

TAYLOR AND MPC

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

**File Ref: 94034
Decision Ref: D02694**

Participants:

Ian Frederick Taylor
Applicant

- and -

Ministry of the Premier and Cabinet
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - working papers and consultants' reports relating to the second report of the "McCarrey Commission" - clause 6 - deliberative process documents - clause 6(3) - matter which is merely factual or statistical - information in the public domain - public interest in the proper functioning of government agencies and in protecting the privacy of individuals and the commercial interests of government and business organisations - clause 8(2) - confidential communications - whether independent commission was an agency - meaning of "a Minister or a public body or office".

Freedom of Information Act 1992 (WA) ss. 10(1); 30; 40(2); 65(1); 65(2); 66(6); 68(1); 72(1)(b); 75(1); 76(3); 102(1); Schedule 1 clauses 6(1), 6(3), 8(2); Glossary in Schedule 2.

Freedom of Information Act 1982 (Commonwealth) s. 36(1)(b); 43(1)(c)(ii).

Re Brog and Department of the Premier and Cabinet (1989) 3 VAR 201

Re Kobelke and Minister for Planning (Information Commissioner WA, 27 April 1994, unreported)

Re Read and Public Service Commission (Information Commissioner WA, 16 February 1994, unreported)

Re Waterford and Department of Treasury (No 2) (1984) 5 ALD 588

DPP v Smith [1991] 1 VR 63

Re Murtagh and Commissioner for Taxation (1983) 6 ALD 112

Re Fewster and Department of Prime Minister and Cabinet (1986) 11 ALN N 266

Attorney General's Department v Cockcroft (1986) 10 FCR 180

Searle Aust Pty Ltd v Public Interest Advocacy Centre (1992) 108 ARL 163

Ryder v Booth [1985] VR 869

DECISION

The decision of the agency of 4 May 1994 is set aside. In substitution, it is decided that:

- (i) Documents 1-7, 10-35, 38-49, 58-60, 68, 70 and 71 ('the Category 1 documents') are exempt under clause 6(1) of Schedule 1 to the FOI Act, except for:
 - the parts of those documents, described in the schedule to the reasons for this decision, which consist of merely factual or statistical matter; and
 - the parts of those documents which are reproduced verbatim, or almost verbatim, in Volume 2 of the Report of the Independent Commission to Review Public Sector Finances,which are not exempt;
- (ii) Documents 8, 9, 36, 37, 50-57, 61-67, 69 and 72 ('the Category 2 documents') are exempt under clause 6(1) of Schedule 1 to the FOI Act; and
- (iii) Documents 73-77 ('the Category 3 documents') are not exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

23 December 1994

REASONS FOR DECISION

1. This is an application for review by the Information Commissioner arising out of a decision of the Ministry of the Premier and Cabinet ('the agency') to refuse Mr Ian Taylor, MLA ('the applicant') access to certain documents. The requested documents are described as the working papers and consultants' reports relating to the second report of the McCarrey Commission ('the Commission'), including letters, memos and any hand-written annotations.

BACKGROUND

2. On 19 February 1993, the Premier, Hon. Richard Court MLA, announced a comprehensive review of Western Australia's public sector finances to be conducted by an Independent Commission. The Chairman of that Commission, Mr Les McCarrey and three other Commissioners were required to complete the review and report to the Premier within 3 months. Consequently, the Commission appointed a number of consultants and established review committees and groups, representative of commerce, industry and the professions, to work with the consultants on the review. The consultants and committees met with senior officers in those areas of the public sector under review and prepared reports for the Commission recording their observations, comments and recommendations in relation to their respective areas of review. The Commission also received unsolicited submissions from various government and non-government sources and, at the end of this process, published a two volume report containing its final findings and recommendations to Government.
3. Access was first sought to those documents under the *Freedom of Information Act 1992* ('the FOI Act') on 9 December 1993 by the then Leader of the Opposition, Hon. Carmen Lawrence MLA. On 7 February 1994, the agency advised the applicant that it had received a deposit from his office in respect of the charges for dealing with the application lodged under the FOI Act by his predecessor, Hon. Carmen Lawrence MLA. At that stage of the process the correspondence on the FOI file produced to me by the agency shows that the agency continued dealing with the application, although clearly Mr Taylor was not the original access applicant. On 18 February 1994 the applicant was advised by the agency that 79 documents relevant to the access application were in the agency's possession and, further, that access was denied in full to 76 of those documents and in part to another single document. The decision to deny the applicant access to the documents was made on 19 January 1994 by Mr M Wauchope, Chief Executive, Office of State Administration ('the initial decision-maker'). The applicant was also advised by the agency that the documents were exempt under clause 6 and clause 8(2) of Schedule 1 to the FOI Act.
4. On 7 April 1994 the applicant, as the then Leader of the Opposition, applied to the Information Commissioner for external review of the decision of the agency to deny him access to these documents. The applicant did not state that he was acting on behalf of the original applicant, Dr Lawrence, nor did he show cause

why I should exercise my discretion under s.66(6) of the FOI Act and accept the complaint even though internal review had not been applied for nor completed. In those circumstances there were no grounds which would found my jurisdiction to accept the complaint and commence a review and the applicant was referred back to the agency.

5. On 18 April 1994, the applicant requested the principal officer of the agency to allow his application for internal review to be lodged notwithstanding that the 30 day time limit prescribed by s.40(2) of the FOI Act had expired. This request was approved by the principal officer of the agency on 20 April 1994. On 4 May 1994, Mr John Pritchard, Chief Executive Officer, Public Sector Management Office, an authorised decision maker of the agency, decided to uphold the initial decision-maker's decision to refuse the applicant access to 76 documents and to grant partial access to one other document. The agency claimed the documents were exempt under clause 6 (Deliberative process) and clause 8(2) (Confidential communications) of Schedule 1 to the FOI Act. On 19 May 1994 the applicant sought review by the Information Commissioner of the decision to deny access to the 77 documents.

REVIEW BY THE INFORMATION COMMISSIONER

6. Under s.65(1) of the FOI Act, a complaint may be made to the Information Commissioner against, among other things, an agency's decision to refuse access to documents. A complaint may be made under s.65(2) by an access applicant or by a third party. In the Glossary to the FOI Act, an "applicant" or "access applicant" is defined to mean "*the person by whom or on whose behalf an access application has been made*". There is no evidence before me that the applicant was authorised to act on behalf of the original access applicant, Dr Lawrence. It appears, however, from the documents produced to me by the agency that, as Leader of the Opposition, he assumed responsibility for this and other matters left by his predecessor. As noted in paragraph 3 above, the agency chose to continue dealing with the access application as if the applicant were the original access applicant. The agency accepted his request for internal review and completed that process as a matter of course. By the time the applicant lodged his complaint with my office, I had before me a decision of the agency which had been reviewed internally by that agency.
7. On this basis, on 23 May 1994, pursuant to my statutory obligation under s.68(1) of the FOI Act, I formally notified both the applicant and the agency that the complaint had been accepted for review and, in accordance with my authority under s.75(1), required the agency to produce for my inspection, the originals of the requested documents. I considered it was necessary for me to examine those documents in order to determine whether the claims for exemption were justified. I also considered that the agency's file maintained in respect of the access application contained documents relevant to the complaint and I required production of those documents to me under s.72(1)(b) of the FOI Act. The required documents were subsequently delivered to my office on 24 May 1994.

