

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

**File Ref: F2061999
Decision Ref: D0252000**

Participants: **Highway Construction Pty Ltd**
Complainant

- and -

State Supply Commission
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents concerning review of tender process – clause 1 – purpose of exemption – clause 1(1)(d)(i) – whether prepared ‘to brief a Minister’ – whether in relation to matters prepared for possible submission to Cabinet – limits on exemption – clauses 1(2) and 1(5) – clause 5(1)(b) – scope and meaning – whether investigation into a contravention or possible contravention of the law – clause 5(5) – whether supply policies issued under s.28(1) of the *State Supply Commission Act 1991* are ‘law’ for the purpose of clause 5(1)(b) – whether investigation was into compliance with supply policies – s.102(1) – onus on agency.

Freedom of Information Act 1992 (WA) s.102(1); Schedule 1 clauses 1(1), 1(1)(d)(i), 1(2), 1(5), 5(1)(b) and 5(5)

State Supply Commission Act 1991 (WA) ss.17(1), 19(1) and 28(1)

Road Traffic Act 1974 (WA)

Road Traffic Code 1975

Re Environmental Defenders Office WA (Inc) and Ministry for Planning [1999] WAICmr 35

Police Force of Western Australia v Kelly and Anor (1997) 17 WAR 9

Re Kobelke and Ministry of the Premier and Cabinet [1998] WAICmr 6

Re Coulson and Western Australian Trotting Association [1998] WAICmr 7

Re Cumming and Others and Metropolitan Health Service Board and Moodie [2000] WAICmr 7

DECISION

The agency's decision is varied. Documents 22, 23, 25 and 42 are exempt under clause 1(1)(d)(i), but the disputed documents are not otherwise exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

12 May 2000

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the State Supply Commission ('the agency') to refuse Highway Construction Pty Ltd ('the complainant') access to documents requested by it under the *Freedom of Information Act 1992* ('the FOI Act').
2. In 1998, the complainant lodged an unsuccessful tender to the Main Roads Department ('the MRWA') for Contract No. 573/97, concerning the widening of Loftus Street in Leederville. Following the completion of the tender process, the complainant made certain representations to the Minister for Transport ('the Minister'). I am advised that, in September or October 1998, those representations resulted in an independent review of the tender process in respect of Contract No. 573/97. I understand that the review was established by the Minister for Works; Services and was conducted by officers of the agency in association with officers from the Department of Contract and Management Services ('CAMS'). At the end of October 1998, members of the review group met with the complainant to provide feedback on their findings. However, the complainant was not given a copy of the report of the review team.
3. On 19 July 1999, the complainant applied to the agency for access under the FOI Act to documents relating to the review of the tender process. On 2 September 1999, Mr C Knox, FOI Co-ordinator, advised the complainant that the agency had identified 43 documents as falling within the ambit of the access application. The agency granted the complainant access to 18 of those documents, but refused it access to 25 documents on the grounds that those documents are exempt under clause 5(1)(b) and clause 7(1) of Schedule 1 to the FOI Act.
4. On 9 September 1999, the complainant applied for internal review of the agency's decision. On 28 September 1999, the internal reviewer confirmed the original decision to refuse access under clauses 5(1)(b) and 7(1). On 25 October 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. I obtained the disputed documents from the agency. Inquiries were made with the MRWA and discussions were held with the parties to clarify aspects of this complaint. On 4 February 2000, after considering the material then before me, I informed the parties in writing of my preliminary view of this complaint including my reasons. It was my preliminary view that some of the disputed documents may be exempt under clause 7, but the balance, claimed to be exempt under clause 5(1)(b), may not be exempt.

6. The complainant withdrew its complaint in respect of those documents that I considered might be exempt under clause 7. I received a further submission in writing from the agency maintaining its claim for exemption under clause 5(1)(b). In addition, the agency also claimed exemption under clause 1(1)(d)(i) for the documents remaining in dispute. A copy of the agency's submission, with exempt matter deleted, was given to the complainant. The complainant responded with a further submission.
7. On 6 April 2000, in response to the new ground of exemption under clause 1(1)(d)(i) relied on by the agency, I provided the parties with a supplementary preliminary view. I remained of the preliminary view that the disputed documents might not be exempt as claimed under clause 5(1)(b), although certain documents might be exempt under clause 1(1)(d)(i). The agency provided me with further material in support of its claims for exemption.

