

Participants:

**The Wilderness Society (WA) Inc.**  
Complainant

- and -

**Department of Environment and  
Conservation**  
Respondent

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – documents relating to the selection of a site for a liquefied natural gas hub – clause 1(1)(a) – whether document is a record of the deliberations or decisions of an Executive body – clause 1(1)(b) – whether documents contain policy options or recommendations for possible submission to Executive body – clause 1(1) – whether disclosure reveals deliberations or decisions of Executive body – section 24 – deletion of exempt matter – clause 2(1)(b) – whether documents would reveal confidential information communicated in confidence to the Government – clause 2(2) – would disclosure on balance be in the public interest.

*Freedom of Information Act 1992*: sections 3(3), 4(a), 15, 24, 76(1)(b), 102(1) and 102(3) : Schedule 1, clauses 1(1), 1(1)(a), 1(1)(b), 1(5), 1(6), 2(1)(b) and 2(2);  
Glossary, clause 1

*Environment Protection and Biodiversity Conservation Act 1999 (Cth)*: section 146(1)

*Interpretation Act 1984*: section 18

*Re Environmental Defender's Office WA (Inc) and Minister for Planning* [1999] WAICmr 35

*Police Force of WA v Winterton* (1997) WASC 504

*Re Cyclists Rights Action Group and Department of Transport* [1995] WAICmr 16

*Re Ravlich and Department of Productivity and Labour Relations* [2000] WAICmr 58

*Re Read and Public Service Commission* [1994] WAICmr 11

## DECISION

The respondent's decision is varied. I find that:

- Document 3 is exempt under clause 1(1)(b) and Document 18 is exempt under clauses 1(1) and 1(1)(b).
- lines 5-10 on page 1 of Document 16 and line 8 on page 1 of Document 21 are exempt under clause 1(1)(b) but the remainder of Documents 16 and 21 is not exempt under that provision, although words 1-9 on line 13 of page 3 of Document 21 are exempt under clause 1(1), and
  - it is practicable to edit Document 16 to delete lines 5-10 on page 1 and to edit Document 21 to delete line 8 on page 1 and words 1-9 on line 13 of page 3, and to give the complainant access to the remainder of those documents.
- Document 19 is exempt under clause 2(1)(b) but Documents 14 and 15 are not exempt under that provision.

Sven Bluemmel  
INFORMATION COMMISSIONER

13 July 2011

## REASONS FOR DECISION

1. This complaint arises from a decision by the Department of Environment and Conservation ('the agency') to refuse The Wilderness Society (WA) Inc ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act').

## BACKGROUND

2. Prior to the September 2008 State election, the former Labor State Government and the Federal Government entered into a strategic assessment agreement ('the Agreement') under s.146(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('the EPBC Act'). The aim of the Agreement, among other things, was to investigate options for the site of a liquefied natural gas hub ('LNG Hub') to process gas from the Browse Basin gas field off the State's north coast. The Agreement was signed on 6 February 2008 and is a public document which can be accessed from the websites of both the State and Federal Governments. In December 2008 the Liberal-National Government selected James Price Point, 60 kilometres north of Broome, as the site for the LNG Hub.
3. On 12 March 2010, the Environmental Defender's Office WA (Inc) applied under the FOI Act on behalf of the complainant to the Environmental Protection Authority ('EPA') for access to "*Documents dated April 2007 or later which refer or relate to a proposal for a common-user Liquefied Natural Gas Hub to process gas from the Browse Basin*".
4. Pursuant to s.15 of the FOI Act, the EPA transferred part of the application to the agency. On 30 March 2010, the complainant and the agency agreed to amend the scope of the application to the following documents:
  - A. *Internal DEC documents and internal correspondence relating to the selection of a site for a common user Liquefied Natural Gas ("LNG") precinct for processing gas from Browse Basin.*
  - B. *Correspondence and records of meeting between DEC and the Federal Department of the Environment, Water, Heritage and the Arts related to the selection of a site for a common user LNG precinct for processing gas from Browse Basin.*
  - C. *Correspondence and records of meeting between EPA and the Department of State Development relating to the selection of a site for a common user LNG precinct for processing gas from Browse Basin.*
  - D. *Correspondence and records of meeting between EPA and the Northern Development Taskforce relating to the selection of a site for a common user LNG precinct for processing gas from Browse Basin.*
  - E. *Correspondence and records of meeting between DEC and any consultants which DEC briefed to provide reports relating to the selection*

*of a site for a common user LNG precinct for processing gas from Browse Basin.”*

5. The agency identified 23 documents as within the amended scope of the application. On 10 May 2010, the agency decided to give access in full or in part to 15 documents but to refuse access to eight documents, which the agency claimed were exempt under clauses 1(1)(a), 1(1)(b), 2(1)(a) and 2(1)(b) of Schedule 1 to the FOI Act. The complainant requested an internal review of the agency’s decision in relation to the latter.
6. On 22 June 2010, the agency decided to give access to one additional document but maintained its exemption claims for the remainder and, on 18 August 2010, the complainant applied to the Information Commissioner for external review of that decision.

