OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2008291 Decision Ref: D0352009

Participants:

Roderick Douglas McKay and Kathleen Glenys McKay
Complainants

- and -

Water Corporation
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – valuation figures in valuation reports – whether the disputed documents are within the scope of the access application – clause 6(1) – whether information of a kind described in clause 6(1)(a) – whether disclosure contrary to the public interest

***Freedom of Information Act 1992* (WA)**: sections 3(1)(b), 66(6), 102(1); Schedule 1, clause 6(1)
***Freedom of Information Act 1982* (Cth)** s.36(1)
***Freedom of Information Act (1992)* (Qld)** s.41 (repealed)
Land Administration Act 1997 s.241(2)(c)
Water Corporation Act 1995 s.30(1)(a)

Re Waterford and Department of the Treasury (No 2) (1984) 5 ALD 588
Manly v Ministry of the Premier and Cabinet (1995) 14 WAR 550
Re WA Newspapers Ltd and Another and Salaries and Allowances Tribunal and Another [2007] WAICmr 20
McKinnon v Secretary, Department of Treasury (2005) 145 FCR 70
Re Little and Others and Department of Natural Resources (1996) 3QAR 170
Re Read and Public Service Commission [1994] WAICmr 1
DPP v Smith [1991] 1 VR 63
Re Collins and Ministry for Planning [1996] WAICmr 39
Re Edwards and Electricity Corporation [1999] WAICmr 13
Ministry for Planning v Collins (1996) 93 LGERA 69
Re Jones and Shire of Swan [1994] WAICmr 6
Re Shire of Mundaring and Ministry for Planning [2001] WAICmr 14
Re Veale and Town of Bassendean [1994] WAICmr 4
Johnson Tiles Pty Ltd and Esso Australia Ltd [2000] FCA 495
Re Ryan and City of Belmont [2000] WAICmr 42

DECISION

The decision of the agency to refuse access to the disputed information is set aside. In substitution I find that the disputed information, as described in paragraph 13 of these reasons for decision, is not exempt under clause 6(1) of Schedule 1 to the FOI Act.

Sven Bluemmel
INFORMATION COMMISSIONER

30 December 2009

REASONS FOR DECISION

1. This complaint arises from a decision made by the Water Corporation ('the agency') to refuse Mr and Mrs McKay ('the complainants') access to documents under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. The agency proposes to construct a pipeline that will be situated, in part, on land owned by the complainants at 26 Venn Road, Ravenswood. To enable the construction of the pipeline to proceed, the agency proposes to acquire a portion of the complainants' property ('the Land'). As I understand it, the agency has the power under the *Land Administration Act 1997* ('the LA Act') to acquire land for public works by negotiated purchase or by compulsory acquisition ('taking').

3. The agency obtained two valuations from two licensed valuers for the Land and made two offers - on 28 May 2008 and 11 September 2008 - to the complainants to purchase the Land. The complainants rejected the agency's offers and no agreement was reached between the parties.

4. By letter dated 10 June 2008, the complainants' solicitors applied under the FOI Act to the agency for access to:

   > *"All files, documents, reports whatsoever related to the valuation and documentation relating to the extent of the area required to be resumed, plans and other materials in relation to area of land to be resumed, letters correspondence and documents held on file in relation to the requirement for the land, or any reports or documents justifying the requirement or the Taking of the Land or any information in relation to the establishment of the value of the land, including town planning reports, environmental reports and valuation reports in respect of land owned by Roderick Douglas McKay and Kathleen Glenys McKay known as Lot 6 on Plan 8516 being land contained in Certificate of Title Volume 1788 Folio 808, the physical street address is 26 Venn Road, Ravenswood."*

5. On 16 July 2008, the agency notified the complainants of its initial decision to give access in full to 56 documents and access to edited copies of 18 documents. With regard to the latter, the agency claimed that the edited matter was outside the scope of the access application (because it did not relate to the Land) or was exempt under clauses 3(1) and 6(1) of Schedule 1 to the FOI Act. Documents 16 and 17, which the agency released in edited form, are valuation reports obtained by the agency in November 2007 and March 2008.

6. By letter dated 13 August 2008, the complainants' solicitors requested an internal review of the decision *"…not to disclose all details of the valuations on which the* [agency]*'s offer to take the land was based."*

7. On 8 September 2008, the complainants' solicitors wrote to the agency to ask why they had not received the agency's decision on internal review. On 9 September 2008, the agency advised that it had no record of receiving the application for internal review and, therefore, had taken no action since the initial decision.

