READ and PSC

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: S0493 Decision Ref: D00194

Participants:

Christopher Paul Read
Applicant

- and -

Public Service Commission
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - Refusal of access - file notes, memos and reports relating to the investigation of an employee grievance - matter relating to the deliberative process of an agency - whether disclosure contrary to the public interest - confidential communications - whether reasonable to expect prejudice of future supply of information of that kind - whether disclosure is in the public interest - factors relevant to the public interest,

Freedom of Information Act 1992 (WA) ss.12(2), 21, 24, 27(1)(a), 30, 41(1)(a), 68, 74, 76(3), 102, part 3, schedule 1 clause 6, Schedule 1 clause 7(1), Schedule 1 clause 8.
Freedom of Information Act 1992 (QLD) s.41(1).
Freedom of Information Act 1966 (US)
Freedom of Information Act 1982 (C'WLTH) ss.36(1)(a), 43(1)(c)(ii).
Freedom of Information Act 1982 (VIC) ss.30(1), 35(1)b).
Interpretation Act 1984 (WA) s.18.
Public Service Act (1978) (WA) ss.19(2), 40.

Eccleston and Department of Family Services and Aboriginal and Islander Affairs (30 June 1993, unreported)
Harris v Australian Broadcasting Corporation (No.1) (1983) 50 ALR 551
Kavvadias v Commonwealth Ombudsman (1984) 2 FCR 64
Re Fewster and Department of Prime Minister and Cabinet (1986) 11 ALN N 266
Re Murtagh and Commissioner of Taxation (1983) 6 ALD 112
Re Waterford and Department of Treasury (No.2) (1984) 5 ALD 588
Re VXF and Human Rights and Equal Opportunity Commission (1984) 17 ALD 491
Pennhalluriack v Department of Labour and Industry (County Court of Victoria,19 December 1983, unreported)
Department of Health and Anor v Jephcott (1985) 62 ALR 421
Attorney-General's Department v Cockcroft (1986) 10 FCR 180
Richards v Law Institute of Victoria (County Court, 13 August 1984, unreported)
Harris v Australian Broadcasting Corporation and Others (No 2) 50 ALR 567
DPP v Smith 9(1991) 1 VR 63
Re Scrivanich and Public Service Board (1984) 1 AAR 487

Re Clarkson and Attorney-General's Department (1990) 4 VAR 197
Re Brog and Department of Premier and Cabinet (1989) 3 VAR 201

PREFACE

This is an application for review by the Information Commissioner, arising from a decision of the Public Service Commission, to refuse Mr. Read access to documents relating to grievances made by the applicant to the Office of Merit Protection, in 1990 and 1992.

This complaint arose from the first access application received by the agency under the *Freedom of Information Act 1992* and it was necessary to devote more time than would normally be necessary, to its resolution particularly as the agency had initially refused access based on a "class of documents". I considered it desirable to advise the agency of its responsibilities under this legislation in some detail and consequently took appropriate steps to enable a reconsideration of the decision. For this reason it was not practicable for me to make a decision on this complaint within the statutory period of 30 days as required under s.76(3)

Following a number of meetings between my office and the agency, the agency abandoned its claims of exemption in relation to a number of documents and released those to the applicant. This decision is in respect of only those documents for which the agency maintained its claims of exemption at the conclusion of that process.

DECISION

The decision under review is varied by deciding that the claims of exemption are justified in respect of the undermentioned documents and parts of documents but not otherwise:-

(i) **Documents A, B, C, D, E, G and H**

(ii) The following passage in Folio 116 of **Document F**:

- The third paragraph ending with the word *"report"*.

(iii) The following passages in **Document L** (and Documents I, K and O where these Folios are duplicated):

- The sentence commencing with the word *"Mrs..."* and ending with the word *"...parties."* in lines 6 and 7 of the paragraph numbered 4 on Folio 225

- The last sentence in the second paragraph of Folio 226.

- The paragraphs commencing with *"Interviews with..."* and finishing with the words *"Mr Pope."* on Folio 228.

(iv) The following passage in **Document P**:

- The sentence commencing *"He eventually..."* and concluding with *"...the enclosure."* in the last paragraph of Folio 326

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

16th February, 1994

REASONS FOR DECISION

BACKGROUND

1. On 9 November 1993, Mr Read ('the applicant') lodged with the Public Service Commission, an application under the *Freedom of Information Act 1992* ('the WA Act') seeking access to *"...all documents held by the Public Service Commission relating to my grievances lodged with the Office of Merit Protection in 1990 and 1992."* In particular, the applicant sought access to those documents which contained "*...the analysis, findings and recommendation of the 1992 grievance."* Pursuant to section 12(2) of the WA Act, he sought access by inspection and reserved the right to seek copies of selected extracts at a later stage. Inspection is a form of access described in section 27(1)(a).

2. In 1990 Mr Read was the subject of an adverse Staff Development Review conducted by his line manager, the Deputy Registrar of the Western Australia Industrial Relations Commission (WAIRC). He submitted a grievance to the Office of Merit Protection claiming the assessment was biased and that it had not been discussed with him. Following inquiries into this complaint the Office of Merit Protection was successful in having the report removed from his personal file. In 1992 Mr Read complained to the Office of Merit Protection regarding an incident in which his decision to deny another employee sick leave was overturned by the same line manager. Mr Read took exception to this action and the Office of Merit Protection commenced an inquiry into this grievance. In the course of this second investigation, other issues related to the employment of Mr Read were raised by senior staff at the WAIRC including the earlier grievance. The documents generated during these inquiries are the subject of his access application.

3. In a Notice of Decision dated 24 November 1993, the applicant was denied access to the documents, this decision being made by Ms Maxine Murray, Acting Manager Equity. Ms Murray identified the documents in file number 00306 93 F6 as being covered by the access application and claimed they were all exempt on the basis of Clause 6 (Deliberative process) and Clause 8 (Confidential communications).

4. The applicant requested an internal review of this decision on 1 December 1993, and indicated his willingness to accept an edited extract of the relevant documents as provided for by s.24. On 22 December 1993, Ms Brenda Robbins, Assistant Commissioner (Equity) confirmed the decision of Ms Murray to deny access. She reached this conclusion after examining the original letter of request, the relevant file, the documents to which the application related and the written decision to deny access in the first instance, and advised the applicant accordingly.

THE REVIEW PROCESS

5. On 23 December 1993 Mr Read applied to the Information Commissioner for external review of the decision of the agency. In addition to providing my office with background information to his grievance with the Office of Merit Protection (OMP), Mr Read rightly identified that the onus was on the agency to establish that its decision was justified (see s.102). He also recognized that a public interest test was integral to establishing the exempt nature of the documents in question under clause 6 and that a public interest test also operated to limit the exemption claimed under clause 8.

6. Upon receiving the complaint for external review, the agency was notified pursuant to my obligations under section 68 of the WA Act. At the same time I required the agency to produce the original documents for my inspection, together with the agency FOI file and a schedule briefly describing the nature of the documents in dispute, in a manner consistent with the practice before the Commonwealth Administrative Appeals Tribunal.

7. In addition to this initial request, I required the agency to supply further reasons to justify their claim that the documents were exempt, including material findings of fact, and to identify the public interest factors claimed to support the decision to deny access. In my view, the written notice of decision of Ms Brenda Robbins dated 22 December 1993, being the decision under review, did not meet the requirements mandated by s.30.

