KOBELKE AND PLANNING AND GBC AND ROWE

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: S1094 & 94007 Decision Ref: D00594

Participants:

John Charles Kobelke
Applicant

- and -

Minister for Planning
first Respondent

- and -

General Bulldozing Co. Pty Ltd
second Respondent

- and -

Gregory Howard Rowe
third Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - Refusal of access - documents relating to a Town Planning Appeal to the Minister for Planning - clause 12 - contempt of Court - whether the Minister constitutes a Court - clause 6 - whether the documents are part of the deliberative process of an agency - public interest factors - clause 3 - whether the documents contain personal information - clause 8 - confidentiality under the FOI Act - whether the documents constitute confidential communications and future supply of that kind of information will be prejudiced - clause 4(3) - business or commercial information - adverse effect of disclosure.

FREEDOM OF INFORMATION - definition of "agency" - whether the Town Planning Appeal Committee is an agency - Schedule 2, Glossary, clause 4 - documents of an agency - whether documents of the Minister or documents of the Town Planning Appeal Committee - agency must deal with application or transfer - section 15 - transfer of applications - whether application properly transferred.

FREEDOM OF INFORMATION - section 33 - consultation with third parties - effect of third party consultation on "permitted period" under section 13.

Freedom of Information Act (WA) ss 6; 9; 10; 13; 15; 30; 32; 33; 40; 63(1); 69(4); 70(3); 76(1); 100; 102; Schedule 1, clauses 3, 4, 6, 8, 12; Schedule 2 - Glossary, clause 1; clause 4.
Freedom of Information Act 1982 (Commonwealth) ss.36(1)(b); 43(1)(c)(ii).
Freedom of Information Act 1982 (Victoria) ss.30(1); 35(1)(a).

Town Planning and Development Act 1928 (WA) ss.40; 55(1)(e).

Ridge v Baldwin (1964) AC 40
Australian Broadcasting Tribunal v Bond and Others (1990) 170 CLR 321
Election Importing Co. Pty Ltd v Courtice (1949) 80 CLR 657
The Queen v Hegarty; Ex parte City of Salisbury (1981) 147 CLR 617
Minister for Immigration and Ethnic Affairs v Pochi (1980) 44 FLR 41
Testro Bros Pty Ltd v Tait (1963) 109 CLR 353
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 Fewster and Department of Prime Minister and Cabinet (1986) 11 ALN N 266
Ryder v Booth [1985] VR 869
DPP v Smith [1991] 1 VR 63
Searle Aust. Pty Ltd v Public Interest Advocacy Centre (1992) 108 ALR 163
Department of Health and Anor v Jephcott (1985) 62 ALR 421
Attorney-General's Department v Cockcroft (1986) 10 FCR 180

DECISION

The decision under review is varied by deciding that the claim for exemption is justified only in respect of:

- those parts of Document 1 listed in paragraph 61 of my reasons for decision;
- the signature in Document 7;
- the telephone number in Document 13;

and the applicant is entitled to be given access to the remaining parts of those documents.

The decision under review is set aside in respect of all other documents listed in paragraph 26 of my reasons for decision and in substitution therefore it is decided that none of those documents is exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

27th April, 1994.

REASONS FOR DECISION

BACKGROUND

1. This is an application for review by the Information Commissioner, arising from a decision of the Minister for Planning ('the Minister'), to refuse Mr Kobelke ('the applicant') access to documents relating to a planning decision by which the Minister upheld an appeal under the *Town Planning and Development Act 1928.*

2. The history of the matter leading up to the FOI application, as far as it is relevant, is as follows:

   On 12 August 1992 General Bulldozing Co Pty Ltd ('the appellant') made application to the City of Wanneroo for approval to develop a concrete batching plant within an area at Neerabup. The application was refused and the Department of Planning and Urban Development ('DPUD') was advised of this decision with a recommendation that DPUD issue a refusal under the provisions of the Metropolitan Region Scheme. This eventually occurred and the appellant through an agent ('the agent'), subsequently appealed to the Minister on 5 January 1993. Additional information to support this appeal was forwarded to the Town Planning Appeal Committee ('TPAC') on 16 February 1993. By letter dated 10 July 1993, the Minister advised the agent of the appellant that the appeal had been upheld.

3. On 17 November 1993 the applicant submitted to DPUD an access application under the *Freedom of Information Act 1992* ('the FOI Act') seeking access to those documents constituting *"...the appeal by General Bulldozing Pty Ltd received on 8 January 1993 relating to a batching plant at Neerabup including any reports and recommendations to the Minister."*

4. This application was subsequently transferred to the TPAC on 22 November 1993, by the FOI Co-ordinator at DPUD. On 5 January 1994 the Minister advised the applicant, by letter, of consultations with third parties that were necessary under the FOI Act. On 20 January 1994 the applicant sought external review by the Information Commissioner as he had not received a reply from the agency by the end of the "permitted period" (s.13(3) of the FOI Act). Subsequently the applicant was refused access to the documents in question, this decision being made by the Minister on 27 January 1994, some 72 days after the application had been lodged with DPUD. Access was refused on the basis that the documents were exempt under clauses 3, 4 and 6 of Schedule 1 to the FOI Act.

5. Inquiries by my office were able to establish that the consultation with third parties had taken longer than expected and this was the reason for the delay in providing the applicant with a formal notice of decision, including reasons, under s.30 of the FOI Act. However, it was not clear, from the information available to my office when the applicant first made contact on 20 January 1994, whether there was in fact a deemed refusal by the principal officer, in this case, the Minister. If there had been a deemed refusal, then the complaint to the Information Commissioner was properly made on 20 January 1994.

6. Part of the confusion appeared to stem from the fact that neither the applicant nor the Minister had appreciated the effect of third party consultations on the time allowed for decision-making under section 13(2) and (3). Section 33 provides for consultation with third parties in respect of documents containing business or commercial information. 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 case the Minister appears to have determined that the documents were, *prima facie* exempt, (this conclusion appears possible from a reading of documents on file) and, accordingly, there was no need to consult with the third party for the purpose of making the ultimate decision to deny access. Section 13, as far as it is relevant, provides as follows:

Decisions as to access and charges

*"**13**. (1) Subject to this Division, the agency has to deal with the access application as soon as is practicable (and, in any event, before the end of the permitted period) by -*

(a) considering the application and deciding -

(i) whether to give or refuse access to the requested documents; and

(ii) any charge payable for dealing with the application;

and

(b) giving the applicant written notice of the decision in the form required by section 30.

(2) If the applicant does not receive notice under subsection (1)(b) within the permitted period the agency is taken to have refused, at the end of that period, to give access to the documents and the applicant is taken to have received written notice of that refusal on the day on which that period ended.

(3) For the purposes of this section the "permitted period" is 45 days after the access application is received or such other

> *period as is agreed between the agency and the applicant or allowed by the Commissioner under subsection (4) or (5).*
> *(4)...*
> *(5)...*
> *(6)...*
> *(7)...*
> *(8)...*
> *(9) This Division has effect subject to Division 3 of this Part."*

7. Section 13 is in the part of the FOI Act entitled *"Part 2 - Access to Documents"* and Division 3 of this Part details the consultation requirements with third parties. Sub-section 13(9) effectively extends the "permitted period" by the time taken to complete essential third party consultations under either s.32 or s.33. I would therefore consider it prudent for agencies to place appropriate time frames on consultations when they are deemed necessary, and for applicants to be informed forthwith of these additional procedures. Communication between agencies and applicants of this nature can avoid misunderstandings about what is occurring and why, and will assist in meeting the objective of the FOI Act, namely, to inform the public about the decision-making processes of government.