### **REVIEW BY INFORMATION COMMISSIONER**

7. Following the receipt of this complaint, the agency produced the originals of the seven documents in dispute in this matter to the Information Commissioner, together with the agency’s FOI file maintained in respect of the complainant’s access application. On 11 February 2011, following negotiations with my office, the agency withdrew its claim for exemption under clause 2(1)(a) and provided me with further information in support of its remaining claims for exemption.
8. On 18 May 2011, the A/Information Commissioner provided the parties with a letter setting out her preliminary view of the complaint. The agency requested, and was granted, an extension of time in which to respond to that letter and, on 9 June 2011, provided my office with further written submissions. A copy of the agency’s letter was given to the complainant, which provided me with written comments on 20 June 2011.

### **THE DISPUTED DOCUMENTS AND EXEMPTION CLAIMS**

9. In its decision of 22 June 2010, the agency described the disputed documents as follows:

Document 3: *“No date Internal document - Strategic Environmental Assessment (SEA) of National Heritage values of the North-West Kimberley”*.

Document 14: *“16-Jan-08 2.41pm Email Final Draft Agreement”*. [In fact, an email dated 16 January 2008 attaching a draft of the Agreement].

Document 15: *“15-Jan-08 1.04pm Email Revised draft commonwealth state agreement”* [In fact, two emails dated 15 January 2008 sent at 12:37pm and 1:04pm attaching a draft agreement made under s.146(1) of the EPBC Act].

Document 16: *“12-Nov-07 Northern Development Taskforce meeting”*.

Document 18: “26-Oct-07 Email 12:55pm from [the Director General of the agency’s] *paper and budget paper*” [Three emails dated 21 September 2007 and 26 October 2007 with an attachment].

Document 19: “24-Oct-07 Email 1.48pm to [the Director General] - *Browse Basin Gas*” [Two emails dated 23 and 24 October 2007 with an attachment].

Document 21: “03-Sep-07 meeting DEC Broome Office”.

10. The agency claims that Documents 3, 16, 18 and 21 are exempt under certain provisions of clause 1 and that Documents 14, 15 and 19 are exempt under clause 2(1)(b) of Schedule 1 to the FOI Act. The agency’s document schedule - attached to its notice of decision dated 22 June 2010 - incorrectly stated that Document 21 was exempt under clause 2(1).

### CLAUSE 1 – CABINET AND EXECUTIVE COUNCIL

11. The agency claims that Document 16 is exempt under clause 1(1)(a) and that Documents 3, 18 and 21 are exempt under clause 1(1)(b) of Schedule 1 to the FOI Act. Clause 1, insofar as it is relevant, provides:

**“1. Cabinet and Executive Council**

(1) *Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body, and, without limiting that general description, matter is exempt matter if it –*

(a) *is an agenda, minute or other record of the deliberations or decisions of an Executive body;*

(b) *contains policy options or recommendations prepared for possible submission to an Executive body;*

...

(5) *Matter is not exempt by reason of the fact that it was submitted to an Executive body for its consideration or is proposed to be submitted if it was not brought into existence for the purpose of submission for consideration by the Executive body.*

(6) *In this clause “Executive body” means –*

(a) *Cabinet;*

(b) *a committee of Cabinet;*

(c) *a subcommittee of a committee of Cabinet; or*

(d) *Executive Council.”*

12. Clause 1(1) contains a general description of matter that is exempt under clause 1 - that is, the deliberations or decisions of an Executive body - and paragraphs (a)-(f) of clause 1(1) concern specific kinds of document or information included within that general description. The purpose of the exemptions in

clause 1 is to protect the confidentiality of the deliberations and decisions of Cabinet and other Executive bodies (as defined in clause 1(6)).