8. On 17 September 2008, the complainants' solicitors wrote to the Information Commissioner, describing the circumstances in respect of the internal review application with the agency and sought external review by the Information Commissioner of the agency's decision to give access to edited copies of the disputed documents.

9. Section 66(6) of the FOI Act provides that the Information Commissioner may allow a complaint to be made even though internal review has not been applied for or has not been completed. After making inquiries with the agency and considering the circumstances as described by the complainants' solicitors, the former A/Information Commissioner accepted the complainants' application for external review under s.66(6) on 22 September 2008.

REVIEW BY THE INFORMATION COMMISSIONER

10. Following my receipt of this complaint, the agency was required to produce the disputed documents to this office, together with the FOI file relating to the complainants' access application. Following discussions and a meeting with agency officers, the agency provided further written submissions to this office in support of its decision.

11. On 3 September 2009, after considering all of the information then before me, I provided the agency and the complainants' solicitors with a letter setting out my preliminary view of this complaint. My preliminary view was that the information deleted from the disputed documents was not exempt under clause 6(1) of Schedule 1 to the FOI Act and I invited the parties to make further submissions to me.

12. On 17 September 2009, I received further submissions from the agency's legal advisers and a copy of those submissions was provided to the complainants. The complainants have made no further submissions to me.

THE DISPUTED INFORMATION

13. The information in dispute in this matter is

    - lines 11-24 on page 2 and lines 7-21 on page 15 of Document 16; and
    - lines 6-8 and 23 on page 7 and lines 11-28 on page 27 of Document 17.

14. The disputed information consists of valuation figures, calculations and other information relating to the valuation of the Land.

PRELIMINARY ISSUE – THE SCOPE OF THE COMPLAINANTS' ACCESS APPLICATION

15. In their letter to me of 17 September 2009, the agency's solicitors said:

> *"The correct position is that the Water Corporation identified that the FOI request was not requesting information pertaining to the potential agreed purchase but to information relating to a proposed taking of land. However, as a gesture of goodwill, the Water Corporation provided access to information which related to the decision to pursue an agreed purchase and refused access to the Disputed Information which was both exempt under...clause 6 and not within the scope of the...FOI application".*

16. The agency now submits that the disputed information is outside the scope of the complainants' access application and is, therefore, outside my jurisdiction on external review. The agency claims that the valuations in Documents 16 and 17 can only be considered in the context of an agreed purchase: they cannot be considered in the context of assessing compensation for a taking of land, which is a separate process under s.241(2)(c) of the LA Act.

17. Among other things, the agency submits that its argument that Documents 16 and 17 are outside scope – because they were obtained for the purposes of a potential agreed purchase rather than resumption – is supported by the fact that the complainants can choose to refuse any offer from the agency, at which point the agency would have to make a decision on taking the Land.

18. I have examined the wording of the complainants' access application, which is set out in paragraph 4 above. I note that the wording includes: "*All files, documents, reports whatsoever related to the valuation...or any information in relation to the establishment of the value of the land, including … valuation reports in respect of land owned by Roderick Douglas Mckay and Kathleen Glenys McKay …"* In my opinion, the complainants clearly sought access to "*information relating to the establishment of the value of the land"*.

19. I note that, at the time of the application, the complainants were engaged in negotiations with the agency for the purchase of the Land. However there always remained the possibility of the agency acquiring the Land by taking if no agreement could be reached, even if the agency had not taken, or threatened to take, any action under its compulsory acquisition power. In light of that, I consider it disingenuous of the agency to take the view that the application was for documents relating only to a resumption of land that had not, at that time, taken place. Indeed, the agency clearly considered that the complainants would be interested in Documents 16 and 17 because it decided to give them access to such documents "*as a gesture of goodwill"*. I consider that, had the agency not dealt with those documents, it would have been open to the complainants to seek a review of the agency's decision on the ground that the agency had not identified all of the documents within the scope of the access application.

20. Under section 4(a) of the FOI Act, agencies are obliged to give effect to the legislation in a way that assists the public to obtain access to documents. If an agency is uncertain as to what kinds of documents are sought by an applicant, I would expect it to take steps to clarify that issue by consulting the applicant and not to take a unilateral decision to deal with certain documents only.

21. In the event, I am satisfied that Documents 16 and 17 contain information relating to the establishment of the value of the Land and that such information is within the scope of the complainants' access application. Consequently, I consider that the disputed information is not outside the scope of this external review.

