Australian Medical and Health

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: F1031998** **Decision Ref: D0071999**

Participants:

Australian Medical Association Limited
Complainant

- and -

Health Department of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to visiting Medical Practitioners Agreement – clause 6(1) – deliberative processes – advice and opinions obtained and recorded for the purpose of the deliberative processes of the agency – whether contrary to public interest to reveal deliberations of agency – clause 11(1)(d) – effective operation of agencies – whether disclosure could reasonably be expected to have a substantial adverse effect on the conduct of industrial relations – meaning of "substantial".

Freedom of Information Act 1992 (WA) ss.24, 102(1), 102(3); Schedule 1 clauses 1, 6(1), 7 and 11(1)(d)
Trade Practices Act 1974 (Cwth).
Re Read and Public Service Commission [1994] WAICmr 1
Re Collins and Ministry for Planning [1996] WAICmr 39
Re Waterford and Department of the Treasury (No. 2) (1984) 5 ALD 588.
Ministry for Planning v Collins (1996) 93 LGERA 69.
Re Ayton and Police Force of Western Australia [1998] WAICmr 15
Re Howard and Treasurer of the Commonwealth (1985) 7 ALD 626
Harris v Australian Broadcasting Corporation (1983) 78 FLR 236
Re Healy and Australian National University (AAT, 23 May 1985, unreported).
Re James and Australian National University (1984) 2 AAR 327)
News Corporation Ltd v National Companies and Securities Commission (1984) 57 ALR 550
Re Heaney and Public Service Board (1984) 6 ALD 310
Re Eccleston and Department of Family and Children's Services and Aboriginal and Islander Affairs (1993) 1 QAR 60
Re Thies and Department of Aviation (1986) 9 ALD 454

DECISION

The decision of the agency is varied. I find that the matter described in paragraph 56 of these reasons for decision is exempt under clause 6(1) of Schedule 1 to the *Freedom of Information Act 1992*, but that the documents are not otherwise exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

27th April 1999

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Health Department of Western Australia ('the agency') to refuse the Australian Medical Association Limited ('the complainant') access to documents requested by it under the *Freedom of Information Act 1992* ('the FOI Act'). The agency claims that the requested documents are exempt under clause 6(1) and clause 11(1)(d) of Schedule 1 to the FOI Act.

2. On 4 September 1995, the then Minister for Health and the Western Australian Branch of the Australian Medical Association Inc ('the AMA (WA)') – an autonomous body entirely independent of the complainant – executed an agreement setting out the terms upon which public hospitals would engage medical practitioners, or permit visiting medical practitioners ('VMPs'), to provide medical services to public patients in public hospitals in Western Australia. That agreement is referred to by the agency as "the Head VMP Agreement". The Head VMP Agreement expired on 4 September 1998.

3. In mid 1997, the agency established a working group, composed of senior officers of the agency, to consider what options and strategies may be available to the agency in relation to negotiating a new VMP agreement with the AMA (WA), taking into account the agency's budgetary constraints; the requirements of public hospitals to obtain the services of generalist and specialist medical practitioners; and the agency's legal advice about the expired agreement. That working group is referred to by the agency as the VMP Working Party.

4. I understand that the AMA (WA) has been in discussions with the agency about the renewal of the Head VMP Agreement, although I understand that negotiations as to its terms have not yet commenced. I also understand that the Minister for Health and the AMA (WA) have agreed that, whilst those discussions are continuing, and until a new VMP agreement is negotiated between the parties, the arrangements that were in place under the expired agreement will continue to apply.

5. In Western Australia, medical practitioners who provide medical services at public hospitals are either employed by the relevant hospital board, on a full time or sessional basis, or they are engaged on a contract for services as a VMP on the terms and conditions contained in the Head VMP Agreement. I understand that the terms of the Head VMP Agreement were incorporated by reference into individual VMP agreements entered into between a public hospital and an individual medical practitioner.

6. At the time of the commencement of this matter, the agency and the AMA (WA) were also negotiating about the terms and conditions of employment of senior

salaried medical practitioners who provide medical services at public hospitals in Western Australia, enterprise and workplace agreements for junior salaried practitioners having then been recently finalised. I understand that the negotiations concerning senior salaried practitioners have since been finalised.

7. The legality of the Head VMP Agreement is a matter of dispute between the parties. That dispute concerns the question of whether certain parts of the expired agreement were in breach of the price-fixing prohibitions contained in the *Competition Code* set out in the *Trade Practices Act 1974*. The *Competition Code* applies as a law of Western Australia by virtue of s.5(1) of the *Competition Policy Reform (Western Australia) Act 1996*. However, as noted above, the parties have, by agreement, extended the operative date of the Head VMP Agreement and are continuing negotiations. It is my understanding that, as of the date of this decision, no agreement has been reached.