8. In its notice of decision dated 4 May 1994 the agency had provided the applicant with a schedule describing each document identified, in its view, as within the ambit of the access application, as well as a statement of reasons in accordance with the requirements of s.30 of the FOI Act. The agency also identified, and weighed, public interest factors for and against release of the documents. In the course of dealing with this complaint one of my officers attended at the agency to satisfy himself that all documents within the ambit of this access application had been correctly included in the schedule supplied to the applicant. This inspection consisted of checking the contents of four files relating to the administration of the Commission. As a result of this inspection I am satisfied that the documents described in the schedule supplied to the applicant with the notice of decision of 4 May 1994 are all the documents to which this access application relates that can be found in the agency.
9. On 30 May 1994, after my initial examination of the documents and the final report submitted to the Government by the Commission, I advised the applicant that it was my preliminary view that the documents contained matter of the type described in clause 6(1)(a) of Schedule 1 to the FOI Act. I invited the applicant's submissions in response to the agency's reasons for its decision in the notice of 4 May 1994 and drew the applicant's attention to a decision of the Victorian Administrative Appeals Tribunal, *Re Brog and Department of the Premier and Cabinet* (1989) 3 VAR 201, which I considered to be relevant to the matter before me. I invited the applicant to comment on the reasons advanced by the agency for denying access in light of that decision which gave some weight, in my view, to the agency's claims for exemption.
10. I requested that the applicant respond to this invitation by 3 June 1994. However, no reply was received by that date. It is necessary for me to impose short time-frames on requests to agencies and applicants alike because of the requirement of s.76(3) of the FOI Act that I make a decision on a complaint within 30 days, unless I consider it impracticable to do so. I recognise the difficulty that such time-frames place on agencies and applicants. Extensions of time may be granted if an agency or an applicant is unable, for demonstrably good reason, to comply with my initial requirements. In this instance, the applicant was given two extensions to 7 June 1994 and 9 June 1994 respectively.
11. On 10 June 1994 I received a submission from the applicant. He disputed the agency's claim that the documents were part of the deliberative processes of the agency and submitted that, in any case, merely factual or statistical matter was not exempt under clause 6(3). He also disputed the claim that the documents were confidential communications and hence exempt under clause 8(2). The applicant argued that, since the consultants had been paid for their work out of public funds and the purpose of their reports was to review public sector finances, the public interest, on balance, favoured disclosure of their reports.
12. On 14 June 1994, after taking into account the applicant's submission, my examination of the documents and consideration of the circumstances in which they were created, I advised the agency of my preliminary view that the claim for

exemption under clause 8(2) of Schedule 1 to the FOI Act could not be sustained in respect of all documents on the basis of the material then before me. I also informed the agency that, after considering the reasons given in its notices of decision, in my view there was insufficient information before me to decide whether disclosure of matter which was not merely factual or statistical would, on balance, be contrary to the public interest. I advised the agency that if it wished to maintain its claim for exemption under clause 6(1) of the FOI Act then it would need to consider the effect of clause 6(3) of Schedule 1 to the FOI Act upon the matter which the agency claimed was exempt matter under clause 6(1). In addition, I provided the agency with a copy of the applicant's submission and invited it to comment on that submission, if it wished to do so, and requested any additional information be provided in writing to my office by 22 June 1994.

13. On 22 June 1994, the agency replied to my invitation and said that it was unable to identify the non-exempt material without the assistance of Mr McCarrey who was out of the country until 7 July 1994. In view of the number of documents in dispute, on 7 July 1994 my office contacted the applicant to ask whether he would be prepared to reduce the ambit of the access application with a view to minimising the further work required to be undertaken by the agency for the purpose of the review of this decision. However, the applicant declined to reduce the ambit of his request and persisted with his claim for access in full to all 77 documents.
14. On 18 July 1994, one of my officers spoke to Mr McCarrey following his return to the State and, on 15 August 1995, the agency received advice from Mr McCarrey. That advice was that, whilst it may be possible to extract from the documents material of a factual or statistical nature, to do so would require each Commissioner to re-examine the documents falling within his portfolio group of agencies and recall which material was considered to be factually sourced as distinct from the consultant's own analysis or conclusions. Mr McCarrey also claimed that this could only be achieved by reconvening the Commission.
15. I received a written response from the agency on 19 August 1994 after it had received that advice from Mr McCarrey. The agency said that neither it nor Mr McCarrey was able to readily identify the material in the documents that was not exempt under clause 6(3) without the assistance of the other Commissioners and the expenditure of considerable time and effort. Based on that assertion, the agency was of the view that the limitation in clause 6(3) did not apply and that the documents in full were exempt under clause 6(1). The agency also affirmed its reliance on both clauses 6(1) and 8(2) as grounds for exemption.
16. On 8 September 1994, I advised the applicant that the agency maintained its claims for exemption for all documents under clauses 6(1) and 8(2), but that it was unable to identify merely factual or statistical matter that was not exempt under clause 6(3). I also advised the applicant that I intended seeking assistance from the various consultants to identify the non-exempt matter in their respective reports. I subsequently wrote to and received responses from 20 consultant firms and individuals who had assisted the Commission. Those individuals also provided me with other information in response to a series of questions I had

asked of them and those responses assisted me with my deliberations on this complaint. At that stage of the review, it appeared to me unlikely that there was any prospect of conciliation of the matter.

Preliminary issue - Is the Commission an "agency" under the FOI Act?

17. The Commission was established by the Premier for the purpose of reviewing public sector finances. Its Terms of Reference were as follows:

"Without limiting the scope of the Commission's review, it shall investigate and report on the following:

1. *Budget sector transactions and outcomes for 1991-92, projected for 1992-93 and trends in recent years with regard to the Consolidated Revenue Fund, the General Loan and Capital Works Fund and relevant accounts in the Trust Fund.*
2. *The outcome in each year if the State Budget had been constructed according to accepted national accounting principles with a single Consolidated Fund.*
3. *The Government's cash position and the trend over recent years, including the application of interest earned on short term investments.*
4. *Review the several assessments of State debt, advise the most appropriate measure of debt, the position at June 30, 1992 and the estimate for June 30, 1993 for:*
 - 4.1 *The Budget Sector*
 - 4.2 *Public Sector Trading Enterprises*
 - 4.3 *The Public Sector as a whole.*
5. *Borrowing and debt redemption policies and practices for general government and government agencies with recommendations for greater scrutiny and control by Parliament.*
6. *Interest commitments identifying accrued, unpaid or deferred interest.*
7. *Contingent and other liabilities of a non-debt nature which could impact on the State's finances, including superannuation commitments.*
8. *The assets and liabilities of the State public sector and the measures required to enable the publication of a comprehensive balance sheet.*

9. *Recommended changes to the presentation of the State Budget and accounts required to better inform Parliament and the public as to the ongoing financial position of the State Government including the true budgetary position, changes in accrued liabilities and public sector debt.*
 10. *Provide forward estimates to 1997-98 of budget sector revenue and expenditure and the budget outcome based on the 1992-93 budget estimates, drawing attention to any significant contingencies which could impact on the Budget.*
 11. *Review the operations of the Treasurer's Advance Accounts.*
 12. *Conduct an examination of the finances and operations of major departments, Government agencies, statutory trading authorities and others as may be referred to the Commission.*
 13. *Recommendations on the future departmental structure of Government.*
 14. *Recommendations to Government on future ownership of assets for reduction of debt.*
 15. *The Western Australian Commission may issue one or more interim reports and the Premier may extend the terms of reference and request advice from the Commission at any time."*
18. The applicant disputed the applicability of the exemption in clause 6 to the documents because it was his view that "...[t]he deliberative process in order to be exempt has to be a deliberative process of "the Government, a Minister or an agency". The Commission was not, and was never intended to be an agent of Government, the representative of a Minister or a 'public body' or agency." The applicant also claimed that the Commission was not an "agency" for the purposes of the FOI Act.
19. At no time had the agency claimed that the Commission was an "agent" of the Government or that it was a representative of a Minister. However, the decision-makers of the agency found, as a matter of fact, that they were entitled to access the documents of the Commission and in fact obtained a number of the documents from Mr McCarrey.
20. The term "agency" is defined in the Glossary in Schedule 2 of the FOI Act as meaning "a Minister or a public body or office". Similarly, the term "public body or office" is also defined in the Glossary in Schedule 2 as meaning, among other things, "a body or office that is established by the Governor or a Minister". From the circumstances of the creation of the Commission as evidenced by its Terms of Reference and the Media Statement issued by the Premier on 19 February 1994, it is clear that the Commission was a body or office established by a Minister, namely the Premier. Therefore, in my view, the Commission was an

"agency" within the meaning of that term as defined in the Glossary in Schedule 2 to the FOI Act. Although the Commission was an agency with a limited life, in my view, that fact does not change its character for the purposes of the FOI Act.

THE REQUESTED DOCUMENTS

21. The requested documents consist of the various reports and submissions of consultants and other interested parties, provided for consideration by the Commission. Some are quite substantial, others less so. In all, there are 77 separate documents to which access has been denied, either in full or in part, although some of the documents identified as being within the ambit of the access application are duplicate copies of others. Mr McCarrey described these documents as falling into one of three categories:

Category 1 Reports to the Commissioners from appointed consultants and committees, comprising people with particular expertise in the area under review (Items 1-7, 10-35, 38-49, 58-60, 68, 70 and 71 in the agency's schedule).

