

JONES AND SWAN

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

**File Ref: L0494 & 94017
Decision Ref: D00694**

Participants:

David Norman Jones
Applicant

- and -

Shire of Swan
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - Valuation Reports - voluntary acquisition of land by Shire - refusal of access to reports - clause 6 - public interest - balancing benefit to municipality and fairness to individual ratepayer - clause 8 - where the future supply prejudiced - clause 10 - "substantial adverse effect" - commercial value - clause 4(2) - does not apply.

Freedom of Information Act 1992 (WA) ss.9(1)(a); 11(1)(c) & (d); 30; 42; 66(4); 68; 72(1)(a); Schedule 1 clauses 4(2); 6; 8; 10.

Freedom of Information Act 1982 (Vic) s.30(1).

Freedom of Information Act 1982 (C'wlth) ss.40(1); 44.

Local Government Act 1960 (WA) ss.278; 279A.

Public Works Act 1902 - 1974 (WA).

Re Hopper and Australian Meat and Livestock Research and Development Corporation (1989) AALB 1509.

Re Read and Public Service Commission (Information Commissioner WA, 16 February 1994, unreported).

Re Veale and Town of Bassendean (Information Commissioner WA, 25 March 1994, unreported).

Re Waterford and Department of the Treasury (No. 2) (1984) 1 AAR 1.

Ryder v Booth [1985] VR 869.

Re Murtagh and Federal Commissioner of Taxation (1984) 6 ALD 112.

Department of Health and Anor v Jephcott (1985) 62 ALR 421.

Harris v Australian Broadcasting Corporation (1983) 78 FLR 236.

Re Healy and Australian National University (Commonwealth AAT, 23 May 1985, unreported).

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

DECISION

The decision under review is set aside and in lieu thereof it is decided that the documents are not exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

9th May, 1994

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review of a decision by the Shire of Swan ('the agency') to refuse Mr Jones ('the applicant') access under the *Freedom of Information Act 1992* ('the FOI Act') to two valuation reports concerning a parcel of the applicant's land.
2. Some time in 1992 the agency entered into negotiations for the purchase of a parcel of land owned by the applicant. On 26 November 1992 the agency advised the applicant that Council had resolved that it was prepared to purchase the property in the 1993/94 financial year at market value set at the time by two independent valuations.
3. It was subsequently agreed that the agency would obtain two valuations of the property and that, if an agreed price still could not be reached on the basis of the two valuations, the applicant was to obtain a third valuation which would be paid for by Council. In a letter to the applicant on 1 June 1993 the agency confirmed that agreement and stated that the aim was to try to reach an agreed price before the end of the budget process.
4. Two valuations from licensed valuers were obtained and on 12 July 1993 the applicant was advised that Council's Senior Executive had decided, after considering the valuations, to recommend that Council make a formal offer to the applicant of a certain sum for the purchase of the land. In a letter dated 27 September 1993 Council made such an offer to the applicant.
5. Following some negotiation between the applicant and the agency, the Shire's Executive Manager, Community Planning and Development, wrote to the applicant offering to include 10% *solatium* to Council's final offer previously communicated to the applicant.
6. The applicant rejected the offer, advising the agency that he knew the figure to be well below a valuation previously obtained by him and submitted to the agency and that he also believed it to be less than the figures submitted by Council's valuers. The applicant sought details of the valuations received by Council in order to reach a compromise agreement. However, the agency responded that Council's offers had been based on credited valuers' advice and refused to provide the applicant with these details. The agency informed him that as a negotiated settlement could not be reached, Council intended to proceed with the resumption of the whole of the land and the applicant's interest in the land would, therefore, be converted to a claim for compensation in accordance with the requirements of the *Public Works Act 1902-1974* ("*Public Works Act*").

7. On 9 November 1993 the applicant exercised his rights under the FOI Act and formally applied to the agency for copies of the valuers' reports. Access was refused on the basis that the documents were exempt under clauses 6 and 8(2) of Schedule 1 to the Act and the applicant was formally advised of this decision on 8 December 1993.
8. The applicant then applied to the agency for internal review of the decision of 8 December 1993. This review confirmed the original decision and the applicant was advised of this outcome on 23 December 1993. In the notice of that decision exemptions for the valuation reports were claimed under clauses 6(1), 8(2) and 10 of Schedule 1 to the Act. Although the original Notice of Decision did not comply with the requirements mandated by s.30 of the FOI Act, the written decision of 23 December 1993 indicated that the matter had been properly reviewed and it did comply with the requirements of ss.30 and 42 of the FOI Act.
9. By a letter dated 19 January 1994 the applicant applied to the Information Commissioner for external review of the decision of the agency to deny him access to the valuation reports. For some reason this complaint was not received by my office until 22 February 1994.

