

Participants:

Lee Phillips Hemsley
Complainant

- and -

City of Subiaco
Respondent

-and-

Foxington Pty Ltd
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to ‘Lords Sports Club’ – clause 6(1) – deliberative processes – whether disclosure contrary to public interest – clause 10(1) – whether substantial adverse effect on financial or property affairs of State or agency – clause 10(3) – whether information has commercial value to an agency – clause 10(4) – whether disclosure of information concerning the commercial affairs of an agency – whether adverse effect on commercial affairs

Freedom of Information Act 1992: sections 30, 30(f), 102(1); Schedule 1, clauses 6(1), 10(1), 10(3), 10(4).

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 v 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 Read and Public Service Commission [1994] WAICmr 1;

Re Collins and Ministry for Planning [1996] WAICmr 39;

Re West Australian Newspapers Ltd and Ministry of the Premier and Cabinet [2006] WAICmr 23;

Re Waterford and Department of the Treasury (No 2) (1984) 5 ALD 588;

Ministry for Planning v Collins (1996) 93 LGERA 69;

Harris v Australian Broadcasting Corporation (1983) 78 FLR 236;

Re West Australian Newspapers Ltd and Dampier Port Authority [1998] WAICmr 22;

Re West Australian Newspapers Ltd and Western Power [2006] WAICmr 10);

Re Healy and Australian National University (Commonwealth Administrative Appeals Tribunal, 23 May 1995, unreported)

Re Hoyts Multiplex Cinemas Pty Ltd and City of Gosnells and Another [1998] WAICmr 5.

DECISION

The decision of the agency is set aside.

In substitution, I find that the disputed matter, as described in paragraph 19 of these reasons for decision, is not exempt under clauses 6(1), 10(1), 10(3) or 10(4) of Schedule 1 to the FOI Act.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

30 October 2008

REASONS FOR DECISION

1. This complaint arises from a decision of City of Subiaco ('the agency') to refuse Mr Lee Phillips Hemsley ('the complainant') access to certain documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. It is my understanding that Foxington Pty Ltd ('the third party'), a wholly owned subsidiary of Australian Capital Equity Pty Ltd ('ACE') operates Lords Sports Club ('Lords') on a property at 588 Hay Street Subiaco ('the property'). It is also my understanding that the third party leases the property from the agency but that the third party owned all of the improvements on the land.
3. The Minutes of the Ordinary Council Meeting of the agency held on 26 November 2002 record that the Council of the agency voted 13/0 to reject a proposal received from ACE for the purchase, on certain conditions, of the property and to also reject a staff recommendation to give consideration to an alternative offer from ACE to purchase the property, subject to specified conditions. The Minutes of that meeting also reveal that the Council of the agency voted 12/1 in support of a recommendation of the Administration Committee of the agency that it investigate and present to the Council of the agency options for rent amelioration for the third party.
4. The Minutes of the Council Meeting of the agency of held on 27 April 2004, record that the Council of the agency voted 11/2 to accept the recommendation contained in the officers' report considered by the Council in a closed meeting. That report, which is Document 2 and has been released to the complainant, states:
 - “1. That Council notes that without prejudice to the rights of the lessee to use the site [588 Hay Street] for any purpose permitted by the prevailing Town Planning Scheme, there is a need to consider alternative long-term uses for the site.
 2. That the preferred mix of long-term land uses on this site be resolved when Council has considered the final redevelopment proposal for the Australian Fine China site and given further consideration to its policies regarding investment strategy and the retention of its investment properties.
 3. That whilst it would be inappropriate and unnecessary for the City to provide financial incentives or support to retain the facility in the event that its closure is mooted, the Chief Executive Officer be authorised to negotiate a reduction in lease term and report back to Council.”