Category 2 Submissions from private sector organisations and individuals, described in the agency's schedule as follows:

- 8 Consultant's Report. April 1993. Strictly Private and Confidential; Copyright - Intellectual Property Rights Reserved.
- 9 Consultant's Report. April 1993. Private and Confidential.
- 36 Consultant's Report: Valuation of CALM Pine Plantations. 28 June 1993.
- 37 Appears to be copy of [36] above.
- 50 "It's time to draw the line". Undated document.
- 51 Letter dated 18 May 1993 to Mr L McCarrey CMG, Chairman of the Independent Commission to Review Public Sector Finances, commenting on the accounting treatment accorded by various state departments to the auctioned value of used earthmoving equipment, in relation to the purchase price of new equipment.
- 52 Undated report entitled "Comparison: Cat 120G John Deere 670 Motor Graders: Main Road Department Auctions 1985-1992".
- 53 Letter dated 7 May 1993 addressed to "Mr P Unsworth, Commission on Government Expenditure", about Building Management Authority (BMA) apprentices.
- 54 Letter dated 13 April 1993 addressed to Mr P Unsworth, Commissioner, Commission on Government Expenditure", about the Building Management Authority and including the issue of apprentices.
- 55 Letter dated 28 April 1993 to Mr L McCarrey, Chairman of the Commission to Review Public Sector Finances, about the review of the BMA.

- 56 Undated "Preliminary Submission to the Commission to Review Public Sector Finances" by the Chamber of Commerce and Industry of Western Australia (Inc).
- 57 "Submission to the McCarrey Commission: Regarding the Future of State Print Division (SPD) of the WA Government Department of State Services." 23 June 1993.
- 61 Letter dated 2 April 1993 to Mr C MacKinnon, outlining details and arrangements relating to the consultancy firm's proposed contribution to the proposed review of the Department of Minerals and Energy.
- 62 "Submission to the Western Australian Government Commission to Review Public Sector Finances on The Importance, Role and Funding of the Department of Minerals and Energy." Undated. Handwritten annotations.
- 63 Appears to be a copy of [62] above, without the handwritten annotations.
- 64 "A Brief on Some Principles for Health Care Reform" prepared for the Commission. April 1993.
- 65 Letter dated 29 July 1993 to Mr L McCarrey, Commission on Public Sector Finances, about State owned nursing home assets - Mt Henry and Sunset.
- 66 Letter dated 3 May 1993 to Mr P Unsworth, Commission to Review Public Sector Finances, about State Government nursing homes.
- 67 Facsimile submission dated 23 April 1993 to Mr P Unsworth, Commission to Review Public Sector Finances, making recommendations on the *WA Health Act*, *State Government Nursing Homes, Home and Community Care*, and the *WA Retirement Villages Act*.
- 69 Letter dated 9 July 1993 and attachments addressed to Mr L McCarrey about the operation of the nursing home industry in Western Australia.
- 72 One (1) page letter dated 9 July to Mr L McCarrey, Chairman, Independent Commission to Review Public Sector Finances about arts industry funding. Marked "Confidential". Includes copy of earlier submission to the Commission about the present and future allocation of State financial resources to the arts industry in Western Australia.

Category 3 Submissions from officers in the public sector, described in the agency's schedule as follows:

- 73 Letter dated 30 April 1993 to Mr L McCarrey, Chairman, Commission to Review Public Sector Finances, about increasing overheads in public service operations. Marked "Confidential".
- 74 One (1) page memorandum dated 7 April 1993 to Mr L McCarrey, Chairman, Commission to Review Public Sector Finances. Eight (8) page attachment outlining the views of a public sector group on "the better management of finances, organisations and people".

- 75 Various letters, tables and attachments provided to the Commission by the Public Service Commission on classification changes within the State Public Service.
- 76 Memorandum dated 8 April 1993 about the public service process for the filling of vacant positions.
- 77 Memorandum dated 29 April 1993 to Mr L McCarrey, Commission to Review Public Sector Finances, about the review of the Building Management Authority.

THE EXEMPTIONS

(a) Clause 6 Deliberative Processes.

22. Exemption was claimed for all the requested documents under clause 6(1) of Schedule 1 to the FOI Act. 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."

23. In my decision in *Re Kobelke and Minister for Planning*, (27 April 1994, unreported) I discussed, at paragraph 47, the purpose of the exemption in clause 6. I consider that discussion to be equally relevant to the documents the subject of the complaint before me in this matter. To establish an exemption under clause 6(1), the agency must satisfy both parts (a) and (b) of this exemption. In my decision in *Re Read and Public Service Commission* (16 February 1994, unreported), I accepted the meaning of the phrase "*deliberative processes of...a Minister or agency*" given by the Commonwealth Administrative Appeals Tribunal in *Re Waterford and Department of Treasury (No 2)* (1984) 5 ALD 588 as being correct for Western Australia (see discussion in *Re Read* at paragraphs 14-26). The relevant passages from *Re Waterford* (cited at paragraph 17 in *Re Read*) are as follows:

"As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing on one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play..."

It by no means follows, therefore, that every document on a departmental file will fall into this category. Furthermore, however imprecise the dividing line may appear in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of the agency..."

It is documents containing opinion, advice, recommendations etc. relating to internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption under s.36 only attaches to those documents the disclosure of which is 'contrary to the public interest'..."

24. Although the applicant accepted that the requested documents were the documents of an agency, namely the Ministry of the Premier and Cabinet, he claimed that the exemption under clause 6(1) did not apply to the documents because the documents were not a part of the deliberative process of the agency to which the access application had been made. That is, they were not part of the deliberative process of the Ministry of the Premier and Cabinet.
25. The exemption in clause 6 provides that matter is exempt matter if its disclosure would reveal opinion, advice or recommendations obtained prepared or recorded or consultations or deliberations that took place in the course of, or for the purpose of, the deliberative processes of "...the Government, a Minister or **an agency**" [my emphasis]. The clause does not require that the documents are "deliberative process" documents of the agency to which the access application was made, nor that they are documents of the agency of whose deliberative process they formed part. Therefore, in my view, the question is not whether the requested documents form part of the deliberative processes of the agency to which the access application was made nor of the agency that holds the documents, but whether the requested documents formed part of the deliberative processes of an "agency" as defined in the FOI Act. For the reasons I have given at paragraphs 17-20 above, I am of the view that the Commission was an agency, albeit now defunct, for the purposes of the FOI Act.

The application of clause 6 to Category 1 documents

26. I have undertaken the task of examining, and considering, the contents of each of the requested documents. In addition, I sought and obtained, from a number of the consultants referred to in Volume 2 of the Commission's report, advice about the circumstances surrounding the creation of the documents. The Category 1 documents were prepared specifically at the request of, and for consideration by, the Commission and for the purpose of enabling the Commission to report to the Premier in accordance with its terms of reference. From my examination of the documents, and taking into account the responses I received from the consultants and the information provided by Mr McCarrey, I am satisfied that the Category 1 documents contain advice, opinion and recommendations obtained in the course of, or for the purposes of, the deliberative processes of an agency. In my view, they are deliberative process documents of an agency, albeit a temporary agency, the Commission. I am satisfied, therefore, that the documents described in the schedule to this decision contain matter of the kind described in part (a) of clause 6(1) of Schedule 1 to the FOI Act. The exempt status or otherwise of those documents must therefore be determined by the application of the public interest test as required by part (b) of clause 6(1) which is discussed in paragraphs 34-48 below.

The application of clause 6 to Category 2 documents

27. I have also examined and considered the contents of the Category 2 documents. Most of those documents clearly indicate that they were either prepared in response to a request from one of the commissioners or prepared by the author for the purpose of submission to the Commission for its consideration. From my examination of those documents, I am also satisfied they contain advice, opinions or recommendations, or a combination of all three, that were obtained, prepared or recorded, for consideration by the Commission during its deliberations. In my view, they are deliberative process documents of the Commission and their exempt status must also be determined by the application of the public interest test in part (b) of clause 6(1).

The application of clause 6 to Category 3 documents

28. Applying the criteria described in *Re Waterford*, cited and quoted in paragraph 23 of this decision, I am not satisfied that all of the Category 3 documents contain matter of the kind described in subclause 6(1)(a) of Schedule 1 to the FOI Act.
29. Document 73 contains the opinions of a Chief Executive Officer about the public service procedures for filling staff vacancies. Although the Terms of Reference of the Commission did not require it specifically to deal with this issue, in my view, the authority to do so may be inferred from references number 12 and 13. On this basis, I consider that this document was obtained in the course of, or for the purposes of, the deliberative processes of the Commission and it satisfies the requirements of part (a) of clause 6(1).

