OFFICE OF THE INFORMATION COMMISSIONER (W.A.)		**File Ref: F0092001** **Decision Ref: D0142001**
	Participants:	**Shire of Mundaring** Complainant - and - **Ministry for Planning** Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – submissions made to the Western Australian Planning Commission relating to proposed amendment of Metropolitan Region Scheme – clause 6 – deliberative process documents – whether disclosure would, on balance, be contrary to the public interest.

Freedom of Information Act 1992 **(WA**) Schedule 1 clauses 3(1) and 6(1)
Metropolitan Region Town Planning Scheme Act 1959 **(WA)** section 33

Re Waterford and Department of the Treasury (No.2) (1984) 5 ALD 588
Re Ministry of Planning v Collins (1996) 93 LGERA 69

DECISION

I set aside the agency's decision. In substitution it is decided that the disputed documents are not exempt under clause 6(1) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

28 March 2001

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Ministry for Planning ('the agency') to refuse the Shire of Mundaring ('the complainant') access to documents requested by it under the *Freedom of Information Act 1992* ('the FOI Act').

2. On 11 July 2000, proposed amendments to the Metropolitan Region Scheme ('the MRS'), concerning land located in the Shire of Mundaring and elsewhere, were advertised in the *Government Gazette* and local newspapers in accordance with the procedures set out in s.33 of the *Metropolitan Region Town Planning Scheme Act 1959* ('the MRTPS Act'). Amendment 1019/33 contains proposals for two new 'town sites' in the Shire of Mundaring and submissions were invited from the public in respect of the proposed amendment.

3. On 20 November 2000, the complainant made an application to the agency for access under the FOI Act to copies of the submissions on Amendment 1019/33 received by the agency. The agency identified 30 such submissions but refused access to those documents on the grounds that they are exempt under clauses 3(1) and 6(1) of Schedule 1 to the FOI Act. The complainant applied for an internal review of the agency's decision. On 13 December 2000, the agency's internal reviewer confirmed the original decision to refuse access to those documents because it was considered inappropriate to disclose the requested documents before the Hearings Committee of the Western Australian Planning Commission ('the Commission') had considered oral submissions from interested persons. Oral submissions were heard on 14 December 2000.

4. Subsequently, I understand that 11 of the 30 government agencies and private individuals or organizations that made written submissions attended the Committee hearings and presented their views to the Committee. A representative of the complainant was one of those 11 and was present during the presentations made by the others, save for one, which was given to the Committee at a closed hearing.

5. On 5 January 2001, the complainant made a complaint to the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained the disputed documents from the agency. Inquiries were made with the parties to determine whether this complaint could be resolved by conciliation. The complainant informed me that it would accept a summary prepared by the agency briefly describing the subject matter of each submission.

However, the agency declined to provide such a summary and the complaint could not, therefore, be resolved in this manner.

7. Subsequently, the complainant withdrew its complaint in respect of 8 documents and agreed to accept access to edited copies of the remainder from which all personal information about third parties had been deleted. The agency was informed of this. Therefore, any matter in the disputed documents which is personal information about a third party is no longer in dispute. Accordingly, it is unnecessary for me to consider the agency's claim for exemption under clause 3(1) for that matter.

8. On 23 March 2001, 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 documents remaining in dispute might not be exempt under clause 6(1). I received a further submission in writing from the agency in support of its claims for exemption.

THE DISPUTED DOCUMENTS

9. There are 22 documents in dispute between the parties. They comprise submissions made to the Commission by government agencies and private individuals or organizations under the procedures set out in the MRTPS Act. The disputed documents are listed on the agency's schedule as Documents 5, 8, 10-16 and 18-30. The agency claims that the disputed documents are exempt under clause 6(1).

THE EXEMPTION

Clause 6 - Deliberative processes

10. 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."

11. I have considered the scope of the exemption in clause 6(1) in a number of my decisions. I agree with the view taken by the Commonwealth 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.

12. The exemption in clause 6(1) is potentially broad in scope and I also agree with the view of the Tribunal when it said, at paragraphs 59-60:

"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) – the nature of the information

13. There are two parts to the exemption in clause 6(1) and the requirements of both paragraphs (a) and (b) of clause 6(1) must be established by the agency. Further, I regard it as necessary to identify the particular deliberative process to which disputed documents are claimed to relate. In this instance, the agency submits that the particular deliberative process to which the documents relate concerns the ongoing deliberations of the Commission to determine whether Amendment 1019/33 to the MRS should be made. The agency informs me that the procedures set out in the MRTPS Act are as follows:

(i) The Commission formulates an amendment and, after satisfying the environmental assessment component, it submits the proposed amendment to the Minister for Planning ('the Minister') for approval to seek public submissions.