THE DISPUTED DOCUMENTS

8. There are 21 documents remaining in dispute in this matter. Those documents are listed and described on a schedule prepared by the agency and given to the complainant and to my office. I refer to the documents by the numbers assigned to them in that schedule. Those remaining in dispute are Documents 1- 2, 4-12, 15-17, 19, 21-23, 25 and 42-43. In general terms, the disputed documents consist of handwritten notes, terms of reference, letters and facsimile messages from the MRWA to the agency, correspondence between Ministers, various correspondence to and from Ministers and agencies, and a working draft report containing a summary of the findings of the review.

THE EXEMPTIONS

(a) Clause 1(1)(d)(i)

9. Clause 1, so far as is relevant, provides:

“1. Cabinet and Executive Council

Exemptions

(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 -

...

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

(i) prepared for possible submission to an Executive body;

(ii) ...

...

Limits on exemptions

(2) *Matter that is merely factual, statistical, scientific or technical is not exempt matter under subclause (1) unless -*

(a) *its disclosure would reveal any deliberation or decision of an Executive body; and*

(b) *the fact of that deliberation or decision has not been officially published.*

...

(5) *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.”*

10. Clearly, the purpose of the exemption in clause 1 is to protect the confidentiality of, *inter alia*, Cabinet discussions and consultations between Ministers: see my decision in *Re Environmental Defenders Office WA (Inc) and Ministry for Planning* [1999] WAICmr 35. Amongst other things, the maintenance of Cabinet solidarity and collective responsibility for its decisions are generally accepted as essential to the Westminster system of Government and the FOI Act recognises that in clause 1 and in the range of documents that are protected from potential disclosure by this exemption.
11. However, there are limits on the exemption in clause 1. Clause 1(2) provides that matter that is merely factual, statistical, scientific or technical is not exempt under subclause 1 unless its disclosure would reveal any deliberation or decision of an Executive body and the fact of that deliberation or decision has not been officially published. Further, clause 1(5) provides that matter is not exempt because 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 my view, both of those limits are relevant in my consideration of this complaint.
12. In order for the exemption to apply, it must be established that the matter in question was prepared to brief a Minister in relation to matters prepared for possible submission to an Executive body. Clearly, therefore, to be exempt under clause 1(1)(d)(i), it must be shown that the disputed matter was prepared to brief a Minister. In addition to that, it must also be shown that it was prepared to brief a Minister in relation to matters of a certain kind, being matters prepared for possible submission to an Executive body.
13. The term “Executive body” is defined in clause 1(6) to mean Cabinet, a committee of Cabinet, a subcommittee of a committee of Cabinet or Executive

Council. The Australian Concise Oxford Dictionary of Current English (3rd edition, 1997) relevantly defines “brief” to mean “*instruct (an employee, a participant, etc.) in preparation for a task; inform or instruct thoroughly in advance.*” In my view, therefore, to brief a Minister is to inform or instruct a Minister.

The agency’s submissions

14. The agency submits that the disputed documents were prepared by its officers for possible submission to Cabinet and in order to brief the Minister. The agency submits that the disputed documents are, therefore, *prima facie*, exempt under clause 1(1)(d)(i) of Schedule 1 to the FOI Act. The agency contends that all the disputed documents are exempt under clause 1(1)(d)(i), not only those containing the results of the review, but also all of the other disputed documents that reveal the agency’s investigation because, in the words of the agency, those documents “*necessarily contain matter that was brought into existence for the purpose of submission to Cabinet.*”
15. The agency further submits that the exemption applies not only to documents such as briefing notes, but extends to matter used to prepare a briefing note to a Minister. The agency submits that to limit the meaning of the words “prepared to brief” to documents such as briefing notes “*...draws an artificial distinction between the subject matter that is used in the preparation of the brief and the subject matter that is ultimately submitted to Cabinet.*” By referring to “matter” as being exempt matter, the agency contends, clause 1(1) is intended to exempt certain types of subject matter and does not focus on whether the document containing the matter was intended to be submitted to Cabinet.
16. The agency submits that “matters prepared for possible submission to an Executive body” comprise the subject matter which forms or will form the submission made ready for consideration or possible consideration by the relevant body and is not limited to a document forming an outline or summary of the subject matter, as it is the subject matter that will attract the exemption, in whatever form it may be presented. The agency submits that, if I accept that the Minister intended to report the findings of the review to Cabinet, it follows that matter contained in the documents which reveals the findings of the review is matter that was intended for submission to Cabinet and is exempt from disclosure under clause 1(1)(d)(i).

