(1) of Schedule 1 to the FOI Act but that that information can be deleted from the disputed documents, in accordance with section 24 of the FOI Act and access given to edited copies of the disputed documents.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

25 June 2008

# REASONS FOR DECISION

1. This complaint arises from a decision made by Curtin University of Technology ('the agency') on 25 May 2007 to refuse Mr Martin Whitely MLA ('the complainant') access to certain documents requested by him in accordance with his right of access under section 10(1) of the *Freedom of Information Act 1992* ("the FOI Act").

## SECTION 1 - BACKGROUND

2. I understand that in late 2002, the agency received an Australia Research Council ('ARC') Linkage project funding grant to start a research program into Attention Deficit Hyperactivity Disorder. Information published on the agency's website provides information to parents, students, teachers and doctors who were interested in participating in the Curtin ADHD Project ('the Project'). The Project website further informs the public that the Project is being led by Associate Professor Heather Jenkins and that the Project is intended to provide information that may improve the educational and personal outcomes of students with Attention Deficit Hyperactivity Disorder ("ADHD"). The Project's stated aim is to:

> *"…compare the effects of stimulant medication (Dexamphetamine or Ritalin) with the new nonstimulant medication, Strattera, on cognitive, educational and social outcomes in boys and girls, diagnosed with ADHD."*

3. The Project is further described on the agency's Project website as:

> *"…an independent university based project funded by the Australian Research Council (ARC) with additional support from:*
>
> - *Association of Independent Schools of Western Australia Incorporated*
> - *Child Development Unit at The Children's Hospital at Westmead*
> - *Eli Lilly Australia".*

4. Eli Lilly Australia Pty Ltd ('Eli Lilly') is the Australian arm of the United States based pharmaceutical company Eli Lilly and Company, which manufactures the nonstimulant medication Strattera.

5. On 13 April 2007, the complainant applied to the agency for access to various documents relating to the Project. The complainant described the requested documents in the following manner:

> *"1. Documents involved in Professor Jenkins* (sic) *submission to the Curtin Ethics Committee;*
> *2. Any documentation provided by Professor Jenkins to the parents of the children involved in the study;*
> *3. Any documents relating to the funding of the study provided by the private sector."*

6. On 25 May 2007, the agency's initial decision-maker notified the complainant of the decision on access, in accordance with the requirements of section 13(1) of the FOI Act. The agency identified forty two documents relevant to the Project. Twenty of those documents – described in the notice of decision given to the complainant as the "Section 1 Documents" – fell within paragraph 1 of his access application; twenty one additional documents – described as the "Section 2 Documents" – fell within paragraph 2 of his access application and one document – described as the "Section 3 Document" – fell within paragraph 3 of his access application.

7. The agency gave the complainant access to eighteen documents, five of the Section 1 Documents and thirteen of the Section 2 Documents. The agency refused the complainant access to all of the remaining documents on the ground that they were all exempt documents under one or more of clauses 4(3) (commercial or business information); 6 (deliberative processes); 8(2) (confidential communications); and 11(1) (effective operation of agencies) of Schedule 1 to the FOI Act.

8. On 1 June 2007, the complainant applied for internal review of the agency's decision to refuse him access to most of the Section 1 and Section 3 Documents. The complainant did not seek internal review of the decision to refuse him access to eight of the Section 2 Documents. The complainant made written submissions to the agency in support of his application, submitting that the public interest weighed strongly in favour of the agency giving him access to the Section 1 and Section 3 Documents to which he had been refused access.

9. By letter dated 21 June 2007, the agency's internal review decision-maker confirmed the agency's decision to refuse the complainant access to the Section 1 and Section 3 Documents which the agency claimed were exempt documents, for reasons similar to those given to the complainant by the agency in the initial decision on access. Following that decision, the complainant applied to the former A/Information Commissioner ('the former A/Commissioner') for external review of the agency's decision to refuse him access to the documents referred to in paragraph 7 above.

## SECTION 2 - REVIEW BY A/INFORMATION COMMISSIONER

10. After receiving this complaint, in accordance with her authority under sections 72 and 75 of the FOI Act, the former A/Commissioner required the agency to produce to her, for her examination, the original of the FOI file relating to the complainant's access application, together with the originals of each of the fifteen Section 1 Documents and the Section 3 Document to which access had been refused by the agency.

11. The former A/Commissioner examined the documents and the agency's FOI file and then directed the Senior Legal Officer to arrange meetings with the complainant and with the agency, for the purposes of discussing this complaint with both parties and pursuing any opportunities for an agreed conciliated outcome to this complaint.

12. The Senior Legal Officer met the complainant first. The purpose of that meeting was to clarify with him the scope of his access application to the agency; to clarify any issues of concern to him about the manner in which the agency had processed and dealt with his access application and, finally, to discuss with him whether there was any scope for his complaint to be resolved by way of conciliation and negotiation between the parties, in accordance with section 71 of the FOI Act.

13. As a result of the meeting between the Senior Legal Officer and the complainant, the complainant advised the former A/Commissioner that he did not seek access to any

    - documents that were merely administrative in nature, such as emails between officers of the agency containing nothing more than information about arranging meetings and discussions;
    - documents that had previously been released to the complainant by the agency, copies of which were also attached to several of the documents to which he had been refused access by the agency;
    - attachments to documents submitted to the agency's Ethics Committee, such as application forms, parent/teacher/student information sheets and blank forms for use by participants in the Project; and
    - documents that consisted of the c*urricula vitae* of any person who may have been or who may still be involved in the Project.

14. Thereafter, the fifteen Section 1 Documents and the Section 3 Document which the complainant had been refused access to were re-examined by the Senior Legal Officer, in light of the complainant's advice to the former A/Commissioner. The Section 1 Documents numbered 1.7, 1.8, 1.9 and 1.11 were identified by the Senior Legal Officer as documents that were merely administrative in nature and therefore, documents of the kind not required by the complainant. Accordingly, Documents 1.7, 1.8, 1.9 and 1.11 are not in dispute.

15. Following further consultations between the Senior Legal Officer and the complainant, he advised the former A/Commissioner that, in light of the agency's strong concerns about the need to ensure the continued integrity of the HREC review processes, by maintaining the anonymity of members of the Human Research and Ethics Committee, he would accept access to edited copies of the requested documents, with the names of the relevant HREC members deleted.

16. The Senior Legal Officer then met with several officers of the agency, in order to discuss with the agency whether there was any scope for the complaint to be resolved by conciliation and negotiation between the parties, in light of the complainant's advice to the former A/Commissioner. After that meeting, the agency decided to give the complainant access to an edited copy of the Section 1 Document numbered 1.2, with the names of the HREC members deleted. As a result, Document 1.2 is no longer in dispute between the parties.

17. The agency also advised the former A/Commissioner that as some details about the Project are publicly available from the Australian Research Council ('the ARC') website, it had decided to give the complainant access to a number of pages of the Section 3 Document. The Section 3 Document actually consists of three distinct documents.

18. The first eighty four pages of Document 3 is the agency's application to the ARC for Linkage Project funding; pages 85 to 93 is a document entitled "Australian Research Council Linkage Project Research Agreement" between the agency and Eli Lilly, dated August 2003; and pages 94 to 134 of Document 3 is a document entitled "*Funding Contract between the Commonwealth of Australia as represented by the Australian Research Council and Curtin University of Technology*" in relation to funding for linkage projects to commence in 2003.

19. The agency gave the complainant full access to pages 2 to 10, 17, 18, 26, 27, 34, 35, 41 and 42 of Document 3. In addition, the agency advised the former A/Commissioner that it had deleted pages 11 to 16, 19 to 25, 28 to 33, 36 to 40 and 43 to 46 from the documents released to the complainant, because those pages consisted of the professional résumés of the researchers who were to be involved with the Project. That kind of information was not sought by the complainant (see: paragraph 13, 4th dot point). Having examined pages 11 to 16, 19 to 25, 28 to 33, 36 to 40 and 43 to 46, I am satisfied that they contain information of the kind not sought by the complainant and are, therefore, outside the amended scope of the complainant's access application and no longer in dispute.

20. The agency maintained its claims for exemption for the Section 1 Documents numbered 1.1, 1.4, 1.5, 1.10, 1.12, 1.14, 1.16, 1.17 and 1.18 and for page 1 and pages 47 to 134 of the Section 3 Document. The agency also made a new claim for exemption, under clause 10 (the State's financial and property affairs) of Schedule 1 to the FOI Act for all of the abovementioned documents.

21. At that stage of the external review proceedings, the complaint could not be resolved by conciliation and negotiation. On 16 April 2008, I wrote to the parties, advising them of my preliminary view of this complaint, including my reasons. In summary, it was my preliminary view on the evidence then before me, that the agency had not discharged the onus it bore under section 102(1) of the FOI Act of establishing, to the relevant probative standard, that the Section 1 Documents numbered 1.1, 1.4, 1.5, 1.10, 1.12, 1.14, 1.16, 1.17 and 1.18 and for page 1 and pages 47 to 134 of the Section 3 Document were exempt under clause 4, 6, 8, 10 or 11 of Schedule 1 to the FOI Act, as claimed. However, it was also my preliminary view that a small amount of personal information recorded in some of those documents, consisting of details of the names and the handwritten signatures of several third parties, was exempt under clause 3(1) of Schedule 1 to the FOI Act.

22. In response to my preliminary view, the agency gave the complainant access to edited copies of the Section 1 Documents numbered 1.17 and 1.18, after deleting the names of a third party from those two documents. Documents

numbered 1.17 and 1.18 are, therefore, no longer in dispute. The agency maintained its claims that the remaining Section 1 Documents and the remaining portions of the Section 3 Document are exempt under clauses 4, 6, 8, 10 or 11 of Schedule 1 to the FOI Act and made further submissions to me in support of its claims.

23. In late June 2008, Eli Lilly also made written submissions to me in which it claimed that the Section 3 Document is exempt under clause 4(3) of Schedule 1 to the FOI Act. As a result, this complaint cannot be resolved by conciliation between the parties and it is therefore necessary for me to resolve this complaint by way of a decision under section 76 of the FOI Act.

## SECTION 3 - THE DISPUTED DOCUMENTS

24. There are eleven documents in dispute. Document 1.1 consists of three discrete documents, which I have numbered 1.1(a), 1.1(b) and 1.1(c) for the purposes of this decision. I have described the disputed documents, with minor variations, using the document descriptions used in the schedule of documents given to the complainant by the agency.

***Section 1 Documents***

| | |
|---|---|
| Document 1.1(a) | Memorandum from Secretary HREC to members of the HREC, dated 2 March 2005 (1 page). |
| Document 1.1(b) | Multi-page Application for Ethical Approval of Research involving Humans, with attached submission from Investigators to the HREC dated 28 February 2005 (20 pages). |
| Document 1.1(c) | Reviewer Reply form and recommendations, dated 18 March 2005 (1 page). |
| Document 1.4 | Reviewer Reply form and recommendations dated 1 April 2005 (3 pages). |
| Document 1.5 | Reviewer Reply form and recommendations dated 3 March 2005 (3 pages). |
| Document 1.6 | Email and attachment from Ethics and Graduate Studies Officer, Office of Research Development, to the Executive Officer, HREC re Jenkins submissions dated 7 April 2005. |
| Document 1.10 | Submissions from Associate Prof Jenkins to Project Reviewers re the proposed research, dated 10 May 2005; |
| Document 1.12 | Submission from A/Prof Jenkins (*et al*) to Executive Officer to HREC for consideration of HREC dated 24 May 2005 (20 pages). |
| Document 1.14 | HREC Form B Progress Report/Application for Renewal re Research (first six pages only) dated 1 June 2006. |
| Document 1.16 | Memo from Associate Professor Jenkins to Executive Officer HREC requesting an amendment to the Research Project. |

***Section 3 Document***

| | |
|---|---|
| Document 3 | A bound document entitled "Executive functioning, gender, age, and medication as predictors of developmental wellbeing among students with ADHD, Australia Research Council Linkage project", undated, (page 1 and pages 47 to 134). |

## SECTION 4 - CLAUSE 4 - COMMERCIAL OR BUSINESS INFORMATION

25. The agency claims that page 1 and pages 47 to 134 of Document 3 are exempt under clause 4(3) of Schedule 1 to the FOI Act. Eli Lilly also claims that Document 3 is exempt under clause 4(3), which provides as follows:

> *"**4. Commercial or business information***
>
> ***Exemptions***
>
> *(1)* …
> *(2)* …
> *(3)* *Matter is exempt matter if its disclosure –*
>
> *(a)* *would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
>
> *(b)* *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*
>
> ***Limits on exemptions***
>
> *(4)* *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*
> *(5)* …
> *(6)* …
> *(7)* *Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest."*

### 4.1 *The agency's claims*

26. The agency's initial decision-maker said that:

> "*The University increasingly engages in business, commercial and financial relationships with other parties. These arrangements and partnerships ensure that the university makes the best use of its resources and engages the resources of partners for mutual benefit. Such arrangements are often overseen and monitored by the Australian Research Council (ARC).*
>
> *The ARC has a commitment to linkage projects. The ARC website states that the* "Linkage Projects scheme supports collaborative research and development

projects between higher education organisations and other organisations, including within industry, to enable the application of advanced knowledge to problems."