5. On 30 August 2007, the agency and the third party entered into a Lease Surrender Agreement ('the Agreement') whereby the agency agreed to accept the surrender of the third party's lease of the property, in accordance with the terms of the Agreement. It is my understanding, from information reported in the local print media, Post Newspapers Pty Ltd ('The Post'), the third party decided that Lords will cease trading on 31 December 2008 and that its lease with the agency will be surrendered on 28 February 2009.
6. By letter dated 27 April 2008, the complainant applied to the agency, under the FOI Act, for access to three documents of the agency relating to the property. The complainant described the requested documents as follows:
 - “1. *The report (and amendment) of the Director Corporate Services of 18 November 2002 on the subject of Council owned property at 588 Hay Street, Identifying details are:
Prepared by: C Liversage, Director Corporate Services
Date: 18 November 2002
File Ref: 588 Hay*
 2. *The report of the Director Development Services and Director Corporate Services of 6 April 2004 on the FUTURE OPTIONS FOR 588 HAY STREET, JOLIMONT*
Identifying details of the report are:
Prepared by Ray Davy, consultant
Supervised by: Geoff Glass, Director Development Services
Scott Hawkins, Director Corporate Services
Date: 6 April 2004
File: 588 Hay*
 3. *The agreement referred to in Section 30 (page 37) of the City of Subiaco 2007 Annual Financial Statement (Annual Financial Report), regarding the lease on 588 Hay Street, and its acquisition by the City of Subiaco from the tenant for a \$3 million break fee.”*
7. On 1 May 2008, the agency's FOI Coordinator acknowledged receipt of the complainant's access application and, on 9 May 2008, the agency's FOI Coordinator made the initial decision on access. The agency refused the complainant access to the first two requested documents on the ground that they were exempt documents under clause 10(4) (commercial affairs of an agency) of Schedule 1 to the FOI Act. The agency also refused the complainant the third of the requested documents, on the ground that it was a legal document, containing a binding confidentiality clause and was, therefore, an exempt document under clause 8(1) of Schedule 1 to the FOI Act.
8. On 19 May 2008, the complainant applied to the agency for an internal review of the initial decision on access. On 6 June 2008, Ms D Jowett, Manager Administrative Services and the agency's internal review decision-maker, made the decision on internal review. Ms Jowett notified the complainant that:

“Documents 1 and 2 are deemed to be exempt under Clauses 4(2), 4(3), 6(1), 10(3) and 10(4) of Schedule 1 to the FOI Act. In that regard we refer you to the relevant sections of the FOI Act.

Self-evidently documents 1 and 2 were produced for the purpose of enabling the Council to conduct a deliberative process behind closed doors to reach a decision on the City-owned property at 588 Hay Street. The City has decided that any release of such documents would be contrary to the public interest, within the meaning of clause 6(1) of Schedule 1 to the FOI Act.

These documents contain material that is commercially sensitive to both the City of Subiaco and Foxington Pty Ltd within the meaning of clauses 4(2), 4(3) and 10(3) and 10(4) of Schedule 1 to the FOI Act, not only by virtue of their relationship as landlord and tenant, but also because they contain formation (sic) as to their respective businesses, commercial and financial affairs. The release of this information is likely to have an adverse affect on those affairs, as well as acting to diminish the commercial value of the information contained therein, bearing in mind that the City has similar leases with a variety of tenants in the immediate vicinity of the property in question in question, on which it depends for the generation of significant revenue intended to be invested for the benefit of the City’s ratepayer’s.

Document 3 is a legally binding commercial agreement containing an enforceable non-publicity clause signed by both parties to the agreement. As a consequence, it is exempt under clause 8(1) of Schedule 1 to the FOI Act. Either party to the agreement would be entitled to legal remedies for the breach of the agreement, including its non-publicity clause.

The City of Subiaco is a significant landlord in its municipal area under a series of long term leases negotiated with a view to generating substantial revenue for the benefit of its ratepayers.

The intrinsic nature of document 3 makes it a document of the utmost commercial sensitivity. Disclosure of its contents could be expected to harms the City of Subiaco’s future business dealings as landlord with other tenants, as well as potentially destroying the commercial value of the information contained in the document, within the meaning of clauses 4(2), 10(3) and 10(4) of Schedule 1 to the FOI Act.”

9. On 22 July 2008, the complainant applied to the A/Information Commissioner for external review of the agency’s decision to refuse him access to those three documents (‘the disputed documents’).

REVIEW BY THE A/INFORMATION COMMISSIONER

10. Following receipt of this complaint, in accordance with my powers under sections 72 and 75 of the FOI Act, I required the agency to produce to me, for my examination, the disputed documents and the FOI file maintained by the agency in relation to the complainant’s access application. On 6 August 2008,

the third party, through its legal advisers, applied to be joined as party to this complaint, in accordance with the third party's rights under section 69(2) of the FOI Act. The third party was then joined as a party to these proceedings.