30. Document 74 contains a summary of the collective views of a group of Chief Executive Officers, under the hand of the then Public Service Commissioner, on the matter of staff selection procedures. For the reasons given in paragraph 29 above, I consider this document also satisfies the requirements of part (a) of clause 6(1).
31. Document 75 is a copy of a document prepared for the Expenditure Review Committee in 1992 by the then Public Service Commissioner. The document was clearly not prepared for the Commission. However, I am satisfied that this document was obtained by the Commission for its consideration in accordance with its Terms of Reference and, in my view, that document also satisfies the requirements of part (a) of clause 6(1).
32. The identity of the author of Document 76 is not readily apparent although it is signed by its author. That document describes the administrative steps for filling staff vacancies in the public service and the author's comments on those procedures. For the same reasons as provided in relation to Documents 73 and 74, I consider this document satisfies part (a) of clause 6(1). The exempt status of Documents 73-76 must also be determined by the application of the public interest test as required by part (b) of clause 6(1).
33. Document 77 is a letter to the Commission from a Minister. In it the Minister brings to the attention of Mr McCarrey his concerns about the work of a particular review committee. In my view, the matter in this document relates to a matter of administration of the Commission and it does not satisfy the requirements of clause 6(1)(a) according to the test in *Re Waterford*. Therefore, in my opinion, that document is not exempt matter under clause 6(1).

The "Public Interest" test in clause 6(1)

34. The public interest is not defined in the FOI Act, nor in any other similar legislation but, when it appears in FOI legislation, it is used to balance competing interests. Whilst there is a public interest in people having access to information, there is also a public interest in the proper functioning of government agencies and in protecting, *inter alia*, the privacy of individuals and the commercial interests of government agencies and business organisations.
35. In applying the public interest test, the difference between matters of general public interest and those of private concern only must be recognised. The public interest is an interest that extends beyond what the public may be interested in today or tomorrow depending on what is newsworthy. In my decision in *Re Read* I discussed this concept by referring to *DPP v Smith* [1991] 1 VR 63, a decision of the Victorian Supreme Court. The Court recognised this difference and said, at p. 65:

"The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members...There

are...several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest."

36. In *Re Murtagh and Commissioner for Taxation* (1983) 6 ALD 112, the President of the Commonwealth Administrative Appeals Tribunal outlined the general principle applying to the public interest test under s.36(1)(b) in the *Freedom of Information Act 1982* (Commonwealth), and said, at p.121:

"It is clear that the public interest is not to be limited by the prescription of categories or classes of documents the disclosure of which to the public would be contrary to the public interest. The public interest is not to be circumscribed. All documents must be examined to ascertain whether, having regard to the circumstances, their disclosure would be contrary to the public interest."

37. If the requirements are expressed in this manner, it is clear that the equivalent exemption under clause 6(1) of the FOI Act is not established merely by a belief on the part of an agency's decision-maker that because documents form part of the deliberative process, disclosure would be, for this reason alone, contrary to the public interest. More is required to satisfy me according to the terms of the statute and, in my view, more was required of the agency in this instance. The burden of proof that the documents are exempt as claimed rests on the agency under s.102(1) of the FOI Act which provides:

"102. (1) Except where subsection (2) or (3) applies, in any proceedings concerning a decision made under this Act by an agency, the onus is on the agency to establish that its decision was justified or that a decision adverse to another party should be made."

38. I have examined the contents of each of the disputed documents in order to assess the potential effects of disclosure and to make a judgement as to where the balance of the public interest lies. This was considered by the Victorian Administrative Appeals Tribunal to be an acceptable approach in *Re Brog* in which the Victorian Administrative Appeals Tribunal addressed this point and said that proof that disclosure would be contrary to the public interest:

"...might arise in the contents of the documents themselves. Matters of mischief, potential for mischief, misinterpretation and undermining of confidence, are prospective and therefore it is the possibility of the fact with which the Tribunal is concerned."

Ordinarily the Tribunal will require appropriate evidence as to that possibility and submissions from the bar are not a substitute for such evidence. However, in a particular case, the documents themselves might be such a substitute."

39. The agency identified "accountability" as a public interest factor in favour of disclosure of the requested documents. The agency also identified a number of public interest factors which, in its view, weighed against disclosure of these documents. I have summarised these factors as follows:
- (i) The public interest in not creating a potential for mischief, confusion, misconstruction and exploitation by releasing reports without appropriate explanatory material;
 - (ii) The public interest in maintaining the integrity of a consultation process by not disclosing preliminary views;
 - (iii) The public interest in professionals being able to make judgements and to offer interim views without these being exposed to scrutiny; and
 - (iv) The public interest in protecting sources of information.
40. Against these factors, the applicant identified those matters which, he argued, favoured disclosure of the requested documents. In his submission to me the applicant refuted the public interest claims of the agency and said:
- (i) *"...it is in the public interests to know what was based on consultants research, and what was solely the Commissioner's view."*
 - (ii) *"On such an important area of Public Sector Finances and Management it is in the public interests to have available as many views as possible."*
 - (iii) *"The public has an interest and a role in advising the Government of what it should do, or not do. It cannot be in the interests of the whole of Executive Government, the Parliament or the public, for sources which would best help them in their respective roles in this decision making to be kept from them."*
 - (iv) *"It is not in the public interest to be presented with a single view about these matters when others may be available if we are to ensure the correct final decisions are made by those responsible."*
41. In *Re Brog*, Mr Brog sought access to two draft reports prepared by an evaluation group, appointed by the Effectiveness Review Committee of the respondent department, which were submitted to the respondent department for comment. The second draft report was made available to Mr Brog because it was regarded as substantially similar to the final report, whereas the differences between the first draft report and the final report were more significant. The Victorian Administrative Appeals Tribunal found that the first draft report formed part of the deliberative process of the respondent department and that it was used in arriving at a final assessment of the work of the applicant. Whilst access to the document was granted with deletions, the Tribunal said that it would be contrary

to the public interest to release those parts of the first draft report which were not in the public domain because to do so, in the absence of accompanying explanatory material, would have the potential for misconstruction, confusion and exploitation and for undermining confidence in the final report.

42. The applicant sought to distinguish the decision in *Re Brog* on the following grounds:
- "1. *It related to a committee appointed by an agency and not an "Independent Commission".*
 2. *The issue was not whether to release the report but a draft of the report. In this case the application relates to the final report of each individual consultant to the Commission and not their draft reports.*
 3. *The factual and statistical content of the reports sought is high and could be unwoven from other parts - although I do not think it is necessary."*

Category 1 documents

43. Although the Category 1 documents are *prima facie* the final reports of the consultants appointed by the Commission, collectively they consist of much of the material from which the Commission prepared its final report. Mr McCarrey told me that in some cases the consultants' reports were not used by the Commission because they were considered inadequate, ill-informed or simply did not address the issues upon which the Commission was focusing. The consultants appointed by the Commission were asked to perform rapid "kerbside" reviews of nominated agencies and had not performed an in-depth analysis of the areas under review because time was of the essence. For this reason many of the consultants considered their particular reports were not of the standard they would normally present as professionals.
44. In my view, the disclosure of reports which, in many cases, are no more than "thumb-nail" sketches of the operations of various departments in the public sector, without explanation or verification of the data and conclusions, would have the potential for misconstruction, confusion and undermining public confidence in the final report. For these reasons I consider that the reasoning of the Tribunal in *Re Brog* is relevant to my consideration of whether it would, on balance, be contrary to the public interest to release the Category 1 documents.
45. I accept that there is a public interest in access to documents which would reveal the processes of Government decision-making. That interest is embodied in the right of access provided by the FOI Act. The final report of the Commission is a public document and I understand that a number of the recommendations of the Commission have been accepted and are being implemented by Government. In my view, the public interest in knowing what Government is doing, and why, is served by the publication of the Commission's final two volume report. From my

examination of the Category 1 documents, and taking into account the submissions of the consultants and the parties to this review, I consider that it would be contrary to the public interest to disclose the hastily formed, and perhaps unsubstantiated, opinions and recommendations of the consultants. Release of the Category 1 documents in my view, has the potential to open the way for selective reporting of parts of them which may be taken out of context, and for the possible misuse of material and data which may now be obsolete, given the passage of time since the Commission released its report and recommendations.