8. By letter dated 2 December 1997, the complainant lodged an application with the agency seeking access under the FOI Act to documents relating to trade practice issues, competition policy and the terms of the agreement concerning the provisions of medical services by VMP's in Western Australia.

9. The agency granted the complainant access to 11 documents but refused access to 23 others on the grounds that those documents are exempt under clauses 1, 6, 7 and 11(1)(d) of Schedule 1 to the FOI Act. The Commissioner of Health confirmed the agency's decision following internal review. By letter dated 9 July 1998, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

10. I obtained the disputed documents from the agency. Inquiries were made through the AMA (WA) to determine whether this complaint could be resolved by conciliation between the parties. However, conciliation was not an option.

11. The agency was invited to provide submissions to me in support of its claims for exemption. Whilst the schedule attached to the agency's initial notice of decision identified the exemption clause claimed for each of the disputed documents, neither of the agency's notices of decision contained sufficient reasons to justify the refusal of access, nor did those notices contain any details of the decision-maker's findings on the material questions of fact underlying the reasons given by the agency for refusing access to the requested documents.

12. Submissions were received from the agency on 14 August 1998. In those submissions, the agency maintained its claims for exemption for all of the documents to which access had been refused. The agency's submissions were provided to the complainant for its consideration. A submission in response was received from the complainant by facsimile transmission on 1 September 1998. In its submission, the complainant maintained its request for access to all of the requested documents.

13. On 17 December 1998, after considering the submissions from the parties and examining the documents in dispute, I informed the parties in writing of my preliminary view of this complaint, including my detailed reasons. Based on the material then before me, it was my preliminary view that some of the documents may be exempt under clause 1 and some under clause 7. However, it was also my preliminary view that the agency had not justified its decision to refuse access to other documents, either in full or in part, under clause 6(1) nor under clause 11(1)(d). It was also my preliminary view that one document did not come within the ambit of the complainant's access application.

14. Subsequently, the agency released some documents to the complainant and the complainant withdrew its complaint in respect of others. Those concessions by both parties mean that only three documents remain in dispute.

THE DISPUTED DOCUMENTS

15. For convenience, I refer to the documents remaining in dispute by the number allocated to each of them on the agency's schedule. The agency claims that the whole of two of the disputed documents and the matter deleted from the third, comprise matter that is exempt under clause 6(1) and clause 11(1)(d) of Schedule 1 to the FOI Act. The disputed documents are:

- Document 2, comprising 3 pages of undated notes of a meeting held on 28 October 1997 between a group of agency personnel referred to as the VMP Working Party.
- Document 16, comprising 25 pages of undated notes concerning the VMPs and options for the agency.
- Document 17, comprising a Summary of Options for the agency concerning the Head VMP agreement. Document 17 has been released to the complainant in edited form. The disputed matter consists of the 6 deleted lines under the heading "Option 1" on page 1.

THE EXEMPTIONS

(a) Clause 6 – Deliberative processes

16. Clause 6(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."*

17. I have discussed and considered the purpose of the exemption in clause 6 and the meaning of the phrase "deliberative processes" in a number of my formal decisions (see, for example, *Re Read and Public Service Commission* [1994] WAICmr 1 and *Re Collins and Ministry for Planning* [1996] WAICmr 39). In *Re Read,* I agreed with the view of the Commonwealth Administrative Appeals Tribunal ('the Tribunal') in *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 that the deliberative processes of an agency are its "thinking processes", the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action: see also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69 at 72.

18. Having examined the disputed documents, I accept that Documents 2, 16 and 17 contain opinions, advice and recommendations that have been obtained, prepared and recorded in the course of the deliberations of the VMP Working Party established by the agency for the purpose of developing options for obtaining the services of VMPs in Western Australia. Therefore, I am satisfied that each of them contains matter that meets the criteria of clause 6(1)(a).

19. Pursuant to s.102(1) of the FOI Act, the onus is on the agency to establish that its decision to refuse access to the disputed matter is justified. In the case of the exemption in clause 6(1), the complainant is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; it is entitled to access unless the agency can establish that disclosure of the particular deliberative process matter would, on balance, be contrary to the public interest.

The agency's submission

20. The agency initially submitted that it and the Department of Productivity and Labour Relations were negotiating with many categories of employees involved in the government health industry, and that the terms and conditions of employment or engagement of all medical practitioners who provide medical services at public hospitals were then the subject of sensitive and critical negotiations. The agency submits that there is a very real interconnection between the terms (and the re-negotiated terms) of all industrial agreements in the government health industry, including VMP agreements, and that re-

negotiation of rates and terms and conditions in one agreement will have an impact on others.