8. The applicant was subsequently supplied with an edited copy of the schedule provided to my office by OMP. He identified all documents in file number 00306 93 F6 as being relative to his claim and sought inspection of the file in order to decide which documents, if any, he would exclude from his access application. My responsibilities under s.74 precluded such a course of action.

9. After examining the documents in question a number of meetings and discussions were held with representatives from OMP and my office in an effort to narrow the range of documents in dispute which initially totalled over 200. During this process OMP agreed to grant access in full to a number of documents and agreed to release others in an edited form. Both the agency and the applicant were given the opportunity to make oral submissions to support their written arguments. This invitation was accepted by both parties. The applicant made no concessions during this process and persisted with his claim for access to all remaining documents on the file. By 3 February 1994, although the number of disputed documents had been reduced to seventeen as a result of OMP agreeing to further releases, it was apparent that a formal decision was necessary to determine this complaint.

THE DISPUTED DOCUMENTS

10. The remaining documents sought to which access has been denied are described as follows:

DOCUMENT A	K. Leadbetter's file notes dated 13/8/92 and 14/8/92 (Folios 98-100)
DOCUMENT B	K. Leadbetter's file notes dated 14/8/92 (Folios 109-111)
DOCUMENT C	K.Leadbetter's file notes dated 17/8/92 (Folio 112)
DOCUMENT D	K. Leadbetter's file notes dated 17/8/92 (Folios 112A-C)
DOCUMENT E	K.Leadbetter's file notes dated 18/8/92 (Folio 114)
DOCUMENT F	K.Leadbetter's file notes dated 19/8/92 and 20/8/92 (Folios 115-117)
DOCUMENT G	K.Leadbetter's notes of interview dated 4/9/92 (Folio 134)
DOCUMENT H	K.Leadbetter's notes of interview dated 7/9/92 (Folios 135 and 136)
DOCUMENT I*	Edited copy of K.Leadbetter's report to B.Robbins dated 10/9/92 (Folios 154-159)
DOCUMENT J	K.Leadbetter's file notes dated 15/10/92 to 22/10/92 (Folio 160)
DOCUMENT K*	K.Leadbetter's report to B.Robbins dated 9/11/92 (Folios 187-188)
DOCUMENT L*	Edited copy of K.Leadbetter's reports to B.Robbins dated 10/9/92 and 9/11/92 (Folios 225-232)
DOCUMENT M	K.Leadbetter's report to M.Murray dated 11/11/92 (Folios 279-280)
DOCUMENT N	K.Leadbetter's file notes dated 19/11/92 to 22/11/92 (Folio 282)
DOCUMENT O*	Edited copy of K.Leadbetter's reports dated 10/9/93 and 9/11/93 (Folios 317-322))
DOCUMENT P	Edited copy of K.Leadbetter's report to M.Murray dated 2/12/93 (Folios 323-333)
DOCUMENT Q	Edited copy of K.Leadbetter's report dated 6/12/93 (Folio 342)

* Denotes documents which are duplicated on the file.

11. Exemptions were claimed under clause 6 and clause 8(2) with respect to Documents A, B, C, D, E, G and H. Exemption was claimed under clause 6 with respect to all other documents or parts of documents as described. The applicant agreed that where documents were duplicated, he required access to one copy only after my office was able to satisfy him that the duplicates were true copies.

THE EXEMPTIONS

(a) The Deliberative Processes - Scope and Meaning

12. Clause 6 (1) of Schedule 1 in the WA Act is in the following terms:

> ***"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."*

13. To qualify for exemption under clause 6, the disputed documents must satisfy both parts (a) and (b) of this exemption. Matter which is purely factual or which is contained in internal manuals of the agency, is excluded from the ambit of the exemption under sub-clause (2) and (3). For the purpose of this complaint, sub-clause (4) is irrelevant since the disputed documents are less than 10 years old. Only when part (a) of the exemption is satisfied is it necessary to consider part (b) and whether disclosure of the documents would, on balance, be contrary to the public interest.

14. The key words in clause 6(1)(a) are the "*deliberative processes...of an agency*". The meaning of the phrase "deliberative processes" has been considered in a number of cases based on the equivalent section in the Commonwealth *Freedom of Information Act 1982* (s.36(1)(a)). More recently, the authorities were extensively canvassed by the Queensland Information Commissioner in *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (30 June 1993, unreported) where the relevant provision is s.41(1).

15. The debate about the meaning of the phrase "deliberative processes" has not been conclusive. On the one hand there is the view that the exemption must be read narrowly as being intended to protect the policy-forming processes of agencies. This view is based on a line of authorities in the United States where the *Freedom of*

Information Act 1966 (US) was the model for the Commonwealth legislation in 1982. (See *Harris v Australian Broadcasting Corporation (No 1)* (1983) 50 ALR 551 for a discussion of the relevant US authorities). The alternate view is that the deliberative processes include both policy decisions and other decisions that are made by an agency in the course of its functions.

16. The argument for a narrow construction has not generally found favour in either the Commonwealth Administrative Appeals Tribunal or the Federal Court although the cases favouring a wide interpretation have not finally determined the issue one way or another (See *Kavvadias v Commonwealth Ombudsman* (1984) 2 FCR 64; *Re Fewster and Department of Prime Minister and Cabinet* (1986) 11 ALN N266; *Re Murtagh and Commissioner of Taxation* (1983) 6 ALD 112; *Re Waterford and Department of Treasury* (No 2) (1984) 5 ALD 588).

17. In *Re Waterford* the Commonwealth Administrative Appeals Tribunal said, (at paras 58-60):

> *"As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing on one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play...*
>
> *It by no means follows, therefore, that every document on a departmental file will fall into this category. Furthermore, however imprecise the dividing line may appear in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of the agency...*
>
> *It is documents containing opinion, advice, recommendations etc. relating to internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption under s.36 only attaches to those documents the disclosure of which is 'contrary to the public interest'..."*

18. The Queensland Information Commissioner accepted this passage in *Re Waterford* as correctly stating the position in that State and said that the deliberative processes normally occur towards the end of a particular process after investigations and the gathering of evidence and data from relevant sources (see *Eccleston, paras 29 and 30).* Section 36(1)(a) of the Commonwealth *Freedom of Information Act 1982* refers to the "deliberative processes involved in the functions of an agency" and s.41(1)(a) of the Queensland *Freedom of Information Act 1992* similarly refers to

the "deliberative processes involved in the functions of government" (my emphasis), ("government" being defined in the Queensland Act to include an agency).

19. I do not believe the omission of the words underlined from the WA Act to be of any material consequence. It is both necessary and desirable in my view, to consider the functions of an agency to determine the scope of the deliberative processes in that agency, and to characterize matter as potentially within the ambit of clause 6(1)(a) (See also the comments in *Re VXF and Human Rights and Equal Opportunity Commission* (1984) 17 ALD 491). The omission of the words "functions of an agency", or similar, from the WA Act is more likely to be for reasons of economy of words during the drafting process than any attempt to depart from the normal means of expression of this exemption.

