

STEELE AND HEALTH

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

**File Ref: 94143
Decision Ref: D01295**

Participants:

Darlene Shirley Steele
Complainant

- and -

**Health Department of Western
Australia**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - clause 3(1) - refusal of access - documents held by agency related to selection and appointment of agency staff - personal information about third parties - personal information about complainant - public interest factors for and against disclosure - third parties' desire for privacy - identity of third parties claimed to be known by complainant - public interest in complainant obtaining access to information about her.

FREEDOM OF INFORMATION - clause 8(1) - refusal of access - confidential agency documents - document drafted by an officer of the agency - implied confidentiality - implied breach of confidence - requirements to establish exemption under clause 8(1).

FREEDOM OF INFORMATION - clause 8(2) - refusal of access - confidential agency documents - information provided by third parties - confidential source of information - confidentiality of sources - prejudice future supply of information - impair the effectiveness of agency's method and procedures for staff management - identity of sources claimed to be known to complainant - public interest factors - public interest in protecting the effective functioning of agency - public interest in complainant being informed of reasons for agency's decisions - agency's concerns over potential litigation - complainant's right of access - protection of confidential sources.

Freedom of Information Act 1992 (WA) ss. 13(1)(b); 21; 26; 30; 68(1); 72(1)(a); 72(1)(b); 75(1); 102(1); 102(3); Schedule 1 clauses 3(1), 3(3), 3(4), 6(1)(a), 8(1), 8(2), 8(3), 14(1)(a); Glossary in Schedule 2.

Freedom of Information Regulations 1993 (WA) Regulation 9(1).

Freedom of Information Regulations 1994 (WA) Regulation 7.

Re Strelley Pastoral Pty Ltd and Department of Land Administration (Information Commissioner WA, 27 March 1995, unreported).

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

Re Kobelke and Minister for Planning and Others (Information Commissioner WA, 27 April 1994, unreported).

Re A and Heathcote Hospital (Information Commissioner WA, 9 June 1994, unreported).

Re Hayes and The State Housing Commission of Western Australia (Homeswest) (Information Commissioner WA, 17 June 1994, unreported).

Re Gray and The University of Western Australia (Information Commissioner WA, 23 June 1994, unreported).

Re Manly and Ministry of the Premier and Cabinet (Information Commissioner WA, 16 September 1994, unreported).

Re C and Department for Community Development (Information Commissioner WA, 12 October 1994, unreported).

Re Smith and State Government Insurance Commission (Information Commissioner WA, 5 December 1994, unreported).

Re Edwards and Ministry of Justice (Information Commissioner WA, 12 December 1994, unreported).

Re James and Australian National University (1984) 6 ALD 687.

Re Gahan and City of Stirling (Information Commissioner WA, 21 October 1994, unreported).

DECISION

The decision of the agency of 6 January 1995 is set aside. In substitution it is decided that:

- (i) Document 1 is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*, except for the first, second and fourth entries on page 3 of that document, which are not exempt;
- (ii) The matter deleted from Documents 2, 3, and 5, is not exempt;
- (iii) Document 4 is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*;
- (iv) Document 6 is not exempt; and
- (v) The names of agency employees or employees within other State Government agencies deleted from Document 7 are not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

