

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

**File Ref: F2004095
Decision Ref: D0152005**

Participants:

Seven Network (Operations) Limited
Complainant

- and -

Western Power Corporation
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refuse access to a document – minutes of meeting of Board of the agency – scope of the access application – whether documents exempt for any reason - clause 3(1) – whether disclosure of document would reveal personal information about third parties – whether disclosure would be in the public interest – clause 6 – deliberative processes of the agency – whether disclosure would, on balance, be contrary to the public interest.

Freedom of Information Act 1992 (WA) ss.14(1), 76(4), 102(1); Schedule 1 clauses 3(1), 6(1), 7.

DECISION

The decision of the agency is set aside. In substitution, it is decided that:

- all of Documents 1 and 1A are within the scope of the complainant's access application; and
- the documents are not exempt documents under the *Freedom of Information Act 1992*.

D A WOOKEY
A/INFORMATION COMMISSIONER

9 August 2005

REASONS FOR DECISION

1. This complaint arises from a decision made by Western Power Corporation ('the agency'), to refuse Seven Network (Operations) Limited ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. The complainant sought access under the FOI Act to a number of documents relating to the termination of the employment of the agency's former Managing Director, Dr Stephen van der Mye ('the former Managing Director'). The agency decided to grant the complainant access in full to a number of documents, but refused the complainant access to other documents, either in full or in part, on the ground that those documents are exempt under one or more of clauses 3(1), 6(1) and 7 of Schedule 1 to the FOI Act.
3. The complainant sought internal review of that decision. The agency in its notice of decision on internal review, confirmed its initial decision to refuse access on the basis that the requested documents are exempt under clauses 3(1) and 7. Thereafter, the complainant made a complaint to the Information Commissioner seeking external review of the decision on access.

REVIEW BY THE INFORMATION COMMISSIONER

4. I obtained the disputed documents and relevant FOI file from the agency. In addition, my office asked the agency to provide further information in support of its claims for exemption under clause 7 for some of the disputed documents. The agency provided additional information in respect of its claims and a revised schedule listing 23 documents (numbered 1-21, but including 1A and 20A), which included 7 additional documents not previously identified by the agency. The agency sent a copy of the revised schedule and edited copies of 5 documents to the complainant.
5. As a result of negotiations with my office, both parties to this complaint agreed to withdraw from their respective positions in relation to certain documents and exemption claims. In addition, my office contacted the former Managing Director, a third party for the purposes of this complaint, who did not object to the disclosure of two of the disputed documents in an edited form. The complainant confirmed that it would accept edited copies of those two documents and it has received copies of those documents. Following that process, only three documents remained in dispute, being Documents 1, 1A and 4 on the revised schedule prepared by the agency. The agency took the view that only parts of the text of each of those documents were within the scope of the complainant's access application, claiming that the other parts did not relate to the former Managing Director's resignation and were therefore "irrelevant".

6. On 19 November 2004, after considering all of the material then before me, I informed the parties, in writing, of my preliminary view of this complaint and my reasons. It was my preliminary view that all of Documents 1 and 1A are within the scope of the complainant's access application; the headings at the top of page 1, the lists of attendees and apologies and paragraphs 1 and 3 of the text of Document 4 are within the scope of the access application; the name and position title of the suggested Acting Chief Executive Officer in paragraph 5 on page 2 of Documents 1 and 1A may be exempt under clause 3(1) of Schedule 1 to the FOI Act; and the documents are not otherwise exempt under clause 3(1) or at all.
7. However, that view was formed without the benefit of submissions from the various third parties named or referred to in the documents. When dealing with the access application, the agency had not consulted those people as it was not required to do so because its decision was to refuse access. My preliminary view in respect of the claims for exemption under clause 3(1) was, therefore, subject to those third parties being given an opportunity to make submissions on the matter. All the third parties were then consulted either by my office or by the agency at the request of my office.
8. The complainant confirmed that he accepted my preliminary view. Following advice of my preliminary view, all the third parties (other than the suggested Acting Chief Executive Officer, who was not consulted) consented to the disclosure of the personal information about them which is contained in the disputed documents.
9. The agency accepted my preliminary view in relation to its claims for exemption under clause 3(1) and released to the complainant a copy of Document 4 edited in accordance with my preliminary view. The complainant withdrew its complaint in respect of that document. However, the agency did not accept my preliminary view that the whole of the text of Documents 1 and 1A are within the scope of the access application, maintaining that all of the information on page 1 and in the first paragraph on page 2 is outside the scope of the complainant's access application and therefore there is no obligation to disclose it.

