

WA NEWSPAPERS AND DAMPIER PORT

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

**File Ref: F0631998
Decision Ref: D0221998**

Participants:

West Australian Newspapers Limited
Complainant

- and -

Dampier Port Authority
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to privatization of Dampier Public Wharf – clause 4(3) commercial or business information – information about business, professional, commercial or financial affairs of a person – whether disclosure of documents would reveal information about business, professional, commercial affairs of third parties – whether disclosure of information could reasonably be expected to produce adverse effect on those affairs – public interest considered – onus on agency under section 102(1) of *Freedom of Information Act 1992* – clause 6 – deliberative processes – advice and opinions obtained for the purpose of the deliberative processes of the agency – public interest in proper functioning of government agencies – public interest in accountability of government agencies in awarding contracts – public interest in parties dealing with government agencies have confidence in tender process – clause 8 – confidential communications – clause 10(1) – State’s financial or property affairs – whether disclosure could reasonably be expected to have a substantial adverse effect on financial or property affairs of the State or an agency – meaning of “substantial” – clause 10(4) – requirements to establish exemption under clause 10(4) – whether documents contain information concerning commercial affairs of an agency

Freedom of Information Act 1992 (WA) ss.30; 102(1); Schedule 1 clauses 4(3), 4(4), 4(7), 6(1), 8, 10(1), 10(4).

Freedom of Information Act 1982 (C’wlth) ss.40(1) and 44.

Harris v Australian Broadcasting Corporation (1983) 78 FLR 236.

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

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

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550.

DECISION

The decision of the agency is set aside. In substitution I decide that the matter remaining in dispute in Document 5 and the whole of Document 29 and the report of the Probity Auditor are not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

31st August 1998

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Dampier Port Authority ('the agency') to refuse West Australian Newspapers Limited ('the complainant') access to 3 documents requested under the *Freedom of Information Act 1992* ('the FOI Act').
2. In early April 1997, the agency published advertisements in various newspapers seeking expressions of interest from organisations interested in operating and managing the Dampier Public Wharf. The responses received were considered by the agency and, in late August 1997, the agency invited 5 organisations to submit detailed tender proposals for the management of the wharf in accordance with the criteria set out in the tender documents provided to each of them.
3. An Evaluation Committee, consisting of representatives of the agency, the Department of Transport and independent consultants, was established for the purpose of evaluating the tender proposals received against the selection criteria and making a recommendation to the Board of the agency as to the preferred tenderer. Subsequently, the tender proposals were evaluated and a preferred tenderer was recommended. Following further negotiations, the lease was granted to Western Stevedores (Dampier) Pty Ltd ('Western Stevedores').
4. In November 1997, the complainant sought certain information from the agency about the leasing of the wharf to Western Stevedores. The agency provided some, but not all, of the requested information to the complainant. Thereafter, by letter dated 18 November 1997, the complainant lodged with the agency an access application under the FOI Act seeking access to documents relating to the leasing of the wharf to Western Stevedores. Following an exchange of correspondence between the complainant and the agency's legal advisers, in early March 1998, a decision was made on access. The agency identified 53 documents within the ambit of the complainant's access application and refused access to all of them.
5. The complainant sought internal review of the agency's decision. By letter dated 17 April 1998, the internal reviewer informed the complainant that 21 of the documents previously identified did not contain any information relating to its request; 19 other documents were not relevant because they were early drafts of documents which had subsequently been modified; and he confirmed the decision to refuse access to the remaining 13 documents. By letter dated 23 April 1998, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained the requested documents from the agency, together with the agency's file maintained in respect of the access application. After those documents were examined, preliminary conferences were arranged with the parties. As a result of discussions between my office and the complainant's representatives, the complainant significantly reduced the scope of its initial request and withdrew from all but 2 of the requested documents, Documents 5 and 29 on the agency's schedule. I was informed that the complainant does not seek access to any information that would identify the organisations that submitted tenders to the agency, nor does the complainant seek access to any sensitive information of a commercial nature relating to the business, professional, commercial or financial affairs of the tenderers concerned.
7. Consequently, attempts were made by my office to resolve this complaint by conciliation between the parties. The agency offered the complainant inspection of Documents 5 and 29 and also inspection of another document, which it had not previously identified as a document within the scope of the access application, being the report of the Probity Auditor appointed by the agency in relation to the contracting out of the wharf facilities. However, the offer of inspection was subject to certain conditions that were unacceptable to the complainant. As a result, conciliation was not a viable option.
8. Thereafter, the agency advised my office that it maintained its claims for exemption for Documents 5 and 29 under clauses 4, 6, 8 and 10 of Schedule 1 to the FOI Act, and also claimed exemption for the Probity Auditor's report. By letter dated 14 August 1998, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the agency had not established a valid claim for exemption in respect of Documents 5 and 29 under any of the exemption clauses cited. It was also my preliminary view that the report of the Probity Auditor was not exempt for any reason. No further submissions were received from the agency and the complainant has not withdrawn its complaint and seeks access to all 3 documents.