THE REVIEW PROCESS

10. Although this complaint was lodged after expiry of the 60 day period this appears to have occurred through no fault of the applicant. I decided to accept the complaint pursuant to my authority under s.66(4) and the applicant was advised accordingly. However, I considered that the statutory period for decision-making by the Information Commissioner commenced from 22 February 1994. In accordance with my obligations under s.68 the agency was advised that I had accepted the complaint and was requested to provide me with the disputed documents together with the agency's FOI file in relation to this matter. These were delivered to my office on 24 February 1994.
11. Following an initial inspection of the documents, and in view of the claims for exemption, I decided to seek additional information from the valuers concerned. This was provided although it took some time and repeated requests in order to obtain the requisite information from one source. The Information Commissioner is given power under s.72(1)(a) to require information from **any** person, not merely state and local government employees. This power is for the purpose of the proper consideration of a complaint and to enable all the public interest factors relevant to a complaint to be taken into account. I am aware that individuals in the private sector may be unfamiliar with the intent and operation of the FOI Act. Nevertheless the statute is law for all Western Australians not merely those employed within government. The necessity to seek information from a variety of sources means that in most cases decisions on complaints cannot reasonably be made within the 30 day period contemplated by the FOI Act.

12. An officer of the agency subsequently attended before me on 21 April 1994 to provide certain additional information required by me and to make oral submissions in support of the claims for exemption. He explained the background to this matter and the procedures followed by Council to resume land by both voluntary acquisition and compulsory resumption under the *Public Works Act*. Although the resumption process is apparently cheaper, he believed the Council had acted in good faith in making the offer to purchase the land. He also explained that if Council resumed the land the applicant could avail himself of further appeal rights under the *Public Works Act*.
13. The agency sought to make further written submissions to me and on 4 May 1994 I was provided with written submissions from solicitors acting for the agency. In this document exemptions were claimed based on clauses 6 and 4(2) and I was referred to the decision of the Commonwealth Administrative Appeals Tribunal in *Re Hopper and Australian Meat and Livestock Research and Development Corporation* (10 February 1989) No 4916 reported in the Australian Administrative Law Bulletin, April 1989 at 1509, to support these claims.

THE EXEMPTIONS

14. The disputed documents consist of two valuation reports with appropriate attachments. The reports consist of three and five pages respectively. Exemptions are claimed for both documents under clauses 6, 8(2), and 10(1),(2) and (4) and 4(2) of Schedule 1 to the FOI Act. The claims for exemption under clause 10 are argued as alternatives and I propose to consider each exempt clause in turn and to explain why I consider that these documents are not exempt under any of them.

(a) Clause 6 - Deliberative processes

15. Clause 6 of Schedule 1 to the FOI Act provides:

(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.*

Limits of exemptions

- (2) *Matter that appears in an internal manual of an agency is not exempt matter under subclause (1).*
- (3) *Matter that is merely factual or statistical is not exempt matter under subclause (1).*
- (4) *Matter is not exempt matter under subclause (1) if at least 10 years have passed since the matter came into existence.*

16. In my decisions in *Re Read and Public Service Commission* (16 February 1994 unreported) and *Re Veale and Town of Bassendean* (25 March 1994 unreported) I accepted as correct for Western Australia the statement of the meaning and scope of "deliberative processes" by the Administrative Appeals Tribunal in *Re Waterford and Department of the Treasury (No.2)* (1984) 1 AAR 1 at paragraphs 58, 59 and 60, which are reproduced below:

"58. 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. 'Deliberation' means 'The action of deliberating: careful consideration with a view to decision' (see The Shorter Oxford English Dictionary). 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. Deliberations on policy matters undoubtedly come within this broad description. 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.

59. It by no means follows, therefore, that every document on a departmental file will fall into this category. Section 36 (5) provides that this section does not apply to a document by reason only of purely factual material contained in the document (see, in this regard the Full Court decision in Harris). See also S.36(6) relating to reports and the like. Furthermore, however imprecise the dividing line may first appear to be 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 an agency. A document which, for example, discloses no more than a step in the procedures by which an agency handles a request under the FOI Act is not a document to which S36(1)(a) applies.