21. The agency informs me that salaries and fees paid to medical practitioners employed or engaged in the government health industry consume a significant proportion of the health budget and that any changes to wage and fee rates and structures cause a re-allocation of expenditure in other areas. The agency submits that the government health industry is under significant pressure, largely attributable to funding shortages. The agency asserts that, as a result of such funding shortages, there is a need to maximise limited health dollars. The agency submits that it is required to strike a fine balance between the fair and adequate remuneration of medical practitioners and the uninterrupted supply of health services in Western Australia. The agency submits that this process inevitably leads to tensions between the agency and bodies representing the interests of health practitioners.

22. The agency submits that, since the receipt of legal advice in respect of the Head VMP Agreement and the individual VMP agreements, it has been working on developing its VMP negotiating position, having regard to budgetary constraints; the requirements of the public hospitals in terms of their needs for the services of particular medical practitioners (generalists and specialists); and the legal constraints.

23. The agency claims that disclosure of the disputed matter would reveal the deliberations of the VMP Working Party. In particular, it claims that disclosure of the documents would only serve to mislead, rather than inform the public, because the documents record early, now outdated, strategies developed by the VMP Working Party. The agency further submits that its position has changed over time since October 1997, as circumstances have changed. The agency contends that the disclosure of the documents has the capacity to inflame relations with the AMA (WA) and to impede the harmonious resolution of the VMP issue by providing the AMA (WA) with access to now outdated strategies.

24. The agency acknowledges that the disputed documents record early deliberations on the VMP issue which are now outdated. The agency submits, however, that although the disputed documents record the early deliberations of the VMP Working Party on the VMP issue, several of the general principles or themes remain current and that disclosure of those generic principles would weaken its negotiating position. The agency also submits that some parts of the disputed documents emphasise the desirability of certain suggested negotiating options, including recommendations about a blend of suggested possible arrangements and remuneration.

25. The agency also claims that the release of the documents has the potential to damage its future negotiating position and that the disclosure of the information in the disputed documents may assist the AMA (WA) at the expense of the agency, given that no reciprocal disclosure of the AMA (WA)'s negotiating position, advice and strategies will occur. The agency also submits that the disclosure of the documents would, on balance, be contrary to the public interest

according to the criteria identified by Davies J in *Re Howard and Treasurer of the Commonwealth* (1985) 7 ALD 626 as "general principles" indicating when disclosure of a deliberative process document is likely to be contrary to the public interest.

26. The agency also referred me to my decision in *Re Ayton and Police Force of Western Australia* [1998] WAICmr 15 in which I found that disclosure of a certain document had the potential to create, or contribute to, further disaffection between management and staff in the Police Force of Western Australia and that there was a possibility that parts of that document could be misinterpreted and misused. That was in circumstances where the Western Australian Police Union of Workers, on behalf of its members, had publicly expressed its dissatisfaction with certain outcomes and processes employed by the Commissioner of Police and had raised the possibility of industrial action by its members.

27. In that matter, I accepted that the then circumstances were of some sensitivity, the Police Force of Western Australia then being in a phase of substantial reform including changing the culture in that agency. I commented in that matter that such a process of profound change necessarily involves a certain degree of destabilisation and disquiet in many of the police officers likely to be affected.

28. The agency submits that, as in that matter, the present circumstances surrounding the negotiations in which the agency is involved are of some sensitivity. The agency submits that it has, for a number of years, been attempting to effect structural reform in what it describes as the VMP culture in Western Australia. The agency contends that the process of attempting to achieve structural reform in VMP arrangements necessarily involves a certain degree of destabilisation and disquiet among medical practitioners likely to be affected and also that the AMA (WA) has raised the spectre of possible industrial action.

29. The agency also submits that the decision of the Commonwealth Administrative Appeals Tribunal ('the AAT') in *Re Heaney and Public Service Board* (1984) 6 ALD 310 related to a matter similar to that currently before me and that the arguments adduced in favour of, and against, release of the disputed documents in *Re Heaney* are very similar to the arguments adduced for and against the release of the disputed documents in this complaint. In that case, the documents in question were held to be exempt under the equivalent to clause 6(1). The agency submits that when the competing facets of the public interest are weighed in this instance then, as in *Re Heaney*, I should also find that, on balance, disclosure of the disputed documents would be contrary to the public interest.

30. Finally, the agency submits that a low level of industrial disturbance in the government health industry best serves the public of Western Australia and that that industrial action by health practitioners will only exacerbate the waiting list problem in Western Australia. I have also been provided with copies of relevant correspondence to the agency, articles from various newspapers and the AMA (WA)'s publication *"Medicus"* as evidence in support of the agency's claims in respect for the disputed documents.

The complainant's submission

31. The complainant submits that the application of the exemption in clause 6 of the FOI Act will most frequently call for the resolution of the tension between the objects which the FOI Act seeks to attain and the tradition of secrecy which has surrounded the way in which government departments, including the agency, make decisions which affect the public. The complainant submits that unless the exemption provisions are applied in a manner which accords appropriate weight to the public interest objects sought to be achieved by the FOI Act, the traditions of government secrecy are likely to continue unchanged.