*There are rules and instructions that must be complied with in relation to ARC funding. In order to qualify for ARC Linkage Project funding there must be significant contribution from industry partners.*

*It is contrary to the requirements of Schedule 1 Clause 4(3) to make available to you any details relating to any* 'funding of the study' *provided by the private sector*."

*The public interest test must also be considered. I am of the view that there is significant public interest on two levels. Firstly there is the question of public interest in the diagnosis and treatment of ADHD…Secondly, there is the question of corporate involvement in university research to the extent that inappropriate influence could be applied.*

*I understand that the perception that this could take place. In my view it is precisely because of this perception that parties to such agreements are subject to close scrutiny from both inside and outside the University to ensure that sound research practice and ethical standards are maintained. Apart from the HREC this research project is subject to standards set by the National Health and Medical Research Council (NHMRC). The university is also subject to internal and external auditing and research reporting to the Commonwealth government.*

*Given this level of monitoring and benchmarking, I am of the view that the public has confidence that university research is impartial as well as scientifically and statistically sound. Having considered the foregoing I have concluded that a public interest argument cannot be sustained in this case.*

*It may well be that once the research is complete and the results are published that a number of the exemptions that apply to the documents at this stage will not apply. The University is hopeful that the applicant will understand the nature of University research and the protocols that are required to undertake it in a manner that meets the stringent standards.*

*It may be helpful for the Commissioner and the Applicant to take note of the website of the Australian Research Council so as to understand better the contractual, funding and monitoring procedures that are part of ABC supported research. The website can be found at http://www.arc.gov.au/."*

27. The agency's internal review decision-maker also said that:

"*I consider that the reading of Clause 4 of Schedule 1 of the Act* "Commercial or Business Information" *does allow for a broader interpretation that simply* "commercial". *Clause 4(3)(a) notes that the exemption applies also to information that would reveal* business, professional, commercial or financial affairs. *The exemption goes on to stipulate that such revelations would have to reasonably expect to prejudice the future supply of information to an agency (in this case, Curtin).*

*The research project is known as an* Australian Research Council (ARC) linkage project. *The ARC oversees significant higher education research funding on behalf of the Commonwealth Government. It is a statutory authority within the*

*Australian Government's Education Science and Training Portfolio. The linkage projects require industry funding to be secured in order for projects to be funded through the ARC.*

*It can be assumed, therefore, that there is a least one 'private sector' contributor to the linkage project….It is not the aim of the FOI Act to reveal financial, business, professional or commercial affairs of a private person or organisation. Such entities are not covered by the provisions of the FOI act and their operations must be respected."*

### 4.2 *Eli Lilly's submissions*

28. Eli Lilly submits that Document 3 contains information about its business, professional and financial affairs because it contains information detailing Eli Lilly's role as a partner investigator in the study the disclosure of which could reasonably be expected to have an adverse effect on Eli Lilly's business, professional and financial affairs or to prejudice the future supply of information of that kind to the agency. Eli Lilly also says that the disclosure of Document 3 would not be in the public interest.

29. Eli Lilly says that it selects research proposals based on a number of factors, including general business need and that it is a function of the industry that business strategies and methodologies regarding clinical trials remain commercial in confidence between relevant parties and are not generally known to industry competitors to ensure the robust business results are achieved. Eli Lilly says that information of the kind contained in Document 3 is not publicly available in order to enable the industry as a whole to conduct thorough and legitimate research without the barrier of unfair and premature retribution.

30. Eli Lilly says that disclosure of the relevant information would permit its industry competitors to see the level of involvement Eli Lilly undertakes in studies and assess its internal business strategies and business needs. Eli Lilly says that the information could be used to advance competitor's business objectives, thereby destabilising Eli Lilly's competitive functioning and future business and financial affairs and also grant an unfair advantage to its competitors who would see the breakdown of methods upon which Eli Lilly bases its involvement in research.

### 4.3 *The complainant's submissions*

31. The complainant submits that the Project is not a commercial operation but rather a research one. The complainant acknowledges that there is a public interest in the diagnosis and treatment of ADHD and submits that it is in the public interest that all documents relating to this project, which involves a study of the effects of mind-altering medications on minors and involves schedule 4 and 8 drugs, should be disclosed. The complainant argues that there is an ongoing debate in the community about the diagnosis and management of ADHD and, as I understand the complainant's argument, the disclosure of this information would inform and be of benefit to that debate.

32. The complainant submits that there is a public interest in the community having confidence that university research is impartial and, to this end, the complainant seeks the disclosure of the funding sources provided for the Project.

33. Further, the complainant submits that since the trial involves administering 'free' medication to the children within the trial and since there exists a high potential for drug company influence, there is a public interest in knowing who is providing the funds for a study which will provide justification for the recommendation of one medication over another.

### 4.4 *The burden of proof under the FOI Act*

34. 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*". Similarly, section 102(2) of the FOI Act provides that if "*…a third party initiates or brings proceedings opposing the giving of access to a document, the onus is on the third party to establish that access should not be given or that a decision adverse to the access applicant should be made*." Section 102(3) of the FOI Act further provides that if, under a provision of Schedule 1, matter is not exempt matter if its disclosure would, on balance, be in the public interest, the onus is on the access applicant to establish that disclosure would, on balance, be in the public interest.

### 4.5 *The standard of proof*

35. The standard of proof that decision-makers must meet under the FOI Act was recently considered by A/Information Commissioner C P Shanahan SC in his decision in *Re WA Newspapers Ltd and Civil Service Association of WA Inc and Salaries and Allowances Tribunal and Mercer (Australia) Pty Ltd* [2007] WAICmr 20. A/Information Commissioner Shanahan reviewed two previous decisions of the Supreme Court of Western Australia in relation to appeals made to the Supreme Court under the FOI Act – *Manly* v. *Ministry of Premier and Cabinet* (1995) 14 WAR 550 and *Police Force of Western Australia v. Winterton*, unreported; SCt of WA (Scott J) Library Number 970646 (see: *Re WA Newspapers* at paragraphs 100 to 103 and paragraph 110).

36. In *Manly*'s case, Owen J of the Supreme Court of Western Australia considered, among other things, a claim for exemption under clause 4(3) of Schedule 1 to the FOI Act and said, at page 573:

> "*How can the* [Information] *Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had "real and substantial grounds for thinking that the production of the document could prejudice that supply" or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision-maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision-maker*".

37. In *Police Force of Western Australia v. Winterton*, unreported; SCt of WA (Scott J) Library Number 970646; 27 November 1997, Scott J of the Supreme Court of Western Australia considered the terms of section 102 of the FOI Act and the relevant standard of proof. In that case, Scott J said, regarding the standard of proof:

> *"As can be seen from cl 5(1)(b) of the First Schedule to the FOI Act, the words "could reasonably be expected to" are also contained within the FOI Act of Western Australia. … for my part, I can see no other sensible meaning for the words* "could reasonably be expected to" *than to conclude that the intention of Parliament was that the standard of proof should be that it was more likely than not that such was the case.*
>
> *In any event, whether that view is correct or not, the Western Australian provisions are different to the Commonwealth Act in that the Commonwealth Act expressly refers to* "prejudice" *in relation to the future supply of information. The Western Australian FOI Act has no equivalent provision so that the reasoning referred to by Bowen CJ and Beaumont J in Attorney General's Department v Cockcroft* (1986) 10 FCR 180 *does not apply to the case presently under consideration. I am therefore of the view that for the purposes of the relevant clause in the Western Australian FOI Act, the standard is the balance of probabilities so that the appellant has to establish that it is more likely than not that the documents come within the exemption*."

38. After reviewing the decisions in *Manly*'s case and *Winterton*'s case, A/Information Commissioner Shanahan concluded that, for the purposes of the FOI Act, the standard of proof to be applied that must be met by decision-makers, in order to establish a claim for exemption under the FOI Act, must be the balance of probabilities. I agree with A/Information Commissioner Shanahan's findings in that regard.

### 4.6 *The agency's notices of decision*

39. Neither of the notices of decision given to the complainant by the agency, pursuant to s.13(1)(b) of the FOI Act, complied with the statutory obligations placed upon the agency's decision-makers by s.30 of the FOI Act. Section 30, so far as is relevant, provides as follows:

> ***"30. Form of notice of decisions***
>
> *The notice that the agency gives the applicant under section 13(1)(b) has to give details, in relation to each decision, of —*
>
> *(a) the day on which the decision was made;*
> *(b) the name and designation of the officer who made the decision;*
> *(c) …*
> *(d) …*
> *(e) …*
> *(f) if the decision is to refuse access to a document—the reasons for the refusal and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based;*
> *(g) …*

> *(h) the rights of review and appeal (if any) under this Act and the procedure to be followed to exercise those rights.*"

40. Whilst the notices of decision included details of the date of the decision, the name and designations of the officers who made the decisions, the exemption clauses claimed by the agency and, broadly, the reasons for the decision to refuse access, neither notice complied with the requirements of section 30(f) of the FOI Act by including the findings on the material questions of fact underlying the reasons for refusing access nor did the notices of decision contain adequate references to the material used or referred to by either decision-maker when they concluded that the disputed documents are exempt documents. No sufficient attempt was made to explain to the complainant or to me the factual basis underlying the agency's reasons for refusing the complainant access to the disputed documents.

## 4.7 Determination

41. The exemption in clause 4 recognises that the business of government is frequently mixed with that of the private sector and that neither the business dealings of private bodies, nor the business of government, should be adversely affected by the operations of the FOI Act (see: *Re Kimberley Diamond Company NL and Department for Resources Development and Argyle Diamond Mines Pty Ltd* [2000] WAICmr 51).

42. The exemption in clause 4(3) deals with information about the business, professional, commercial or financial affairs of a person, including a company or incorporated body. The exemption in clause 4(3) consists of two parts and both paragraphs (a) and (b) must be satisfied before a claim for exemption is established. If the requirements of paragraphs (a) and (b) of clause 4(3) are satisfied, then the application of the limits on exemption in clauses 4(5) and 4(7) must be considered.

### 4.7.1 *Clause 4(3)(a) – information about the business, professional, commercial or financial affairs of a person*

43. The first step to establishing a claim for exemption under clause 4(3) is to identify the particular information which is claimed to be "*…information about the business, professional, commercial or financial affairs of a person*". In this instance, the agency did not provide the complainant with any information to identify the particulars which it claims consists of information of that kind.

44. The agency's decision-makers asserted that "[I]*t is contrary to the requirements of Schedule 1 Clause 4(3) to make available to you any details relating to any* 'funding of the study' *provided by the private sector"* and that "[I]*t can be assumed, therefore, that there is a least one 'private sector' contributor to the linkage project….It is not the aim of the FOI Act to reveal financial, business, professional or commercial affairs of a private person or organisation. Such entities are not covered by the provisions of the FOI Act and their operations must be respected*."

