

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

**File Refs: F2001036 & F2002040
Decision Ref: D0172002**

Participants:

Separovich Nominees Pty Ltd
Complainant

- and -

**Minister for Planning and
Infrastructure**
Respondent

- and -

Separovich Nominees Pty Ltd
Complainant

- and -

**Western Australian Land Authority
(LandCorp)**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – reports – internal memoranda and working documents – clause 1 – purpose of exemption – clause 1(1)(d)(i) – whether document prepared ‘to brief a Minister’ – whether in relation to matters for possible submission to Cabinet – limits on exemption – clauses 1(2) and 1(5) – clause 6 – deliberative process – advice and opinion obtained and recorded for the purpose of deliberative processes of Minister – whether contrary to public interest to disclose deliberations – limits on exemption – whether factual or statistical – clause 10(1) – whether documents concern financial affairs of the State – whether disclosure would have a substantial adverse effect on financial affairs of the State – meaning of “substantial adverse effect”.

Freedom of Information Act 1992 (WA) Schedule 1 clauses 1(1)(d)(i), 6, 7 and 10(1)
Hope Valley – Wattleup Redevelopment Act 2000

Harris v Australian Broadcasting Corporation (1983) 78 FLR 236

Re Healy and Australian National University (Administrative Appeals Tribunal, Cwth, 23 May 1985, unreported)

Re James and Australian National University (1984) 2 AAR 327

Esso Australia Resources Limited v The Commissioner of Taxation (1999) 74 ALJR 339

DECISION

The decision of LandCorp is set aside. In substitution, I decide that the Garland Report (Document 14) is not exempt under clauses 1(1)(d)(i), 6 or 10 of Schedule 1 to the *Freedom of Information Act 1992*.

The decision of the Minister is varied. I decide that:

- (i) Documents 20 and 21 are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*; and
- (ii) Documents 2, 14, 15, 18 and 19 are not exempt under clauses 6(1) or 10(1) of schedule 1 to the *Freedom of Information Act 1992*.

Further, the personal information described in paragraph 47 of my Reasons for Decision should be deleted before access is given to the Garland Report.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

13 May 2002

REASONS FOR DECISION

1. These are two applications for external review by the Information Commissioner arising out of decisions made by the Minister for Planning and Infrastructure ('the Minister') and by the Western Australian Land Authority ('LandCorp') to refuse Separovich Nominees Pty Ltd ('the complainant') access to documents requested under the *Freedom of Information Act 1992* ('the FOI Act').

Background

2. Since 1996, the Government has been working on the Fremantle Rockingham Industrial Areas Regional Strategy (FRIARS) to address issues relating to land use, planning and development. The result was a plan to ensure appropriate development in the Kwinana industrial area. The Hope Valley Wattleup Redevelopment Project ('the Hope Valley Project') involves planning for the next generation of industrial development in the area and the acquisition of various properties in Hope Valley and Wattleup.
3. After the election of the current Government, in late March 2001, the Minister met with a substantial number of Hope Valley and Wattleup residents at several public meetings so that the residents could raise their concerns about the future of the Hope Valley and Wattleup townships. During the course of those meetings, the Minister received requests for assistance from several business proprietors and business property owners in the Wattleup commercial centre who believe that the FRIARS and the Hope Valley Project have adversely affected their businesses. As a result, the Minister requested LandCorp to review the claims made by the Wattleup business proprietors.
4. In late April and early May 2001, LandCorp officers conducted a series of interviews with all but one of those business proprietors and assessed the situation. In late May 2001, LandCorp provided the Minister with a report ('the LandCorp Report') containing a detailed analysis of the various claims and which identified a range of reasons for a decline in the viability of the affected businesses, which were unrelated to the FRIARS. The various business proprietors and owners considered that the Government should pay some form of compensation for the difficulties they had experienced following the implementation of the Hope Valley Project. Among other things, the LandCorp Report contained advice to the Minister and made recommendations arising from the review. In July 2001, LandCorp engaged John Garland International to review the LandCorp Report and to provide further comment.
5. The complainant is one of the businesses affected by the Hope Valley Project. The complainant asserts that its income has been negatively affected by the redevelopment project proposed under the *Hope Valley - Wattleup Redevelopment Act 2000*, which was proclaimed on 1 January 2001. The complainant claims that compensation is payable by the Government for loss of income.
6. On 8 October 2001, the complainant made almost identical applications to the Minister and to LandCorp for access, under the FOI Act, to documents relating to the rezoning of the Hope Valley/Wattleup townships. LandCorp gave the complainant access to