CLAUSE 6 – DELIBERATIVE PROCESSES

22. The agency claims that the disputed information is exempt under clause 6(1) of Schedule 1 to the FOI Act. Clause 6 provides:

> ***"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) Matter that appears in an internal manual of an agency is not exempt matter under subclause (1).*
>
> *(3) Matter that is merely factual or statistical is not exempt matter under subclause (1).*
>
> *(4) Matter is not exempt matter under subclause (1) if at least 10 years have passed since the matter came into existence".*

23. 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.

24. In order to establish a *prima facie* exemption under clause 6(1), the requirements of both paragraphs (a) and (b) of clause 6(1) must be satisfied. The public interest test in clause 6(1)(b) is not a limit on the exemption; it is an element of the exemption. In consequence, unless an agency claiming exemption under clause 6 can establish that disclosure would, on balance, be *contrary* to the public interest, the documents will not be exempt. If both paragraphs (a) and (b) are satisfied, the disputed information will be exempt, subject to the application of any relevant limit on exemption set out in clauses 6(2) to 6(4).

The burden and standard of proof

25. Section 102(1) of the FOI Act provides that the agency bears the onus of establishing that its decision to refuse the complainants access to the disputed information was justified. In that regard, Owen J of the Supreme Court of Western Australia in *Manly v Ministry of the Premier and Cabinet* (1995) 14 WAR 550 said, at p.573 of that decision:

> *"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."*

26. Although the claim for exemption in that case was made under clause 4(3) of Schedule 1 to the FOI Act, I consider those comments apply equally to the exemption claimed by the agency in the present case.

27. The relevant standard of proof to establish a claim for exemption under the FOI Act is the balance of probabilities: see *Re WA Newspapers Ltd and Civil Service Association of WA Inc and Salaries and Allowances Tribunal and Mercer (Australia) Pty Ltd* [2007] WAICmr 20.

The complainants' submissions

28. The complainants' submissions are set out in their application for external review and in correspondence to my office dated 19 September 2009 and 22 December 2009. In brief, the complainants submit as follows:

    - The agency has made the complainants an offer, which it says is reasonable and based on sworn valuations from independent valuers; however, the agency has told the complainants that it is bound by those valuations.

    - The agency ultimately has the power to resume the Land.

    - The complainants are seeking access to the disputed information to assist with fair negotiations between them and the agency for the

value of the Land. The complainants wish to critique the valuations so as to understand the nature of the agency's offer and assess whether it is for market value.

- The complainants are placed under a considerable degree of pressure as the agency is effectively negotiating under threat of land resumption and on the basis that it is restrained by valuations received but at the same time not allowing the complainants to scrutinise those valuations.

- There have been no negotiations with the agency since 17 September 2008, at which date the complainants' solicitors advised the agency that any further discussions would be a complete waste of time because the complainants are not in a position to engage in negotiations in any meaningful way.

- The framework within which any offer or counter offer was made is in the past so that the valuation amounts are now out of date, although the disputed information would provide information as to how those amounts were reached and to challenge any assumptions.

- In view of the agency's powers, the complainants are at a disadvantage and it is in the public interest that the process of acquisition be undertaken with full disclosure.

The agency's submissions

29. The agency's submissions are contained in its initial notice of decision and in correspondence with my office dated 13 May 2009, 17 September 2009 and 22 December 2009. I have summarised those submissions as follows:

    - Documents 16 and 17 were obtained as part of ongoing deliberative processes within the agency to determine the value of the Land to the complainants and then determine the price which the agency was willing to pay. If disclosed, the disputed information would reveal opinion and advice obtained or prepared in the course of those deliberative processes.

    - The use of the past tense in clause 6(1)(a) means that if the disputed information falls within the exemption it is not relevant whether the deliberation is ongoing or has concluded.

    - The public interest is a matter in which the public at large has an interest, as opposed to an interest that an individual has in a matter (see *McKinnon v Secretary, Department of Treasury* (2005) 220 ALR 587 at 591).

    - The agency recognises that there is a public interest in the complainants being able to exercise their right of access under the FOI Act and a public interest in preserving the principle of acquisition of

private property on just terms: *Re Little and Others and Department of Natural Resources* (1996) 3 QAR 170.

- The agency considers that it has satisfied the latter public interest by an offer to disclose the disputed information to the complainants on the condition that the complainants obtain, and simultaneously disclose, a third valuation (for which the agency is prepared to pay). The agency submits that this would result in a fair and just acquisition on voluntary terms because, in that way, the third valuation would not be biased by knowledge of the valuations contained in Documents 16 and 17.