32. The complainant submits that the agency's categorisation of the public interest factors is typical of the tendency by agencies to use these grounds as "class claims" and that agencies commonly claim that certain documents should be exempt, not because of the actual effect that disclosure would have but solely because, for example, documents are high-level communications or because there is a belief, but no actual evidence, that future communications of public servants will be less frank and candid. The complainant submits that such arguments ignore the particular contents of the documents in question and any public interest factors that may weigh in favour of disclosure.

33. The complainant contends that the public interest factors weighing against disclosure discussed in *Re Howard* and referred to by the agency in support of its position that disclosure would threaten the proper workings of government and effective decision-making processes were considered and rejected by the Queensland Information Commissioner in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60.

34. The complainant submits that, in *Re Eccleston*, the Queensland Information Commissioner considered, among other things, that claims favouring non-disclosure of documents should be examined to determine whether they would defeat any of the fundamental aims of freedom of information legislation. The complainant notes that in *Re Eccleston*, the Queensland Information Commissioner expressed the view that a claim for exemption based upon the view that disclosure of high-level documents is contrary to the public interest irrespective of their contents, is inconsistent with the scope of the right of access which accords unconditional access to all documents irrespective of origin and that general arguments based on the preservation of the candour and frankness of pre-decisional communication are inimical to the very purpose of the balancing of public interests, since such claims do not permit an inquiry as to the effect of disclosure of the particular contents of the documents in question.

35. The complainant submits that the public is capable of making an informed decision once presented with accurate information and that the public is quite capable of differentiating between a draft position and a final position. The complainant submits that there is a public interest in having access to as much information as possible to enable adequate public debate and that it cannot harm the public to have access to information that will enable it to appreciate all the possible implications, irrespective of whether preliminary or tentative concerns

expressed in the documents in issue prove ultimately to be justified. The complainant also submits that the eventual working out of solutions or livable compromises is more likely to be assisted than harmed by the disclosure of relevant information, which promotes informed discussion.

Is disclosure contrary to the public interest?

36. I agree, in essence, with the complainant's submission and the view of the Queensland Information Commissioner in respect of the criteria expressed in *Re Howard*. Whilst some of them may be helpful guidelines to consider in some cases, they do not comprise a prescriptive list. In my view, it is clear from the scheme of the FOI Act that its purpose is to give effect to the public interest in the openness and accountability of a democratically elected government. The FOI Act does that by providing a general right of access to government documents (and the information contained in them), except where some harm to the public interest could reasonably be expected to result from such disclosure.

37. Some of the exemptions in Schedule 1 to the FOI Act clearly protect certain classes of documents where the particular public interest concerned is considered paramount to all other interests. Others incorporate a "public interest test" and require competing interests to be balanced and weighed against each other. Clause 6 is the only exemption that requires an agency, seeking to rely on it as justification for non-disclosure, to demonstrate that disclosure would, on balance, be contrary to the public interest.

38. I remain of the view (expressed in previous decisions) that it would be contrary to the public interest to prematurely disclose documents while deliberations in an agency are continuing, if there is evidence that the disclosure of such documents would adversely affect the decision-making process, or that disclosure would, for some other reason, be contrary to the public interest. In either of those circumstances, I consider that the public interest is served by non-disclosure. I do not consider that it is in the public interest for any agency to conduct its business with the public effectively "looking over its shoulder" at all stages of its deliberations and speculating about what might be done and why. Generally, I consider that the public interest is best served by allowing deliberations to occur unhindered and with the benefit of access to all of the material available so that informed decisions may be made.

39. I also recognise a public interest in parties involved in negotiations being able to maintain – to the extent reasonably and fairly necessary – the confidentiality of their negotiating position while discussions are on foot. Where the party is an agency of a democratic government, however, the extent to which confidentiality is reasonably and fairly necessary will be affected by the particular, and sometimes competing, duties of public accountability that apply to such bodies.

40. The agency's submission acknowledges the fact that strategies identified by the VMP Working Party in 1997 are now out-dated and that the agency's negotiating position had changed somewhat since that date. However, the

agency takes the view that the disclosure of the early deliberations would be threatening to a number of VMPs and that the disputed documents could be used by the AMA (WA) to engender unrest and distrust amongst its members. The agency claims that that result will make the negotiating process more difficult. However, the agency has not explained to my satisfaction how the particular information contained in the documents could be expected to cause that effect.