(ii) Once the Minister gives consent, the proposed amendment is made available at certain locations for inspection by the public and is also advertised in the *Government Gazette* and in local newspapers. Those people or bodies likely to be affected by the proposed amendment are consulted at this time. In the present case, there was a 3-month submission period commencing on 10 July 2000 and concluding on 13 October 2000.

(iii) At the close of the submission period, the Commission holds hearings to allow those people or bodies who made written submissions to the Commission to explain or expand upon those submissions. The Hearings Committee listens to the various points of view either in public or in private, but the hearing is not a forum for debate.

(iv) The Commission refers submissions to the Environmental Protection Authority ('the EPA').

(v) Following the application of any environmental conditions suggested by the EPA, the Commission submits the proposed amendment and the submissions, together with its report on those submissions, to the Minister.

(vi) If the Minister considers that the proposed amendment should proceed, it is forwarded to the Governor. The Governor may approve the proposed amendment, make modifications or revoke the approval.

(vii) Once the amendment receives gubernatorial approval, the amendment is again advertised for public inspection and is tabled in both Houses of Parliament, together with the Commission's report and the submission documents. At this point, the submissions become public documents.

(viii) The amendment remains before both Houses of Parliament for a set period and may be disallowed by resolution of either House. If not disallowed, the amendment is effective after the conclusion of the requisite time or outcome of debate (according to the Standing Orders of both Houses).

14. The agency informs me that the process of conducting hearings before the Hearings Committee has been adjourned and that there is a possibility that further hearings may occur. Accordingly, the agency claims that the deliberations of the Commission in relation to Amendment 1019/33 are ongoing and are currently at stage 3 (described above) in the statutory process.

15. I have examined the disputed documents. Taking into account the statutory process described in paragraph 13 above, I accept that disclosure of the disputed documents would reveal opinions that have been obtained, prepared and recorded in the course of, and for the purpose of, the deliberative processes of the Commission. Therefore, in my opinion, the requirements of clause 6(1)(a) are established.

Clause 6(1)(b) – contrary to the public interest

16. In my view, it may be contrary to the public interest to prematurely disclose deliberative process documents relied upon by the Commission while its deliberations are continuing but only to the extent that disclosure of the disputed documents would adversely affect the decision-making process such that it would be contrary to the public interest to do so, or that disclosure would, for some other reason, be demonstrably contrary to the public interest.

The agency's submission

17. The agency submits that disclosure could have an adverse effect on the Commission's deliberative process because that process is ongoing. The agency states that, in the event that further hearings occur, the effect of disclosing written submissions to the complainant would be to give the complainant an unfair advantage in those hearings over other persons because the complainant could enhance the presentation of its own case.

18. The agency states that a number of outstanding matters need to be addressed by the Commission, including consultation with the EPA and consultation with the Minister. The agency submits that if the disputed documents are disclosed, the complainant may lobby the Commission or the agency's officers. The agency submits that, if this were to occur, it would have the likely effect of hindering the decision-making process of the Commission.

19. The agency also submits that there is no legislative basis under the MRTPS Act for the disclosure of submissions in the course of the amendment process and that it would be contrary to the principles of natural justice and procedural fairness for the decision-making process of the Commission to proceed in such a way. The agency claims that the legislative scheme controls the amendment process and establishes the necessary procedures for the Commission to follow. The agency submits that the established procedures do not provide a forum for individuals or bodies to lobby the Commission in relation to specific issues. The agency submits that the disclosure of information to the public under the statutory procedure is entirely different to disclosing the disputed documents under the FOI Act.

20. The agency submits that the fact that the complainant was present when oral submissions were made by various individuals to the Hearings Committee weighs in favour of non-disclosure of the written submissions on the basis that the public interest was served by conducting those hearings in public.

21. Finally, in response to my preliminary view, the agency made another submission, which, in part, is as follows:

> *"Under present procedures, submissions are published by the Commission and become public when they are tabled in Parliament together with the Commission's report on submissions and the amendment. Your determination in this case has the impact of changing that procedure for proposed amendment 1019/33 and for all future amendments to the MRS*

and for Regional Planning Schemes. The Commission does not shrink from that prospect but is of the view that some 'point of release' of submissions should exist. The Commission considers that a review of procedures should be undertaken by the agency responsible for the process and legislation and not occur in an ad hoc manner. Supporting actions, public advice and procedures may then be developed and be in place to support those changes.

…

An argument can be put that, if submissions were to be made public, that persons would be less likely or not inclined to make submissions. A reduction in submission and comment brought about by such circumstances is contrary to the intent of procedures in the MRTPS Act and certainly the intent of the FOI Act. There is no rational basis for presuming a decline in submissions however the potential for such an occurrence would be detrimental to future proposed amendments.

