

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

**File Ref: F2004049
Decision Ref: D0042005**

Participants:

Graham David Mahony
Complainant

- and -

City of Melville
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to CEO’s job performance and contract renewal and other matters – clause 7 - legal professional privilege - clause 11 - effective operation of agencies - ‘candour and frankness’ argument - whether a substantial adverse effect - scope of the access application – clause 3(1) - personal information - prescribed details - whether disclosure would be in the public interest - section 26 – whether reasonable grounds to believe that documents exist or should exist – sufficiency of searches and inquiries.

Freedom of Information Act 1992 (WA): section 6(a), 26(1), 102(1), 102(3); Schedule 1, clauses 3(1), 3(3), 3(4), 3(6), 7(1), 11(1)(c) and 11(1)(d)

Freedom of Information Regulations 1993: Regulations 9(1) and 9(2)

Local Government Act 1995: sections 5.39, 5.94 and 5.97

Esso Australia Resources Ltd v The Commissioner of Taxation (1999) 168 ALR 123

Attorney-General’s Department and Another v Cockcroft (1986) 64 ALR 97

Harris v Australian Broadcasting Corporation (1983) 78 FLR 236

Re James and Australian National University (1984) 2 AAR 327

Re Rindos and University of Western Australia [1995] WAICmr 20

Manly and Ministry of Premier and Cabinet (1995) 14 WAR 550

Re National Tertiary Education Industry Union (Murdoch Branch) and Murdoch University and Others [2001] WAICmr 1

DECISION

The decision of the agency to refuse access to the disputed documents or to give access to edited copies is varied. I find that:

- Document 8 is exempt under clause 7(1) of Schedule 1 to the *Freedom of Information Act 1992*;
- the information in Documents 1-7, 9(b) and 10(b), listed in the Appendix to the reasons for this decision, is exempt under clause 3(1);
- the documents are not otherwise exempt; and
- the agency's decision to refuse access to other documents in accordance with s.26 was justified.

D A WOOKEY
A/INFORMATION COMMISSIONER

30 March 2005

REASONS FOR DECISION

1. This complaint arises from a decision made by the City of Melville ('the agency') to refuse Mr Mahony ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 27 December 2003, the complainant applied to the agency under the FOI Act for access to:
 - (1) copies of all performance review reports relating to the contracted position of the Chief Executive Officer ('CEO') of the agency since the incumbent, Mr John McNally, commenced employment in that position;
 - (2) a copy of the report prepared by an independent consultant relating to the renewal of the CEO's contract in 2004, together with all notes, records of meetings and other documents prepared in relation to that report during the period of that consultancy; and
 - (3) a copy of the report, investigation notes and other notes, photographs and related documents in respect of an alleged incident (described by the complainant) which occurred at the agency's 2002 Christmas celebrations.
3. On 6 January 2004, the agency refused the complainant access to those documents, without identifying them, on the basis that they were exempt under clauses 8(2), 11(1)(a), 11(1)(c) and 11(1)(d) of Schedule 1 to the FOI Act. With regard to the documents in item (2) above, the agency advised the complainant that the independent consultant's working papers had never come into the agency's possession and that those documents had since been shredded by the consultant. In reference to item (3), the agency advised the complainant that "*no incident as you describe it took place.*" The complainant later advised the agency that the alleged incident took place in 2001 and not 2002, as previously stated.
4. On 17 March 2004, the agency confirmed its decision to refuse access to the requested documents under clauses 8 and 11. On 18 March 2004, the complainant applied to the Information Commissioner for external review of the agency's decision.

REVIEW BY A/INFORMATION COMMISSIONER

5. Following the receipt of this complaint, I obtained the disputed documents in this matter and the agency's FOI file. My Legal Officer met separately with the complainant and with the agency. Subsequently, the agency gave the

complainant a schedule which identified the documents and information claimed to be exempt and access to edited copies of all but two of the documents.

6. Both parties provided me with further information concerning their respective positions and the agency then claimed that the disputed information and documents were exempt under clauses 3, 7 and 11 of Schedule 1 to the FOI Act.
7. On 20 August 2004, I informed the parties, in writing, of my preliminary view of this complaint. My preliminary view was that one document was exempt under clause 7(1) of Schedule 1 to the FOI Act and certain information in the remaining documents was exempt under clause 3(1) but that none of the disputed documents or information was exempt under clauses 11(1)(c) or 11(1)(d). It was also my preliminary view that there was nothing in the information then before me to establish that any further documents within the scope of the complainant's access application exist or should exist.
8. In response to my preliminary view of this complaint, the agency gave the complainant access in part to one document and access in full to three other documents, but maintained its claims for exemption in respect of one document and certain information in others.
9. The complainant made a lengthy written submission in response to my preliminary view. In ensuing discussions, in an endeavour to reach a conciliated resolution of this matter, the complainant withdrew his complaint in respect of certain information which I considered to be "prescribed details" pursuant to clauses 3(3) and 3(4) of Schedule 1 to the FOI Act and therefore not exempt. However, as at least some of that information is contained in a document to which I understand (from his latest submission of 6 January 2005) the complainant continues to seek full access, a conciliated resolution has not been able to be achieved. Since my preliminary view was that those details were not exempt, it seems to me that the question of whether that information should be disclosed remains in issue and it is therefore included in my decision on this complaint.
10. Mr McNally did not respond to an invitation to be joined as a party to this complaint in his personal capacity and has made no submissions in respect of the matter.

THE DISPUTED DOCUMENTS AND INFORMATION

11. The whole of Document 8 and certain information in documents 1-7, 9(b) and 10(b) remain in dispute. The disputed documents are listed and described below:
 - Documents 1-5 - organisational reviews of the agency for the financial years 1998/99-2002/03;
 - Document 6 - Performance Evaluation Report for 1997-1998;
 - Document 7 - Preliminary Report on the Annual Salary Review for the CEO, 1997-1998;

- Document 8 - facsimile coversheet from Clayton Utz Lawyers to the agency with an attachment, dated 8 January 1999;
- Document 9(b) - letter report dated 1 December 2003 from an independent consultant to the agency; and
- Document 10(b) - memorandum dated 27 November 1998 from the CEO to the Mayor and the Organisation Performance Review Panel members.