THE DISPUTED DOCUMENTS

10. The documents remaining in dispute are Document 1, which is a copy of minutes of a meeting of the Board of Western Power on 19 February 2004, and Document 1A which is a copy of Document 1 marked "Draft".

THE DISPUTED INFORMATION

11. The information in dispute is all of the information on page 1 and the first paragraph on page 2 of each of Documents 1 and 1A.

THE AGENCY'S SUBMISSION

12. The agency claims that the information on page 1 and the first paragraph on page 2 of Documents 1 and 1A are not within the scope of the complainant's access application as the information does not relate to the employment of the former Managing Director or his resignation.
13. The agency initially claimed that those parts of the disputed documents were exempt on that basis but subsequently acknowledged that the fact that a document or part thereof is outside the ambit of a request "*... does not strictly mean that it is exempt*" but that there is no obligation to disclose such documents or parts of documents. Although the fact that a document or part of a document is not within the scope of an access application is clearly not a basis for exemption, I agree that an agency need not give access to matter that is not within the scope of an access application, not because it is exempt but because the access applicant has not requested access to it. That is confirmed by s.14 of the FOI Act which provides:

"14. Ambit of application may be reduced by agreement

If it is apparent from the terms of the access application that an applicant seeks information of a certain kind contained in documents of the agency, the agency may, with the agreement of the applicant, deal with the application as if it were an application relating only to those parts of those documents that contain information of that kind."

14. Although it does not appear that the agency sought any such agreement from the complainant in this instance, the complainant has made it clear in its dealings with my office that it seeks access only to information relating to the employment, resignation and termination of employment of the former Managing Director and that it is prepared to accept access to only those parts of the agency's documents which contain information of that kind. In this case, I must decide whether the agency has correctly identified the information within the disputed documents which is within the scope of the complainant's access application.

THE SCOPE OF THE ACCESS APPLICATION

15. I have examined the disputed documents and I have considered the specific terms of the complainant's access application. The complainant's access application, dated 2 March 2004 was for access to "*... documentation relating to the employment of the Managing Director of Western Power, Dr Stephen Van der Mye*" and was specified to cover "*... all internal documentation relating to Dr Van der Mye's resignation*" and "*... any correspondence to Western Power on Dr Van der Mye's termination from the office of the Minister for Energy and the Office of the Premier*".
16. In the circumstances of this matter, it is my view that the complainant's access application, as stated above, is clear. The terms of the access application specified that the complainant was seeking access to documents of the agency

relating to the former Managing Director's employment with the agency, including documents of the agency relating to his resignation.

17. Although the former Managing Director is not specifically referred to in some of the paragraphs of text in the Documents 1 and 1A, all of the paragraphs of text on the first page of Documents 1 and 1A and the first paragraph on the second page of both documents are part of the minutes of the one agenda item; they do not relate to separate agenda items. In my view they record certain matters directly leading to the resignation of the former Managing Director, particularly given the heading in the minutes for that agenda item. The specific references to the resignation do not exist in a vacuum and having considered the contents of the documents, I am of the view that those contents in their entirety directly relate to the circumstances of the resignation of the former Managing Director, including events leading to it and the context in which it became considered necessary and occurred. Therefore, the whole of each of the disputed documents relates to the former Managing Director's resignation, in my view, and consequently I find that the whole of Documents 1 and 1A is within the scope of the complainant's access application.

EXEMPTIONS

Clause 3

18. Following advice that my preliminary view was that only the reference to one person whose name and position appears on page 2 of each of the documents, the complainant withdrew its complaint in respect of that name and position. That particular information is, therefore, no longer in dispute between the parties and need not be disclosed. Following advice of my preliminary view that none of the other personal information (as that term is defined in the FOI Act) about the other people named or referred to in the disputed documents is exempt because one of the limits on that exemption applies to it, and subsequently that all of those third parties had consented to disclosure of the personal information about them which is contained in the disputed documents, the agency abandoned all its other claims for exemption under clause 3(1). I need not, therefore, consider those claims any further.
19. The agency argued only that the disputed matter should not be disclosed because it is not within the scope of the access application, and claimed no other exemptions for that information. However, as I am prohibited by s.76(4) of the FOI Act from making a decision to the effect that access is to be given to a document if it is established that the document is an exempt document, I have considered whether any other exemptions may apply to those parts of the documents which, contrary to the view of the agency, I have decided are within the scope of the access application. Although the agency bears the onus under s.102(1) of the FOI Act to establish that its decision to refuse access was justified and it claimed no other exemptions on this occasion, I have nonetheless considered whether any other exemption applies because, in some instances, it will be apparent from the document itself, without more, that it is an exempt document. I take the view that, if it is established on that basis that the

document is an exempt document, I do not have the power to make a decision to the effect that access to it should be given.