22 May 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Health Department of Western Australia ('the agency') to refuse Ms Darlene Steele ('the complainant') access to certain documents of the agency requested by the complainant under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant is a former employee of the agency. In September 1993 the complainant unsuccessfully applied for the position of Acting Director, Legal Policy Branch of the agency and, on 7 October 1993, interviews were held for the position. Mr Nigel McBride was the recommended applicant and he was subsequently appointed to the position of Acting Director. It is my understanding that the written reasons and decision of the selection panel were provided to the complainant in a document described as "Outcome of Expression of Interest", dated 19 October 1993. Following her unsuccessful application for the position of Acting Director, on 25 October 1993 the complainant lodged a formal Notice of Grievance with the agency, in accordance with Administrative Instruction 1001. The complainant also lodged two formal complaints against the agency with the Commissioner for Equal Opportunity.
3. Following correspondence between the agency and the complainant's solicitors, in January 1994, an Independent Investigator, Ms S Wilson, Acting Manager, Swan Health Services, was appointed by the agency to carry out the investigation into the matters raised in the complainant's Notice of Grievance. The Independent Investigator appointed by the agency, Ms Wilson, was nominated by the complainant as a person acceptable to her to act as the investigator. The Independent Investigator provided her findings and report to the Commissioner of Health in May 1994.
4. The Independent Investigator's findings and Report was itself the subject of a number of complaints from other officers of the agency who complained that the Report denied them procedural fairness and was fundamentally flawed. In July 1994, the agency therefore sought independent legal advice to determine whether the complaints made about the Independent Investigator's Report were justified.
5. The Independent Investigator's Report was referred by the agency to Minter Ellison Northmore Hale, Barristers and Solicitors, for an external review. It is my understanding that the agency has provided the complainant with a copy of the Report prepared by the Independent Investigator, Ms S Wilson, addressing the matters raised in the complainant's Notice of Grievance, and with a copy of the report entitled "Review of Investigator's Report on Grievances of Ms D Steele", prepared by Mr N Douglas of Minter Ellison Northmore Hale, dated 24 August 1994.

6. On 20 October 1994, the complainant applied to the agency under the FOI Act for access to certain documents including, *inter alia*, all documents relating to the posting and selection of the position of Acting Director, Legal Policy Branch, from August 1992 to date.
7. The decision on access was initially made by Mr J Henderson, Project Director of the agency, on 5 December 1994. The agency identified 32 documents as coming within the ambit of the complainant's access application. The complainant was granted access in full to copies of 18 documents. The complainant was also granted access to edited copies of 5 documents. Finally, the complainant was refused access to 9 documents. The agency advised the complainant that the documents to which access was refused were exempt documents under clause 3(1), clause 8(2) or clause 14(1)(a) of Schedule 1 to the FOI Act. The agency further claimed that the matter which the agency had deleted from the 5 documents concerned was exempt matter under clause 3 of Schedule 1 to the FOI Act.
8. On 20 December 1994, the complainant applied to the agency for internal review of the decision of Mr Henderson. Among other things, the complainant claimed that the agency had failed to identify certain documents which the complainant claimed came within the ambit of her access application and which the agency should have identified. As a result of receiving that further information from the complainant, the agency conducted further searches and located additional documents, which were released to the complainant.
9. The decision on internal review was made by Mr G Stacey, Acting Director, Health Workforce Branch on 6 January 1995. Mr Stacey varied the initial decision of Mr Henderson. Several further documents were released to the complainant. However, the agency maintained its claims that other documents were exempt under clause 3(1), clause 8(1) and clause 8(2) of Schedule 1 to the FOI Act. In addition, the agency denied the complainant access to one document under s. 26 of the FOI Act, because the document either did not exist or could not be found by the agency. On 9 January 1995, the complainant sought external review by the Information Commissioner.

REVIEW BY THE INFORMATION COMMISSIONER

10. On 12 January 1995, in accordance with my statutory obligations under s.68(1) of the FOI Act, I advised the agency that I had received, and formally accepted, this complaint for review. Pursuant to my authority under s.75(1) and s.72(1)(b) of the FOI Act, I sought production to me of the originals of the documents in dispute, together with the file maintained by the agency in respect of this matter. As the notice of decision provided to the complainant by the agency under s.13(1)(b) of the FOI Act did not conform with the requirements of s.30 of the FOI Act, pursuant to my powers under s.72(1)(a) of the FOI Act, I required the agency to provide to me further information to justify the agency's decision to

refuse access to documents or parts of documents, including the findings on material questions of fact underlying the agency's reasons for refusing access, referring to the material on which those findings were based. The information and documents requested were provided to me on 20 January 1995.