46. I do not accept the claim of the applicant that it is in the public interest to know what was based on consultants' research and what was solely the Commission's view. If there is such a public interest, and I am not persuaded that there is, in my opinion, this interest has been served by the publication of the Commission's report which contains the views of the Commissioners and relevant parts of various reports which were endorsed by them. Given that the Commission did not accept and endorse all of the views in the documents prepared by consultants and others and given my understanding that a number of the recommendations of the Commission which were accepted by Government are being implemented, in my view, the release of the Category 1 documents would add nothing to the public understanding of the decisions being made by Government. On the basis of the material provided by the agency, the consultants and Mr McCarrey, and from my own examination of the documents, I am satisfied, for the reasons given in paragraph 45 above, that it would, on balance, be contrary to the public interest to disclose these documents. Other than the non-exempt matter which is discussed in paragraphs 52-56 below which is also identified in the schedule attached to these reasons, and the matter discussed in paragraphs 47 and 48 below, I find all the documents in Category 1 to be exempt under clause 6(1) of the FOI Act.
47. As already noted at paragraph 26 above, I have examined each of the Category 1 documents in detail. I have also compared the contents of several of the Category 1 documents with the corresponding Chapters in Volume 2 of the Commission's final report. It is apparent to me that in a number of instances the Commission has reproduced verbatim, or almost verbatim apart from some inconsequential changes for contextual purposes only, a considerable proportion of the text of the reports of the consultants. The following are examples of where this has occurred:
- (i) Document 7 - Most of the text on pages 15-32 of this consultant's report have been reproduced verbatim at pages 113-130 of Chapter 23;
 - (ii) Document 29 - Several pieces of text from pages 30-33 of this consultant's report have been reproduced verbatim at pages 261-263 of Chapter 30;
 - (iii) Document 39 - Most of the text of pages 1-17 of this Committee report have been reproduced verbatim at pages 224-232, 234-237, 239-243 of chapter 29, including all but two of the Committee's recommendations;

- (iv) Document 47 - Pages 2-17 of this consultant's report have been reproduced verbatim at pages 361-376 of Chapter 38; and
 - (v) Document 48 - Most of the text of pages 2, 5, 7-9, 12-21, 23, 26 and 28 of this consultant's report have been reproduced verbatim at pages 255-266 of Chapter 30.
48. The reports and/or recommendations of many of the officially appointed consultants who authored Category 1 documents are reproduced verbatim, or almost verbatim, in the Commission's final report, and have, therefore, already been disclosed by the publication of Volume 2. Therefore, the disclosure of that information under the FOI Act would not, in my view, on balance be contrary to the public interest, and I find that such matter is not exempt.

Category 2 Documents

49. The documents in this category consist of unsolicited material provided to the Commission by private sector individuals and organisations. The applicant has been granted access to some of this material with the consent of the authors. Mr McCarrey indicated that the Commissioners had considered and rejected some material included in submissions received by the Commission as it was not considered relevant to the Commission's Terms of Reference. I do not consider it practicable for me to consult with each and every individual and organisation that submitted written proposals to the Commission and I have not done so in relation to the Category 2 documents. In my view, it would be contrary to the public interest for these documents to be disclosed to the applicant because the extent of the reliance on them by the Commission is not known. As the material was unsolicited by the Commission, I consider the disclosure of this material would not serve to inform the public about government decision-making, nor would it make government agencies more accountable. In my view, the Category 2 documents contain matter that is exempt under clause 6(1) of Schedule 1 to the FOI Act. I consider that the factual or statistical matter contained in those documents is not readily identifiable and severable and I find that those documents are exempt.

Category 3 documents

50. Although I accept that Documents 73, 74, 75 and 76 are deliberative process documents, the agency has not satisfied me that it would be contrary to the public interest to disclose these documents. I accept that Document 73 was considered by its author to be private and confidential. However, I do not accept that it would, for this reason alone, be contrary to the public interest to disclose that document. In my view, the responsibilities of Chief Executive Officers of government agencies include the right and the duty to express critical views about administrative procedures in the public sector that adversely affect efficiency and effectiveness, for the purpose of finding better ways to achieve desirable outcomes.

51. The arguments that established the exempt status of Category 1 documents do not, in my opinion, apply in relation to Documents 73, 74, 75 and 76. Not only are the documents themselves of a different nature, there have been no other reasons given by the agency which persuade me that it would, on balance, be contrary to the public interest to disclose those documents. I do not accept that senior executives in the public sector would expect their views about staff selection and promotion procedures to remain secret, nor do I consider in the public interest that they should. Therefore, in the absence of any evidence to the contrary, I am not satisfied that the requirements of part (b) of clause 6(1) have been established with respect to Documents 73, 74, 75 or 76 and I find that these documents are not exempt under clause 6(1) of the FOI Act.

Non-exempt merely factual or statistical matter

52. Clause 6 is subject to a limitation in sub-clause (3) which provides as follows:

"(3) Matter that is merely factual or statistical is not exempt under subclause(1)."

53. Similar limitations or exceptions in other FOI legislation use the word "purely" rather than "merely". The Concise Oxford Dictionary defines "mere" as "...solely or no more or better than what is specified", and "merely" as "unmixed". The word "pure" is also defined as meaning "unmixed, unadulterated" and "purely" as meaning "in a pure manner, unmixed." In my view, the expressions "merely factual or statistical" and "purely factual or statistical" are interchangeable.
54. Whilst raw data or statistical matter in a disputed document may not be exempt by virtue of sub-clause (3), the word "merely" indicates that such matter may be exempt if it is inextricably woven in with the exempt matter. In some of the documents before me, principally those of Category 2, statistical and factual matter which may be severable as non-exempt matter under clause 6(3) is not readily identifiable. The applicant, in his submission dated 10 June 1994, contended otherwise, although he did not have the benefit of access to the documents to verify his belief. He said: *"[t]he exemption of deliberative process does not apply to any matter that is merely factual or statistical (see schedule 1, clause 6(2) [sic] of the FOI Act). I am certain that they are not so interwoven with the rest of the report, not to be available...The factual and statistical content of the reports sought is high and could be unwoven from other parts - although I do not think it is necessary."*
55. The responsibility in the first instance of identifying the non-exempt matter clearly rests with the agency that claims the exemption under clause 6(1). Although the agency consulted with Mr McCarrey and advised me that it was not possible to identify the matter contained within the documents that was merely factual or statistical without some degree of difficulty, it was clearly under an obligation to do so. The result of the agency's failure to properly consider a claim for exemption in relation to each discrete document was a "class" claim for exemption for all the disputed documents. Not only is a class claim generally excluded under the FOI Act, but decisions of the Commonwealth Administrative

Appeals Tribunal and the Federal Court have consistently confirmed the need to approach the deliberative process exemption from the point that not all documents kept by an agency attract the exemption provided by the equivalents of the clause in other jurisdictions. In *Re Fewster and Department of Prime Minister and Cabinet* (1986) 11 ALN N 266, at paragraphs 35 and 36, the Tribunal, considering an exemption based on s.36(1)(b), the Commonwealth equivalent of clause 6(1), said:

"In my view...no justification is to be found within the language of s.36 of the Act for a "class" claim of exemption...In my view, more than that is required for the purposes of s.36(1)(b).

Where Parliament has deemed it necessary to give paramountcy to the undoubted public interest in confidentiality and candour and frankness by protecting a class of documents containing high level communication from disclosure under the Act, it has done so by express proscription. Thus by force of...the Act, a document is an exempt document if it is a document that has been submitted to Cabinet for its consideration, being a document that was brought into existence for that purpose. Similar provision has been made with respect to Executive Council documents...Parliament has not gone on to provide, as it might well have done, had it been so minded, that documents containing confidential communications between Ministers or between senior public servants and Ministers are also exempt, as a class, from disclosure under the Act. Rather, the question whether such communications should be exempt has been left to be determined having regard to the contents of each document, in the light of the public interest posed by s.36(1)(b)" [My emphasis].

56. After examining the Category 1 documents and taking into account the submissions of the various consultants, I have identified the factual matter and statistical information that I consider is not exempt matter and it is described in the schedule attached to this decision. Some of the remaining parts of the documents listed in that schedule contain some factual and statistical matter which is so inextricably mixed with the opinion, advice and recommendations contained within the documents, that it cannot, in my view, be considered "merely" factual or statistical. Therefore, I find that that matter is exempt from disclosure under the FOI Act for the reasons given in paragraphs 34-48 above.