45. Those statements by agency's decision-makers do not establish a *prima facie* claim for exemption under clause 4(3). As I have said above, the agency must establish not only that page 1 and pages 47 to 134 of Document 3 contain information of the kind described in clause 4(3)(a) but also that the disclosure of those pages could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of a person or, in the alternative, prejudice the future supply of information of that kind to Government or to the agency. Similarly, Eli Lilly must also establish that Document 3 contains information of the kind described in clause 4(3)(a) about it and that disclosure of Document 3 could reasonably be expected to have an adverse effect on its business, professional, commercial or financial affairs or, in the alternative, prejudice the future supply of information of that kind to Government or to the agency

46. Notwithstanding the agency's failure to address the requirements of clause 4(3), I have examined page 1 and pages 47 to 134 of Document 3. Page 1 contains the names of three companies, including Eli Lilly or bodies other than the agency. In the context in which those names appear on page 1 and elsewhere in Document 3, those three bodies are 'third parties' within the meaning of section 33(1)of the FOI Act. In the broadest sense then, the names of those third parties may be said to be information of the kind described in clause 4(3)(a) about those third parties and that information meets the requirements of clause 4(3)(a).

47. Having examined the relevant pages, pages 47 to 50 of Document 3 do not, in my opinion, contain any information of the kind described in clause 4(3)(a) about any identifiable third party. Accordingly, I am not satisfied that those pages contain any information of the kind described in clause 4(3)(a) of Schedule 1 to the FOI Act.

48. Pages 51, 52, 55, 60 to 63, 65 to 93 of Document 3 contain some information of the kind described in clause 4(3)(a) about Eli Lilly and the other third parties referred to in paragraph 43 above. Pages 94 to 134 of Document 3 make up a copy of the funding contract between the agency and the ARC in relation to the Project. Accordingly, I am satisfied that the information recorded in pages 51, 52, 55, 60 to 63, 65 to 93 and 94 to 134 is information that also meets the requirements of clause 4(3)(a).

### 4.7.2 *Clause 4(3)(b) – could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that to the Government or to an agency*

49. In order to displace the complainant's statutory right of access, the agency and Eli Lilly must establish a case for exempting the disputed information from disclosure (see: Owen J's comments in *Manly's* case).

50. With respect to clause 4(3)(b), no probative information to the relevant standard has been put before me by the agency to establish how or why the disclosure of page 1, pages 51, 52, 55, 60 to 63, 65 to 93 and pages 94 to 134 of Document 3 could reasonably be expected to have an adverse effect on the third parties'

business and commercial affairs or prejudice the future supply of information of that kind to Government or to the agency.

51. With regard to the relevant information about Eli Lilly, I note that in documents provided to participating doctors, parents, children and school principals (copies of which the agency has also released to the complainant), there is a substantial amount of information about the Project participants, including Eli Lilly, the purposes and aims of the Project, the manner in which the Project research would be carried out and other information relating to the Project. Eli Lilly is publicly identified as a participating industry partner in the Project on the agency's website and additional information about Eli Lilly's participation in the Project is also recorded in other documents previously released to the complainant by the agency.

52. I also note that a standard version of pages 94 to 134 of Document 3 - the funding contract between the agency and the ARC - is publicly available from the ARC's website. That funding contract is a *pro-forma* document which any person or organisation seeking researching funding from the ARC can download from the ARC website. My office accessed and printed a copy of the ARC's *pro-forma* contract from its website. With two minor exceptions, the contract document which my office has downloaded and printed from the ARC's website is identical to pages 94 to 134 of Document 3. In this matter, it is apparent that at the relevant time, an officer or officers of the agency obtained a copy of the ARC's *pro-forma* contract from the ARC's website (as my office also has) and then added the relevant information about the agency into the first and last pages of the ARC's *pro forma* contract. According to the investigations carried out by my office, all of the remaining pages are identical in every respect to those that are on the ARC website.

53. In the absence of any probative information from the agency, I am not satisfied that the agency has discharged the onus it bears under section 102(1) of the FOI Act to the relevant standard and established that the disclosure of page 1, pages 51, 52, 55, 60 to 63, 65 to 93 and pages 94 to 134 of Document 3 under the FOI Act could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of any person, including the third parties or that the disclosure of those pages could reasonably be expected to prejudice the future supply of information of that kind to Government or to the agency. The terms of clause 4(3)(b) have not been met by the agency.

54. As regards the claims made by Eli Lilly, I accept that there is some information of the kind described in clause 4(3)(a) in Document 3. However, on the basis of my examination of Document 3, I do not find that there is any detailed information about Eli Lilly's business strategies and methodologies relating to clinical trials; I do not accept Eli Lilly's claim that disclosure of Document 3 would permit Eli Lilly's industry competitors to ascertain Eli Lilly's level of involvement in clinical studies nor to assess Eli Lilly's business strategies and business needs nor do I accept that the disclosure of Document 3 would give Eli Lilly's commercial competitors an unfair advantage over Eli Lilly. As I have said, information about Eli Lilly's participation in the Project has already been published by the agency, in information given to doctors, parents and teachers.

I am not satisfied that Eli Lilly has discharged the onus it bears under section 102(2) of the FOI Act to the relevant standard and established that disclosure of Document 3 under the FOI Act could reasonably be expected to have an adverse effect on its business, professional, commercial or financial affairs.

55. Accordingly, I find that the disputed information contained in of page 1, pages 51, 52, 55, 60 to 63, 65 to 93 and pages 94 to 134 of Document 3 is not exempt under clause 4(3) of Schedule I to the FOI Act. As the agency has failed to establish that the disputed pages in Document 3 are exempt under clause 4(3), it is unnecessary for me to consider whether any of the limits on exemption in clauses 4(4) to 4(7) apply.

## SECTION 5 – CLAUSE 6 – DELIBERATIVE PROCESSES

56. The agency claims that Documents 1.1, 1.4, 1.5, 1.6, 1.10, 1.12, 1.16 and page 1, pages 47 to 50, 51, 52, 55, 60 to 63, 65 to 93 and pages 94 to 134 of Document 3 are exempt under clause 6(1) of Schedule 1 to the FOI Act. Clause 6 provides, insofar as it is relevant:

> ***"6. Deliberative processes***
>
> ***Exemptions***
>
> *(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) …".*

### 5.1 *The agency's claims*

57. The agency said, in its initial notice of decision, that:

> *"*[A]*cademic Research is one of the main activities of a university. Universities contribute to the development of society by adding to knowledge through both research and teaching. In order for academic research to be of the highest quality the university monitors that research. It puts in place checks and balances to*

*ensure that those involved in the research, including human subjects, are protected from harm.*

*The 'deliberative processes' of an organisation agency have also been described as the thinking processes. There is a requirement any research undertaken at Curtin proposing to include human subjects must be approved by the Human Research Ethics Committee. This is part of the deliberation that must take place when research projects are being developed. The submissions to that Committee and the Committee's responses to the researchers are clearly part of the deliberative process. To release these documents would be to release exempt matter because its disclosure would reveal the consultations and deliberations that have taken place. They are consultations and deliberations between the researcher and the University's committee with responsibility for approving the research.*

*With this exemption consideration must be given to a 'public interest' test. That is, at Schedule 1 Clause 6(1)(b) matter is exempt if its disclosure would, on balance, be contrary to the public interest.*

*The broad area of interest is Attention Deficit/Hyperactivity Disorder (ADHD). In my view there is significant public interest in the diagnosis and treatment of ADHD. There is general community debate about the disorder and its treatments. As a general principle, I conclude that there is significant public interest in this matter. The question that needs to be answered, however, is whether, on balance the public interest outweighs the "deliberative processes" exemptions(sic). In my view it does not. The release of the documents would not be in the public interest.*

*The community must have confidence that Universities have integrity and ethical standards in relation to their research.*

*The HREC draws its membership widely; from both inside and outside the University. Add to that the fact that there are a number of internal and external reporting requirements applied to the University.*

*The University's HREC must be free to act in a full and frank manner when considering research proposals. There is a long tradition of integrity and rigour associated with University research. One of the reasons for that is because research processes are closely monitored and sub-standard research practices are not tolerated. Those rare occasions when academic research is exposed as fraudulent it leads to significant public interest and is newsworthy. This adds weight to the argument that in the vast majority of cases, university researches 'get it right'. Given all of the above, I can see that disclosure of these documents would on balance, be contrary to the public interest."*

58. The agency said, in the notice of decision on internal review, that:

"[A]*t Curtin, whenever research that involves human subjects is being considered and developed, details must be submitted to the HREC. The research cannot proceed until it has been approved. This is one of the 'checks and balances' that allows confidence in university based research. Research, along with teaching and learning, is core business for universities in Australia.*
…
*The argument for non release of the documents must be also considered. I am of the view that public interest in matters of academic research are well served by the checks and balances that already exist, that is, the University Human Research*

*Ethics Committee (HREC). The Committee is based on the model promoted by the Australian Vice-Chancellors Committee (AVCC) (now known as Universities Australia). Added to this is the monitoring of research undertaken by the National Health and Medical Research Council (NHMRC).*

*Given the above, I am inclined to the view that the public interest is already well served by the overseeing of human research at Curtin by these bodies.*

The complainant has "…*expressed the view that the full release of these documents would demonstrate the impeccable value of the HREC, and would engender public confidence in the University. Whilst this may be the case, the converse must also be considered. What damage would be done to University research if the deliberative processes that have taken place in coming to an agreed research protocol are made available to the public? University research is a privileged domain and it requires significant academic education and training to access it. The HREC itself is 'blind'; in that its membership is not generally known so that there can be an absence of influence or bias…I have considered public interest argument in relation to these documents and whilst I acknowledge significant public interest in matters relating to ADHD and its treatment, I consider tat the public interest would not be further advanced by releasing documents relation (sic) to the formulation of research* processes. *It may be a different matter if I was being asked to decide upon the release of research outcomes*."

59. In September 2007, the agency submitted that:

"[T]*he argument against the release of the information relates to the long held view that scientific research, when conducted at a university is valid and reliable and contains adequate checks and balances. There are strict guidelines that have been adopted by Curtin in relation to human research ethics. Curtin subscribes to national protocols. In relation to HREC procedures there is a specific requirement for appropriate confidentiality of the content of applications and the deliberations of review bodies…*

*The document is a submission that proposes a research project. As noted above it contains a Scientific Protocol, Ethical Analysis and Research Plan. The research is not complete. It has not been published or otherwise reported in the professional literature or at a conference. Deliberative processes are those processes that may be said to reveal the 'thought processes' of an agency. In this case the research proposal, relating to research that is ongoing and not yet concluded, is deliberative in that to reveal it would be to reveal how the agency (this researcher) is operating and deliberating…. The University is required to apply a public interest test to this exemption. The matter is not exempt if its disclosure would, on balance, be in the public interest. As outlined in consideration of earlier exemption clauses, an argument for release as a result of public interest cannot be sustained.*"

60. In response to my preliminary view, the agency maintained its claim for exemption under clause 6(1) and submitted that it is not in the public interest for the premature release of the disputed documents, for the following reasons:

- *"[R]elease of documents under FOI is release that is unfettered. As such, it is likely that document 1.16, if released, could be read on its own, without the benefit of further information regarding the study, which may lead to members of*

*the public drawing incorrect conclusions about the information contained in document 1.16, the study or indeed about Associate Professor Jenkins herself. The information contained in document 1.16 will more than likely form part of the findings produced, and published, at the conclusion of the research. It is in that way that the information will be able to be correctly interpreted as part of the whole study.*

- *Curtin submits that document 1.16 contains more than information simply about the establishment and approval of the project, but contains information about the study itself, and opinions of Associate Professor Jenkins regarding certain aspects of the study. Release of this document would reveal information relating to the research being undertaken by Associate Professor Jenkins, and if released prematurely is likely to expose Associate Professor Jenkins and Curtin to damage as a result of dissemination of this information out of context.*

- *Curtin has also considered the public interest in releasing document 1.16. There is a strong public interest in the public knowing and understanding the processes and procedures that are in place for considering, approving and overseeing any study involving humans. This is why Curtin makes information relating to its research and development processes accessible to the public free of charge, on its websites. However, the potential for misleading interpretation of this document to be provided by only reading information relating to changes in the study outweighs the public interest in releasing this document to the applicant."*

## 5.2 Determination

61. To establish a *prima facie* claim for exemption under clause 6(1), it is not sufficient for the agency to establish that the documents contain information of the kind described in clause 6(1)(a); the requirements of paragraphs 6(1)(a) and 6(1)(b) of clause 6(1) must both be satisfied by the agency (see: *Ministry for Planning v Collins* (1996) 93 LGERA at page 76). If the agency satisfies the requirements of paragraphs 6(1)(a) and (b), the documents under consideration will be exempt, subject to the application of the limits on exemption set out in clauses 6(2) to 6(4).