8. Following clarification of the situation with the parties, on 3 February 1994 my office sought and obtained from the Minister the relevant documents and the agency's file maintained in relation to the application. The office of the Minister also provided an outline of the Town Planning Appeal System in general terms. I also sought a schedule of documents and additional reasons, including material findings of fact, to justify the claims for exemption in relation to each document. In my view the correspondence of the Minister to the applicant dated 27 January 1994, purporting to be a Notice of Decision, did not meet the requirements mandated by section 30 of the FOI Act.

9. The schedule provided to my office on 18 February 1994 identified 19 documents said by the agency to fall within the ambit of the access application. However additional exemptions were then claimed for various documents on this schedule under clauses 3, 4, 6, 8 and 12. The applicant was provided with a copy of this schedule and he confirmed that he was seeking access to all documents listed thereon. When the schedule and the disputed documents were examined in detail it appeared to me that there was a procedural anomaly that needed to be resolved before I could proceed to determine the complaint. The issue involved the meaning of "documents of an agency" and the correct procedures to be followed on the transfer of an application from one agency to another. As this matter may arise in other areas of the public sector, I consider it appropriate to briefly outline the position and the requirements under the FOI Act for the benefit of future decision-making.

(a) Agency

10. Section 10 of the FOI Act provides a right of access *"...to documents of an agency (other than an exempt agency)..."*. In the Glossary **"agency"** means -

    (a) a Minister; or
    (b) a public body or office

    The Glossary further defines **"public body or office"** as follows:-

    "(a) a department of the Public Service;
    (b) an organisation specified in column 2 of the Schedule to the Public Service Act 1978;
    (c)...
    (d)...
    (e) a body or office that is established for a public purpose under a written law;
    (f)...
    (g)..."

11. The Town Planning Appeal Committee is constituted under s.40 of the *Town Planning and Development Act 1928*. Its purpose is to consider, report and make a recommendation to the Minister for Planning, on any appeal on which the Minister sees fit to require such consideration. In performing this function the TPAC assists the Minister to determine an appeal and it is therefore performing a "public purpose" as that term is commonly understood. In my view, DPUD, the Minister and the TPAC are all separate "agencies" for the purposes of the FOI Act. The question is whether the documents to which access is sought are documents of any of these agencies and, if so, which one.

(b) Documents of an agency

12. Documents of an agency are described in clause 4 of the Glossary in Schedule 2 to the FOI Act. Not all provisions in Schedule 2 are drafted in the form of definitions. However, s.9 of the FOI Act provides that the Glossary defines or affects the meaning of some of the words and expressions in this Act. Clause 4 states:

    "Documents of an agency

    4. *(1) Subject to subclause (2), a reference to a document of an agency is a reference to a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer.*

(2) Where the agency is a Minister a reference to a document of an agency is a reference to a document that -

(a) is in the possession or under the control of the Minister in the Minister's official capacity; and

(b) relates to the affairs of another agency (not being another Minister),

and includes a document to which the Minister is entitled to access and a document in the possession or under the control of a member of the staff of the Minister as such a member, but does not include a document of an agency for which the Minister is responsible.

(3)..."

13. Thus "documents of an agency" are identified by reference to the notions of possession and control. Where the agency is a Minister, sub-clause (2) further provides that in order for a document to be *a document of the Minister (as an agency)*, it must also relate to another agency other than another Minister and it must not be a document of an agency for which the Minister is responsible.

14. The additional information provided to my office about the Town Planning Appeal system in this State indicated that there has been established, as a sub-office of the Minister for Planning, a full time chairman of the TPAC with appropriate administrative support staff to deal with the volume and frequency of planning appeals to the Minister. Planning appeal documents are generated during the course of administration of the appeal process up to the point where the Minister proceeds to a decision on the matter presented to him.

15. It is unlikely that all of the documents to which the applicant is seeking access, are documents of the Minister as described in clause 4(2), and this conclusion is supported by the description in the schedule of the actual documents identified as coming within the scope of this access application. The effect of clause 4(2) is that some or all of the appeal documents to which the applicant is seeking access, may be either documents of the TPAC or documents of the Minister. In my view some of them are properly characterised as documents of the TPAC.

16. As the TPAC was the agency receiving the access application initially transferred from DPUD, it was obliged under the FOI Act to either deal with the access application in so far as it relates to its own documents, or further transfer the application, either fully or partially, together with any documents held by the TPAC, to the Minister for a decision if the documents in question were documents of the Minister or were received or originated from the Minister. In this instance the applicant had been advised of the transfer of the application from DPUD to the TPAC, but had received a decision refusing access made by the Minister. There was no indication that the TPAC had dealt with the application in the manner prescribed by the FOI Act, nor had the TPAC accepted that it was an agency in its own right separate to the Minister.

(c) Transfer of Applications

17. The procedures for transferring applications between agencies are set out in s.15 as follows:

> ***"Transfer or notification of applications***
>
> ***15****. (1) If the agency does not hold the requested documents but knows, or has reasonable grounds to believe, that the documents are held by another agency (other than an exempt agency), the agency has to transfer the access application to the other agency.*
>
> *(2) If the agency holds the requested documents but the documents originated with or were received from another agency (other than an exempt agency), and are more closely related to the functions of that other agency, the agency may transfer the access application to that other agency together with copies of the documents.*
>
> *(3) The transferring agency has to give the applicant written notice of the transfer without delay.*
>
> *(4) The notice has to clearly state the day on which, and the agency to which, the access application was transferred.*
>
> *(5) The agency to which the access application is transferred, or partially transferred, is to be regarded as having received the application on the day on which it was received by the transferring agency.*
>
> *(6) The agency to which the access application is transferred under subsection (2) is required to make decisions as to access in respect of the documents of which it receives copies but not in respect of other documents that it holds which may fall within the scope of the documents requested in the original application.*
>
> *(7) If subsection (1) or (2) applies to one or more but not all of the requested documents the agency is authorised to make a partial transfer under this section as if a separate access application had been made in respect of the document or documents to which the relevant subsection applies.*
>
> *(8) If the agency holds the requested documents but the documents originated with or were received from an exempt agency, the agency has to notify the exempt agency that the access application has been made."*

18. In the case of a transfer under sub-section (1) or (2), the first *finding of fact* which must be made in relation to an application is a finding in relation to the

possession or control of the documents in dispute. In other words, the agency receiving the access application must locate, identify and describe the documents said to come within the ambit of the access application and then determine whether they are documents of that agency as defined in clause 4 of Schedule 2. If those documents or some of them originated with or were received from another agency and are more closely related to the functions of that other agency, then the agency may consider a partial or full transfer of the application to that other agency. The advice provided to the applicant under s.15(3) or the Notice of Decision under s.30 should also contain this information.

19. Section 100 provides that decisions under the FOI Act must be made by either the principal officer of the agency or by an officer of the agency directed by the principal officer for that purpose, either generally or in a particular case. The decision to grant or deny access to the documents which come within the ambit of the access application (which are documents of the TPAC as opposed to those which are documents of the Minister), must be made by either the Chairman of the TPAC or some other officer directed by him. In this instance, the decision to deny access to all appeal documents was made by the Minister and I do not consider that this was appropriate under these circumstances.

20. The function of the Information Commissioner under s.63(1) is to *"...deal with complaints made...about decisions made by agencies in respect of access applications..."*. The Minister for Planning is not the principal officer of the TPAC, as that term is defined in the Glossary in Schedule 2 to the FOI Act. Except in the case of a deemed refusal by the principal officer of an agency where there is no decision on the access application, decisions must be made in accordance with the authority outlined in s.100. As the TPAC had neither dealt with the application nor effected a proper transfer from the TPAC to the Minister, it appeared to me that the complaint of the applicant was not a matter which was within my jurisdiction, at least in respect of some of the documents which had been provided to my office. Although the Information Commissioner has power under s.76(1), to review any decision, and decide any matter that could have been decided by the agency, in most instances I believe the primary responsibility for these matters rests with the relevant agency.