some of the requested documents but refused access to others. The complainant sought internal review of the decision to refuse it access to one document, which it referred to as the "Garland Report". LandCorp confirmed the initial decision and refused the complainant access to the Garland Report on the ground that it is exempt under clauses 6 and 10 of Schedule 1 to the FOI Act.

7. Meanwhile, by 27 February 2002, the complainant had not received a decision from the Minister and it sought assistance from my office. Following inquiries, on 5 March 2002, the Minister granted the complainant access to nine documents and, on 7 March 2002, the Minister granted the complainant access to some additional documents. However, the Minister refused access to nine documents on the ground that those documents are exempt, either in full or in part, under clauses 6, 7 and 10 of Schedule 1 to the FOI Act. One of those documents (Document 14) is the Garland Report.
8. Subsequently, the complainant lodged two complaints with me seeking external review of the decisions made by the Minister and LandCorp. As the Minister and LandCorp have both refused the complainant access to the Garland Report, for substantially the same reasons, I have decided to deal with both complaints in this one decision.

REVIEW BY THE INFORMATION COMMISSIONER

9. I obtained the disputed documents from the Minister and LandCorp. Inquiries were made to determine whether these complaints could be resolved by conciliation. As a result, the Minister released one additional document to the complainant. In addition, I was informed by LandCorp that it was prepared to release the Garland Report, if the other business owners and business operators from the Wattleup commercial centre who are identified in that document, consented to its disclosure to the complainant.
10. Acting upon that advice, the complainant obtained the written consent from all but two of the business owners and operators. However, LandCorp then resiled from its decision and refused access to the Garland Report and belatedly claimed that it was exempt under clause 1(1)(d)(i). As a result, my proceedings in dealing with these complaints were delayed for more than 5 weeks through no fault on the part of the complainant. Having made a commitment to disclose the Garland Report, I had expected, as did the complainant, that LandCorp would honour that undertaking.
11. After considering the material before me, on 23 April and on 26 April 2002, I informed the parties in writing of my preliminary view of these complaints. I advised LandCorp that it was my preliminary view that the Garland Report might not be exempt under clauses 1(1)(d)(i), 6 or 10 as claimed. In respect of the Minister's documents, it was my preliminary view that two documents might be exempt under clause 7, but the balance of the Minister's documents, including the Garland Report, might not be exempt.
12. Subsequently, the Minister granted the complainant access to complete copies of two of the disputed documents. However, both the Minister and LandCorp made further written submissions to me in support of their respective claims for exemption for the remaining documents. The complainant did not respond.

THE DISPUTED DOCUMENTS

13. The documents remaining in dispute and the exemptions claimed for those documents are as follows:

Doc	Date	Description	Exemption Clauses
2	23/3/01	Notes of meetings held at Hope Valley/Wattleup Project Office – exemption is claimed for the last two dot points on page 4.	6
14	12/9/2001	Report of John Garland International ('the Garland Report')	1(1)(d)(i), 6 and 10(1)
15	8/10/2001	Letter to Minister from LandCorp attaching its consideration of the Garland Report and a recommended course of action. Only parts of the attachment are claimed to be exempt.	6
18	18/2/02	Letter to Minister from LandCorp containing attachment (Document 19)	6
19	18/2/02	LandCorp Report entitled "Consideration of Issues affecting the Operation of Businesses at 1050 Rockingham Road."	6
20	8/2/02	Letter from Crown Solicitor's Office to LandCorp.	7
21	14/1/02	Letter from a firm of solicitors to LandCorp.	7

THE EXEMPTIONS**(a) Clause 1(1)(d)(i) – Cabinet and Executive Council**

14. LandCorp claims that the Garland Report (Document 14) is exempt under clause 1(1)(d)(i) of Schedule 1 to the FOI Act. The Minister has not claimed exemption for Document 14 under this exemption clause. Clause 1, so far as is relevant, provides:

1. Cabinet and Executive Council

(1) Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body, and, without limiting that general description, matter is exempt matter if it –

(a)...