11. Following an examination of the FOI file and the disputed documents, my Investigations Officer made further inquiries with the agency, with the complainant and with the third party, in order to assist me to deal with this complaint.
12. On 12 August 2008, the third party's legal advisers informed my Investigations Officer that it appeared to the third party that access had been refused to the Lease Surrender Agreement (and the other requested documents) by the agency, under clause 4 of Schedule 1 to the FOI Act relating to trade secrets, commercially valuable information or information concerning the third party's business affairs. The third party's legal advisers notified my Investigations Officer that, if access had been refused on that basis, the third party wished to make submissions to the Information Commissioner that those exemptions did not apply to the Lease Surrender Agreement, insofar as they related to any information of, or related to, their client the third party and that access should not have been refused to that document on that basis. The third party's legal advisers said that the third party did not regard that document as confidential. Finally, the third party's legal advisers informed my Investigations Officer that the third party may also hold the same views in relation to the other documents, depending on the basis for refusal of the information in each case.
13. On 13 August 2008, my office notified the agency of the advice received from the third party and invited the agency to re-consider its claims for exemption in relation to each of the disputed documents, having regard to the third party's position. On 14 August 2008, the third party's legal advisers further advised my Investigations Officer that, to the extent that the first two disputed documents contained any information about the third party's business, commercial and financial affairs, the disclosure of that kind of information would not in the submission of the third party, destroy or diminish that commercial value nor would its disclosure have an adverse effect on the third party's business, commercial and financial affairs.
14. On 18 August 2008, my office notified the agency of the additional advice received from the third party and again invited the agency to re-consider its claims for exemption in relation to each of the disputed documents having regard to the third party's position.
15. By letter dated 25 August 2008, the agency's legal advisers informed my Investigations Officer that the agency had reconsidered its position in relation to the disputed documents and had decided to give the complainant access to edited copies of the disputed documents. Following a further exchange of correspondence between my office and the agency's legal advisers and consultations with senior officers of the agency, by letter dated 3 September 2008, the agency gave the complainant access to edited copies of each of the disputed documents, with only the names of natural persons and certain monetary figures deleted from the disputed documents. The agency claimed that

- the matter deleted from the disputed documents was exempt matter under clauses 3(1) (personal information), 6(1) (deliberative processes), 10(1) (agency's financial or property affairs), 10(3) (diminution of information that has commercial value to an agency) and 10(4) (agency's commercial affairs) of Schedule 1 to the FOI Act.
16. Following receipt of those documents, the complainant advised my office that he did not seek access to the personal information which the agency claimed is exempt under clause 3(1) of Schedule 1 to the FOI Act. As a result, that personal information is no longer in dispute between the parties and it is unnecessary for me to deal with the agency's claim for exemption for that matter.
 17. On 17 September 2008, the third party's legal advisers informed my Investigations Officer that the third party, ACE and Comserv (No.1698) Pty Ltd ('Comserv') consented to the disclosure of the monetary figures deleted from the disputed documents by the agency. The third party's legal advisers also provided me with copies of several press clippings, containing articles published in The Post newspaper, relating to the surrender of the third party's lease to the agency. My Investigations Officer notified the agency of the advice received from the third party's legal advisers and again invited the agency to reconsider its position on the matter.
 18. By letter dated 26 September 2008, the agency's legal advisers advised me that the agency maintained its claims for exemption for the monetary figures deleted from the disputed documents on the ground that those figures consist of exempt matter under clauses 6(1), 10(1), 10(3) and 10(4) of Schedule 1 to the FOI Act.
 19. In light of the advice received from the agency, this complaint was considered by me not to be susceptible to further conciliation under section 71 of the FOI Act and, accordingly, I am required to deal with the agency's claims for exemption for the matter remaining in dispute between the parties.

THE DISPUTED DOCUMENTS

20. The disputed documents are:
 - Document 1** *“Confidential Minutes of Ordinary Council Meeting – Tuesday, 26 November 2002”;*
 - Document 2** *“Council Meeting Confidential Minutes 27 April 2004 Future Options for 588 Hay Street, Jolimont”* and the attachments; and
 - Document 3** *“Confidential Lease Surrender Agreement between the City of Subiaco and Foxington Pty Ltd”.*