41. I accept the agency's submission that there is a public interest in the agency ensuring that an optimal supply of medical services is available in public hospitals. I also agree with the agency's submission that the public interest is served by a low level of industrial disputes in the government health industry. In that context, I consider that there is a public interest in the agency being able to continue its current negotiations with the AMA (WA) towards that end, without prematurely disclosing information that has been used by the agency to develop its current and preferred negotiating position. I also consider that the public interest would be best served by allowing the agency's negotiations with the AMA (WA) to continue without the agency having to disclose material that may weaken or adversely affect the agency's negotiating position in that respect.

42. However, with one exception discussed below, I am not persuaded that the disputed documents contain sensitive material the disclosure of which is likely to affect the agency's negotiating position in the way it is claimed. I have some difficulty accepting the view that the disclosure of strategies and options that are now over 14 months old, acknowledged by the agency to be obsolete, and no longer relevant to current negotiations would, on balance, be contrary to the public interest. It seems to me that the integrity of the deliberative processes of the VMP Working Party, if any, or those of the agency itself could not be adversely affected by the disclosure of such matter.

43. I have also considered whether any other public interest could be affected by the disclosure of the disputed documents. I accept the fact that the government health industry is under significant pressure and that a satisfactory solution to the current problems should be expedited. To that end, I consider that there is a public interest in having a government health industry that produces health outcomes that benefit the community as a whole.

44. Whilst I accept that some degree of confidentiality is required by government agencies in delivering services to the community, I also consider that, as a general rule, the public is entitled to have access to information that has been gathered by public officials on its behalf and at its expense. I consider that to be particularly so where that information is directly relevant to the rights or interests of the particular applicant as well as to the community as a whole.

45. I also recognise that there is a public interest in minimising industrial disputes, especially those involving government agencies. On this occasion, the agency has not persuaded me that disclosure of the particular information in the documents could be expected to cause or contribute to an industrial dispute. It appears that the agency has already released to the complainant information of a similar nature to that in dispute. To my knowledge, that disclosure does not appear to have caused or exacerbated any industrial disputation. Further, I

disagree with the agency's assertion that personnel involved in the VMP Working Party should necessarily be able to communicate and record their deliberations in confidence. The rationale underlying the exemption is essentially that such deliberations should be open and accessible except where some harm is likely to result from their disclosure.

46. It seems to me that undue secrecy at this time may contribute to further disharmony and mistrust. For example, the point of disagreement between the parties over the legality of the Head VMP Agreement might be resolved or its resolution might be assisted by the disclosure of respective legal advices. I am not persuaded that the disclosure of out-dated and discarded comments, strategies, options and recommendations would produce the result claimed by the agency. I am not persuaded that the disclosure of information of that kind could be expected to prejudice the agency's negotiating position. In the current state of those negotiations, it seems that industrial action has been raised as a possibility in respect of known issues between the agency and the AMA (WA) and it could not, therefore, be said to be likely to be caused by disclosure of the disputed documents.

47. In the context of the recently completed negotiations between the agency and the AMA (WA) relating to the remuneration, terms and conditions of employment of senior salaried medical practitioners, it is my understanding that limited industrial action, in the form of a "work to rule" campaign, was implemented by those practitioners. However, I also understand that that "work to rule" campaign had nothing to do with the proposed VMP negotiations but, rather, was a direct result of disagreement between the parties over the matter of study and conference leave entitlements for part-time senior medical practitioners. It was not the result of the disclosure of information of the kind contained in the disputed documents, nor could it be said to have been caused by, or related to, any disclosure such as presently contemplated. In any event, that matter has been resolved and the parties have now agreed to the remuneration, terms and conditions of employment of senior salaried medical practitioners.

48. It was further suggested by the agency, in its submissions while the negotiations concerning senior salaried medical practitioners were still on foot, that disclosure of the disputed matter could be expected to have an adverse effect on those negotiations which were, at the time, considered by the agency to be *"currently and critically poised"*. As those negotiations have now been successfully concluded and the arrangements for senior salaried medical practitioners finalised, clearly disclosure of the disputed documents could have no effect – adverse or otherwise – on those negotiations.

49. I do not agree with the agency's submission that the arguments for and against disclosure in *Re Heaney* are very similar to those in this matter. That case concerned an application for access, under the Commonwealth FOI Act, to documents in the possession of the Commonwealth Public Service Board ('the Board') which related to an industrial dispute concerning a salary campaign conducted against the Snowy Mountains Hydro-Electric Authority ('the Authority') by the Association of Supervisory Technical Employees ('the Employees' Association').

50. The Board was advising the Authority on the matters the subject of the industrial dispute between the Employees' Association and the Authority, both bodies having a statutory role to play in the determination of the terms and conditions of officers appointed under the relevant legislation. The dispute between the Authority and the Employees' Association had led to industrial action by the Employees' Association in the form of work bans and was ultimately settled following proceedings in the Conciliation and Arbitration Commission. The dispute had been settled between the parties by the date of the AAT hearing in respect of the access application.