21. I therefore advised the applicant, the Minister and the chairman of the TPAC of my views on this matter and sought to have this anomaly corrected. The matter before me was not a case of a deemed refusal by the Minister but rather a case involving the relationship, for FOI purposes, of two related agencies, and it required a preliminary decision by the TPAC in the first instance. In accordance with my responsibilities under s.69(4) and s.70(3) I considered it prudent to allow the Minister and the TPAC to reconsider their positions in light of these matters. As a consequence, both the Minister and the TPAC were given additional time to provide a decision on the schedule of documents.

RESOLUTION OF THE PROCEDURAL ANOMALY

22. On 10 March 1994, the Chairman of the TPAC advised the applicant that he had formally transferred the original FOI application to the Minister. However, on 16 March 1994, the applicant advised my office that he had not yet received a decision within the agreed extended period and requested I deal with the matter as a deemed refusal by the Minister. In view of the circumstances outlined and, in particular, the considerable period of time that had elapsed since the applicant had lodged his application, I considered this an appropriate step at that point and all parties were advised accordingly.

THE REVIEW PROCESS

23. As well as seeking additional reasons from the Minister to justify the claims for exemption, the agent, the appellant and the applicant were provided with the opportunity of addressing me further on this matter. I also sought additional information on the operation of the Ministerial appeal system, from the Chairman of the TPAC. As the exemptions contained public interest tests, the applicant was invited to identify the aspects of the public interest favouring disclosure of the document. For this purpose he was given a copy of the additional information provided by the Minister.

24. The agent met with me and my Principal Solicitor on 25 March 1994 and explained his role in the appeal process. The appellant nominated the agent to present its views and the agent identified, on behalf of his client, the information which was claimed to be commercially sensitive. The agent also identified a business interest in this matter in relation to his own affairs and he was invited to make submissions in writing on this aspect. These were duly provided together with further arguments to support the claims for exemption on behalf of the appellant.

25. I also met with the Minister to hear oral submissions in support of the claims for exemption. An invitation to make oral submissions was also extended to the applicant but he submitted his arguments in writing. Although these procedures had the effect of extending the time for decision-making by my office, I believe the requirement to afford procedural fairness and a right to be heard to all parties is essential to do justice to a complaint. This inevitably means that the statutory period of 30 days for the Information Commissioner to make a decision is unrealistic in practice.

THE DISPUTED DOCUMENTS

26. The nineteen documents in dispute, and the exemptions claimed under Schedule 1 to the FOI Act in respect of each are described as follows:

1	Report setting out grounds and basis of appeal, dated 17/2/93	Clauses 3, 4, 6, 8, 12
2	Letter to TPAC enclosing Notice of Appeal dated 4/1/93	Clauses 3, 4, 8, 12
3	Notice of Appeal dated 5/1/93 directed to the Minister	Clauses 3, 4, 8, 12
4	Letter of acknowledgement from TPAC to agent on behalf of appellant dated 18/1/93	Clauses 3, 4, 12
5	Compliments slip and copy letters from agent to TPAC, dated 21/1/93	Clauses 3, 4, 6, 8, 12
6	Recommendation of the Committee for Statutory Procedures to Minister for Planning dated 8/2/93	Clauses 3, 6, 8, 12
7	Letter from agent to TPAC dated 8/2/93	Clauses 3, 6 , 8, 12
8	Letter dated 16/2/93 from agent to TPAC enclosing Document 1	Clauses 3, 12
9	Comment on submission from DPUD to TPAC, dated 4/3/93	Clauses 3, 6, 8, 12
10	Appeal action work sheet, undated, author not known	Clause 12
11	Memo from Executive secretary TPAC to Chairman TPAC re appeal proceeding, dated 17/3/93	Clauses 3, 6, 12
12	Request to TPAC member to investigate appeal, dated 19/3/93	Clauses 3, 6, 2
13	File note from TPAC member, dated 3/4/93	Clauses 3, 6, 8, 12
14	Memo from Chairman TPAC to Executive Secretary TPAC dated 7/4/93	Clauses 3, 12

15	Request to second TPAC member to investigate appeal, dated 7/4/93	Clauses 3, 6, 12
16	Report on appeal from TPAC member, dated 30/6/93	Clauses 3, 4, 6, 8, 12
17	Memo from Executive Secretary, TPAC to Chairman TPAC, dated 5/7/93	Clauses 3, 12
18	Decision letter from Minister to agent, dated 10/7/93	Clauses 3, 4 and 12
19	Copy of Document 18 sent to relevant parties	Clauses 3, 4 and 12

The applicant was granted access by the Minister to edited versions of Documents 16 and 18 and now seeks access to the matter deleted from those documents.

THE EXEMPTIONS

(a) Clause 12 - Contempt of Parliament or Court

27. An exemption based on clause 12 of Schedule 1 was claimed for all documents listed on the schedule provided with the Notice of Decision. It is appropriate to deal with this exemption first since I am of the opinion that the claims of the agency based on clause 12 are not justified. My reasons follow:

Clause 12 states:

> ***"12. Contempt of Parliament or court***
>
> ***Exemptions***
>
> *Matter is exempt matter if its public disclosure would, apart from this Act and any immunity of the Crown -*
>
> *(a) be in contempt of court;*
>
> *(b) contravene any order or direction of a person or body having power to receive evidence on oath;*
> *or*
>
> *(c) infringe the privileges of Parliament."*

28. I have not found any reported cases where this exemption, or its equivalent, has been relied upon by agencies. The Australian Law Reform Commission Report

No 35 on "Contempt" ('the ALRC Report'), at p.18, identified four broad categories of conduct amounting to contempt of court. These were:

(i) interference with proceedings;

(ii) contempt by publication;

(iii) non-compliance with orders and undertakings; and

(iv) contempt relating to tribunals and commissions.

29. The ALRC Report also noted, at p.3, that the underlying theme of the law of contempt of court is that the administration of justice by the courts must be protected from unacceptable interference. Parliament and the courts both have powers to regulate their own proceedings. These powers have traditionally been regarded as a necessary incident to their functions. The law of contempt of court and the law protecting parliamentary privilege ensure that these bodies are able to regulate their own proceedings and to operate without interference or obstruction. Similar powers have also been given to bodies such as Royal Commissions and tribunals exercising judicial or quasi-judicial powers. Clause 12 indicates that the FOI Act is not intended to override the public interest served by this exemption.

30. The FOI Act, in clause 1 of the Glossary, defines "court" to include a tribunal. Although there appears to be some overlap between the types of conduct amounting to a contempt of court and hence covered by sub-clause (a), and the specific conduct mentioned in sub-clause (b), I am of the opinion that neither is applicable in this case. The Minister is empowered to determine appeals under the *Town Planning and Development Act 1928* but I am of the view that, in doing so, he performs an administrative rather than a judicial function. In my opinion, contempt of a body performing a purely administrative function is not contemplated by clause 12.

31. The principles upon which to decide whether a body is performing a judicial function, and hence amenable to control by the prerogative writs, or an administrative function, in which case the prerogative writs would not lie, were discussed in *Ridge v Baldwin* (1964) AC 40, and, more recently, by the High Court in *Australian Broadcasting Tribunal v Bond and Others* (1990) 170 CLR 321. The nature of the function performed by the body is relevant as is the content of the particular legislation conferring that function. In *Election Importing Co Pty Ltd v Courtice* (1949) 80 CLR 657, Williams J., delivering a judgment on an application for an interlocutory injunction, considered the difference between administrative and judicial functions and said:

> *"...a person is prima facie subject to a duty to act judicially in performing a statutory duty or exercising a statutory power if the performance or exercise will impose a new legal liability on a person, or will interfere with the legal rights of another person with respect to some particular matter*

or matters...But the particular legislation must be examined in each case to determine whether the principle is applicable."