THE DISPUTED MATTER

21. The disputed matter consists of following matter:

Document 1	Page 1, paragraph 1 of the Council decision, the dollar figure in the last line (Item 1)
	Page 1, paragraph 1 of the staff recommendation, the dollar figure in the last line (Item 2)
	Page 1, paragraph 2 of the staff recommendation, the dollar figure in the last line (Item 3)
	Page 2 of the Minutes, 3 rd paragraph, the dollar figure in the last line (Item 4)
	Page 2 of the Minutes, under the heading “Detail”, the dollar figures in the 3 rd paragraph (Item 5)
	Page 2 of the Minutes, under the heading “Detail”, the dollar in the last line of the 4 th paragraph (Item 6)
	Page 3 of the Minutes, the dollar figures in the 2 nd , 7 th and 11 th lines of paragraph 2 (Items 7, 8 and 9)
	Page 3 of the Minutes, the dollar figures in the 4 th and 5 th lines of paragraph 3 (Item 10)
	Page 3 of the Minutes, the dollar figure in the 2 nd line of paragraph 4 (Item 11)
Document 2	Page 11 of the attachment entitled ‘ <i>Review of Recreation and Related Issues Foxington Pty Ltd</i> ’, the dollar figures in the last line of paragraph 3 (Item 12)
Document 3	Page 2, the dollar figures in the definition “Surrender Sum” (Item 13)
	Page 5, clause 3, the dollar figures in paragraphs (a) and (b) of “Surrender Sum” (Item 14)

THE AGENCY’S ONUS

22. Section 102(1) of the FOI Act provides that, 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 was justified or that a decision adverse to another party should be made. Accordingly, in this complaint, the agency bears the onus of establishing its claims for exemption for the disputed information under clauses 6(1), 10(1), 10(3) and 10(4) of Schedule 1 to the FOI Act.
23. Neither of the notices of decision provided to the complainant by the agency, pursuant to section 13(1)(b) of the FOI Act, complied with the statutory obligations placed upon the agency’s decision-makers by section 30 of the FOI Act. Section 30 of the FOI Act states that if the decision is to refuse access, the notice of decision given to the applicant must include the reasons for the refusal of access and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based.

24. An examination of the initial notice of decision indicates that the agency's decision-maker quoted the text of the exemption clauses claimed, without explaining the agency's reasons for refusing the complainant access to the requested document. Similarly, the notice of decision on internal review contained some more detail as to the basis of the refusal of access but was insufficient, in my view, to establish the exemptions claimed.
25. The standard of proof that an agency's 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/Information Commissioner Shanahan reviewed two earlier decisions of the Supreme Court of Western Australia in relation to appeals made to the Supreme Court under the FOI Act – *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 and *Police Force of Western Australia v Winterton*, unreported; SCt of WA (Scott J) Library Number 970646 (see: *Re WA Newspapers* at paragraphs 100 to 103 and paragraph 110).
26. In *Manly's* case, Owen J of the Supreme Court of Western Australia considered, amongst other things, a claim for exemption under clause 4(3) of Schedule 1 to the FOI Act. His Honour said, at page 573 of his judgment:

“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”.

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

“As can be seen from cl 5(1)(b) of the First Schedule to the FOI Act, the words “could reasonably be expected to” are also contained within the FOI Act of Western Australia. ... for my part, I can see no other sensible meaning for the words “could reasonably be expected to” than to conclude that the intention of Parliament was that the standard of proof should be that it was more likely than not that such was the case. In any event, whether that view is correct or not, the Western Australian provisions are different to the Commonwealth Act in that the Commonwealth Act expressly refers to

“prejudice” in relation to the future supply of information. The Western Australian FOI Act has no equivalent provision so that the reasoning referred to by Bowen CJ and Beaumont J in Attorney General’s Department v Cockcroft (1986) 10 FCR 180 does not apply to the case presently under consideration. I am therefore of the view that for the purposes of the relevant clause in the Western Australian FOI Act, the standard is the balance of probabilities so that the appellant has to establish that it is more likely than not that the documents come within the exemption.”