11. In the course of dealing with this complaint, the complainant again alleged that other documents described by her, and which the complainant claimed were relevant to her access application, had not been identified by the agency. At my request, the agency undertook further searches. On 23 February 1995, my office was advised that additional documents, including the document to which the agency had denied the applicant access under s.26 of the Act, had been located either on computer discs and/or in the personal filing systems of members of the agency. The complainant was provided with access to copies of those documents. At that stage, seven documents remained in dispute between the parties.
12. On 16 March 1995, after examining the seven documents remaining in dispute and considering the submissions of the parties, I provided the parties with my preliminary view in respect of this complaint. I advised the agency that its claims for exemption for some of those documents had not been substantiated and of my reasons for reaching this conclusion. The agency was invited, in light of my preliminary view, to reconsider its claims for exemption for those documents. Alternatively, if it did not accept my preliminary view, an opportunity to make further submissions was provided. The agency subsequently declined to make further submissions and requested me to make a formal decision on this complaint.
13. On the same date, I also provided the complainant with my preliminary view on the matter. I advised the complainant that it was my preliminary view that the agency's claims for exemption for some of the documents appeared to be correct. The complainant was invited to reconsider her complaint in respect of those documents, taking into account my preliminary view. Alternatively, she was also provided with an opportunity to make further submissions to me in respect of the matter. The complainant made further submissions to me and also requested a formal decision on her complaint.

THE DISPUTED DOCUMENTS

14. The seven documents remaining in dispute between the parties and the exemptions claimed in respect of each, are as follows:

No	Date	Description	Exemptions
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1	22/9/93	Expression of interest from Mr McBride for the position, Acting Director, Legal Policy Branch	3(1)
2	14/3/94	Memorandum from Mr McBride to Director, Human Resource Management, including hand-written annotations	3(1)
3	14/3/94	Copy of document 2 with different hand-written annotations	3(1)
4	15/6/94	Memorandum to Mr P Solomon, Managing Director, Government Health Bureau, signed by three officers of the agency	8(2)
5	20/6/94	Copy letter to complainant from Managing Director, Government Health Bureau, with hand-written annotations.	3(1) for three names
6	3/5/94	Memorandum from Acting Director, Legal Administration to the Assistant Commissioner, Bureau of Government Health Services and Director, Human Resources	3(1); 8(1); 8(2)
7	various	Attachments to document 6 concerning a coronial inquiry	3(1) for various names

THE EXEMPTIONS

(a) Clause 3 - Personal information

15. Document 1 and parts of Documents 2, 3, 5, 6 and 7 are claimed by the agency to be exempt under clause 3(1) of Schedule 1 to the FOI Act. The parts of documents for which exemption is claimed contain the names of various third parties. Clause 3 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."*

16. In the Glossary in Schedule 2 to the FOI Act, "**personal information**" is defined to mean: "*...information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -*

(a) *whose identity is apparent or can reasonably be ascertained from the information or opinion; or*

(b) *who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.*

17. As I have said on numerous occasions, and most recently in *Re Strelley Pastoral Pty Ltd, Coongan Aboriginal Corporation, Pinga Pty Ltd, Strelley Housing Incorporated and Department of Land Administration* (27 March 1995, unreported, at para 21), in my view the purpose of the exemption in clause 3(1) is to protect the privacy of third parties (see *Re Veale and Town of Bassendean* (25 March 1994, unreported, at para 34); *Re Kobelke and Minister for Planning and Others* (27 April 1994, unreported, at para 68); *Re A and Heathcote Hospital* (9 June 1994, unreported, at para 23); *Re Hayes and The State Housing Commission of Western Australia (Homeswest)* (17 June 1994, unreported, at para 20); *Re Gray and The University of Western Australia* (23 June 1994, unreported, at para 14); *Re Manly and Ministry of the Premier and Cabinet* (16 September 1994, unreported, at para 46); *Re C and Department for Community Development* (12 October 1994, unreported, at para 22); *Re Smith and State Government Insurance Commission* (5 December 1994, unreported, at para 13); and *Re Edwards and Ministry of Justice* (12 December 1994, unreported, at para 15).

18. Further, it is also my view that, in some instances, the mention of a person's name in the context of an agency's documents may reveal "personal information" about that individual. However, more is normally required to establish an exemption under clause 3(1) of Schedule 1 to the FOI Act.