The complainant’s submission

17. The complainant submits that the purpose of the review was agreed at the initial meeting it had with the Minister and other people at Parliament House on 8 September 1998. The complainant states that the review could not have taken place without its approval and that it would not have agreed to a review if it had been contemplated or discussed at the meeting that the purpose of the review would be simply to brief the Minister for Transport for a possible submission to Cabinet. The complainant submits that at no stage during that meeting was it proposed by any of the parties present that the review was to be conducted for that purpose (or for the purpose of investigating a possible breach of the law).

18. The complainant submits that it considers that the review was not for either of those purposes. The review was necessary because the complainant was dissatisfied with its tender not being accepted, in spite of the fact that it was the lowest tender. The complainant submits that, at the meeting, its representatives made it clear to the others present that the complainant would not accept the MRWA's decision to award the contract to the company to which it was awarded and that it would, if necessary, mount a legal challenge to that decision.
19. The complainant advises me that, as a compromise, the suggestion was made that the dispute be referred to an independent person for adjudication. It agreed in principle to that suggestion and the meeting resolved to take steps to commence the review process.

Consideration

20. I have examined the disputed documents. As to the general exemption in clause 1(1), in my view, none of the documents records any deliberations or decisions of an Executive body and their disclosure would not reveal any such deliberations or decisions.
21. I do not accept that a lack of awareness or misunderstanding on the part of the complainant about one or more of the purposes of the review is sufficient to establish that the disputed documents are not exempt under clause 1. Further, it seems to me that the purpose relevant to the exemption need not, necessarily, have been the sole purpose for the preparation of the matter in order for it to be exempt. Therefore, I have examined the disputed documents to determine the purpose for which each of them was created.
22. I do not accept the agency's submission that, as the Minister intended to report the findings of the review to Cabinet, it follows that matter which reveals the findings is matter that was intended for submission to Cabinet and is exempt from disclosure under clause 1(1)(d)(i). The exemption is not for matters prepared for possible submission to Cabinet; it is for matter prepared to brief a Minister in relation to such matters. I do not accept that, merely because a Minister intends ultimately to submit a matter to Cabinet, it can be said that every document (or all matter contained in every document) relating to that matter has been prepared to brief the Minister.
23. The extension of that argument is 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 view, that is not the intention of the provision. As I have said, the exemptions provided by clause 1 are designed to preserve the essential confidentiality of the processes of Cabinet (and other Executive bodies). Reading clause 1 as a whole, it is clear from considering each of the subclauses that specific kinds of documents - those central to the Cabinet process - are protected and not every document that may relate to a matter that may ultimately be referred to Cabinet. Such documents may attract exemption under some other clause of Schedule 1 but I consider the clause 1 exemptions to be

specific to certain kinds of documents relating to Cabinet and other Executive bodies.

24. In this instance, I accept that the Minister intended to report to Cabinet as soon as he was in possession of advice or opinion from the Chairman of the review team. That intention is obvious from Document 4 (folio 112). I accept, therefore, that the results of the review may be considered a matter prepared for possible submission to Cabinet. However, in my opinion, the review itself was not conducted for the purpose of providing a briefing to the Minister. It was undertaken for the purpose of determining whether the tender process was properly conducted. As the Minister intended to report to Cabinet on the outcome of the review, then clearly, the Minister would have had to have been briefed as to the outcome of the review, and matter prepared for the purpose of that briefing.
25. Based on my examination of the disputed documents, I do not accept that each of them was prepared for that purpose. Most of the disputed documents appear to me to have been created for the purpose of establishing and conducting the review and not for submission to Cabinet or to brief the Minister in respect of the results of the review. Clearly, the terms of reference (Documents 1, 2 and 6) were not prepared for the purpose of briefing the Minister. The contents of the documents that are facsimile messages to the review team, draft letters, and letters between Ministers (Documents 4, 5, 7, 8, 10, 11 and 17) suggest that those documents were not prepared for that purpose either. Documents 9 and 12 appear to me to have been prepared as *aides-memoire* for the review team rather than for the purpose of briefing the Minister. I find that none of those documents is exempt under clause 1(1)(d)(i).
26. Document 15 is a draft report containing a summary of the findings made by the review team. As that document is stated on its face to be a working draft and the agency has provided nothing to establish that its intended ultimate purpose was to brief the Minister, I do not consider that it was prepared for that purpose. Document 19 is headed "Loftus Street Tender" and lists some key findings and conclusions in point form. There is nothing either before me from the agency, or that is apparent from the document itself, to persuade me that Document 19 was prepared for the purpose of briefing the Minister. Rather, there is a reference in the document that suggests to me that it was prepared to assist in a debriefing of the complainant. Therefore, I find that Document 15 and Document 19 are not exempt under clause 1(1)(d)(i).
27. Document 16 lists, in table form, the points of complaint made by the complainant and summarises the findings made by the review team in respect of those points. On its face, Document 16 does not appear to me to have been prepared for the purpose of briefing the Minister, although it is similar to another document, folio 309, which is attached to Document 23, which is dealt with in paragraph 29 below.
28. However, there is nothing either before me from the agency, or that is apparent from Document 16, to persuade me that Document 16 was prepared for the purpose of briefing the Minister. Although a copy of Document 16 was part of