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

THE EXEMPTIONS CLAIMED

29. The agency claims that the disputed matter is exempt matter under clause 6(1) of Schedule 1 to the FOI Act.

(a) ***Clause 6 – deliberative processes***

30. Clause 6(1) of the FOI act provides as follows:

“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 exemptions

- (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.”*

31. To establish a *prima facie* claim for exemption under clause 6, the agency must satisfy the requirements of both paragraphs (a) and (b) of subclause 1 of clause 6(1). If the disputed documents contain matter of a kind described in paragraph (a), then it is necessary to consider the requirements of paragraph (b); that is, whether disclosure of that matter would, on balance, be contrary to the public interest. Further, the exemption in clause 6(1) is subject to the limitations provided in clauses 6(2), 6(3) and 6(4), and regard must be had to whether any of those limitations applies.
32. Under s.102(1) of the FOI Act, the agency bears the onus of establishing not only that the disputed document contains information of the kind described in clause 6(1)(a) but also that the disclosure of the disputed document would, on balance, be contrary to the public interest. The complainant is not required to establish that disclosure would, on balance, be in the public interest. The disputed document will not be exempt under clause 6 if the agency cannot establish, to the appropriate evidentiary standard, the requirements of both paragraphs (a) and (b) of clause 6(1).
33. The former Commissioner and the former A/Commissioner discussed and considered the purpose of the exemption in clause 6, and the meaning of the phrase “deliberative processes” in a number of their published decisions (see: *Re Read and Public Service Commission* [1994] WAICmr 1; *Re Collins and Ministry for Planning* [1996] WAICmr 39 and *Re West Australian Newspapers Ltd and Ministry of the Premier and Cabinet* [2006] WAICmr 23). Both the former Commissioner and the former A/Commissioner agreed with the view of the Commonwealth Administrative Appeals Tribunal (“the AAT”) in *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 that 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 course of action: see also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69 at 72. I also agree with that view.

Clause 6(1)(a)

34. The agency says that Items 1, 2, 4, 5 and 6 of the disputed matter comprise the sum proposed by ACE, an associated company of the complainant, for the proposed purchase of the property; that Item 3 is the sum put forward by the agency for the proposed sale of the property; that Items 7, 8 and 9 consist of figures that relate to an agency-commissioned valuation for the property; that Item 10 consists of the estimated investment value of the lease over the property; and that Item 11 consists of a comparative valuation by the agency of the ACE offer for the purchase of the property. The agency also says that Item 12 consists of an estimate by the agency of the likely operating loss of operating the Recreation Facilities at the property and that Items 13 and 14 consist of the

sum agreed between the agency and the third party for the surrender of the third party's lease over the property.

35. The complainant says that Items 1, 2, 5 and 6 consist of information about the amount of money ACE offered to the agency to purchase the property at the property and that Items 13 and 14 consist of information about the figure agreed between the third party and the agency for the surrender of the third party's lease over the property. The third party says that it does not claim exemption for the information in Items 1, 2, 5 and 6 and that, in the view of the third party, ACE and Comserv, none of those figures is exempt under the FOI Act. The third party also says that those figures and also the figures agreed by it and the third party – Items 13 and 14 – is information that is already a matter of public knowledge and in the public domain because it was recorded at Section 30, page 37 of the agency's 2007 Annual Financial Statement.

THE AGENCY'S SUBMISSIONS

36. The agency made the following submissions in support of its claims for exemption under clause 6(1):

“The information forms an important part of deliberations leading to a decision by the City of Subiaco in relation to the property owned by it at 588 Hay Street. This deliberative process is still ongoing at the current time, generating considerable public interest and debate, and involving a current ‘Expression of Interest’ in relation to the site. No final decision has yet been made by the City of Subiaco in relation to 588 Hay Street.

The public interest in this regard lies firmly in maintaining the City of Subiaco's position while considering future options and entering into commercial negotiations in relation to 588 Hay Street. There is a clear public interest in the City of Subiaco being able to make a decision without people ‘looking over their shoulders’ during the process. The information pertaining to these ongoing deliberations as to 588 Hay Street is to be distinguished from that dealing with mere procedural or administrative processes.”

CONSIDERATION

37. I have examined the disputed documents and considered the parties' submissions. Having examined the disputed documents, I am satisfied that Document 1 contains a record of certain staff advice and recommendations made to the Council of the agency in relation to 588 Hay Street as well as a record of the deliberations of the Council of the agency at its meeting held on 26 November 2002. I am also satisfied that Document 2 and the attachments thereto, including a report relating to the review of recreation and related issues also contains a record of certain staff advice and recommendations made to the Council of the agency as well as a record of the deliberations of the Council of the agency at its meeting held on 27 April 2004. Accordingly, I am satisfied

that Documents 1 and 2 contain information of the kind described in paragraph (a) of clause 6(1).