### **The agency's submissions**

13. The agency's submissions are contained in its notices of decision and its letters to this office of 11 February 2011 and 9 June 2011. In summary, as I understand it, the agency makes the following submissions:
- Clause 1 is not subject to a public interest test.
  - Documents 3, 18 and 21 contain policy options or recommendations prepared for possible submission to an Executive body. Documents 3 and 18 contain matter that was prepared for possible submission to the Expenditure Review Committee ('ERC') as it was then, and Document 21 contains policy options prepared for submission to the Northern Development Ministerial Committee ('the NDM Committee'). Both the ERC and the NDM Committee are committees of Cabinet.
  - Document 16 is a record of the deliberations or decisions of the Northern Development Taskforce ('the Taskforce'), which is an Executive body, being a subcommittee of a committee of Cabinet. The agency provided me with a copy of the Taskforce's terms of reference, which state that it was established by Cabinet on 15 June 2007 and consisted of the Directors General and Chief Executive Officers of certain government agencies.
  - It would not be practicable to edit Documents 3, 16, 18 and 21 without rendering them unintelligible. In any event, there is no statutory obligation to give access in edited form because, "*unless an access applicant specifically asks to be given access to edited documents, either in their FOI application or following consultation, any obligation to edit documents does not arise because the FOI applicant has not sought access to edited documents*" and "*it necessarily follows that Documents 16 and 21 in their entirety are 'exempt documents' as defined in the FOI Act*".

### **The complainant's submissions**

14. The complainant's submissions are set out in its letters to this office dated 18 August 2010 and 20 June 2011. The complainant submits that the Taskforce - referred to in connection with Document 16 - is not a subcommittee of a committee of Cabinet because its members were not ministers but the heads of government departments. Consequently, Document 16 is not exempt under clause 1(1)(a), as the agency claims.
15. The complainant seeks a reconsideration of whether Documents 3, 18 and 21 are, in fact, exempt under clause 1 or, in the alternative, "*whether this exemption should be waived given the level of public interest in the proposal and the amount of time which has elapsed since the documents were produced.*" The complainant questions the agency's argument that the public interest limitation

does not apply to clause 1(1)(b) and submits that there is a general public interest in ensuring transparency in government decision-making.

16. The complainant submits that it would be practicable to edit Documents 16 and 21 for the reasons set out on pages 6 and 7 in the A/Information Commissioner's letter of 18 May 2011 to the parties.
17. The complainant also submits that the argument that there is no obligation on an agency to edit documents unless an applicant specifically asks for access to edited documents is not consistent with the agency's own actions. In the present case, the agency on its own initiative, in its decision of 10 May 2010, gave the complainant access to edited copies of Documents 4, 6, 17 and 20 and confirmed that decision on internal review.

### Consideration

18. I agree with the agency that clause 1 is not subject to a public interest test so that there is no scope for me to consider the complainant's arguments in that regard. Although the agency can choose to waive its claims for exemption for Documents 3, 18 and 21, it has opted not to do so.

### *Document 16 - clause 1(1)(a)*

19. Clause 1(1)(a) provides that matter is exempt matter if it is an agenda, minute or other record of the deliberations or decisions of an Executive body. The term 'Executive body' is defined in clause 1(6) to mean, amongst other things, Cabinet, a committee of Cabinet or a subcommittee of a committee of Cabinet.
20. I have examined Document 16, which is a record of the discussions of a Taskforce meeting held on 12 November 2007. Although the agency claims that the Taskforce is a subcommittee of a Cabinet committee, it is not clear on the information before me that that is correct. As the complainant points out, none of the Taskforce members is a Minister.
21. In *Re Environmental Defender's Office WA (Inc) and Minister for Planning* [1999] WAICmr 35, the former Information Commissioner noted that there are generally considered to be two main types of committees of Cabinet: standing committees and Cabinet subcommittees. In that decision, the former Commissioner said at [16]:

*“Standing committees are usually comprised of several Ministers and may also include one or more key senior public service officers. Those committees are established on an ongoing basis to deal with regularly recurring matters of Cabinet business. Cabinet subcommittees are generally established to deal with particular, finite matters or projects. Cabinet subcommittees are composed of at least one Minister, and include senior public service officers from relevant areas and representatives of relevant industry or other community interests. Such subcommittees are required to report back to Cabinet at various stages and to obtain Cabinet approval for each strategic stage of a particular project.”*

22. The Interim Report of the Taskforce, dated June 2008, states:

**“2. Cabinet Decision**

*State Cabinet on 15 June 2007 endorsed a proposal to convene a Northern Development Ministerial Committee and Taskforce, to identify one or more suitable strategic industrial sites to minimize the environmental and heritage footprints of, and be practicable for, proposed Browse Basin gas-based projects.”*

