VEALE AND BASSENDEAN

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: L0193 & 94004 Decision Ref: D00494

Participants:

Ian Leslie Veale
Applicant

- and -

Town of Bassendean
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - Refusal of access - memorandum from Town Clerk to Councillors - clause 6 - whether part of the deliberative process of the Council - public interest factors - clause 8(2) - whether confidential communications - whether disclosure would prejudice future supply - public interest factors - section 3 - personal views and thoughts on matters of concern to author personally - whether personal information - public interest in protecting privacy weighed against public interest in disclosure.

FREEDOM OF INFORMATION - whether access should be granted where Supreme Court proceedings on foot - access under FOI where other means available - FOI Act creates an additional right of access.

FREEDOM OF INFORMATION - abuse of process - whether the applicant's reasons for seeking access constitute an abuse of the Act.

Freedom of Information Act (WA) ss.3;6;8(1);10;21;30;32; Schedule 1 clauses 3, 5, 6, 7, 8(2), 12; Schedule 2 - Glossary.
Freedom of Information Act 1982 (Commonwealth) s.41(1);43(1)(c)(ii)
Freedom of Information Act 1982 (Victoria) s.35(1)(b);36(1)(a)

Re Read and Public Service Commission (Information Commissioner WA 16 February 1994 unreported)
Re Waterford and Department of Treasury (No. 2) (1984) 5 ALD 588
Re Howard and Treasurer of the Commonwealth (1985) 3 AAR 169
Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs (Information Commissioner QLD 30 June 1993 unreported)
Re Murtagh and Commissioner of Taxation (1984) 54 ALR 313
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)
Re Corrs Pavey Whiting and Byrne and Collector of Customs for the State of Victoria and Alphapharm Pty Ltd (1987) 13 ALD 254; (1987) 74 ALR 428; (1987) 14 FCR 434
Re The Commissioner of Taxation of the Commonwealth of Australia and Nestles Australia Ltd (1986) 69 ALR 445

Re Mervyn Louis Lane and Conservator of Wildlife (1983) 5 ALN No. 297
Re Kingston Thoroughbred Horse Stud and Australian Taxation Office (1986) 17 ATR 626; (1986) 86 ATC 2030
Re Green and Australian and Overseas Telecommunications Corporation (AAT Decision 8155, 21 August 1992)
Goodwin v Phillips (1908) 7 CLR 1
Re Beck and State Electricity Commission of Victoria and A and B (1985) 1 VAR 91

DECISION

The decision of the agency under review by which it refused the applicant access to a document claimed to be exempt under clauses 6, 8(2) and 3 of the *Freedom of Information Act 1992)* (WA) is set aside.

In substitution therefore, it is decided that the document is not exempt and the applicant is entitled to be given access to it in the form requested.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

25th March 1994

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner, of a decision by the Town of Bassendean ('the agency'), to refuse Mr Veale ('the applicant') access to a document under the *Freedom of Information Act 1992* ('the FOI Act').

2. On 19 November 1993 the applicant applied to the agency for access to a document described as *"...a copy of the Memorandum to Councillors referred to in the Council's answer to my question minuted at page 11 of the ordinary Council Minutes dated 27 October 1992, being a memorandum referred [sic] to me personally, and to the Bassendean Ratepayer's Association".*

3. On 3 December 1993, the agency advised the applicant that the document was exempt under clauses 6, 8(2) and 3 of the FOI Act and access was therefore refused. This decision was made by the present General Manager/Town Clerk. The Town Clerk is the principal officer for the purposes of the FOI act and internal review of this decision was, therefore, not available.

4. On 17 December 1993, the applicant lodged a complaint against the refusal of the agency to permit him access to the document. In that letter of complaint he said, *"I believe that because I have requested a copy of a document which makes assertions about me personally, my right of access to that information is a factor significant in favour of disclosure of the document to me, and outweighs the issue of public interest or the effect of inhibiting future supply or advice of opinions of that kind. I believe my right under Section 21 of the Freedom of Information Act to know what other people are saying about me in an official capacity (or indeed any capacity) is itself justification for granting me access to a copy of the document."*

THE REVIEW PROCESS

5. Following my receipt of the application for external review, I advised the agency on 5 January 1994, and I sought the production of the original document together with the agency FOI file. The documents were subsequently made available to me, together with an additional statement of reasons, including material findings of fact, in accordance with the statutory requirements under s.30 of the FOI Act.