38. However, having examined Document 3, there is nothing in that document which contains any information of the kind described in clause 6(1)(a) of Schedule 1 to the FOI Act. It is a lease surrender document, reflecting the agreed terms of the surrender of the lease. It does not reveal anything in the nature of the deliberations leading to the agreement to those terms. Nothing in Document 3 would, if disclosed under the FOI Act, reveal the “thinking processes” of either the agency or the Council of the agency. I am not satisfied that the agency has discharged the onus it bears under section 102(1) of the FOI Act and established the requirements of clause 6(1)(a) of the FOI Act with respect to Document 3. Accordingly, I find that Document 3 is not exempt under clause 6(1) of Schedule 1 to the FOI Act.
39. Moreover, I note that the agency has already given the complainant access to edited copies of Documents 1 and 2. The only information deleted from the three disputed documents is the monetary amounts deleted from the relevant pages. In effect, by providing access to the edited copies of Documents 1 and 2 the agency has already “revealed” to the complainant and to the world at large, the “thinking processes” of the agency and the Council of the agency, when it deliberated on the matters that were before the Council on 26 November 2002 and again on 27 April 2004.
40. In my opinion, the disputed matter would not, if disclosed under the FOI Act, reveal anything about the “thinking processes” of either the agency or the Council of the agency. The deliberations of the agency and the recommendations made have already been revealed to the complainant by the agency.
41. In addition, in my opinion, the limit on exemption in clause 6(3) would apply to the disputed matter, in this case. Clause 6(3) states that matter that is merely factual or statistical information is not exempt matter under clause 6(1). The monetary figures, which the agency has deleted from the disputed documents, consist in my opinion, of factual and statistical information. As a result, the limit on exemption in clause 6(3) applies to render that information non-exempt. Accordingly, I find that the disputed matter is not exempt matter under clause 6(1) of Schedule to the FOI Act.

(b) *Clauses 10(1), 10(3) and 10(4)*

42. The agency claims that the disputed matter is exempt under clauses 10(1), 10(3) and 10(4) of Schedule 1 to the FOI Act. Clause 10 of Schedule 1 to the FOI Act, so far as is relevant, provides:

“10. *The State's financial or property affairs*

Exemptions

- (1) *Matter is exempt matter if its disclosure could reasonably be expected to have a substantial adverse effect on the financial or property affairs of the State or an agency.*
- (2) ...
- (3) *Matter is exempt matter if its disclosure —*
 - (a) *would reveal information (other than trade secrets) that has a commercial value to an agency; and*
 - (b) *could reasonably be expected to destroy or diminish that commercial value.*
- (4) *Matter is exempt matter if its disclosure -*
 - (a) *would reveal information (other than trade secrets or information referred to in subclause (3)) concerning the commercial affairs of an agency; and*
 - (b) *could reasonably be expected to have an adverse effect on those affairs.*
- (5) ...

Limit on exemptions

- (6) *Matter is not exempt matter under subclause (1), (2), (3), (4) or (5) if its disclosure would, on balance, be in the public interest.”*

- 43. The exemptions in clause 10 are concerned with information about the commercial affairs of the State and agencies themselves. The specific language of clauses 10(1), 10(3) and 10(4) makes it clear that those subclauses are directed at protecting different kinds of information from disclosure under the FOI Act. Whilst an agency may claim exemption for the disputed matter under more than one subclause of clause 10, clauses 10(1), 10(3) and 10(4) are mutually exclusive exemption clauses. However, in this instance, the agency has made no attempt to identify which of the disputed matter it claims is exempt under clause 10(1), which of the disputed matter it claims is exempt under 10(3) and which of the disputed matter it claims is exempt under 10(4).
- 44. The agency made the following submissions to me in support of its claims for exemption under clauses 10(1), 10(3) and 10(4):

“This information is of commercial value to the City as a commercial landlord with a wide property investment portfolio within the City’s boundaries. The City is currently engaged in a number of situations similar to that in relation to 588 Hay Street.

This figure gives an indication as to what value the City attributes to 588 Hay Street. This represents information that is central to the

commercial affairs of the City of Subiaco as a commercial landlord. The release of this information would have a substantial adverse effect on the commercial and financial or the property affairs of the City. This is in a context of where similar negotiations are being entered into and agreements negotiated for other properties owned by the City of Subiaco. These activities, including the information as to the value of 588 Hay Street, are central to the commercial activities of the City of Subiaco.

The information in relation to 588 Hay Street is still of current commercial value to the City of Subiaco, with planning and negotiations ongoing for the property, including an 'Expression of Interest' process that is still current. These activities are central to the commercial activities of the City of Subiaco.

It could reasonably be expected that the release of this information would have an adverse effect on the City's commercial position so far as the ongoing process in relation to 588 Hay Street is concerned, and more generally as a landlord with a significant investment portfolio. The commercial value of this information, both to the City itself and, indirectly, to its ratepayers, could reasonably be expected to be destroyed or diminished by its public disclosure. In the present circumstances, the City of Subiaco has exempted only that limited material, in terms of monetary figures, that it regards as having commercial value to it.