(b)...

(c)...

(d) was prepared to brief a Minister in relation to matters –

(i) *prepared for possible submission to an Executive body...*”

15. In my view, the purpose of the exemption in clause 1 is to protect the confidentiality of, among other things, Cabinet discussions and consultations between Ministers. In order for the exemption in clause 1(1)(d)(i) to apply, LandCorp must establish that the Garland Report was prepared to brief a Minister in relation to matters prepared for possible submission to an Executive body, that is, in this case, Cabinet.

LandCorp’s submission

16. LandCorp claims that the Garland Report is exempt under clause 1(1)(d)(i) because that Report was “...*commissioned at the request of the Minister*” to advise on the impact of the redevelopment project on the businesses within the Wattleup commercial centre. LandCorp also submits that it is likely that the findings in the Garland Report will be submitted to Cabinet, especially if a consideration of the findings results in a recommendation that compensation be paid. LandCorp informs me that the Garland Report was provided to the Minister on 8 October 2001 and that the Minister was asked to consider the recommendations arising from it.
17. LandCorp referred me to certain material in the disputed documents, which it submits supports its claims that the Garland Report was commissioned by the Minister and it also submits that it is reasonable to assume that that document would ultimately be submitted to Cabinet. On that basis, LandCorp claims the Garland Report is exempt under clause 1(1)(d)(i).

Consideration

18. I have examined the Garland Report, which consists of four separate and distinct documents, being the report of John Garland International and three attachments. The first attachment is a report by Graham O’Hehir, which states, on its face, that it is a report to John Garland International. The second attachment is a report by J J Le-Fevre & Co, which states that it was prepared for John Garland International. The third attachment consists of photographs and statistical information provided by Main Roads and Police. In total, Document 14 consists of 90 pages, including 42 pages of statistical data.
19. Having examined all of the documents before me, including the disputed documents, I conclude that the Garland Report was prepared for more than one purpose. I consider that it was prepared to test the conclusions reached in the LandCorp Report, which was provided to the Minister on 24 May 2001. It is also apparent to me that it was prepared for LandCorp to advise LandCorp and through LandCorp, the Minister, on the impact of the Hope Valley Project. Following receipt of the Garland Report, LandCorp provided advice to the Minister, in the form of briefing notes and a 5-page briefing memorandum and forwarded a copy of the Garland Report to the Minister. In my view, the mere fact that a document was commissioned by an agency, whether at the request of a Minister or not, does not necessarily mean that the document was prepared for the purpose of briefing the Minister in relation to matters of the kind described in clause 1(1)(d)(i). For example, it may be that a document was prepared for the purpose of informing an agency about an issue, so that LandCorp would be in a position to brief the relevant Minister.