THE DISPUTED DOCUMENTS

9. There are three documents remaining in dispute in this matter. Document 5, dated October 1997, is entitled *Report of the Evaluation Committee on the proposals received for the Management and Operation of the Dampier Public Wharf*. Document 29, dated August 1997, is entitled *Request For Proposals from Shortlisted Parties to undertake the Management of the Dampier Public Wharf*. The third document is the report of the Probity Auditor, dated October 1997. Although the existence of that document was not initially disclosed to the complainant by the agency, I am satisfied that it falls within the scope of the access application.

THE ONUS ON THE AGENCY

10. Section 102(1) of the FOI Act provides that the onus is on the agency to establish that its decision was justified or that a decision adverse to another party should be made. In my view, neither the original notice of decision nor the notice of decision on internal review complies with the statutory requirements of s.30 of the FOI Act. Although the agency prepared a schedule of documents, that schedule does not contain any reasons for refusing access. In my view, the agency has simply paraphrased the terms of the exemption clauses.
11. Further, in the course of external review, the requirements to establish valid claims for exemption were explained to the agency by my office but I have received nothing from the agency that goes any way towards meeting the agency's obligations under the FOI Act. For example, it is clear from the specific words of the subclauses of clauses 4 and 10, that the exemptions those subclauses provide are directed at protecting different kinds of information from disclosure under the FOI Act. Whilst an agency may claim, in the alternative, exemption for documents under more than one exemption clause or subclause, as a matter of construction, the same information cannot be exempt under more than one of the subclauses of clauses 4 or 10. An agency may argue on external review that information is exempt under one of those provisions and put arguments in the alternative as to which is applicable. However, at this stage, the agency has not done so.
12. Given that the agency has not identified the specific subclause of clause 4 and clause 10 under which exemption is claimed for Documents 5 and 29, I have considered the material before me in an effort to clarify that aspect of this complaint. That material indicates that exemption is intended to be claimed under subclauses 4(3), 10(1) and 10(4) of Schedule 1 to the FOI Act. Accordingly, I have considered whether Documents 5 and 29 may be exempt under those clauses.
13. Similarly, whilst the agency now claims exemption for the Probity Auditor's report, it has neither identified the particular exemption clause under which exemption is so claimed nor given any reasons to justify its refusal of access to that document. Nonetheless, I have considered whether the contents of the document itself indicate that it may be exempt under the FOI Act and, in particular, whether it may be exempt under any of the exemption clauses claimed by the agency in respect of Documents 5 and 29.