62. Unlike the other exemption clauses set out in Schedule 1 to the FOI Act that are limited by a "public interest test" limit on exemption, in the case of a claim for exemption under clause 6(1), an access applicant is not required to demonstrate that disclosure of the requested documents would be in the public interest but, rather, an access applicant is entitled to access unless the agency establishes that the disclosure of the requested documents would reveal information of the kind described in clause 6(1)(a) and that the disclosure of those documents would, on balance, be contrary to the public interest. The onus of establishing that the disclosure of the requested documents "*…was contrary to the public interest*" rests with the agency (see: *Health Department of Western Australia v Australian Medical Association Ltd* [1999] WASCA 269, unreported at paragraph 18.).

63. The 'deliberative processes' of an agency are its 'thinking processes', the process of reflection for example on the wisdom and expediency of a proposal, a particular decision or a course of action: see *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 and *Re Collins* at pages 72 and 73.

### 5.2.1 *Document 3*

64. As regards Document 3, after examining that document, I am not satisfied that the disputed pages in that document are exempt under clause 6(1), as claimed by the agency. The agency did not claim exemption for Document 3 under clause 6 in the initial decision or the decision on internal review. However, in a letter to the former A/Commissioner, dated 14 September 2007, the agency claimed that Document 3 was exempt under clauses 4, 6, 8 and 10 of Schedule 1 to the FOI Act. Notwithstanding that claim, no reasons nor explanation were given to the former A/Commissioner as to why the agency claimed exemption under clause 6(1) for Document 3 and no submissions, written findings of fact or other probative material has since been put before me by the agency to support the claim for exemption under clause 6 for Document 3.

65. In the absence of any information or probative material to the relevant standard from the agency, I am not satisfied that the agency has discharged the onus it bears under section 102(1) of the FOI Act of establishing that its decision to refuse the complainant access to the disputed pages in Document 3 on the ground that they are exempt under clause 6(1), is justified. Accordingly, I find that page 1; pages 47 to 50, 51, 52, 55, 60 to 63, 65 to 93 and pages 94 to 134 of Document 3 are not exempt under clause 6(1) of Schedule 1 to the FOI Act.

### 5.2.2 *Documents 1.1, 1.4, 1.5, 1.6, 1.10, 1.12, 1.14 and 1.16*

66. Having examined Documents 1.1, 1.4, 1.5, 1.6, 1.10, 1.12, 1.14 and 1.16, I accept the claim that those documents contain some information of the kind described in clause 6(1)(a) in that they contain some opinion, advice and recommendations and they establish that consultations took place between Associate Professor Jenkins and the HREC, in relation to the deliberative processes of the HREC about the application for, and subsequent approval of, the Project. Accordingly, I am satisfied that the disclosure of those documents would reveal matter of the kind described in clause 6(1)(a) before the Project was approved the HREC.

67. The agency has made a number of assertions as to why the agency says that an argument for release of the disputed documents, including Documents 1.1, 1.4, 1.5, 1.6, 1.10, 1.12, 1.14 and 1.16 to the complainant, in the public interest cannot be sustained. I have summarised those assertions as follows:

    (i) the community must have confidence that universities have integrity and ethical standards in relation to their research;

    (ii) the HREC must be free to act in a full and frank manner when considering research proposals;

    (iii) there is a long tradition of integrity and rigour associated with university research, research processes are closely monitored and substandard research practices are not tolerated;

(iv) research that involves human subjects cannot proceed at the agency unless and until the proposed research has been submitted to and approved by the HREC;

(v) the 'public interest' in matters of academic research are well served by the checks and balances that already exist (the HREC) and the monitoring of research undertaken by the National Health and Medicine Research Council (the NHMRC');

(vi) damage may be done to university research if the deliberative processes that have taken place in coming to an agreed research protocol are made available to the public;

(vii) the agency may well risk its reputation and status as a developing research university if it were to make available information and documents which have traditionally been confidential;

(viii) the potential risk to the agency and to established and widely accepted research protocols means that an argument for the release of the documents as a result of a public interest argument cannot be sustained;

(ix) the public interest would not be further advanced by releasing documents relating to the formulation of research processes; and

(x) the Project is not yet complete and, in the opinion of the agency, the disclosure of Documents 1.1, 1.4, 1.5, 1.6, 1.10, 1.12 1.14 and 1.16 will reveal how the researcher is operating and deliberating.

### 5.3 *The complainant's submissions*

68. The complainant submits that:

- human research on children involving the use of psychotropic drugs is an area that attracts a high level of interest and concern at a public level and that the way to engender public confidence in the agency is to release documents such as these to public inspection when requested;
- the public interest in having access to evidence of the ethical standards used by the institutions such as the agency far outweighs any concern about privileging the 'deliberative processes' of the agency and the agency should use this as an opportunity to demonstrate the impeccable nature of the HREC;
- what could be more in the public interest than ensuring and demonstrating that the highest level of ethical consideration is involved when approving research projects, involving the medication of children with drugs, with a known range of potential adverse side effects including suicidal ideation;
- the public interest is not being well-served because there are still questions being raised both publicly and within the university sector about the ethical basis for studies which involve children;

- a completely transparent process is necessary to ensure that there are no questions about the ethical nature of university research.

### 5.4 *The public interest*

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

70. I agree with the views previously expressed by the former Commissioner and the former A/Commissioner. I also consider that it may be contrary to the public interest to disclose documents while deliberations in an agency are continuing, if there is evidence that disclosure would adversely affect the agency's decision-making processes, or that disclosure would, for some other reason, be demonstrably contrary to the public interest.

71. I have considered the reasons given by the agency in support of its claims that it would be contrary to the public interest to disclose Documents 1.1, 1.4, 1.5, 1.6, 1.10, 1.12, 1.14 and 1.16. I do not accept the agency's claims.

72. Document 1.1(a) is a single page memorandum from the then Secretary of the HREC to members of the HREC. Based on my assessment of that document, it is, in my view, an administrative document and, if disclosed, would reveal nothing more than the fact that Associate Professor Jenkins' proposed research protocol was submitted to certain members of the HREC, for their consideration and comment, in accordance with the agency's usual processes which, I note, are described in detail on the agency's website. In my opinion, there is nothing in Document 1.1(a) that discloses any 'deliberative processes' of the agency apart from the fact that it reflects a routine step in an administrative process.

73. Document 1.1(b) is Associate Professor Jenkins' application, on Form A '*Application for Ethical Approval for Research Involving Humans*' for consideration by the HREC. An up to date version of Form A is publicly available from the agency's website, together with extensive notes and information prepared and published by the agency for the clear purpose of assisting a person to submit such an application to the HREC. Attached to Document 1.1(b) is Associate Professor Jenkins' detailed explanation of the proposed research project. In my opinion, nothing in Document 1.1(b) contains any information about the 'deliberative processes' of the HREC or the agency. It is a research protocol submitted for consideration and approval.

74. Documents 1.1(c), 1.4 and 1.5 are the responses and comments prepared by members of the HREC, after their initial assessment of Associate Professor

Jenkins' application for ethical approval. Document 1.6 is an email from the then Executive officer of HREC, attaching a comprehensive summary of the HREC members' initial assessment of Associate Professor Jenkins' proposed research project. Those three documents indicate that the members of the HREC 'thought' about the research proposal and offered some comments and suggestions about the research proposal. Documents 1.10 and 1.12 are further submissions from Associate Professor Jenkins' to the HREC, in response to the HREC member's initial assessments of the proposed research project. Those documents therefore reflect something of the "thinking processes" of the agency.

75. Documents 1.1(a), 1.1(b), 1.1(c), 1.4, 1.5, 1.6, 1.10 and 1.12 all relate to the "deliberative processes" of the relevant members of the HREC in the sense that they reflect the consultations that took place when they received, evaluated and ultimately approved Associate Professor Jenkins' proposed research project, during the period between March and June 2005. In my opinion, those documents were prepared for the specific purpose of seeking and obtaining HREC approval for the Project. However, it is evident that that "deliberative process" was completed in early June 2005, when the HREC granted approval for the Project.

76. No evidence has been put before me by the agency to establish that the HREC continues to deliberate on Associate Professor Jenkins' original application for ethical approval. Nor has any evidence to the required probative standard been put before me by the agency to establish that the disclosure of Documents 1.1(a), 1.1(b), 1.1(c), 1.4, 1.5, 1.6, 1.10 and 1.12 - which I note are now more than 3 years old - would, in some other manner, adversely affect the agency's decision-making process in relation to the Project or at all.

77. Document 1.14 is a progress report to the HREC from Associate Professor Jenkins, dated June 2006 in relation to the Project and Document 1.16 is a memorandum from Associate Professor Jenkins dated October 2006, seeking an amendment to the Project. As with Documents 1.1(a), 1.1(b), 1.1(c), 1.4, 1.5, 1.6, 1.10 and 1.12, no evidence has been put before me by the agency to establish that the HREC continues to deliberate on either Document 1.14 or Document 1.16 nor has any evidence to the required probative standard been put before me to establish that disclosure of Documents 1.14 and 1.16 would, in some other manner, adversely affect the agency's decision-making process in relation to the Project.

78. The agency claims that "…*damage may be done to university research if the deliberative processes that have taken place in coming to an agreed research protocol are made available to the public*". Those claims are, in my opinion, unsupported speculation and conjecture. I find that none of the disputed documents contain any record of the deliberations of the HREC, when it considered, and ultimately approved, Associate Professor Jenkins' research proposal. Based on my examination of the disputed documents, the agency's assertion that "damage may be done to the university" if the deliberative processes were to be revealed does not accord with my finding in that regard. In addition, that claim also ignores the substantial amount of information about the

procedure and processes that are required to be followed by researchers submitting applications seeking ethical approval of research from the HREC which is publicly available from the agency's website.

79. I have not attached much weight to that claim. Other than the assertion made by the agency, there is nothing either in the disputed documents or that has been put before me by the agency that sways me to accept that proposition.

80. The agency also claims that it "*…may well risk its reputation and status as a developing research university if it were to make available information and documents which have traditionally been confidential*" and also that "*…the potential risk to the agency and to established and widely accepted research protocols means that an argument for the release of the documents as a result of a public interest argument cannot be sustained.*" Those claims are, in my opinion, also unsupported speculation and conjecture and I have not attached much weight to them either.

