

Participants:

**Deacons**  
Complainant

- and -

**Minister for Housing and Works;  
Heritage; Indigenous Affairs and  
Land Information**  
Respondent

## DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to deliberative processes of agency – clause 4(2) - information having a commercial value – whether disclosure could reasonably be expected to diminish or destroy commercial value of the information – clause 6(1) – deliberative processes – whether disclosure would, on balance, be contrary to the public interest

*Freedom of Information Act 1992 (WA)*: sections 10(1), 13(1)(b), 30, 39(3)(a), 72, 75, 102(1), 102(2) and 102(3); Schedule 1, clauses 3(1), 4(2) and 6.

*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 Yerilla Gems Pty Ltd, Gembank Limited, WA Gem Explorers Pty Ltd and Department of Minerals and Energy* [1996] WAICmr 58;

*Re Zurich Bay Holdings Pty Ltd and City of Rockingham* [2006] WAICmr 12;

*Re Waterford and Department of Treasury (No 2)* [1984] 5 ALD 588;

*Ministry for Planning v Collins* (1996) 93 LGERA 76;

*Health Department of Western Australia v Australian Medical Association Ltd* [1999] WASCA 269, unreported;

*Re Martin and Ministry for Planning* [2000] WAICmr 56;

*Re Western Australian Newspapers and Western Power Corporation* [2005] WAICmr 10;

*DPP v Smith* [1991] VR 63;  
*Re Murtagh and Commissioner for Taxation* (1983) 6 ALD 112;  
*Channel 31 Community Educational Television Ltd v Inglis* [2001] WASCA 405.

**DECISION**

The decision of the agency to refuse access to Document 24 under clause 6(1) of Schedule 1 of the *Freedom of Information Act 1992* is confirmed.

JOHN LIGHTOWLERS  
A/INFORMATION COMMISSIONER

6 August 2008

## REASONS FOR DECISION

### BACKGROUND

1. This complaint arises from a decision made under the *Freedom of Information Act 1992* ('the FOI Act') by the Minister for Housing and Works; Indigenous Affairs; Heritage; Land Information ('the Minister') on 30 May 2008 to refuse the law firm Deacons ('the complainant') access to copies of certain documents requested by the complainant and to give the complainant access to edited copies of other documents.

#### *The access application*

2. By letter dated 7 April 2008, pursuant to its right of access under section 10(1) of the FOI Act, the complainant lodged an access application with the Minister under the FOI Act. The complainant applied to the Minister for access to the following kinds of documents:  
  

*"...all file notes, letters, correspondence, all assessments, reports, agendas, minutes of meetings, valuations, documents, plans, decisions, briefings, briefing notes, writings, memoranda, documents, electronic communications such as emails and electronically stored documents and all drafts between the Minister for Housing and Works, Heritage, Indigenous Affairs, Land Information, her Principal Policy Officer...and any other officers/advisers of the Minister and the Department for Housing and Works, the City of Swan and service providers in relation to the discussions with (a third party) and (a second third party) in regard to the plans for the long term care, support, services and accommodation for the aged and infirmed in the East Metropolitan Region."* ("the requested documents").
3. By letter dated 30 May 2008, the Minister notified the complainant of the decision on access. The complainant was informed that twenty eight (28) documents had been identified by the Minister and that twenty five (25) of those documents were considered by the Minister to be documents of the kind described in the complainant's access application. The complainant was given full access to fifteen of the requested documents; access to edited copies of six of the requested documents; and refused access to four of the requested documents.
4. The Minister advised the complainant that access had been refused, either in full or in part, to five of the requested documents on the ground that those documents were documents of an 'exempt agency'. The Minister also advised the complainant that access had been refused to one of the requested documents, on the ground that it was exempt, in full, under clause 4 and clause 6 of Schedule 1 to the FOI Act and that certain matter had been deleted from one of the requested documents on the ground that the deleted information was also exempt under clause 4 of Schedule 1 to the FOI Act.
5. As the decision on access was made by the Minister, internal review of the Minister's decision was not available to the complainant under the FOI Act (see: section 39(3)(a) of the FOI Act). Accordingly, by letter dated 23 June 2008, the

complainant applied to the A/Information Commissioner for external review of the Minister's decision. However, the complainant limited the scope of its application for external review to a request for a review of the Minister's decision in relation to the documents numbered 5, 6, 7, 8, 22, 24 and 27 ('the disputed documents') as listed and described in a document schedule provided to the complainant by the Minister with the Minister's notice of decision.