6. On 12 January 1994 solicitors for the author of the document (the former Town Clerk) requested that their client be joined as a third party to the complaint and that they be given an opportunity to make submissions on his behalf. The agency also notified me that solicitors for its insurer had submitted that, since the applicant had commenced an action in defamation in the Supreme Court against the former Town Clerk in relation to the contents of the document and to which the Council could be joined as a party, the rules of the Supreme Court governed the availability of documents between the parties.

7. Although I sought further information from the former Town Clerk on the circumstances surrounding the creation of the document in issue, I was not persuaded that he was a third party as that term is defined in the FOI Act. Nevertheless, in accordance with my statutory obligations, I recognised his interest in this issue and agreed to accept formal submissions on his behalf. These were duly provided by his solicitors.

8. During the review process, submissions were exchanged between the parties, other than those parts the disclosure of which would reveal exempt matter. In this way it was possible to fully canvass all issues, particularly as there was a history between the parties. In addition to written submissions, all parties were invited to make oral submissions. Solicitors for the former Town Clerk, and the applicant in person, attended at my office on different occasions for this purpose. The applicant particularly requested that his submissions be made without the presence of lawyers and I agreed to this course of action. There is of course an unequal power relationship between the parties to most complaints and any procedure that can redress this imbalance is desirable in my view.

THE DISPUTED DOCUMENT

9. In 1989 the applicant became the President of the Bassendean Ratepayers Association ('the BRA') and in this capacity, he sought certain information from time to time, on Council activities. Much of the information could not be supplied because it related to actions of the Council during the 1980's and apparently Council records prior to 1989 were unreliable. Attempts were made to answer these requests for information but the volume and frequency of them apparently created an administrative burden for the staff of the Council. In 1989 the then Town Clerk became aware of a dispute involving the BRA and he attempted to confirm the *bona fides* of both the BRA and the applicant, without success. The Town Clerk became concerned at the disruption to the operations of Council allegedly caused by the applicant's requests for information and he raised this issue with several Councillors and the Mayor. It was agreed that his concerns should be reported to the full Council and he began to prepare a draft report. However, in the interim he secured a new position elsewhere and it was then that the Memorandum dated 20 July 1992 was created. The disputed document is a three-page Memorandum marked "Confidential" and dated 20 July 1992. It is addressed to "All Councillors" and signed by Mr Stephen Goode, General Manager/Town Clerk.

10. In the additional information provided to my office by the former Town Clerk, he explained the background leading up to the creation of this document and the factional divisions in the Council at that time. Apparently the demands for information from the applicant and his constant questioning of Council activities and decisions was adversely affecting the efficiency of the Council's administration, particularly as there was only a small administrative staff to handle the day to day business. The former Town Clerk described the purpose in creating the document as follows:

> *"I then drafted the confidential memorandum dated 20th July 1992 because I thought it was still important to focus Council's attention on an issue which was disruptive to the functions of Council and consuming administrative resources and directly incurring costs. It was not unusual for the way we operated at the Town Council for me to prepare memorandums [sic] or discussion papers as a first step to raising Council's awareness on issues. I would then seek feedback on such memos/discussion papers before drafting reports with recommendations for Council action.*
>
> *It was my intention that the memorandum would act as an awareness raising mechanism and pave the way for my successor to work with Council to address my concerns."*

THE EXEMPTIONS

11. In the original Notice of Decision provided to the applicant on 3 December 1993 denying access, exemptions were claimed based on clauses 6, 8(2) and 3 of Schedule 1 to the FOI Act. During the course of this review other arguments were raised by solicitors for both the former Town Clerk and the agency's insurers, concerning the relationship between the FOI Act and the rules of the Supreme Court governing the process of discovery of documents as well as arguments based on abuse of process. As the agency has not convinced me that the document is exempt based on clauses 6, 8(2) or 3, I intend to state my reasons and then to discuss these additional issues.

(a) Clause 6 - Deliberative Process

12. The exemption in clause 6 of Schedule 1 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. In my decision *Re Read and Public Service Commission* (16 February 1994, unreported) I accepted the meaning of the phrase *"deliberative processes of ...a Minister or agency"* given by the Commonwealth Administrative Appeals Tribunal in *Re Waterford and Department of Treasury (No 2)* (1984) 5 ALD 588, as being correct for Western Australia (see discussion in *Re Read* at paras 14-26). The relevant passages from *Re Waterford* (at paras 58-60) are as follows:

"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'..."