20. Where the interpretation of a provision is unclear, a construction that would promote the purpose or object of the law is to be preferred (s.18 *Interpretation Act 1984 (WA)*). Judge Lazarus, considering the purpose of s.30(1), the Victorian equivalent, in *Pennhalluriack v Department of Labour and Industry* (County Court of Victoria, 19 December 1983, unreported) referred to at paragraph [2326], Victorian Administrative Law, Vol 1, said:

> *"It is sufficiently apparent that the purpose of this provision is to protect the deliberative processes of government and to ensure that measure of confidentiality which will enable policy and the like decisions to be taken after the frankest possible interchange of views and ideas between officers of the public service and between them and their Minister, as well as between members of the ministry. Such an exemption is very wide indeed, and no doubt the superadded requirement that disclosure would be contrary to the public interest is placed there to cut down the breadth of application of the exemption so that it extends to protect the public interest but no further...[I]t is this [public interest] provision more than any other which is designed to restrict a destructively wide ambit of exemption; and in every case sought to be brought within s 30 a very real onus would lie upon the agency (cf s 55(2)) to satisfy the court that disclosure would be detrimental to the public interest."*

21. Section 3(1) of the WA Act provides:

> *"3. (1) The objects of this Act are to:*
>
> *(a enable the public to participate more effectively in the State; and*
>
> *(b) make the persons and bodies that are responsible for State and local government more accountable to the public."*

22. In his second reading speech to the Western Australia Parliament on 28 November 1991, the then Minister for Justice, the Honorable David Smith said:

> *"The Freedom of Information Bill sets the scene for a real and meaningful level of accountability. Without information about the processes that govern them, members of the community cannot fully participate in government and exercise their rights as citizens."* (My emphasis)

[Although the 1992 Bill replaced the 1991 Bill, it retained the key features of the 1991 Bill, the major amendment to the earlier version being the inclusion of Part 3- Amendment of Personal Records (see Hansard, p 4156, 1 September 1993).]

23. From these sources and authorities, I understand that the WA Act and the exemptions should be interpreted according to the ordinary meaning of the words used, and in a way that facilitates and encourages the disclosure of information. It may be argued that the purpose of the legislation could best be achieved by confining "deliberative processes" to policy decisions only since this approach would give maximum effect to the intent that the public are informed about the processes of government. The arguments for a narrow interpretation therefore have some weight within the context of the WA Act.

24. However, the word "policy" is susceptible to a variety of meanings. In *Re Fewster and Department of Prime Minister and Cabinet* (1986) 11 ALN N266, (at para 14) the Deputy President of the Tribunal accepted the submission that a "policy" is something that "provides a guide for handling of particular cases or problems as they arise in the future. A policy may relate both to what should be done, and how it should be done." Although I am inclined to think that the "how" of a policy decision is more correctly described as "procedures", the deliberative processes at the very least, includes policy decisions. In *Re VXF and Human Rights and Equal Opportunity Commission,* at paragraph 31, the Tribunal made this distinction and said:

> *" I therefore accept that s.36(1) comprehends, in the deliberative processes both deliberations for decision making and deliberations for policy making. It does not however cover documents dealing with the purely procedural or administrative functions of an agency. I consider that the use of a social worker to help the applicant obtain medical or financial assistance or to clarify her rights to leave or pay from Australia Post are not part of the deliberative processes involved in the functions of the Commission. They are functions of an administrative nature incidental to but not part of the deliberative processes involved in the functions of the agency."*

25. The meaning ascribed to deliberative processes in *Re Waterford* is clearly broad enough to cover these two aspects of decision making. The added requirements under clause 6(1)(b) mean that the application of the public interest test must determine the exempt status of each and every document claimed to form part of that process. It is the application of this public interest test, presented as an integral part of the exemption itself, that satisfies me that the objects of the WA Act will be achieved by adopting the *Re Waterford* approach.

26. For this reason I also accept the passage in *Re Waterford* cited at paragraph 17 of this decision, as correctly describing the ambit of "deliberative processes" in clause 6(1)(a) of the WA Act and I adopt the view of the Queensland Information Commissioner in *Eccleston* that these processes, in the main, occur towards the end of a larger process, subject to the following qualification. If a document comes into existence earlier on in that process, it may still be characterised as "deliberative". I have in mind the instance where options may be canvassed, evaluated and discarded at an early stage in the process. In these circumstances if disclosure of such a document would reveal the process of reflection, weighing up or evaluation of arguments for and against a course of action, it may be considered to fall within the requirements of clause 6(1)(a).

(b) Confidential Communications

27. Clause 8 of Schedule 1 in the WA Act is as follows:

> ***"8. Confidential communications***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure (otherwise than under this Act or another written law) would be a breach of confidence for which a legal remedy could be obtained.*
>
> *(2) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information of a confidential nature obtained in confidence; and*
> *(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*

Limits on Exemptions

> *(3) Matter referred to in clause 6 (1) (a) is not exempt matter under subclause (1) unless its disclosure would enable a legal remedy to be obtained for a breach of confidence owed to a person other than-*
>
> *(a) a person in the capacity of a Minister, a member of the staff of a Minister, or an officer of an agency; or*
>
> *(b) an agency or the State.*
>
> *(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."*

28. Although there is some overlap between the requirements of clause 8(1) and (2), information is inherently confidential if it is not in the public domain. That is, the information must be known by a small number or limited class of persons. Where the person supplying the information specifically requests that the information should not be disclosed, and the person receiving it agrees, then an obligation of confidence arises. In *Department of Health and Anor v Jephcott* (1985) 62 ALR 421, the Full Federal Court held that a source of information is confidential if provided under an express or implied pledge of confidentiality. In order to qualify for exemption under clause 8(2) it is not sufficient to establish only that the information was of a confidential nature and obtained in confidence. Part (b) must also be satisfied to claim the exemption and the application of the public interest test must be considered.

29. In A*ttorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 190, the court said that the words "*could reasonably be expected to prejudice the future supply of information"* in s.43(1)(c)(ii) of the *Freedom of Information Act 1982* (Commonwealth), were intended to receive their ordinary meaning and required a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth, would decline to do so if the documents in question were disclosed.

30. Section 35(1)(b) of the *Freedom of Information Act 1982* (Victoria) uses the expression "similar information" in that Act's equivalent exemption. In *Richards v Law Institute of Victoria* (County Court, 13 August 1984, unreported) at page 9 Dixon J. said:

> *" [T]he words 'similar information' refer to information of the class or character contained in the case under consideration, and the precise contents of the information in the particular case are not relevant."*

31. In my view, the requirement in clause 8(2)(b) of the WA Act, that the future supply of information of **that** kind be prejudiced, is a reference to similar information as those words were applied in the *Richards* case.

THE CLAIMS OF THE AGENCY

32. The Public Service Commissioner ('the Commissioner') is an office established under the *Public Service Act 1978.* Under s.40 of that Act, the Commissioner is also appointed as Chief Executive Officer of the Public Service Commission which replaced the Public Service Board by gubernatorial approval on 15 March 1988. For the purposes of the WA Act, the Public Service Commission is an "agency" as defined in the Glossary of the *Freedom of Information Act* 1992.

33. The Commissioner performs his or her functions by administrative instructions published in Public Service notices by virtue of s.19(2) of the Public Service Act 1978. Administrative Instruction 1001 entitled "Grievance Resolution" is such an instruction published under the authority of s.19(2). In addition to outlining the general policy on grievances, it provides:

> *"**PRINCIPLES***
>
> *1...*
> *2...*
>
> *3. Confidentiality should be maintained at all times in the resolution of the grievance.*
>
> *4. The principles of natural justice should apply in the resolution of a grievance:*
>
> - *all parties to a grievance should have the opportunity to put their cases and have them considered;*
> - *any allegation made against an employee should be made known to that employee;*
> - *all investigations and decisions must be made by persons who are impartial and disinterested;*
> - *an employee should be given the opportunity to comment on the possible bias of any other person involved in the grievance resolution process;*
> - *employees should feel confident that they will not suffer any discrimination as a result of using the grievance resolution process.*
>
> *5. Information relating to the grievance and its resolution should be freely available to those involved.*

6..."