60. *It is documents containing opinion, advice, recommendations etc. relating to the internal processes of deliberation which are potentially shielded from disclosure - documents that might, perhaps, have been aptly described in the headnote as 'Internal Thinking Documents'. 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' (S.36(1)(b) of the FOI Act and cf.ss.35,36,37(1)(b) and 37(2) of the Administrative Appeals Tribunal Act 1975)."*

17. In *Ryder v Booth* [1985] VR 869, a decision of the Full Court of the Supreme Court of Victoria, Gray J. said, at p.877, that s.30(1), the Victorian equivalent of clause 6, was concerned with information generated within an agency rather than information obtained by an agency from outside. In that case, the Court was concerned with medical reports used by the State Superannuation Board in assessing entitlements to payments from the fund. However, 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.
18. Clause 6 is designed to protect the "thinking processes" of an agency. It seems to me that this purpose is served when documents are properly characterised as forming part of the deliberative processes of an agency in the sense described in *Re Waterford*. The agency claimed the documents were provided in confidence and that they were used by the agency in its deliberations on the appropriate price to be paid to the applicant and to inform the agency in its commercial negotiations with the applicant. It was contended that the documents amount to opinion, advice or recommendations obtained, prepared or recorded in the course of, and for the purpose of, Council's deliberative processes being negotiations for the purchase of land.
19. The valuation reports clearly contain opinion, namely, the opinions of the respective valuers as to the value of the applicant's land. The question then is whether negotiations over the price an agency is prepared to offer to a landowner, when that agency is a Shire Council, are part of the deliberative processes of that agency. The valuers' reports were obtained by the agency for the purpose of considering the price to be offered to the applicant for the acquisition of his land, and they formed part of the material considered by Council for that purpose. Section 278 of the *Local Government Act 1960* provides:

"A Council, for the purpose of carrying out a work or undertaking which it is authorised by law to carry out, but not otherwise, may, in the name and on behalf of the municipality -

- (a) *Purchase or otherwise acquire land from a person who is willing to sell it, and may pay the purchase money out of the municipal fund, or out of other money properly applicable for the execution of the work or undertaking, and may mortgage the whole or part of land so*

purchased to secure to the vendor payment of the purchase money, with interest;

(b) " (my emphasis)

20. For my purposes in considering the claim of exemption under clause 6, the words highlighted in the section reproduced above are significant. Further, section 279A of the *Local Government Act 1960* provides that "[w]here a Council resolves to purchase or otherwise acquire land for the purpose of carrying out a work or undertaking the resolution shall specify that purpose." The functions of a municipal council clearly include carrying out works and undertakings on behalf of its ratepayers.
21. In my view, negotiations over the price to be paid when land is acquired for this purpose are part of the deliberative processes of such a council. I am therefore satisfied that the valuers reports meet the requirements of clause 6(1). However, in order for these documents to be exempt under clause 6, part (b) of that clause must also be satisfied. That is, the agency must satisfy me that disclosure of the documents would, on balance, be contrary to the public interest.

The Public Interest Arguments of the Agency

22. It was asserted by the agency that disclosure of the information would be contrary to the public interest for the following reasons which are summarised:
 - (i) The information contained in the documents could not be of value to any other member of the public than the applicant (as well as the agency) and that disclosure would be contrary to the interests of the ratepayers of the municipality and, therefore, contrary to the public interest because disclosure might result in the aborting of the land acquisition negotiations, resulting in the valuation fees incurred and other expenses associated with the negotiations being thrown away.
 - (ii) A party to negotiations who obtains a valuation report is not obliged to rely on the report and may be justified in rejecting one or other of all the reports as inaccurate or inappropriate in the circumstances. Therefore, for the agency to be obliged to disclose the documents "*upon which it may place no reliance*" would "*severely complicate and hinder the negotiation process, and may compel the Council to abandon the negotiations for acquisition of the subject land, with consequential disadvantages to the municipality and its inhabitants as a result of the time and expenses thrown away...*".
 - (iii) Disclosure of the documents could damage the agency's professional relationship with valuers and may jeopardise the future supply of similar information. Further, valuation reports are supplied on the understanding that they be used only by the party to whom they are

addressed and that they are not reproduced in part or whole without written approval from the valuer.