12. The agency claims that Document 8 is exempt under clause 7(1) and certain information in Documents 1-7, 9(b) and 10(b) is exempt under clauses 3(1), 11(1)(c) and 11(1)(d). As I understand it, the parts of the documents which remain in dispute are as described in the following table.

Document No.	Disputed information
1	<ul style="list-style-type: none"> • Pages 67 to 71 inclusive; and • the results/scores and comments of elected members on pp.72-76 inclusive.
2	<ul style="list-style-type: none"> • Pages 44 to 47 inclusive; and • the results/scores and comments of elected members on pp.48-53 inclusive.
3	<ul style="list-style-type: none"> • Pages 39 to 42 inclusive.
4	<ul style="list-style-type: none"> • The results/scores of elected members and their comments in bullet points 1, 2, 9 and 10 on p.26; • pages 34 to 37 inclusive; and • the results/scores of elected members on pp 38-41 inclusive.
5	<ul style="list-style-type: none"> • Pages 29-33 inclusive; and • the results/scores and comments of elected members on pp 34 to 41 inclusive.
6	<ul style="list-style-type: none"> • Pages 35-39 inclusive; and • the results/scores and comments of elected members on pp 40 to 45 inclusive.
7	<ul style="list-style-type: none"> • The four sets of initials listed at the end of page 5 under the heading "MEETING 26/10/98".
8	<ul style="list-style-type: none"> • The whole of Document 8.
9(b)	<ul style="list-style-type: none"> • The name in the second last line of the second paragraph on p1; • the name in the second, eighteenth and twenty sixth lines, the sixth to fifteenth words inclusive of the twenty fourth line and all but the last three words of the twenty fifth line on p.2; • the eight bullet points on p.3; • all of p.4; • all of p.5 except the first two headings and first three bullet points; • all of the second paragraph, the last seven words of the third line and all of the fourth line of the third paragraph, the last three words of the second line and first four words of the third line of the fourth paragraph on p.6; • the third and fourth paragraphs and the second table on p.7; and • the name and signature on p.8.
10(b)	<ul style="list-style-type: none"> • Paragraphs 4 and 5 on page 1.

THE EXEMPTIONS CLAIMED

Clause 7 - legal professional privilege

13. The agency claims that Document 8 is exempt in full under clause 7(1) of Schedule 1 to the FOI Act. Clause 7(1) provides that matter is exempt if it would be privileged from production in legal proceedings on the ground of legal professional privilege.
14. Legal professional privilege protects from disclosure confidential communications between clients and their legal advisers if made or brought into existence for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* (1999) 168 ALR 123 at 132.

The complainant's submissions

15. The complainant submits that Document 8 may not be exempt if the circumstances are that the CEO sought the advice the subject of the communication. The complainant submits that a private matter between the CEO and his lawyer should not incur expenditure of ratepayers' monies and, if Document 8 contains a communication between the CEO and his lawyer, that document may not be confidential as it is now in the possession of the agency.
16. The complainant also says that the Council of the agency ('the Council') approved a pay increase for the CEO at the same time as it announced the extension of the CEO's contract and he considers that this undermined the independence of the review process and that ratepayers were not adequately informed about that process at the annual electors' meeting. In consequence, the complainant submits that it is necessary to access Document 8 to determine whether or not the review process was "*a public sham*".

Consideration

17. I have examined Document 8. In my opinion, it is *prima facie* privileged, being a confidential communication between the agency - 'the client' for the purpose of the privilege - and its legal advisers which, on its face, was made for the dominant purpose of giving legal advice. There is nothing in the material before me or on the face of the document to suggest that Document 8 relates to information sought by the CEO in his private capacity.
18. I understand the complainant's reference to the need to access the document to determine whether the review process was a sham is a submission concerning the public interest. Since clause 7(1) is not subject to a 'public interest test', the complainant's submissions in relation to that issue are not relevant to the matters for my determination.

19. I find that Document 8 is exempt under clause 7(1) because it would be privileged from production in legal proceedings on the ground of legal professional privilege.

Clause 11 - effective operation of agencies

20. The agency claims that the disputed information in Documents 1-7, 9(b) and 10(b) is exempt under clauses 11(1)(c) and 11(1)(d) of Schedule 1 to the FOI Act.

21. Clause 11, insofar as it is relevant, provides:

- “(1) *Matter is exempt matter if its disclosure could reasonably be expected to –*
- (a) ...
- (b) ...
- (c) *have a substantial adverse effect on an agency's management or assessment of its personnel; or*
- (d) *have a substantial adverse effect on an agency's conduct of industrial relations.*

Limit on exemptions

- (2) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*
22. In *Attorney-General's Department and Another v Cockcroft* (1986) 64 ALR 97 at page 106, the Full Federal Court said that the words ‘could reasonably be expected’ 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 the stated consequences to follow if the documents in question were disclosed.
23. To establish an exemption under clauses 11(1)(c) or 11(1)(d) the agency must show that disclosure could reasonably be expected to result in a "*substantial adverse effect*" on the management or assessment of its personnel or on the conduct of its industrial relations. The requirement that the adverse effect must be ‘substantial’ is an indication of the degree of gravity that must exist before a *prima facie* claim for exemption is established: see *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236. In the context of these exemption provisions, I accept that ‘substantial’ is best understood as meaning ‘serious’ or ‘significant’- see, for example, *Re James and Australian National University* (1984) 2 AAR 327 at 341.