The public interest in this context lies firmly in maintaining the City of Subiaco's commercial position, its 'competitive edge', both while it is still considering future options and entering into commercial negotiations for 588 Hay Street and generally, in its activities as a commercial landlord. The release of this information could otherwise be expected to adversely impact upon those affairs.

However, the public interest lies not only in maintaining the City of Subiaco's commercial advantage per se but also in maintaining the underlying asset value of the City's property in conformity with the aims and objectives expressed in sections 1.3(3) and 3.1(1) of the Local Government Act 1995 (WA). The commercial value of the City's property assets is maintained for the direct benefit of the general body ratepayers within the City of Subiaco. It is this benefit to ratepayers that will be endangered or destroyed if the commercial advantage afforded to the City is required to be publicly divulged."

Clause 10(1)

45. Clause 10 of Schedule 1 to the FOI Act reflects the commercial reality that many State and local governments are increasingly engaged in commercial activities and is intended to ensure that the commercial and business affairs of government agencies - conducted by those agencies for and on behalf of the

Western Australian public - are not jeopardised by the disclosure of documents under the FOI Act unless there is a public interest that requires such disclosure.

46. To establish an exemption under clause 10(1), the agency must show that disclosure of the disputed matter could reasonably be expected to result in a “*substantial adverse effect*” on the financial or property affairs of the State or an agency. The requirement that the adverse effect must be “substantial” is an indication of the degree of gravity that must exist before the exemption can be made out: *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236. In the context of clause 10(1), the former Commissioner and the former A/Commissioner have accepted that the word “substantial” is best understood as meaning “serious” or “significant” (see: *Re West Australian Newspapers Ltd and Dampier Port Authority* [1998] WAICmr 22; *Re West Australian Newspapers Ltd and Western Power* [2006] WAICmr 10). I agree with the former Commissioner’s and the former A/Commissioner’s views in that regard.

CONSIDERATION

47. I have examined the disputed matter and considered the submissions made by the agency. As regards the agency’s submissions in relation to the exemption in clause 10(1), I consider that those submissions amount largely to a recitation of the exemption claimed and an unsupported supposition as to the potential outcome of disclosure of the disputed matter. They are therefore speculative as to the asserted adverse effect because those assertions have not been backed up with persuasive supporting material.
48. The agency asserts that the disputed matter gives an indication as to what value the agency attributes to the property; that this is information that is central to the commercial affairs of the agency as a commercial landlord and therefore that the release of the disputed matter would have a substantial adverse effect on the commercial and financial or the property affairs of the agency in the context of similar negotiations being entered into by the agency and agreements being negotiated for other properties owned by the agency. The agency asserts that the disputed matter is central to the commercial activities of the agency and that the disputed matter is still of current commercial value to the agency, with planning and negotiations ongoing for the property, including an ‘Expression of Interest’ process that is still current and is also central to the commercial activities of the agency.
49. Notwithstanding those assertions, the agency has not provided me or the complainant with any findings on the material questions of fact underlying its reasons for relying on clause 10(1). For example, the agency has made no attempt to explain to me how the disclosure of Items 1, 2, 4 and 5, being the amount of money which ACE offered the agency, six years ago, to purchase the property at the property could reasonably be expected to have a substantial adverse effect on the commercial and financial or the property affairs of the agency. Similarly, the agency failed to explain to me how the disclosure of Items 12, 13 and 14, being the sum agreed between the agency and the third party in relation to the surrender of the lease for the property, given that information has already been publicly disclosed in the agency’s 2007 Annual

- Financial Statement and in local newspaper articles, could reasonably be expected to have a substantial adverse effect on the commercial and financial or the property affairs of the agency.
50. Pursuant to section 102(1) of the FOI Act, the onus is on the agency to establish that its decision to refuse the complainant access to the disputed matter was justified. In that regard, I refer again to the comments of Owen J, in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at page 573, as quoted in paragraph 24 above.
 51. Other than the agency's assertions there is nothing before me that goes towards establishing the requirements of clause 10(1) in respect of any of the disputed matter. The agency has not identified the nature of any adverse effect on the property or financial affairs of the State or an agency that could reasonably be expected to follow from disclosure of the disputed matter, nor how disclosure could cause any such effect; nor has the agency provided any explanation or supporting material as to the degree of gravity of the harm it claims may be caused by disclosure. It merely makes the assertion. The onus on agencies under section 102(1) of the FOI Act is a real one and, in the absence of any probative material from the agency in support of its claims for exemption, I find that the disputed matter is not exempt under clause 10(1).