23. Accordingly, two separate entities were created: the NDM Committee and the Taskforce. The Taskforce’s terms of reference state that the NDM Committee comprised the former Deputy Premier (as Chair) and four former Ministers and the Taskforce consisted of seven senior government officers from relevant government departments and agencies.
24. The Taskforce’s functions were, among other things, to deliver a recommended location or locations for the LNG Hub and to provide advice to the Ministerial Committee. The Taskforce initially identified 43 potentially suitable sites, which were later narrowed to 11. In December 2008, the Taskforce published its Final Site Evaluation Report, which advised that the most suitable site was James Price Point. The Taskforce was then closed down and in January 2009 its work passed to the newly established Department of State Development.
25. Although given the opportunity in the A/Commissioner’s letter of 18 May 2011 to provide this office with further material to establish that the Taskforce was an Executive body for the purposes of the FOI Act – noting that, under s.102(1) of the FOI Act, the agency bears the onus of proof in that matter – the agency provided no further information on that question.
26. On the information before me, I accept that the NDM Committee is a committee of Cabinet and is, therefore, an Executive body as listed in clause 1(6) but I am not persuaded that the Taskforce is a subcommittee of a committee of Cabinet. Consequently, I do not consider that Document 16 is a record of the deliberations or decisions of an Executive body as defined.
27. Nonetheless, having examined Document 16, I consider that lines 5-10 on page 1, if disclosed, would reveal recommendations prepared for possible submission to an Executive body – in this case, the ERC – which I accept is (or was) a committee of Cabinet, and that the limit on the exemption in clause 1(5) does not apply. In my opinion, that particular matter is exempt under clause 1(1)(b) but that – for the reasons referred to below – it would be practicable to give the complainant access to Document 16 with that matter deleted.

**Documents 3, 18 and 21 - clause 1(1)(b)**

28. Clause 1(1)(b) provides that matter is exempt matter if it “*contains policy options or recommendations prepared for possible submission to an Executive body.*”



29. Document 3 is a single page which the agency advises me is extracted from its draft budget submission to the ERC and the Cabinet for the financial years 2007/2008 - 2010/2011. From my consideration of Document 3, I accept that is an accurate description. I am satisfied that Document 3 contains a recommendation prepared for possible submission to an Executive body and that clause 1(5) has no application. Accordingly, I consider that Document 3 is exempt under clause 1(1)(b) as the agency claims.
30. Document 18 is a series of three emails and an attached document. Email 1 is dated 21 September 2007; email 2 is dated 26 October 2007 sent 11:04am; and email 3 is dated 26 October 2007 sent 12:55pm and contains the attachment.
31. I have examined Document 18. In my view, email 3 and its attachment and certain information in emails 1 and 2 would reveal the deliberations of an Executive body (relevantly, Cabinet and the ERC). I also consider that those emails contain policy options and recommendations prepared for possible submission to another Executive body (the NDM Committee).
32. In light of that, I am satisfied that Document 18 is exempt under clauses 1(1) and 1(1)(b) and that clause 1(5) does not operate to limit the exemption in the latter case. In this particular case, I agree with the agency that it would not be practicable to edit Document 18 because the editing required would be so substantial as to render the emails unintelligible.
33. Document 21 is a record of a meeting between members of the Taskforce and a representative of the Commonwealth Government, held on 3 September 2007. The agency submits that Document 21 consists of policy options or recommendations prepared for possible submission to the NDM Committee.
34. Having examined Document 21, it is not evident to me that the agency's claim is correct. I accept that line 8 on page 1 of that document indicates that certain matter, which could be described as a recommendation, is proposed to be placed before Cabinet. In my opinion, that matter is exempt under clause 1(1)(b), as the agency claims and clause 1(5) has no application. I also consider that words 1-9 on line 13 (up to the comma) of page 3 are exempt under clause 1(1) because they would reveal a decision of Cabinet.
35. However, I am not persuaded that the remainder of Document 21 consists of policy options or recommendations prepared for possible submission to the NDM Committee. Consequently, I am not satisfied that any of the remaining information in Document 21 is exempt under clause 1(1)(b) as the agency claims. In my view, it would be practicable for the agency to delete line 8 on page 1 and words 1-9 on line 13 of page 3 and give the complainant access to the remainder of the document, for the reasons referred to below.