81. The former Commissioner dealt with a similar claim about matters that had been regarded as 'traditionally confidential' in the first full year of the operation of the FOI Act in Western Australia (see: *Re Kobelke and Minister for Planning* [1994] WAICmr 5 and *Re Taylor and Ministry of the Premier and Cabinet* [1994] WAICmr 26.) In *Re Kobelke* the former Commissioner said, at paragraph 60 of that decision, that:

> "*…the confidentiality of documents may be a public interest factor against disclosure under clause 6(1)(b) in circumstances where it can be shown that protection of the type of information contained in the document is essential for the proper functioning of the deliberative process.*"

82. In *Re Kobelke,* the former Commissioner considered the decision of the Full Federal Court of Australia in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* [1992] FCA 241, in which the Federal Court said:

> "*Prior to the coming into operation of the* [Commonwealth] *FOI Act, most communications to Commonwealth Departments were understood to be confidential because access to the material could be obtained only at the discretion of an appropriate officer. With the commencement of the FOI Act on 1 December 1982, not only could there be no understanding of absolute confidentiality, access became enforceable, subject to the provisions of the FOI Act. No officer could avoid the provisions of the FOI Act simply by agreeing to keep documents confidential. The FOI Act provided otherwise.*"

83. The former Commissioner then said that the Federal Court's decision in *Searle's* case

> "*…is relevant within the context of the operation of FOI in Western Australia because section 10(1) of the FOI Act provides a person with a right of access to documents of an agency (other than an exempt agency), subject to and in accordance with the FOI Act… the legally enforceable right of access under the FOI Act may only be avoided by the means laid down in the FOI Act in relation to the disclosure of exempt matter. The effect of the passage quoted from* Searle *in respect of confidential communications is that previous understandings of*

> *confidentiality may not be sufficient to protect information from disclosure under FOI since it is the specific requirements in clause 8 that must be applied rather than any long-standing convention of confidentiality.*"

84. I agree with the former Commissioner's views in *Re Kobelke* and *Re Taylor* and her analysis of the Federal Court's decision in *Searle*'s case. I do not accept that merely claiming that disclosure would have the adverse consequences claimed by the agency is sufficient to discharge the onus that is upon the agency to justify its decision to refuse access under clause 6(1). The exemption in clause 6(1) of the FOI Act is not established merely by a belief on the part of an agency's decision-makers that because documents purportedly form, or once formed part of an agency's deliberative process, disclosure would be, for that reason alone, contrary to the public interest. More is required to satisfy the terms of the FOI Act. Where it can be shown that protection of the type of information contained in a document is essential for the proper functioning of the deliberative process of an agency, then the requirements of clause 6(1)(b) may be established.

85. The agency says that the disclosure of Documents 1.1, 1.4, 1.5, 1.6, 1.10, 1.12 and 1.16 will reveal how the researcher is operating and deliberating because the Project is ongoing. Whilst the Project is not yet complete and the research is ongoing, I regard the agency's claim that disclosure of the documents would reveal how the researcher is operating and deliberating to be without substance. However, the fact that Associate Professor Jenkins may be engaged in continuing research in relation to the Project does not, in my view, lead me to a conclusion that the initial consultations that took place in early 2005 between Associate Professor Jenkins and the HREC, prior to approval of the research protocol, would disclose how the researcher is now operating and deliberating. Nothing has been put before me by the agency to the required probative standard to establish that Associate Professor Jenkins' deliberative processes or her current operating processes could be affected - adversely or otherwise - by disclosure of Documents 1.1, 1.4, 1.5, 1.6, 1.10, 1.12 and 1.16.

86. Further, the first five reasons given by the agency, as set out in paragraph 60 above are, in my view, merely generalised arguments in support of the agency's position that academic research of the kind under consideration in this matter is of benefit to the public and that there are sufficient "checks and balances" built into that research system so that the public does not need to inquire further about the probity, integrity and rigour of that research. It is a view that I do not accept without supportive probative material, which is, as I have said above, lacking in this case. By way of example, if I were to accept the agency's assertion that members of the HREC must be free to act "*…in a full and frank manner*" when considering research proposals, that would mean that I accept as reasonable the agency's claim that professional academic members of the agency, and other like agencies, will only make honest, and sometimes adverse comments and criticisms about research proposals submitted to the HREC for ethical approval if they can do so behind the cloak of confidentiality.

87. In my view, such a claim is inconsistent with the ethical standards expected of professionals in the academic world and elsewhere and, as with all of the other

claims made by the agency, it is not supported by credible evidence. The agency's views do not, in my view, establish that disclosure of the dispute documents would, on balance, be contrary to the public interest. In effect, the agency has given those statements as a basis for claiming that because of the inherent "*checks and balances*" in the HREC ethical approval processes the public generally and the complainant in particular, should take the agency's word that the proper processes have been followed and that it should not be subject to further scrutiny and be held further accountable by disclosure under the FOI Act.

### 5.4.1 *The "public interest" test in clause 6(1)*

88. The term 'the public interest' is not defined in the FOI Act but it is used to balance competing interests. Whilst there is a public interest in people having access to information, there is also a public interest in the proper functioning of government agencies and in protecting, *inter alia,* the privacy of individuals and the commercial interests of government agencies and business organisations. In applying the public interest test, the difference between matters of general public interest and those of private concern only must be recognised. The public interest is an interest that extends beyond what the public may be interested in today or tomorrow depending on what is newsworthy.

89. In *Re Read and Public Service Commission* [1994] WACmr 1, the former Commissioner discussed the concept of 'the public interest' by reference to the decision of the Victorian Supreme Court in *DPP v Smith* [1991] 1 VR 63. The Victorian Supreme Court said, at p. 65 of that case:

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

90. In *Re Murtagh and Commissioner for Taxation* (1983) 6 ALD 112, the President of the Commonwealth Administrative Appeals Tribunal ('the AAT') described the general principle applying to the public interest test under s.36(1)(b) in the *Freedom of Information Act 1982* (Commonwealth) – the Commonwealth equivalent of clause 6 of the FOI Act – and said, at p.121:

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

## 5.5 Determination

91. There is a general public interest in persons being able to obtain access to information held by the government and in the exercise of their rights of access under the FOI Act. At paragraphs 53 and 54 of *Channel 31 Community Educational Television Ltd v Inglis* [2001] WASCA 405, unreported Hasluck J of the Supreme Court of Western Australia said:

> "*Section 18 of the Interpretation Act 1984 (WA) requires that in the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.*
>
> *It is apparent from s 3, that the objects of the Freedom of Information Act are to be achieved by creating a general right of access to State and local government documents. The right of access is constituted by s 10 in respect of the documents of an agency. The definition of that term includes reference to provisions in the glossary bearing upon the meaning of "public body or office", which provisions are consistent with the objects of the Act and suggest that proper weight should be given to the objects in order to promote the purpose underlying the scheme of the Act.*"

92. In my view, the agency's submissions and claims for access, in response to the complainant's access application are inconsistent with the objects and intent of the FOI Act. Little weight was given, both at the initial decision stage and the internal review stage, by the agency to promoting the purposes and objects of the FOI Act. The reasons given by the agency for refusing access to the disputed documents are not, in my opinion, enough to justify refusing further access. Since the introduction of the FOI Act, people are no longer entitled only to whatever information an agency chooses to disclose because as McKechnie J said at paragraph 84 of *Health Department of WA v AMA* life under the FOI Act is "*…very different from life before it. If an agency fails to resolve a dispute with an applicant, the matters must be determined by the Information Commissioner*". The FOI Act is intended to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and local government more accountable to the public.

93. In my opinion, much of the information about the Project is already in the public domain. There is significant information available on the agency's Project website relating to the Project and in the documents, including the information sheets provided to parents, doctors, principals and students, prior to their deciding whether or not their children, patients and students would take part in the Project. I am not satisfied that the agency has established that disclosure of the disputed documents would be contrary to the public interest. Subject to the views I have expressed about the exempt personal information and the information not required by the complainant, there is no good reason why the complainant and the public, generally, should not be made aware of the contents of all of the disputed documents.

94. There is a strong public interest in agencies being accountable for their decision-making and in the public having access to information about university research projects, particularly where, as here, the Project involves academic research involving the medication of children with drugs. I agree with the complainant's submission that obtaining information about research of the kind being undertaken in relation to the Project is a strong public interest factor in favour of the public being able to scrutinise the approval given by the HREC of the agency and make its own judgment as to whether the HREC is discharging its functions properly. I also consider that disclosure of the disputed documents would serve the public interest in keeping the community informed and in promoting the discussion of matters of the kind relating to research about research that may improve the educational and personal outcomes of children diagnosed as suffering from ADHD.

95. In balancing the competing interests, on the material available to me, I am not persuaded, on the basis of the limited material put before me by the agency, that the agency has established to the required standard, that disclosure of Documents 1.1, 1.4, 1.5, 1.6, 1.10, 1.12, 1.14 and 1.16 would, on balance, be contrary to the public interest and I find that the agency has not established that those documents are exempt under clause 6(1). In this case, however, the disputed documents relate to the approval process to establish the ADHD project, which as I have said, is now a concluded process.

96. I acknowledge that there is a public interest in ensuring that the community has confidence that universities have integrity and ethical standards in relation to their research and that the HREC must be free to act in a full and frank manner when considering research proposals. I accept the agency's advice that it has stringent internal and external reporting requirements and that research processes are closely monitored and sub-standard research practices are not tolerated. In my view, stringent internal and external reporting requirements as described by the agency are both necessary and appropriate but I would expect that to be the case in any event. However, the fact that such processes exist at the agency does not mean that individuals such as the complainant should be denied access to the same documents, in an effort to satisfy themselves that such internal and external reporting requirements are appropriate and being adhered to. An assertion that the complainant and the public at large should "take the agency's word for it" that all the necessary checks and balances are being adhered to is not sufficient to persuade me that the public interest is best served by non-disclosure.

97. However, in my view, the agency has not established, to the required standard, that disclosure of the disputed documents would, on balance, be contrary to the public interest. I do not accept that disclosure of the disputed documents in this case would be more likely than not to erode the confidence the community may have in the integrity and ethical standards of the agency's research function, particularly research relating to human testing. In my view, many of the agency's claims and submissions are unsupported. For example, the claim by the agency that it would be contrary to the public interest to disclose the disputed documents because "*…university research is a privileged domain and it requires significant academic education and training to access it*" is directed

to nothing more than preserving that "privileged domain". Further, the agency has not established, by presenting objective supporting evidence, why it is reasonable to expect that the agency would not continue to have members of the HREC give full and frank advice when assessing a research proposal in the future when the complainant has agreed to accept access to an edited copy of documents with the names and other personal information about the HREC members deleted so as to not identify the HREC members.

98. I accept the complainant's submissions that human research on children involving the use of psychotropic drugs is an area that attracts a high level of interest and concern at a public level and that there is a strong public interest in ensuring and demonstrating that the highest level of ethical consideration is involved when approving research projects of a kind involving the medication of children with drugs with a known range of potential adverse side affects to be more persuasive in this case. I also accept the complainant's submission that it is reasonable to expect that there would be a transparent process in place to ensure that there are no questions about the ethical nature of university research and the review processes of the HREC.

99. There is a public interest in the complainant being able to exercise his rights of access under the FOI Act. There is also strong a public interest in open and transparent scrutiny of decision-making processes such as the decision-making processes of the HREC, because that enhances accountability and, in my view, would increase public acceptance and acknowledgement of the value of academic and university research in relation to the diagnosis and treatment of ADHD. I consider also that there is a public interest in disclosure of the disputed documents in order to satisfy the significant public interest in the diagnosis and treatment of ADHD.

100. In weighing up the competing public interests in this case, I am not persuaded that disclosure of the disputed documents would, on balance, be contrary to the public interest. Accordingly, I find that Documents 1.1, 1.4, 1.5, 1.6, 1.10, 1.12, 1.14, 1.16 and Document 3 are not exempt under clause 6(1).

## SECTION 6 – CLAUSE 8 – CONFIDENTIAL COMMUNICATIONS

101. Following consideration of my preliminary view of this matter, by letter dated 6 May 2008, the agency made further submissions to me in support of its claim that the first six pages of Document 1.14 are exempt under clause 8(2) of Schedule 1 to the FOI Act. However, as the agency has not withdrawn its previous claims for exemption for Documents 1.1, 1.2, 1.4 - 1.12, 1.16 and Document 3, I am also required to deal with the agency's claim for exemption under clause 8(2) for all of those documents.