14. To establish the exemption under clause 6(1), sub-clauses (a) and (b) must both be satisfied as the public interest test is an integral part of this exemption. If a document does not meet the criteria described in sub-clause (a), it is unnecessary, as a matter of practice, to consider the public interest test in (b). However, in some cases, the fact that disclosure of opinion, advice or recommendation would be contrary to the public interest, may mean that such opinion, advice or recommendation was offered in the course of, or for the purposes of, the deliberative processes of an agency The matter before me was not such a case.

15. The agency claimed that the document was intended to become part of a report to Council via the appropriate Standing Committee through which it said municipalities deliberate. It was prepared as a memorandum rather than a report because the Town Clerk could not provide a balanced view as he was unable to obtain the information he needed from the BRA. Solicitors for the former Town Clerk also said that the memorandum was prepared for the purpose of the Council's deliberative processes. Their arguments may be briefly summarised as follows:

    (i) It was prepared in his capacity as an officer of Council.
    (ii) It raised matters relevant to the efficient and economical conduct of Council affairs.
    (iii) It recorded the former Town Clerk's opinion and made recommendations.

(iv) The information was clearly provided for the serious consideration of Councillors.

(v) The deliberations involved Council policy for setting up procedures to deal with a particular group of people.

16. As stated in *Re Waterford*, documents dealing with the administrative or procedural processes of an agency, do not fall within the scope of the deliberative process exemption. The level of recognition to be given to the BRA, or to any other group within the municipality, in my view is an administrative matter. It concerns the management of Council itself rather than the business for which the Council, as a function of local government, is responsible. There may be an issue of efficiency and hence financial cost associated with processing the requests for information from the applicant in his capacity as a representative of the BRA. Although this clearly impacts on the capacity of Council to conduct its business, requiring a management decision on options to deal with the issue, this fact does not make that management decision a "deliberative process" of the agency as that term is used in *Re Waterford.*

17. In my view the submission of the former Town Clerk that the memorandum was prepared to act as an awareness raising device supports my conclusion in this regard. I have also had the opportunity of examining the document and I am satisfied from a reading of its contents, that it was prepared for this purpose, namely to identify problems for Council's consideration. It does not exhibit any of the characteristics of weighing up and evaluation of options or arguments for and against a particular course of action, sufficient to bring it within the description of clause 6(1). Whilst it is arguable that it contains opinion, I am of the view that opinion was not recorded for the purpose of, nor in the course of, the deliberative processes.

18. Even if I accept the argument that the document is a deliberative process document, on balance it would not be contrary to the public interest to disclose this document. The agency identified that there was a public interest in factual information and conclusions drawn from those facts by professional officers, to be made available to the public so that the processes of government could be understood and appreciated. However, the public interest factors said to militate against disclosure in this instance were:

(i) The document did not present a balanced view and it was not in the public interest for personal views and opinions of an officer of the council to be made public when that officer had not done justice to the subject through lack of information.

(ii) Disclosure of the document would not make local government more accountable because accountability includes ensuring that information provided is accurate and cannot be misapplied or misconstrued by the public.

(iii) Disclosure of the document would have an adverse effect on the administration of the local authority as its officers would feel impeded from conveying concerns and personal opinions of a sensitive nature to councillors if these were to become public.

19. Solicitors for the former Town Clerk also claimed it was in the public interest that the operations of Council not be impeded by information being withheld from it. None of these public interest claims was supported by any material from which I could conclude that these factors of the public interest outweighed the public interest in an applicant exercising his rights under the FOI Act.

20. The factors identified by the agency are equivalent to some of the factors identified as relevant by the Administrative Appeals Tribunal in *Re Howard and Treasurer of the Commonwealth* (1985) 3 AAR 169. The criteria outlined in *Howard* have been relied upon in decisions under the Commonwealth *Freedom of Information Act 1982* as "general principles" indicating when disclosure of a deliberative process document is likely to be contrary to the public interest. However these factors have been criticised by some members of the Tribunal and they were critically analysed and their correctness questioned by the Information Commissioner in Queensland in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (30 June 1993, unreported). Briefly, the factors in *Howard* are as follows:

    (i) The higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed.
    (ii) Disclosure of communications made in the course of the development and consequent promulgation of policy tends not to be in the public interest.
    (iii) Disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest.
    (iv) Disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest.
    (v) Disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process.