(b) Clause 8 - Confidential communications

57. The agency claimed that each of the requested documents was exempt under clause 8(2) of Schedule 1 to the FOI Act. As I have determined that the Category 1 documents (other than non-exempt factual matter and matter already published in Volume 2 of the Commission's final report) and the Category 2 documents are exempt under clause 6(1), it is unnecessary for me to determine the question of whether those parts I have found to be exempt under clause 6(1) are also exempt under clause 8(2). However, it is necessary that I consider whether those documents and parts of documents I have found are not exempt under clause 6(1) are exempt under clause 8(2). Those are the merely factual or

statistical matter contained in the Category 1 documents; those Category 1 documents or parts of documents already published in the final report of the Commission; and Documents 73, 74, 75, 76 and 77.

58. Clause 8(2) as far as it is relevant provides:

"(2) *Matter is exempt matter if its disclosure -*

(a) *would reveal information of a confidential nature obtained in confidence; and*

(b) *could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*

Limits on exemption

(3)...

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

59. In order to qualify for exemption under clause 8(2), an agency must not only establish that, if the information were disclosed, it would reveal information of a confidential nature obtained in confidence, but also that the disclosure of the information could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 190, the Federal Court said that the words "*...could reasonably be expected to prejudice the future supply of information*" in s.43(1)(c)(ii) of the Commonwealth FOI Act were intended to receive their ordinary meaning and required a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect those who would otherwise supply information of the relevant kind to the Commonwealth would decline to do so if the documents in question were disclosed.

60. Those are the tests which must be applied when agencies are considering a claim for exemption under clause 8(2). Furthermore, I stated in my decision in *Re Read*, information is inherently confidential if it is not in the public domain. That is, the information must be known to a small number or a limited class of persons. I also said that the requirement in part (b) of clause 8(2) that the future supply of information of that kind could reasonably be expected to be prejudiced, is a reference to similar information or information of the class or character contained in the documents under consideration.

The application of clause 8(2) to non-exempt factual or statistical matter described in the schedule to these reasons for decision

61. In this matter, I am satisfied that there is sufficient evidence and material before me to reach a conclusion that the Category 1 documents were given and received in confidence and that they contain some information of a confidential nature.

This evidence includes the nature of the matter contained within the documents, the express undertaking of confidentiality between the consultants and the Commission, Mr McCarrey's statements that the consultants were given explicit oral undertakings by the Commissioners that the material provided to the Commission would be received and dealt with in confidence and the responses I received from the consultants that they believed the reports were provided and received in confidence.

62. However, both the agency and the consultants relied heavily on the confidentiality undertaking as justification for the conclusion that the documents were exempt. A similar claim arose in the course of my dealing with a complaint concerning access to confidential documents provided by a third party to assist in a town planning appeal before the Minister for Planning in *Re Kobelke*. I rejected that claim because I accepted then, as I do now, the comments of the Full Court of the Federal Court of Australia in *Searle Aust Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163, where the Full Court said, at p.180:

"Prior to the coming into operation of the FOI Act, most communications to Commonwealth Departments were understood to be confidential because access to the material could be obtained only at the discretion of an appropriate officer. With the commencement of the FOI Act on 1 December 1982, not only could there be no understanding of absolute confidentiality, access became enforceable, subject to the provisions of the FOI Act. No officer could avoid the provisions of the FOI Act simply by agreeing to keep documents confidential. The FOI Act provided otherwise."

63. I consider this statement to be relevant within the context of the operation of FOI in Western Australia. As I said in *Re Kobelke*, at paragraph 78, s.10(1) of the FOI Act provides a person with a right of access to documents of an agency (other than an exempt agency), subject to and in accordance with that Act. This legally enforceable right of access may only be avoided by the means laid down in the Act in relation to the disclosure of exempt matter. The effect of the passage quoted from *Searle* in respect of confidential communications is that previous understandings of confidentiality cannot be relied upon as the only justification to protect information from disclosure under the FOI Act because the specific requirements of clause 8(2) must be satisfied. Without more, a convention of confidentiality or an express assurance of confidentiality, such as was given in this instance, is insufficient to establish a claim under this clause.
64. Of course, the decision in *Searle* does not mean that previous confidentiality agreements are irrelevant under the FOI Act. They are relevant to establish the requirements of part (a) of clause 8(2) but they are not conclusive in respect of the requirements of part (b). In this instance, the agency, Mr McCarrey and the majority of the consultants all relied on the confidentiality undertakings rather than addressing the specific requirements of the FOI Act and, in particular, the requirements of parts (a) and (b) of clause 8(2). The deeds of confidentiality were between particular consultants and the State and operate to prevent the consultant, without the written consent of the Commission, from disclosing

information obtained during the course of the consultancy. The deeds of confidentiality further provide that the particular consultant may disclose information which is required by law to be disclosed to any person authorised to receive it. The FOI Act is a law that permits disclosure of such documents in the circumstances provided by that Act. The deeds of confidentiality do not appear to impose any obligation of confidentiality upon the Commission. Further, some of the factual and statistical matter contained in the Category 1 documents is sourced from Annual Reports to Parliament by government agencies or other public documents and is clearly not confidential in nature.

65. The evidence provided to me to address the requirements of part (b) of clause 8(2) consists of the written confidentiality undertaking and statements by Mr McCarrey that many of the consultants had been concerned about confidentiality because of possible damage to their reputations if the reports were published, given that their views could not be substantiated within the restricted time available to the consultants to prepare their reports for the Commission. Almost all of the consultants' reports contain some sort of qualification or disclaimer in respect of the information therein. The agency claims those concerns about confidentiality support its decision that the future supply of consultants reports could reasonably be expected to be prejudiced if the understanding of confidentiality was breached by the disclosure of these documents.
66. A number of the consultants contacted by my officers told me that they were in the business of preparing such reports and that disclosure of the documents would be unlikely to prejudice their willingness to continue to provide similar reports in the future. By way of contrast, others indicated that they would be unwilling to provide such information in the future if the documents were to be disclosed. The only reason for this latter view which I am able to discern from the material before me appears to be an unwillingness to have opinions and views disclosed when they are predicated on unsubstantiated data and information. In one case, a consultant told me that he was concerned about future bias in his dealings with government if his particular report was disclosed.
67. The Commission acknowledged, in its final report, that a number of consultants had provided their services for no fee other than a recoup of direct expenses and others charged only minimal fees. The agency said that this fact, together with the assurance of confidentiality, meant that disclosure of the documents under FOI would result in consultants being unwilling, or less willing in the future, to provide their services on such a basis to Government.
68. Under part (b) of clause 8(2) it is the ability of the agency to obtain information of the kind contained in the documents that must be prejudiced. The exemption is not concerned with the question of whether the particular consultants whose reports may be disclosed will provide such reports in the future. The question is whether an agency, such as a Commission established to assist Government in a particular matter, will be able to obtain information of that kind in the future, and it is not sufficient to show that some consultants may be reluctant to co-operate and provide reports: *Ryder v Booth* [1985] VR 869 at 872. Mr McCarrey submitted to the agency that the ability of any future Commission to obtain free

and frank input from the public generally, and from public servants in particular, would be prejudiced if assurances about confidentiality were overturned. However, as I have said earlier, the confidentiality of documents is not, alone, a sufficient reason to establish an exemption under clause 8(2).

69. The written confidentiality agreements and the verbal assurances of confidentiality that were given by the Commission are not sufficient to satisfy me that it would be reasonable to expect any prejudice to an agency's ability to obtain reports from consultants in the future, particularly reports that contain factual and statistical information on the operations of government departments. Nor is there any other evidence before me that would so satisfy me. In the case of the Category 1 documents supplied to the Commission by consultants who are in the business of marketing their expertise, whether for a standard fee, an honorarium or gratuitously, I reject the assertions of the agency and Mr McCarrey that disclosure of the Category 1 documents could reasonably be expected to prejudice the ability of the Government or any similar Commission to obtain such reports in the future. In the business world there is competition amongst consultancy firms and I consider any prejudice to the ability of the Government to obtain information from consultants in the future unlikely and, therefore, not reasonable to expect. In my view, the agency has failed to discharge its onus under s.102(1) of the FOI Act and I find that the exemption under clause 8(2) is not established with respect to the Category 1 documents.

