

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

**File Ref: F0072000
Decision Ref: D0132000**

Participants:

Michael Robert Coleman
Complainant

- and -

City of Melville
First Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – development agreement – clause 6(1) – whether document of a kind described in clause 6(1)(a) – whether disclosure contrary to the public interest – existence of ongoing negotiations – whether negotiations likely to be adversely affected – onus on agency.

Freedom of Information Act 1992 (WA) s. 3(1), 3(2); Schedule 1 Clauses 4(3), 6(1) and 10(4).

Re Waterford and Department of the Treasury (No 2) (1984) 5 ALD 588

Ministry for Planning v Collins (1996) 93 LGERA 69

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550

DECISION

The decision of the agency is set aside. The disputed document is not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

13 March 2000

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the City of Melville ('the agency') to refuse Mr Coleman ('the complainant') access to a document requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. For the last few years, the agency and the State government have been discussing the development of an area of land formerly occupied by Heathcote Hospital. Agreement was reached in early 1999, and the agency and the Minister for Works ('the owner') signed a Deed in the form of a Development Agreement outlining the proposal and the respective rights and obligations of the agency and owner of the site.
3. Following public opposition to the proposal to sell part of the site for housing in order to fund the redevelopment of the larger part of the site for community use, the agency and the owner entered into further negotiations concerning certain aspects of the agreement. The complainant has been a vocal opponent of the sale of any part of the site for private use and is a community representative on a committee composed of representatives of the agency, the Government and the community subsequently formed to consider alternative proposals.
4. On 5 October 1999, the complainant made an application to the agency for access under the FOI Act to a copy of the Development Agreement ('the disputed document'). On 8 December 1999, the agency informed the complainant that, after consulting the owner, it had decided to refuse access to the disputed document on the ground that it was exempt under clause 10(4) of Schedule 1 to the FOI Act.
5. On 13 December 1999, the complainant sought internal review of the agency's decision. On 24 December 1999, the Chief Executive Officer of the agency confirmed the initial decision. On 5 January 2000, the complainant made a complaint to the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. In my opinion, the agency's notices of decision provided to the complainant do not comply with s.30 of the FOI Act. They do not contain sufficient reasons, nor any findings on material questions of fact underlying the reasons, for refusing access based on clause 10(4). Therefore, I sought further information from the agency to justify its decision to refuse access to the disputed document. I also obtained a copy of the disputed document from the agency.

7. Discussions took place with the parties to determine whether this complaint could be resolved by conciliation. The agency offered to conciliate this complaint by providing the complainant with an edited copy of the disputed document. However, that outcome was not acceptable to the complainant because the matter the agency proposed to delete from the disputed document was information of particular interest to the complainant.
8. On 21 February 2000, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the disputed document may not be exempt under clause 10(4). The agency responded by providing a further submission abandoning the claim for exemption under clause 10(4) and substituting a new claim for exemption based on clause 6(1). I also met with representatives of the agency who explained to me the reasons for the decision of the agency to refuse access to the document. I also received a further submission from the complainant.

THE DISPUTED DOCUMENT

9. The disputed document is the Development Agreement made between the agency and the owner on 28 January 1999.

THE EXEMPTION

10. Clause 6, so far as is relevant, 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."

11. Clearly, the requirements of both paragraphs (a) and (b) must be satisfied in order to establish exemption under clause 6(1). Further, in the case of this exemption, the complainant is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; he is entitled to access unless the agency can establish that disclosure of the particular deliberative process matter would be contrary to the public interest.
12. 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. I agree 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.
13. I also agree with the Tribunal's view, at page 606, that:

"It by no means follows, therefore, that every document on a departmental file will fall into this category...Furthermore, however imprecise the dividing line may first appear to be in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency..."

It is documents containing opinion, advice, recommendations etc. relating to the internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption under s 36 only attaches to those documents the disclosure of which is "contrary to the public interest"."

clause 6(1)(a)

14. The agency submits that the disputed document is the foundation of ongoing negotiations between the agency and the owner for the deliberative process of formulating an alternative strategy in respect of the site and which it is intended will result in the amendment or replacement of the present agreement. The agency submits disclosure of the disputed document would reveal consultations and deliberations which have taken place for the purpose of that deliberative process.
15. I do not accept that the disputed document is of a kind described in clause 6(1)(a). In my view, it does not contain information in the nature of opinion, advice or recommendations, nor would its disclosure reveal any consultation or deliberation that has taken place. Clearly, the disputed document is itself the result of deliberations by both the agency and the owner as to the future of the site. No doubt it followed consultation and was finalised following advice and opinion given, and recommendations made, to each party for the purpose, and in

the course of, that deliberative process. However, the disputed document does not itself reveal the deliberations and consultations that led to its creation.