a document subsequently prepared to brief a Minister, and even if Document 16 itself was used to brief the Minister, it does not follow, necessarily, that Document 16 was prepared for that purpose. There is nothing before me that establishes the purpose for which Document 16 was prepared. Therefore, I do not consider that the agency has discharged the onus it bears under s.102(1) to establish that its decision in respect of Document 16 was justified. Accordingly, I find that Document 16 is not exempt under clause 1(1)(d)(i).

29. Document 22 is a memorandum from the Chief Executive Officer of CAMS to the Minister headed "Interim Briefing". Document 23 is a memorandum from the Acting Chief Executive Officer of the agency to the Minister for Works; Services, plus attachments (folio 309 which is almost identical to Document 16 and folios 310-311 which comprise a draft copy of Document 22). Document 23 refers to folios 310-311 as "*the Briefing Note to the Minister for Transport.*" The briefing note outlines the review and recommends certain action. It also includes a reference to an attachment described as a summary of issues (folio 309). In my opinion, Documents 22 and 23 clearly comprise matter prepared to brief a Minister in relation to matters prepared for possible submission to an Executive body. Accordingly, I find that Document 22 and Document 23 (including its attachments), are exempt under clause 1(1)(d)(i) of Schedule 1 to the FOI Act.
30. Document 25 and Document 42 are letters from the Chief Executive Officer of CAMS to the Minister. Given that Documents 25 and 42 each deals with various aspects of the same subject matter dealt with in Document 22, I am satisfied that Document 25 and Document 42 were prepared for the purposes of briefing the Minister. I am also satisfied that the briefing related to a matter to be submitted to Cabinet. Accordingly, I find that those documents are exempt under clause 1(1)(d)(i).
31. Document 43 is a letter from the Minister to the Chief Executive Officer of CAMS. It appears to me to have been created in response to Documents 22 and 25 being sent to the Minister. Document 43 is a request for advice from the Chief Executive Officer. I do not consider that a letter from a Minister requesting advice can be said to be "matter prepared to brief a Minister". Therefore, I find that Document 43 is not exempt under clause 1(1)(d)(i).
32. Document 21 consists of a facsimile cover sheet and four pages of attachments sent from the MRWA to the agency. It appears to me that the attachments were sent to the agency to assist in the review process. However, there is no material put before me by the agency that persuades me that the facsimile cover sheet or the attachments were prepared for the purpose of briefing the Minister. Accordingly, I find that Document 21 is not exempt under clause 1(1)(d)(i).
33. Notwithstanding that, the attachments to Document 21 contain details about tenders submitted to the MRWA by private bodies and organisations. The contents include details of successful tenders as well as details about unsuccessful tenders. I consider that information consisting of the identities of third party tenderers and the amounts of the unsuccessful tender bids to be information concerning the business, commercial or financial affairs of those

third parties that may be exempt matter under clause 4(3) of Schedule 1 to the FOI Act. Neither party has made submissions to me concerning those documents but the complainant has subsequently withdrawn its complaint in respect of that matter and does not seek access to it. That matter can therefore be deleted pursuant to s.24 of the FOI Act before access is given.