The agency's submissions

24. In relation to clause 11(1)(c), the agency advises me that the performance measurement scores and comments from elected members and officers in relation to the organisational reviews and the CEO's performance reviews were obtained in the course of the agency's formal processes for managing and assessing its personnel and it has always been understood that those are confidential processes.
25. In its submission of 23 December 2004, in response to my preliminary view, the agency continued its objection to disclosure of the disputed information in Documents 1-6 on the basis that "... *they are privileged communications between the Chief Executive Officer and his Board of Directors ... and have not even been directly shared with the Executive Managers of the Divisions to which they relate.*" The agency submitted that, although each comment had been acted upon, neither the comments nor the documents had been directly presented or shown to the Executive Directors "... *because to do so would be prejudicial to the good management of the Local Authority*".
26. The agency says that the last page of Document 7 contains handwritten notes made as an aide-mémoire by the Manager of Human Resources in closed session and submits that if this information were disclosed, "*it is likely that no notes would ever be made in this context again or that if they were, a regimen would be put in place to destroy ephemeral records before the meeting adjourned.*" However, in response to my preliminary view, the agency released those notes with the exception of four sets of initials.
27. The agency says that Document 9(b) is a confidential report prepared by an independent consultant as part of a confidential review process, which resulted in the CEO's reappointment. The agency submits that if the disputed information in this document were disclosed it would, in future, lead to a loss of confidence by the Council and the CEO in such review processes.
28. The agency notes that Document 10(b) is a memorandum from the CEO to the elected members containing his personal observations prior to a meeting concerning, among other things, his salary and contract renewal. The agency submits that, if the CEO is unable to put in writing his views on personal issues - including his own contract - to his employer without the risk of disclosure, it would jeopardize necessary communication or, if done verbally, could lead to misunderstanding or unnecessary innuendo. The agency submits that "[t]he provisions of clause 11 surely apply to the confidential elements of a confidential memo between an employee and his employer, when sharing personal and contract information."
29. In relation to clause 11(1)(d), the agency notes that the CEO is the only employee of the agency who is directly accountable to the Council. The agency submits that the disclosure of the CEO's performance measures and the report in Documents 1-7 is "*extremely likely*" to have a damaging effect on the relationship between the CEO and the Council in the context of industrial relations. The agency submits that participants in that process would be

unlikely to give their frank opinions in future if that information were disclosed.

The complainant's submissions

30. In his letter to me seeking external review, the complainant says that the CEO was employed by the agency in 1994 under a five-year contract, which was extended in 1999 for five years and extended again in 2004 for a further five years. The complainant advises me that he is seeking access to the disputed information and documents to better understand the basis of the CEO's contract renewals and, in particular, to see whether the process was conducted in accordance with the *Local Government Act 1995* ('the LG Act') or was biased or flawed in any way.
31. The complainant also says that ratepayers finance the agency in large measure and - as the 'shareholders' of the agency - they are entitled to open and transparent government, which should include periodic market-testing of contracted positions. He submits that it is in the public interest that the Council and its elected representatives are fully open and accountable for the decisions they make.
32. The complainant alleges that there is a perception of bias and a lack of impartiality in the re-appointment process conducted by the Council and he has provided me with copies of certain documents which he submits support this allegation. The complainant submits that ratepayers should have the right to explore whether there is any possibility of bias or undue influence in the process of evaluating whether or not to extend the CEO's contract.
33. The complainant says that, as part of the process of evaluation for the latest extension of the CEO's contract, the agency engaged an independent consultant who prepared a report (Document 9(b)). He submits that this document should be released in its entirety so that electors can understand why the CEO's position was not opened to public competition and so that it can be demonstrated that the process is transparent and that electors have obtained the best value for their money.
34. The complainant submits that it is in the public interest to make the details surrounding the renewal of the CEO's contract available for public review because most of that information is not confidential - although the basis of the decision to renew the CEO's contract has not been disclosed - and ratepayers are entitled to know how the \$200,000 plus salary package paid to the CEO is determined.
35. The complainant submits that it is in the public interest for ratepayers to know what arguments were considered by the Salary Review Committee and the Council on the CEO's renewal of contract and what negotiations took place. The complainant also submits that the agency should not be permitted to hide behind the FOI Act and use it as an excuse for not releasing information relating to a contracted position.

Clause 11(1)(c)

36. As I understand it, the agency raises two issues in relation to this exemption. The first is that the agency's procedures for its organisational review and the performance review and re-appointment of the CEO are confidential and that the disclosure of the disputed information would lead to a loss of confidence in those procedures. The second is that the disclosure of the disputed information in Documents 1-7, 9(b) and 10(b) would inhibit frank and open communication.
37. Documents 1- 6 are the agency's organisational or performance reviews for the years 1997/98 to 2002/03. I understand that the purpose of those reviews is to enable the elected members to assess the effectiveness of the overall management of the agency. The purpose of the reviews is to examine the performance of the CEO and the different divisions of the agency for the year in question. The six documents are all marked as being confidential and not for public distribution, although the agency has now given the complainant access to edited copies of them.
38. Although the agency asserts they are 'privileged communications', it has not explained the basis of that claim, and they are not, on the face of it, subject to any of the recognised 'privileges' of which I am aware. The disputed information - which has been deleted from those documents - includes the elected members' comments on the performance of Corporate Services, Community Services and other agency divisions and on the CEO's skills, derived from questionnaires completed by the elected members. The elected members are not referred to by name and it does not appear to me that they can be identified from their comments or the ratings they have given to performance measures.
39. As I understand it, the agency claims that disclosure of the disputed information in Documents 1-6 could reasonably be expected to have a substantial adverse effect on the agency's management or assessment of its personnel on the basis that there would be a loss of confidence in its review procedures or that it would inhibit frank and open communication.
40. Document 9(b) is the report prepared by an independent consultant in December 2003 to assist the Council in relation to the CEO's performance review and the renewal of his contract. Among other things, Document 9(b) sets out the task methodology and comments from elected members (who once again are not individually identified). The agency submits that the disclosure of the disputed information in Document 9(b) would lead to a loss of confidence by the elected members and the CEO in the process of a confidential review by an independent consultant which would, in effect, lead to a loss of candour by the participants in future similar reviews with consequent prejudicial effects to the review process.
41. It appears to me that the agency's submissions in relation to the disputed information in Documents 1-6 and 9(b) amount to a 'candour and frankness' argument, which has been the subject of comment by the former Information