## **REVIEW BY THE INFORMATION COMMISSIONER**

6. Following receipt of this complaint, in accordance with my authority under sections 72 and 75 of the FOI Act, I required the Minister to produce to me, for my examination, the FOI file maintained by the Minister in relation to the complainant's access application and the disputed documents. The disputed documents and the FOI file were produced to me by the Minister on 3 July 2008.
7. After examining the disputed documents and the notice of decision given to the complainant by the Minister and considering the Minister's claims for exemption, my Senior Legal Officer wrote to the Minister and to the complainant by letter dated 10 July 2008, advising the parties of his preliminary view of this complaint and his reasons for that view.
8. In summary, it was my Senior Legal Officer's preliminary view, on the basis of the information then before me, that Documents 5, 6, 7, 8 and 22 were not documents of an 'exempt agency' and that Documents 24 and 27 were not exempt documents under clause 4 or clause 6 of Schedule 1 to the FOI Act. However, it was also my Senior Legal Officer's view that each of the disputed documents contained a small amount of personal information, as that term is defined in the FOI Act, about several individuals – including such details as their names, their email addresses and their contact telephone numbers – which information was *prima facie* exempt matter under clause 3(1) of Schedule 1 to the FOI Act.
9. My Senior Legal Officer invited the Minister and the complainant to reconsider their respective positions in relation to the disputed documents and he also invited both parties to provide me with written submissions in support of their respective positions should an agreed outcome not be reached.
10. By letter dated 17 July 2008, the complainant advised me that it would accept access to edited copies of Documents 5, 6, 7, 8, 22, 24 and 27 with the personal information about third parties deleted from those documents. The Minister was notified of the complainant's advice in that regard and, following further consideration by the Minister, edited copies of Documents 5, 6, 7, 8 and 22 were released to the complainant. After further consultation with the complainant, by letter dated 28 July 2008, the complainant withdrew its request for access to an unedited copy of Document 27, as it had previously been given access to an edited copy of that document by the Minister and by the Department of Housing and Works, following an FOI application to that agency.
11. As a result of the concessions made by each of the parties, only one document, Document 24, remains in dispute. The Minister claims that Document 24 is exempt from disclosure under clause 4 and clause 6 of Schedule 1 to the FOI Act

and, by letter dated 25 July 2008, the Minister provided me with written submissions in support of the claims for exemption made for Document 24.

***Document 24***

12. The Minister claims that Document 24 is exempt under clause 4 (commercial information) and clause 6 (deliberative processes). Document 24 consists of an email dated 4 April 2008, from an officer of the Department of Housing and Works to a Policy Officer at the Minister's office and a draft Expression of Interest document.

13. Clause 4 of Schedule 1 to the FOI Act provides as follows:

***“4. Commercial or business information***

***Exemptions***

- (1) *Matter is exempt matter if its disclosure would reveal trade secrets of a person.*
- (2) *Matter is exempt matter if its disclosure –*
  - (a) *would reveal information (other than trade secrets) that has a commercial value to a person; and*
  - (b) *could reasonably be expected to destroy or diminish that commercial value.*
- (3) *Matter is exempt matter if its disclosure-*
  - (a) *would reveal information (other than trade secrets or information referred to in sub clause (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 sub clause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*
- (5) *Matter is not exempt matter under sub clause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant.*
- (6) *Matter is not exempt matter under sub clause (1), (2) or (3) if the applicant provides evidence establishing that the person concerned consents to the disclosure of the matter to the applicant.*