21. The "candour and frankness" argument, factor 3 in both *Howard* and in the submission of the agency, has been consistently rejected by the Commonwealth Administrative Appeals Tribunal and it was rejected in *Eccleston.* In *Re Murtagh and Commissioner of Taxation*(1984) 54 ALR 313 at 326, the 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."

22. In the absence of such "evidence" being provided to me, I also reject the candour and frankness argument as being applicable in this instance. As to arguments (i) and (ii) of the agency detailed above, these also reflect certain of the *Howard* criteria and, in the absence of further grounds to support these claims, I am not convinced that disclosure would be contrary to the public interest. In this respect, I endorse and approve of the comments in *Eccleston* regarding the fourth and fifth criteria in *Howard.* I have reproduced the Information Commissioner's comments on the fourth criterion in order to do them justice. At paras 136 -137 he said:

"The formulation of the fourth of the Howard criteria seems to be based on principles gleaned from the Crown privilege/public interest immunity cases which are incompatible with the objects and legal framework of the FOI Act. The fourth criterion suggests that, without regard to questions of effective government processes, a judgement may be made that disclosure of particular information will confuse the public or lead to unnecessary debate. This seems to me to be impliedly inconsistent with the views expressed by a majority of judges of the high court in Australian Capital Television Pty Ltd v Commonwealth [No 2] (1992) 66 ALJR 695, as to the indispensability in a representative democracy of freedom of communication in relation to public affairs and political discussion.

The fourth criterion is based on rather elitist and paternalistic assumptions that government officials and external review authorities can judge what information should be withheld from the public for fear of confusing it, and can judge what is a necessary or an unnecessary debate in a democratic society. I consider that it is better left to the judgement of individuals and the public generally, as to whether information is too confusing to be of benefit or whether debate is necessary."

23. On the fifth *Howard* criterion, at paras 138-139 the Queensland Information Commissioner was of the view that in certain circumstances disclosure of interim documents, which do not fairly disclose the reasons for a decision subsequently taken, may be contrary to the public interest. However, the mere fact that the contents of a document may ultimately change is not sufficient, without more, to support a claim that disclosure would be contrary to the public interest. This was the substance of the agency's first argument and also that of the solicitors for the former Town Clerk. Neither the agency nor the solicitors provided additional facts to justify such a conclusion.

(b) Clause 8(2) - Confidential Communications

24. The agency claimed two separate bases for exemption under clause 8(2). The first was the fact that the document contained hearsay obtained in confidence.

The second was that it was a confidential communication between the former Town Clerk and Councillors and was never intended to be a public document. The exemption under clause 8(2) is in the following terms:

> *"(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."*

25. 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.

26. I am satisfied under both bases of claims of the agency, that the document contains confidential communications. From information provided to me by the applicant and the former Town Clerk, it appears that there was some dissatisfaction with the election of the applicant as "President" of the BRA in 1989 and with the process by which this occurred. This dissatisfaction was conveyed to the former Town Clerk in confidence. However I am not satisfied that the future supply of information of this kind will be prejudiced from the disclosure of this document.

27. In *Attorney-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 judgement 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.

28. 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."

29. 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. In the context of the matter before me, the requirement to establish the exemption is that the information be of a type revealing the concerns of ratepayers about local issues and the credibility of other community groups. It may well be that the individuals directly concerned with providing information on this occasion to the former Town Clerk, may be deterred from doing so in future. However, I am not persuaded, as a matter of human nature, that it will deter other ratepayers from voicing their concerns about local issues as the need arises, either publicly or confidentially to selected Councillors or officials such as the Town Clerk.

30. In respect of the second claim, I am not convinced that existing or future Town Clerks will be deterred from their duties in providing Council with advice, as and when required, by the disclosure of this document. Although the present General Manager/Town Clerk submitted that she would be obliged to caution her staff about the manner of expressing personal opinions in the future, this would not necessarily lead to a diminution in the quality or quantity of that advice as contended. Without expressing a view as to whether the disputed document contains such statements, I accept the submission of the applicant that agencies should not circulate statements which are misconceived or false and which may damage the reputation of an individual. If the effect of disclosure under the FOI Act is to modify the practices of employees so that written documents in the future contain facts and an objective assessment of situations, that is a desirable outcome and one in which there would be a strong public interest. For this reason the agency has not persuaded me that on balance, the public interest favours non-disclosure and I accept the applicant's argument that there is a public interest in individuals having access to personal information about them that is conveyed to government agencies. Section 21 and Part 3 of the FOI Act recognise this right also.