Clause 10(3)

52. The agency claims that the disputed matter is exempt under clause 10(3). Clause 10(3) protects information from disclosure if it has a commercial value to an agency, which value could reasonably be expected to be destroyed or diminished by disclosure. In order to establish an exemption under clause 10(3), the matter for which a claim for exemption is made must be shown to have a commercial value, although I agree with the former Commissioner and the former A/Commissioner that it is not necessary that the commercial value be quantified or assessed (see: *Re Hoyts Multiplex Cinemas Pty Ltd and City of Gosnells and Another* [1998] WAICmr 5; *Re Rogers and Water Corporation and Others* [2004] WAICmr 8).
53. The former Commissioner and the former A/Commissioner consistently expressed the view that matter has a 'commercial value' to a person if it is valuable for the purpose of carrying on the commercial activities of any person or organisation and, further, that it is by reference to the context in which the information is used, or exists, that the question of whether or not particular information has a commercial value to a person may be determined (see: *Re Precious Metals Australia Ltd and Department of Minerals and Energy* [1997] WAICmr 12).
54. In order to establish a *prima facie* claim for exemption under clause 10(3), the agency must satisfy the requirements of both paragraphs (a) and (b). If the requirements of both of those paragraphs are satisfied, the disputed documents will be exempt, subject to the application of the limit on exemption contained in clause 10(6).

55. The agency has not attempted to explain to me how the disclosure of the disputed matter would have the effects of destroying or diminishing any commercial value as claimed. The agency relies on its assertion that such would be the case, and relies on the intrinsic nature of the documents. It is not apparent to me from the intrinsic nature of the documents that the claimed effects will follow from their disclosure. I refer again to the comments of Owen J in *Manly's* case, cited in paragraph 24 above. In my view, the agency has failed to discharge the onus it bears under section 102(1) of the FOI Act to establish the requirements of clause 10(3) of the FOI Act in relation to the disputed matter.
56. On the information before me, I consider that, even if the disputed matter could be said to be information having a commercial value to the agency (and, as I have said, I am not satisfied that it can), I do not consider that the agency has established that the disclosure of the disputed documents and information could reasonably be expected to destroy or diminish any commercial value it may have. In that regard, I also note that the former Commissioner and the former A/Commissioner have stated that where information is already within the public domain, then its commercial value (if any) could not be further diminished by disclosure: see *Re Hoyts Multiplex Cinemas* at paragraph 15.

Clause 10(4)

57. In order to establish a *prima facie* claim for exemption under clause 10(4), the agency must show that the matter under consideration is information about the commercial affairs of an agency (although not necessarily the agency) and also show that disclosure of that information could reasonably be expected to have an adverse effect on those affairs.
58. Based on my examination of the disputed documents, I consider that each of those documents contains some information of the kind referred to in paragraph (a) of clause 10(4) about the agency, as well as some information about the business affairs of the third party. I therefore consider that the requirements of clause 10(4)(a) are satisfied in respect of the disputed documents, including the disputed matter.
59. However, even though the disputed documents contain matter that could be characterised as information about the commercial affairs of an agency, that alone is not sufficient to establish a *prima facie* claim for exemption. The requirements of clause 10(4)(b) must also be satisfied.
60. In this instance, as with its other claims for exemption, the agency has asserted that an adverse effect on its commercial affairs could reasonably be expected if the disputed matter were to be disclosed. The agency has not identified the disputed matter in the disputed documents which it claims is exempt under clause 10(4). Given that the agency has already disclosed the information in the three disputed documents to the complainant, with the exception of the monetary amounts it has deleted from the disputed documents, I find it difficult to accept the agency's otherwise unsupported assertions that the disclosure of the disputed

matter could reasonably be expected to have an adverse effect on the agency's commercial affairs.

61. The agency has not provided me or the complainant with any findings on the material questions of fact underlying its reasons for relying on clause 10(4) nor has it identified what adverse effect could be expected, nor explained how disclosure would cause that effect, and the agency has not provided any probative material in support of its claim in this regard. There is nothing in the material before me provided by the agency that establishes that an adverse effect upon the commercial affairs of the agency could reasonably be expected to follow from the disclosure of the disputed matter.
62. Accordingly, I do not accept the agency's claims for exemption based on clause 10 (4). In my view, the agency has not discharged the onus it bears under section 102(1) of the FOI Act and established that the disputed matter is exempt under clause 10(4) of Schedule 1 to the FOI Act and I so find.