Commissioner ('the former Commissioner') in a number of decisions. In *Re Rindos and University of Western Australia* [1995] WAICmr 20 the former Commissioner said, at paragraph 37:

"That argument has been consistently rejected by the Commonwealth Administrative Appeals Tribunal and I have also rejected it ... In Re Murtagh and Commissioner of Taxation (1984) 54 ALR 313, at 326, the Commonwealth Tribunal said:

'The candour and frankness argument is not new. It achieved pre-eminence at one time but now has been largely limited to high level decision-making and to policy-making...No cogent evidence has been given to this Tribunal either in this review or, so far as we are aware, in any other, that the enactment of the FOI Act 1982 has led to an inappropriate lack of candour between officers of a department or to a deterioration in the quality of the work performed by officers. Indeed, the presently perceived view is that the new administrative law, of which the FOI Act 1982 forms a part, has led to an improvement in primary decision-making.'"

42. In this case, the agency is asking me to accept that the disclosure of the disputed information in Documents 1-6 and 9(b) could reasonably be expected to prevent, for example, the elected members from making frank comments about the performance of the CEO or the agency or, conversely, would prevent the CEO from making frank comments about the salary and conditions offered to him by the agency.
43. I consider that to be mere speculation by the agency which is not supported by evidence. It does not appear to me that the elected members' comments in the relevant documents can be attributed to any particular individual and - with the exception of the CEO - individuals are generally not identified since the focus in Documents 1-6, at least, is on how the agency as an organisation is functioning. In light of this, I do not accept that the elected members or the CEO would be less than candid in their comments or would not participate in the relevant review processes. Moreover, the agency has not identified how the adverse effects it has identified would be 'substantial' in nature.
44. Consequently, on the basis of the information before me, I am not satisfied that the agency has established the requirements of clause 11(1)(c) with respect to the disputed information in Documents 1-6 and 9(b), pursuant to the onus placed on it by section 102(1) of the FOI Act.
45. Document 7 is a report - prepared in 1998 for the elected members by the agency's Manager Human Resources - to advise on how the salary package for the CEO has evolved and how it compares to those offered by other local governments. Document 7 is marked "*highly confidential - not for distribution*". The agency has now given the complainant access to all but four sets of initials on page 5 of that report. I have examined that information which does not appear to me to be directly relevant to the management and assessment of the agency's staff. I do not accept the agency's submission that

the disclosure of this information could reasonably be expected to have a substantial adverse effect on the agency's management or assessment of its personnel because, in future, no officer would make notes on documents at meetings or that the agency would ensure that such notes would be destroyed. It is not clear to me how those actions would adversely affect the management or assessment of staff, let alone have a substantial adverse effect. Consequently, I am not satisfied that the agency has established the requirements of clause 11(1)(c) with respect to the disputed information in Document 7.

46. Document 10(b) is a memorandum, marked "*private and confidential*", from the CEO to the elected members on his 1998 Performance Review Panel and the agency has given the complainant access to an edited copy of that document. I have examined the disputed information in Document 10(b) and I do not accept the agency's claim that its disclosure would jeopardize communication between the CEO and the Council because this might mean that the CEO would have to rely on giving that kind of information verbally, which could lead to miscommunication. Once again, I consider this to be mere speculation on the part of the agency which is unsupported by evidence, and I find it difficult to accept the argument that a senior professional public servant could reasonably be expected to act in that way.
47. On the basis of the information currently before me, I do not accept that the disclosure of the disputed information in Document 10(b) could reasonably be expected to have a substantial adverse effect on the agency's management or assessment of its personnel.
48. I find that the disputed information in Documents 1-7, 9(b) and 10(b) is not exempt under clause 11(1)(c). In light of that finding, it is unnecessary for me to consider the application of clause 11(2) and the question of public interest.

Clause 11(1)(d)

49. The agency also claims that the disputed information in Documents 1-7, 9(b) and 10(b) is exempt under clause 11(1)(d). I have already considered the 'candour and frankness' argument raised by the agency in relation to its claim for exemption under clause 11(1)(c) and I do not accept it in relation to the agency's claim under clause 11(1)(d), for the same reasons.
50. The agency has provided me with no other submissions or evidence to establish that the disclosure of the disputed information in Documents 1-7, 9(b) and 10(b) could reasonably be expected to have a substantial adverse effect on its conduct of industrial relations.
51. Pursuant to section 102(1) of the FOI Act, the onus is on the agency to establish that its decision was justified or that a decision adverse to another party should be made. I refer to the comments of Owen J, in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at page 573, in relation to a claim for exemption under clause 4(3) of the FOI Act, when he expressed the nature of the onus the agency bears in the following way:

“How can the Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had “real and substantial grounds for thinking that the production of the document could prejudice that supply” or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker.”

52. In view of the above, I find that the disputed information in Documents 1-7, 9(b) and 10(b) is not exempt under clause 11(1)(d). Accordingly, it is unnecessary for me to consider the application of clause 11(2) and the question of public interest.

Clause 3(1) - personal information

53. The agency claims that the disputed information in Documents 1-7, 9(b) and 10(b) is exempt under clause 3(1). Clause 3 provides:

“(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).