Application of clause 8(2) to matter from Category 1 documents which has been published in the Commission's final report

70. Matter contained in the Category 1 documents which has been reproduced in the Commission's final report is in the public domain, and is, therefore, no longer confidential information. This matter fails to meet the requirements of part (a) of clause 8(2) and I find that it is not exempt matter under this clause.

Application of clause 8(2) to Category 3 documents

71. The information contained in Documents 73 and 74 was provided to Mr McCarrey following discussions between Mr McCarrey and the authors of those documents. Taking into account the agency's claim that the Commissioners gave firm oral undertakings to all the persons who provided input to the Commission that material was being requested and would be received in confidence, and the confirmation of many of the consultants that they understood their submissions were to be treated in confidence, I am persuaded that the information in Documents 73 and 74 was obtained by the Commission in confidence. Further, from my examination of those documents, in my opinion, the information in these documents would, *prima facie*, be information that is not in the public domain and it would only be known to a limited number of people. Therefore, I consider that the information in those documents is information that satisfies part (a) of clause 8(2).

72. However, as Documents 73 and 74 have been provided to the Commission by senior executives within the public sector, I reject the agency's claim that the supply of such information to the Government or an agency could reasonably be expected to be prejudiced in the future. The agency has provided no evidence that would persuade me that such a result could be a reasonable consequence of the disclosure of those documents. Further, I do not accept the argument that it is reasonable to expect that senior executives in the public sector would be reticent to provide such information or that they would refuse to provide information of that kind to a Commission of this nature in the future.
73. In the case of Document 75 there is no evidence or explanation from the agency as to how the Commission obtained that document. However, accepting the agency's claim that the Commissioners gave firm oral undertakings of confidentiality, I accept that the document was obtained by the Commission in confidence. Document 75, which was originally prepared for submission to the Expenditure Review Committee by the then Public Service Commissioner, together with several attachments, contains advice to that Committee about a review of classification profiles in Public Service Departments. In my view, having regard to the contents of that document, I am satisfied that the information contained in it is confidential.
74. However, for similar reasons to those set out in paragraph 72 above, I do not accept the agency's claim that the disclosure of that document could reasonably be expected to prejudice the supply of information of that kind to the Government or an agency in the future.
75. In the case of Document 76 there is no evidence or explanation from the agency as to how the Commission obtained that document. However, for similar reasons to those set out in paragraph 72 above, I accept that the document was also obtained by the Commission in confidence. That document describes the administrative steps for filling staff vacancies in the Public Service. From my reading of its contents, I am satisfied that it does not contain any information of a confidential nature, and, for similar reasons to those given in paragraph 72 above, I reject the agency's claim that the disclosure of that document could reasonably be expected to prejudice the supply of information of that kind to the Government or an agency in the future.
76. Document 77 is a letter from a Minister to Mr McCarrey. From my examination of its contents and the circumstances in which it was provided to Mr McCarrey, I am of the view that it may have been provided in confidence. However, I reject the agency's claim that the disclosure of that document could reasonably be expected to prejudice the future supply of information of that kind to the Government or an agency. The agency has not provided any evidence that would persuade me that such a consequence is reasonable to expect.
77. For the reasons given in paragraphs 71-76 above, I consider that the agency has not discharged its onus of proof under s.102(1) with respect to Documents 73, 74, 75, 76 or 77 and I find that those documents are not exempt under clause 8(2).

| Item No | Report Title or subject | Non-exempt factual/ statistical matter |
|---------|--|---|
| 1 | Letter re document 2 | Nil. |
| 2 | Report of the Privatisation/Contracting Taskforce | Cover Sheet and Table of Contents Page 4. <p style="text-align: center;">Appendix A</p> 1/1- First 5 paragraphs only. 1/6- First 3 paragraphs only and paragraph 5. 1/17- All. 1/19- First 3 paragraphs only. 1/24- First 3 paragraphs only. 1/25- All except last paragraph. 1/26- First paragraph only. 1/28- First 2 paragraphs only. 1/29- First 2 paragraphs only. 1/30- First 2 paragraphs only. 1/31- First 2 paragraphs only. 1/32- First 2 paragraphs only. 1/34- First 2 paragraphs only. 1/37- First 5 paragraphs except last sentence in paragraph 4. |
| 3 | Review of WA Public Sector Information Technology and Telecommunications | Cover Sheet and Table of Contents Page 4- under heading "Management Roles"- Paragraphs 1,3 and 4. Page 8 - First 5 paragraphs. Page 12 - All. Page 14 - First paragraph. All tables annexed to the report. |
| 4 | Review of WA Public Sector Information technology and Telecommunications - Executive Summary | Cover Sheet Page 2 under heading "Management"- First paragraph. Page 3 - Budget and FTE information only. Page 4 - First 7 paragraphs. Appendix. |
| 5 | Review of Department of State Services | Cover Sheet and Table of Contents Page 4 - All. Page 5 - All. Page 6 - All matter preceeding heading "Key Issues identified by KPMG Peat Marwick". Page 9 - First 2 paragraphs only. Page 11 - First 3 paragraphs only. Pages 12 - 17 inclusive. All matter under headings except recommendations. Page 18 - All. Appendix A. Appendix B. |
| 6 | Appears to be a copy of 5 | |
| 7 | Transport and Warehousing Review | Cover pages and Index. Pages 35-40 inclusive. |

| Item No | Report Title or subject | Non-exempt factual/ statistical matter |
|---------|--|---|
| 10 | Preliminary Review of SECWA | Cover Sheet and Table of Contents. Page 9 - Parts 3 and 3.1. Page 10 - First 2 paragraphs under heading 3.2. Pages 19-22 except last paragraph before 5.3 on page 21 and last paragraph before heading (d) Regulatory functions on page 22. |
| 11 | Supplement to the Preliminary Review of SECWA | Cover Sheet and Table of Contents. Pages 12 and 14. |
| 12 | WA Treasury Corporation stamped "Draft" | Nil except Cover Sheet. |
| 13 | Totalisator Agency Board of Western Australia | Cover Sheet. Page 6 - Two graphs only. Page 7 - Table only. Page 8 - Graph only. |
| 14 | Review of Department of Agriculture | Cover Sheet, covering letter and Table of Contents. Pages 1 and 2. Page 3 - All except last paragraph. Page 4 - All matter except that following the heading "Observations". |
| 15 | Review of Agricultural Protection Board | Cover Sheet, covering letter and Table of Contents. Page 1- All. Page 2 - All except the matter after the heading "Observations". |
| 16 | Appears to be copy of 15 | |
| 17 | Review of Rural Adjustment and Finance Corporation of WA | Covering letter and Table of Contents. Pages 1-5 inclusive. Page 6 - Financial data only. Page 7 - Financial data only. Pages 8 and 9. Page 10 - Financial data under headings "Fixed Assets" and "Loans" only. Page 11 - Financial data under headings "Trust Fund Account at Treasury" and "Debt Capital" only. Page 12 - Financial data only. |
| 18 | Review of Department of Corrective Services | Cover Sheet and Table of Contents. Page 1 Page 2 - First paragraph only. Pages 6 - 12. Page 13 - First two paragraphs and last paragraph only. Pages 14 and 15. Page 16 -First 3 paragraphs only. |

| Item No | Report Title or subject | Non-exempt factual/ statistical matter |
|---------|--|--|
| 19 | Report on the Fisheries Department of WA | Cover Sheet and Table of Contents. Page 1- All except last sentence in 2.4. Page 4 - Part 3.1. Page 5 - Part 3.5 and last 3 paragraphs on this page. Page 6 - First 5 paragraphs. Page 12 - Part 6.1. Pages 20 - 28 inclusive. Last page disclaimer. |
| 20 | Review of State Print | Cover Sheet. Page 2 - All except first 2 paragraphs. Pages 3 and 4- - All. Page 5 - All except second sentence under heading Premises and second sentence under heading Fixed Assets. Page 6 - All. Page 7 - First 2 paragraphs and last paragraph plus revenue figures. Page 13 - Last paragraph. Page 14 - All. |
| 21 | Appears to be a copy of 20 | |
| 22 | Review of Cleaning Services | Cover Sheet. Page 1 - All except paragraphs 2 and 3. Page 2 - First paragraph and Table only. Page 3 - Part 5.0. Appendix 1. |
| 23 | Appears to be a copy of 22 | |
| 24 | Review of Taxi Control Board and Roger Graham's Report | Cover Sheet. Page 2 - Except recommendations. Page 7 - Except for last paragraph. Page 8 - Dot point 6 only. |
| 25 | Review of DOPLAR and DOSHWA | Cover Sheet and Table of Contents. Page 3 - First paragraph except last sentence. Pages 6-8. Page 12 - Comparative Table only. Pages 14 and 15. Page 18 - Except last 3 paragraphs. Pages 21-23 - Graphs. |
| 26 | The WA Tourism Commission Finance and Operations Review Report | Cover Sheet and Covering Letter. Pages 1- 5. Page 6 - except Executive Summary Comments. Page 7 - Funding History Table and first paragraph following. Page 9 - Staff numbers, first two sentences only. Pages 11 and 12. Page 13 - First paragraph only. |