51. The documents under review by the AAT *Re Heaney* consisted of correspondence exchanged between the Authority and the Board during the dispute, while the work bans were in place and the proceedings in the Conciliation and Arbitration Commission were on foot and concerned the attitude that should be taken in the proceedings to the Employees' Association's salary claim. The Board argued, among other things, that disclosure of the documents would not be in the public interest because it would adversely affect the Board's future handling of industrial disputes in the Commonwealth sector, including future wage and salary negotiations between the Employees' Association and the Authority and the Board. The main thrust of the Board's argument was that communications between the Authority and the Board in such matters should remain confidential in order that, even if there were disagreement between the two bodies on the approach to be taken, publicly a united position would be taken in order that the government be seen to be "speaking with one voice".

52. That is not an issue in the case before me. The documents are not communications between two government bodies involved in the one dispute. They are internal working documents concerning the consideration within the agency of various possible options to pursue. They were not created in the context of negotiations that had clearly broken down and resulted in significant industrial action, nor in respect of the position to be taken in proceedings then on foot between the parties, as was the case in *Re Heaney*. In the matter before me, although discussions have commenced as to the form that a new agreement should take, negotiations as to its actual terms have not, as I understand it, even commenced. I do not consider that the circumstances, or the main issue of concern, in that matter are comparable to the circumstances in this matter.

53. As to the agency's submissions relating to my decision in *Re Ayton*, I accept that the circumstances of the negotiations relating to the VMPs are of some sensitivity. However, the issue is whether disclosure of the particular documents in dispute in this matter could be expected to have an adverse effect. The circumstances referred to in *Re Ayton* were not specifically related to negotiations for remuneration or other terms and conditions of engagement of police officers, but to a range of broader issues. They concerned a different kind of issue altogether involving a dispute between staff and management of an agency, and the contents of the disputed document in that matter were of an altogether different nature to the disputed matter in the complaint presently before me.

54. Balancing all those competing public interests, including the public interest in persons being able to exercise their right of access under the FOI Act, I am of the view that disclosure of the information contained in documents, most of which is outdated and not relevant to the ongoing negotiations, would not on balance, be contrary to the public interest, with the following qualification.

55. That is, I accept that disclosure of the disputed matter in Document 17, and the same matter where it appears in Documents 2 and 16, would have the effect of revealing current principles or themes that are an integral part of the agency's negotiating position. I accept that disclosure of that information at this point could adversely affect the capacity of the agency to achieve a settled result. I consider that it would, on balance, be contrary to the public interest to disclose that matter. Accordingly, I am satisfied that it is exempt under clause 6(1) of Schedule 1 to the FOI Act. In my view, none of the limits on exemption in clauses 6(2) or 6(3) applies to that matter.

56. I have also considered whether it is practicable, in terms of s.24 of the FOI Act, to give access to Document 2 and Document 16 with that exempt matter deleted. In my view it would be practicable to do so. Therefore, I find that the matter deleted from Document 17 is exempt under clause 6(1). I also find that paragraph (iv) on page 2 of document 2 is exempt under clause 6(1); and that the first, third and fourth dot points on page 18 of Document 16 are also exempt under clause 6(1), for the same reasons.

(b) Clause 11(1)(d)

57. The agency also claims that the disputed documents are exempt under clause 11(1)(d) of Schedule 1 to the FOI Act. I have already found that the matter identified in paragraph 55 above is exempt under clause 6(1). Accordingly, I need not decide whether that matter is also exempt under clause 11(1)(d). However, I have considered the agency's claims under that clause for the balance of Documents 2 and 16. Clause 11(1)(d) provides:

> "***11. Effective operation of agencies***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> *(a)…*
> *(b)…*
> *(c)…*
>
> *(d) have a substantial adverse effect on an agency's conduct of industrial relations.*
>
> ***Limit on exemptions***

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

58. To establish an exemption under clause 11(1)(d) the agency must show that disclosure could reasonably be expected to result in a *"substantial adverse effect"* on an agency's conduct of industrial relations. The requirement that the adverse effect must be "substantial" is an indication of the degree of gravity that must exist before a *prima facie* claim for exemption is established: *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236. In the context of the exemption in clauses 11(1)(c) and (d), I accept that "substantial" is best understood as meaning "serious" or "significant": *Re Healy and Australian National University* (AAT, 23 May 1985 unreported); *Re James and Australian National University* (1984) 2 AAR 327 at 341.

The agency's submission

59. The agency claims that the disclosure of the disputed documents could reasonably be expected to have a substantial adverse effect on an agency's conduct of industrial relations. The agency further submits, for reasons similar to those given in respect of the claim for exemption under clause 6(1), that disclosure of the disputed documents would, on balance, be contrary to the public interest.