20. It is for that reason that I advised the agency, in my letter informing it of my preliminary view of the complaint, that I had considered whether or not the disputed documents might be exempt under clause 6 of Schedule 1 to the FOI Act. It appeared to me that the only exemption other than the one provided by clause 3(1) which could possibly apply to the disputed documents was the exemption provided by clause 6 of Schedule 1 to the FOI Act.

Clause 6

21. Clause 6 of Schedule 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.*

Limits on exemptions

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

Clause 6(1)(a)

22. In my opinion, both of the disputed documents contain a combination of opinion that has been recorded, and consultation and deliberation that has taken place, in the course of and for the purpose of the deliberative processes of the agency in

determining what action to take in respect of the perceived issues occurring in the agency at the time and as to what action to take following the former Managing Director's resignation. In my view, therefore, the disputed information is information of a kind described in clause 6(1)(a).

Clause 6(1)(b)

23. However, matter will only be exempt under clause 6(1) if the requirement of clause 6(1)(b) - that its disclosure would, on balance, be contrary to the public interest - is established. I advised the agency of my preliminary view that I was not persuaded that disclosure of any of the disputed information would, on balance, be contrary to the public interest, and my reasons for that view.
24. I consider there to be a very strong public interest in the protection of the personal privacy of individuals. That public interest is itself recognised by the inclusion of the clause 3 exemption in the legislation and is, in my view, a strong one.
25. However, although clearly personal information as defined in the FOI Act, it does not appear to me that the information concerning the former Managing Director is information of the particularly private, personal kind that the exemption is primarily designed to protect. All of it concerns the former Managing Director's performance as the Chief Executive Officer of the agency and does not include, for example, any information concerning his private life or in any other way particularly personal to him. Although it includes opinions about his performance as Managing Director, which it may be argued is particularly personal information about him as an individual, in this instance the former Managing Director's performance and the circumstances surrounding his resignation were widely publicized at the time, receiving extensive media coverage, and the subject of considerable debate in the community as evidenced by newspaper articles, "letters to the editor" and talk-back radio at the time. It does not appear to me that the personal information contained in the documents would, if disclosed, reveal anything of significance in respect of the former Managing Director that has not already been publicly disclosed and discussed.
26. The information about other people – all of whom are or were at the time – public officers although "personal information" as defined in the FOI Act, is similarly not of the particularly private, personal nature for which there are protections in the FOI Act. It is information only about things done by those people in the course of their duties as public officers. I do not consider, therefore, that the public interest in the protection of personal privacy requires the non-disclosure of that information.
27. Also weighing against disclosure, I recognise a public interest in maintaining the integrity and effectiveness of the deliberative and decision-making process of agencies. However, in this case, clearly the deliberative process undertaken by the agency in respect of the matters minuted cannot be compromised or prejudiced by disclosure of the disputed documents because those deliberative processes were concluded some time ago and are at an end.

28. Weighing in favour of disclosure is the accountability of the agency and the Government to the community for its management of the perceived “crisis”; the public interest in open and transparent government as far as is possible; and, to that end, people being able to exercise their rights of access under the FOI Act.
29. The agency made no submissions to me in response to my preliminary view in this regard. On the material presently available to me, there is nothing that suggests that any significant public interest weighs against the disclosure of the disputed documents such that their disclosure would, on balance, be contrary to the public interest.
30. As the agency has not sought to pursue a claim for exemption under clause 6(1), and as it is not apparent to me that the disputed documents or any parts of them are exempt under that exemption clause, I find that they are not exempt under clause 6(1) of Schedule 1 to the FOI Act.
31. The agency has not claimed any other exemption for the documents. It is not apparent to me from the disputed documents themselves, or any other material before me, that they are exempt under any other exemption clause. Therefore, I find that the disputed documents are not exempt. Subject to deletion of the name and position title appearing in the last line of the fourth paragraph on page 2 of each document (which information is no longer in dispute between the parties) the complainant is entitled to be given access to the documents.