34. The Commissioner's program of Public Sector Employment is delivered through sub-programs of which Merit Protection is one such sub-program under the direction of the Assistant Public Service Commissioner (Equity). The Office of Merit Protection (OMP) delivers the services of the sub-program whose objective is:

> *"The provision and promotion of an accessible process for the independent review of human resource practice and decisions and to ensure the principles and practices of merit and equity apply to human resource management across the public sector."* (Public Service Commission Annual Report 1993)

The role of OMP includes receiving grievances from public sector employees, resolving these by conciliation or mediation and evaluating and reporting on personnel policy issues raised by grievances, appeals and disciplinary matters.

35. In response to questions from my office, Mr Leadbetter, on behalf of the agency, provided the following written comments on the role of OMP:

> *"...the Office of Merit Protection's (OMP) grievance management activities often require decisions by the Public Service Commissioner and/or the Assistant Commissioner (Equity) and may result in the invoking of powers under the Public Service Act 1978 and/or the provisions of the Act e.g. Administrative Instructions. Such decisions are based on the investigation reports prepared by myself. These reports reflect the nature of the grievance, the steps taken during my enquiries and/or investigations, a record of interviews and evidence, and my conclusions and recommendations. Thus the decision-maker is provided with as complete a history etc of the grievance to aid his/her decision."*

36. It is apparent that the documents in dispute were created in the course of such an investigation. Written evidence from Ms Robbins on behalf of the Commissioner dated 12 January 1994, indicated that these investigations often involve "complex and sensitive matters." Although no specific examples were provided, other than the case in point, I take her comments to mean that grievances may involve poor human resource or organizational management practices involving senior officers, but not exclusively so.

37. The arguments of the agency in support of the exemptions may be conveniently divided into two types. First there are those based on confidentiality in order that OMP may fulfill its role effectively. Second the agency claims that the grievance management processes are deliberative and for this reason alone, should not be disclosed.

38. In support of the confidentiality claim, Ms Robbins' submission of 31 December 1993 said:

> *" A consistent fear has been expressed by those aggrieved employees that their personal security and future employment may be in jeopardy if it becomes generally known that they have approached OMP and provided information which may reflect on or draw other employees (especially more senior officers) into the grievance investigation. OMP has attempted to assuage such fears by accepting the information in confidence and advising informants that, should an allegation be made against another party, the principles of natural justice demand that those accused be advised and given the opportunity to respond. As a result of that advice, a number of obviously aggrieved employees have decided to not pursue their grievances. Thus, OMP is concerned that, where possible, the information gathered during a grievance investigation should remain confidential, thereby alleviating aggrieved employees fears and enhancing their confidence in an approach to OMP."*

39. In further submissions dated 12 January 1994 and 20 January 1994, Ms Robbins again reiterated her concern for OMP's future operations if it became known that information given in confidence could be released under FOI. She identified consequences which she said would flow from such disclosure in the following terms:

> *"...any indication that "in confidence" discussions with the Office will be subject to release... will increase the fears of employees ...exacerbate their reluctance to come forward and substantially impact adversely on the Office's operational capacity and its ability to achieve its objectives. It may also result in the withholding of information vital to the reform and effective and efficient management of the public sector..."*

40. The second argument of the agency proceeds from a misunderstanding relating to the application of clause 6(1). The mere fact that a document may be described as deliberative carries no presumption that it is, for this reason only, to be regarded as exempt. The second limb of that exemption must be established before this position is reached. The agency's written and oral submissions failed to appreciate this requirement. For example, the submission dated 20 January 1994 said:

> *"...I remain strongly of the view that, the Office of Merit Protection's (OMP) grievance management activities e.g. interviews, enquiries, investigations, file searches, which produce file notes, written reports, etc. leading to conclusions, recommendations and decisions are* ***deliberative processes*** *as defined at Schedule 1, Clause 6 of the FOI Act. I particularly note that Clause specifically identifies* ***opinion, consultation, deliberation, advice or recommendation****, all of which reside within the above activities."* [Agency emphasis]

41. Based on this view the agency identified two competing public interests. The public interest in favour of disclosure was said to be a significant interest in the behaviour of senior public sector officers and the expectation that standards are being met or that appropriate steps had been taken to overcome any deficiencies. Equally significant was said to be the public interest in non-disclosure based on the Commission's need to manage "whistle-blowing" and other staff grievances. The agency argued this latter interest was the stronger because of recommendations of the 1992 Royal Commission Into Commercial Activities of Government and Related Matters, aimed at ensuring a high standard of public sector responsibility and accountability.

THE APPLICANT'S SUBMISSION

42. Mr Read based his claim for access on the argument that the documents in the agency file contained personal information, and on the provisions of s.21 of the WA Act which he said favoured disclosure of this information. The applicant is at a disadvantage in that he does not have access to the documents in dispute and could not know that some documents contain personal information relating to other employees and that others contain non-personal information. When this fact was made known to him, he said that he was not seeking access to information about third parties. His request for access to edited copies of documents tends to support this statement. Section 21 states:

> *"**21.** If the applicant has requested access to a document containing personal information about the applicant, the fact that matter is personal information about the applicant must be considered as a factor in favour of disclosure for the purpose of making a decision as to -*
>
> *(a) whether it is in the public interest for the matter to be disclosed; or*
>
> *(b) the effect that the disclosure of the matter might have."*

43. In his letter seeking external review he said:

> *"The Public Service professes to be a Model Employer. The people of this State demand, and are entitled to, fair and open government. The enactment of the FOI legislation recognizes and fulfils this expectation. I refer you also to the pronouncements of the Royal Commission into WA Inc that the giving of reasons for decisions is a fundamental democratic right. I respectfully submit that it is right and proper that I be given access under this legislation to the material about me."*

44. In a further written submission dated 28 January 1994, Mr Read again stressed the importance of his rights under the legislation to know what others had said about him and his work performance. He said:

"...The recurring theme is of dominance of the individual's right to be aware of what has been said about them...This is a clear reinforcement of the dominance of Section 21 of our own Act."

45. The general right to know about the processes of government is one aspect of the public interest that must be balanced against the competing public interest in protecting the deliberative processes of government. The general right is given added weight by the requirements under s.21 when the information is personal to the applicant. However, the nature of the information is merely another factor to be considered in the balancing process. Section 21 makes it clear that it is a **factor** only and Mr Read is mistaken in his view that the personal nature of the information is the dominant factor.

46. In his oral submission to me Mr Read again stressed the importance of his right to know what has been said about him, especially where these comments reflect adversely on his performance, and the importance of his right to be informed and given reasons for decisions made in relation to the resolution of his grievance.

FINDINGS

47. My examination of the disputed documents indicated that a number of documents of like kind could be conveniently grouped together for the sake of making findings of fact and reaching conclusions since this made it easier to identify the public interest factors relevant to each group. Where the contents of a particular document in one of these groups differs from the rest, that document is described more fully. However, in taking this approach it is necessary to describe the contents of all disputed documents in general terms only in order to avoid the disclosure of exempt material.