- Disclosure of the disputed information would be contrary to the public interest because:

  (i) it would serve only the private interests of the complainants because they are, in consequence, likely to overstate the value of the land, leading to the agency having to pay more than the market value of the land;

  (ii) it is now out of date and, in the current economic circumstances, is likely to be misleading because the relevant information was obtained at a time when the market value was likely to be higher, so that it may cause the complainants to believe that the appropriate negotiating range is higher than what is fair and just and undermine the negotiating process;

  (iii) compelling the agency to reveal out of date and potentially misleading valuation information (when the agency is offering to pay for an up to date valuation from a valuer of the complainants' choice) will not bring the parties closer together in terms of bargaining position or assist the parties to reach a sale or acquisition on 'just terms';

  (iv) in effect, disclosure would compromise the agency's ability to act on commercial principles, which would be in contravention of its duty to act in accordance with prudent commercial principles in performing its functions under s.30(1)(a) of the *Water Corporation Act 1995.* As the agency is appropriating government funds, it is essential to maintain a defensible negotiating position so that those funds are appropriated reasonably and justly;

  (v) under the LA Act there is no requirement for either the acquiring agency or the landowner to provide their previously obtained valuations to assess compensation in the event of a resumption of land. It is only when a compulsory acquisition is being made that the value of the land becomes an issue as to 'just terms' and Parliament has legislated as to the process to be followed in that circumstance;

(vi) where a voluntary purchase is being made there is no requirement to provide a valuation and any party can simply refuse any offer made. In those circumstances, there is no public interest in providing a valuation to landowners who may then choose not to sell, having obtained a free valuation of their property; and

(vii) the complainants' attempt to circumvent the LA Act by using the FOI Act in relation to compensation is an abuse of process and should be prevented from occurring.

30. The agency advises me that compulsory acquisition of the Land is a last resort – which it has not 'threatened' as the complainants claim – and its preference is for a negotiated agreement. The agency has also made submissions to me concerning relevant cases involving valuation reports, which I have considered below. Finally, the agency submits that none of the limits on the exemption in clauses 6(2) to (4) applies to the disputed information.

Deliberative process of an agency – clause 6(1)(a)

31. I agree with the agency's submission that the use of the past tense in clause 6(1)(a) means that if the disputed information falls within that paragraph, it is not relevant whether the deliberative process has ended or is ongoing. However, I consider that the question of whether the relevant deliberative process is ongoing or not is relevant to a consideration of whether disclosure of the disputed information would, on balance be contrary to the public interest.

32. Having examined the disputed information, I consider that it can be categorised as opinion or advice that has been obtained and recorded in the course of the deliberative processes of the agency. I accept that the relevant deliberative processes in this case are the agency's deliberations to determine the value of the Land and the agency's deliberations to determine the price, or range of prices, which the agency is willing to pay for the Land. Accordingly, I am satisfied that the disclosure of the disputed information would reveal matter of the kind referred to in clause 6(1)(a).

The public interest test - clause 6(1)(b)

33. The disputed information will be exempt if its disclosure would, on balance, be contrary to the public interest. I accept the agency's submission that the public interest is a matter in which the public at large has an interest as distinct from the interest of an individual or individuals: see *McKinnon*'s case, *Re Read and Public Service Commission* [1994] WAICmr 1 and *DPP v Smith* [1991] 1 VR 63.

34. In *Ministry for Planning v Collins* (1996) 93 LGERA 69, a case arising from negotiations between a private citizen and the West Australian Planning Commission ('the WAPC') concerning the possible sale of land by voluntary acquisition, Templeman J said, at p.13:

> *"In reaching a decision on the public interest question, the Commissioner must make a judgment. And unless it is shown that the Commissioner has erred in law in doing so, that judgment will stand even though the court hearing an appeal from the Commissioner pursuant to s 85(1) of the Act might have reached a different conclusion"*.

35. Accordingly, I am required to consider and evaluate the relative weight of competing facets of the public interest before reaching a conclusion as to where the balance lies.

36. I recognise that there is a public interest in the agency carrying out negotiations to acquire land by agreed purchase without the risk of those negotiations being undermined by the disclosure of sensitive information. In general, I consider that it would be contrary to the public interest to prematurely disclose documents while deliberations in an agency are continuing, if there is evidence that the disclosure of such documents would adversely affect the decision-making process, or that disclosure would, for some other reason, be contrary to the public interest. In general, I consider that the public interest is best served by allowing deliberations to occur unhindered and with the benefit of access to all of the material available so that informed decisions may be made.