Limits on exemption

- (2) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.*
- (3) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -*
- (a) the person;*
 - (b) the person’s position or functions as an officer; or*
 - (c) things done by the person in the course of performing functions as an officer.*
- (4) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed services for an agency under a contract for services, prescribed details relating to -*
- (a) the person;*
 - (b) the contract; or*
 - (c) things done by the person in performing services under the contract.*

- (5) *Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.*
- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*
54. The term ‘personal information’ is defined, in the Glossary in Schedule 2 to the FOI Act, to mean:
- “... information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –*
- (a) *whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
- (b) *who can be identified by reference to an identification number or other identifying particular such as a finger print, retina print or body sample”.*
55. In my view, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies. The definition of ‘personal information’ in the Glossary makes it clear that any information or opinion about a person from which that person can be identified is exempt information under clause 3(1).

The complainant’s submissions

56. Following the receipt of my preliminary view, the complainant provided me with further submissions and material. That material included media articles which the complainant says demonstrate the biased and conflicting manner in which members of the Organisational Review Committee (‘the ORC’) - which considered the reappointment of the CEO - conducted the review process. The complainant submits that those issues are of serious concern to ratepayers who want public scrutiny and accountability concerning the actions of the ORC.
57. In brief, the complainant submits that ratepayers should have the right to explore whether there is any possibility of bias or undue influence in the process of evaluating whether or not to extend the CEO’s contract and whether the review process was conducted fairly and independently. The complainant submits that there is a public interest in making this information available for analysis and review.
58. The complainant says that the CEO’s position has been renewed without competition twice, effectively leading to a 15-year uncontested contract with no way of determining whether ratepayers are obtaining best value for money. The complainant submits that it is in the public interest for the CEO’s contracted position to be market-tested since the State Supply Commission recommends this occur every five years and the Independent Commission

Against Corruption in New South Wales holds similar views. In addition, the complainant submits that ratepayers are entitled to know why the CEO's position was not market-tested; what alternatives were considered; and why those alternatives were rejected.

59. The complainant submits that ratepayers have the right to hold the Council and elected members publicly accountable for the use of public funds for a contracted position.
60. The complainant submits that if the methodology of the review process or the evaluation process is unsound or flawed there may be no justification for the renewal of the CEO's contract and that the denial of access to the assessments made of the CEO's performance prevents public scrutiny of this process. Accordingly, the complainant submits that it is in the public interest for the disputed information in Document 9(b) to be released so that:
- it can be reviewed to see whether it followed 'industry practice';
 - electors can see how various issues referred to by the members of the ORC were dealt with;
 - electors can understand why the CEO's position was not opened to public competition; and
 - it can be demonstrated that the review process is transparent and that electors have obtained the best value for their money.
61. The complainant advises that he is not seeking access to information concerning individuals in Documents 1-6 but that scores or summaries relating to the evaluation of the CEO's performance should not be exempt because it goes to the heart of the review process. In addition, the complainant submits that there is a particular public interest in disclosing the opinions of the members of the ORC in view of their public statements made during the review process and because those opinions relate to the position of the CEO in the course of performing the function of CEO.

The agency's submissions

62. In its letter to me of 3 May 2004, the agency submits that the disputed information is predominantly personal performance criteria that have been scored by elected members and officers of the agency. The agency says that, although it is prepared to release general performance indicators, the matter which the agency claims is exempt relates to personal information about the CEO "*in respect of his personality, attributes, behavioural style and other measures of his individuality.*"
63. The agency submits that, although it has released the methodology relating to the CEO's Functions and Performance Measures to the complainant, once those measures have scores recorded against them and personal comments made in respect of them, that information is personal information about the CEO which is exempt under clause 3(1).

Consideration

64. The first question that I must consider is whether, if disclosed, the disputed information in Documents 1-7, 9(b) and 10 (b) would reveal “personal information”, as that term is defined in the FOI Act and, if so, whether any of the limits on the exemption applies to that material.
65. The disputed information in Documents 1-7 and 9(b) includes references to individual officers of the agency and an independent contractor who has performed services for the agency under a contract of services. That material includes: names, initials, job titles and personal signatures; salary amounts, benefits and allowances; and opinions concerning the work performance of the CEO and other officers.
66. With regard to the four sets of initials in Document 7, I accept that the disclosure of this information would reveal personal information about those persons whose identities I consider are apparent or can be reasonably ascertained from that information. The disputed information in Document 10(b) refers, in the main, to information relevant to the CEO’s 1998 salary review.
67. Taking into account the context in which that information appears in Documents 1-7, 9(b) and 10(b), I consider that its disclosure would reveal ‘personal information’ about the individuals referred to, as defined in the FOI Act. It is, therefore, information of a kind that is *prima facie* exempt under clause 3(1) of Schedule 1 to the FOI Act.
68. Clause 3(1) is subject to the limits on exemption in clause 3(2)-(6). Disclosure would not merely reveal personal information about the complainant (clause 3(2)) nor has the complainant provided any evidence that any of the individuals concerned consents to the disclosure of personal information about themselves to the complainant (clause 3(5)). Therefore, only the limits in clause 3(3), (4) and (6) need be considered in this instance.

