

## CYCLISTS' RIGHTS ACTION GROUP AND TRANSPORT

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

**File Ref: 95038  
Decision Ref: D01695**

Participants:

**Cyclists' Rights Action Group**  
Complainant

- and -

**Department of Transport**  
Respondent

### DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - verbatim report of Ministerial council meeting - clause 2 - inter-governmental relations - confidential information communicated in confidence - onus on complainant - overriding public interest in disclosure.

*Freedom of Information Act 1992 (WA)* ss. 68(1); 72(1)(b); 75(1); 102(3); Schedule 1 clause 2.

*Freedom of Information Act 1982 (C'wlth)* ss. 33A(1)(b); sub-section 33A(5); 36(1).

*Re Cyclists' Rights Action Group and Department of Transport* (Commonwealth Administrative Appeals Tribunal, 29 July 1994, unreported).

## DECISION

The decision of the agency of 6 January 1995 is set aside. In substitution it is decided that the last paragraph on page 9 and the first five paragraphs on page 10 of the verbatim report of the 80th Meeting of the Australian Transport Advisory Council held on 25 May 1990, are not exempt matter under the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

20th June 1995

## REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision of the Department of Transport ('the agency'), to refuse the Cyclists' Rights Action Group ('the complainant'), represented by its president, Mr W J Curnow, access to parts of the verbatim report of the 80th meeting of the Australian Transport Advisory Council (ATAC) held on 25 May 1990 in Perth, Western Australia.

## BACKGROUND

2. On 14 October 1994, the complainant lodged with the agency an access application under the *Freedom of Information Act 1992* ('the FOI Act') seeking access to pages 9 and 10 of the verbatim report of the 80th meeting of the ATAC held on 25 May 1990. The complainant made it clear that access was sought to those parts of the document which recorded any discussions concerning the compulsory wearing of bicycle helmets by cyclists.
3. On 22 November 1994, Mr L Poore, Acting Manager, Transport Policy Co-ordination in the agency, refused access on the ground that the requested document is exempt under clause 2 of Schedule 1 to the FOI Act.
4. On 20 December 1994, the complainant sought internal review of the decision of Mr Poore. On 6 January 1995, Dr M Paul, Acting Director, Maritime Division in the agency, confirmed the decision to deny access on the ground that the requested document is exempt under clause 2 of Schedule 1 to the FOI Act. The complainant applied to the Information Commissioner on 6 March 1995, seeking external review of that decision.

## REVIEW BY THE INFORMATION COMMISSIONER

5. On 16 March 1995, in accordance with my obligation under s.68(1) of the FOI Act, the agency was notified that I had accepted this complaint for review. Pursuant to my authority under s.75(1) and under s.72(1)(b) of the FOI Act, I sought the production to me of the requested document together with the file maintained by the agency with respect to this matter. I also required the agency to provide further information to justify its decision that the requested document is exempt from disclosure to the complainant. That information and the documents requested, together with some submissions in support of its exemption claims, were provided to my office on 27 March 1995.
6. The agency also provided me with a copy of decision number A93/108 of the AAT in the matter of *Re Cyclists' Rights Action Group and Department of Transport* (AAT, 29 July 1994, unreported). The agency subsequently provided an additional submission, with some documentation in support of its claims. The

complainant's complaint to me was supported by submissions in a document headed "Grounds for Review".

7. By letter dated 17 May 1995, a copy of which was provided to the agency, I informed the complainant that it was my preliminary view that pages 9 and 10 of the report may be exempt under clause 2(1)(b) of Schedule 1 to the FOI Act. I invited the complainant, in light of my preliminary view, to reconsider its complaint. The complainant was invited to make a further submission, addressing in particular the public interest in the disclosure of those pages, or to withdraw the complaint. On 31 May 1995, I received a further submission from the complainant, a copy of which was provided to the agency, and I received the agency's response to that additional submission on 8 June 1995.
8. In this instance, as the complainant resides in the Australian Capital Territory, conciliation between the parties was not an option, nor did I consider that it was possible to further narrow the matters in dispute between the parties.