(a) The applicability of clause 6 and clause 8 to Documents A, B, C, D, E, G and H.

(i) Clause 6

48. **Documents A, B, C, D, E, G and H** are all similar. They are described as file notes and consist of hand-written notes of discussions between Mr Leadbetter and other employees involved in, or with information about, Mr Read's grievance. The file indicates that the formal grievance was lodged with OMP on or about 21 July 1992. Some of these documents came into existence shortly thereafter when Mr Leadbetter had commenced his inquiries. They contain answers to specific questions and other relevant information volunteered by the interviewees.

49. From the contents of these particular documents and their dates of creation, I conclude that the documents were created by Mr Leadbetter in order to record facts which would either substantiate or refute the allegations made by Mr Read. I find that these documents are more accurately characterised as consisting of data gathered during the investigation phase and, for the reasons given in the passage in *Re Waterford* cited at paragraph 17 of this decision, they are not part of the deliberative processes of the agency. In *Harris v Australian Broadcasting Corporation and Others (No 2)* 50 ALR 567 at 569, Beaumont J., said, on this point:

> *"... a distinction is to be drawn for the present purposes between purely factual material, which is of an investigative character, on the one hand, and opinion, advice or recommendation, which is part of the policy forming or deliberative processes on the other hand."*

This finding necessarily disposes of the agency's arguments that these documents are exempt under clause 6(1)(a) although they may be exempt for other reasons.

(ii) Clause 8

50. Administrative Instruction 1001, which applies across the public sector, makes reference to the requirement for confidentiality to be maintained in the grievance system of agencies. The Policy Statement and Guidelines issued by OMP also stress requirements related to the confidentiality of this process. The expectation of confidentiality is supported by the personal experiences of Ms Murray and Ms Robbins over the past three years which are said by Ms Robbins, in her submission of 31 December 1993, to have required constant reassurances about confidentiality to be given to aggrieved parties and other witnesses.

51. Folios 112A-C which comprise **Document D** are clearly marked "Strictly Confidential" and whilst these words alone are not conclusive of a finding of confidentiality, Mr Leadbetter's oral submission was to the effect that a guarantee of confidentiality was specifically sought by all but one of the employees concerned. The agency's FOI file contains evidence to support this claim. Mr Read disputed the fact that there was either an express or an implied understanding of confidentiality in relation to the grievance system. It was his view that confidentiality should be assessed by reference to the classification or level of the parties consulted by OMP since it was his belief that information given by rank and file employees was confidential but not information given by his superiors or members of the executive.

52. The requirements of clause 8(2) do not require distinctions of this nature. Confidentiality of information is a matter of fact to be decided from an examination of the circumstances in which the communications were made between the parties involved and the contents of that information. I find that Documents **A, B, C, D, E G and H** contain statements of opinion and other relevant facts and there is evidence, which I accept, that this information was given and received in confidence.

53. There is also evidence from Mr Leadbetter, albeit anecdotal, of the lengths to which some employees will go in order to keep secret their contact with OMP for fear of reprisals. The same concerns were expressed by Ms Robbins based on her own experiences of human nature and on OMP's dealings with employees who perceive that their careers would be ruined if it became known in the wider public sector that they had complained to OMP. No specific examples were given to support these beliefs although the Public Service Commissioner, in his submission dated 31 December 1993, stated that aggrieved employees in the past have decided not to pursue their grievances when advised by OMP that allegations against another person must be brought to the attention of that person in accordance with Administration Instruction 1001.

54. On this basis, and the fact that grievances may involve questions about the management practices of senior officers, which fact was alluded to in the additional reasons provided to my office by Ms Robbins on 31 December 1993, I find that it is reasonable to expect that some employees would be reluctant to identify inappropriate practices of this type in the future, and to bring these to the attention of OMP for informal resolution if confidentiality was not assured. The requirements under clause 8(2)(a) and (b) are established to my satisfaction in relation to **Documents A, B, C, D, E G and H** and it only remains to be considered whether disclosure would, on balance, be in the public interest.

The Public Interest - Clause 8

55. The public interest is not defined in the WA Act, nor in any other similar legislation. It is allied to the concept of public interest immunity or crown privilege, considered by courts in determining whether official documents of government could be produced in court. In Freedom of Information legislation, the public interest test is used to balance competing interests. Whilst the public has an interest in access to information, the public also has an interest in the proper functioning of government agencies and in protecting the privacy of individuals and the commercial interests of business organizations.

56. In applying the public interest test, the difference between matters of general interest and those of private concern only, must be recognized. The public interest is an interest that extends beyond what the public may be interested in today or tomorrow depending on what is newsworthy. In *DPP v Smith* [1991] 1 VR 63 at 65 the court recognised this difference and said:

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

benefit of the public; it follows that such form of interest per se is not a facet of the public interest."

57. The agency argued that there is a strong public interest in developing and maintaining a system to enable proper scrutiny of management practices across the public sector. The system under which OMP operates was said to be essential to ensure people were treated fairly and that undesirable practices in the Public Service were identified and addressed. The agency also argued that there was a public interest in maintaining a system which allows public sector employees to speak freely without fear of retribution or persecution by management, particularly since there is no legislation to provide this protection. The need for such a legislative system to protect "whistle-blowers" was identified by the Royal Commission into Commercial Activities of Government and Related Matters 1992 (see Part II. para 4.7).

58. These public interest factors against disclosure must be considered alongside those identified by the applicant which he claims favour disclosure of the disputed documents. The applicant's interest in access to personal information is a factor of the public interest recognized by the WA Act itself. Part 3 of the Act provides a system whereby personal information that is inaccurate, incomplete, out of date or misleading may be amended. This aspect of the public interest was considered an important factor in *Re Scrivanich and Public Service Board* (1984) 1 AAR 487, where the Tribunal said there was a public interest in giving an applicant access to documents in possession of the Grievance and Appeals Bureau of the Public Service Board, the Commonwealth equivalent of OMP. That case, which is distinguishable on its facts, concerned an appeal over promotion procedures and the right of the applicant was considered greater than any public interest in a procedure which allowed officers to make comments about subordinates being considered for promotion, without the need to justify to the subordinate, the fairness of what had been said.

59. Whilst the public interest in an individual being made aware of allegations against him or her and being given an opportunity to answer those allegations is recognised, Mr Read's right to know what others have said about him does not require that he be given access to the actual records of those conversations particularly where these took place in confidence. He is entitled to know the substance of comments, complaints and allegations and Administrative Instruction 1001 provides for this to occur. The right in Part 3 of the WA Act, to amend personal information does not include an automatic right to change a record revealing an opinion genuinely held by someone else. This right only arises if the applicant can prove, to the satisfaction of the agency, that the information is inaccurate, incomplete, out of date or misleading.

60. The applicant disputes the claim by OMP that he was advised of the substance of all complaints against him. Allegations that the system has not been followed by the agency in this instance are not matters for me and are more appropriately taken up in another forum. The fact is there is in existence a grievance system that is capable of addressing Mr Read's concerns on this issue but the minimum requirement of an effective system, in my view, is a manual of procedures, or similar, to explain to staff

how the principles of Administrative Instruction 1001 are to be applied. This manual should describe how the parties are to be informed of what others have said about them, the means of recording information so that it is freely available and an acknowledgement in writing by parties when they are made aware of relevant information.