37. At the time of the agency's initial decision in July 2008, there were ongoing negotiations between the agency and the complainants and the agency was concerned that disclosure of the valuation reports would reveal the parameters of its negotiating range. The agency contended that such disclosure would undermine its negotiating position, which would be contrary to the public interest. In my view, it might well be contrary to the public interest to disclose an actual negotiation range, however I am not persuaded that disclosure of valuation reports would necessarily disclose an agency's negotiation range. The bottom end of an agency's negotiation range may be lower than the lowest valuation it has received, and the top price it is willing to pay may be higher than the highest valuation it has received. Such a discrepancy between valuations and a negotiation range may occur for any number of reasons which are not related to the valuation of the land itself.

38. The agency currently submits that Documents 16 and 17 were obtained as part of its ongoing deliberative processes. The agency has also informed me that there have been no negotiations with the complainants since September 2008, although negotiations may be recommenced. The complainants advise me that negotiations with the agency have stalled or broken down. In my opinion, the latter is the more realistic view.

39. In light of that, and in view of the agency's submission that the valuations in Documents 16 and 17 are out of date, it appears to me that, although the agency's deliberations to determine the value of the Land and the price it is willing to pay for the Land may be ongoing, those current deliberations no longer relate to the particular valuation amounts in Documents 16 and 17. Consequently, I am not persuaded that disclosure of those amounts could damage negotiations between the parties because those negotiations are no

longer on foot. Nor, in my view, could they damage future negotiations because the valuation amounts are now out of date.

40. The agency does not claim that disclosure of the disputed information would adversely affect its ongoing deliberations on the value of the Land and the price it is prepared to pay. However, had it done so, I am not persuaded that disclosure would have any adverse effect on its ongoing deliberations for the reasons that follow.

41. The agency claims that disclosure of the disputed information would serve a private interest rather than a public one. I do not accept that submission. As the former Information Commissioner said in *Re Collins and Ministry for Planning* [1996] WAICmr 39 at [29], a submission of that kind: "*...fails to recognise any public interest in the agency dealing fairly with a private citizen and in being seen to deal fairly in transactions with all citizens*".

42. In the present case, the complainants submit that disclosure would enable them to understand and critique the agency's offer to assist with fair negotiations. In my view, there is a public interest in persons in the complainants' situation being provided with information to assist them to assess the basis upon which the agency has made an offer; to challenge any assumptions upon which it is based; and to evaluate the fairness of that offer. That is an interest that might affect any member of the public who owns land and is not confined solely to the complainants. In my view, such an interest is a public rather than a private interest.

43. I agree with the agency's submissions that there are public interests in the complainants being able to exercise their rights of access under the FOI Act and in preservation of the principle of acquisition of private property on just terms.

44. I do not accept the agency's submissions that the disclosure of the disputed information is:

- likely to lead to the complainants overstating the value of the Land;
- likely to result in the agency having to pay more than the market value of the Land;
- not likely to bring the parties closer together in terms of bargaining position; and
- not likely to assist in a sale or acquisition on just terms.

45. With regard to the first of those assumptions the agency submits:

> "*There are a number of Valuers and Solicitors who base their business substantially on opposing government land acquisitions.*
>
> ...
>
> *Their negotiations are initially based on highly exaggerated figures that are really nothing but ambit claims ... They want to obtain our valuations so that they can tailor their valuation to effectively counter comments and conclusions raised by the Corporation's independent valuers. The negotiation process is potentially impaired by this process as the*

> *valuation is not truly an 'independent' view, but catered totally to refute the Corporation's valuations."*

46. The agency has provided me with no material to support that claim or its claim that the complainants in particular are likely to overstate the value of the Land if they are given access to the disputed information. Although it is apparent that the complainants are not happy about the proposed acquisition, there is nothing before me which suggests that the complainants are likely to deal with the agency in bad faith.

47. In addition, there is nothing before me – apart from the agency's assertion – to establish that the disclosure of the disputed information is likely to lead to the agency having to pay more than the market value of the Land. As I understand it, the agency is not compelled to accept any offer made by the complainants and, if an agreed value cannot be reached, the agency has the option to resume the Land.

48. I do not accept the agency's claims that disclosure of the disputed information would not result in bringing the parties closer together in terms of bargaining position or assist in reaching an agreement on just terms. I consider that the disclosure of the disputed information is likely to facilitate, rather than hinder, the process of the acquisition and the complainants reaching agreement based upon a fair market value for the Land by getting negotiations restarted and by giving the complainants an understanding of the basis on which the previous offers were made. In that way, the complainants will be in a position to assess the fairness of the agency's offer for themselves. In my view, a settlement on just terms is more likely where such information is open to scrutiny and discussion.