19. Document 1 comprises an application by Mr McBride for the position of Acting Director, Legal Policy Branch, and includes Mr McBride's claims against the relevant selection criteria for the position of Acting Director, Legal Policy Branch. From my examination of this document, I am satisfied that the information in Document 1, except for the covering letter addressed to Mr S Anderson, is "personal information" about Mr McBride. The covering letter has been released to the complainant by the agency. The agency claims that the release of Document 1 would be an unwarranted invasion of Mr McBride's privacy, which is not outweighed by any public benefit resulting from disclosure.

20. The complainant claims there is a public interest in the existence of a proper, fair and equitable system for filling vacancies at senior executive level and that access to documents which reveal the workings of such a system and the relative merits of the candidates, is in the public interest.
21. I recognise that there is a strong public interest in the maintenance of personal privacy, except where there is a stronger competing public interest that requires the disclosure of personal information. I also recognise a public interest in State government agencies adopting fair and equitable selection processes for the filling of vacancies.
22. In my view, the public interest in ensuring that fair and equitable selection procedures were adopted by the agency in relation to this matter is served by the release to the complainant of the copy of the Outcome of Expression of Interest of 19 October 1993; the copy of the Report prepared by the Independent Investigator, Ms S Wilson, of 22 October 1993 and the copy of the Review of Investigator's Report on Grievances of Ms D Steele, prepared by Minter Ellison Northmore Hale, of 24 August 1994.
23. In my view, there is nothing in Document 1 that would add to this public interest by its disclosure and I reject the claims of the complainant that the substance of an applicant's *curriculum vitae* would disclose the reasons for a particular decision or that it would make a valuable contribution to public debate on the issue. There is no evidence or material before me which indicates any general public debate or interest in this particular matter, other than the complainant's personal interest in pursuing a grievance. In my view, that is a private interest and not an aspect of the public interest relevant for my consideration of where the balance of the public interest lies.
24. I find that those parts of Document 1 which have not been disclosed to the complainant are exempt under clause 3(1) of Schedule 1 to the FOI Act, except for those details on page 3 which disclose the positions occupied by Mr McBride in the agency and the relevant dates. That is, the first, second and fourth entries listed on that page. Those are prescribed details for the purposes of clause 3(4) of Schedule 1 to the FOI Act, so prescribed by regulation 9(1) of the *Freedom of Information Regulations 1993* (as amended by regulation 7 of the *Freedom of Information Regulations 1994*) and, accordingly, I find that they are not exempt.
25. The agency claims exemption for the text of Document 2 under clause 3(1) of Schedule 1 to the FOI Act, for reasons similar to those submitted by the agency in respect of Document 1. Document 2 is a memorandum from the Acting Director, Legal Administration, to the Director, Human Resources Management, of the agency. The document contains some personal information about the complainant. The document contains hand-written annotations which have been released to the complainant.
26. The agency claims that the text of Document 2 contains personal and sensitive information about the author, who is communicating as a private person and not as an officer of the agency. Conversely, the complainant claims that the

document is not personal to the author, Mr McBride, and points to the fact that it is an official memorandum, signed by Mr McBride, in his official capacity. I accept the claim of the complainant that this memorandum was written by Mr McBride in his official capacity. That much is evident from the document itself.