23. Turning to the first of the agency's arguments, in the circumstances indicated in paragraphs 4, 5 and 6 above, I am not persuaded that disclosure of the documents would be likely to result in the aborting of the land acquisition negotiations. It is apparent from the documents and the information provided to me by the agency that the negotiations have already broken down and that that may be attributed in a large part to the refusal of the agency to disclose to the applicant the valuations it has obtained and the applicant's belief at the time that the offer was made to him that it was below the value or values estimated by the valuers. Furthermore, the agency has already indicated to the applicant that it considers the negotiations to have failed, and the agency has initiated compulsory resumption processes, although this may involve some further, more limited, negotiation.
24. Similarly, in respect of the agency's second argument, it appears to me that the negotiations were hindered by the agency's refusal to disclose the valuation reports. It was argued in this context that if a vendor is made aware of the estimated valuations in the valuation reports, and those estimated values differ, then the vendor will invariably fix on the higher of the two as the correct valuation and negotiations are thus hindered. However, in the course of dealing with the matter before me it was brought to my attention by the agency and confirmed by the applicant, that the applicant has become aware from another source of the amounts of the two estimated values. Therefore, in my opinion, disclosure of the reports to the applicant will not have this effect. Rather, disclosure may go some way to assisting the applicant to understand the basis on which the agency's offer was made and any future negotiations may be assisted rather than hindered. In any event, the agency is no more nor less obliged to rely on the reports or act upon them if they are disclosed to the applicant than if they are not.
25. In *Re Murtagh and Federal Commissioner of Taxation* (1984) 6 ALD 112, a case concerning an application for access to documents which would disclose the basis of the applicant's income tax assessment, the Administrative Appeals Tribunal rejected as abhorrent an argument that *"mutual half-light" should be "the necessary pre-condition of negotiation and settlement"* in relation to negotiations between taxpayers and the Australian Taxation Office. Although the matter before me is different I am nonetheless of the view that in this instance it is not in the public interest that these negotiations be conducted in "mutual half-light". If it is in the public interest, and I consider that it is, that a local authority acquiring a ratepayer's property should make every effort to ensure that a price that is both fair and equitable to the ratepayer and fair to the ratepayers of the shire is paid to the ratepayer for his or her land, then - in my view - there is no damage to the public interest in disclosing to the ratepayer valuations of the property that have been obtained by the local authority in the course of that process.

26. The agency has a considerable power to compulsorily resume a ratepayer's land. In my opinion, it is in the public interest that where negotiations have been undertaken by the agency for the voluntary acquisition of such land the agency is seen to act fairly in its dealings with ratepayers. Voluntary acquisition ought to be seen as a fair alternative to compulsory resumption proceedings and, in my opinion, it is in the public interest that the ratepayer in this instance be provided with access to the valuation reports in order to assist him to assess the basis upon which the agency's offer has been made and the fairness of that offer. Disclosure may facilitate the process of reaching agreement upon a fair market value for the property. In my view, that public interest outweighs the public interest, if indeed there is any, in the agency making a profit or "getting the best deal" in this matter. The public interest in acting fairly in the interests of the ratepayers of the shire as a whole is not incompatible with the public interest in acting fairly in the interests of this individual ratepayer.
27. It was also suggested by the agency that while another party would be entitled to maintain the confidentiality of its valuation reports, that party could nevertheless compel Council to disclose its confidential valuation reports and thereby establish a commercial disadvantage for the municipality. It was claimed that the inhabitants of the municipal district more clearly represent the public interest than an individual applicant for access, particularly if the applicant is the person engaged in commercial negotiations with the municipality. For the reasons I have stated at paragraphs 24, 25 and 26 above, I do not accept these arguments.
28. The agency asserted that the least effect of disclosure would be that valuers would be inhibited in the provision of their advice and that circumstance would place the municipality at a disadvantage compared to any other person seeking to deal in land with a municipality on a commercial basis. Both valuers were consulted by the agency in the course of dealing with the access application and the documents provided to me indicate that, with some qualifications, neither objected to the disclosure of his report to the applicant. This fact was also conveyed to me by these valuers in the course of my dealing with this complaint. Therefore, I do not consider that the agency has discharged its onus of establishing that disclosure of the documents in this case would, on balance, be contrary to the public interest and I find that the documents are not exempt under clause 6.