32. The High Court examined the Municipal Officers (South Australia) Award 1973, in *The Queen v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617, and determined that the functions of a Board of Reference, sitting to consider a dispute over classification and salary level, were administrative and not judicial. In a joint judgment, Gibbs CJ., Stephen , Wilson , and Mason JJ., said that the application of criteria to facts found involving a subjective evaluation or value judgement, was ordinarily associated with the administrative process. Other factors pointing to a function being administrative rather than judicial included its traditional classification as such, the fact that it is given to a non-judicial tribunal or body and, per Murphy J., the breadth of the discretion involved in its exercise.

33. A duty to act judicially extends to the actual manner or steps by which the decision is made: Deane J. in *Australian Broadcasting Tribunal v Bond and Others* (op. cit.); *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41 at p. 67. The minimum requirement of such procedures is a duty to accord procedural fairness to the parties but the precise content of the obligation in a particular case is to be found in the statutory framework governing the particular proceedings: *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353.

34. The Ministerial appeal process does not interfere with existing rights of the parties, nor does it impose new legal liabilities on any person. The Minister determines a dispute between parties and in doing so, confers a new "right" on the successful appellant, namely a right to proceed according to the planning approval. The Minister, when determining a planning appeal, does not sit as a "court" nor is he empowered to take evidence on oath from the parties. The determination of any particular appeal is not open to public view in the normal manner expected of a court or a judicial or quasi-judicial tribunal. The Minister's own letter to the applicant, dated 20 January 1994, suggests that appeals are decided on the basis of written arguments presented by or on behalf of the appellant, supported by documentary material.

35. The Chairman of TPAC explained the steps followed in Ministerial appeals as follows:

(i) The appellant lodges a completed Notice of Appeal, in the prescribed form, at the office of the Chairman of TPAC. A copy is also given to the responsible authority against whom the appeal is lodged.

(ii) TPAC issues a receipt for the appeal fee and makes up an appeal file.

(iii) On receipt of a response from the relevant authority the file is examined to see whether additional information is required for investigating the appeal, and, if necessary, additional papers such as policy documents and Town Planning Scheme Texts are obtained. The appeal is then allocated to a TPAC member to consider, report and make a recommendation for consideration by the Minister.

(iv) The TPAC member acts independently in the investigation of the appeal. There is no specified procedure and the member is free to

choose his or her own *modus operandi* for such an investigation. It is common practice to conduct a site visit, talk to both parties and study written submissions.

(v) After completing the investigation, the TPAC member submits a report and recommendation, through the TPAC office, to the Minister for consideration.

(vi) The Minister 'weighs' the appeal before him having regard to the appellant's submission, the authority's response and the TPAC member's report and recommendation. In addition to planning principles, the Minister may have regard to humanitarian, hardship, personal and family grounds such as are considered relevant. Government policies on town planning issues are also relevant.

(vii) The Minister makes a decision and advises the appellant by letter. The responsible authority is also advised of the outcome by letter. The decision letter specifies particulars of the appeal and gives reasons for the Minister's decision. The reasons given are generally broad statements on the matter and do not contain detailed argument on all the issues raised. The decision of the Minister is final and has effect according to its tenor.

36. Part V of the *Town Planning and Development Act 1928* deals with appeals. The majority of sections in this Part of that Act prescribe the procedures that the Town Planning Appeal Tribunal is bound to follow, including the provision of written reasons for its decisions. Although s.55(1)(e) of the *Town Planning and Development Act 1928* provides that regulations may be made in respect of the procedures to be followed on appeal to the Minister, apart from regulations prescribing procedures for instituting an appeal and the form of Notice of Appeal, no other procedures have been prescribed by regulation.

37. In his oral submission to me, the Minister stated that, although there are accepted conventions as to the matters to be taken into account in deciding an appeal and the manner in which the appeal is conducted, the Minister may make his decision on any basis and in whatever manner he sees fit. The Minister is not required to use the TPAC nor to give any reasons for his decision. It appears to me that the breadth of the discretion exercised by the Minister, and the absence of any legislative requirement that he provide written reasons for his decision, suggest the performance of an administrative function. Further, there is nothing in the enabling legislation that points to the Ministerial appeal function as being, in any way, judicial.

38. For these reasons I am of the view that the Minister, in deciding an appeal, is not a "court" under the FOI Act. The public disclosure of documents used in the Ministerial appeal process would not constitute conduct amounting to a contempt of that process as the exemption is designed to protect the administration of justice not administration *per se.* However, a more compelling argument in my view, is that ascribing judicial powers to a Minister of the Crown, contravenes the basic principle underlying the separation of powers in the Westminster system of government. Therefore, I cannot accept the validity of any of the arguments put for exemption based on clause 12(a) and (b) and the

exemption under clause 12(c) is not applicable since parliamentary privilege is not available to protect administrative functions performed by a Minister as part of his or her Ministerial duties. Accordingly, none of the documents is exempt under clause 12 and Document 10 - for which no other exemption was claimed - is not exempt at all and the applicant is entitled to be given access to that document.

(b) Clause 6 - Deliberative Process

39. Clause 6(1) 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."*

40. In my decision in *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 paragraphs 14-26). The relevant passages from *Re Waterford* (at paragraphs 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'..."

41. In his reasons to the applicant for denying access to the appeal documents the Minister said:

"...the call for access to all town planning appeal documents strikes at the heart of that appeal process and could place the system in disrepute with the very public it is designed to serve...Public scrutiny of an appeal procedure is contrary to the intent of the system as it is not in the public interest for the personal, financial or commercial submission of an appellant to be open for general view. such a situation does not assist decision-making in instances involving personal circumstances or special situations. Should a position of unfettered public scrutiny be allowed to prevail, particularly whilst an appeal is being considered, it would make a mockery of the process and prejudice the determination. Appeals, by their very nature, must be confidential and strictly between the aggrieved parties and the mediator."

42. Expressed in this general manner, the Minister's concerns, though no doubt genuine and, in respect of some documents valid, amount to a "class" claim for all appeal documents. Not only is a class claim excluded under clause 6(1), but decisions by the Commonwealth Administrative Appeals Tribunal and the Federal Court have consistently confirmed the need to approach the deliberative process exemption from the point that not all documents kept by an agency attract the exemption conferred under this clause and its equivalents in other jurisdictions. In *Re Fewster and Department of Prime Minister and Cabinet* (1986) 11 ALN N 266, at paragraphs 35 and 36, the Tribunal, considering an exemption based on s.36(1)(b) the Commonwealth equivalent, said:

"In my view...no justification is to be found within the language of s.36 of the Act for a "class" claim of exemption...In my view, more than that is required for the purposes of s.36(1)(b).

Where Parliament has deemed it necessary to give paramountcy to the undoubted public interest in confidentiality and candour and frankness by

protecting a class of documents containing high level communication from disclosure under the Act, it has done so by express proscription. Thus by force of...the Act, a document is an exempt document if it is a document that has been submitted to Cabinet for its consideration, being a document that was brought into existence for that purpose. Similar provision has been made with respect to Executive Council documents...Parliament has not gone on to provide, as it might well have done, had it been so minded, that documents containing confidential communications between Ministers or between senior public servants and Ministers are also exempt, as a class, from disclosure under the Act. Rather, the question whether such communications should be exempt has been left to be determined having regard to the contents of each document, in the light of the public interest posed by s.36(1)(b)" [My emphasis].

43. In this instance there is no question involving the scrutiny of an appeal whilst it is in progress. Furthermore, the purpose of FOI legislation is to open government decision-making processes to public scrutiny, as far as possible. It is therefore arguable that the advent of FOI can assist rather than hinder the integrity of the Ministerial appeal process. In any case, the agency must persuade me that disclosure of each particular document would, on balance, be contrary to the public interest whenever the deliberative process exemption is claimed.