(7) *Matter is not exempt matter under sub clause (3) if its disclosure would, on balance, be in the public interest.”*

14. The exemption in clause 4 consists of three separate and distinct subclauses. The exemption in clause 4(1) protects from disclosure information about the trade secrets of a person. The exemption in clause 4(2) protects from disclosure information, other than the trade secrets of a person, that has a commercial value to a person and the exemption in clause 4(3) protects from disclosure commercially sensitive information about the business, professional, commercial or financial affairs of a person, including a company and an incorporated body.

### ***The Minister's claims***

15. The schedule attached to the notice of decision given to the complainant by the Minister on 30 May 2008 listed, and briefly described, Document 24. In column 3 of the schedule opposite Document 24, under the heading “DECISION”, the decision on access was described by the word “*Declined*”. In column 4 of the schedule, under the heading “EXEMPTIONS APPLIED” the words “*Exemption 4, Commercial or business information*” and the words “*Exemption 6, Deliberative processes*” appeared. Except for reference to the heads of exemption claimed, no reasons for the decision to refuse the complainant access to Document 24 were given, in either the Minister’s notice of decision or in the schedule attached to that notice of decision.
16. In the Minister’s response to my Senior Legal Officer’s preliminary view letter of 10 July 2008, the Minister’s office submitted that:

*“[D]ocument 24 consists of an email and draft Expression of Interest (EOI) document. These documents were declined citing Exemption 4, commercial or business information and exemption 6, deliberative process.*

*As Document 24 is regarding a Draft document, it is considered to fall within the scope of Exemption 6(1) paragraphs (a) and (b), and Exemption 4(2) paragraph (a). An EOI forms part of the Government tender process and becomes available to the public once finalised. In draft form however, an EOI, and any documents discussing it such as the email with handwritten notes that also constitutes Document 24, contains recommendations, advice, and consultation between agencies (Exemption 6(1) paragraph (a)), in this case the Ministerial Office and the Department of Housing and Works, which would be contrary to the public interest to release to Deacons (Exemption 6(1)(b)) as such deliberations would provide Deacons’ client with a competitive advantage over other parties also interested in partaking in the EOI process (Exemption 4(2)(a)) and therefore compromising the fairness and equity of the Government tender process.”*

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

17. Section 102(1) of the FOI Act provides that, except where section 102(2) or section 102(3) applies, in any proceedings concerning a decision made under the FOI Act by an agency, the onus is on the agency to establish “...*that its decision*

*is justified or that a decision adverse to another party should be made*". Accordingly, in this instance, the Minister bears the onus of establishing that the decision to refuse the complainant access to Document 24 was justified.

### ***The standard of proof***

18. The standard of proof that decision-makers must meet under the FOI Act was considered by A/Information Commissioner C P Shanahan SC 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/Commissioner Shanahan reviewed two decisions of the Supreme Court of Western Australia in relation to the interpretation of 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.
19. In *Manly*'s case, Owen J of the Supreme Court of Western Australia considered, among other things, a claim for exemption made by the Ministry of Premier and Cabinet under clause 4(3) of Schedule 1 to the FOI Act. Owen J said, at page 573 of his decision:

*"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"*.

20. In *Police Force of Western Australia v Winterton*, unreported; SCt of WA (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 [FOI Act] 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."*

21. After reviewing the Supreme Court's decisions in *Manly's* case and *Winterton's* case, A/Commissioner Shanahan concluded that, for the purposes of the FOI Act, the standard of proof 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/Commissioner Shanahan's findings in that regard.