(b) Clause 8(2) - Confidential communications

29. Clause 8(2) of Schedule 1 to the FOI Act 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."*

30. I have discussed the meaning of this clause in my earlier decisions *Re Read* and *Re Veale*. As previously stated, 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. However, 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.
31. For the purpose of considering the application of clause 8(2) to these documents, I accept that the valuation reports are confidential communications within the meaning of clause 8(2)(a). Council regularly obtains valuations from licensed land valuers operating within the municipal district of the shire and I accept that it is a well established convention that the valuers carry out their investigations and provide these reports on a confidential basis. Both the valuers in this instance endorsed their valuations with an express statement that their reports were provided to the client exclusively for the purpose for which the report was obtained. In response to inquiries by me, one valuer informed me that the report was "*issued for the confidential use of the party to whom it was addressed and no liability was extended to any third parties.*" The other informed me that, generally, it was expected that a valuation would be treated as confidential to the party to whom it was addressed, but that in most instances when permission was sought, the valuer would agree to a third party being shown the valuation on the understanding that the third party will not act upon the valuation. That valuer indicated that there was an implied understanding of confidentiality between the valuer and the agency.
32. Part (b) of clause 8(2) requires the agency to demonstrate, to my satisfaction, that it is reasonable to expect that professional valuers would decline to provide information concerning property valuations to the Council in the future, if these particular reports were disclosed to this applicant. Not only has the agency failed to satisfy me on this point, the particular valuers concerned in this instance unequivocally stated that disclosure of these documents would not cause either one of them to refuse to provide such valuations to this agency or to other local government authorities in the future. Both valuers informed me that they are in the business of providing valuation reports and the provision of these reports is a business transaction. On this basis, I find that it is unlikely that professional people in the business of providing local government agencies with property valuation reports, will discontinue this practice in the future. Therefore, it is not

reasonable to suggest that the supply of information of this kind in the future, will be prejudiced in any way. For this reason I find that these documents are not exempt under clause 8(2).

(c) **Clause 10 - The State's financial or property affairs**

33. Clause 10 of Schedule 1 to the FOI Act provides as follows:

"10. The State's financial or property affairs

Exemptions

- (1) *Matter is exempt matter if its disclosure could reasonably be expected to have a substantial adverse effect on the financial or property affairs of the State or an agency.*
- (2) *Matter is exempt matter if its disclosure would reveal trade secrets of an agency.*
- (3) *Matter is exempt matter if its disclosure -*
 - (a) *would reveal information (other than trade secrets) that has a commercial value to an agency; and*
 - (b) *could reasonably be expected to destroy or diminish that commercial value.*
- (4) *Matter is exempt matter if its disclosure -*
 - (a) *would reveal information (other than trade secrets or information referred to in subclause (3)) concerning the commercial affairs of an agency; and*
 - (b) *could reasonably be expected to have an adverse effect on those affairs.*
- (5) *Matter is exempt matter if its disclosure -*
 - (a) *would reveal information relating to research that is being, or is to be, undertaken by an officer of an agency or by a person on behalf of an agency; and*
 - (b) *would be likely, because of the premature release of the information, to expose the officer or person or the agency to disadvantage.*

Limit on exemptions

(6) *Matter is not exempt matter under subclause (1),(2),(3),(4) or (5) if its disclosure would, on balance, be in the public interest."*

34. To establish an exemption under clause 10(1) the agency must show that disclosure will cause a "*substantial adverse effect*" on its property or financial affairs. Similar words appear in clauses 9(1)(a) and 11(1)(c) and (d) and in the equivalent provisions of the Commonwealth FOI Act, ss 40(1) and 44. The agency claimed that the documents were exempt under clause 10(1) because disclosure would be likely to prejudice the agency in its negotiations for the voluntary acquisition of land and would set a precedent that would severely handicap the agency in conducting any such future negotiations or arrangements.
35. The requirement that the adverse effect must be "substantial" is an indication of the degree of gravity that must exist before the exemption can be made out: *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236. In the context of s.40(1)(d) of the Commonwealth FOI Act, "substantial" is best understood as meaning "serious" or "significant": *Re Healy and Australian National University* (23 May 1985 unreported); *Re James and Australian National University* (1984) 2 AAR 327 at 341.
36. The effects upon the financial or property affairs of the agency, which it was claimed would follow from the disclosure of these documents, were said to be the prejudice that the negotiations would suffer because of the handicap that the agency would be under. I am not convinced that such an effect would result from disclosure of these documents for the reasons given in paragraphs 23 and 24. In any case if the agency was handicapped in any way in its negotiations, and I am not convinced on this point, the agency has not satisfied me that this effect would be substantial. It is possible, for example, that the applicant could accept the figure offered by Council or, alternatively, that the parties could agree on a suitable figure. In either case, the effect of disclosure could not be said to be substantially adverse. For this reason I reject the argument for exemption based on clause 10(1).
37. The agency also claimed exemption under clause 10(3) on the basis that the reports have a commercial value to the agency as they provide information upon which the agency may determine a maximum figure it might pay for the voluntary acquisition of a particular parcel of land. Clause 10(3) is designed to protect the legitimate commercial interests of government agencies. However, as the Report of the Royal Commission Into Commercial Activities of Government and Related Matter noted, in Part II, Chapter 2.5, commercial secrecy in this sense is only justified where it is necessary to secure an economic advantage to the public at large, or to safeguard against economic prejudice to the public. The agency claimed that disclosure of these documents would set a precedent for all other ratepayers to be given copies of future valuation reports and, if this occurred, the public at large would suffer because the Council would lose its negotiation advantage.