16. Similarly, a further deliberative process as to the future of the site and the appropriate renegotiation of the agreement may well be on foot, but the disputed document does not reveal any of the deliberations or consultations undertaken in or for that deliberative process, nor any opinion or advice given, or recommendation made, to either party in respect of that deliberative process. In my opinion, the character of the document is not of the kind referred to in clause 6(1)(a). Therefore, I do not consider that there are any grounds to justify the agency's decision to refuse access to the document based on clause 6(1).

clause 6(1)(b)

17. In any event, even if the document met the requirements of clause 6(1)(a) (which, in my view, it does not), the agency must establish that its disclosure would be contrary to the public interest. The complainant submits that the disputed document stands alone and does not form part of any deliberative process. The complainant provided me with cuttings of newspaper articles and a leaflet issued by the agency to illustrate that the key components of the original agreement, including the cost of the project, are already in the public domain. The complainant submits that there is a public interest in the disclosure of documents of this kind because the ratepayers ultimately bear the risks for such proposals. The complainant submits that disclosure would serve the public interest in free and open government.
18. The agency submits that it recognises that there is a public interest in local government affairs being accountable and transparent and that this public interest weighs in favour of disclosure. However, the agency also submits that, following the interest generated in the community by this project, the agency provided extensive information to the public via, for example, the media, a public awareness campaign, a public meeting, a process of public consultation and through documents such as the agency's budget, financial report and Principal Activity Plan. The agency considers that the public has had access to a significant amount of information on the development of the Heathcote site. In view of this, the agency considers that the public interest in preventing the commercial disadvantages it claims would ensue from disclosure of the detailed contractual arrangements between the parties outweighs the public interest in providing the community with full information on the project.
19. The objects of the FOI Act are set out in s.3(1) and include making the persons and bodies that are responsible for State and local government more accountable to the public. To achieve that aim, s.3(2) creates a general right of access to State and local government documents. I consider that there is a public interest in revealing the processes by which State and local government agencies make decisions that affect the public and, in particular, the spending of public funds. This clearly accords with one of the major objects of the FOI Act - that of promoting informed public participation in the processes of government. In my view, there is a public interest in disclosure of documents that inform the public about the way in which State and local government agencies perform their

functions because such disclosure enhances accountability. That public interest is also clearly reflected in the objects and intent of the FOI Act.

20. I accept that considerable information on the future of the Heathcote site has been provided by the agency to the general public. However, provided that the disclosure of specific information is not exempt for any reason under the FOI Act, I do not see that the provision of considerable information on the project is an argument for denying access to further information. The FOI Act gives a right of access, subject to the exemptions; the public is no longer required to accept only that information that government chooses, for whatever reason, to provide. Whilst the amount of information already disclosed concerning a particular matter may be a factor to weigh against any adverse effect likely to follow from disclosure, it is not of itself a reason to refuse access.
21. The agency submits that the content of the document is the subject of ongoing negotiations between it and the owner to determine a strategy for the development of the land that meets the interests of all parties, including the public. The agency claims that those negotiations have reached a critical stage and disclosure at this point will result in various persons, including the complainant, putting their own interpretation on the contents of the document and possibly misinterpreting the various rights and obligations expressed therein.
22. The agency accepts that the public has a right to bring pressure to bear on the agency and the owner during their deliberations to achieve a satisfactory outcome. However, the agency submits that it is not in the public interest for that to occur if it will undermine those negotiations. The agency submits that there is a public interest in achieving a successful outcome to those negotiations and for the parties to reach agreement about a suitable development proposal for the site.
23. The agency submits that disclosure of the disputed document may cause the breakdown of the ongoing negotiations and that, in that case, litigation will ensue, which will be very costly to the agency and therefore the ratepayers. It is submitted by the agency that it is, therefore, in the public interest to successfully negotiate a further agreement for the site, and that it would be contrary to the public interest to disclose the disputed document when the likely effect of that will be that the current negotiations will fail.
24. The agency also made submissions concerning 4 specific items in the disputed document, arguing, essentially, that those items are likely to be changed as a result of the current negotiations and that, therefore, their disclosure would impact upon the negotiations. It is not explained how their disclosure would impact upon the current negotiations, other than an assertion that, because there may be alternative interpretations as to the effect of the agreement, the agency “... *may be forced to adopt a position, which it would not otherwise take if it were allowed to complete the deliberative process.*” It is not explained how disclosure of the disputed document may force the agency to adopt a position and I do not accept that, merely because alternative interpretations as to the

legal effect of a legal document may be available, the agency will be forced to do something it would not otherwise have done.

25. I accept that discussions about the development of the site are ongoing. I recognise that there is a public interest in ensuring that deliberations in agencies occur unhindered by the prospect of disclosure under the FOI Act, so that proper, informed decisions can be made. However, I am not persuaded that the ongoing negotiations in this matter are likely to be adversely affected by the disclosure of the disputed document. It is not sufficient for the agency simply to proffer that view, and I refer to the comments of Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at page 573, in respect of a claim for exemption by an agency under clause 4(3) of the FOI Act, when he expressed the nature of the onus the agency bears in the following way:

“How can the Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision-maker that he or she had “real and substantial grounds for thinking that the production of the document could prejudice that supply” or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision-maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision-maker.”

26. Whilst I accept that it may be contrary to the public interest for the ongoing negotiations to break down and for expensive litigation to ensue, I do not consider that the agency has provided any persuasive support for its assertion that disclosure of the disputed document would be likely to cause the breakdown of negotiations. Nor am I persuaded that disclosure of the disputed document would be demonstrably contrary to the public interest for any other reason.
27. Accordingly, as I do not consider that that the document is of a kind described in clause 6(1)(a) and, even if it were, the agency has not established that its disclosure would, on balance, be contrary to the public interest, I find that the disputed document is not exempt.