102. Clause 8 provides, so far as is relevant:

> ***"8. Confidential communications***
>
> ***Exemptions***
>
> *(1) ...*

*(2) Matter is exempt matter if its disclosure —*

*(a) would reveal information of a confidential nature obtained in confidence; and*

*(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*

***Limits on exemption***

*(3) ...*

*(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."*

## 6.1 *The agency's claims*

103. The agency initially claimed that:

> "*…confidentiality is a significant value in relation to research development and approval. The membership of the HREC is unknown generally. The HREC has significant responsibilities and both impartiality and confidentiality are vital to its ongoing effectiveness and to maintain the confidence of researchers, publishers and other affected by research outcomes.*
>
> *For the purposes of the FOI Act, matter is considered to be confidential if*
>
> - *it is given and received in confidence,*
> - *it is confidential in nature, and*
> - *it is known to a limited number of people.*
>
> *All of these apply to communications between university researchers and the HREC. The rigour of university research could be compromised if these documents are released.*
>
> *With this exemption there must be consideration given to a 'public interest' argument. That is,* matter is not exempt if its disclosure would, on balance, be in the public interest. *In my view, the same argument that I applied in consideration of Clause 6 has applications in this Clause. …I have concluded that this is general public confidence in universities to conduct research with integrity, and there are significant checks and balances to allow the public to maintain that confidence. Given the foregoing, I have taken the decision that Schedule 1 Clause 8(2) applies to the documents… (other than those authorised for release) and to release those exempt documents would be contrary to the provisions of the Act.*"

104. In submissions made to the former A/Commissioner in September 2007, the agency claimed that:

> [T]*he material must of itself* reveal information of a confidential nature obtained in confidence. *The process of providing submissions to the University HREC is confidential. In order for scientific and research protocols to be applied there are strict guidelines. Curtin University of Technology subscribes to the National Statement on Ethical Conduct in Human Research as developed by the Commonwealth Government through the Australian Research Council (ARC) and the National Health and Medical Research Council (NHMRC). This statement was endorsed in March 2007. It provides clear guidelines relating to Human Research Ethics in University· research and also provides the blueprint for a Human*

*Research Ethics Committee (HREC) as has been adopted by Curtin University of Technology. Confidentiality is seen to be paramount in university human research. The research methodology is submitted to the HREC in confidence. Confidentiality is of such importance, in fact, that the names of members of the HREC (other than the Chair and the Executive Officer) are confidential.*

*Further to the above provision, there is a requirement that a second stem of confidentiality is satisfied. CI 8(2) (b) of Schedule 1 of the Act requires that in addition to the above there must be consideration given to whether disclosure of the matter could reasonably be expected to prejudice the future supply of information of that kind to the government of the agency, in this case the University. University research has long been considered the most valid and reliable. There are strict procedural guidelines and stringent assessment of research outcomes. Published research can add not only to professional credibility and status but can add significantly to world knowledge. Curtin may well risk its reputation and status as a developing research university if it were to make available information and documentation which has by tradition been confidential.*

*Whilst a definitive argument cannot be made as to what the future supply of information of this kind may be in the wake of any such release, it is unreasonable for the University to risk reputation, future research initiatives, collaborative partnerships and income. That in itself suggests that disclosure of the Scientific Protocol, Ethical Analysis and Research Plan could reasonably be expected to prejudice the future supply of information of this kind to the University. University research in Australia is competitive. Researchers often look to the University that provides them with the best infrastructure and support in order to decide where they will base themselves and their associated research. Adherence to well defined and stringent research protocols may well be a significant consideration in making that decision.*

*This exemption must also be considered in relation to a public interest test. That is, in accordance with the provisions of CI 8 (4) of Schedule 1 of the Act, matter is not exempt if its disclosure would, on balance, be in the public interest. It is clear that there is public interest in the subject of this research. There is also a broader public interest in the ethical treatment of children in research. Each of these must be considered in relation to this research. In favour of release is an argument relating to accountability of researchers and universities in relation to the ethical treatment of research participants. The argument against the release of the information relates to the long held view that scientific research, when conducted at a university is valid and reliable and contains adequate checks and balances. There are strict guidelines that have been adopted by Curtin in relation to human research ethics. Curtin subscribes to national protocols. In relation to HREC procedures there is a specific requirement for appropriate confidentiality of the content of applications and the deliberations of review bodies. (National Statement on Ethical Conduct in Human Research p82 5.1.37(t). The chapter outlines the responsibilities of HRECs, other ethical review bodies and researchers.*

*On balance, given the risk to the University and to established and widely accepted research protocols, an argument for release of the document as a result of a public interest argument cannot be sustained.*"

105. The agency submits that scientific research is confidential and until it is published, there is a requirement that the methodology and hypotheses remain confidential to the researchers. The agency says that the Project research is

ongoing and, therefore, there is the potential for the Project research to be corrupted if the information contained in the disputed documents is released.

106. The agency says, in relation to Document 3, that in making arrangements and agreements with third parties the agency is aware of the need for confidentiality. The agency says that commercial and financial interests of all parties must be kept confidential and, if the agency was to reveal confidential information about commercial or financial arrangements with third parties then such arrangements and agreements would be in jeopardy because industry partners may be reluctant to enter into arrangements or agreements with the agency if there was a view that confidentiality was at risk.

107. As regards public interest considerations, the agency maintains that it is a long held view that scientific research, when conducted at a university is valid and reliable and contains adequate checks and balances. The agency further says that there are strict guidelines that have been adopted in relation to human research ethics and the agency subscribes to national protocols. In relation to HREC procedures there is specific requirement for appropriate confidentiality of the content of applications and the deliberations of review. The agency claims that on balance, given the risk to the agency and to established and widely accepted research protocols, an argument for release of the disputed documents as a result of a public interest argument cannot be sustained.

## 6.2 Determination

108. There are two parts to the exemption in clause 8(2). To establish a *prima facie* claim for exemption under clause 8(2), the agency must establish that the requirements of both paragraphs (a) and (b) of clause 8(2) have been met. In other words, the agency must not only show that the documents for which exemption is claimed under clause 8(2) would, if disclosed, reveal information of a confidential nature obtained in confidence but also that the disclosure of information of that kind could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

109. The agency says that for the purposes of the FOI Act, matter is considered to be confidential if it is (a) given and received in confidence; (b) is confidential in nature; and (c) is known to a limited number of people. The agency, without producing any objective material to support the claim, asserts that all three of those factors apply to communications between university researchers and the HREC and that the rigour of university research could be compromised if the disputed documents were to be released.

110. For information to have been 'given and received in confidence', the information must have been both given and received on the basis of either an express or implied understanding of confidence. In this matter, nothing has been put before by the agency, other than the unsupported assertions set out in paragraphs 103 to 107 above to establish that the disputed documents contain confidential information that was both given to, and received by the HREC of the agency on the basis of an express understanding of confidence. There is nothing put before me by the agency to establish that any of the persons who

supplied the information recorded in the disputed documents specifically requested that the information should not be disclosed by the agency nor is there any evidence that either the agency or the HREC itself agreed to receive the disputed documents in confidence.

111. However, the agency asserts that "*...the process of providing submissions to the HREC is confidential*"; that research methodology is submitted to the HREC in confidence and that confidentiality is of such importance to the process that the names of HREC members, other than the Chair and Executive Officer are confidential. Notwithstanding that claim, the exemption in clause 8(2) is not intended to protect the confidentiality of "processes" such as those employed by the HREC but, rather, information of a confidential nature obtained in confidence.

112. None of the disputed documents bears any indication, on its face that, it was submitted to the HREC in confidence. However, information may be found to be inherently confidential if it is not in the public domain and the information is known only by a small number or limited class of persons (see: *Re Henderson, Goatley, McHale and Weaver* [1997] WAICmr 21). Having examined the disputed documents and taking into account other material before me, I am prepared to accept that the disputed documents contain some information that is inherently confidential information, because it is information that is known only to a limited number of people and it is not otherwise in the public domain. I do not, however, accept the agency's claim that all of the information recorded in the disputed documents is inherently confidential because, as I have said earlier, much of the information recorded in the disputed documents, such as information about the manner in which the research was to be conducted, the purposes and objectives of the Project and, generally, details about the participating industry partners, is already in the public domain.

113. I also accept that it may be implied from the process by which submissions are made to the HREC by researchers, seeking ethical approval to undertake research involving human beings, that there was an expectation between the researcher and the HREC, that research proposals are submitted to, and considered by the HREC in confidence. However, as I have said above, much of the information recorded in the disputed documents is already in the public domain.

114. I also accept, on its face, the agency's claim that confidentiality with respect to scientific and academic research is an important element of the process, particularly where that the relevant research is ongoing. However, having examined the disputed documents, in my view there is nothing in the disputed documents which would, if disclosed under the FOI Act, reveal any information about the actual results of the Project research before they are considered by the agency. The disputed documents do not contain any information of that kind.

115. I also acknowledge that there are necessary elements of confidentiality in the process of researchers providing submissions to the HREC, when seeking ethical approval for proposed research protocols. In particular, I accept that the need for confidentiality of the identities of the members of the HREC, in order

to ensure that there is no possibility of interference, lobbying or unintended bias arising in the consideration of such submissions. However, I do not consider that to be of much moment in this instance, because the complainant has confirmed his willingness to be given access to edited copies of the disputed documents with any information about the identities of the HREC member deleted.

116. In summary, I am satisfied that part (a) of clause 8(2) has been established in relation only to the information recorded in the disputed documents which is not otherwise in the public domain. Therefore, it is not possible for me to determine if all of the disputed documents satisfy the requirements of clause 8(2)(a). However, in order to qualify for exemption under clause 8(2), it is not sufficient for the agency to establish only that the information was of a confidential nature and obtained in confidence. Part (b) of clause 8(2) must also be satisfied to claim the exemption and the application of the public interest test must be considered. Accordingly, even if I was satisfied that the agency had established that all of the disputed documents met the requirements of clause 8(2)(a) – which I am not – then the agency must also satisfy me that the disclosure of the disputed documents could reasonably be expected to prejudice the future supply of information of that kind to the agency.

117. The agency says that it "*…may well risk its reputation and status as a developing research university if it were to make available information and documentation which has by tradition been confidential.*" and that it is "*…unreasonable for the agency to risk reputation, future research initiatives, collaborative partnerships and income.*" The agency also asserts that university research is competitive and that researchers often look to the university that provides them with the best infrastructure and support in order to decide where they will base themselves and their associated research. The agency claims that if the disputed documents were to be disclosed, disclosure could reasonably be expected to prejudice the future supply of information of the kind recorded in the disputed documents to the Government or to an agency, including the agency.

118. I do not consider that the harm or prejudice described by the agency is one that could reasonably be expected to follow if the disputed documents were to be disclosed under the FOI Act. In order to satisfy the requirements of clause 8(2)(b) of Schedule 1 to the FOI Act, the agency must establish that the disclosure of the disputed documents could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

119. The former Commissioner and the former A/Commissioner expressed the view in a number of their formal decisions in relation to the exemption in clause 8(2) that paragraph (b) of the exemption in clause 8(2) is directed at the ability of the Government or an agency to obtain the relevant kind of information from the sources generally available to it in the future and that paragraph (b) is not concerned with the question of whether the particular source of a document would refuse to supply that kind of information to the Government or to the agency, in the future (see: paragraph 16 of *Re Askew and City of Gosnells*

[2003] WAICmr 19 and paragraph 111 of *Re Geoff Ninnes Fong & Partners Pty Ltd and Shire of Roebourne and Others* [2007] WAICmr 11).

120. I agree with the former Commissioners' views in this regard. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, at 190, the Full Federal Court said that the words "*…could reasonably be expected to prejudice the future supply of information*" in section 43(1)(c)(ii) of the *Freedom of Information Act 1982* (Commonwealth) were intended to receive their ordinary meaning and required 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 that those who would otherwise supply information of the relevant kind to the Commonwealth would decline to do so if the documents in question were disclosed.