Clause 3(3) and 3(4)

69. Clause 3(3) and clause 3(4) provide that certain ‘prescribed details’ in relation to officers or former officers of an agency, or persons who perform or have performed services for an agency under a contract for services, are not exempt. Those prescribed details are set out in regulations 9(1) and 9(2) of the *Freedom of Information Regulations 1993* (‘the Regulations’) as follows:

“9.(1) *In relation to a person who is or has been an officer of an agency, details of –*

- (a) *the person’s name;*
- (b) *any qualifications held by the person relevant to the person’s position in the agency;*

- (c) *the position held by the person in the agency;*
 - (d) *the functions and duties of the person, as described in any job description document for the position held by the person; or*
 - (e) *anything done by the person in the course of performing or purporting to perform the person's functions or duties as an officer as described in any job description document for the position held by the person ...*
- (2) *In relation to a person who performs or has performed services for an agency under a contract for services, details of -*
- (a) *the person's name;*
 - (b) *any qualifications held by the person relevant to the person's position or the services provided or to be provided pursuant to the contract;*
 - (c) *the title of the position set out in the contract;*
 - (d) *the nature of services to be provided and described in the contract;*
 - (e) *the functions and duties of the position or the details of the services to be provided under the contract, as described in the contract or otherwise conveyed to the person pursuant to the contract;*
 - (f) *anything done by the person in the course of performing or purporting to perform the person's functions or duties or services, as described in the contract or otherwise conveyed to the person pursuant to the contract ...".*

70. Having inspected the relevant documents, I am satisfied that, of the disputed information, the following is information that is prescribed details only, in that it consists, for example, of names, job titles or things done in the course of officers of, or consultants to, the agency performing their functions, duties or services:

- **Document 1:** the names in bullet point 7 of page 71;
- **Document 5:** the name on the last line on page 30; the name in point 1 under "Concerns" on page 31; the name in point 13 on page 32;
- **Document 6:** The last three words in the third sentence of bullet point 9 on page 36; the third sentence in bullet point 19 on page 37; the name in bullet point 1 and the job title in bullet point 4 on page 38;
- **Document 9(b):** the consultant's name wherever it appears (the second last line of page 1 of the letter; lines 2, 18 and 26 on page 2; the signature

block on page 8); the job title in paragraphs 3, 4 and 5 on page 6; and the job title in point 2 on page 8.

71. Where the disclosure, for example, of an officer's name or title would also reveal information about that person that is not a prescribed detail as listed in regulation 9(1) or 9(2) of the Regulations, that name or title has been omitted from the above list on the basis that it is not 'merely' prescribed details. I consider that the use of the term 'merely' in clause 3(3) and 3(4), according to its ordinary dictionary meaning, means 'solely' or 'no more than', for example, an officer's name or position.
72. By virtue of the limits on exemption contained in clause 3(3) and 3(4) of Schedule 1 to the FOI Act, I find that the information referred to in the bullet points in paragraph 70 above is not exempt under clause 3(1).

Clause 3(6)

73. Since I am satisfied that a *prima facie* claim for exemption exists under clause 3(1) for information relating to, among other things, salary amounts, benefits and allowances, and information or opinions concerning the work performance of the CEO and other officers, it remains for me to consider whether disclosure of that information would, on balance, be in the public interest. Pursuant to section 102(3) of the FOI Act, the onus is on the complainant to establish that disclosure would, on balance, be in the public interest.
74. In brief, the complainant submits that there is a public interest in:
 - an agency's observance of legislative requirements in relation to senior appointments;
 - local governments being accountable to their ratepayers for the expenditure of public monies, in particular, in relation to the salary package offered to CEOs of local governments;
 - the accountability and transparency of the agency's decision-making processes;
 - the scrutiny of advice given to agencies and the review processes followed by agencies, particularly where it concerns a matter of such critical public importance as the appointment of a highly-paid CEO of a local government; and
 - ensuring that concerns raised by the local community concerning the conduct of the agency's review processes are investigated.
75. I understand the complainant to submit that, on balance, those interests outweigh the public interest in maintaining the personal privacy of an individual, in this case, the CEO.
76. The agency submits that there is a public interest in keeping private what is essentially very personal information about, in particular, the CEO. The agency also submits that, by disclosing the general performance indicators and the terms of the CEO's employment contract, it has satisfied the public interests in accountability and transparency.

Balancing the public interest factors

77. Determining whether or not disclosure would, on balance, be in the public interest involves identifying those public interests that favour disclosure and those that weigh against it and making a determination as to where the balance lies. In this case, very broadly, the competing public interests are essentially the accountability of the local authority and the personal privacy of the individuals concerned. In cases such as this, where the individuals are public officers, the balance can be a fine one.
78. I recognise that there is a very strong public interest in maintaining the personal privacy of individuals. In my view, that interest may only be displaced by a very strong countervailing public interest that requires the disclosure of personal information.
79. I accept that there is a public interest in agencies, including local governments, observing statutory requirements concerning senior appointments. However, in this case, I do not consider that the disclosure of the disputed matter would assist in determining whether the agency has observed the statutory requirements of the LG Act. It seems to me that the agency has already disclosed sufficient information - by way of the edited documents - to enable that to be assessed.
80. I also agree that there is a public interest in local governments, such as the agency, being accountable for the expenditure of public money in the form of salaries paid to senior staff. I note that details of the salary packages of senior State Government officials are publicly available on the internet. In *Re National Tertiary Education Industry Union (Murdoch Branch) and Murdoch University and Others* [2001] WAICmr 1 the former Commissioner accepted, at paragraph 68, that there is a public interest in the public receiving value for the expenditure of public monies and that the public is entitled to know how much of its money is received in salary and entitlements by senior public officers for performing functions on behalf of the public. I agree with that view.
81. Moreover, I consider that that public interest has been recognised by the LG Act which provides for the inspection by the public of senior officers' employment contracts to ascertain the salary, remuneration and benefits payable to those officers. Section 5.94 of the LG Act provides:

“Any person can attend the office of a local government during office hours and free of charge inspect, subject to section 5.95, any of the following in relation to the local government, whether or not current at the time of inspection -

...

(t) contract under section 5.39 and variation of such contract;

...

in the form or medium in which it may for the time being be held by the local government.”

82. Section 5.39 relates to the employment contracts for CEOs and senior employees. Section 5.95(5) provides as follows:

“A person’s right to inspect information referred to in section 5.94 does not extend to the inspection of information referred to in paragraph (t) of that section if –

- (a) the information relates to a matter other than the salary or the remuneration or benefits payable under the contract; and*
- (b) in the CEO’s opinion, the information should not be available for inspection by members of the public because of the private nature of that information.”*

83. Notwithstanding the above, section 5.97 of the LG Act also provides that nothing in Division 7 of the LG Act – which relates to sections 5.91-5.97 – affects the operation of the FOI Act. I understand that provision to mean that any restriction on the inspection of contracts, referred to in section 5.95(5), is subject to any finding by me that information which is restricted from inspection under the LG Act should be disclosed because it is not exempt under the FOI Act.