60. The Commissioner of Health claims, in his most recent submissions, that the agency has placed before me sufficient evidence that clearly demonstrates that the AMA (WA) is prepared to encourage its members to engage in industrial action; that there is a high level of mistrust on the part of the AMA (WA) towards the agency and, that in the past, the AMA (WA) has made recommendations to its members to engage in, or refrain from engaging in industrial action in order to resolve negotiations with government in accordance with its requirements.

61. The agency submits that, based upon past practice, it is reasonable to anticipate that the AMA (WA) will manipulate the information in the disputed documents to mount a fear campaign to ensure that medical practitioners only negotiate with the agency through the AMA (WA).

62. The agency submits that the VMP Working Party strategy papers do not deal with remote or ancillary issues concerning medical practitioners; they deal with the immediate and "nub" issues of proposed terms of engagement, and in particular, remuneration rates. The agency claims that the release of the disputed documents has the potential to damage its future negotiating position; that the release of Document 2 (an out-dated record of deliberations of the VMP Working Party) has the capacity to impede the harmonious resolution of the VMP issue, because it may inflame the AMA (WA)'s executive officers and encourage it, as part of its overall industrial relations strategy, to respond with "industrial warfare".

63. The agency also contends that there are reasonable grounds to anticipate that the AMA (WA) will, as part of its bargaining ploy, engage the employed medical practitioners in industrial action as leverage on the agency to resolve the VMP issue in accordance with its requirements. The agency also initially claimed that the AMA (WA) may use the VMP issue as leverage in the negotiation of, among other things, workplace agreements for senior salaried medical practitioners, which were, at the time, on foot.

64. The agency also contended that the AMA (WA) had threatened to make the finalisation of negotiations relating to senior medical practitioners conditional upon finalisation of the negotiations concerning a new Head VMP Agreement and that any form of industrial action such as threats to "go slow" or "work to rule" would be of far greater significance and have far greater potential to cause widespread disruption than if the two issues were negotiated and resolved independently.

65. The agency submits that the disputed documents do not disclose improper conduct on the part of any agency personnel, or any other personnel, nor do they show that agency personnel have acted beyond the limits of their or the agency's authority. The agency further submits that the disputed documents contain commercial and contractual issues that, pre-finalisation, are appropriately kept confidential, as are the policy aspects of the disputed documents dealing with matters such as proposed education and implementation strategies.

66. The agency submits, as it did in relation to the claims under clause 6(1), that there is a public interest in the harmonious and efficient conduct of industrial relations by the agency and in a low level of industrial disputation in the government health industry. The agency submits that there is also a strong public interest in it being able to maximise limited health dollars by conducting negotiations with the AMA (WA) on a level playing field, where its officers are able to freely discuss and agree appropriate negotiating strategies to implement in negotiations with the AMA (WA), just as it is in the public interest for the AMA (WA) being able to consult with its members as well as non-member medical practitioners on VMP and employee issues in its negotiations with the agency.

67. It is also the submission of the agency that the material produced to me is compelling evidence of the AMA (WA)'s "interlinked" approach to the resolution of employed medical practitioners and VMP terms and conditions, as well as the its preparedness to engage in industrial action should it acquire information about the agency's strategies that does not accord with its requirements.

The complainant's submission

68. If I am satisfied that a *prima facie* claim for exemption exists under clause 11(1)(d), then, pursuant to s.102(3) of the FOI Act, the onus is on the complainant to establish that disclosure would, on balance, be in the public interest. The complainant is a separate and autonomous organisation to the

AMA (WA) and submits that the AMA (WA) became involved in this matter at the complainant's request, to enable meetings to occur with my office on its behalf. The complainant submits that it is neither a party to the Head VMP Agreement nor a party to any of the negotiations referred to in the agency's submissions. The complainant submits that there is no industrial relationship between it and the agency.

A substantial adverse effect on the conduct of industrial relations?

69. I accept the complainant's submission that it is not a party to the negotiations between the agency and the AMA (WA). However, nothing in clause 11(1)(d) requires an agency to establish that an industrial relationship exists between it and the access applicant for the exemption to apply. The complainant's submission does not recognise the fact that, if the disputed documents are not exempt as claimed, then no conditions or restrictions (other than those imposed by the general law) as to their use can apply. Consequently, those documents would be disclosed to the world at large, including the AMA (WA) and not merely to the complainant (see the comments of Woodward J in *News Corporation Ltd v National Companies and Securities Commission* (1984) 57 ALR 550 at 559).

70. I am not persuaded that the disclosure of Document 2 and Document 16, edited in the manner described in paragraph 56 above, could reasonably be expected to have a substantial adverse effect on the conduct of industrial relations by an agency in Western Australia. I consider that some degree of compromise between parties to an industrial dispute is often necessary before a solution can be reached. In some cases, that compromise position is only reached after industrial disputation has occurred. In the context of the complaint before me, I accept that the exemption is concerned not with adverse effects on industrial relations, but with adverse effects on the conduct of industrial relations. An example might be where the anticipated reaction to the contents of documents actually manifests in a lack of cooperation by the AMA (WA) in subsequent negotiations.