38. I am unable to accept the claim that the parameters for negotiating a price for land constitute "commercial value" in the sense used in clause 10(3). The valuation reports are a guide only. They are useful when the Council, acting in good faith, decides to purchase land from ratepayers but they are not binding on the Council. Because the Council may choose to disregard them or it may, in any particular instance, decide to resume land instead of negotiating a settlement, it does not seem to me that the public at large will suffer any economic prejudice by Council choosing one method of acquisition over another. Even if the requirements of sub-clause 10(3)(a) were satisfied, there is no material before me which would satisfy me that it is reasonable to expect the value of these reports to be destroyed or diminished by disclosure.
39. If, indeed, the reports to which access is sought have been used by the agency to determine the parameters within which it may negotiate a price - and the agency has indicated in a letter dated 29 October 1993 that its *"offers have been based on credited valuers advice"* - then, in my view, disclosure will not cause the reports to be any less useful for that purpose. I accept the agency's submission that valuations *"tend as a matter of practice to be somewhat imprecise"*, that valuations may vary and that there may be good reasons for preferring to rely on one rather than another or to use them only as a guide to establish the parameters of negotiation. However, if the valuation reports have not been relied upon by the agency, or one has been preferred over the other, then the agency should be prepared to give the applicant its reasons why they have not been relied upon or why one has been preferred. In either case, if the reports do have a commercial value to the agency, I am not satisfied that that value will be diminished by their disclosure and I find that they are not exempt under clause 10(3).
40. The agency also claimed exemption under clause 10(4), asserting that disclosure would reveal the commercial affairs of the agency - being the negotiations for the acquisition of the subject land - and would adversely affect those affairs because the *"adversary third party"* could apply the information to pre-empt Council's deliberations and to *"remove the commercial element from the negotiations from the Shire's point of view."* As my understanding is that the agency has already deliberated upon this matter and made its offer to the applicant, I do not consider that disclosure of the documents to the applicant could cause him to pre-empt the agency's deliberations in this matter. For the reasons stated at paragraphs 23 and 24 above, I am not persuaded that disclosure would have an adverse effect on the agency's commercial affairs in this instance. Accordingly, I find that the documents are not exempt under clause 10(4).

(d) Clause 4(2) - Commercial or business information

41. Solicitors for the agency claimed the reports were also exempt under clause 4(2). This exemption is in similar terms to clause 10(3), the difference being that the former applies to **any person** whilst the latter applies specifically to government agencies as defined in the Glossary in the FOI Act. I do not intend to discuss the claim based on clause 4(2) in detail as I am of the view that it has no relevance in

this instance. It is not contended by the agency that the valuers' reports have a commercial value, if indeed they have, to any other person.

42. In my view, the decision in *Re Hopper* to which I was referred does not assist the agency either. That case concerned an application for access to a draft report containing a detailed market research study into the beef breeding industry for the purpose of developing a marketing plan. Access was refused based on the Commonwealth equivalent to clause 4(2) and (3). However, there was evidence before that Tribunal which enabled it to conclude that the information in the report would be commercially valuable because of the highly competitive market environment.
43. In the matter before me the agency is not operating in a commercially competitive environment where protection of the economic assets of a business are paramount. The need for the agency to act prudently in its commercial dealings is a recognition of its obligations to ratepayers, including the applicant. For reasons which I have already stated, I am not persuaded that disclosure of these documents is inconsistent with those obligations.