Similarly, it could occur that, if submissions become public during the submission period, submissions will not be lodged until the end of that procedure. The time then spent processing the large quantity and providing copies to multiple submitters in an interchange of submissions has the potential to remove the Ministry's resources from the 'formal' process of assisting and advising the Commission, which I would content [sic] *is the priority task.*

Public confidence in a known and understood process may be diminished. The form of the public submission process applied from the MRTPS Act has roots in the Town Planning and Development Act 1928 (TPD Act). All local governments in the State are required to use the provisions of the TPD Act and the Town Planning Regulations (1967) to advertise and seek public submissions on local government town planning schemes and amendments to those schemes. The flow-on effect of a decision on submissions to an amendment under the MRS cannot be underestimated. Such a change, if it were to occur, should be managed through a legislative and publicised public process. The potential for local governments across the State to commit resources to a diverse distribution of public submissions between constituents is counter to the intent and spirit of the present legislation. Such significant changes are a real and substantial alteration that would be counter to the public interest.

…

Under present procedures all submissions are held by and for the consideration of the Commission. A change whereby submissions are available to all parties as they are received would change that procedure and remove it from the control of the Commission and add to the time duration of an amendment procedure. Such occurrences would affect the integrity of the process and be counter to the public interest.

The availability of submissions to all parties, as they are lodged, I would suggest, prompt persons to wait to the last minute to lodge submissions (as

mentioned above). Submissions lodged during the period would be available to other parties who may then refute or counter positions espoused in earlier submissions. Parties may then enter a process of claim and counter claim over a series of submissions or would include only the minimum of information. The information then available to the Commission for it to consider would be argumentative and potentially detracted [sic] *from the planning issues or concentrated on individual argument. In such circumstances it would be reasonable to surmise that the 'hearing' process would increasingly occur in private. That is, written submissions would contain little information and argument would be presented in private oral submissions.*

Later submissions could be enhanced with the benefit of the knowledge taken from other submissions. The process of natural justice suggests that if one party were to have an opportunity to refute, then a similar opportunity must be extended to the initial submitter. A complex process of rounds of claim and counter claim may then occur. 1 suggest that any actions which compound and makes [sic] *more complex the public submission process is counter to the public interest and does not support disclosure of documents.*

Persons with access to greater resources would benefit from a process that disclosed submissions before the Commission had considered them. An ability to add resources to claim, counter claim and argument may have the deleterious effect of wearing down the person with fewer resources. There is a potential to thereby 'remove' the 'little bloke' from the public submission procedure,. Should these scenarios develop, they would certainly be detrimental to public participation in the planning process."

Consideration

22. I have considered the latest submission from the agency in support of its claim that the documents are exempt, but I do not consider that that submission contains anything of substance. The claims made by the agency are, by its own admission in at least one instance, speculative and without a rational basis. I consider it unlikely that a decision under the FOI Act would radically change the procedures normally followed by the Commission in the manner suggested by the agency. Further, if changes were to be made, they might improve the process rather than detract from it. There is no evidence before me, either in the case of this proposed amendment or in the case of previously proposed amendments, of a need or a desire for the exchange of each and every submission made to the Commission. Even if there were such a need, it seems to me that the practice of making all written submissions public as they are submitted to the Commission could readily be accommodated. In my view, the agency has described a number of hypothetical scenarios, but I do not consider than they are the probable results of a disclosure being made under the FOI Act. Rather, they are mere speculation by the agency.

23. It seems to me that there are four main arguments made by the agency in support of its claim for exemption under clause 6(1). The agency submits, firstly, that disclosure would be contrary to the public interest because it would give the complainant an unfair advantage in any future hearings because the complainant could enhance the presentation of its own case. However, the submission period is now closed and, whilst a resumption of the hearings process is by no means a certainty, it is clear to me that the process does not involve a debate over the issues.

24. There is no information before me to show that the complainant will be given a second opportunity to speak to its submissions before the Hearings committee. In the event that it is, the agency has stated that the complainant may only proffer its views, not debate those of other persons. Presumably, if the complainant made a further submission in public, other interested persons could do the same. I cannot see how that outcome would have any adverse effect on the deliberative processes of either the Commission or the Minister. Nor am I persuaded that disclosure of the disputed documents would give the complainant an unfair advantage. If the disputed documents are not exempt, then those documents are available to any person wishing to make a further submission.

25. Further, there is no material before me which establishes that the Commission's deliberative process would be adversely affected by further relevant information being made available to it. Rather, if disclosure has the effect of making additional information available to the Commission, then I consider that that result is more likely to enhance the deliberative processes of the Commission by ensuring that all relevant information is available to it before a decision is made.

26. Secondly, the agency submits that disclosure would hinder the ongoing decision-making process of the Commission because the complainant would subject it and the agency to pressure by agitating or lobbying for acceptance of a particular point of view. However, I consider those claims to be unsupported speculation and conjecture and I have not attached much weight to them. Further, in my opinion, it cannot be contrary to the public interest for an agency to use its resources (which are paid for out of the public purse) to respond to concerns raised by sectional interests or to general public concerns about planning issues, before any final decision is made on a matter of such importance to the local community. Nor, in my view, can it be contrary to the public interest for persons affected by planning decisions to be able to lobby the government before a final decision is made.