44. The protection afforded to documents under clause 6(1) does not extend to protect matter appearing in an agency's internal manual, nor to matter which is merely factual or statistical (sub-clauses (2) and (3)). Further, in my view and for the reasons given in my decision in *Re Read*, documents dealing with the procedural or administrative functions of an agency do not attract the exemption under clause 6(1). For this reason, it is my view that Documents 5, 11, 12, 13 and 15 are not exempt under this clause as they record steps in the administrative functions of the TPAC and are generated during the procedures described at paragraph 35 above. The claims for exemption under clauses 3 or 8 are considered at paragraphs 69 - 72, 79, 80 and 82 below.

45. Of the remaining documents for which exemption under clause 6(1) is claimed (being Documents 1, 6, 7, 9 and 16), Document 16 has already been provided to the applicant by the Minister in an edited form. The applicant confirmed with a member of my staff that he was seeking access to the edited portions of this document. In my opinion the claim for exemption under clause 6(1) in relation to the edited parts, cannot be sustained. The information deleted by the Minister is not of a type considered "deliberative" in the sense referred to in *Re Waterford*. The edited parts of Document 16 contain the names of an officer of DPUD, the agent and the TPAC member investigating the appeal and a reference to an attachment to the document. These details are, therefore, not exempt under this clause. The claims for exemption under clauses 3, 4 or 8 are considered at paragraphs 69 - 72, 81 and 86.

46. Document 1 is a report setting out the substance of the appeal, prepared by the agent on behalf of the appellant. It is a document specifically prepared for consideration by the Minister as part of his deliberative process in determining an

appeal. It is also prepared to assist the deliberative process of the TPAC member in making his recommendation to the Minister. In *Ryder v Booth* [1985] VR 869, the Full Court of the Supreme Court of Victoria considered the application of the "deliberative process" exemption (s.30(1)) in the Victorian *Freedom of Information Act 1982* to medical reports used by the State Superannuation Board in assessing entitlements to payments from the fund. Gray J. said, at p. 877, that s.30(1) was concerned with information generated within an agency rather than information obtained by an agency from outside. However, he accepted that under s.35(1)(a) of that Act, information communicated in confidence to an agency from outside is exempt from disclosure if it falls within the exemption provided for in s.30(1).

47. The purpose of the clause 6 exemption is to protect the "thinking processes" of an agency by enabling a full and frank exchange of information between Ministers, senior public officials and their advisors. There is nothing in the wording of clause 6 which suggests to me that the opinion, advice, recommendation, consultation or deliberation contained within a particular document, must be generated within an agency in order to attract the exemption. The nature of the business of government means that frequently the business interests of the private sector are likely to be reflected in the documents of agencies as advice, opinions, recommendations and the like and these should be capable of attracting the exemption under clause 6 where it is appropriate to do so.

48. There are differences between the wording of s.35(1)(a) (Victoria) and its equivalent in Western Australia, clause 8, and I consider that the claim for exemption under clause 6 for Document 1 is not prejudiced by the fact that the document was generated outside the agency. Document 1 identifies factors relevant to the site and the development application including opinions and comments on DPUD's refusal, and elaborates on the grounds of the appeal using commercial and business information of the appellant to make the relevant points. The fact that the document is used primarily by the TPAC member in preparing advice for the Minister does not make it any less a deliberative process document in my view. Having determined that it meets the requirements of clause 6(1)(a), whether or not it is exempt is dependent upon whether the agency has discharged its onus under s.102 and established that disclosure of Document 1 would, on balance, be contrary to the public interest. My findings on this point are stated and discussed at paragraphs 52 - 63 below. Further, it must be noted that I consider parts of this document to be merely factual and hence not exempt under clause 6(3). However, as other exemptions are claimed for this document, the factual parts of it are considered further in the discussion about the applicability of these exemptions.

49. In my opinion, Document 6 is also a deliberative process document recording an opinion from the Committee for Statutory Procedures and directed to the Minister as part of the appeal file. It is clear from a reading of this document, that it was prepared for the purpose of the Minister's consideration of this appeal. The exempt status of this document is also dependent on the application of the public interest test under clause 6(1)(b) and my finding on that point appears at

paragraph 63 below. The exemptions claimed under clauses 3 and 8 for this document are considered at paragraphs 69 - 72 and 79 below.

50. I do not consider Document 7 to be a deliberative process document. It is a letter requesting no further action on the appeal until such time as additional information is supplied. As such, it is an administrative or procedural document only and I find that it is not exempt under clause 6. The claims for exemption under clauses 3 or 8 are considered at paragraphs 69 - 72 and 79 below.

51. Document 9 contains opinion and I am satisfied that it was recorded in the course of, or for the purpose of, the deliberative process. Its exempt status must also be determined by a consideration of the requirements under clause6(1)(b) and my finding on that point is stated at paragraph 63 below. The claims for exemptions under clauses 3 and 8 in respect of this document are considered at paragraphs 69 - 72 and 79.

THE PUBLIC INTEREST

52. To establish an exemption under clause 6 with respect to Documents 1, 6 and 9, the agency must satisfy me that disclosure of these documents would, on balance, be contrary to the public interest. This means that the agency must identify, and balance against one another, the public interest factors for and against disclosure. On the one hand there is the public interest in the applicant's right to know which is embodied in the FOI Act itself. On the other there is the public interest in maintaining the proper workings of government. It is unfortunate that agencies continue to focus on the latter aspect of the public interest, whilst ignoring the former.

53. In the schedule provided to my office describing the disputed documents, the Minister identified the public interest factors against disclosure of the documents. These factors summarised are as follows:

> *" It is not in the public interest of the parties in the document to be personally identified.*
>
> *It is not in the interests of the parties in the document to have their commercial dealings or business dealings identified.*
>
> *It would prejudice the integrity of the decision-making process if deliberations of the Minister were open to scrutiny."*

54. Without more, I do not find these reasons totally convincing especially as they focus on individual rights rather than the greater public good that is embraced by the notion of the "public interest". Consequently, I made further inquiries and sought additional information, to assist me to identify those *" standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of*

society and for the well being of its members" (*DPP v Smith* [1991] 1 VR 63 at 65).

55. It appears that Western Australia is the only State to have established a dual appeal system with appeal rights to either the Minister or the Town Planning Appeal Tribunal ('the Tribunal'). An appeal to one extinguishes the right of appeal to the other. By contrast, other jurisdictions provide for appeals to a Tribunal, Court or Board. In describing the existing system in the States and Territories, the Commonwealth Department of Industry, Technology and Commerce, in a 1990 publication entitled "Combined Jurisdiction for Development Appeals in the States and Territories", said, at p.72, of the situation in this State:

> *"Ministerial appeals are generally dealt with much more quickly than appeals to the Town Planning Appeal Tribunal.*
>
> *However there are a number of criticisms from a wide variety of sources concerning the appropriateness of a right of appeal to the Minister. They include the following:-*
>
> * *The system leaves open the possibility of a purely political decision being made without regard to planning merit;*
> * *The planning merits of a proposed development are not debated in an open forum;*
> * *The respondents can include the State Planning Commission. The State Planning Commission is subject to public direction of the Minister by statute. Appeals can lie from the Commission's decision to the Minister;*
> * *There is no opportunity for the parties to an appeal to see or be aware of the contents of submissions by the other party;*
> * *The principles of natural justice are contravened."*