20. LandCorp must establish not only that the Garland Report was prepared to brief the Minister, but also that it was prepared to brief the Minister in relation to matters prepared for possible submission to Cabinet. Whilst I accept that the Garland Report contains recommendations, I can find nothing in the other disputed documents or in the Garland Report itself, which supports a finding that the Garland Report was prepared to brief the Minister in relation to matters of the kind described in clause 1(1)(d)(i), nor has LandCorp provided me with any material in support of that proposition.
21. The exemption in clause 1(1)(d)(i) does not apply to matter submitted or prepared for possible submission to Cabinet; it applies to matter prepared to brief a Minister in relation to such matters. I reject the claim made by LandCorp that, since the Garland Report was commissioned by the Minister, and it is likely or reasonable to assume that the subject matter of the document would be submitted to Cabinet, the document is exempt under clause 1(1)(d)(i). The extension of that argument would be that every document relating to any matter that may ultimately be taken to Cabinet will be exempt under clause 1(1)(d)(i). Clearly, in my opinion, that is not the intent of the exemption.
22. In any event, clause 1(1) is subject to the limits on exemption in subclauses 1(2)-(5). Subclause 1(5) provides that matter is not exempt by reason of the fact that it was submitted to an Executive body for its consideration or is proposed to be submitted if it was not brought into existence for the purpose of submission for consideration by the Executive body. In clause 1, "Executive body" means, among other things, Cabinet.
23. In my view, the Garland Report is a report of the kind, which would be used by LandCorp to formulate advice for the Minister so that the Minister would be in a position to present a proposal to Cabinet. Although LandCorp claims that it is reasonable to assume that the material would ultimately be submitted to Cabinet, the exemption does not apply to that kind of material. There is nothing before me, which persuades me that the Garland Report was prepared to brief the Minister in relation to matters prepared for possible submission to Cabinet, or that it was brought into existence for that purpose. Accordingly, I find that the Garland Report, Document 14, is not exempt under clause 1(1)(d)(i).

(b) Clause 6

24. LandCorp claims that the Garland Report is exempt under clause 6(1). The Minister claims that the Garland Report, together with Documents 2, 15, 18 and 19 are exempt under clause 6(1). 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.”

25. A document is not exempt under clause 6 merely because it concerns or relates to the deliberative processes of the Government, a Minister or an agency. The deliberative processes of an agency are its “thinking processes”, the process of reflection, for example, on the wisdom and expediency of a proposal or a particular decision or course of action. To establish that documents are exempt under clause 6, the documents must contain information of the kind referred to in clause 6(1)(a) and also that disclosure of that kind of information would, on balance, be contrary to the public interest.
26. Having examined the Garland Report and Documents 15, 18 and 19, I accept that they contain information of the kind described in clause 6(1)(a), being opinion, advice and recommendations that were obtained, prepared or recorded in the course of, or for the purposes of, the deliberative processes of a Minister or an agency. In general terms, it seems to me that those documents are related to the deliberative process of obtaining advice and information about the impact, if any, of the industrial redevelopment in the Hope Valley/Wattleup area to businesses operating in Rockingham Road. I am satisfied that the disclosure of those documents would reveal opinion, advice and recommendations obtained for that process. Therefore, I am satisfied that the Garland Report and Documents 15, 18 and 19 fall within the terms of clause 6(1)(a).
27. In respect of Document 2, I am not entirely satisfied that the disputed matter in that document falls within the terms of clause 6(1)(a) because that information does not appear to me to be advice, opinion or recommendations of the kind referred to in clause 6(1)(a). The Minister submits that the disputed matter identifies further issues, which are indicators for consideration during deliberations. I am prepared to accept that the disputed matter may be classified loosely as advice, in the sense that it describes matters for further consideration. However, that is not sufficient to establish the exemption and the complainant is entitled to access unless the Minister and LandCorp establish that disclosure of the Garland Report and Documents 2, 15, 18 and 19 would, on balance, be contrary to the public interest.

The Minister’s submission

28. The Minister informs me that the question of whether or not to compensate some landholders is presently before Cabinet. The Minister informs me that disclosure of commercial information relating to property valuations and matters related to the complainant, which was obtained as part of the deliberative process, would give the complainant an unfair advantage in negotiations with Government and may also provide other parties who wish to also negotiate commercial deals with Government with access to that information. The Minister submits that no decision has been made and that the Government needs to be able to canvass, consider and evaluate options and possibly discard them, without jeopardising the consultative process by the early release of information that may ultimately be discarded.

LandCorp's submissions

29. LandCorp submits that the Garland Report was used by it, not only to brief the Minister, but also to deliberate on what course of action, if any, was required and that the deliberative process involves making decisions with regard to individual situations, as well as broader policy implications that may impact on the Hope Valley Project as a whole.
30. LandCorp submits that disclosure of the Garland Report would be contrary to the public interest because it could affect the proper workings of government by potentially, having an adverse financial impact through raising the issue of compensation and through setting a precedent, which could generally apply to broader Government activities. LandCorp claims that disclosure could damage the integrity and viability of decision-making process of Government because deliberations are continuing. LandCorp informs me that it is still attempting to reach agreement with the complainant and the matter may result in legal proceedings.