## **THE DISPUTED DOCUMENT**

9. The complainant seeks access to two pages only of the verbatim report of the meeting of ATAC, now known as the Australian Transport Council (ATC), held in Perth on 25 May 1990 ('the disputed document'). The relevant pages record the discussion concerning compulsory wearing of bicycle helmets. The complainant has been provided with a précis of those discussions by the Secretary of the ATC, and the Ministers whose discussions are recorded on those pages have also been identified to the complainant. However, the complainant is seeking access to a complete and unabridged copy of those parts of pages 9 and 10 of the disputed document which record those discussions. It is my understanding that the complainant is not seeking access to any record of other discussions that may appear on pages 9 and 10 of the disputed document.

## **THE EXEMPTION**

10. The agency claims that pages 9 and 10 of the disputed document are exempt under clause 2(1) of Schedule 1 to the FOI Act. There are two alternative grounds provided by clause 2 upon which matter may be exempt from disclosure. It is my understanding that the agency relies upon both sub-clauses in this instance. Clause 2(1) provides:

**"2. *Inter-governmental relations***

***Exemptions***

- (1) *Matter is exempt matter if its disclosure -*

- (a) *could reasonably be expected to damage relations between the Government and any other government; or*
- (b) *would reveal information of a confidential nature communicated in confidence to the Government (whether directly or indirectly) by any other government.*

***Limit on exemptions***

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

***Definition***

- (3) *In this clause -*

*"other government" means the government of the Commonwealth another State, a Territory or a foreign country or state."*

**Paragraph (a) of Clause 2(1)**

- 11. In support of its claims under paragraph (a) of clause 2(1) of Schedule 1 to the FOI Act, the agency submitted that:

*"...the Governments of the Commonwealth, Victoria, New South Wales, Queensland, Tasmania, Australian Capital Territory and the Northern Territory have all expressed the strong opinion that the documents in question should not be released. In recent discussions with the Secretary of the ATC...it was also apparent he would be concerned if the documents were released as the ATC relies on the integrity of its members to ensure the confidentiality of its records are [sic] maintained. If the documents were released by Western Australia, it would be seen by the majority of Council members and the Commonwealth as a clear breach of trust and must impact on our relations with these other Governments."*

- 12. The agency also referred me to the decision of the AAT in *Re Cyclists' Rights Action Group* and submitted that, as the AAT *"...found the evidence overwhelming that the public interest was best served by maintaining the confidential nature of Council deliberations..."*, this should also be the position in Western Australia and the agency's decision to refuse access should be confirmed. That case arose out of a previous FOI request made to the Department of Urban Services in the Australian Capital Territory in 1992. The Commonwealth application had been transferred to the Department of Transport on 5 May 1993 and the Department of Transport refused access to pages 9 and 10 of the report.
- 13. The complainant sought review of that decision by the Commonwealth Administrative Appeals Tribunal (General Administrative Division) ('the AAT'). The AAT affirmed the decision to refuse access on the grounds that the document

was exempt under s.33A(1)(b) and s.36(1) of the Commonwealth *Freedom of Information Act 1982*. The agency provided me with copies of the responses provided to the Secretary of the ATC in 1993 by representatives of the governments of New South Wales, South Australia, Tasmania, Victoria, Queensland, the Australian Capital Territory, the Northern Territory and the Commonwealth, which resulted in the AAT's decision cited above.

14. I was also provided with a memorandum dated 19 April 1995, from the Minister for Transport (Western Australia) to the Director General of Transport. In that memorandum the Minister stated that:

*"In this case the majority of Ministers have objected to the release of the papers requested. It would be a clear breach of confidentiality and the trust of my Ministerial colleagues if these papers were now to be released."*

15. The Minister went on to say that:

*"Ministerial Council meetings are reflective decision-making forums as members can speak openly and can "thrash out" issues. The effectiveness relies on the confidentiality of the meeting. Any release of information that is clearly marked as confidential will impact on the conduct of future meetings and is likely to affect the relationship between the Commonwealth and the States/Territories."*

16. The views in 1993 of the members of the ATAC as to the effects of disclosure on inter-governmental relations may be summarised as follows:

NSW Considered that the papers should remain confidential and that disclosure could affect relations between the Commonwealth and the States. However, whilst not resiling from that general position, there were no objections to the release of pages 9 and 10.

WA Did not object to the disclosure of that part of the verbatim report relating to the compulsory wearing of bicycle helmets.

VIC Considered that confidentiality of ATC documents should be maintained and stated that the premature release of confidential information, particularly verbatim discussions, might very well prejudice the consideration of an issue and most certainly would affect relations between the Commonwealth and States/Territories.