84. Having examined the disputed information in Document 9(b), in the context in which it appears, I consider that there is a public interest in the disclosure of the following information in Document 9(b): paragraphs 3 and 4 and the table on page 7 and line 10 on page 8 (with the heading “*Recommendations*” counted as line 1), which comprises information about the CEO’s salary package in 2003.

85. In my opinion, the public interest in the disclosure of that information outweighs, in this case, the CEO’s right to privacy since it is information about the independent consultant’s recommendation as to the agency’s expenditure of funds, which the public is entitled to scrutinise and is in line with the agency’s earlier disclosure to the complainant of Appendix C to Document 11(b) which gives a breakdown of the CEO’s salary package for 1999.

86. I recognise that there is a public interest in local governments, such as the agency, being open and transparent in respect of their decision-making processes. In the present case, the agency has disclosed the performance criteria for the office of CEO, together with the detailed functions and performance measures. I have also considered whether it is in the public interest for the results of those performance measures, and the comments of the elected members relating to them, to be disclosed.

87. From the information before me, it is clear that, in the course of the Council’s decisions to renew the CEO’s contract, the Council:

- conducted annual performance reviews based on detailed performance criteria, as it was required to do under the LG Act and the CEO’s employment contract;

- conducted annual organisational reviews, which gave the elected members an opportunity to assess the effectiveness of the CEO's management of the agency and his particular strengths and weaknesses; and
 - appointed an independent consultant to assist the Council in relation to its deliberations regarding the renewal of the CEO's contract in 2004.
88. Much of the material relating to those processes has been disclosed to the complainant. The information that has not been disclosed gives detailed information on how the elected members perceived the CEO's skills, strengths and weaknesses. In my opinion, the disclosure of that particular material would not cast any further light on the agency's decision-making processes, or make those processes any more transparent, and that public interest does not therefore require its disclosure.
89. I also consider that there is a public interest in senior managers, such as the CEO, having the respect and confidence of those under their supervision and, in my opinion, this could be undermined if lower ranking officers had access to the detailed performance assessments of their superiors.
90. The disputed information in Document 10(b) – being paragraphs 4 and 5 on p.1 – contains the CEO's views about his remuneration. It is more than six years old and not relevant to the CEO's current appointment or remuneration. I understand that a copy of the employment contract executed in early 1999, including the salary package, has already been disclosed to the complainant as have other documents indicating how the package was arrived at. In my opinion, none of the public interests favouring disclosure would be furthered by disclosure of the disputed information in Document 10(b).
91. Having examined the disputed information in Documents 1-7, 9(b) and 10(b), it does not appear to me that that material could evidence that the process was biased or the subject of undue influence and I do not consider that, on the information before me, there is a public interest in disclosing that information on the basis of the complainant's allegations. If the complainant has evidence that the review process was compromised he has the option of taking it up with the proper authorities.
92. In my view, for those reasons, there is a strong public interest in maintaining personal privacy in relation to the specific performance criteria outcomes. In balancing the competing interests, on the basis of the material before me, and taking into account the information already disclosed to the complainant, I consider that the public interests identified by the complainant have largely been satisfied by the access already given and I do not consider that the public interests favouring disclosure outweigh the public interest in protecting the privacy of the CEO in this instance.
93. In respect of the other officers named in the documents, I do not consider that any of the public interests identified as favouring disclosure requires – or would in any way be furthered by – the disclosure of the brief opinions expressed about them in the documents.

94. Accordingly, it is my view that the information identified in the Appendix to this decision is personal information about the CEO and other individual officers of, or consultants to, the agency which is exempt under clause 3(1).

Names of private individuals and organisations

95. Finally, in three of the disputed documents there are what appear to be the names of private individuals or organisations. They appear in: the last line of the sixth bullet point on p.42 of Document 3; the first line of the thirteenth bullet point on p.36 of Document 4; and the first line of the seventh bullet point on p.38 of Document 6. The first of those appears to me to be personal information about a private individual and *prima facie* exempt. As none of the public interests favouring disclosure in this case applies to it, in my view it is exempt under clause 3(1).
96. However, in my opinion, whether or not they are exempt, all three names are outside the scope of the complainant's access application and complaint. It is not information relating to the appointment of the CEO and it is clear from the complainant's submissions that he does not seek information not related to that process or information concerning private individuals or businesses. In my opinion, those three names should be deleted before any access to those documents is given.

Section 26

97. The complainant submits that there should be further documents within the scope of his access application. Firstly, he states that the agency advised him that the independent consultant who prepared the report in Document 9(b) destroyed the working papers relevant to the preparation of that document. The complainant advises me that, in his experience, working papers relevant to such matters are customarily retained for a period of up to seven years so that information can be verified, if required, from the source document, for the purposes of, among other things, professional indemnity. He queries whether those documents were really destroyed and whether they are documents that are owned by the agency under its contract with the consultant. If those working papers have been destroyed, the complainant takes the view that this is not in the public interest of open and transparent government.
98. The agency, in its notice of decision dated 6 January 2004, advised the complainant that “[t]he Manager of Human Resources for the City of Melville, Mrs Kylie Johnson, advises me that Ms Lake has now shredded her working papers in relation to the preparation of her report, and that those working papers never came into possession of the City.”
99. Secondly, in his letter to me seeking external review, the complainant submits that documents should also exist in relation to two incidents that he alleges occurred at the agency's Christmas party in 2001. I note that the complainant's access application makes reference to only one of those matters. Accordingly, I consider that the second alleged incident he refers to falls outside the scope of his access application.

