

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

**File Ref: F2041999
Decision Ref: D0172000**

Participants:

Ljiljana Maria Ravlich
Complainant

- and -

**Electricity Corporation trading as Western
Power Corporation**
First Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to a joint venture company 50% owned by government agency – clause 8(1) – confidential communications – whether disclosure would give rise to a cause of action for breach of a common law obligation of confidence – confidentiality clause – limit on exemption in clause 8(3) – clause 6(1)(a) – public interest – s.26 – sufficiency of the agency’s searches.

Freedom of Information Act 1992 (WA) ss. 20, 26, 30, 68(2), 102(1); Schedule 1 Clauses 3, 4(1), 4(2), 4(3), 6, 6(1)(a), 8(1), 8(3), 10(3), 10(4) and 11.

Electricity Corporation Act 1994 (WA)

Re Speno Rail Maintenance Australia Pty Ltd and The Western Australia Government Railways Commission and Another [1997] WAICmr 29

DECISION

The decision of the agency is varied.

1. The documents identified and claimed to be exempt by the agency are exempt under clause 8(1) of Schedule 1 to the *Freedom of Information Act 1992*; and
2. The documents described in items 1 and 2 of the access application either do not exist or cannot be found, and access is refused pursuant to s.26 of the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

21 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 Electricity Corporation trading as Western Power Corporation ('the agency') to refuse the Hon Ms Ravlich MLC ('the complainant') access to documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. The agency is the approved trading name of a body corporate called the Electricity Corporation established under s.4(1) of the *Electricity Corporation Act 1994*. The Electricity Corporation is an agent of the Crown, but it is not part of the Public Service. The functions of the agency are set out in s.28 of the *Electricity Corporation Act 1994* and include, among other things, the generation, acquisition, exchange, transportation, distribution, marketing and supply of electricity.
3. In 1997, the agency and AOC Australia Pty Ltd ('AOC') jointly discussed the possibility of forming a new company to provide electricity services in the market place. At that time, AOC was a wholly owned subsidiary of AOC International Ltd (UK), which in turn was a wholly owned subsidiary of OGC International Plc (UK) ('OGC'). In April 1997, whilst those discussions were continuing, OGC and its subsidiaries were the subject of a successful takeover by the Halliburton Company, based in Texas in the United States. AOC then became part of a Halliburton business unit in Australia, Brown & Root Energy Services ('BRES').
4. BRES decided to pursue the proposed investment in a new company under the ownership of Brown and Root Pty Ltd ('B&R'), a company intended to hold investments in Australia. On 1 January 1998, B&R and the agency executed a Shareholders Agreement by which means Integrated Power Services Pty Ltd ('IPS') was incorporated. The agency and B&R each hold 50% of the shares of IPS.
5. In February 1999, the complainant lodged an initial access application with the agency seeking access to documents relating to IPS. The agency decided not to deal with the application because to do so would divert a substantial and unreasonable portion of the agency's resources away from its other operations. However, no attempt was made to assist the complainant to reduce the scope of her application to a manageable form. The complainant made a complaint to the Information Commissioner seeking external review of the agency's decision. In the course of my dealing with that complaint, the agency provided the complainant with a schedule listing relevant types of documents concerning IPS held by the agency. The complainant then withdrew her complaint and lodged a fresh application with the agency.

6. In her fresh application, the complainant described the documents to which she sought access in the following terms:
 - “1. *all written communications between, and to, the Premier, the Minister for Energy, any other Ministers of the Crown, the CEO of Western Power and/or the Board of Directors of IPS in relation to this request;*
 2. *all internal documents such as briefing notes, filenotes, memos, minutes of meetings and all related communications (including electronic) between, or to, any of the above-mentioned parties;*
 3. *documents marked with a (*) on the attached schedule of documents.”*
7. The agency identified 30 documents as falling within the ambit of the access application. The agency refused access to those documents on the ground that they are exempt under clauses 4, 6 and 10 of Schedule 1 to the FOI Act. The complainant applied for an internal review of the agency’s decision and asked that additional searches be conducted as she was not satisfied that all documents had been located.
8. On 17 September 1999, the internal reviewer confirmed the initial decision to refuse access on the grounds that the requested documents are exempt under clauses 4, 6 and 10, and claimed that some of the documents are also exempt under clauses 8 and 11 of Schedule 1 to the FOI Act. The complainant was informed that no documents existed in respect of item 1 of her application and that the agency declined to deal with item 2 of the application on the basis that the work involved would be excessive.
9. On 26 October 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency’s decision, in particular, the refusal of access, the refusal to deal with item 2 and the sufficiency of the searches undertaken to identify and locate documents within the ambit of the access application.