SA Did not object to the disclosure of extracts from the transcript of the meeting of ATAC.

QLD Objected to the disclosure but provided no reasons as to the expected impact of disclosure on relations between the Commonwealth and State and Territory Governments.

- TAS Supported the maintenance of confidentiality and considered that disclosure could prejudice inter-governmental relations. However, recognised that not all the information recorded in the transcript would fall into this category. Nevertheless, supported the refusal of access if other representatives were of this view.
- NT Objected to release and considered that this had the potential to undermine the basis of free and open consultation at such meetings thereby compromising their value.
- ACT Supported the policy of confidentiality in the public interest.
17. In *Re Cyclists' Action Group* the AAT, with all the views summarised in paragraph 16 above before it, found the evidence as to the question of whether disclosure could reasonably be expected to damage inter-governmental relations, to be equivocal. With respect, so do I. I was also provided with current advice from the Minister for Transport in Western Australia as to his view of the likely effects of disclosing confidential information obtained at Ministerial Council meetings, which indicates that his view is now different to his view in 1993.
18. Accordingly, I am not persuaded, by the material before me, that some kind of damage to inter-governmental relations could reasonably be expected to follow from the disclosure of the relevant parts of pages 9 and 10 of the requested document. Indeed, there is no material before me to establish the nature of the expected harm to inter-governmental relations that it is claimed will follow from the disclosure of the relevant parts of pages 9 and 10 of the report.
19. In my view, the claims of the agency in this instance amount to a "class claim" for the verbatim report. Although I appreciate the agency's concerns in relation to disclosure of verbatim reports of meetings of the ATAC generally, the complainant is only seeking access to a limited part of that document. It appears to me that neither the agency, nor all of those who previously objected to disclosure, has had sufficient (or, in some cases, any) regard to the particular parts of the document sought and the potential effects of disclosure of that particular matter. There is simply no material, other than the views summarised in paragraph 16 above, from which I could conclude that disclosure of those parts of pages 9 and 10 of the disputed document could reasonably be expected to damage inter-governmental relations. Therefore, I find that pages 9 and 10 of the document are not exempt under clause 2(1)(a) of Schedule 1 to the FOI Act.

**Paragraph (b) of clause 2(1)**

20. In my view, the exemption under clause 2(1)(b) of Schedule 1 to the FOI Act is established if there is material to persuade me that disclosure of information or documents requested by an access applicant would involve the disclosure of confidential information that was given and received in confidence between governments. That is, the information must be confidential in nature and it must be given and received in confidence between those governments.

21. In support of its claim under paragraph (b) of clause 2(1), the agency argued that Ministerial Council meetings are closed forums involving participation by Ministers and selected advisers only. Confidential information, it is claimed, is frankly exchanged between those present in order for policy decision-making at the highest level. That statement was also confirmed in the advice provided to me from the Minister for Transport in Western Australia and in the evidence before the AAT.
22. From my examination of the disputed document and the submissions and supporting information provided by the agency, I am satisfied, generally speaking, that disclosure of a verbatim report of the ATAC would reveal information communicated in confidence between governments. However, I am not persuaded that all information communicated to the ATAC and now the ATC, albeit communicated in confidence, is confidential in nature and I am not satisfied that the relevant parts of pages 9 and 10 of the disputed document contain confidential information.
23. In my view, the fact that a meeting is confidential, and that a transcript of its proceedings is not widely distributed, does not necessarily mean that all matters discussed and recorded at that meeting consist of confidential information. Some regard must be had to the contents of the particular information to which access is sought. That view is supported by Principle 13 of the "general recommendations on improving the efficiency and effectiveness of Ministerial Councils" endorsed by the Council of Australian Governments at its meeting on 8-9 June 1993 which states:

*"Subject to the applicability of the relevant Commonwealth, State or Territory Freedom of Information legislation, unless all members of Council agree, any discussion by, or working documents of the Council, or any committee, sub-committee, working party officer or agent of the Council shall be confidential"* (my emphasis).
24. Principle 13, in my opinion, makes it clear that the right of access under FOI legislation to Ministerial Council documents such as the disputed document will depend on the application of the relevant exemptions under the FOI Acts, and not on a claim for exemption based on the particular type of document to which access is sought.
25. I have examined pages 9 and 10 of the disputed document. Some of the comments in the relevant paragraphs on those pages may have been confidential in 1990. On that basis, I consider that disclosure of parts of the relevant paragraphs on pages 9 and 10 may disclose information of a type described in paragraph (b) of clause 2(1). However, even if that is so, the exemption in clause 2(1) of Schedule 1 to the FOI Act, is limited by a "public interest test". That is, the information is not exempt if its disclosure would, on balance, be in the public interest. That requires a consideration of the circumstances in which it would, on balance, be in the public interest to disclose matter of a type described in clause 2(1)(b) of Schedule 1 to the FOI Act.