### ***The Minister's notice of decision***

22. The notice of decision which the Minister gave to the complainant, pursuant to section 13(1)(b) of the FOI Act, does not comply with the statutory obligations placed upon decision-makers by section 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."*

23. The Minister's notice of decision included details of the date of the decision, the Minister's name and designation and the exemption clauses claimed. However, neither the notice of decision nor the schedule attached to that notice of decision complied with the statutory requirements of section 30(f) of the FOI Act. Save for the reference to the head of exemption claimed, no other reasons were given by the Minister for refusing the complainant access to the disputed documents. No findings on any material questions of fact were included in the notice of decision nor were any references to the material used or referred by the Minister, when she decided that the disputed documents were exempt documents, given to the complainant. Except for the reference to the head of exemption, no attempt was made to explain to the complainant the factual basis underlying the decision

for refusing access to the disputed documents, in order to satisfy the statutory requirements of section 30(f) of the FOI Act.

***Clause 4 – commercial or business information***

24. The former Information Commissioner ('the former Commissioner') and the former A/Information Commissioner ('the former A/Commissioner') have expressed the view that it is clear from the specific words of clause 4 that the exemptions in each of clauses 4(1), 4(2) and 4(3) are directed at protecting different types of information from disclosure under the FOI Act and that information which is exempt matter under clause 4(1) cannot also be exempt matter under clause 4(2) or clause 4(3) and that matter that is exempt matter under clause 4(2) cannot also be exempt under clause 4 (1) or clause 4(3) - (see: *Re Yerilla Gems Pty Ltd, Gembank Limited, WA Gem Explorers Pty Ltd and Department of Minerals and Energy* [1996] WAICmr 58 and *Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others* [2006] WAICmr 12).
25. In order to establish a *prima facie* claim for exemption under clause 4(2), the Minister must identify the specific matter recorded in Document 24 for which exemption is claimed under clause 4(2) and give reasons for that claim. There are two paragraphs to clause 4(2) and both must be addressed in order to establish a *prima facie* claim for exemption under clause 4(2). In this instance, it is asserted that the release of Document 24 would "...provide Deacons' client with a competitive advantage over other parties also interested in partaking in the EOI process and therefore compromise the fairness and equity of the Government tender process."
26. I have examined the access application submitted to the Minister by the complainant. There is nothing on the face of that application or in any of the other documents put before me by the Minister to indicate or establish that the complainant submitted the access application to the Minister on behalf of a client. The heading to the access application states that the applicant was "*Deacons, Solicitors*". That being the case, I reject the assertion that the release of Document 24 would provide "*Deacons' client*" with a competitive advantage over other parties interested in participating in the EOI process. Apart from the inference that the complainant, as a law firm, could be expected to be acting on instructions from an undisclosed client, in making the complaint, which inference may be able to be drawn from the terms of the access application, which refer to individuals who attended a particular meeting, there is no other evidence before me that the complainant was acting for a client.
27. Clause 4(2)(a) states that matter is exempt matter if its disclosure would reveal information (other than trade secrets) that has a commercial value to a person. In this case, the Minister has not provided any evidence to the complainant or to me to the required evidentiary standard, to identify the specific information which the Minister asserts has a commercial value to any person nor has the Minister identified any person or persons to whom that information would have a commercial value.

28. Moreover, no evidentiary material to the required probative standard has been put before me to satisfy the requirements of clause 4(2)(b) of Schedule 1 to the FOI Act. It appears to me, from my examination of the documents put before me by the Minister that paragraph (b) of clause 4(2) has not been adequately addressed. Accordingly, to assert that Document 24 is exempt under clause 4(2)(a), without providing some probative material to the required evidentiary standard and without also addressing the requirements of clause 4(2)(b) of Schedule 1 to the FOI Act, does not discharge the onus the Minister bears under section 102(1) of the FOI Act of establishing that the decision to refuse the complainant access to Document 24, on the ground that Document 24 was purportedly exempt under clause 4(2) was justified. Without supporting submissions I am not willing to rely simply on an inference to make a finding of fact that a client might stand behind the complainant in the making of this complaint.