REVIEW BY THE INFORMATION COMMISSIONER

10. Upon receipt of this complaint, my Investigations/Legal Officer attended the agency’s offices and inspected the relevant files. As a result, additional copies of some of the documents listed on the agency’s schedule were located, some with hand-written annotations. It was also noted that the description of documents on the schedule omitted the fact that some documents contained attachments.
11. Consequently, among other things, I asked the agency to prepare a new schedule listing each document separately and providing reasons for the agency’s decision to refuse access to each of those documents, including its findings on the material questions of fact underlying the reasons and referring to the

material on which those findings were based. The agency provided me with a new schedule in which it claimed that the documents are exempt under clauses 4, 6 and 10 of Schedule 1 to the FOI Act. No reference was made to the agency's previous claims for exemption under clauses 8 and 11.

12. I also reminded the agency of its obligation under s.68(2) of the FOI Act to notify third parties of the complaint. I understand that the agency notified B&R and IPS of the complaint. However, neither sought to be joined as a party to the complaint and therefore neither has participated in these proceedings.
13. The agency's reasons were so deficient in terms of the requirements in s.30 of the FOI Act, that I did not consider, on the material then before me, that it had discharged the onus under s.102(1) to establish that its decision to refuse access was justified. For example, the reasons given under each exemption clause for all documents were, with some exceptions, essentially the same. Thus, the agency made frequent use of the following statement:

“This document contains information relating to the strategic business and financial priorities, strategies and arrangements of IPS. Information also includes potential contracts. Release of this information into the public domain would competitively disadvantage Western Power, Brown & Root and compromise IPS' ability to compete with other commercial entities.”

14. To illustrate the approach taken by the agency to its obligations under the FOI Act, the agency gave that particular explanation to support its claims for exemption under clauses 4 and 10 in respect of Document 8. Document 8 consists of 3 separate documents (a total of 5 folios) - a facsimile cover sheet, an agenda and the company motor vehicle policy for IPS. Having examined Document 8, I could not find any information relating to the strategic business and financial priorities, strategies and arrangements of IPS or of potential contracts in 4 of the 5 folios (that is, 2 of the 3 documents).
15. It appeared to me that the agency had made a number of very broad statements about the kind of information alleged to be in the documents and it was not always apparent that the documents contained information of the kind described. For another example, Document 2 was alleged to include *“details of costs, resourcing, bank accounts and strategic plans.”* Whilst I could find some information that might be related to strategic plans or resources, I could not find any information concerning costs or bank accounts.
16. On 28 January 2000, I informed the parties, in writing, of my preliminary view of this complaint, including my reasons. It was my preliminary view, based on the material before me, that the agency had not discharged the onus on it under s.102(1) of the FOI Act and, therefore, that the documents might not be exempt as claimed. Although the agency alleged, on the one hand, that no documents exist in relation to item 1 of the complainant's request, in my view, that statement was contradicted by the agency's decision to refuse to deal with those described in item 2 of the application. Therefore, it was also my preliminary view that the agency's decision under s.20 of the FOI Act to refuse to deal with part of the access application might not be justified.

17. After receiving that notification, the agency provided me with a detailed submission, including its reasons for claiming that each of the documents is exempt under one or more of the exemptions in clauses 3, 4(1), 4(2), 4(3), 6, 8(1), 10(3) and 10(4) of Schedule 1 to the FOI Act. Having considered that submission and the contents of those documents, I have reached the view that the documents are exempt under clause 8(1) and my reasons follow. If the agency had given a proper notice of decision containing those reasons to the complainant in the first instance, and to me when this matter first came before me as a complaint, the expenditure of a considerable amount of resources, time and efforts by my office and by the parties might have been avoided.

THE DISPUTED DOCUMENTS

18. Although the initial schedule of documents prepared by the agency was incomplete, I am satisfied that the complainant is generally aware of the kinds of documents in dispute in this matter. Those documents include records of discussions on recent business dealings of IPS, business development plans, financial statements, minutes of meetings, a draft agreement and facsimile messages about those matters. The schedule lists 34 documents.

THE EXEMPTIONS

(a) Clause 8(1) Confidential communications

19. The agency claims that each document in the schedule is exempt under clause 8(1) of Schedule 1 to the FOI Act. Clause 8, so far as is relevant, provides:

“(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)...

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) 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)...”