27. Thirdly, the agency submits that there is no legislative basis for disclosure of submissions at this point and that the established legislative process ought to control the process. Whilst I accept that the MRTPS Act prescribes procedures applicable to the planning process, the agency also informs me that the Commission follows other procedures, which are not prescribed by that Act. For example, the agency informs me that there is no legislative basis for the Hearings Committee to hold hearings in private or in public, nor is there any legislative basis for the practice of tabling the written submissions in Parliament. Clearly, in my view, the Commission does not consider that the

procedures in the MRTPS Act comprise a code of practice that cannot be modified as a need arises, and neither do I.

28. Fourthly, the agency submits that disclosure of written submissions under the FOI Act will establish a precedent and result in a process that is less desirable, more complex and not in the public interest. In view of my comments above, I am not persuaded that the agency has established any factual basis for that claim. The agency claims that a decision under the FOI Act will change the long established procedures followed by the Commission when it deals with all future amendments under the MRS and Regional Planning Schemes. However, I do not consider that a decision of the Information Commissioner under the FOI Act establishes any such precedent. Clearly, each complaint to me is dealt with on its merits. Further, at agency level, decisions of the Information Commissioner may identify factors which an agency should consider when making a decision on access, but they act as guides only.

Public interest

29. I have consistently expressed the view when considering the application of the exemption in clause 6(1) that it may be contrary to the public interest to prematurely disclose deliberative process documents while deliberations in an agency are continuing, if there is evidence that disclosure of such documents would adversely affect the agency's decision-making process, or that disclosure would, for some other reason, be demonstrably contrary to the public interest. In either of those circumstances, I consider that the public interest may be served by non-disclosure because the public interest may be best served by allowing deliberations to occur unhindered and with the benefit of access to all material available so that informed decisions may be made.

30. In the case of the exemption in clause 6(1), the complainant is not required to demonstrate that disclosure would be in the public interest. Rather, the complainant is entitled to access unless the agency can establish that disclosure of the disputed documents would, on balance, be contrary to the public interest.

31. I recognise that there is a public interest in the complainant being able to exercise its rights of access under the FOI Act. I note that the complainant is a local government authority and, presumably, it acts in the interests of all of its ratepayers and residents, not merely those who made submissions regarding Amendment 1019/33.

32. I recognize that there is a public interest in a local community being fully informed about development proposals, which have the potential to significantly affect the life-style and amenity of the community concerned. The agency submits that the public consultation procedures in the statutory scheme are sufficient and that the public scrutiny argument should not be considered to be a strong public interest factor in favour of disclosure. I accept that the public interest in community participation in the decision-making process may be satisfied, to some extent, by the public consultation process set out in the

MRTPS Act. However, I do not consider that fact to be determinative of the question before me.

33. I also recognise a public interest in the accountability of agencies for the decisions made on behalf of the community at large and I consider that that public interest is enhanced by the disclosure of relevant and timely information so that members of the public can participate in the decision-making processes of government.

34. I also recognise that there is a public interest in maintaining an established planning process that is understood and accepted by the community. The advice given to me by the agency is from persons with an expert background in planning issues. Whilst I have given that advice some weight, I do not consider it to have more weight than the public interests served by the objects and intent of the FOI Act.

35. I recognize that there is a public interest in ensuring that the Commission and the Minister are fully informed about planning issues. However, I consider that the public interest is served, not hindered, by the disclosure of information that would enable a local community to have input into a planning process that directly affects, or could affect, that community. One of the stated objects of the FOI Act in s.3(1) is to enable the public to participate more effectively in governing the State. In my view, if public participation in that process is to have any meaning, it should allow input into the planning process at an early stage and well before a decision is made. Further, the public is only able to participate in such democratic processes if it has access to relevant and timely information.

36. Weighing against disclosure, I recognise that there is a public interest in ensuring the soundness of the deliberative processes of an agency so that informed decisions can be made. However, in the circumstances of this complaint and based on the material before me, I am not persuaded that disclosure would have any adverse effect on the soundness of the deliberative processes of the Commission or that it would result in any less information being presented to the Commission for the purposes of its deliberations.

37. Therefore, in balancing the competing interests, I have given more weight to the factors favouring disclosure. I am not persuaded that disclosure of the disputed documents would adversely affect the deliberative processes of the Commission or the Minister or that any other public interest would be so adversely affected by their disclosure that it would, on balance, be contrary to the public interest to disclose them. Accordingly, I find that the disputed documents are not exempt under clause 6(1). However, access should be provided to edited copies of the documents with personal information deleted from them.

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