31. Solicitors for the former Town Clerk also argued that there was a public interest in allowing an officer of Council to investigate and report freely on matters of concern to Council. Further, they argued that there was a strong public interest in ensuring that the flow of essential information was maintained. However, for the reasons already given, I am not persuaded that the *status quo* will be changed by disclosure of this document. Freedom of Information legislation, and its principles and tenets, has ushered in a new era of accountability in state and local government. The implications of this have yet to be accommodated within the culture of government and some individuals and agencies are obviously uneasy with the change. Nevertheless, the FOI Act demands that requests for information and access be viewed in a new light, that is, from a consideration of the public's right to know what government is doing and why decisions are being made.

(c) Clause 3 - Personal Information

32. An exemption was also claimed by the agency on the grounds that the document contained personal information relating to the former Town Clerk, being his personal views and thoughts on matters of concern to him personally. However, the point was not pressed with any degree of conviction by the parties. Both the former Town Clerk and his solicitors were consulted by the agency prior to the agency denying access. Section 32 provides for consultation with third parties in respect of documents containing personal information as defined in the Glossary in Schedule 2 to the FOI Act. Such consultation is for the purpose of ascertaining the third party's views on disclosure of the document but this is only necessary when the agency reaches a preliminary decision and intends to grant access to the relevant information. In this instance it appears that such consultation was unnecessary as the agency had decided to deny access.

33. In the Glossary, "**personal information**" means *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 fingerprint, retina print or body sample.

34. The purpose of the exemption in clause 3 is to protect the privacy of individuals. It is the identity of an individual, which must be apparent, or which can reasonably be ascertained from disclosure of the document, that is relevant for the purpose of this exemption. Although in some instances, the mere mention of a person's name may reveal "personal information" about that individual (such as the identity of an informer), more is normally required in order to establish this exemption. Parts (a) and (b) of the definition suggest that disclosure of the document ordinarily must reveal something more about an individual, other than his or her name, to attract the exemption.

35. In my view, where the individual is an employee in state or local government, unless disclosure of the document in question would reveal additional private information about that individual, other than his or her name or position in an agency, the public interest in protecting the privacy of that person is outweighed by the public interest in disclosure provided by the FOI Act itself. At the time of this decision, no details had been prescribed for the purpose of attracting the limitations in sub-clauses (3) and (4). I do not believe that it was the intention of Parliament, to provide anonymity for public sector employees each time the name of one of them is mentioned in a file. Such a result would be contrary to the stated aims of the Act and would not assist in promoting openness or

accountability. Until such time as details are prescribed by regulation for the purposes of sub-clauses (3) and (4) I find that disclosure of the names of public sector employees would, on balance, be in the public interest, where this can be done without infringing the privacy of those individuals.

36. In this instance, the document discloses no more than the name, position and opinion of the former Town Clerk on matters within his responsibility as an officer of the Council. The disclosure of this information, though inherently "personal", does not infringe on the privacy of that individual sufficiently to justify protection under the exemption claimed and disclosure of this information therefore would, on balance, be in the public interest.

THE RELATIONSHIP BETWEEN THE FOI ACT AND RULES OF THE SUPREME COURT GOVERNING DISCOVERY.

37. One of the arguments for denying access advanced by the agency was related to the fact that the applicant had commenced proceedings in the Supreme Court against the former Town Clerk for the publication of statements defaming the applicant in the disputed document. The writ is the subject of a Professional Indemnity claim under an insurance policy held by the agency. The agency therefore argued that it was against the public interest to promote litigation by disclosure of the document, especially as the cost would be borne by the ratepayers. The applicant told me he had not yet drafted a Statement of Claim because he was unable to obtain a copy of the memorandum which was now the subject of his FOI application. As the agency was not a party to the proceedings he had commenced, he was unable to obtain an order for discovery of the document.

38. The prospect of litigation was also advanced as an argument against the disclosure of a document in the public interest in *Read's* case. I did not accept this as a valid argument then and I do not do so now. As I stated in *Read's* case, I cannot see how the release of this document 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.