20. In my decision in *Re Speno Rail Maintenance Australia Pty Ltd and The Western Australia Government Railways Commission and Others* [1997] WAICmr 29, I considered the scope and meaning of the exemption in clause 8(1). It is my view, for the reasons given in *Re Speno* at paragraphs 15-28, that the exemption in clause 8(1) extends only to documents the disclosure of which would give rise to a cause of action for breach of a common law obligation of confidence, such as a contractual obligation of confidence for which a legal remedy would be available, and does not include those documents the disclosure of which would give rise to a cause of action for breach of an equitable duty of confidence and for which only an equitable remedy would be available.
21. The Shareholders Agreement ('the Agreement'), Document 29, contains a confidentiality clause. I consider that my obligations under s.74 of the FOI Act to ensure that exempt matter is not disclosed, both when I am dealing with a complaint and in giving my reasons for decision, mean that I cannot describe the information protected by that confidentiality clause. Further, I am constrained from detailing even the terms of the confidentiality clause itself. Necessarily, those obligations restrict the amount of information that I am able to give to the complainant to enable her to participate in an informed way in the external review process. Notwithstanding that, I am satisfied that the complainant has been informed, as far as is possible, albeit in general terms, of the nature of the documents in dispute and the reasons why the agency claims that those documents are exempt.
22. I have examined the disputed documents and the terms of the confidentiality clause. I am satisfied that all of the disputed documents contain information that is covered by the confidentiality provisions of the Agreement. Although Documents 1-5 were created prior to the execution of the Agreement, in my view, the contents of those documents are such that they also fall within the terms of the confidentiality clause.
23. In my view, the disclosure of the disputed documents, other than under the FOI Act or another written law, would be a breach of the confidentiality clause in the Agreement and would enable B&R to obtain a legal remedy against the agency for breaching that confidentiality. Accordingly, I find that those documents are exempt under clause 8(1) of Schedule 1 to the FOI Act.

Limit on exemption – clause 8(3)

24. Clause 8(1) is subject to the limit on exemption in clause 8(3). The limit on exemption in clause 8(3) only applies to matter of the kind referred to in clause 6(1)(a), and then only if the disclosure of that kind of matter would enable a legal remedy to be obtained for a breach of confidence owed to a person other than a Minister, an agency, or their officers, or the State. That is, information consisting of opinion, advice or recommendation that has been obtained, prepared or recorded in the course of, or for the purposes of, the deliberative processes of the agency, or any consultation or deliberation that has taken place in the course of, or for the purposes of those deliberative processes, is not exempt under clause 8(1) unless the obligation of confidence is owed to someone other than a government agency.

25. In my view, Documents 1-5, which predate the Agreement are the only documents that require a consideration of whether the limit on exemption in clause 8(3) might apply. I am satisfied that those documents contain advice and opinion and record consultations and deliberations that have taken place in the course of, or for the purposes of, the agency deliberating about its future business directions and the form that those business dealings should take. In my opinion, those documents contain matter of the kind referred to in clause 6(1)(a).
26. However, having considered the information contained in those documents and the terms of the confidentiality clause in the Agreement, in my view, the disclosure of that information would enable a legal remedy to be obtained for a breach of confidence owed by the agency to B&R. Accordingly, I do not consider that the limit on exemption in clause 8(3) applies to those documents. In my opinion, the information in those documents is covered by the confidentiality provision in the Agreement. Although the complainant is prepared to accept access to edited copies of the disputed documents with sensitive commercial information deleted, I do not consider that it is practicable to edit them in that manner.

Public interest

27. Both parties also made submissions to me concerning the matter of the public interest in the disclosure, or non-disclosure, of the disputed documents. The agency submits that the confidentiality of the business dealings between a private company and the agency weighs against disclosure. Further, the agency submits that there are no public interests factors that favour disclosure of the documents.
28. The complainant submits, among other things, that there is a public interest in the public being informed of what the agency is doing in its business dealings with IPS because the agency is using government money for that purpose. The complainant submits that government agencies are able to avoid being open and accountable by entering into business arrangements with private companies and hiding behind the veil of a “commercial-in-confidence” claim. The complainant submits that, since the agency enjoys the benefits of being a public agency, it should not be exempt from the accountability mechanisms of government. She further submits that the establishment and ongoing operation of IPS involves the expenditure of public money and those activities should, therefore, be open to public scrutiny. The complainant expressed a willingness to be given access to edited copies of the documents with sensitive commercial information deleted if possible.
29. Clearly, there is a public interest in accountability for the expenditure of public monies and I agree with the complainant that such accountability should not be able to be avoided by government agencies “commercializing” their activities and operating through separate commercial entities. I consider it a telling omission from the agency’s submissions in this, and previous complaints to me, that it fails to recognise any public interest in its accountability, as a government agency, for its commercial activities.