THE EXEMPTIONS

(a) Clause 4 (Commercial or business information)

14. Clause 4, so far as is relevant, provides:

“4. Commercial or business information

Exemptions

- (1) ...
- (2) ...
- (3) *Matter is exempt matter if its disclosure -*
 - (a) *would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
 - (b) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*

Limits on exemptions

- (4) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*
- (5) ...
- (6) ...
- (7) *Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest.”*

- 15. In my view, the purpose of the exemption in clause 4(3) is to protect from disclosure the business, professional, commercial or financial affairs of any person, including a company or incorporated body, that has business dealings with government agencies. Clearly, the exemption is a recognition of the fact that the business of government is frequently mixed with that of the private sector and that neither the business dealings of private bodies, nor the business of government, should be adversely affected by the operation of the FOI Act.
- 16. In order to establish an exemption under clause 4(3), it must be shown that the matter under consideration is information about the business, professional, commercial or financial affairs of a person (including a company or incorporated body) and it must also be shown either that disclosure of that kind of information could reasonably be expected to have an adverse effect on those affairs or that disclosure could reasonably be expected to prejudice the future supply of that kind of information to the Government or to an agency. Finally, if the requirements of paragraphs (a) and (b) of clause 4(3) are satisfied, then the limits on exemption set out in clauses 4(4) and 4(7) must also be considered.

Clause 4(3)(a) – the nature of the information

17. I have examined the disputed documents. Document 5 is the final report of the committee appointed to review the tender proposals. I consider it contains little, if any, information about the commercial affairs of the agency. However, in my opinion, it does contain a substantial amount of information about the business, professional and commercial and financial affairs of the organisations that submitted tender proposals to the agency.
18. Document 29 contains, among other things, detailed information about the objectives of the tender process; the selection criteria; the tender process and protocol; the process by which the Evaluation Committee would evaluate the tender proposals; and several appendices containing financial and trade information, sample vessel pricing information and a copy of the Port of Dampier Operating and Safety Procedures. I consider it contains some information about the business, professional, commercial or financial affairs of the agency as well as some information about the business, professional, commercial or financial affairs of several third parties, albeit that little of it is current information.
19. The Probity Auditor's report contains an assessment of the tender process adopted by the agency. It contains a very small amount of information that could be said to be about the professional affairs of several third parties, being merely that they participated in the process or might be consulted on a professional basis if necessary.
20. Therefore, I consider that Documents 5 and 29 and the Probity Auditor's report contain some information of the kind referred to in paragraph (a) of clause 4(3) about third parties and I consider that the requirements of paragraph (a) of clause 4(3) are satisfied in respect of some parts of those documents.

Clause 4(3)(b) – an adverse effect on commercial or business affairs

21. The agency has not explained the nature of any adverse effect on the business, professional, commercial, or financial affairs of any third parties nor how that effect could be caused by disclosure of Documents 5 and 29. Therefore, I have no probative material before me against which I might assess the conclusion reached by the agency that the disclosure of Documents 5 and 29 could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of any third parties.
22. I understand that the agency has notified the third parties referred to in the disputed documents. However, whilst several third parties have contacted my office in relation to this matter, none of them has sought to be joined as a party to the complaint nor to make submissions in respect of the sensitivity of any business information about them contained in those documents. One third party did not object to the disclosure of the documents.

23. In any event, the complainant has informed me that it does not seek access to any information that would identify the tenderers or to any sensitive information relating to the business, professional, commercial or financial affairs of the third parties. I am of the view that, if the names of the tenderers and all of the information that might identify them were deleted from the documents, then any sensitive business, commercial or financial information about them would not be disclosed, as any such information could not be identified as being about any particular third party.
24. Only Document 5 contains information about the tenderers and I consider that it would be practicable to delete from Document 5 any matter that identifies the tenderers or reveals to which tenderer particular information relates. I have identified that matter to the agency.
25. Document 29 and the Probity Auditor's report do not contain any information identifying, or about, the tenderers. Having inspected those documents, and in the absence of any evidence or submissions to the contrary, I am of the view that they do not contain sensitive commercial information about any third parties, or that the business, commercial or financial affairs of any of those third parties could reasonably be expected to be adversely affected by disclosure of the documents.
26. In my view, subject to the deletion from Document 5 of the matter that I have identified to the agency, I find that Documents 5 and 29 and the Probity Auditor's report are not exempt under clause 4(3) of Schedule 1 to the FOI Act.