61. On balance, I find that the public interest in the maintenance of a system based on the confidential exchange of information, outweighs the public interest in the applicant having access to these actual records. In these circumstances, edited access is not an option in my view. There is always a possibility that the identity of third parties can be deduced from the substance of their comments. If this occurred, the confidentiality of the system would be in jeopardy to the detriment of the public interest. Accordingly I find that **Documents A, B, C, D, E, G and H** are exempt under clause 8(2).

(b) The applicability of clause 6 to Documents F, J and N

62. **Document F**, consisting of Folios 115, 116 and 117, and **Documents J** and **N** are records of early discussions between Mr Leadbetter and other employees with information about Mr Read's grievance. They contain references to possible options and an evaluation, albeit in general terms, of these options. Mr Leadbetter told me that the documents came into being after the grievance had been formally lodged by Mr Read and were created in the course of Mr Read's employer seeking advice from Personnel Advisory Services in the Public Service Commission on an appropriate course of action to deal with the problem of Mr Read remaining at the WAIRC. Because these options were related to the resolution of the grievance, Mr Leadbetter was consulted. However, he perceived a conflict of interest with his impartial management of the grievance system and he withdrew from further discussions on the issue. The documents are hand-written file notes but Mr Leadbetter considered them to be part of the grievance record and therefore within the ambit of the applicant's request.

63. I have concerns about the practice of important and substantial records being maintained as file notes, particularly as this file contains what I consider to be, an unacceptable number of such records. This matter has been discussed with OMP during the course of my review of this complaint and I understand the practice has now ceased. However, after examining the contents of the documents and taking into account the explanation of Mr Leadbetter, I am unable to agree with the agency's submission that these documents are deliberative process documents of any agency. Mr Read's position at the WAIRC, or elsewhere in the Public Service, is an administrative matter, namely that of personnel management. The functions of the WAIRC are not concerned with the placement of personnel. The mere fact that the continued employment of Mr Read necessitated an examination and evaluation of options is not, of itself, sufficient to characterise these documents as deliberative in the WAIRC, in the sense described in *Re Waterford*. Whilst the functions of the Public Service Commission include the placement of personnel, these documents

would not be used by the Public Service Commission in performing this function. For this reason they are not deliberative process documents of this agency.

64. All of the parties involved in these consultations, had an expectation of confidentiality in relation to their discussions. Therefore, I am satisfied that the folios comprising **Document F** contain confidential communications, but I am not satisfied that their disclosure would prejudice the future supply of such information to either OMP or the WAIRC. Personnel management issues such as these arise from time to time in any organisation and will continue to be the concern and the responsibility of managers within all departments. With the exception of the third paragraph in Folio 116, ending with the word *"report"* and the last paragraph commencing with the words *"Rang Read..."*, I find that Folios 115 and 116 are not exempt under clause 6(1)(a) or clause 8(2).

65. The third paragraph records the substance of a discussion with a Crown Solicitor. The agency claimed an exemption based on legal professional privilege with respect to this paragraph during the course of its oral submission. The nature and scope of legal professional privilege at common law has been the subject of consideration by the High Court in a number of cases. A concise summary of the general principles extracted from those judgments is contained in the decision of Mr K Howie, Member of the Victorian AAT, in *Re Clarkson and Attorney-General's Department*,(1990) 4 VAR 197 at p.199:

> "*The nature of legal professional privilege has been closely examined by the High Court in a number of decisions, in particular Grant v Downs* (1976) 135 CLR 674, *Baker v Campbell* (1983) 153 CLR 52, *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, and *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.
>
> *From these decisions, the following principles emerge:*
>
> *(1) To determine whether a document attracts legal professional privilege consideration must be given to the circumstances of its creation. It is necessary to look at the reason why it was brought into existence. The purpose why it was brought into existence is a question of fact.*
>
> *(2) To attract legal professional privilege the document must be brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings. Submission to legal advisers for advice means professional legal advice. It includes the seeking or giving of advice. Use in legal proceedings includes anticipated or pending litigation.*
>
> *(3) The reason for legal professional privilege is that it promotes the public interest. It assists and enhances the administration of justice by facilitating the representation of clients by legal advisers. There are eloquent statements of the importance of this public interest in each of the cases referred to above.*

(4) Legal professional privilege attaches to confidential professional communications between salaried legal officers and government agencies. It must be a professional relationship which secures to the advice an independent character. The reason for the privilege is the public interest in those in government who bear the responsibility of making decisions having free and ready confidential access to their legal advisers. Whether or not the relationship exists is a question of fact.

(5) If a document contains material that does not fulfil the required test, that does not necessarily deny the document the protection of the privilege. What matters is the purpose for which the document was brought into existence. If it was for the required purpose, it is not to the point that the document may contain advice which relates to matters of policy as well as law. However, an analysis of the document may assist in determining its moving purpose.

(6) A client may waive legal professional privilege: see in particular the Maurice *case.*

(7) Some vigilance is necessary to ensure that legal professional privilege is not successfully invoked to protect from production documents that do not properly fall within its ambit. Otherwise the important public purposes it is intended to serve will be undermined.

(8) Legal professional privilege does not attach to documents brought into existence for the purpose of guiding or helping in the commission of a crime or fraud, or for the furtherance of an illegal purpose, including an abuse of statutory power, or for the purpose of frustrating the process of the law itself: see the Kearney *case."*

66. The contents of the third paragraph in Folio 116 indicate that legal advice was sought by Mr Leadbetter in response to a specific matter raised by a third party involved in the grievance investigation. The advice provided is both legal and policy concerning possible litigation. I am satisfied that this paragraph meets the test in *Baker v Campbell* (op. cit.) (ie. a confidential communication between a person and his or her solicitor or barrister, made or brought into existence for the sole purpose of seeking or giving legal advice or for the sole purpose of use in existing or anticipated litigation), and in paragraph (5) above, and therefore is exempt on the ground of legal professional privilege under clause 7(1) of Schedule 1. Having so determined, it nevertheless remains an option for the agency to waive this privilege and release this information to the applicant.

The last paragraph records the substance of a conversation between Mr Leadbetter and the applicant. In my view it contains factual matter only which is not exempt by virtue of clause 6(3).

67. Folio 117 consists of three paragraphs. The first and third paragraphs contain confidential communications as described in paragraphs 61 and 63 of this decision which are not exempt for the same reasons cited earlier. The second paragraph contains references to third persons which may be considered "personal information". The agency made no submissions with respect to this paragraph. I consider that the terms of the access application do not include a request for access to this information and, in both his oral submission and his letter to the agency of 1 December 1993 requesting internal review, the applicant confirmed that he was not seeking access to information about third parties and would accept edited access to the relevant documents. In these circumstances it is practicable for access to be provided to an edited version of this Folio. The information in the second paragraph that is not within the ambit of the access application and therefore should be deleted, is as follows:

    * line 7 - All the words after *"He suggested I peruse..."* to the end of that sentence in line 9;

    * lines 10 to 15 - The sentences commencing *"He..."* and concluding in line 15.

68. **Document J** records discussions between Mr Leadbetter and other parties in which options for dealing with Mr Read's employment at WAIRC, were discussed and evaluated. For the reasons outlined in relation to Document F, I consider that this document is not exempt because it does not form part of the deliberative process of either agency, nor is it exempt under clause 8(2) for the same reasons discussed at paragraph 63.