49. In my opinion, the agency's submissions fail to recognise the imbalance of power in the acquisition process between the agency and private citizens such as the complainants by virtue of the compulsory acquisition powers available to the agency under the LA Act. That power imbalance was recognised by the former Commissioner in *Re Edwards,* which dealt with a similar issue. In that case, the Commissioner said at [75]:

> *"The agency cannot, in my view, as it appears to have done in its submissions to me, ignore the imbalance of power in negotiations between it and a private citizen or the public interest in it both exercising its powers in such situations fairly and in being seen to exercise them fairly so that people finding themselves in the position of the complainants can have confidence that they are being fairly dealt with by an agency of their democratically elected government".*

50. In *Re Little* - in which the relevant provision (s.41 of the *Freedom of Information Act 1992* (Qld)) is similar in terms to clause 6(1) - the disputed information included information contained in a valuation report prepared for a proposed acquisition of private property by a government agency. In that case, the Queensland Information Commissioner ('the Qld Commissioner') observed at [47]:

> *"[The power to take the property of citizens for public purposes] is one of the most intrusive powers which a government is able to exercise against a citizen. Moreover, it is a fundamental principle of Australia's system of law and government that, in the absence of exceptional circumstances, the State ought not compulsorily acquire the property of a citizen on other than just terms. In my opinion, the balance of the public interest lies in ensuring that the process of acquisition is as transparent as possible for the affected citizen, who should be permitted access to information that would assist an assessment of whether fair compensation is paid for the property acquired."*

51. I agree with those observations and consider them relevant to all circumstances in which government agencies seek to acquire land from private citizens, including the present case. In my view, such transparency serves to achieve the objects of the FOI Act which include making the persons and bodies that are responsible for State and local government more accountable to the public (s.3(1)(b)).

52. I do not accept the agency's submission that disclosure of outdated valuations is likely to be misleading. The former Commissioner considered a similar argument in *Re Edwards* and said at [49]-[50]:

> *"I am not persuaded by the agency's argument that disclosure is only likely to result in confusion and mistrust and to prejudice negotiations for settlement because the valuations were prepared in respect of a date "which has been overtaken" and do not take account of matters since acknowledged by the agency to be relevant to compensation. It is quite apparent from the face of the documents themselves - and I am quite sure the complainants are capable of recognising - that the valuations are as at dates some time in the past. It is also apparent from the face of the documents the factual basis on which those valuations were made and the factors taken into account by their authors.*
>
> *Clearly ... they are not directly relevant to any negotiations that might take place now or in the future. Their disclosure might, however, give the complainants some understanding of the processes undertaken by the agency in such matters and the basis on which earlier offers were made ... as I have said, the documents clearly do not contain current valuation assessments. They would not, if disclosed, reveal any current negotiating range that may be under consideration by the agency."*

53. Documents 16 and 17 are now 25 months and 19 months old respectively and that would be clear to the complainants on the face of those documents. Although the valuation figures are out of date, I consider that the remaining information would assist the complainants to understand the basis upon which the previous offers were made. Moreover, it is open to the agency to provide them with additional information to clarify any misunderstanding that might arise from the disclosure of the disputed information.

54. I have also not given much weight to the agency's contention that the public interest in acquisition on just terms has been met by its offer to disclose the disputed information simultaneously with a third valuation obtained by the complainants at the agency's cost. Such an offer could, at best, assist in achieving, rather than fully meeting, that end.

55. I agree with the Qld Commissioner in *Re Little* when he said, at [49]:

> *"...I can see no valid reason why a landowner whose property is targeted for acquisition should not have the opportunity to subject the respondent's valuation report to detailed critical analysis. The object of the exercise is, after all, to determine a fair amount of compensation for acquisition of the property. A landowner hoping to persuade the respondent that it has undervalued the landowner's property will have to convincingly attack the assumptions, or evidence, or methodology on which the respondent's valuation report is based, with or without the assistance of another report from an independent valuer. The respondent's professional valuers can be expected to defend and justify their assessments if they are satisfied they have not erred in any material respect".*

56. I accept the agency's submission that compulsory acquisition of the Land is a last resort and that its preference is a negotiated agreement. However, the fact remains that the agency does have the power to compulsorily acquire the Land if a sale cannot be achieved by negotiation. In my view, there is a strong public interest in ensuring the acquisition process is as transparent and fair as possible for the affected citizen. I do not consider that, in this case, the public interest in achieving a fair settlement is satisfied by the disclosure of the disputed information to the complainants only after they have obtained their own valuation, as proposed by the agency.