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

27. Clause 10 of Schedule 1 to the FOI Act, so far as is relevant, provides:

"10. The State's financial or property affairs

Exemptions

- (1) *Matter is exempt matter if its 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) *Matter is exempt matter if its disclosure -*
 - (a) *would reveal information (other than trade secrets or information referred to in subclause (3)) concerning the commercial affairs of an agency; and*
 - (b) *could reasonably be expected to have an adverse effect on those affairs.*

(5) ...

Limit on exemptions

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

28. Some of the exemptions provided by clause 4 and clause 10 are in substantially similar terms and the requirements to establish a valid claim for exemption under some subclauses of each are also similar. Whilst clause 4 is concerned with information about the commercial or business affairs of private third parties dealing with State or local government agencies, clause 10 is concerned with information about the commercial affairs of the State and agencies themselves.

Clause 10(1)

29. To establish an exemption under clause 10(1) for the disputed documents, the agency must show that disclosure of those documents 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) 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" is best understood as meaning "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.
30. There is nothing before me that goes towards establishing the requirements of clause 10(1) in respect of any of the disputed documents. The agency has not identified the nature of any adverse effect on the property or financial affairs of the State or an agency that could reasonably be expected to follow from disclosure of the documents, nor how disclosure could cause any such effect. The agency has provided no explanation or supporting material as to the degree of gravity of the harm it claims may be caused by disclosure. It merely makes the assertion.
31. The onus on agencies under s.102(1) of the FOI Act is a real one. On this point, I refer to the comments of Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 in respect of a claim for exemption under clause 4. His Honour said, at p.573:

"How can the Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had "real and

substantial grounds for thinking that the production of the document could prejudice that supply” or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision-maker to proffer the view. ...it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker.”

Clause 10(4)

32. In terms of the exemption under clause 10(4), the agency must show that the matter under consideration is information about the commercial affairs of an agency (not necessarily the agency) and also that disclosure of that information could reasonably be expected to have an adverse effect on those affairs.
33. Based on my inspection of the disputed documents, I consider that Document 29 contains some information of the kind referred to in paragraph (a) of clause 10(4) about the agency. I therefore consider that the requirements of clause 10(4)(a) are satisfied in respect of some parts of that document. Although they contain information related to the preparation for a particular commercial transaction by the agency, Document 5 and the Probity Auditor’s report do not appear to me to contain information about the commercial affairs of the agency. However, even if all the disputed documents were to contain matter that could be characterised as information about the commercial affairs of an agency, that alone is not sufficient to establish a *prima facie* claim for exemption. The requirements of clause 10(4)(b) must also be satisfied.
34. In this instance, once again, the agency has simply asserted that an adverse effect on its commercial affairs could reasonably be expected if Documents 5 and 29 were to be disclosed. However, again, the agency has not identified what adverse effect could be expected, nor explained how disclosure would cause that effect, and the agency has not provided any probative material in support of its claim in this regard. There is nothing in the material presently before me that establishes that an adverse effect upon the commercial affairs of the agency could reasonably be expected to follow from the disclosure of Document 5, Document 29 or the Probity Auditor’s report.

FINDINGS

35. For these reasons, on the evidence currently before me, I do not accept the agency’s claims for exemption based on clause 10. I am of the view that the agency has not established that the documents are exempt under clause 10(1) or 10(4) and I so find.