69. **Document N** is a record of discussions between Mr Leadbetter and Mr Read and Mr Leadbetter and a third party. Exemption is claimed only with respect to the second paragraph consisting of notes of the conversation with the third party. This paragraph is a mixture of factual information which is not exempt by virtue of clause 6(3), matter which may be considered "personal information" about that third party, and opinion which does not form part of the deliberative processes because Mr Leadbetter was still conducting his investigation. The applicant indicated to me that he did not require access to personal information about third parties. Therefore the information which is not within the ambit of the access application and which should be deleted for this reasons, is as follows:

    * the sentence commencing after the date 18/11/93 in line 2 and finishing in line 3.

    * the last sentence commencing in line 6 and ending in line 8.

(c) The applicability of clause 6 to Documents I, K, L, O and P

70. **Document L** consists of copies of Documents I, and K. Document O is a copy of Document I. The applicant has agreed that access to Document L only is required. For the purpose of this decision, findings with respect to Document L will also apply to Documents I, K and O. An exemption is claimed with respect to the edited parts of Documents L and P only, the remaining parts consisting of factual matter have been released to the applicant.

71. The edited parts of these documents contain opinions, advice and recommendations. It is apparent from the documents that they are reports from a subordinate to a supervisor recommending action to finalize the grievance. They have the characteristics of deliberative process documents in that disclosure would reveal the thinking processes of the agency including an evaluation of the range of options considered practicable for resolving the issue and recommendations affecting other parties. Mr Leadbetter said that he submitted these reports through the normal chain of command for a final determination by the Public Service Commissioner. However, the recommendations in the earlier report were overtaken by intervening developments including locating the so called "Read Dossier" at the Industrial Relations Commission. From an examination of the documents and Mr Leadbetter's explanation, I am satisfied that Documents L and P are deliberative processes documents under clause 6(1)(a).

72. As the applicant indicated to me, in his oral submissions, that he did not require access to personal information about third parties, I consider, without deciding the matter, that the following passages which may contain personal information about third parties may remain deleted from the documents.

Document L

Folio 226	The sentences commencing with the words *"This relates..."* and ending with the word *"...intent"* in lines 2-7 of the first paragraph. The sentence commencing with the words *"Both the..."* and ending with the word *"...shortcomings"* in lines 13, 14 and 15 of the second paragraph.
Folio 227	The sentences commencing with the words *"In this meeting..."* and ending with the words *"...be unfounded"* in lines 3-8 of the first paragraph marked with an asterisk(*). All of the third paragraph marked with an asterisk(*) after the words *"Conduct interviews with:"*
Folio 229	All of the fourth paragraph marked with an asterisk(*).

Folio 230 — All of the words commencing *"...which"* in the first line, to *"...annually"* in the last line of the first paragraph.

Folio 232 — The first three lines of the first paragraph commencing at the word *"...include"* and finishing with the word *"...annually."*

The last three words in the fourth line of the last paragraph and the first word of the fifth line of the last paragraph.

Document P

Folio 330 — The last two words in line 5 and all of line 6 of the last paragraph.

Folio 329 — The first line of the first paragraph.

All the words after *"...which"* in the third line of the last paragraph.

Folio 327 — The sentence commencing with a name in line 8 and ending with the word *"...details"* in line 10 of the fourth paragraph.

Folio 326 — The last sentence in the last paragraph.

Folio 325 — All the words from *"...due to"* in line 6 to the words *"...to participate"* in line 7 of the first paragraph under the heading **CONCLUSION**.

Folio 324 — The words commencing with *"...and"* in line 1 and ending with *"...1993"* in line 2 of the second paragraph.

The first five paragraphs marked with asterisks(*) under the heading **RECOMMENDATIONS.**

All the words from *"...and to"* in line 3 to *"...placement"* in line 6 of the sixth paragraph marked with an asterisk(*).

The exempt status of the balance of the edited material in Documents L and P remains to be determined by the application of part (b) of clause 6.

(d) The applicability of clause 6 to Documents M and Q

73. **Document M** is an informal note from Mr Leadbetter to Ms Murray. I say it is informal because it is addressed to 'Maxine' rather than Ms Murray and it is initialled only by Mr Leadbetter. He told me this document was prepared as a briefing note in response to a letter that Mr Read had written to the Public Service Commissioner. I have concluded, from the substance of this note, that it was prepared to enable Ms

Murray to respond to Mr Read on behalf of the Public Service Commissioner. Although the document relates to a collateral issue it is not integral to the resolution of the grievance and it cannot be said that the document is part of the deliberative processes of the Public Service Commission. For this reason I find that it does not meet the requirements of clause 6(1)(a) and therefore is not exempt.

74. **Document Q** is entitled "Addendum to my report on Chris Read's letters to the Public Service Commissioner and Myself". Again it is informally addressed to 'Maxine' and I take this to mean that it is an addendum to Document M. Document Q contains opinions of Mr Leadbetter and exemption is claimed for the edited passages only. The edited parts of this document discuss administrative matters that have arisen during the course of the grievance investigation and recommendations to deal with these. The last paragraph is a comment made by Mr Leadbetter on the ratings received by Mr Read in a 1991 Staff Development Report. I do not consider that this document is part of the deliberative processes of the agency for the reasons already given and therefore it is not within the requirements of clause 6 (1)(a).

The Public Interest Test - Clause 6 (1)(b)

75. The agency's claims for exemption for **Documents L and P** based on clause 6, identified four public interest factors said to show that disclosure of these documents, or parts of documents, would be contrary to the public interest. These factors may be summarized as follows:

(i) The public interest, following the Royal Commission Into Commercial Activities of Government and Other Matters and the McCarrey Inquiry, in identifying undesirable practices in the Public Service and a public interest in accountability processes and procedures which is being facilitated by the operations of OMP.

(ii) The public interest in preserving the operational efficiency of OMP because of the role it plays in maintaining an harmonious, efficient and accountable Public Service and in ensuring that public sector employees are treated fairly and equitably.

(iii) The public interest in preserving the confidentiality of some information given to OMP and certain processes of OMP in order that employees can enter the grievance system confident that they are protected and that the independence and integrity of OMP is maintained.

(iv) The public interest in avoiding harm to the Public Service by the promotion of litigation because the release of some of the documents may facilitate litigation against an agency or members of that agency.

76. In *Re Murtagh*, the President of the Tribunal, outlined the general principle applying to the public interest test under s.36(1)(b) in the Commonwealth Act, and said (at p.121):

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

77. In expressing the requirements in this manner it is clear that the equivalent exemption under clause 6(1) of the WA Act is not established merely by a belief that because documents form part of the deliberative process, disclosure would be, for this reason alone, contrary to the public interest. More is required to satisfy me according to the terms of the statute. The burden of proof of exemptions is on the agency under s.102(1) which provides:

> ***102**. (1) Except where subsection (2) or (3) applies, in any proceedings concerning a decision made under this 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.*

78. I have a difficulty with the submissions of the agency because of the absence of any tangible proof of its claims of detriment if access is granted to these documents. Most of the arguments are mere speculation as to the consequences of disclosure rather than evidence of such. Accordingly I have examined the contents of the disputed documents in order to assess the potential harm and to make a judgment as to where the balance of the public interest should be. This was an acceptable approach in *Re Brog and Department of Premier and Cabinet* (1989) 3 VAR 201 at 209 where the Tribunal addressed this point and said that proof that disclosure would be contrary to the public interest:

> "*...might arise in the contents of the documents themselves. Matters of mischief, potential for mischief, misinterpretation and undermining of confidence, are prospective and therefore it is the possibility of the fact with which the Tribunal is concerned.*
>
> *Ordinarily the Tribunal will require appropriate evidence as to that possibility and submissions from the bar are not a substitute for such evidence. However, in a particular case, the documents themselves might be such a substitute."*

79. I do not accept the agency's claim for exemption based on the first ground of public interest, which argues that the existence of OMP is essential to ensure the accountability of the Public Service. This submission conveniently ignores the existence of other means to ensure such accountability. For example, in addition to the function performed by OMP, other mechanisms include FOI itself and investigation by the State Ombudsman. I can find nothing in the disputed documents

which suggests to me that it would be contrary to this public interest to reveal the report of an investigator to his superior in which he outlines the results of his inquiries and his recommendations. In fact the purpose of the WA Act will be further served by such a disclosure.