27. However, from my examination of document 2, I also accept that the document contains personal information about the author. The document was prepared by Mr McBride following a meeting with the Independent Investigator appointed by the Commissioner of Health to investigate the matters raised in the complainant's Notice of Grievance. Mr McBride raised with the Director of Human Resources, his personal concerns about the matters being investigated by the Independent Investigator and about certain allegations made against him in the formal complaints made against the agency by the complainant to the Commissioner for Equal Opportunity. He requested the Director to provide him with copies of all relevant documents related to the complainant's notice of grievance and complaint to the Commissioner for Equal Opportunity and the opportunity to respond to each of those matters.
28. I am satisfied from my examination of document 2, that it contains "personal information" about the author, and also "personal information" about the complainant. The disclosure of this document would reveal more information about the author that just his name, the position he held in the agency and things done by him in the course of performing his functions or duties or services. Therefore, I do not consider that clause 3(4) (Mr McBride being a contract employee of the agency) operates in this instance to limit the exemption provided by clause 3(1). Whilst the FOI Act is intended to open the process of decision-making by government and its agencies to public scrutiny, and thereby promote greater understanding, accountability and public participation in the process of government, FOI is not intended to open the private and professional lives of its citizens to public scrutiny in circumstances where there is no demonstrable public benefit.
29. Whilst the onus of persuading me that the disclosure of documents containing personal information about a third party would, on balance, be in the public interest, lies on the access applicant under s.102(3), the fact that a requested document also contains personal information about the complainant (the applicant) is, under section 21 of the Act, a factor to be taken into account in considering whether it is in the public interest for the matter to be disclosed, or the effect the disclosure of the matter might have.
30. Whilst the agency claimed that the document contained personal and sensitive information about the author, who was communicating as a private person and not as an officer of the agency, the point was not pressed with any degree of conviction by the agency. Having received my preliminary view on this document, the agency declined to provide any further submissions in support of its claims that Document 2 was exempt under clause 3(1). In particular, the agency provided no information relating to the balancing of the competing public interests, namely the public interest in the protection of privacy and the public

interest in an applicant having access to personal information about her, and being informed of the process by which her grievances were dealt with by the agency.

31. In *Re James and Australian National University* (1984) 6 ALD 687, Deputy President Hall said, "*...in Re Burns and Australian National University* (1984) 6 ALD 193, my colleague, Deputy President Todd concluded that, for the purposes of the Freedom of Information Act, the concept of public interest should be seen as embodying public concern for the rights of an individual. Referring to a decision of Morling J, sitting as the former Document Review Tribunal (*Re Peters and Department of Prime Minister and Cabinet* (2) (1983) 5 ALN 218 Deputy President Todd said: "But what is important is that His Honour considered that there was a public interest in a citizen having access in an appropriate case so that if the citizens "need to know" should be in a particular case be large, the public interest in his being permitted to know would be commensurably enlarged".
32. Deputy President Hall agreed with Deputy President Todd's conclusions and then said "*...the fact that Parliament has seen fit to confer upon every person a legally enforceable right to obtain access to a document of an agency, or an official document of a Minister, except where those documents are exempt documents is, to my mind, a recognition by Parliament that there is a public interest in the rights of individuals to have access to documents - not only documents that may relate more broadly to the affairs of government, but also to documents that relate quite narrowly to the affairs of the individual who made the request.*"
33. In my view, this is a case in which the documents requested by the complainant relate directly to her individual affairs and to the investigation of her grievances against the agency, her former employer. In my view, the public interest in the disclosure of the documents in this matter outweighs the public interest in maintaining the privacy of Mr McBride. I have reached this conclusion after considering the background to this complaint, and after weighing the competing public interest factors for and against disclosure of this document.
34. The requests made by Mr McBride to the Human Resources Manager of the agency in document apparently led the agency to provide him, and other officers of the agency, with a copy of the Independent Investigator's report, for their consideration and response. Thereafter, following a number of complaints from officers of the agency that the Independent Investigator's report denied them procedural fairness and was fundamentally flawed, the agency sought independent legal advice to determine whether the complaints made about the Independent Investigator's Report were justified.
35. The complainant submitted that there is a public interest in the rights of individuals to have access to such documents. The complainant further submitted that because this document was used in the decision-making process of the agency, in respect of her complaints against the agency, it is in the public interest for her to have access to all documents which arose in the agency's decision making process related to this matter.