### **Determination**

29. In the absence of any material findings of fact, clear and unambiguous reasons and relevant detailed information to the required probative standard as to why the Minister claims that Document 24 is exempt from disclosure under clause 4(2), I am not satisfied that the Minister has discharged the onus she bears under section 102(1) of the FOI Act. I do not accept that Document 24 is exempt under clause 4(2), as claimed. Accordingly, I find that Document 24 is not exempt under clause 4 of Schedule 1 to the FOI Act.

### ***Clause 6 - deliberative processes***

30. The Minister also claims that Document 24 is exempt under clause 6 of Schedule 1 to the FOI Act. Clause 6 of Schedule 1 provides as follows:

#### ***“6. Deliberative processes***

##### ***Exemption***

(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 exemptions***

(2) *Matter that appears in an internal manual of an agency is not exempt matter under sub clause (1).*

- (3) *Matter that is merely factual or statistical is not exempt matter under sub clause (1).*
- (4) *Matter is not exempt matter under sub clause (1) if at least 10 years have passed since the matter came into existence.”*

## Consideration

31. The meaning of the phrase “*deliberative processes of ...a Minister or agency*” was discussed by the Commonwealth Administrative Appeals Tribunal (‘the AAT’) in *Re Waterford and Department of Treasury (No 2)* (1984) 5 ALD 588. In *Re Waterford* the AAT said:

*“As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing on one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) [the equivalent of clause 6(1)(a)] come into play...*

*It by no means follows, therefore, that every document on a departmental file will fall into this category. Furthermore, however imprecise the dividing line may appear in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of the agency...*

*It is documents containing opinion, advice, recommendations etc. relating to internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption under [http://www.austlii.edu.au/au/legis/wa/consol\\_act/foia1992222/s36.html](http://www.austlii.edu.au/au/legis/wa/consol_act/foia1992222/s36.html) s.36 [the equivalent of clause 6] only attaches to those documents the disclosure of which is ‘contrary to the public interest’...”*

32. To establish a *prima facie* claim for exemption under clause 6(1), it is not sufficient for the Minister to establish that Document 24 contains 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 (see: *Ministry for Planning v Collins* (1996) 93 LGERA at page 76). The Minister must discharge her onus under section 102(1) of the FOI Act and establish, by reference to objective material of probative evidentiary value, that the requirements of paragraphs 6(1)(a) and (b), have been met. If that is the case, then Document 24 will be exempt, subject to the application of any of the limits on exemption set out in clauses 6(2) to 6(4).
33. 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), the complainant is not required to demonstrate that disclosure of the requested documents would be in the public interest but, rather, the complainant is entitled to access unless the Minister 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 disclosure of Document 24 “...was contrary to the public interest” rests with the Minister (see: *Health Department of Western Australia v Australian Medical Association Ltd* [1999] WASCA 269, unreported, at paragraph 18).

### ***The Minister’s claims***

34. The Minister claims that Document 24 is exempt under clause 6 of Schedule 1 to the FOI Act because:

- Document 24 is a draft EOI document;
- an EOI forms part of the Government tender process and becomes available to the public when finalized;
- in draft form, an EOI document and any documents discussing it, such as a covering email with handwritten notes, contains recommendations, advice and consultations between agencies – the Department of Housing and Works and the Minister’s office; and
- it would be contrary to the public interest to release Document 24 to Deacons, as such deliberations would provide Deacons’ client with a competitive advantage over other parties also interested in partaking in the EOI process and therefore compromise the fairness and equity of the Government tender process.

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

35. I have examined Document 24. I am satisfied that the covering email, dated 4 April 2008, establishes that an officer of the Department of Housing and Works consulted with a Policy Officer at the Minister’s office, in relation to the draft EOI document. I am also satisfied, on the basis of my examination of the draft EOI document, that it was prepared in the course of and for the purposes of the deliberative processes of the Department of Housing and Works and the Minister. Having examined both the email and the draft EOI document, I am able to infer from their contents that the EOI comprises a proposal, and is therefore in the nature of a recommendation and/or advice as to a possible course of action. On the basis of my examination of the email and the draft EOI document, I am satisfied that Document 24 meets the requirements of clause 6(1)(a) of Schedule 1 to the FOI Act.