80. In support of its second argument, the agency emphasized the informal approach adopted by OMP, the sense of trust which was developed with clients and suggested that there was a public interest in this style of operation which produced better results. When pressed for further details on this point Mr Leadbetter said that the Public Service Commissioner possessed coercive powers to conduct formal hearings but these were used infrequently and were generally reserved for more serious matters. In contrast OMP had dealt with a significant number of grievances (including appeal grievances) since 1989 as the following figures show:

1989/90	142
1990/91	122
1991/92	105
1992/93	205
1993/Jan 94	74

81. Mr Leadbetter outlined the monitoring processes applied by OMP and the education program to advise employees and management of their rights and responsibilities in the workplace. He said the informal approach adopted by OMP is conducive of better results and I recognise that there is a public interest in efficient processes which save time, effort and money. It is preferable in my view, for information to be volunteered in an atmosphere of trust without resort to the formal investigative powers of the Public Service Commissioner. There is also a public interest in establishing programs to advise public sector employees of their rights and managers of their responsibilities, although this result could also be achieved in other ways such as by accessing information under FOI.

82. Disclosure of the reports of Mr Leadbetter, in my view, will not affect procedures used by OMP to investigate grievances. The aspects of the system which are said to enhance efficiency will be unaffected by the release of final documentation describing these procedures. There is no evidence, nor any suggestion, that Mr Leadbetter himself would be affected in the proper performance of his duties by disclosure of these documents.

83. I accept that there is a public interest in any system which allows grievances to be aired and also in fostering a culture where employees are confident that they will not be victimized for speaking out against perceived injustices. I consider that this is an important factor given that legislative support for such a process was recommended by the 1992 Royal Commission. In the absence of "whistle-blower" legislation in Western Australia, the agency's arguments against disclosure on this ground carry some weight. I also recognise the public interest in a system which balances protection for "whistle-blowers" and the right of an individual to know, and have the opportunity to answer, allegations against him or her. However, the question in this

instance, is whether disclosure of these reports would affect the desirable aspects of the grievance system, including the confidentiality of information, to such an extent that disclosure would, on balance, be contrary to the public interest.

84. I accept the submission of the agency that the effectiveness of OMP depends on the assurances of confidentiality which it is able to give to public sector employees. Although confidentiality is not a separate ground under clause 6(1)(b), it is a material factor to be considered in balancing the public interest factors for and against disclosure. The integrity of the system can be maintained if there is certainty about maintaining confidences. In so far as disclosure of **Documents L** and **P** reveal the substance of confidential communications found to be exempt under clause 8(2) the relevant parts can effectively be deleted wherever they appear in these documents. This procedure will provide that degree of certainty necessary for integrity and, at the same time, allow disclosure of the majority of the documents in dispute. The parts which require deletion for these reasons are as follows:

> The sentence commencing with the word *"Mrs..."* and ending with the word *"...parties."* in lines 6 and 7 of the paragraph numbered 4 on Folio 225 in **Document L.**
>
> The last sentence in the second paragraph of Folio 226 in **Document L.**
>
> The paragraphs commencing with *"Interviews with..."* and finishing with the words *"...Mr Pope."* on Folio 228 in **Document L**
>
> The sentence commencing *"He eventually..."* and concluding with *"...the enclosure."* in the last paragraph of Folio 326 in **Document P.**

85. The fourth ground of public interest is rejected for the reason that I cannot see how the release of these documents would promote litigation and even if this is likely, there is a public interest in all citizens being able to exercise their rights at law where the facts establish an appropriate cause of action.

86. The applicant contested the public interest claims of the agency although he was not obliged to do so. He stated that he was entitled to be told of the reasons for the agency's decision in relation to his grievances and that there was a public interest in him being afforded natural justice on this issue. Among the disputed documents, there was no single document containing the information in the form that he expected although disclosure of any number of documents could provide the information he was seeking. I consider the argument in favour of disclosure based on a right to know the reasons for administrative decision-making, to be the essential feature of Freedom of Information legislation.

87. I accept that there is a public interest in the efficiences to be gained by an informal grievance system that provides a means of educating staff about their rights in the workplace and a means to encourage and facilitate the giving of information in confidence about undesirable practices in the Public Service. However the agency has been unable to satisfy me that, on balance, disclosure of the disputed documents would have an adverse effect on the thinking processes of this agency or that the system would be jeopardised by the release of these documents.

88. I am persuaded that disclosure of confidential communications will have an adverse effect on the operations of OMP and that this would be contrary to the public interest because it would diminish the capacity of the agency (the Public service Commission) to deal with grievances less formally and more speedily. However, I am not persuaded that release of other matter would have that effect, or would be contrary to the public interest on any other basis. Therefore, I find that other than matter described in paragraph 84 above and found to be exempt under clause 8(2), **Documents L and P** are not exempt. In reaching this conclusion I have been influenced by the fact that the documents contain "low level" communications, considering the overall activities of government and agencies, and are "routine" documents as distinct from those that reveal creative debate and candid consideration of alternatives such that they should be protected from disclosure.

89. I am also influenced by the fact that the principles contained in Administrative Instruction 1001 include a requirement that information relating to the grievance and its resolution should be made available to the parties concerned. It seems to me that these reports should be disclosed according to the agency's own principles, if not under Freedom of Information. On balance, the public interest in access to this information outweighs any countervailing public interest against disclosure based on mere speculation as to what might occur to OMP in particular, or to the Public Service in general.

CONCLUSION

90. For the reasons outlined, **Documents A, B, C, D, E, G and H** are not exempt under clause 6(1) but they are exempt on the ground that they are confidential communications under clause 8(2).

Document F is not exempt under clause 6(1) or clause 8(2) but parts of Folio 116 are exempt under clause 7 because they attract legal professional privilege. The applicant is not entitled to access those parts of Folio 117 which may contain personal information of a third party as described in paragraph 67 as that information is outside the ambit of the application.

Document J is not exempt under clause 6(1) or clause 8(2) and the applicant is entitled to access.

Parts of the second paragraph in **Document N** are not exempt under clause 6(3) and access to an edited version should be provided in accordance with the determination at paragraph 69.

The applicant should not be provided with access to the edited parts of **Documents L and P** (and copies thereof, see paragraph 70) that may contain personal information about third parties in accordance with the determination at paragraph 72.

The balance of the edited parts of **Documents L and P** (and copies thereof, see paragraph 70) are not exempt under clause 6(1) but the passages described in paragraph 84 are exempt under clause 8(2).

Documents M and Q are not exempt under clause 6(1) and the applicant is entitled to access.

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