39. The solicitors for the former Town Clerk also argued that the rules of the Supreme Court should regulate the availability of documents between the parties. They also questioned whether Parliament intended that a party to litigation should be able to obtain documents by making an FOI application rather than by complying with the rules of the court made for this purpose. The question of the relationship between the FOI Act and the processes of discovery of the Supreme Court has not been determined in this State or elsewhere. In *Re Corrs Pavey Whiting and Byrne and Collector of Customs for the State of Victoria and Alphapharm Pty Ltd* (1987) 13 ALD 254; (1987) 74 ALR 428; (1987) 14 FCR 434, there was discussion by the Federal Court about the availability of the equitable jurisdiction of discovery in aid of contemplated proceedings, as an alternative to the procedures under FOI. The Court noted that discovery of that special kind, like other equitable remedies in aid of legal rights, will not be ordered if other remedies, including statutory remedies, appear adequate. Thus, in that case the availability of procedures under FOI would appear to be a material factor in any attempt to utilise the old equity procedures (see also *Re the Commissioner of Taxation of the Commonwealth of Australia and Nestles Australia Ltd* (1986) 69 ALR 445, where these matters were raised but not argued before the Court). FOI was recognised as an additional and alternative method to discovery in aid where litigation is contemplated. In the case before me, however, litigation is already on foot.

40. There is some guidance, albeit limited, in decisions of the Commonwealth Administrative Appeals Tribunal. In *Re Murtagh* the Tribunal rejected a submission that disclosure of documents pursuant to an FOI application would

prejudice proceedings before the Taxation Board of Review because, as there were no discovery rules applicable to such proceedings, no rules of discovery could be subverted and a prejudicial effect had not been shown. However, without deciding the matter, the Tribunal, at 326-327 made the following comment:

> *"If there were proceedings before a State Supreme Court, it would be proper to give consideration as to whether, in the public interest, the grant of access to documents should be left to the decision of the Court, it having adequate powers to order disclosure if, having regard to the justice of the case, it considered that disclosure would be appropriate."*

41. In *Re Mervyn Louis Lane and Conservator of Wildlife* (1983) 5 ALN No 297, the Tribunal rejected a submission that proceedings before it be adjourned pending the determination of proceedings then on foot in the Court of Petty Sessions because the Tribunal considered it unnecessary to come to any final view as to whether, if there were a conviction, the Court of Petty Sessions would have power to make a certain order. The Tribunal commented that had it been necessary to come to a view on that point, it may have considered it appropriate to adjourn proceedings until the Court had dealt with the matter before it because *"[a]n administrative tribunal should not act in such a manner as to prejudice the conduct of proceedings which are on foot before a court of law."*

42. The matter of adjournment of an FOI issue pending the determination of Supreme Court proceedings was also raised in argument in *Re Kingston Thoroughbred Horse Stud and Australian Taxation Office* (1986) 17 ATR 626; (1986) 86 ATC 2030. At the time of the Tribunal hearing, discovery and inspection had not been sought but affidavit evidence in support of this process had been filed. The Tribunal was urged not to allow the applicant to proceed with his application which could amount to "a fishing expedition" which was not permitted under the rules governing discovery and inspection in the Supreme Court hearing. In that case an exemption was claimed under a Commonwealth provision which exempted documents where disclosure would prejudice the proper administration of the law. There is no equivalent provision in the Western Australian FOI Act. The Tribunal decided to proceed to reservation of decision and then decide whether the decision should be handed down or reserved until the finality of the proceedings in the Supreme Court.

43. In *Re Kingston* the Tribunal took into account the fact that litigation was in progress; that the rules of discovery and inspection provided by the High Court applied to such proceedings; and that the investigation process into the respondent's involvement in an alleged tax evasion scheme was ongoing and likely to involve assessments of a similar nature against other persons. The fact that release under the FOI Act is release to the world at large, supported the exemptions claimed because it could reasonably be expected to prejudice the proper administration of the law in relation to those individuals who were still under investigation.