36. In my view, this is a matter in which the complainant's right of access to documents outweighs the individual right to privacy. Therefore, on the material before me, I find that this document is not exempt under clause 3(1) nor under any other clause of Schedule 1 to the FOI Act.
37. Document 3 is a copy of Document 2, with different hand-written annotations upon it. The agency has not claimed that the hand-written annotations are exempt matter and has released those annotations to the complainant. For the reasons given in paragraphs 25, 26 and 27 above in relation to Document 2, I also reject the agency's claim that Document 3 is exempt under clause 3(1), of Schedule 1 to the FOI Act.
38. Exemption under clause 3(1) is also claimed by the agency for 3 names contained in the hand-written note on page 2 of Document 5. Document 5 is a copy of a letter from the Managing Director, Government Health Bureau, to the complainant, bearing a hand-written note on page 2. I reject the claim of the agency that this information is exempt under clause 3(1). The persons whose names appear on this page were, at that time, all officers of the agency. Clause 3(3) of Schedule 1 to the FOI Act provides that matter is not exempt matter under subclause 3(1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to the person; the person's position or functions as an officer; or things done by the person in performing the functions of an officer. Under regulation 9 of the *Freedom of Information Regulations 1993* (as amended) that information comprises prescribed details for the purpose of clause 3(3) and, accordingly, I find that the 3 names on page 2 of Document 5 are not exempt.
39. The agency also claims that Document 6 is an exempt document under clause 3(1). Document 6 is a memorandum from the Acting Director, Legal Administration to the Assistant Commissioner, Bureau of Government Health Services and to the Director, Human Resources. It is headed "Darlene Steele - Grievance/Equal Opportunity Complaints." The agency claims Document 6 is protected by clause 3(1) of Schedule 1 to the FOI Act because it is personal comment and opinion, provided by the author outside his activities as an officer of the agency. However, this submission is contradicted by information provided to me by Mr McBride. He informed me that in his view he had a duty to inform his direct supervisor, and the manager responsible for human resources within the agency, about matters affecting the ability of the Branch to function effectively.
40. I accept that Document 6 contains personal information about Mr McBride, in that it records matters pertaining to the working relationship between Mr McBride and the complainant. However, it also contains personal information, being comments and opinions, about the complainant. The fact that a requested document contains personal information about the complainant (applicant) is, under s.21 of the FOI Act, a factor to be taken into account by the agency when considering whether it is in the public interest for the matter to be disclosed or the effect that the disclosure of the matter might have. In my view, the agency has

not had sufficient regard to this fact. In fact, from the evidence before me on this matter, it appears that the agency apparently had no regard to it whatsoever.

41. Despite being provided with the opportunity to do so, the agency declined to provide any further submissions to support its claims that Document 6 was exempt under clause 3(1). Without further information relating to the balancing of the competing public interests, namely, the public interest in the protection of privacy and the public interest in an applicant having access to personal information about him or her, I consider the agency has not discharged its onus under s.102(1) of the FOI Act and, accordingly, I find that document is not exempt under clause 3(1) of Schedule 1 to the FOI Act.
42. Document 7 consists of various attachments that were submitted with Document 6. Those attachments concern a coronial inquiry. Exemption is claimed under clause 3(1) of Schedule 1 to the FOI Act for various names in those documents. The complainant agrees to the deletion of the names of deceased persons. However, she does not agree to the deletion of names of agency employees or other employees within State Government agencies.
43. In my view, the names deleted from those documents, other than the names of deceased persons - to which, in any event, the complainant does not seek access - are not exempt matter under clause 3(1) of Schedule 1 to the FOI Act because of the limits on exemption provided by clauses 3(3) and 3(4) of Schedule 1 to the FOI Act and the agency has not persuaded me otherwise. Therefore, I find that the names of agency employees or employees within other State Government agencies are not exempt.

(b) Clause 8 - Confidential communications

44. Document 6 is claimed by the agency to be exempt under clause 8(1) and 8(2) of Schedule 1 to the FOI Act. In addition, the agency claims that Document 4 is exempt under clause 8(2) of Schedule 1 to the FOI Act. Clause 8 provides:

"8. Confidential communications

Exemptions

- (1) *Matter is exempt matter if its disclosure (otherwise than under this Act or another written law) would be a breach of confidence for which a legal remedy could be obtained.*
- (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.*

Limits on exemption

(3) *Matter referred to in clause 6 (1) (a) is not exempt matter under subclause (1) unless its disclosure would enable a legal remedy to be obtained for a breach of confidence owed to a person other than -*