56. The Ministerial appeal system has been in place since 1970 and, in the intervening years, practices and understandings that are known in the planning and development industry have been developed. Appeals involving complex or legal issues are directed to the Tribunal whilst others relating to personal or sensitive matters requiring a sympathetic consideration, are directed to the Minister. The volume of appeals to the Minister has remained fairly high whilst appeals to the Tribunal have declined somewhat in the last 5 years as the following figures, provided by the TPAC, show:

Year	**Minister**	**Tribunal**
1989	584	48
1990	521	48
1991	507	32
1992	492	25
1993	589	22

57. Although I express no opinion on the criticisms contained in the Commonwealth report, the number of Ministerial appeals indicates to me that a significant part of government decision-making about planning issues which affects local communities, occurs without the benefit of proper scrutiny by those communities or anyone else. The unnecessary secrecy surrounding actions of government was the subject of the Royal Commission into Commercial Activities of Government and Related Matters. Some of the comments of that Royal Commission are relevant in the context of the Ministerial appeals process. The Commissioners said, in Part II, Chapter 2, paragraphs 2.1.3 - 2.1.8:

> *"If government is to be truly government for the people, if the public is to be able to participate in government and to experience its benefits, the public must be properly informed about government and its affairs.*
>
> *The Commission does not suggest that open government can hold for all purposes and in all circumstances. There can be justifiable reasons for government keeping certain information confidential...But we believe it is incontestable in this State, despite an increased awareness on the part of government of a need to keep the public better informed, that the balance between what is publicly revealed in an accurate and informative way by government and what is kept secret or else relatively uninformative, disproportionately favours government...Despite the extensive statutory powers government agencies have to affect the rights and interests of individual citizens in particular instances, the individual member of the public has no general right to be given reasons for a decision which affects his or her interests."*

58. I recognise that there is a public interest in the existence of an alternative to the Tribunal, particularly where such a system is able to determine matters informally and to take into account factors personal to appellants. Parliament itself has recognised the public interest in such a system by providing a legislative basis for its existence in the *Town Planning and Development Act 1928*. On the other hand there is a public interest in knowing about the decisions of government under such a system and how and why they are made.

59. I do not accept the argument that in all cases members of the public are necessarily entitled to a degree of personal privacy when they have dealings with government. The wider public good on occasions requires otherwise as the Royal Commission recognised. In this instance, not only is the name of the appellant already in the public arena (this matter being the subject of Parliamentary Questions), but it is known to the applicant. The agent told me that he had no objection to his identity and business name and address being disclosed. The Minister also argued that the "personal" details of an appellant, which were often brought to his attention in the course of an appeal, should remain confidential. I accept that there is a strong public interest in protecting the privacy of individuals. The FOI Act recognises this in the clause 3 exemption. However, in this instance, the appellant is a company and clause 3, is not intended to protect the "privacy" of such a body which must protect its business interests, where necessary, by the application of the exemptions in clause 4. For this reason I reject the first public interest factor submitted by the Minister as disclosure of the identity of individuals in this appeal is not contrary to the public interest.

60. I accept that the need for commercial confidentiality is on a different footing. Since the decision in *Searle Aust. Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163, discussed at paragraphs 77 and 78 below, any existing confidentiality conventions between government and third parties must be disregarded in favour of the application of the legislative provisions of the FOI Act and the precise terms of the exemptions, where applicable. Unlike the situation under the Commonwealth FOI Act, in my view the confidentiality of documents may be a public interest factor against disclosure under clause 6(1)(b) in circumstances where it can be shown that protection of the type of information contained in the document is essential for the proper functioning of the deliberative process.

61. The agent claimed that he would be obliged to caution his clients in the future on the implications of FOI and to recommend that business information be deleted from future appeal documents. The result of such a step, it was claimed, would be to change the style of appeals and the type of information offered in support thereof. Although this argument may be more relevant to the claims for exemption based on clauses 4 and 8, without deciding the validity of the exemption based on these clauses, I am of the view that a lack of commercial and business information would render the Ministerial appeal system inoperable and that it would be contrary to the public interest for Ministerial decisions about planning matters to be made without the benefit of such information. The agent,

on behalf of the appellant, indicated to me the commercial and business information which was considered sensitive. Essentially this was information relating to the detail of the operation of the proposed plant. He told me that the appellant objected to disclosure of this information and that it may not have been provided if it were expected that it may be disclosed. These parts are:

* plate 2
* the table on pages 5 and 6
* the last 3 paragraphs on page 7 under the heading 3.2.2 DEVELOPMENTAL DETAIL
* plan 4
* plate 3
* plan 5
* all of page 8
* the first paragraph on page 9

The agent also identified as sensitive the first 3 pages of the document entitled "Conditions of Works Approval". However, as that document is publicly available from the EPA and, therefore, section 6 of the FOI Act applies, I consider that document is not accessible under FOI and hence is not within the ambit of the access application.

62. Subject to the following comments in relation to non-exempt factual matter, I therefore find that those parts of Document 1 identified to me by the agent on behalf of the appellant, and listed in paragraph 61 above, are exempt under clause 6 because they contain business and commercial information given in confidence to the Minister and that this type of information is essential for the proper functioning of the deliberative processes, namely, the Ministerial appeal system in Western Australia and that disclosure of this information would, on balance, be contrary to the public interest. For this reason it is unnecessary to consider the claims for exemption for those parts of Document 1 under clauses 3, 4 and 8.

63. I do not accept that the same considerations that apply to Document 1 apply to the disclosure of Documents 6 and 9. These documents contain opinion and advice from relevant government agencies. That advice or opinion may be "personal" to its proponent but the documents do not contain or reveal other private information which requires protection from disclosure. The privacy of the individuals would be unaffected by the release of advice or opinion proffered as part of their public sector duties. On the contrary, the release of these documents may go some way towards revealing the range of matters considered by the Minister. There is, therefore, a public interest in their release and the exemption for these documents has not been established to my satisfaction.

FACTUAL MATTER

64. Document 1 consists of a 16 page submission with additional plates and plans and three appendices. Appendix I contains a copy of the notices of planning refusal from DPUD to the City of Wanneroo and the appellant. In my view the information in the documents in Appendix I, other than the reasons for refusal in the paragraphs numbered 1, 2 and 3 in the notice to the City of Wanneroo, is factual matter and, other than those paragraphs (which I have already found not to be exempt under clause 6), is not exempt pursuant to clause 6(3). The claims for exemption under clauses 3, 4 and 8 are considered at paragraphs 71, 72, 82 and 87 below. Of the documents contained in Appendix II, I consider that the Environmental Protection Authority (EPA) Conditions of Works Approval contains purely factual matter. However, for the reasons I have given at paragraph 61 above, I consider that access to that document is not available under the FOI Act. Appendix III contains a copy of the City of Wanneroo refusal in the first instance and a copy of Form 2R. In my opinion, the Form 2R is purely factual and not exempt under clause 6. The claims for exemption under clauses 3, 4 and 8 are considered at paragraphs 71, 72, 82 and 87 below.

65. Contained within Document 1 are a number of maps and plans which are copies of government documents. None of these maps or plans is exempt therefore for the reasons given. However, other maps and plans relate to the business affairs of the appellant and come within the exemption as already stated. The documents and pages of the submission which are **not exempt** because they disclose factual information only are as follows:

* The document described as "Plan 1 Regional Location".

* Page 3 of the submission.

* The document described as "Plate 1 Aerial view of subject land".

* Page 4 of the submission.

* The document described as "Plan 2 Lease Boundary Alteration Plan".

* The first two paragraphs and the heading on page 5.

* The numbered headings and paragraphs 1, 2 and 3 only on page 7.

* Page 9 (except for the first paragraph which is exempt - see paragraph 61 above).

(c) Clause 3 - Personal Information

66. Clause 3 of Schedule 1 provides:

> ***"3. Personal information***

Exemption

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

Limits on exemption

(2)...
(3)...
(4)...
(5)...

(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."