44. A more recent case concerned an FOI application in which the applicant sought access to documents which would reveal the identity of the person responsible for harassing telephone calls to the applicant. The case turned on whether disclosure of the document would be an unreasonable disclosure of personal information under s.41(1) of the Commonwealth *Freedom of Information Act 1982*. The Tribunal said that the FOI Act did not seek to override or in any way vary the rules relating to the production of documents in the context of Court proceedings. Rather, it added to a person's rights to obtain access but did not restrict his or her gaining access by other means: *Re Green and Australian and Overseas Telecommunications Corporation* (AAT Decision 8155, 21 August 1992).

45. Although *Green* is distinguishable on its facts, the reasoning of the Tribunal is applicable to a consideration of the complaint of the applicant. The Tribunal took the view that there were differences between disclosure under FOI and production of documents in accordance with the rules of evidence in court proceedings. Because of this, considerations of whether justice would be frustrated in the applicant's trial, were not matters to which the Tribunal should give weight so as to tilt the balance in favour of disclosure under FOI. Whether or not justice is frustrated was considered to be a matter of public interest and therefore one of the factors, together with questions of privilege and public interest immunity, taken into account when considering whether documents, the subject of a subpoena, must be produced in particular civil or criminal proceedings. However the Tribunal found that the same degree of weight should not be accorded to those issues in the context of the FOI Act.

46. The FOI Act creates a right of access to Government documents. The public interest in this right is balanced in the Act against a number of other public interests which are contained in the form of exemptions and which are essential for the proper workings of Government. As the Tribunal in *Green* recognised in relation to the Commonwealth Act, in my view, it is clear from the provisions of the Act itself that the Parliament of Western Australia turned its mind to the effect of the FOI Act on legal proceedings. Clause 5 exempts matter which would prejudice a fair trial of any person or the impartial adjudication of any case or hearing of disciplinary proceedings; clause 7 exempts matter which would be protected from production of the grounds of legal professional professional privilege; clause 12 exempts matter if its disclosure would be in contempt of Court. However, the Parliament has not provided that matter is exempt if it is sought for use in legal proceedings but, rather, has provided that an applicant's reasons are irrelevant.

47. An applicant's reasons for seeking access do not affect his or her right to be given access (section 10(2)), although reasons may be relevant in considering the public interest where this is applicable. I recognise that there is a public interest in not subverting the rules governing proceedings before the Supreme Court which have been developed to ensure procedural fairness between the parties. However, I am of the opinion that, in this instance, disclosure of the document would not have this effect.

48. Proceedings have been commenced between the applicant and the former Town Clerk. The agency is not a party to those proceedings. The applicant has submitted to me that the former Town Clerk has told the applicant that he does not have a copy of the document the applicant now seeks. If that is the case, the applicant will be unable to obtain the document by discovery in those proceedings. On behalf of the former Town Clerk I have been told that the former Town Clerk does have a copy of the document but that the applicant has not sufficiently identified the document in his requests to him for a copy. If that is so, the document may be discoverable in the proceedings. Even so, I am not persuaded that disclosure under FOI would prejudice those proceedings or subvert the Supreme Court rules governing the matter.

49. In the course of submissions on this matter I was referred to the case of *Re Beck and State Electricity Commission of Victoria and A and B* (1985) 1 VAR 91. In that case the President of the Tribunal said, at page 94, that *"[s]hould there be civil proceedings in the Courts, the established rules of discovery will regulate the availability of documents* ***between the parties***" (my emphasis). The rules of the Supreme Court can only regulate the proceedings between the parties to the action presently before it. The agency is not a party to those proceedings and, therefore, the availability of documents between the agency and the applicant is not governed by the rules of discovery in the Supreme Court. In this case, those rules apply only to the availability of documents between the applicant and the former Town Clerk.

50. Section 3(3) of the FOI Act states that the Act is not intended to inhibit access being given by other legal means available. The Act creates an **additional** means of gaining access to document, a legally enforceable right. It is inimical to the principles of our legal system to suggest that the exercise of one right, namely to commence proceedings where there is a right of action in defamation, should, in the absence of an express provision, extinguish another legal right, namely the right of access under the FOI Act. This is the effect of the argument that once an action is commenced in the civil courts, the procedural rules of those courts assume supremacy and prevail over other rights including the right of access to documents under FOI. I am unable to accept the legitimacy of that conclusion and I do not believe that Parliament intended that to be the position.