### ***Editing Documents 16 and 21***

36. I have considered the agency's submissions in relation to the editing of Documents 16 and 21. Section 24 of the FOI Act, which relates to the editing of documents, provides:

**“24. Deletion of exempt matter**

*If –*

- (a) the access application requests access to a document containing exempt matter; and*
- (b) it is practicable for the agency to give access to a copy of the document from which the exempt matter has been deleted; and*
- (c) the agency considers (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to an edited copy,*

*the agency has to give access to an edited copy even if the document is the subject of an exemption certificate.”*

- 37. The objects of the FOI Act, as set out in section 3, are to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and local government more accountable to the public. Those objects are to be achieved by, among other things, creating a general right of access to government documents and by requiring that certain documents concerning State and local government operations be made available to the public.
- 38. Section 3(3) provides that “[n]othing in this Act is intended to prevent or discourage ... the giving of access to documents (including documents containing exempt matter) ... otherwise than under this Act if that can properly be done or is permitted or required by law to be done.”
- 39. I consider that the objects and principles of administration contained in the FOI Act seek to encourage the disclosure of information. I do not accept s.24 of the FOI Act to mean - as the agency appears to argue - that access can never be given to edited copies of documents unless the applicant has either directly asked for edited copies in his or her access application or the agency has consulted with the applicant on that particular question. I consider that would be reading the words of s.24(c) very narrowly and in a way that is not within the spirit of the FOI Act.
- 40. In particular, if the agency was in any doubt as to whether the complainant wanted access to edited copies of documents, I would have expected it to have consulted the complainant, in accordance with its obligations under s.4(a) of the FOI Act. Section 4(a) requires that agencies:
  - “are to give effect to this Act in a way that –*
  - (a) assists the public to obtain access to documents.”*
- 41. Clause 1 of the Glossary to the FOI Act defines ‘document’ to mean, among other things, ‘any record’ and ‘any part of a record’.

42. I consider that, even without a direct request for edited copies or consultation on that point, it would be open to an agency to consider that from the terms of an application that an applicant would wish to be given access to an edited copy of a document rather than no document at all. In that regard, I note that s.18 of the *Interpretation Act 1984* requires, in the interpretation of a provision of a written law: “a construction that would promote the purpose or object underlying the written law” to be the preferred construction, rather than a construction that would not promote a law’s purpose or object.
43. As the complainant says, the agency did not take the same view in dealing with the complainant’s application, since it gave the complainant access to a number of edited documents in its initial decision without the access applicant specifically requesting access in that form in its application and without the agency consulting the complainant on that issue. The agency also confirmed that decision on internal review.
44. In any event, s.76(1)(b) of the FOI Act provides that in dealing with a complaint, the Information Commissioner has power to:

*“decide any matter in relation to the access application ... that could, under this Act, have been decided by the agency.”*

Accordingly, I have consulted the complainant who advises me that it wishes to be given access to edited copies of documents, if it is practicable to do so.

45. The application of s.24, and particularly the qualification contained in s.24(b), was discussed by Scott J in *Police Force of Western Australia v Winterton (1997) WASC 504* where His Honour stated:

*“It seems to me that the reference to the word "practicable" is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context. In that respect, where documents only require editing to the extent that the deletions are of a minor and inconsequential nature and the substance of the document still makes sense and can be read and comprehended in context, the documents should be disclosed. Where that is not possible, however, in my opinion, s24 should not be used to provide access to documents which have been so substantially altered as to make them either misleading or unintelligible.”*

46. The A/Commissioner, in her letter to the parties, considered that it was practicable to edit Document 16 because lines 5-10 on page 1 consist of a discrete item the deletion of which would not render the remainder of the document unintelligible. The A/Commissioner also considered that it was practicable to edit Document 21 to delete line 8 of Document 21 and words 1-9 on line 13 of page 3 because such editing would not render the document either unintelligible or misleading.

47. I agree that the editing of Documents 16 and 21 as proposed would be practicable because, in my view, those deletions would not cause those documents to lose either their meaning or context.
48. However, before access is given to edited copies of Documents 16 and 21, the agency should delete the names, initials, contact details or other identifying particulars of any person other than officers of WA Government agencies (for whom that information is ‘prescribed details’ that is not exempt under clauses 3(3) and 3(4)). For example, the name of any Commonwealth Government representative is personal information that would be exempt under clause 3(1) of Schedule 1 to the FOI Act.
49. I note that a small amount of information in Documents 16 and 21 refers to third party companies but, in my view, none of that information is exempt under clauses 4(1), 4(2) or 4(3).

## CLAUSE 2 – INTER-GOVERNMENTAL RELATIONS

50. The agency claims that Documents 14, 15 and 19 are exempt under clause 2(1)(b) of Schedule 1 to the FOI Act. Clause 2, insofar as it is relevant, provides:

### **“2. *Inter-governmental relations***

(1) *Matter is exempt matter if its disclosure -*

(a) *...; or*

(b) *would reveal information of a confidential nature communicated in confidence to the Government (whether directly or indirectly) by any other government.*

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

(3) *In this clause –*

**“other government”** *means the government of the Commonwealth, another State, a Territory or a foreign country or state.”*

51. I consider that clause 2 operates to preserve, amongst other things, the maintenance of good relations, including the flow of information, between the State Government and other governments.
52. To satisfy the requirements of clause 2(1)(b), the agency must establish that the disclosure of Documents 14, 15 and 19 would reveal information of a confidential nature that was given to the Government and received by it in confidence (whether directly or indirectly) by any other government (see *Re*

*Cyclists Rights Action Group and Department of Transport* [1995] WAICmr 16 at [20]).