34. As I have found that Documents 22, 23, 25 and 42 are exempt under clause 1(1)(d)(i), it remains for me to consider whether the limit on exemption in clause 1(2) applies to those documents. Clause 1(2) provides that matter that is merely factual, statistical, scientific or technical is not exempt under clause 1(1) unless its disclosure would reveal any deliberation or decision of an executive body and the fact of that deliberation or decision has not been published. Although there is some factual matter in those documents, I do not consider that it is “merely” factual. In my view, it forms part of the briefing material and I do not consider that it is practicable to give access to that material. To do so would require substantial editing of the documents to such an extent that the result would be meaningless. Accordingly, in my opinion, the limit on exemption in clause 1(2) does not apply.

(b) Clause 5(1)(b)

35. Although the agency also claims exemption for each of the disputed documents under clause 5(1)(b), I need not deal with that claim in respect of the documents that I have found to be exempt under clause 1(1)(d)(i), that is, Documents 22, 23, 25 and 42. Clause 5(1)(b) provides:

“5. Law enforcement, public safety and property security

Exemption

(1) Matter is exempt matter if its disclosure could reasonably be expected to -

(a)...

(b) reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted.”

36. The scope and meaning of the exemption in clause 5(1)(b) has been the subject of 3 decisions of the Supreme Court of Western Australia dealing with police investigations. In the case entitled *Police Force of Western Australia v Kelly and Another* (1997) 17 WAR 9, Anderson J said, at page 13:

“In my opinion, the phrase “ ... if its disclosure could reasonably be expected to ... reveal the investigation of a contravention of the law in a particular case ... is apt to include the revelation of the fact of a particular investigation by police of a particular incident involving certain people”.

The meaning of “the law” in clause 5(1)(b)

37. The term “the law” in clause 5(1)(b) is not limited in its application to the criminal law only. The wording of clause 5(1)(b) clearly contemplates investigations that may lead to disciplinary proceedings, as well as those potentially leading to prosecution. Clause 5(5) of Schedule 1 to the FOI Act defines “the law” to mean “*the law of this State, the Commonwealth, another State, a territory or a foreign country or State*”. I consider that the exemption clearly extends to laws of many kinds including, for example, regulatory laws such as those regulating the conduct of public sector employees or the conduct of horse races: see my decisions in *Re Kobelke and Ministry of the Premier and Cabinet* [1998] WAICmr 6 and *Re Coulson v Western Australian Trotting Association* [1998] WAICmr 7.

The agency’s submissions

38. The agency submits that policies issued under s.28(1) of the *State Supply Commission Act 1991* (‘the Supply Act’) are “law” for the purpose of clause 5(1)(b). Section 28(1) provides that the agency may prepare, issue, amend and revoke supply policies with respect to “*policies and practices relating to the supply of goods and services and the disposal of goods under this Act for, or by, a public authority....*”. The policies prepared and issued by the agency are found in a document entitled “Policies and Guidelines for Buying Wisely” (‘the supply policies’) relating to the procurement of goods and services. Section 17(1) of the Supply Act provides:

“Subject to the Act, all public authorities, including all employees, members and officers of public authorities and all officers of the Public Service of the State, shall comply with supply policies”.

39. The agency submits that the purpose of the review of the tender process for Contract No. 573/97 was to determine whether the MRWA had complied with its own tender evaluation process and also whether the tender evaluation process of the MRWA complied with supply policies made under s.28 of the Supply Act. The agency submits that the supply policies govern the supply of goods and services in the strict sense, as well as the procurement of works that are within the scope of services provided by a public authority such as the MRWA. The agency contends that a breach of the supply policies constitutes a contravention of s.17(1) of the Supply Act and, hence, is a contravention of a law for the purposes of clause 5(1)(b) of Schedule 1 to the FOI Act. Accordingly, the agency claims exemption under clause 5(1)(b) on the ground that disclosure of the disputed documents could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law, namely, its supply policies.
40. The agency submits that the supply policies are a law for the purposes of clause 5(1)(b) because they result from a legislative power granted under a written law,

s.28 of the Supply Act, and have legislative effect by virtue of s.17(1) of that Act. The agency submits that the supply policies have the force of law because legal redress may be available in circumstances where the application of policy creates a legitimate expectation on the part of a party affected by such policies. In addition, the agency contends that, for the purpose of clause 5(1)(b), a “law” does not have to be subsidiary legislation nor have penalty provisions attached to it and that the exemption is not limited to investigations conducted by law enforcement agencies.