67. 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.

68. 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 an actual 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.

69. Exemption under clause 3 was claimed by the Minister for all the documents except Document 10. Documents 5, 6, 7, 9, 11, 12, 13, 14, 15, 16, 17 and 19 contain the names of various public sector employees and the positions they occupy, or occupied when the appeal was current, and the names of three TPAC members, including the Chairman. TPAC members are appointed by the Governor and their names and addresses appear in the Government Gazette from time to time. This information, though inherently "personal", is therefore already in the public domain. In my view, where the individual is a public sector employee, 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 protecting the privacy of that person is outweighed by the public interest in disclosure provided by the FOI Act itself.

70. 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 it was the intention of Parliament to provide anonymity for public sector employees each time a name of one of them is mentioned in a file. Such a result would be contrary to the stated aims of the FOI 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 consider that disclosure of the names of public sector employees is generally not unreasonable having regard to the public interest and, in this case, it is in the public interest that those names be disclosed.

71. However, where the individual is not a public sector employee, I accept that different considerations apply. Documents 1, 2, 3, 4, 6, 7, 8, 11, 12, 13, 15, 16, 18 and 19 contain the name of the agent and, therefore, reveal that he acted for the appellant in the appeal. In this instance, the agent informed me that he has no objection to disclosure of these details. The documents also reveal the agent's business address and the names of his associates, which appear on his letterhead. The agent informed me that he had no objection to disclosure of his business address and, in any event, once the agent's name is disclosed those details are easily ascertainable by reference to public records. Hence, I find that disclosure of that information, if it can be described as personal information, is not exempt under clause 3. Document 7 (a letter from the agent's firm to the TPAC Chairman), however, is signed on behalf of the author of the document by a person who does not appear on the agent's letterhead as a member of the agent's firm. I find that matter, revealing the person's name and signature and the fact that he or she presumably is employed by the agent is personal information to which none of the limitations in clause 3 applies and is, therefore, exempt.

72. Document 5, the letters in Appendix 1 in Document 1 from DPUD to the appellant and the City of Wanneroo and the letters in Appendix II of Document 1 contain the name of a person described as "the owner" in Document 5 and to whom the letters in Appendices I and II in Document 1 are addressed. As the name of that person is easily ascertainable by reference to public records, I do not consider it to be personal information protected by clause 3 and, therefore, I find that it is not exempt under this clause. The edited parts of Document 16 contain a reference to an attachment; that reference is not personal information and is not exempt under clause 3. In my opinion, there is no other personal information in any of the documents. For these reasons I find that Documents 1, 2, 3, 4, 5, 6, 8, 9, 11, 12, 14, 15, 17, 19 and the edited parts of Documents 16 and 18 are not exempt under clause 3. Further I find that the signature appearing in Document 7 and the telephone number appearing in Document 13 are exempt but that those Documents are otherwise not exempt under clause 3.

(d) Clause 8 - Confidential communications

73. The agency claimed an exemption based on clause 8(2) in relation to Documents 1, 2, 3, 5, 6, 7, 9, 13 and 16. Clause 8(2) provides:

> *"(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."*

74. As I stated in my decision *Re Read*, 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.

75. 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. In A*ttorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 190, the court said that the words "*could reasonably be expected to prejudice the future supply of information"* in s.43(1)(c)(ii) of the *Freedom of Information Act 1982* (Commonwealth) were intended to receive their ordinary meaning and required a 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.

76. These are the tests that must be applied when agencies are considering a claim for exemption under clause 8(2). Furthermore, as I stated in *Re Read* the requirement in clause 8(2)(b) that the future supply of information of **that** kind must be prejudiced is a reference to similar information or information of the class or character contained in the case under consideration.

77. Since the decision of the Full Court of the Federal Court of Australia in *Searle*, it appears that a government agency cannot, by agreement or conduct, bind itself so as to guarantee that confidential information provided to it will not be disclosed under FOI laws. The Court said, at p.180:

> *"Prior to the coming into operation of the FOI Act, most communications to Commonwealth Departments were understood to be confidential because access to the material could be obtained only at the discretion of an appropriate officer. With the commencement of the FOI Act on 1 December 1982, not only could there be no understanding of absolute confidentiality, access became enforceable, subject to the provisions of the FOI Act. No officer could avoid the provisions of the FOI Act simply by agreeing to keep documents confidential. The FOI Act provided otherwise."*

78. This statement is relevant within the context of the operation of FOI in Western Australia. Section 10(1) provides a person with a right of access to documents of an agency (other than an exempt agency), subject to and in accordance with the FOI Act. This legally enforceable right of access may only be avoided by the means laid down in the Act in relation to the disclosure of exempt matter. The effect of the passage quoted from *Searle* in respect of confidential communications is that previous understandings of confidentiality may not be sufficient to protect information from disclosure under FOI since it is the specific requirements in clause 8 that must be applied rather than any long-standing convention of confidentiality.

79. In my view, Documents 2, 3, 5, 7 and 9 are routine, administrative or procedural documents generated as a matter of practice, and of necessity, during the course of an appeal. I do not accept the claim for confidentiality of these documents based on clause 8(2) because I am of the view, as a matter of common sense and necessity, that this type of document will continue to be generated and provided for future appeals and, therefore, the necessary element of clause 8(2)(b) is not satisfied. Document 6 is a memorandum, addressed to the Minister and bearing a stamp indicating it was received by the TPAC, from the Committee for Statutory Procedures, recording its recommendation in respect of the appeal. No argument has been put to me by the Minister that persuades me that an action for breach of confidence would lie should this document be disclosed, nor that disclosure would prejudice future supply of information of that kind. Accordingly, I find that Documents 2, 3, 5, 6, 7 and 9 are not exempt under clause 8.

80. Document 13 is a file note written by the TPAC member originally assigned to deal with the appeal. This member withdrew from the investigation and the document appears to have originated after his withdrawal. It records certain steps already undertaken by that member in respect of the investigation and suggestions for further action. The text of the document suggests that the information was intended for the TPAC member who would assume the function of investigating this appeal. No argument has been put to me which persuades

me that disclosure of the document would prejudice the future supply of information of that kind. In my view, it is a matter of usual professional practice that such information be provided and I find that the document is not exempt under clause 8.

81. The applicant has previously been granted access to Document 16, with certain matter deleted and access is now sought to the edited parts of that document. The edited matter consists of the names of an officer of DPUD, the agent and the TPAC member who prepared the report and a reference to an attachment. The agent informed me that he has no objection to disclosure of his name. Therefore, I do not accept that disclosure of that information would prejudice the future supply to government, of information of that kind. I am not persuaded that the name of the TPAC member is information of a confidential nature obtained in confidence and I am not convinced that disclosure would prejudice future supply of information of that kind. The attachment referred to is a reproduction of plan 5 in Document 1. I have found that plan to be exempt under clause 6. The mere reference in Document 16 does not, in my view, reveal confidential information that attracts exemption under clause 8 and I find that the reference is not exempt under this clause. Accordingly, I find that the edited parts of document 16 are not exempt under clause 8. It is not clear to me whether any of the attachments to Document 16 was provided to the applicant with the edited version of that document supplied to him by the Minister. The attachments are reproductions of plans 1, 2, 4 and 5 in Document 1 (although they are numbered differently in Document 16) and a reproduction of Document 15. My decision and reasons therefore in relation to these documents as part of Document 1 apply equally to these documents as part of Document 16.