53. If it is established that the documents are exempt, then s.102(3) provides that the onus is on the complainant, as the access applicant, to demonstrate that clause 2(2) applies, that is, that disclosure of Documents 14, 15 and 19 would, on balance, be in the public interest.

### **The complainant's submissions**

54. The complainant makes the following submissions:
- Given that Documents 14, 15 and 19 were created some three to four years ago (2007 and 2008) and that Western Australia's government has changed since that time, any deliberative process referred to in the documents is unlikely, if disclosed, to cause harm to Commonwealth-State relations.
  - The strategic assessment of potential locations for the LNG Hub is highly controversial and has generated a high level of public interest since, among other things, it involves locating a major industry to the Kimberley coast in one of the most iconic and unspoilt landscapes in Australia. Given the time that has elapsed; the level of public interest; and what is at stake, there is a strong public interest in ensuring a transparent site selection and environmental assessment process, which would favour the release of any documents relating to this proposal.
  - Documents 14 and 15 are described as emails relating to drafts of the Agreement. As the Agreement is now in the public domain, the complainant submits that the alleged confidential nature of the information contained in Documents 14 and 15 should also form part of the public record and should therefore be disclosed.
  - The Government has waived any right to confidentiality that it might have had in relation to this proposal or, in the alternative, the public interest in ensuring that the site selection and environmental assessment process is undertaken in a transparent manner outweighs the public interest in maintaining confidentiality.
  - In balancing the public interests, any harm caused by the disclosure of Documents 14, 15 and 19 is outweighed by the public interest in having access to this information.

### **The agency's submissions**

55. In brief, I understand the agency to submit as follows:
- Documents 14, 15 and 19, if disclosed would reveal the subject matter of discussions between the State Government and the Commonwealth Government, which is information of a confidential nature communicated

in confidence. The attachments to Documents 14 and 15, which are drafts of the Kimberley strategic environmental impact assessment agreement ('the Agreement') are marked 'confidential'. None of the information in Document 19 has ever been made public.

- "... [I]t is incumbent upon the complainant to identify the public interest factors for and against disclosure." The complainant has not identified any public interest factors that weigh in favour of non-disclosure.
- Other than the complainant's submission that there is a public interest in ensuring a transparent site selection and environmental process, the complainant has simply made a number of unsupported assertions, which are not public interest factors that weigh in favour of disclosure. The complainant's submission that, if disclosed, the 'deliberative processes' in the documents are unlikely to harm Commonwealth-State relations are misconceived and irrelevant since information relating to deliberative processes is the subject of the clause 6(1) exemption and has nothing to do with clause 2(1)(b).
- In considering the public interest factors that favour disclosure, the agency recognises a public interest in information that may make a valuable contribution to public debate on a particular matter. However, since the final version of the Agreement is now publicly available the public interest in disclosing Documents 14 and 15 is satisfied.
- Against disclosure, the agency recognises public interests in preserving intergovernmental co-operation and the flow of information between governments and in maintaining the capacity of governments to communicate in confidence (*Re Ravlich and Department of Productivity and Labour Relations* [2000] WAICmr 58 at [32]).
- When consulted by the agency, the Commonwealth strongly opposed the disclosure of Document 19 because of the confidentiality of the information contained in that document.
- With regard to Document 19, there is a public interest in preserving the confidentiality of communications between the State and Commonwealth Governments regarding policy options or recommendations prepared for possible submission to an Executive body.
- There is a compelling public interest in maintaining the confidentiality of the information in Documents 14, 15 and 19.
- The public interests favouring non-disclosure outweigh the public interests in disclosure, in this case and disclosure would be contrary to the public interest.