41. The agency claims that the MRWA is bound by the supply policies in respect of Contract No. 573/97 because the Supply Act applies to the procurement of works by a public authority. The agency submits that support for the view that the MRWA is bound by the supply policies is found in:
 - (a) clause 1.3 of the MRWA Procurement Management Manual (‘the Procurement Manual’) which states that policies in the Manual “*are in accordance with section 17*” of the Supply Act; and
 - (b) the MRWA schematic diagram entitled “Procurement, Quality System Document Structure” which shows that the MRWA Contract Manual Volume 1 – Major Works 1711/001 (‘the Contract Manual’) conforms with clause 1.3 of the Procurement Manual.
42. The agency acknowledges that the main purpose of the review was to determine whether the MRWA had complied with its own tender evaluation process contained in the Contract Manual. However, the agency submits that the Contract Manual contains procedures and guidelines made in accordance with supply policies governing the procurement of works, goods and services. Accordingly, the agency submits that a review of the tender process necessarily requires a consideration of whether the MRWA complied with those supply policies.

The complainant’s submissions

43. The complainant submits that, among other things, the supply policies are not a law for the purposes of clause 5(1)(b). The complainant also submits that, in the event that the supply policies are a law for the purpose of the exemption in clause 5(1)(b), the MRWA is not bound by the supply policies because the MRWA has been granted an exemption by the agency from compliance with the supply policies. In addition, the complainant submits that the Supply Act does not apply to works contracts but only to the provision of goods and services and Contract No. 573/97 is a contract for works only.

Does a failure to comply with supply policies amount to a possible contravention of the law for the purpose of clause 5(1)(b)?

44. I accept the agency’s submission that the application of clause 5(1)(b) is not limited to investigations by law enforcement agencies: see, for example, my decision in *Re Kobelke* and, more recently, *Re Cumming and Others and Metropolitan Health Service Board and Moodie* [2000] WAICmr 7. In my view, the terms of the exemption clause clearly contemplate investigations that

may lead to disciplinary proceedings, as well as those that may lead to prosecutions.

45. I also accept that the supply policies can be distinguished from government policies that are administrative in nature. In the present case, s.17(1) of the Supply Act requires all public sector authorities, including employees, members and officers of public authorities and all officers of the Public Service of the State to comply with supply policies. In clause 5(5) of the FOI Act, the term “contravention” is defined to include a failure to comply. In my opinion, a failure to comply with s.17(1) of the Supply Act may amount to a contravention of the law for the purposes of clause 5(1)(b).

Is the MRWA bound by the supply policies in respect of the contract?

The MRWA’s submission

46. The Acting Commissioner of the MRWA submits that the Supply Act, and hence the supply policies, has no application in respect of contracts for works and that the tender process for Contract No. 573/97 was in respect of a contract for works and that it was conducted in accordance with the MRWA’s Contract Manual. The Acting Commissioner informs me that the procedures outlined in the Contract Manual accord with the objectives and principles of the supply policies. There is some support for the view that the MRWA is not bound by the supply policies in respect of public works contracts in Document 5 from the Minister for Works; Services, the Minister with responsibility for the Supply Act.

The agency’s submissions

47. The agency submits that it is irrelevant to the matter before me whether or not the Supply Act covers the review of a tender evaluation process for the procurement of works and whether or not the agency had jurisdiction to assess the MRWA’s tender evaluation process. The agency argues that it conducted a review to determine whether the MRWA’s tender evaluation process complied with supply policies, that such a review could only be conducted by way of an assessment against supply policies, and that, therefore, it was an investigation into a possible contravention of the supply policies. The agency’s argument is that, as the supply policies are given the force of law by s.17(1) of the Supply Act, the review was therefore an investigation of a contravention or possible contravention of the law, regardless of whether the MRWA was bound by the policies.
48. I do not accept that argument. Clearly, in my view, there can be no contravention or possible contravention of the supply policies where an organisation or agency is not bound to comply with them. Section 102(1) of the FOI Act provides that the agency bears the onus of establishing that its decision to refuse access is justified. Accordingly, the onus is on the agency to establish that the MRWA is bound by the supply policies in respect of Contract No. 573/97.