## The Public Interest

26. Under s.102(3) of the FOI Act, the complainant bears the onus of establishing that disclosure would, on balance, be in the public interest. The complainant identified a number of factors which, he suggested, tipped the balance in favour of disclosure. I have summarised those factors as follows:

- (i) the public interest in knowing whether any consideration was given to the efficacy of wearing helmets, the possible infringement of civil liberties, discrimination, adverse effects and whether there was a social ill that required a legislative remedy;
- (ii) the public interest in knowing what government Ministers are saying on behalf of their constituents;
- (iii) the public interest in participating in the processes of government by having full access to information; and
- (iv) the public interest in ensuring Ministerial accountability by scrutinising the information on which Ministerial decisions are based.

27. Further, it was the submission of the complainant that governments hold information for the purposes of the public and not for their own purposes. Therefore, it was argued, access to information is a right given by FOI legislation and the public is entitled to full knowledge, and presumably full disclosure, of government held information in order to further the objects of the FOI Act.

28. I recognise a public interest in the maintenance of confidentiality of Ministerial Council meetings at which Ministers are able to frankly discuss and explore policy options in relation to matters of national significance. I also recognise a public interest in enabling the public to participate in government decision-making through access to information and documents.

29. I am not bound to follow the decision of the AAT in *Re Cyclists' Rights Action Group*, and I consider that decision is distinguishable because it was decided on the basis of s.33A(1)(b) of the Commonwealth FOI Act. Whilst that section is similar to clause 2(1) of Schedule 1 to the FOI Act, there are differences. Sub-section 33A (1) provides:

*"33A. (1) Subject to subsection (5), a document is an exempt document if disclosure of the document under this Act:*

- (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State; or*
- (b) would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth."*

30. Sub-section 33A(5) provides that the section is not to apply to a document in respect of matter in the document the disclosure of which under the Act would, on balance, be in the public interest. It can be seen that s.33A(1)(b), unlike clause 2(1)(b) in Schedule 1 to the FOI Act, does not contain a requirement that the information sought to be disclosed be confidential in nature, only that it be communicated in confidence. Clause 2(1), on the other hand, requires not only that the information was obtained in confidence, but also that it is confidential in nature. Further, the AAT did not have the relevant document before it, although it had viewed the document on a previous occasion, as it did not consider it necessary for its purposes in that case to inspect the document. Given the requirements of s.33A(1)(b), with respect, I agree. However, in my view, in this instance, a proper consideration and application of the exemptions in the FOI Act required that I inspect the particular document to which access is sought.
31. I have taken into account the fact legislation has been enacted governing the compulsory wearing of bicycle helmets in most, if not all, States and Territories and that the information to which access is sought by the complainant is 5 years old. In my view, the information recorded in pages 9 and 10 is no longer confidential, if it ever was, nor is it of a type that warrants absolute secrecy. Further, as the complainant is only seeking access to a very small part of the verbatim report, I consider, in those circumstances, that the public interest in maintaining the confidentiality of Ministerial Council meetings is outweighed by the public interest in the disclosure of information that may contribute to a better understanding of the processes of government decision-making.
32. I am not suggesting that verbatim reports of Ministerial Council meetings should be disclosed under FOI as a matter of course as each case will depend on its own merits. However, taking into account the content of the information, its age, the absence of any demonstrated need for confidentiality in relation to that information at this time, the fact that the identity of the Ministers speaking on the issue has already been revealed to the complainant and the fact that legislation has been enacted, both in the ACT where the complainant resides and in this State, I am of the view that the information in pages 9 and 10 of the disputed document is not a government secret. In my view, disclosure of that information would, on balance, be in the public interest. I find that the parts of pages 9 and 10 of the verbatim report of the 80th ATAC meeting concerning the compulsory wearing of bicycle helmets are not exempt.

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