**Consideration – clause 2(1)(b)**

56. Documents 14, 15 and 19 are all emails containing communications between the State Government and the Commonwealth Government in relation to the LNG Hub proposal to process gas from the Browse Basin. Documents 14 and 15 include attachments that are drafts of the Agreement, which was made between the two governments pursuant to s.146(1) of the Commonwealth EPBC Act. The Agreement was signed on 6 February 2008 and is a public document that can be downloaded from the websites of both the Commonwealth and State Governments. Under it, the two governments committed to undertake a strategic assessment of the impacts of actions under a plan for the Browse Basin common-user liquefied natural gas (LNG) precinct and associated activities.
57. The question for my determination is whether, if disclosed, Documents 14, 15 and 19 would reveal information of a confidential nature communicated in confidence to the WA Government by the Commonwealth Government. I note that Documents 14 and 15 are, in fact, communications to the Commonwealth Government by the WA Government. However, it is clear from the content of Documents 14 and 15 that versions of the draft Agreement had been going between the two before the dates of those documents. In view of that, I accept that the communications in Documents 14 and 15 would, if disclosed, reveal information communicated to the WA Government by the Commonwealth Government. In addition, I am satisfied that Document 19 is an email to an officer of the WA Government from an officer of the Commonwealth Government forwarding a document and another email.
58. Information that is known only by a small number or limited class of persons is inherently confidential if it is not in the public domain: *Re Read and Public Service Commission* [1994] WAICmr 11 at [28]. Although the Agreement is a public document, I understand that the emails in Documents 14, 15 and 19; the drafts of the Agreement attached to Documents 14 and 15; and the attachment to Document 19, are not in the public domain and I am satisfied that those documents are known only to a small number of government officers. I am satisfied that Documents 14, 15 and 19 contain information of a confidential nature.
59. Information is obtained in confidence where there is evidence that the information was both given and received on the basis of an express or implied understanding of confidence. In the present case, the draft Agreements attachments to Documents 14 and 15 are both marked 'confidential' and Documents 14, 15 and 19 all pre-date the signing and publication of the Agreement.
60. Essentially, I consider the communications in Documents 14, 15 and 19 to form part of the deliberative process that led up to the signing of the Agreement. In my opinion, it can be inferred that the information in Documents 14, 15 and 19 was communicated in confidence from the nature of the information; the purpose for which it was provided; and the context in which it was provided.

61. In light of the above, I consider that the agency has satisfied the requirements of clause 2(1)(b) and that Documents 14, 15 and 19 are *prima facie* exempt under that provision. However, the complainant submits that those documents are not exempt because the limit on the exemption in clause 2(2) applies.

**Clause 2(2)**

62. Clause 2(2) provides that matter is not exempt under clause 2(1) if its disclosure would, on balance, be in the public interest.
63. I do not accept the agency's submission that it is incumbent on the complainant to identify public interests that weigh against disclosure when there exists the possibility that there are none. In the present case, the complainant was unable to identify factors weighing against disclosure but operated on the assumption that "*any harm*" otherwise identified would be outweighed by the public interests favouring disclosure. Nonetheless, I note that it is incumbent on the complainant to establish that disclosure would, on balance, be in the public interest, pursuant to s.102(3) of the FOI Act.
64. Nor do I accept the complainant's submission that the agency has waived any right to confidentiality. There is nothing before me to support that statement which might be used in balancing the public interests identified as relevant in this case.
65. In favour of disclosure, the complainant submits that there is a strong public interest in ensuring a transparent site selection and environmental assessment process in relation to a highly controversial proposal such as that relating to the LNG Hub and that disclosure of Documents 14, 15 and 19 would further that particular public interest.
66. The complainant also submits that:
- given the controversial nature of the proposal;
  - the high level of public interest;
  - the change in government;
  - the amount of information already disclosed including information about the Agreement that is no longer confidential; and
  - the fact that the disputed documents are now over three years old so that their disclosure is unlikely to harm the Commonwealth-State relationship,

there is a public interest in disclosing Documents 14, 15 and 19.

67. The agency acknowledges that there is a public interest in disclosing information that may make a valuable contribution to public debate but argues that the particular public interest in transparency has been satisfied by the disclosure of the Agreement.



68. In the present case, I accept that the site selection process has been a controversial issue, as evidenced by the amount of media attention given to the subject and the numbers of people signing petitions presented to Parliament.
69. I recognise a public interest in the accountability of agencies for the manner in which they discharge their functions on behalf of the public of Western Australia, including informing the public, where possible, of the basis for decision-making and the material considered relevant to the decision-making process. Of particular relevance to this case, I consider there to be a public interest in a controversial issue such as the LNG Hub proposal being seen to be as open and transparent as possible in order to maintain the public's trust and confidence in the site selection process.
70. I accept that the publication of the Agreement and other documents relevant to the site selection process, as well as the community consultation that has taken place, goes some way to satisfy the public interests in government transparency and accountability. However, in my view, the drafts of the Agreement and discussions relevant to its drafting – which is the information in issue in this case – may contain valuable insights into what was considered by the Government and why, and may also provide clarification and a better understanding of the deliberative process leading to the decision, so that I am not prepared to say that those public interests are fully satisfied by the information already in the public domain.
71. I also recognise that there is a public interest in members of the community, such as the complainant, being able to exercise its rights of access under the FOI Act.
72. I do not accept the agency's view that the complainant's reference to deliberative processes is irrelevant to the balancing of competing public interests. I 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.
73. In the present case, the complainant acknowledges that there is a public interest in the Government's deliberative processes remaining confidential where there is evidence that disclosure would adversely affect those deliberations but submits that, in this case, any deliberations on the Agreement ended three years ago and the Agreement itself has been a public document since that time. I accept that is correct.
74. Weighing against disclosure, the agency submits that there is a public interest in preserving intergovernmental co-operation and the flow of information between governments and also a public interest in maintaining the capacity of governments to communicate in confidence. In *Re Ravlich*, the Information Commissioner said, at [32]:

*“Weighing against disclosure, I recognise a public interest in preserving the flow of information between governments and inter-governmental cooperation so that joint initiatives can be effectively and efficiently implemented. I also consider that there is a strong public interest maintaining the capacity of governments to communicate in confidence with each other and with the knowledge that confidences will be honoured.”*

75. In *Re Ravlich*, the former Information Commissioner took into account certain letters from the Assistant Secretary of the National Office of Workplace Services who, amongst other things, suggested that disclosure of the relevant agreement between the State and Commonwealth Governments could reasonably be expected to give rise to complications for the Commonwealth in relation to its contracts with other States. There was also in evidence a clear statement by the Assistant Secretary that disclosure of the agreement would mean that, in future, the Commonwealth would be reluctant to enter into further contractual relations with the relevant State Department.
76. In the present case, the agency’s FOI file reveals that, on 21 June 2010, the Commonwealth advised the agency by email that it had no objections to the release of Documents 14 and 15. In light of that, I do not accept the agency’s claim that the disclosure of those documents would be contrary to the public interest because such disclosure would not adversely affect inter-governmental cooperation.
77. However, the email of 21 June 2010 also advises the agency that the Commonwealth Department of Environment, Water, Heritage and the Arts (‘DEWHA’) objected to the disclosure of Document 19 because that matter was communicated in confidence. DEWHA advised that *“[s]hould the document be released the Department will unlikely enter into preliminary discussions. This would not be in the public interest as these preliminary discussions often shed light on formal processes that are yet to be initiated under a variety of Acts (eg. the Environment Protection and Biodiversity Conservation Act 1999).”*
78. I have examined Document 19, which consists of a wide-ranging and frank exchange of views by the Director General of the agency and his Commonwealth counterpart. Although, in its notice of decision dated 10 May 2010, the agency asserted that Document 19 contained policy options and recommendations prepared for possible submission to an Executive body, it made no claim under clause 1 for that matter and I have been unable to identify any information of that description.
79. As already stated, I accept that the communications in Document 19 were made in confidence and I recognise that there is a public interest in maintaining the capacity of governments to cooperate and communicate freely and in confidence to each other.
80. Having considered the nature and content of that exchange of views, and taken into account the Commonwealth Government’s objection to the disclosure of that information, I consider that it would be contrary to the public interest to

disclose Document 19 because, in my view, there is a real possibility that such disclosure would reduce the free flow of information between governments. In addition, it seems to me that much of the information in Document 19 relates to the broader Kimberley region and would not directly assist the complainant's understanding of the site selection process in this case.

81. In balancing the competing public interests, I consider that those favouring disclosure outweigh those favouring non-disclosure in the case of Documents 14 and 15 but not in the case of Document 19.
82. In light of that, I consider that the limit on the exemption in clause 2(2) applies to Documents 14, 15 but not to Document 19. In consequence, Document 19 is exempt under clause 2(1)(b) but Documents 14 and 15 are not exempt under that provision.

## CONCLUSION

83. I find that:
  - Document 3 is exempt under clause 1(1)(b) and Document 18 is exempt under clauses 1(1) and 1(1)(b).
  - lines 5-10 on page 1 of Document 16 and line 8 on page 1 of Document 21 are exempt under clause 1(1)(b) but the remainder of Documents 16 and 21 is not exempt under that provision, although words 1-9 on line 13 of page 3 of Document 21 are exempt under clause 1(1), and
    - it is practicable to edit Document 16 to delete lines 5-10 on page 1 and to edit Document 21 to delete line 8 on page 1 and words 1-9 on line 13 of page 3, and to give the complainant access to the remainder of those documents.
  - Document 19 is exempt under clause 2(1)(b) but Documents 14 and 15 are not exempt under that provision.

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