49. The agency contends that the MRWA is bound by the supply policies in respect of the relevant contract. The agency contends that supply policies may be made with respect to the supply of goods and services and the disposal of goods under, for or by a public authority. The agency submits that supply policies relate not only to the supply of goods and services in the strict sense, but also to the procurement of works which fall within the scope of services provided for a public authority. The agency referred to the reasons given in points (a) and (b) of paragraph 41 above in support of that contention. However, the complainant queried whether clause 1.3 of the Procurement Manual and the MRWA schematic diagram were in existence at the relevant time and also pointed out that a different reference number in the schematic to the Contract Manual had been cited by the agency in its submissions.
50. I consider that alternative interpretations to those suggested by the agency could be placed on both the schematic diagram and the extract from the Procurement Manual. Clause 1.3 of the extract merely states that the policies in the Procurement Manual are “in accordance” with s.17(1) of the Supply Act. The reference in clause 1.3 to there being an obligation on all public authorities to adhere to the supply policies appears to me to be a reference to s.17 in the Supply Act rather than to any specific obligation on the MRWA to comply with the requirements of s.17(1) in respect of this particular contract. In addition, the schematic diagram simply refers to the Procurement Manual containing policies for procurement that are “in line” with the strategy of the agency. Accordingly, I am not persuaded by the agency’s submissions on those points.
51. Inquiries by my office have established that there have been some discussions over the years on the question of whether or not the Supply Act applies to contracts for works. The agency provided me with legal advice that it had received concerning the application of the Supply Act. However, I do not consider that that advice relates to the matters currently before me. In my opinion, the legal advice does not assist the agency in respect of its decision under the FOI Act and is irrelevant to the question of whether or not the MRWA is bound by the supply policies in respect of Contract No. 573/97.
52. In addition, the complainant provided me with a copy of an extract from a transcript of evidence given on 4 February 1998 to the Parliamentary Standing Committee on Estimates and Financial Operations. The complainant submits that the evidence given to the Committee supports its contention that the MRWA is exempt from complying with the supply policies. I have examined that extract provided. In my opinion, that document refers to an exemption granted to the Commissioner of the MRWA, pursuant to s.19(1) of the Supply Act. However, the exemption appears to me to apply only in respect of the responsibility for arranging and coordinating the supply of goods and services. I consider that exemption to be irrelevant to the matters before me in this complaint.
53. I accept that the provisions in the MRWA’s Contract Manual are in accordance with the supply policies. However, the fact that the MRWA has adopted procedures that accord with the supply policies does not mean that the MRWA is bound by those policies. On the basis of the information provided to me, I do

- not consider that the agency has discharged the onus that it bears under s.102(1) of the FOI Act of establishing that the MRWA is bound to comply with the supply policies in respect of public works, such as Contract No. 573/97.
54. Further, if the MRWA is not bound by the supply policies in respect of Contract No. 573/97 then, in my opinion, the investigation by the review team could not have been an investigation into a possible contravention of the supply policies and, therefore, a possible contravention of s.17(1) of the Supply Act. Accordingly, disclosure of the disputed documents could not reasonably be expected to reveal the investigation of a contravention or possible contravention of the law, specifically, s.17(1) of the Supply Act. An investigation which examined the question of whether or not an agency would have contravened a particular law, had it been bound by it, is not in my opinion, an investigation into a contravention or possible contravention of the law within the terms of clause 5(1)(b).
55. The agency contends that, since the tender process was in accordance with the supply policies, any review of that process was necessarily an investigation concerned with the question of whether an agency had complied with those policies. However, I do not accept that argument because the purpose of the review was to decide whether or not the MRWA had complied with the processes outlined in its Contract Manual. The fact that those processes reflected the requirements of the supply policies is not enough to convert the review into an investigation into a contravention or possible contravention of the supply policies by an agency that is not bound by those policies.
56. By way of analogy, suppose a landlord of a large block of flats issued to his tenants a direction that all traffic in the car park (which is private property and not covered by the *Road Traffic Act 1974* ('the RTA')) is to keep left, in the same way that all traffic on public roads is required to keep to the left by regulation 501 of the *Road Traffic Code 1975* ('the Code'), (being regulations made under the RTA). In those circumstances, an investigation into an incident in which a motorist failed to keep left in the car park clearly would not constitute an investigation into a possible contravention of the Code, simply because the rule for driving in the car park is based on the same rule in the Code and the requirements of each are identical.
57. I consider that the agency's contention goes well beyond the scope of the exemption, even though the Supreme Court's decision in *Kelly's* case makes it clear that the scope is broad. Having examined the disputed documents, I am satisfied that none of those documents, on its face, reveals an investigation into a contravention or possible contravention of any law.
58. Accordingly, for the reasons given, I find that the disputed documents are not exempt under clause 5(1)(b).