57. With respect to the agency's submission that it is essential for it to maintain a 'defensible negotiating position' to ensure that government funds are appropriated reasonably, I recognise a public interest in the agency's efficient management of public monies when negotiating a transaction such as the one in question here. However, I consider that particular interest must be balanced against the public interest in ensuring that government agencies deal fairly and transparently with private citizens when seeking to acquire land in the course of acquisition processes, whether those processes are voluntary or compulsory: see *Re Little* at [48].

58. In *Ministry for Planning v Collins*, Templeman J said, at p.15:

> *"…It could hardly be said that government agencies must deal fairly when engaged in compulsory acquisition, but that there is no such obligation when negotiating for the voluntary acquisition of land. I see no inconsistency between what the appellant describes as "the efficient management of public moneys" and acting fairly in its dealings with private citizens".*

59. In *Re Edwards,* the former Commissioner said, at [76]-[78]:

> *"I recognise that there is a public interest in government agencies dealing fairly with private citizens and being seen to deal fairly with such people so the community can maintain its confidence in the fairness of such dealings...*
>
> *...*
>
> *I acknowledge that the statutory procedures that govern the acquisition of private land for public purposes are designed to be fair and transparent, but the end result is the loss of private property. It seems to me therefore, that the procedures for negotiating compensation should also be fair and transparent.*
>
> *I cannot see any inconsistency between the agency being accountable for its decision-making processes and operating on a commercial footing..."*

60. *Re Jones and Shire of Swan* [1994] WAICmr 6 concerned negotiations for the voluntary acquisition of a parcel of land by a local government. However, a negotiated settlement could not be reached and the agency advised its intention to proceed with the resumption of the whole of the land under the applicable legislation. In that case, the former Commissioner said at [25]-[26] that:

> *"... it is not in the public interest that these negotiations be conducted in "mutual half-light". If it is in the public interest, and I consider that it is, that a local authority acquiring a ratepayer's property should make every effort to ensure that a price that is both fair and equitable to the ratepayer and fair to the ratepayers of the Shire is paid to the ratepayer for his or her land, then - in my view - there is no damage to the public interest in disclosing to the ratepayer valuations of the property that have been obtained by the local authority in the course of that process.*
>
> *The agency has a considerable power to compulsorily resume a ratepayer's land. In my opinion, it is in the public interest that where negotiations have been undertaken by the agency for the voluntary acquisition of such land the agency is seen to act fairly in its dealings with ratepayers. Voluntary acquisition ought to be seen as a fair alternative to compulsory resumption proceedings and, in my opinion, it is in the public interest that the ratepayer in this instance be provided with access to the valuation reports in order to assist him to assess the basis upon which the agency's offer has been made and the fairness of that offer. Disclosure may facilitate the process of reaching agreement upon a fair market value for the property. In my view, that public interest outweighs the public interest, if indeed there is any, in the agency making a profit or "getting the best deal" in this matter…"*

61. I agree with those views and recognise strong public interests in agencies, which like the agency in this case possess extraordinary powers and resources in respect of the acquisition of property that are not available to private citizens, being seen to act fairly and transparently.

62. I acknowledge that the agency is required by legislation to act on commercial principles but I am not persuaded by the agency's claim that disclosure of the disputed information would compromise the agency's ability to act prudently in relation to those principles in performing its functions under the *Water Corporation Act 1995.* The former Commissioner in *Re Edwards* dealt with a similar argument and said, at [74]:

> *"Whilst the agency operates in a commercial environment and on a commercial footing, it is not in the same position as a private enterprise. Its primary function is to provide an essential service to the people of the State and, in order to enable it to do that, it has resources and powers available to it that are not available to private enterprise, including the power to compulsorily acquire the land, or an interest in the land, of private citizens..."*

63. In *Re Shire of Mundaring and Ministry for Planning* [2001] WAICmr 14, the Shire sought access to submissions made to the WAPC about a proposed amendment to the Metropolitan Regional Scheme. The Ministry claimed that the established legislative process did not include the disclosure of submissions, so that those documents ought not to be disclosed. Although in that case the former Commissioner accepted that the relevant legislation contained planning procedures applicable to the matter in question, she did not consider that those procedures ruled out disclosing the submissions. In the present case, the agency makes a similar argument in respect of the procedures set out in the LA Act, to the effect that there is no requirement under the LA Act for the agency to disclose the disputed information so that, therefore, it should not be disclosed. For the same reason as in *Re Shire of Mundaring,* I do not accept that the absence of any requirement to disclose valuations to affected landowners precludes access being given to that information under the FOI Act.