121. Similarly, in *Ryder v Booth* [1985] VR 869, the Full Court of the Victorian Supreme Court considered whether the Victorian equivalent of clause 8(2)(b) applied to medical reports provided in confidence to the State Superannuation Board. On the question of whether disclosure would be reasonably likely to impair the future supply of similar information, Young C.J. said, at p 872:

> *"The question then is, would disclosure of the information sought impair (i.e. damage) the ability of the Board to obtain similar information in the future. Put in terms of the present appeals this means that the question is, would the disclosure of the information damage the ability of the Board to obtain frank medical opinions in the future. It may be noted that it is the ability of the Board that must be impaired. The paragraph is not concerned with the question whether the particular doctor whose report is disclosed will give similar information in the future but with whether the agency will be able to obtain such information. There may well be feelings of resentment amongst those who have given information "in confidence" at having the confidence arbitrarily destroyed by the operation of the legislation, but it is another thing altogether to say that they or others will not provide such information in the future. It is not sufficient to show that some people may be inhibited from reporting so frankly if they know that their report may be disclosed. More is required to satisfy the onus cast upon the agency by s.55(2) of the Act.*"

122. Unsupported assertions made by the agency such as "*…research could be compromised*"; "*…industry partners may be reluctant to enter into arrangements or agreements with the University*"; "*…it is unreasonable for the University to risk reputation*" and "*…it is reasonable to conclude that if document…without the benefit of further information will lead to members of the public drawing incorrect conclusions*" do not, in my opinion, establish the requirements of clause 8(2)(b). I do not agree with the agency's claim that it necessarily follows that disclosure of the disputed documents under the FOI Act makes it likely that the future supply of information of the kind recorded in the disputed documents would be prejudiced. In my view, the agency's claim that disclosure of the disputed documents could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency is unsupported by probative material to establish that there are real and substantial grounds for it.

123. In my view, it is unlikely that any prospective researchers would tend to see the agency in any lesser light, because the FOI Act applies equally to all other Western Australian universities with which the agency submits it is competing. The FOI Act has been in force in Western Australia since 1993 and since the introduction of the FOI Act, private organisations doing business with government (including public institutions such as Universities) must expect greater scrutiny of those dealings than in respect of their dealings in the private sector, because government is accountable to the public for, among other things, its provision of services and facilities to the public and expenditure of public monies, and the FOI Act is one means of facilitating and furthering that accountability.

124. I do not accept either the agency's claim that researchers in a like position would refuse to provide that kind of information to the agency in the future and that it could, therefore, be expected that the disclosure of the disputed information in this instance could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. All Western Australian universities have been subject to the FOI Act since 1993 and many university documents have been released on numerous occasions. Notwithstanding that, no evidence has been put before the former Commissioner, the former A/Commissioner or to me of any diminution of the quality or quantity of information provided to universities by researchers and prospective researchers in that period nor, indeed, has any evidence of any diminution in the numbers of research projects being undertaken at Western Australian universities in that period.

125. Furthermore, the agency acknowledges that a definitive argument cannot be made as to what the future supply of information of this kind may be in the wake of any such release. Whilst definitive evidence is not required, some supportive probative material is needed to support the agency's claims. A similar assertion was made to the former A/Commissioner in *Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others* [2006] WAICmr 12. At paragraph 129 of *Re Zurich Bay*, the former A/Commissioner said that*:*

> *"… I do not accept either the agency's or the third party's claim that tenderers in a like position would refuse to provide that kind of information to the agency in the future and that it could, therefore, be expected that the disclosure of the disputed information in this instance could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the third party or to prejudice the future supply of information of that kind to the Government or to an agency. If contractors wish to obtain the government contract in question, they have no option but to provide that information. Further, I am not persuaded by the agency's submission that, if tender information of the kind in question is disclosed, contractors will be deterred from tendering for government contracts. As I have said above, tender documents have been subject to the FOI Act since 1993 and have been released on numerous occasions. No evidence has been put before me of any diminution of the quality or quantity of information provided in tender documents for government contracts in that period or, indeed, of any diminution in the competitiveness for government contracts."*

126. In this matter, nothing has been put before me by the agency of any diminution of the quality or quantity of information provided to State government agencies, including universities, by researchers and participating industry partners involved in research of the kind under consideration in this matter or at all, since the commencement of the FOI Act in late 1993. I am therefore left with the agency's unsupported assertions which, as I have said, have not been supported by probative material.

127. For the reasons given above, I am not persuaded that the requirements of paragraph (a) and (b) of clause 8(2) are satisfied and therefore it is unnecessary for me to consider whether the "public interest test" limit on the exemption in clause 8(4) applies to the disputed information. Accordingly, I find that the Documents 1.1, 1.2, 1.4 - 1.12, 1.16 and Document 3 are not exempt matter under clause 8. That being the case, it is unnecessary for me to consider the agency's submissions that it would, on balance, be contrary to the public interest to disclose the disputed documents.

## SECTION 7 – CLAUSE 10 – THE STATE'S FINANCIAL OR PROPERTY AFFAIRS

128. Neither of the agency's decision-makers initially claimed exemption for any of the requested documents under clause 10 of the FOI Act. However, in a letter dated 14 September 2007 addressed to the former A/Commissioner, the agency claimed that Documents 1.1, 1.4, 1.5, 1.6, 1.10, 1.12, 1.14, 1.16, 1.17, 1.18 and Document 3 were exempt under clause 10(5) of Schedule 1 to the FOI Act. However, as noted above, the agency subsequently released edited copies of Documents 1.17 and 1.18 to the complainant.

129. The agency maintains its claim that Documents 1.1, 1.4, 1.5, 1.6, 1.10, 1.12, 1.14, 1.16 and Document 3 were exempt under clause 10(5) of Schedule 1 to the FOI Act. Clause 10(5) provides, as far as is relevant:

> ***"10. The State's financial or property affairs***
>
> ***Exemptions***
>
> *(1)* …
> *(2)* …
> *(3)* …
> *(4)* …
> *(5)* *Matter is exempt matter if its disclosure –*
>
> *(a)* *would reveal information relating to research that is being, or is to be, undertaken by an officer of an agency or by a person on behalf of an agency; and*
>
> *(b)* *would be likely, because of the premature release of the information, to expose the officer or person or the agency to disadvantage.*
>
> ***Limit on exemptions***
>
> *(6)* *Matter is not exempt matter under subclause (1), (2), (3), (4) or (5) if its disclosure would, on balance, be in the public interest."*

130. The exemption in clause 10(5) is directed at protecting from disclosure information relating to research undertaken by an officer of an agency or by a person on behalf of an agency. In order to establish a claim for exemption under clause 10(5), the agency must show that the disputed documents contain information about the research undertaken by an officer of an agency or by a person on behalf of an agency and also that disclosure of that information could reasonably be expected to disadvantage the officer, person or agency.

### 7.1 *The agency's claims*

131. The agency claims that:

> "*It is clear that this* [Document 1.1] *relates to research. It is attached to a document entitled 'Application for Ethical Approval or Research Involving Humans'. Its disclosure would clearly reveal information relating to research that is being undertaken. Furthermore, the research is ongoing and thus to release any information before the publication of the results of the research has the real potential to invalidate the research. Scientific research requires adherence to longstanding research protocols and many of these relate to processes for analysing data and publishing results. It would be contrary to accepted procedures to release, at this stage, matters relating to the scientific protocol, ethical analysis and research plan in relation to this application for research approval.*
>
> *Document 1.1, although headed "Application for Ethical Approval of Research Involving Humans" does not describe the study that was approved. Rather, it is an initial enquiry of the HREC, which is further refined by comments, recommendations and submissions from HREC members. For the reasons outlined…, Curtin considers that release of Document 1.1 would reveal information relating to the research that is being undertaken by the study at Curtin, but have enormous potential to expose Associate Professor Jenkins and Curtin to disadvantage if that information was released without adequate explanation.*
>
> *The University is required to apply a public interest test to this exemption. The matter is not exempt if its disclosure would, on balance, be in the public interest. As outlined in consideration of earlier exemption clauses, an argument for release as a result of public interest cannot be sustained.*
>
> *Documents 1.4 and 1.5 are considered in concert as they are each a 'reviewer response' to the research application. Consideration must be given to Clause 10 of Schedule 1 of the Act. As indicated earlier in this advice, research matter is exempt. These two documents clearly relate to research and the exemption clearly applies. Furthermore, it is the view of the University that clause 6 Deliberative Process also requires examination in relation to these documents. As part of the approval process for research reviewers undertake a review of the proposal and provide feedback to the HREC and the researcher. The researcher in fact does not know who is providing the feedback, it is provided anonymously. In this case the research is ongoing and therefore it is part of the deliberative processes of the University to deal with documents in this way. The public interest argument that applies to research has been considered earlier and applies also to consideration of this clause and these documents. Given all of the above the University cannot agree to the release of Documents 1.4 and 1.5 as they are exempt.*

*Document 1.6 is described as an email and attachment from Ethics and Graduate Studies Officer to the Executive Officer HREC re Associate Professor Jenkins re HREC Submission. This is an email that forwards the reviewers' reports. It is exempt for the same reasons that documents 1.4 and 1.5 are exempt.*

*It is the University's view that the first six pages [of Document 1.10] contain exempt matter after consideration of Clause 10 of Schedule 1 of the Act. Particular attention is drawn to Subclause 5-relating to research. This document is part of the research deliberations that University researchers must undertake in order to gain approval for Human Research.*

*Document 1.12 is a 71 page document relating to submissions to the HREC by Associate Professor Jenkins…. The University says the arguments that relate to documents above apply also to this document, even without attachments, the document relates to research and is deliberative in nature. The research is ongoing. The public interest test that has been discussed earlier relates to this document also.*

*Document 1.14 is a 43 page document known as HREC Form B. It is a progress report that researchers are required to submit as part of the monitoring process. As with the documents above it is exempt in that it relates to research and is deliberative in nature. The research is ongoing. The same arguments that apply to Documents 1.4 and 1.5 above apply to this document. In relation to the first 6 pages only, Curtin maintains that this document is exempt under clause 6(1), 8(2) and 10(5) of Schedule 1 to the FOI Act, and does not believe that release of the document is in the public interest as it discusses the progress of the study, and notes changes that have been required to the initial approved study for operational reasons. It does not simply record the establishment of the study, but instead "reports" on the progress of the study.*

*Release of documents under FOI is unfettered. As such, it is reasonable to conclude that document 1.14, if released, could be read on its own, without the benefit of further information regarding the study. This may lead to members of the public drawing incorrect conclusions about the information contained in document 1.14, the study or indeed about Associate Professor Jenkins herself.*

*Document 1.16 is a memo from Associate Professor Jenkins to the Executive Officer of HREC requesting an amendment to the research project. The considerations that apply to Documents 1.4 and 1.5 above apply also to this document. Document 1.16 is a submission to the HREC relating to a change in the study, which needs to be read as part of the whole study itself.*

*Release of documents under FOI is release that is unfettered. As such, it is likely that document 1.16, if released, could be read on its own, without the benefit of further information regarding the study, which may lead to members of the public drawing incorrect conclusions about the information contained in document 1.16, the study or indeed about Associate Professor Jenkins herself. The information contained in document 1.16 will more than likely form part of the findings produced, and published, at the conclusion of the research. It is in that way that the information will be able to be correctly interpreted as part of the whole study.*

*Curtin submits that document 1.16 contains more than information simply about the establishment and approval of the project, but contains information about the study itself, and opinions of Associate Professor Jenkins regarding certain aspects of the study. Release of this document would reveal information relating to the research being undertaken by Associate Professor Jenkins, and if released prematurely is*

*likely to expose Associate Professor Jenkins and Curtin to damage as a result of dissemination of this information out of context.*

*Curtin has also considered the public interest in releasing document 1.16. There is a strong public interest in the public knowing and understanding the processes and procedures that are in place for considering, approving and overseeing any study involving humans. This is why Curtin makes information relating to its research and development processes accessible to the public free of charge, on its websites. However, the potential for misleading interpretation of this document to be provided by only reading information relating to changes in the study outweighs the public interest in releasing this document to the Applicant.*

*You will note from Documents 1.4, 1.5, 1.6, 1.10 and 1.12 many recommendations were made to the application proposed at Document 1.1. The actual recommendations were made by members of the HREC and relate specifically to the study in question. To release information regarding research that is being undertaken, and the interim steps taken to obtain approval for that research is likely to damage the integrity of that research and expose Curtin to disadvantage.*

*Overall the public interest argument has been considered. There is agreement that there is significant public interest in the matters that form the subject of the research. Media interest and community interest is evident. This would weigh in favour of release. But there is also a public view that University research must be unfettered. Well established protocols exist in relation to University research, evidenced by the Guidelines referred to in this advice and subscribed to by Curtin. The well established traditions and reputation of University research and the monitoring of University research by bodies such as the Australian Research Council and the National Health and Medical Research Council allow the public to have confidence in University research processes. In the view of the University there is public confidence in research in Universities and it would not be in the public interest to compromise research by making public procedures and deliberations and research details that are accepted generally as being confidential.*"

## 7.2 Determination

132. Having examined the disputed documents, I am satisfied that they contain some information about the research being undertaken by an officer of the agency (Associate Professor Jenkins). I accept that some of the information in the disputed documents relates directly to the Project. Accordingly, I am satisfied that the disclosure of the disputed documents would reveal matter of the kind referred to in clause 10(5)(a) of Schedule 1 to the FOI Act.

