

ENVIRONS KIMBERLEY AND RESOURCES DEV.

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: 97157
Decision Ref: D0031998**

Participants:

Environs Kimberley Incorporated
Complainant

- and -

Department of Resources Development
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to evaluation of Expressions of Interest – access to edited copies – clause 6 – deliberative processes – identification of particular deliberative process – whether contrary to the public interest to reveal deliberations of agency.

Freedom of Information Act 1992 (WA) Schedule 1 clauses 3, 4, 6(1); Glossary.
Re Waterford and Department of Treasury (No. 2) (1984) 5 ALD 588
Ministry for Planning v Collins (1996) 93 LGERA 69

DECISION

The decision of the agency is set aside. The disputed matter is not exempt.

**B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER**

19th January 1998

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Department of Resources Development ('the agency') to refuse Environs Kimberley Incorporated ('the complainant') access to parts of documents requested by the complainant under the *Freedom of Information Act 1992* ('the FOI Act').
2. The agency is responsible for ensuring the efficient and effective development of the natural resources of Western Australia by the private sector for the on-going benefit of the community of the State. In performing that function, the role of the agency includes, among other things, the facilitation of the development and operation of major projects by managing contact between the proponents, government and the community and coordinating timely decision-making and approval procedures.
3. In September 1996, the agency published Issue 2 of a Community Newsletter that provided information about the progress of the State Government in assessing opportunities for new irrigated agriculture in the West Kimberley region of the State. The newsletter reported that a process had commenced to allow the selection of a suitable private proponent, or group of proponents, to carry out detailed feasibility studies in the West Kimberley.
4. An advertisement in national and local newspapers on 4 January 1997 called for Expressions of Interest (EOIs) to undertake and finance a feasibility study of an integrated, large scale irrigated agriculture industry in the West Kimberley known as the West Kimberley Water and Land Resources Development. Subsequently, a Technical Review Panel ('the Panel') comprising officers from various government agencies was formed to evaluate the EOIs received from three proponents.
5. Following the analysis and evaluation, the Panel prepared a report and submitted a recommendation to the West Kimberley Land and Water Resources Steering Committee ('the Committee'). The Committee reported to the Policy Committee for the West Kimberley Land and Water Resources Development Project and, in July 1997, Cabinet ratified the selection of the preferred proponent. It is my understanding that a Memorandum of Understanding recording the agreement between the Government and the preferred proponent is being finalised.
6. By letter dated 18 April 1997, the complainant applied to the agency under the FOI Act seeking access to documents relating to the proposed development. Access to a number of documents was granted, but access to 6 others was refused. The agency claimed that those documents were exempt under clauses 3, 4, 6 and 9 of Schedule 1 to the FOI Act.

7. The complainant sought internal review of the agency's initial decision to refuse access to the 6 documents. Subsequently, the agency granted the complainant access to one additional document, but maintained its claims that the other 5 were exempt. By letter dated 26 August 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision to refuse it access to 5 documents.

REVIEW BY THE INFORMATION COMMISSIONER

8. I obtained the disputed documents from the agency. Preliminary conferences were held with the agency and the complainant to determine whether this complaint could be resolved by negotiation between the parties. As a result of those discussions, the agency agreed to provide the complainant with access to edited copies of 3 documents (the documents numbered 290, 291 and 292 on the agency's schedule). However, the agency maintained its claims for exemption for 2 documents (Documents 171 and 294).
9. The complainant subsequently withdrew its complaint in respect of Documents 171, 290 and 294. However, the complainant maintained its complaint in respect of the matter deleted from Documents 291 and 292. After considering the material before me, on 10 November 1997, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the agency had not established a valid claim for exemption for the matter to which access had been refused in Documents 291 and 292.
10. I received a further submission from the agency and provided the complainant with a copy of that submission. Although a further negotiated settlement of this complaint was attempted, that attempt was unsuccessful. The complainant did not withdraw its complaint in respect of the matter in dispute.

THE DISPUTED MATTER

11. The only matter remaining in dispute is that matter deleted from the edited copies of Documents 291 and 292. Document 291 comprises notes of a meeting of the Panel held on 21 April 1997. The matter to which access is refused appears in Agenda Items 3 and 4. Agenda item 3 is headed "Review and Analysis Proposals". It consists of the figures in the table showing the comparative results of the analysis of the submissions by the three proponents, and the final three paragraphs under this agenda item. Agenda item 4 is headed "Timeframe for Selection Process" and the disputed matter consists of the whole of the text under this heading. Document 292 is a draft document entitled "Evaluation of Proposals" and consists of a comparative table containing the evaluation of the three proposals against the selection criteria. The complainant has been given access to the selection criteria, but not the evaluations.