71. However, although I have read all of the extracts submitted to me by the agency, I cannot find any suggestion that the AMA (WA) does not desire a resolution of the issues between the parties. It is one thing to maintain a philosophical position and to drive a hard bargain and another to refuse to bargain or negotiate at all. In any case, having regard to the nature of it, I am not persuaded that the disclosure of the remainder of the matter in Document 2 and Document 16 could have an adverse effect on the conduct of industrial relations, nor that it would have a substantial adverse effect on the conduct of industrial relations. As I have already explained, some of that information has already been disclosed to the complainant in other documents to which access has been granted.

72. Clearly, the agency's submissions as to the potential effect of disclosure on the negotiations relating to senior salaried medical practitioners are no longer relevant, those negotiations having been concluded. Accordingly, I have not taken those submissions into account in reaching my decision in this matter.

73. The agency referred me to the decision of the AAT in *Re Thies and Department of Aviation* (1986) 9 ALD 454, a decision that does not, in my opinion, support the agency's position in this matter. In *Re Thies*, the AAT considered among other things, the meaning of the phrase "substantial adverse effect" in the context of s.40(1)(e) of the Commonwealth *Freedom of Information Act 1982* ('the Commonwealth FOI Act'). Section 40(1)(e) of the Commonwealth FOI Act is the provision equivalent to clause 11(1)(d) of the FOI Act.

74. In *Re Thies*, the AAT observed that the meaning of the phrase "substantial adverse effect" was first considered by the AAT in *Re Heaney* and subsequently applied by the AAT in *Re Healy*. The AAT stated that, in the context of s.40 (1)(d) and (e) of the Commonwealth Act, "*…in order to decide whether a particular effect would or could reasonably be expected to result from disclosure constitutes 'a substantial adverse effect' it must be viewed, in respect of para (d), against the background of the manner in which the operations of the agency are conducted and, in respect of para (e), against the background of the manner in which its industrial relations are conducted*". In *Re Thies*, the AAT concluded that the phrase "substantial adverse effect" connotes an adverse effect that is sufficiently serious or significant to cause concern to a properly informed reasonable person.

75. The *Thies* case concerned an application for access to transcripts of communications made by a commercial pilot to the Commonwealth Department of Aviation ('the Department'). The agency refused access to the requested documents, because two staff associations, representing flight service operators and air traffic controllers, firmly opposed disclosure of the requested transcript. The Department claimed that disclosure would cause industrial problems and a deterioration of its industrial relations with the two associations. The agency claimed the transcripts were exempt from disclosure under s.37(2) and s. 40(1)(d) and (e) of the Commonwealth FOI Act.

76. The AAT observed that the Department's case rested entirely upon what it foresaw as the adverse effects that would flow from the reaction of the two staff associations to the granting of access. Evidence was given by representatives of the staff associations as to the possible reactions of members of the staff associations, if the transcripts under consideration were to be disclosed. The AAT found that it had not been established that any of those alleged reactions would occur, but that some of the reactions so described could reasonably be expected to occur. However, the AAT found, on the facts, that the anticipated reactions would not, if they occurred, have any serious or significant effect on the Department's conduct of industrial relations in that case. The AAT set aside the decision that the documents were exempt and substituted for it a decision that the applicant was to be given access.

77. In my opinion, in this matter the agency's claims also rest entirely upon what it foresees as the adverse effects that would flow from the reaction of the AMA (WA) executive if access were granted to the disputed documents. Other than the unsubstantiated assertions of the agency, there is nothing before me to establish that disclosure of the disputed documents could reasonably be expected

to inflame the AMA (WA) executive, nor that any reaction that disclosure might cause would have any serious effect on the agency's conduct of industrial relations.

78. In any event, I am not satisfied that the potential for some mistrust or suspicion amounts to a serious or significant adverse effect on the conduct of industrial relations as required by the exemption. In my opinion, the degree of gravity of harm encompassed in a *prima facie* claim for exemption under this subclause requires more than mere potential for distrust and suspicion. I would venture to say that a certain degree of tension between the parties to such negotiations is not unnatural, if not to be expected.

79. For those reasons, based upon the evidence before me, I find that the agency has not established that any substantial adverse effect on the conduct of industrial relations could reasonably be expected to follow from the disclosure of the disputed documents. As I have found that the agency has not established a *prima facie* claim for exemption under clause 11(1)(d), it is unnecessary for me to consider whether the limit on exemption in clause 11(2) applies in this instance. I find that the remainder of the matter in Document 2 and in Document 16 is not exempt matter under clause 11(1)(d) of Schedule 1 to the FOI Act.

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