51. Further support is also found in the fact that rules of the Supreme Court are subsidiary legislation and, as such, they should not override rights created under primary legislation. In this case, the FOI Act is a latter Act and its provisions would normally prevail where there is any inconsistency between two State Acts: *Goodwin v Phillips* (1908) 7 CLR 1. In addition, section 8(1) of the FOI Act provides that this Act prevails over any other prohibitions or restrictions imposed by other enactments, including the Supreme Court Rules (see definitions of "enactment" "written law" in the *Interpretation Act 1983*). This also supports my conclusion on this issue.

52. The authorities cited in which this issue has been considered indicate that when proceedings are on foot in the Supreme Court (or any other court), this fact may be relevant in weighing the public interest factors for and against disclosure.

However, if the document in question does not meet the threshold requirements to establish the exemption claimed, the public interest test, and where the balance should lie, is unlikely to arise as a matter for determination. As I have determined that the document is not exempt for the reason that it does not meet the threshold requirements under clauses 6(1) and 8(2), the relationship between the FOI Act and the rules of the Supreme Court is not an issue.

53. However, in circumstances where the question does arise, the agency must satisfy me that disclosure would have a prejudicial effect on those proceedings. In the complaint before me, it is difficult to see how the existing proceedings can be prejudiced by disclosure of the disputed document. The proceedings are between the applicant and the former Town Clerk and the rules of that Court will govern the availability of documents between the parties. The agency is not a party to those proceedings and, therefore, the availability of documents between the applicant and the agency is not presently governed by the rules of discovery. The gaining of access to the document from some source other than a party to the proceedings does not, therefore, subvert the Supreme Court rules, nor, in my view, prejudice the proceedings before that Court. For these reasons, I do not accept the argument against disclosure based on the public interest said to follow from the fact that civil proceedings for defamation had been instituted in the Supreme Court.

ABUSE OF PROCESS

54. It was also submitted on behalf of the former Town clerk, that the applicant's complaint was an abuse of process because the right of access created in s.10 is expressed to be *"Subject to this Act..."*. The argument advanced was that these words include the objects of the Act contained in s.3 and the applicant's complaint was not in accord with these objects. This argument was based on the reason for the applicant seeking the document in question, namely to pursue his civil action for defamation against the former Town Clerk. It was argued that the FOI application was a "back door" attempt to secure a copy of the document because the proceedings before the Supreme Court had not yet reached a stage where the parties were required to produce and exchange documents.

55. In response, solicitors for the applicant argued that the reasons for seeking the document did not constitute a reason to deny access. It was said that any use which an applicant may make of a document obtained under FOI is subject to the normal legal requirements if it is used for an unlawful purpose but, in any case, the use of the document in the course of litigation was a purpose contemplated by s.3(1)(b) as being a way in which individuals and government agencies become more accountable to the public.

56. I am not persuaded by the argument that the use to which the applicant proposes to put this document constitutes an abuse of process because it does not advance the attainment of the objects of the FOI Act. The legislation creates a legally enforceable right of access to documents of state and local government agencies. It is irrelevant, for my purpose, as the Tribunal in *Green* indicated, that the same documents may be accessible by other means. The applicant's reasons for seeking access are also irrelevant, as provided in section 10. In my view the words *"Subject to this Act"* in the opening sentence of section 10, mean that the right of access created by the Act can only be exercised in accordance with the procedures prescribed in the Act and that right is qualified by provisions such as those in s.6. In other words, the right is exercisable only when a valid application is made in accordance with the procedures prescribed and subject to valid claims for exemption which may be made in accordance with the exemptions in Schedule 1. The objects and intent of the Act are given effect by the creation of this right; the right is not limited by the objects and intent of the Act.

57. Administrative bodies such as the Information Commissioner are created by statute and have no inherent jurisdiction other than that described in the legislation creating them. Consequently there is no inherent jurisdiction to prevent an abuse of the processes of the Act, such as may be found in the jurisdiction of the superior courts. For this reason, the argument based on an alleged abuse of process is not accepted as being applicable in these circumstances.

CONCLUSION

58. The document to which the applicant is seeking access under the FOI Act, is not exempt under clauses 6, 8(2) or 3 and he is therefore entitled to access. The arguments advanced by solicitors for the author of the document, seeking to maintain the claim of the agency for non-disclosure based on public interest factors said to exist by virtue of the fact that the applicant has instituted civil action against the author of the disputed document, are not accepted for the reasons stated. I do not accept the argument based on an alleged abuse of process for the reasons given.

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