(c) Clause 6 (Deliberative processes)

36. The agency also claims that Documents 5 and 29 are exempt under clause 6 of Schedule 1 to the FOI Act, and I have also considered whether the Probity Auditor’s report might be exempt under clause 6. Clause 6 of Schedule 1 to the Act 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.”*

37. In my opinion, having inspected it, Document 29 contains no information of the kind referred to in clause 6(1)(a), and there is nothing before me from the agency to persuade me otherwise. It was prepared for the purpose of being provided to the companies invited to submit tender proposals and, in my opinion, can be characterised as the tender specifications to be addressed by the tenderers in their respective tender proposals. It does not, in my opinion, contain any opinion, advice or recommendation or reveal any consultation or deliberation that took place. Document 5, on the other hand, is the final report of the Evaluation Committee. That document clearly contains the Evaluation Committee’s assessments against the selection criteria of each of the tender proposals submitted; the Evaluation Committee’s views on each tender submission; and the recommendations the Evaluation Committee made to the agency in respect of the matter. I am satisfied that that information consists of opinion and recommendations prepared and recorded for the purpose of the agency’s deliberative process of deciding upon an operator and manager of the wharf. Accordingly, I consider that it is matter of the kind described in paragraph (a) of clause 6(1).

38. The Probity Auditor’s report clearly contains opinion and advice provided to the Board of the agency, being an assessment of the fairness, equity and probity of the process adopted by the agency for the selection of the preferred tenderer. I have no submissions from the agency to assist me to determine whether that advice and opinion was obtained for a deliberative process of any agency and, if so, what that deliberative process was. As I understand it the report was obtained and provided to the Board for it to take into account when deciding whether or not to approve the awarding of the lease to the preferred tenderer. It is not entirely clear from the document itself whether that is the purpose for which it was obtained. However, it does appear to have been obtained in the

course of an agency's deliberative process, in this case being the selection of an operator and manager of the wharf and, therefore, to satisfy the requirements of clause 6(1)(a).

39. However, there is nothing before me to explain why it would, on balance, be contrary to the public interest to disclose either Document 5 or the Probity Auditor's report. Whilst I recognise a public interest in protecting the integrity of the deliberative processes of an agency, the agency's deliberative processes in respect of selecting an operator and manager have concluded and it is unlikely, therefore, that those deliberations could be affected by disclosure at this point in time. I also recognise that there is a public interest in ensuring that the business, commercial, professional and financial affairs of third parties dealing with government should not be adversely affected by disclosure under the FOI Act. That public interest is recognised by the provisions of clause 4 of Schedule 1 to the FOI Act. In this instance, I do not consider that it would be contrary to that public interest to disclose the documents provided that Document 5 is edited in the manner I identified to the agency.
40. Weighing in favour of disclosure of the documents, I consider there to be a public interest in the accountability of agencies for their actions and, to that end, as much transparency as possible in the awarding of contracts, particularly those of such importance to the State as the operation and management of a significant port. I consider it to be in the public interest for both tenderers for government contracts and the public generally to have confidence that such transactions are dealt with properly by the government and its agencies.
41. Weighing those public interests, and in the absence of the agency identifying any others to be considered, I find that, on balance, disclosure of the documents would not be contrary to the public interest.

Finding

42. Therefore, I find that Documents 5 (subject to the deletions described in these reasons for decision) and 29 and the Probity Auditor's report are not exempt under clause 6(1) of Schedule 1 to the FOI Act.

(d) Clause 8 (Confidential communications)

43. Finally, whilst the agency cited clause 8 of Schedule 1 to the FOI Act as justification for its refusal to grant access, the agency has not given even the barest details (including under which subclause of clause 8 exemption is claimed) or reasons in support of its claims in this regard. There is no material before me that suggests to me that either of the exemptions provided by clause 8 might apply. Accordingly, I find that the documents are not exempt under clause 8 of Schedule 1 to the FOI Act.

CONCLUSION

44. For the reasons given, I am not satisfied that the agency has discharged the onus imposed on it by s.102(1) of the FOI Act to establish that its decision to refuse the complainant access to Documents 5 and 29 and the report of the Probity Auditor was justified. There is insufficient material before me to reach any conclusion other than a conclusion that the documents are not exempt, and I so find.