THE EXEMPTION

12. The agency claims the disputed matter is exempt under clause 6 of Schedule 1 to the FOI Act. Clause 6 provides:

"6. *Deliberative processes*

Exemptions

(1) Matter is exempt matter if its disclosure -

(a) would reveal -

(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) any consultation or deliberation that has taken place,

in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency;

and

(b) would, on balance, be contrary to the public interest."

13. Clearly, the requirements of both paragraphs (a) and (b) must be satisfied in order to establish a valid claim for exemption under clause 6(1). I have discussed and considered the purpose of the exemption in clause 6 and the meaning of the phrase "deliberative processes" in a number of my formal decisions. I agree with the view of the Commonwealth Administrative Appeals Tribunal in *Re Waterford and Department of 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.

14. The disputed matter in Document 292 consists of the evaluative opinions of the members of the Panel about the comparative strengths and weaknesses of each of the EOIs against the selection criteria. The disputed matter in Document 291 contains a summary of that information and sets out the subsequent steps and a timeframe for the completion of the selection process. Based on the material before me, I am satisfied that the disputed matter comes within the terms of clause 6(1)(a).

Clause 6(1)(b) – “contrary to the public interest”

15. The agency bears the onus of establishing that the disclosure of the disputed matter would be contrary to the public interest. The agency submits that the

disputed matter forms part of the deliberative process of the agency commencing with the calling for and the evaluation of the EOIs and concluding with the completion and signing of a Memorandum of Understanding between the Government and the successful proponent. The agency submits that the release of information before the completion of the process may seriously threaten the progress of the project and therefore its release would be contrary to the public interest, which is served by the project proceeding.

16. In summary, the agency submits that it would be contrary to the public interest to allow disclosure of the disputed matter because:
- release of information may cause the proponent to feel that it cannot deal with government agencies in an open and frank manner;
 - the matters contained in the documents are sensitive and their release has the potential to adversely impact on the project;
 - the complainant has already had access to the selection criteria and can readily see that weight was given to issues beyond economic criteria;
 - the complainant will be able to offer its views on the environmental impact of the proposal when formal environment assessment is sought by the proponent;
 - release of the information before the Memorandum of Understanding is finalised has the capacity to interfere with negotiations for the completion of the Memorandum of Understanding and to threaten the progress of the project; and
 - the public interest is served best by allowing the processes to proceed to their finality rather than risk a premature end for other reasons.

Consideration

17. One of the aims of the FOI legislation is to open the decision-making processes of government agencies to scrutiny by the public to foster accountability and to allow the public to participate in those processes as far as possible. I consider that there is a public interest in the disclosure of documents that inform the public about how government agencies make their decisions because such disclosure enhances accountability.
18. However, I consider that it would be contrary to the public interest to prematurely disclose documents while the deliberative process is continuing if there is evidence that the disclosure of such documents would adversely affect that process, or that disclosure would, for some other reason, be demonstrably against the public interest. In either of those circumstances I consider that the public interest is served by preserving the integrity of the agency's deliberative processes.
19. In this instance, I accept the agency's submission that its deliberative processes in this project are continuing and will only be complete when the Memorandum of Understanding is signed. However, the disputed matter relates to an earlier stage

of the process relating to the selection of the preferred proponent. That stage of the process is complete and the agency's Community Newsletter published in August 1997 summarises the selection criteria applied by the Panel, names the preferred proponent and briefly outlines its proposals for the feasibility study.

20. The agency submits that the release of the disputed matter at this stage in the deliberative process could adversely impact on the project as the preferred proponent may decide not to proceed with the consequent risk to the public of losing the project opportunity permanently or for an extended period of time. However no probative evidence has been placed before me to support that submission.
21. I have balanced against the risk referred to in the agency's submission the other evidence before me. That includes the nature of the disputed matter which I have described in paragraph 11 which has been used by the agency to reach a decision that, clearly, has direct implications for the Kimberley community. From my examination of the disputed matter, I have concluded that it contains no commercial or business information relating to the preferred proponent. It is my understanding, from the August 1997 edition of the agency's Community Newsletter, that the preferred proponent has already carried out six years of pre-feasibility research costing approximately \$2.5 million. I invited the preferred proponent to give me its views on whether it would object to the release of the disputed matter. It has not done so.
22. Based on the material before me I am not persuaded that it would be contrary to the public interest to disclose the disputed matter. Further, I am not persuaded that any other public interest would be harmed by the disclosure of the disputed matter. Accordingly, I find that the disputed matter is not exempt under clause 6 of Schedule 1 to the FOI Act and the complainant is entitled to be given access to unedited copies of Documents 291 and 292.