(a) *person in the capacity of a Minister, a member of the staff of a Minister, or an officer of an agency; or*

(b) *an agency or the State.*

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

(i) Clause 8(1)

45. Exemption was claimed under clause 8(1) for Document 6. The agency claims that the decision maker has taken legal advice and believes that there are grounds for breach of confidence. The exemption under clause 8(1) relates to breaches of confidence at common law. In order to establish the exemption under clause 8(1), the information which the agency claims to be confidential, must be identified with some particularity. The agency has not identified the information which the agency claims to be confidential nor has the agency presented any evidence in support of its claim.
46. Further, the matter contained in Document 6 is, in my view, matter of the kind referred to in clause 6(1)(a) of Schedule 1 to the FOI Act, being opinion and advice prepared by an officer of the agency, in the course of, or for the purposes of, the deliberative processes of the agency. It was prepared by Mr McBride in his capacity as an officer of the agency. In accordance with the provisions of clause 8(3) of Schedule 1 to the FOI Act, matter of that kind is not exempt matter under clause 8(1) of Schedule 1 to the FOI Act unless its disclosure would enable a legal remedy to be obtained for a breach of confidence owed to a person other than, *inter alia*, an officer of an agency.
47. On the material before me, I am not persuaded that the agency has established a factual basis for its claim that the disclosure of this document would be a breach of confidence, for which a legal remedy could be obtained, and I find that this document is not exempt under clause 8(1) of Schedule 1 to the FOI Act.

(ii) **Clause 8(2)**

48. Exemption was also claimed under clause 8(2) for Document 6. In order to establish an exemption under clause 8(2), it must be shown by the agency that the document contains matter that is confidential in nature and which, was given in confidence to the agency and was received in confidence by the agency. It must also be shown that disclosure of the document could reasonably be expected to prejudice the future supply to the agency of information of that kind. That is, there must be a reasonable expectation that disclosure would have the effect of impairing the agency's ability to obtain this kind of information from its employees in the future. Whilst there is some material before me that would satisfy the requirements of part (a) of clause 8(2), the agency has not persuaded me that its ability to obtain that kind of information in the future could reasonably be expected to be prejudiced by the disclosure of this document.
49. The agency claims that Document 6 contains information that was provided by Mr McBride above and beyond the requirement of an officer fulfilling his role in public officer and that therefore the release of the document could reasonably be expected to prejudice the future supply of such information to the agency. The agency further claims that the release of the document would be an unauthorised use of information since it could potentially expose Mr McBride to an action for defamation and that he could take legal action against the agency for exposing him in this manner.
50. The author of the document, Mr McBride submitted that if the document were to be released and the complainant took legal action against him, every manager in the public sector who found himself or herself in similar circumstances would be unlikely to candidly express their concerns about staff members to their employers because of the risk of litigation. The agency's and Mr McBride's views that the risk of litigation is a reasonable ground for concluding that in future managers in the public sector will decline to provide information of the kind in question has been rejected in the past and I also reject it now.
51. As I stated in my decision in *Re Gahan and City of Stirling* (21 October 1994, unreported), the "candour and frankness" argument has been consistently rejected by the Commonwealth Administrative Appeals Tribunal in the context of FOI appeals. Whilst I accept that the Mr McBride's views and the agency's views about the effect of disclosure may be genuinely held, I am unable to accept that they are correct. The fact that disclosure of this document may mean that, in the future, managers in the public sector will be less prone to record comments about a staff member where those comments cannot be justified is, in my view, an effect of the FOI Act which is in the public interest. If, as a consequence of the FOI Act, greater care is taken by managers as to the accuracy of the content of written records, that will, in my view, serve the public interest. (see *Re James and Australian National University* (1984) 6 ALD 687).
52. Notwithstanding the agency's and Mr McBride's claims to the contrary, I am not persuaded that officers in State government would be less candid or truthful in providing reports on staffing matters to their superior officers. Further, there is

no evidence put before me by the agency to persuade me that officers in State government agencies would provide less candid, frank and truthful comments when those comments are supported by factual records relating to a person's work history.