### ***Clause 6(1)(b) – whether disclosure would, on balance, be contrary to the public interest***

36. 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).

37. 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.
38. Determining whether or not disclosure of documents under the FOI Act would be in the public interest, involves a process of identifying the public interest factors for and against disclosure and then carefully weighing those competing factors, in order to determine where the balance lies. As I have said previously in this decision, pursuant to section 102(1) of the FOI Act, the onus is on the Minister to establish that it would, on balance, be contrary to the public interest.
39. The term "public interest" is not defined in the FOI Act, or in any other similar legislation. When the term appears in the FOI Act as a limit on exemptions, it is used to balance competing interests, specifically the public interest in applicants being able to exercise their rights of access under the legislation and the public interests contained in the exemption clauses. 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 organizations.
40. In applying the public interest test, the difference between matters of general public interest and those of private concern only must be recognized. The public interest is an interest that extends beyond what the public may be interested in today or tomorrow depending on what is newsworthy. In *DPP v Smith* [1991] 1 VR 63, the Victorian Supreme Court recognized this difference and said, at p. 65:
- "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."*
41. In *Re Murtagh and Commissioner for Taxation* (1984) 54 ALR 313, the President of the AAT outlined the general principle applying to the public interest test under s.36(1)(b) in the *Freedom of Information Act 1982* (Commonwealth), the equivalent to clause 6(1), and said, at p.323:

*“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”.*

42. In this instance, the Minister asserts that it would be contrary to the public interest to release Document 24 to Deacons, because to do so would allegedly provide “*Deacons’ client*” with a competitive advantage over other parties also interested in participating in the EOI process and, as a result, compromise the fairness and equity of the Government tender process. As I have previously noted, the evidence before me establishes that the complainant submitted the access application to the Minister in its own name and apart from a possible inference from the terms of the complaint, and the Minister’s assertion, there is no other supporting evidence before me that the complainant made the access application for or on behalf of a client or another party.
43. 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.”*

44. 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.
45. In my view there is a public interest in agencies being able to make decisions without someone “looking over their shoulders” and the premature disclosure of document, in circumstances where decisions have yet to be made and while negotiations continue, may be detrimental to a successful outcome for the deliberative process. Having examined the disputed documents, and on the basis of the Minister’s submissions, I find as a fact that the EOI process is still ongoing and hence deliberations are still ‘alive’ and ongoing in relation to Document 24.
46. The main thrust of the Minister’s submission that it is contrary to the public interest to disclose Document 24 to the complainant is the assertion that

disclosure would give the complainant a competitive advantage over other parties also interested in participating in the EOI process and thereby compromise the fairness and equity of the Government tender process.

47. It is a common feature of the contracting process that it is a competitive one. The competitive market depends on there being other parties interested in participating in an EOI of the kind described in Document 24. While it is open to the Minister to provide all such interested parties with a copy of an EOI, thereby creating a “level playing field” for all relevant parties, I accept that in the circumstances of this particular case where no decision has been made as yet whether to proceed with the EOI in the draft form as proposed in Document 24 or at all, the early release to the complainant of the draft proposal would risk undermining the tender process.
48. I accept, based on the Minister’s submission, and having regard to the competitive nature of the contracting process, that it is more probable than not that the fairness and equity of the Government tender process in this instance risks being compromised by the early release to the complainant of this draft proposal for a possible EOI ahead in time of a decision whether to proceed with such an EOI and in what form.
49. In summary, I find that, on balance, it is contrary to the public interest to disclose Document 24 to the complainant. Accordingly, I am satisfied, on the basis of the information before me, that the Minister has satisfied the requirements of clause 6(1)(b) and I therefore find that Document 24 is exempt under clause 6(1) of Schedule 1 to the FOI Act.

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