82. As I have found that parts of Document 1 are exempt under clause 6, it is not necessary for me to decide the claim for exemption under clause 8 with respect to those parts. However, exemption under clause 8(2) is claimed for the remaining parts of Document 1, including factual matter which is not exempt pursuant to clause 6(3). For reasons stated at paragraph 87 below, I do not consider that the requirement under clause 8(2)(b) is satisfied and I find that those parts of Document 1 which are not exempt under clause 6, are not exempt under clause 8(2). As the appellant, through its representative, has indicated to me that it has no objection to disclosure of that information, I do not accept the Minister's argument that disclosure would constitute a breach of confidence for which a legal remedy could be obtained and I find that those parts of Document 1 are not exempt under clause 8(1). Accordingly, I find that Documents 2, 3, 5, 6, 7, 9, 13, the edited parts of Document 16 and those parts of Document 1 other than those specified in paragraph 61 above, are not exempt.

(e) Clause 4 - Commercial or business information

83. Exemptions under clause 4(3) were claimed for Documents 1, 2, 3, 4, 5, 16, 18 and 19. Clause 4(3) is part of the exemption in clause 4 which is designed to protect commercial and business privacy. It is the business equivalent of the protection provided to individuals by clause 3. Clause 4(3) states:

> *"(3) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
>
> *(b) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*
>
> ***Limits on exemptions***
>
> *(4) Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*
>
> *(5) Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant.*
>
> *(6) Matter is not exempt matter under subclause (1), (2) or (3) if the applicant provides evidence establishing that the person concerned consents to the disclosure of the matter to the applicant.*
>
> *(7) Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest."*

84. To establish the exemption under clause 4(3) disclosure of the documents in question must reveal information of the type mentioned, about any person, not necessarily the person who wrote the document, and it must be reasonable to expect that disclosure in this manner would produce some adverse effect or would prejudice the future supply of information of that kind. The public interest test in sub-clause (7) envisages that some kinds of business or commercial information may be disclosed if the public interest, on balance, requires this to occur.

85. Document 2 consists of two pages of correspondence from the agent to the Chairman of the TPAC, enclosing a Notice of Appeal in the prescribed form and a remittance for costs. This document contains details of the business name and

address of the agent which may be characterised as information about the business or professional affairs of the agent. However, I am of the view that it is not reasonable to expect any adverse effect if this information is disclosed under the FOI Act. However, it is reasonable to expect the fact that such a business exists and is engaged in the preparation of planning appeals, to be well known at least in the commercial and business world. Furthermore, the agent did not object to the disclosure of this information. The document also contains information of the kind described in clause 4(3)(a) about the appellant. However, for the same reasons stated at paragraph 87 below in respect of Document 1, I find that the requirement under part (b) of that clause is not satisfied, and I find that Document 2, therefore is not exempt.

86. Document 3, described as the Notice of Appeal, Document 4 and Document 5 are not exempt under clause 4(3) for the same reasons given in paragraph 85. An exemption was also claimed under clause 4(3) for the edited parts of Documents 16 and 18. The deleted matter in Document 18 is the name and address of the agent. The deleted information in Document 16 consists of the name of the agent, the name of the TPAC member who prepared the report and a reference to an attachment. I find that the mere reference to the attachment does not contain information that meets the descriptions in clause 4(2)(a) or clause 4 (3)(a) and is not exempt. For the reasons stated in paragraph 85 above, I find that the name of the agent in this document is not exempt under clause 4. In my opinion, the name of the TPAC member is not information of a kind contemplated by clause 4(2)(a) or 4(3)(a) and, therefore, I find that the claim for exemption under clauses 4(2) and 4(3) in respect of the deleted parts of Documents 16 and 18 fail. Document 19 is an unsigned copy of Document 18 and bears the names of the other parties to whom a copy of Document 18 was sent. For the reasons given in relation to Documents 16 and 18, I find that the name and address of the agent and the name of the TPAC member are not exempt under clause 4 . Further, I find that the titles of the other two parties do not satisfy clause 4(2)(a) or clause 4(3)(a) and are not exempt under clause 4. My understanding is that the applicant seeks access only to those parts as he has already been given access to the balance of that document.

87. As I have decided that parts of Document 1, are exempt under clause 6, I do not need to consider the claim for exemption under clause 4(3) for that document, except in respect of those parts I have found not to be exempt under clause 6. I accept that some of those parts of Document 1 contain information of a kind described in clause 4(3)(a). However, much of that information has already been disclosed or is otherwise publicly available. The agent, on behalf of the appellant, informed me that the appellant did not object to its disclosure. In view of those circumstances, I do not accept that disclosure could reasonably be expected to have an adverse effect on the business affairs of the appellant, nor that the future supply of information of that kind to the Government would be prejudiced by disclosure of that information in this case. I find that the name of the person to whom the letters in Appendices I and II are addressed, and which appears in Document 5, is not exempt under clause 4 for the same reasons cited in paragraph 71 above. I also find that those parts of Document 1 which I have found not to be exempt under clause 6 are not exempt under clause 4.

88. The agent also submitted on his own behalf that disclosure of Document 1 would reveal his methodology in preparing appeal documents and that this was a business interest which had a commercial value to him. The submission of the agent on this point was as follows:

> *"...This office enjoys a reasonably high success with Appeals and we are of the view this success finds basis in our professional approach; our ability to rationally argue a case in the appropriate forum; and to examine and glean elements from a determination which assists in a final resolution of these Appeals. The method in which we undertake this research and prepare and present Appeals has traditionally been a matter of our own professional confidentiality - transpiring only to the Minister and his advisors at Appeal time.*
>
> *It is as a result of this ability and associated expertise that we are able to attract Clients seeking this particular service.*
>
> *Within the Guidelines of Section 4 of the Act we therefore claim an exemption to the release of our Appeal documentation on the basis that the Appeal documents are exempt as their disclosure would reveal both our trade secrets and method of operation and would certainly diminish or destroy the commercial value of those documents to our practice.*
>
> *With respect to Sub-clause (3) of Section 4 we are also of the view that release of the Appeal format and methodology would reveal information about the business and professional affairs of our Office and would therefore be expected to have an adverse affect on those affairs."*

89. The agent did not provide any material to support his claims for exemption based on sub-clauses 4(1), (2) or (3) other than the assertion based on the wording in clause 4. I cannot accept the claim that the report methodology is a trade secret. Although the term "trade secret" is not defined and it is the subject of some legal complexities, clause 4 is essentially concerned with protecting confidential information of a commercial character such that it constitutes an economic asset of the business concerned. Disclosure of Document 1 would reveal how this particular agent structures an appeal submission but a perusal of the document itself shows that this is largely a matter of common sense. The format used is unremarkable and for this reason I cannot accept the claim that it constitutes a trade secret warranting absolute protection by secrecy.

90. Sub-clause 4(2) requires the applicant to satisfy me, if his methodology has a commercial value, that the alleged effect that would follow from disclosure is one that is acceptable to reason. This agent handles some 12-15 appeals per year. In the context of the Ministerial appeal system it is unlikely that any adverse effects would follow from disclosure of the methods employed in this

instance. In fact the reverse result might follow in that clients may be attracted to a business that enjoys a demonstrable success in such appeals. In any case, the agent has not persuaded me that his method of preparing this appeal has a commercial value, if indeed it has, nor has he persuaded me that it is reasonable to expect that this value would be diminished or destroyed by the disclosure of Document 1.

91. Clause 4 is designed to protect a variety of information and it is not possible, as a matter of statutory construction, for the same piece of information to be exempt under more than one sub-clause of this clause. However, even if I accept that the document contains information which would satisfy sub-clause 4(3)(a), on the basis of the material before me, I do not accept that it is reasonable to expect an adverse effect from its disclosure. The applicant claimed that it was in the public interest to provide all information on which the Minister relied in reaching his decision. I accept that there is a public interest in knowing how decisions are made and this public interest is served in my view, by making as much information about these processes available as possible, subject only to the protection of essential private interests. In this case, the protection of the commercial privacy of the appellant can be achieved and, at the same time, the public interest in the applicant exercising his right to know can also be served.

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