Public Interest

31. The exemption in clause 6 ensures effective public administration by protecting from disclosure material forming part of the thinking processes of an agency or the Government when circumstances require that the confidentiality of those deliberations be maintained. In my view, it may be contrary to the public interest to disclose documents while deliberations in an agency are continuing, if there is evidence that disclosure would adversely affect the decision-making process, or that disclosure would, for some other reason, be demonstrably contrary to the public interest.
32. I recognise that there is a public interest in the accountability of LandCorp and the Minister for decisions, which they make and which affect the livelihood of members of the public. I also consider that there is a public interest in the complainant being able to exercise its rights of access under the FOI Act and to be given access to documents. One of the clear objects of the FOI Act is to enable the public to participate more effectively in governing the State. In my view, that object is only achievable if the public has timely access to information so that the public is fully informed and able to contribute to the formulation of public policy and to the public debate about issues which affect the lives and livelihood of citizens.
33. In my view, it cannot be contrary to the public interest for a Government to share information with its citizens, especially when the citizens have indirectly paid for that information. I do not consider that disclosure would give the complainant an unfair advantage over the Government in any negotiations over compensation, which might occur. It seems to me that if both parties have access to the same information then there will be 'a level playing field', and no one party will be advantaged or disadvantaged over the other.
34. Even if current negotiations between LandCorp and the complainant result in some sort of agreement about compensation, I do not consider that that result would necessarily set a precedent for other government activities. It seems to me that such matters depend more on the respective rights and obligations of the parties, rather than on a previous decision. Further, it is not apparent to me how disclosure could damage the

integrity and viability of LandCorp's decision-making processes. Disclosure would merely place in the hands of the complainant, commercial and business information supplied by the complainant and by the other business owners and operators, together with other information reflecting the views of the independent assessors. I consider that the disclosure of that kind of information may assist a settlement to be reached, rather than hinder negotiations.

35. Therefore, in weighing the public interest factors for and against disclosure, I have given more weight to the public interest in accountability and the disclosure of information that will assist and inform the public about Government issues. Accordingly, I find that the Garland Report and Documents 2, 15, 18 and 19 are not exempt under clause 6(1).

(c) Clause 10(1) The State's financial or property affairs

36. The Minister and LandCorp also claim that the Garland Report is exempt under clause 10(1). Clause 10, so far as is relevant provides:

"10. The State's financial or property affairs

(1) Matter is exempt matter if is disclosure could reasonably be expected to have a substantial adverse effect on the financial or property affairs of the State or an agency.

(2)...

(3)...

(4)...

(5)...

Limit on exemptions

(6) Matter is not exempt under subclause (1), (2), (3), (4) or (5) if its disclosure would, on balance, be in the public interest."

37. To establish an exemption under clause 10(1) for the Garland Report, the Minister and LandCorp must show that disclosure of that document could reasonably be expected to cause a "substantial adverse effect" on the property or financial affairs of the State or an agency. Similar words appear in clauses 9(1)(a) and 11(1)(c) and (d) of Schedule 1 to the FOI Act, and in the equivalent provisions of the Commonwealth FOI Act: (ss. 40(1) and 44). The requirement that the adverse effect must be "substantial" is an indication of the degree of gravity that must exist before the exemption can be made out: *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236. In the context of clause 10(1), I accept that "substantial" means the same as "serious" or "significant": see *Re Healy and Australian National University* (Administrative Appeals Tribunal, Commonwealth, 23 May 1985, unreported); *Re James and Australian National University* (1984) 2 AAR 327 at 341.