53. The complainant submitted that there was a public interest in the release of this document in unabridged form. She contended that release of the document would make a valuable contribution to the public debate on the hiring processes used by the agency and that justice would be denied to her if all documents touching on the decision to appoint the Acting Director were not disclosed. Although the complainant seeks to persuade me as to where the balance of the public interest should lie, the agency bears the onus in the first instance, of establishing the elements of the exemption in clause 8(2). On the material before me, I am not persuaded that the agency has satisfied its onus of proof under s.102(1) of the FOI Act with respect to this exemption. That is, the agency has not satisfied the requirements of part (b) of clause 8(2). Accordingly, I find that that document is not exempt.
54. Exemption was also claimed under clause 8(2) of Schedule 1 to the FOI Act for Document 4. The agency claims this document was given and received in confidence and that the three officers who co-signed the document have indicated that they will not supply information of this kind again if it is released. The complainant believes the document contains information about one or other of the candidates for the position of Acting Director, Legal Policy Branch, or opinion about the management of the Legal Policy Branch. In her submission to me the complainant says that public servants who express opinions which influence decision-making should be accountable for their comments.
55. From the material before me, I accept that the document was provided in confidence by the officers concerned and that it contains confidential information. The agency submits that this information is known to few people and has been kept confidential. As I have said in previous decisions, information is inherently confidential if it is not in the public domain. (see *Re Veale*). Further, from my examination of the matter contained in Document 4, I accept that by its nature, the matter contained in the document is matter of a confidential nature. I am therefore satisfied that the first part of clause 8(2)(a) has been established.
56. However, to claim the exemption under clause 8(2), the agency is also required to meet the requirements of part (b). The crux of the requirement in clause 8(2)(b) is the ability of the agency to obtain similar information to that recorded in the document in dispute, in the future. The agency must persuade me that its ability to obtain unsolicited comments and advice from its employees in the future, could reasonably be expected to be prejudiced by the disclosure of this document. On the material before me, I am not persuaded that the agency has satisfied its onus of proof under s.102(1) of the FOI Act with respect to this exemption. That is, the agency has not satisfied the requirements of part (b) of clause 8(2). Accordingly, I find that this document is not exempt under clause 8(2) of Schedule 1 to the FOI Act.

ARE ANY OF THE DOCUMENTS EXEMPT FOR ANY OTHER REASON?

57. Document 4 is a memorandum to the Managing Director, Government Health Bureau, of the agency, dated 15 June 1994. The agency claimed the document was exempt under clause 8(2) of Schedule 1 to the FOI Act, however, for the reasons set out in paragraphs 54 to 56 above, I am not persuaded that Document 4 to exempt under clause 8(2) of Schedule 1 to the Act.
58. However, from my examination of the document, I am satisfied that it clearly contains matter which is "personal information" about Mr McBride and that that matter is, "*prima facie*", exempt matter under clause 3(1) of Schedule 1 to the FOI Act. In addition, the document neither refers to, nor contains any information about the complainant.
59. As I am satisfied that Document 4 contains personal information about Mr McBride, the onus of establishing that the disclosure of the information would, on balance, be in the public interest falls to the complainant, in accordance with s.102(3) of the Act. The complainant was invited to make submissions to me in support of her claim that the disclosure of Document 4 would, on balance, be in the public interest.
60. In her further submissions to me the complainant claimed that the document was produced with the specific purpose of influencing a decision which was in progress, a decision that directly affected the complainant and Mr McBride, that it was clearly in the public interest for documents used to directly affect decision making to be disclosed; that the information will make a valuable contribution to the public debate on the hiring processes used by the agency and that this is a matter of serious interest not only to the complainant but to the greater community, who are interested in fair and equitable decision making within Government.
61. In my view, none of the submissions made by the complainant is sufficient to satisfy me that the document should be disclosed to the complainant. From my examination of the document it is apparent that it could not have been used by the agency for the purposes of deciding who to appoint as the position of Acting Director, Legal Policy Branch. The document is dated 15 June 1994. That date is some 9 months after the position concerned was advertised and was filled.