64. I do not accept the agency's submission that the use of the FOI process by the complainants to gain access to information arising from the agency's land acquisition process is an abuse of process. Under the FOI Act, the right of access to documents is exercisable once a valid application has been made and that right is exercised subject to and in accordance with the provisions of the FOI Act, including the exemptions in Schedule 1. That right is not conditional upon whether or not the applicant is involved in some other related process such as litigation or the acquisition of the applicant's land under the LA Act.

65. In *Johnson Tiles Pty Ltd and Esso Australia Ltd* [2000] FCA 495, a litigant company requested documents under the Commonwealth *Freedom of Information Act 1982* ('Cth FOI Act') from a government agency to assist it in the conduct of its action against that agency. The Federal Court considered whether there were any limitations on the right of the company under the Cth FOI Act to make that request. The court was not satisfied that such requests constituted an abuse of process or had the tendency to interfere with the administration of justice and observed that the FOI legislation gives litigants collateral, but lawful, means of seeking to obtain and present the evidence needed for the presentation and conduct of the litigant's case. I accept that this

rationale is also applicable to rights under the FOI Act. In my opinion, there is no abuse of process in the complainants seeking to exercise their rights of access under the FOI Act.

66. Having weighed up the competing public interests for and against disclosure, I am not persuaded, on the information before me, that disclosure of the disputed information could reasonably be expected adversely to affect the integrity of the agency's deliberative processes or that disclosure would, for any other reason, be demonstrably contrary to the public interest.

67. The agency has made submissions to me concerning a number of previous decisions involving valuation reports and, in particular, refers me to the decisions in *Re Ryan and City of Belmont* [2000] WAICmr 42, *Re Collins*, *Re Jones, Re Little* and *Re Edwards*, which all relate to the disclosure of information contained in valuation reports under the FOI Act and the application of clause 6(1) or its equivalent in Qld FOI Act. In brief, the agency submits that *Re Ryan* should be followed in this case and that the other cases should be distinguished

68. I am not persuaded by the agency's arguments that the facts in this present case are distinguishable from the facts in *Re Jones, Re Collins, Re Little* and *Re Edwards*. I note that in each of those cases, the former Commissioner and the Qld Commissioner decided, on the information before them, that disclosure of the relevant valuation reports would not, on balance, be contrary to the public interest and that the matter in question was therefore not exempt under clause 6 or its equivalent.

69. *Re Jones, Re Edwards* and *Re Little* are cases in which the applicants were landowners whose land was in the process of being acquired by government agencies by way of negotiated purchase or, failing that, by compulsory acquisition. In *Re Jones* and *Re Edwards* negotiations had effectively broken down. The situation in *Re Little* was similar, except that the negotiations to reach an agreed price were still ongoing. In both *Re Jones* and *Re Edwards*, the former Commissioner found that it would not, on balance, be contrary to the public interest to disclose the valuation figure.

70. In *Re Ryan*, a ratepayer sought access to valuation reports relating to a proposed land exchange, whereby part of a recreation reserve in the City of Belmont ('the City'), which was Crown land, would be exchanged with land owned by a private company for the purpose of rationalising public open space and providing for redevelopment on the reserve.

71. In that case, the complainant was not the owner of the private land involved in the proposed land exchange and it was the City that was involved in negotiations with the private landowners to establish the market value of the land in question and other matters. Those negotiations were for the purpose of acquiring the land by agreement although, in the event that no agreement could be reached, the option remained to resume the relevant land, pursuant to the LA Act.

72. The former Commissioner in *Re Ryan* considered the application of clause 6(1) with regard to the valuation figures and accepted the City's argument that the disclosure of that information could adversely affect sensitive ongoing negotiations with the private landowners. The Commissioner found that the public interests favouring the disclosure of those figures were outweighed by the public interest in maintaining the City's ability to negotiate effectively in respect of certain outstanding matters still to be settled with the private landowners; in effect, disclosure of the disputed matter would, on balance, be contrary to the public interest. In my view, *Re Ryan* is distinguishable on its facts from the present case.

CONCLUSION

73. In my view, the agency has not established that the disclosure of the disputed information would, on balance, be contrary to the public interest and I find that the disputed information is not exempt under clause 6(1) of Schedule 1 to the FOI Act. In light of that, it is not necessary for me to consider whether any of the limits on exemption in clauses 6(2)-6(4) applies.

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