The Minister's submission

38. The Minister submits that the information contained in the Garland Report is commercial information and is a detailed analysis and valuation of commercial properties in the Hope Valley/Wattleup area for which the Government may have to consider the payment of compensation. The Minister submits that, in the event that the Government is required to pay compensation, possibly as a consequence of the disclosure of commercial information about the Government's bargaining position, that this would have a substantial adverse impact on the financial or property affairs of both the Government and LandCorp.
39. The Minister submits that disclosure would give the complainant an unfair advantage in negotiations with Government, and possibly other parties who may wish to negotiate commercial deals with the government. It is submitted that the Government would be disadvantaged if the documents are disclosed at a time when Cabinet is deliberating because the complainant, any other business owners, would be privy to analysis and information prepared for the Government to assist it in its deliberations.

LandCorp's submission

40. LandCorp claims that it is attempting to negotiate a commercial acquisition with the complainant, on behalf of the Government. LandCorp asserts that, if the complainant develops unrealistic expectations about compensation as a result of the disclosure of the Garland Report, its ability to negotiate would be compromised. LandCorp also submits that the issue of compensation will set a general precedent for broad Government activities, which would result in the Government paying above market rates in commercial negotiations, costing significant amounts of money and, therefore, substantially and adversely impacting upon the finances of the State.

Consideration

41. Neither the Minister nor LandCorp has put anything before me that goes towards establishing the requirements of clause 10(1). As I understand it, the Minister considers that the likely adverse effect on the financial affairs of the State will be that the Government would suffer a disadvantage in its commercial negotiations with the affected businesses because those businesses will be given an unfair advantage over the Government negotiators. However, I am not persuaded that the Government would be disadvantaged in that way, nor am I persuaded that that result is one that could reasonably be expected to follow from disclosure of the Garland Report.
42. The only financial information in the Garland Report is business and commercial information provided by the complainant and by other business proprietors and business property owners to the various consultants who interviewed them. None of that information is about the financial or property affairs of the State or of LandCorp. Further, I reject the claim that the Garland Report contains commercial information about the Government's bargaining position *viz-a-viz* possible claimants. In my opinion, there is no information of that kind in the Garland Report.

43. I also reject the claim that disclosure would set a precedent resulting in the Government paying above market rates in commercial negotiations and thereby costing significant amounts of money to the State. In my view, there are no grounds for believing that the disclosure of the Garland Report, containing certain views about the impact of the Hope Valley Project on local businesses, could reasonably be expected to have the wide-ranging repercussions described by the Minister and by LandCorp.
44. In any event, as clause 10(1) is limited by the public interest test in subclause 10(6), for the reasons given in paragraphs 31-35 above, I consider that disclosure would, on balance, be in the public interest. Accordingly, I find that the Garland Report is not exempt under clause 10(1).

(d) Clause 7 – Legal professional privilege

45. The Minister claims exemption under clause 7 for Documents 20 and 21. Legal professional privilege applies to confidential communications between a legal adviser and a client made or brought into existence for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 74 ALJR 339.
46. Document 20 is a legal opinion provided to LandCorp by the Crown Solicitor's Office. Document 21 is a legal opinion provided to LandCorp by the law firm Allens Arthur Robinson. Having examined both documents, I am satisfied that they are confidential communications between a legal adviser and a client, which were clearly made for the dominant purpose of giving legal advice to the client. I do not consider the disclosure by LandCorp of Documents 20 and 21 to the Minister can be characterised as an act of disclosure to a third party amounting to waiver of any privilege attaching to those documents because I consider that LandCorp is effectively the agent of the Minister in this matter. Therefore, I am satisfied that Documents 20 and 21 would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that Document 20 and Document 21 are exempt under clause 7(1) of Schedule 1 to the FOI Act.

Personal information

47. Finally, the Garland Report contains some personal information about third parties. Specifically, it contains the *curriculum vitae* of John Garland and Graham O'Hehir. In my view, that kind of information is, *prima facie*, exempt matter under clause 3(1). Neither Mr Garland nor Mr O'Hehir has been consulted about the disclosure of that information. Whilst it may be that neither would object to the disclosure of that kind of information, I consider that it would be practicable to delete it from the document and to give the complainant access to an edited copy only.