30. I accept that there is a public interest in protecting the commercial viability of the agency and private companies engaged in business with it, and it is the balance between those competing public interests that must be struck when considering whether disclosure of particular documents is in the public interest. In my view, the most appropriate way of determining where the balance should be struck would be to make it a condition of doing business with government agencies that private sector organisations accept that greater scrutiny is required of such commercial arrangements. It seems to me that, subject to some confidentiality, the proper balance between the competing interests might be to require more accountability from private sector bodies utilising public monies or assets for private gain, rather than to allow less accountability from government agencies doing business with them. However, that is clearly a policy question that is for the government to decide and not me.
31. The exemption in clause 8(1) is not limited by a “public interest test”. Therefore, if the documents are exempt under clause 8(1), then they are exempt whether or not the disclosure of any or all of them would, on balance, be in the public interest. For the reasons given, I find that all of the disputed documents are exempt under clause 8(1) of Schedule 1 to the FOI Act.
32. The agency also claims that each of the documents is exempt under one or more of clauses 3, 4(1), 4(2), 4(3), 6, 10(3) and 10(4). However, in view of my finding that they are exempt under clause 8(1), I need not consider whether they are exempt for any other reason.

Sufficiency of search

33. In its notice of decision following internal review, the agency informed the complainant that there were no written communications between, and to, the Premier, the Minister, any other Minister of the Crown, the Chief Executive Officer of the agency and/or the Board of Directors of IPS concerning IPS, as requested in item 1 of the access application. In effect, the agency advised the complainant that the requested documents in item 1 of the access application did not exist, even though the complainant had been given access to 3 documents as a result of making an access application to the agency in March 1999.
34. In its submission to me, the agency stated only that “[a]ll of the documents falling within the ambit of items 1 and 2 of [the complainant’s] application were identified and provided to her on 31 March 1999.” However, the complainant does not accept that claim and suggests that additional documents should exist.
35. Section 26 of the FOI Act deals with the obligations of an agency in circumstances where it is unable to locate documents sought by an access applicant. Section 26 provides that an agency may advise an applicant in writing that it is not possible to give access to a document if all reasonable steps have been taken to find the document and the agency is satisfied that either the document is in its possession but cannot be found, or the document does not exist.

36. The agency did not cite s.26 as a reason for refusing access to the documents, but it is clear to me that it had decided that the requested documents did not exist. However, in the agency's notice of decision on internal review, it had refused to deal with item 2 of the access application pursuant to s.20 of the FOI Act, although it did not cite that specific provision. Notwithstanding that, the agency now informs me that it does not hold any other documents of the kind referred to in items 1 and 2 of the access application, other than those previously disclosed to the complainant.
37. In previous decisions about the sufficiency of an agency's searches for documents, I have expressed the view that there are two questions that must be answered. The first question is whether there are reasonable grounds to believe that the requested documents exist or should exist in the agency. In circumstances where the first question is answered in the affirmative, the next question, in my view, is whether the agency has taken all reasonable steps to find those documents. I consider that it is my responsibility to inquire into the adequacy of the searches conducted by the agency and to require further searches to be conducted if necessary.
38. The agency informs me that the board of IPS, a private company, is not required to notify the agency or the Minister of its commercial activities. Further, although the agency is a shareholder in IPS and is required to communicate with the Minister about matters as required by the *Electricity Corporation Act 1994*, in the ordinary course of business, there would not be any reason for the agency to communicate with the Premier or with other Ministers. As a result, the agency informs me that no additional documents exist.
39. The agency also informs me that searches have been made of its records, both electronic and paper files, but no additional documents have been found. A physical search was made by the agency of 35 files held in the Legal, Corporate and Transmission divisions of the agency without result. One of my officers inspected the relevant agency files *in situ* and searched its computer records for the documents. I am informed that ministerial correspondence can be traced electronically on the ministerial tracking system ('the MTS'). A search was made of the MTS using "IPS" and "AOC" as the search words. Those searches identified the 3 documents previously provided to the complainant. A physical search was also made of the paper files, but that search did not locate any additional documents.
40. My officer also examined the 3 original documents previously released to the complainant. Those documents were filed sequentially in the agency's files. A physical check was also made of the papers filed before and after the dates shown on those documents, but no other items of ministerial correspondence or documents relevant to items 1 and 2 of the access application were found in those files.
41. In the circumstances, and taking all of the information before me into account, it appears to me that additional documents referred to in items 1 and 2 of the complainant's access application may not exist. In any event, I am satisfied that

the agency has taken all reasonable steps to find those documents, but none can be found. Accordingly, I confirm the decision of the agency to refuse access on the basis that the documents either cannot be found or do not exist.