100. The complainant advises me that the information concerning the alleged incident was obtained from certain former and current elected members but he has not provided me with any other information. He submits that the lack of documents relating to the alleged incident potentially raises the question of a cover-up of serious matters by elected members who attended the function and their fitness to hold office, which might also indicate questionable judgment when deciding to renew the CEO's contract. However, in its notice of decision dated 6 January 2004, the agency advised the complainant that it had made inquiries but could find nothing to establish that the alleged incident had occurred.
101. In respect of both matters, the agency refused the complainant access to the requested documents under section 26 of the FOI Act, on the basis that such documents do not exist.
102. Section 26 of the FOI Act provides as follows:
- “(1) The agency may advise the applicant, by written notice, that it is not possible to give access to a document if –*
- (a) all reasonable steps have been taken to find the document; and*
- (b) the agency is satisfied that the document –*
- (i) is in the agency's possession but cannot be found; or*
- (ii) does not exist.*
- (2) For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document.”*
103. When dealing with the requirements of section 26, there are two questions that must be answered. The first is whether there are reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency. In circumstances where that question is answered in the affirmative, the second question is whether the agency has taken all reasonable steps to find those documents.
104. The onus is on the complainant, as the person asserting that documents should exist, to provide me with information and material to establish his claim. I do not consider that it is my function to physically search for requested documents on behalf of a complainant. Provided I am satisfied that the requested documents exist, or should exist, I take the view that it is my responsibility to inquire into the adequacy of the searches conducted by an agency and to require further searches to be conducted if necessary.

105. Following the receipt of the complaint, my Legal Officer made further inquiries with the agency concerning the existence of the requested documents. The agency's Manager of Human Resources provided me with correspondence from the independent consultant, which confirmed that it held only an electronic copy of Document 9(b) and that various documents supplied by the agency had been returned to the agency. The author of Document 9(b) also confirmed that her working notes had contained the statements made by elected members but, since those statements were all included in Document 9(b), she had shredded those notes at the time that Council accepted her report. In light of that information, and in the absence of any evidence to the contrary, I find that no working papers relating to Document 9(b) exist.
106. The Manager of Human Resources also advised me that she personally made inquiries in relation to the alleged incident at the agency's Christmas party with a number of senior officers who were working for the agency at the relevant date, none of whom can recollect any incident of the kind alleged. I understand that, following a search of the agency's computer system, the agency has been unable to identify any documents relating to such an incident.
107. On the basis of the information before me, other than the complainant's unsupported assertion, there is nothing to establish that the alleged incident took place and, thus, that documents concerning that incident exist or should exist. In view of this, I am not satisfied that the requested documents exist.
108. Following the receipt of my preliminary view, the complainant queried whether draft versions of Document 9(b) or other documents considered by the ORC had been disclosed. However, in my opinion, only draft versions of Document 9(b), rather than other documents considered by the ORC, come within the scope of the complainant's access application which was for performance review reports relating to the CEO's position and the report prepared by the independent consultant "*together with all notes, records of meetings and other documents prepared in relation to that report during the period of the consultancy*".
109. The agency was asked to make further inquiries and searches as to the existence of any drafts of Document 9(b) that may have been considered by the ORC but the agency's FOI Co-ordinator advised me that its searches did not locate any draft copies of Document 9(b) either in hard copy or electronic form. In light of the information before me, I am not satisfied that draft copies of Document 9(b) exist or should exist.
110. In his submission of 6 January 2005, the complainant queries that some of the information he has been given access to suggests that other information is being withheld from him by the agency. For example, he notes that one document refers to "*Part D – CEO Skills*" and suggests that Parts A, B and C and possibly other parts following D should have been provided to him. I have received the relevant documents and I confirm that the material not given to him is outside the scope of his application.

111. Finally, in his submission of 6 January 2005, the complainant referred to the reference in Document 9(b) to the consultant having attended two Council meetings, and queried why the minutes of those meetings had not been disclosed in response to his access application. All the agendas and minutes for 2003-2005 are available on the agency's website. Therefore, pursuant to s.6(a) of the FOI Act, the access provisions of the FOI Act do not apply to them and the agency was not obliged to provide them in response to the access application.
112. For those reasons, I find that the agency's decision under s.26 of the FOI Act to refuse access to additional documents requested, on the basis that they do not exist or cannot be found, was justified.

APPENDIX

The following information is exempt under clause 3(1) of Schedule 1 to the FOI Act:

Document 1:

The name in bullet point 10 on page 68; the name in bullet point 1 on page 70; the “results” recorded on pages 72-75; and the elected members’ comments on pages 75-76.

Document 2:

The name which appears in bullet point 3 on page 46; the scores and comments from elected members on pages 48-50; the scores on page 51 and the elected members’ comments under the heading “CEO Strengths” on page 51; the scores and elected members’ comments on pages 52-53.

Document 3:

The first two words in bullet point 4 on page 39; the second sentence in bullet point 2 on page 41.

Document 4:

The scores/results recorded in the table and bullet points 1, 2, 9 and 10 on page 26; the names which appear in bullet point 5 on page 36; the scores/results recorded on pages 38-41.

Document 5:

The last five words in the second sentence in item 2 on page 33; the scores/results and elected members’ comments on pages 34-41.

Document 6:

Bullet point 6 on page 38; the scores/results on pages 40-42; the elected members’ comments on pages 42-43; and the scores/results on pages 44-45.

Document 7:

The four sets of initials listed at the end of page 5 under the heading “MEETING 26/10/98”.

Document 9(b):

Words 6-15 in line 24 and words 1-10 on line 25 on page 2; the points listed under “Chief Executive Officer’s Strengths” on page 3; the whole of page 4; all but the first three bullet points on page 5; the signature on page 8.

Document 10(b):

Paragraphs 4 and 5 on page 1.