133. However, for the requirements of 10(5) to be established, I must be satisfied that it would be likely, because of the premature release of the information, to expose the officer or person or the agency to disadvantage. The agency has, in my opinion, not provided me with probative evidence to support the claim that the ADHD project or the persons conducting the project would be disadvantaged by disclosure of the disputed information.

134. I acknowledge the agency's advice that scientific research requires adherence to longstanding research protocols and many of these relate to processes for analysing data and publishing results. However, the agency's assertion that the "*…release of any information* [relating to the Project] *before the publication of*

*the results of the research has the real potential to invalidate the research*" is not supported by objective material. Similarly, the agency's claim that "*…revealing information relating to the research that is being undertaken by the study at Curtin but have enormous potential to expose Associate Professor Jenkins and Curtin to disadvantage"* is also an unsupported assertion which, without more, does not demonstrate why the release of this information, at this point, would cause disadvantage. The disputed information does not include any data as a result of testing and does not include any finding, conclusions or reports created as a result of the results of the project. Rather, the disputed information consists primarily of the submissions and proposals of the project leader in support of approval for the project, various communications between parties associated with the approval process and the documents that formally record the establishment of the project.

135. I am more persuaded by the complainant's submissions that it is reasonable to expect that there would be a transparent process in place to ensure that there can be public confidence in the ethical nature of university research and the review processes of the HREC. The fact that disclosure of the disputed documents 'may' potentially lead members of the public to draw incorrect conclusions about the information recorded in those documents is not sufficient, of itself, to render their disclosure contrary to the public interest. To the extent that the contents of a document may be out of date or not reflect the final version of the approved research protocol may be relevant to a consideration of where the balance of the public interest should lie in this case but it is not sufficient to justify a finding, on that fact alone, that it would be contrary to the public interest to disclose such documents. Such a conclusion is a simplistic view of the public interest and it ignores other competing interests, including the right of access granted by the FOI Act, and the capacity of the agency to release further information to the public, if necessary.

136. I am also not persuaded by the claim that disclosure of a series of documents used by the HREC of agency in settling and approving a final research protocol for the Project would be contrary to the public interest. I reject the view of the agency that members of the public are unable to understand the difference between an initial application submission to the HREC and the final, approved version of the research protocol. I credit the public with greater capacity for understanding the contents of documents. I also reject the claim that the public is likely to be misled by the disclosure of documents that reveal a process of reviewing, correcting and refining of written material produced by an agency. The iterative processes of government agencies are well known.

137. In the absence of any objective material to support the claim, I do not consider the disclosure of the disputed documents would more likely than not result in damage to or criticism of the officers concerned or the agency. Neither am I persuaded, by any material before me, that the credibility of either Associate Professor Jenkins or the agency is likely to be affected by disclosure of those documents. There is simply nothing to support the claims that the disputed documents could be used to damage the agency or to Associate Professor Jenkins or that public perception of the agency would be otherwise harmed.

138. In any case, it is my view that the decision-making processes of government agencies, including the agency, particularly once completed, should be able to withstand scrutiny and that there is a public interest in the disclosure of documents that will enable that to occur. Further, in my opinion, the disclosure of the disputed documents can only serve to place into perspective the approval given by the HREC and hence inform the public about the processes leading to that outcome.

139. I also do not accept the agency's claim that disclosure of the disputed documents would lead to confusion, uncertainty or that the public would be likely to draw incorrect conclusions from the information recorded in the disputed documents. Not only is there no material before me from the agency to support such a claim, I do not accept the inference to be drawn from such a claim that the public is unable to recognise the difference between the various documents that were considered by the HREC in approving the research protocol prior to the commencement of the Project. In any event, it is within the scope and power of the agency to release additional information, whether by way of a press release or other documents, to counter any confusion, uncertainty misconceptions that may arise following disclosure under the FOI Act.

140. For the reasons given above, I am not persuaded that the requirement of paragraph (b) of clause 10(5) has been satisfied by the agency and therefore it is unnecessary for me to consider whether the "public interest test" limit on the exemption in clause 10(6) applies to the disputed documents. Accordingly, I consider that the agency has failed to establish that its decision to refuse access to the disputed documents and information under clause 10(5) was justified. I find that Documents 1.1, 1.4, 1.5, 1.6, 1.10, 1.12, 1.14 and 1.16 and Document 3 are not exempt under clause 10(5) of Schedule 1 to the FOI Act.

## SECTION 8 – CLAUSE 11 – EFFECTIVE OPERATION OF AGENCIES

141. In its initial decision on access, the agency claimed that the Section 1 Documents to which access had been refused and the Section 3 Document were exempt under clause 11 of Schedule 1 to the FOI Act. No further submissions or information have been received from the agency in support of that claim. However, as the agency has not withdrawn its claim for exemption under clause 11, I am required to consider that claim as it relates to Documents 1.1, 1.4, 1.5, 1.6, 1.10, 1.12, 1.14, 1.16 and Document 3. Clause 11 provides as follows:

> ***"Clause 11 - Effective operation of agencies***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure could reasonably be expected to —*
>
> *(a) impair the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency;*
> *(b) prevent the objects of any test, examination or audit conducted by an agency from being attained;*
> *(c) have a substantial adverse effect on an agency's management or assessment of its personnel; or*

*(d) have a substantial adverse effect on an agency's conduct of industrial relations.*

***Limit on exemptions***

*(2) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.*"

## 8.1 *The agency's claims*

142. The agency's initial decision-maker advised the complainant that:

> "*…the disclosure of the majority of section 1 documents could reasonably be expected to impair the effectiveness of the HREC, which in turn has direct relevance* to tests, examinations or audits*. In a general sense the role of the HREC could be described as relating to tests, examinations or audits. The role of the HREC has a role to oversee and monitor ethical standards of research. In undertaking that role effectively, there must be full and frank discussions and feedback. The exemption applied to these section 1 documents and for the reasons outlined in relation to considerations of clauses 6 and 8, the public interest argument cannot be sustained.*
>
> *…In my view the exemption applies to the Section 3 bound document. The University is required to create records and documents so that research proposals and agreements can be developed and implemented.* …[Document 3] *contains a variety of information that was committed to paper to protect the interests of the University, other parties and also the research project. These documents are created so that the University (and other parties) can operate effectively. They provide confidence to the parties and set down and expectations in relation (in this case) to the research project. In my view they clearly are exempt from release because they relate to the effective operations of the agency (in this case, the University). Again, a public interest argument must be considered in relation to this exemption. The argument provided above in relation to other exemptions applies also to this exemption.*"

143. Although the agency's internal review decision-maker confirmed the initial decision to refuse the complainant access to the disputed documents, there were references to clause 11 in the notice of decision on internal review and, as I have said, no further submissions in support of the agency's claim for exemption under clause 11 have been received from the agency.

## 8.2 Determination

144. To establish a *prima facie* claim for exemption under clause 11(1)(a) the agency must show that disclosure of the documents in dispute could reasonably be expected to impair the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency. However, to establish a *prima facie* claim for exemption under clause 11(1)(b) the agency must show that disclosure of the documents in dispute could reasonably be expected to prevent the objects of any test, examination or audit conducted by the agency from being attained.

145. In her decision in *Re H and Graylands Hospital* [1996] WAICmr 50, the former Commissioner said, at paragraph 18, that exemption in clause 11(1)(b) appeared to be directed at the outcome of a particular test, examination or audit, whereas

clause 11(1)(a) appears to be directed at protecting the viability of a method or procedure for the conduct of a test, examination or audit by an agency. The former Commissioner expressed the view that there appeared to be some overlap between the exemptions provided in clauses 11(1)(a) and 11(1)(b) of Schedule 1 to the FOI Act and that, depending on the nature of the test in question, disclosure of 'test' documents may have the effect of either impairing the method or procedure for conducting the tests, or preventing the objects of the test from being attained, or both.

146. In this instance, the agency has not claimed that the disclosure of the disputed documents could reasonably be expected to impair the effectiveness of a method or a procedure for the conduct of tests, examinations or audits by an agency or that disclosure could reasonably be expected to prevent the objects of any test, examination or audit by an agency from being attained but, rather, that disclosure could reasonably be expected to impair the effectiveness of the HREC itself.

147. Notwithstanding that claim, no supporting evidence has been put before me to establish that the HREC conducts tests, examination or audits on behalf of the agency. In each of the published decisions of the former Commissioner relating to claims for exemption made by agencies under clauses 11(1)(a) and 11(1)(b) (see: *Re Simonsen and Edith Cowan University* [1994] WACmr 10; *Re H* and *Re 'Q' and Graylands Selby-Lemnos and Special Care health Service* [2003] WAICmr 33), the relevant agency presented probative material to the former Commissioner and former A/Commissioner to establish that the documents under consideration in those cases related to specific tests and examinations conducted by those agencies. In each of the abovementioned complaints, the relevant agency established, by reference to the documents and to the procedures used by the agencies to conduct tests, the exemption claimed.

148. In this instance, the agency has not identified the particular method or procedure nor the kinds or types of tests, examinations or audits to which the disputed documents relate. Having examined the disputed documents and considered the claims of the agency I am not satisfied that disputed documents contain any information of a similar kind to that which was under consideration in *Re Simonsen, Re H* and *Re 'Q'*. The disputed documents do not contain such details as test scoring methodologies; test answers; scores given to test answers; guides for the a person administering a test or audit; details as to what to look for in responses to test questions. There is no evidence before me from the agency to establish, as there was in the three complaints referred to above, that disclosure of the disputed documents could reasonably be expected to prevent the objects of any future testing by the agency from being attained or that the objects of tests conducted by the agency from being attained.

149. The agency claims that disclosure of the disputed documents could reasonably be expected to impair the effectiveness of the HREC itself, because the role of HREC, in a general sense, could be described as relating to tests, examinations or audits. If I were to accept that argument – and I do not – it would mean that I accepted an interpretation of the exemption in clause 11 which is not contemplated by the clear words of the exemption. Such a result, in my view,

cannot objectively be considered to be reasonable or open on a plain reading of the words used. In addition, the agency has not presented any objective evidence to the required standard that would discharge the onus that rests upon it under s.102(1). Accordingly, I find that none of the disputed documents is exempt under clause 11(1)(a) or clause 11(1)(b) of Schedule 1 to the FOI Act.

## Conclusion

150. Accordingly, for the reasons given, I find that the disputed documents are not exempt under clause 4(3), 6(1), 8(2), 10(5) and 11 of Schedule 1 to the FOI Act. However, I also find that the disputed documents contain a small amount of personal information about third parties, including details of their names, in some instances, their handwritten signatures, their contact telephone numbers and/or their email addresses which is information that is exempt under clause 3(1) of Schedule 1 to the FOI Act. However, in accordance with section 24 of the FOI Act, the names, handwritten signatures, telephone numbers and email addresses can be deleted from the disputed documents by the agency and access given to edited copies of the disputed documents.

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