| Item No | Report Title or subject | Non-exempt factual/ statistical matter |
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| 26 (cont.) | The WA Tourism Commission Finance and Operations Review Report (cont.) | <p>Pages 15, 16, 18-22 - Tables of Performance Indicators only.</p> <p>Page 24 - All under heading Background.</p> <p>Page 26 - Last 2 paragraphs.</p> <p>Page 27 - First 4 and last 2 paragraphs.</p> <p>Page 28.</p> <p>Page 29 - Last 2 paragraphs.</p> <p>Pages 30 and 31.</p> <p>Page 32 - All except paragraphs under heading Other Comments.</p> <p>Page 33 - Table of Performance Indicators only.</p> <p>Appendix 1.</p> <p>See above comments.</p> <p>Cover Sheet and Table of Contents.</p> <p>Pages 1-7.</p> <p>Page 8 - First paragraph.</p> <p>Page 10 - Part 3.3 Statutory Arrangements.</p> <p>Page facing page 12 and first sentence on page 12.</p> <p>Appendices I- VI</p> |
| 27 | Appears to be a preliminary draft of 26 | . |
| 28 | Aboriginal Affairs Planning Authority - Review of Public Sector Finances. | |
| 29, 30 & 31 | Report for the Independent Commission to Review Public Sector Finances in WA, 30 April 1993 (3 copies) | <p>Cover Sheet.</p> <p>Pages 1 and 2.</p> <p>Page 3 - Except last paragraph.</p> <p>Page 5 - Except first paragraph.</p> <p>Page 6.</p> <p>Page 7 - Except paragraph 3.</p> <p>Page 19.</p> <p>Tables of Diagnostic Results at end of report except last table entitled Estimated Annualised Benefit Range.</p> |
| 32 | Department of Agriculture | Nil. |
| 33 | Report on the Financial Position, Current Budgets, and Financial Parameters for the Operation of the Hospital Laundry and Linen Service | <p>Cover Sheet and Index.</p> <p>Appendices I, I(b), II, III(d), III(e).</p> |
| 34 | Review of the requirements for the Full Commercial Independence of the WA Hospital Laundry and Linen Service. | <p>Cover Sheet and Table of Contents.</p> <p>Page 1 - First paragraph, Part 1.2.</p> <p>Page 2.</p> <p>Page 8 - Part 3.0.</p> <p>Page 14.</p> <p>Page 15 - First paragraph under heading "Legislation" only.</p> <p>Page 16.</p> <p>Page 18 - Paragraphs under heading "Legislation".</p> |

| Item No | Report Title or subject | Non-exempt factual/ statistical matter |
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| 34 (cont.) | Review of the requirements for the Full Commercial Independence of the WA Hospital Laundry and Linen Service. (cont.) | Page 20. Appendix 3. Cover Sheet and Table of Contents. |
| 35 | Hospital Laundry and Linen Service Draft Business Plan. | |
| 38 | Report of the Education Sub-Committee | Cover Sheet and Table of Contents. Page 3 - Table 1. Page 4- Figure 1. Page 11 - Table 2. Page 12 - Table 3. |
| 39 | Appears to be a copy of 38 | |
| 40 | Appendices to the Report of the Education Sub-committee | Cover Sheet and Table of Contents. First Report Page 1 - Preamble only. Page 6. Pages 7-9, 10-15, 17-20, 21-31. Page 47 - First 2 sentences of last paragraph. Pages 49 and 50. Page 53 - Table and following 2 paragraphs. Page 56 under heading Cleaning - first 3 paragraphs and under heading Gardening on the same page, the first sentence and Table. Page 57 under heading Bus Services - 3 paragraphs. Second Report Page 3 - First 2 paragraphs. Pages 6 - 12, 14, 15, 17, 18. Page 36 - All except first paragraph. Pages 38 and 39 - Budget figures for 1992/93. Pages 40, 41 and 42 - Budget figure. Appendix I |
| 41 | Department of Marine and Harbours | Cover Sheet. Parts 1 and 2. Part 3.1, 3.2, 3.3 except second paragraph. Part 4.1 Part 4.2 - Financial data except last 4 paragraphs. Part 5 - financial data only. Part 5.1, 5.1.2, and 5.1.3-5 except recommendations. Part 5.2.2 and 3 - except recommendations. Part 5.3 - except recommendations. Appendices I, II and III. |
| 42 | Fremantle Port Authority | Cover Sheet and Table of Contents. Page 2. Page 4 - Part 1.1. Part 5 - All. Page 8 - Part 1.5 - first paragraph only. |

| Item No | Report Title or subject | Non-exempt factual/ statistical matter |
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| 42 (cont.) | Fremantle Port Authority (cont.) | <p>Page 9 - Part 1.6 - First two sentences of first paragraph only. Part 1.7 - first two paragraphs only. Page 10 - Part 1.8 - first four paragraphs only. Page 11 - Part 2. Part 2.1 - first paragraph only and first sentences of the second and fourth paragraphs. Page 12 - Part 2.3 - first paragraph only. Page 13 - Last paragraph. Page 14 - First 2 paragraphs. Page 15 - First paragraph of Part 5 and all of Part 6. Page 16 - All. Page 17 - First paragraph.. Page 18. Appendices I, II, III, IV, VII, VIII, IX, X.</p> |
| 43 | Government Accommodation | <p>Cover Sheet and Table of Contents. Page 7 - Parts 3.0, 3.1, 3.2. Page 8 - First 2 paragraphs. Pages 9-12. Page 13 - Except last 2 paragraphs. Page 14 - Except first paragraph. Page 23 - Last paragraph. Page 24 - Table. Appendices 1, 2 and 3.</p> |
| 44 | Property Holdings - State Housing, April 1993 | <p>Cover Sheet and Table of Contents. Page 1 - First paragraph only. Pages 7-17. Page 18 - Except paragraphs 2 and 4. Page 19. Page 20 - Except first 2 paragraphs. Page 21. Appendices 1, 2 and 3.</p> |
| 45 | Land Development | <p>Cover Sheet and Table of Contents. Pages 8-13. Page 14 - Financial table only. Pages 15-25 except last two paragraphs on page 25. Part 3.5 - page 36 and staffing figures on page 37. Appendices 1, 2 and 3.</p> |
| 46 | Review of Finances and Operations of the Water Authority of Western Australia | Nil. |
| 47 | Review of the Public Trustee, April 1993 | <p>Cover Sheet and Table of Contents. Page 2 - All. Page 3 - All. Page 4 - First table of financial data only. Page 5 - All. Page 6 - Part 3.2 "Trust Management." Page 7 - All. Page 8 - Both tables.</p> |

| Item No | Report Title or subject | Non-exempt factual/ statistical matter |
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| 47 (cont.) | Review of the Public Trustee, April 1993 (cont.) | Page 9 - Second table only. Page 10 - Figures relating to CRF and fees raised on investment income. Page 11 - Operating Surplus chart only. Page 12 - Revenue and Expenditure Charts. Page 13 - First Table only. Page 16 - Bibliography and References. |
| 48 | Review of the Police Department | Cover Sheet. Pages 2-6, 11, 17 and 33. Page 7 - parts 5.3 and 5.4 only. Page 10 - Part 7.0. Page 12 - Two tables of comparative figures. Page 22 - First paragraph of Part 12.0 only. Page 23 - First sentence and next paragraph under Part 13.0; First 3 paragraphs under Part 14.0 only |
| 49 | Overview of the Contingency Costs of the Western Australian Police Department | Cover Sheet Nil. |
| 58 | Letter to Commission on Public Sector Finances about the Western Australian Coastal Shipping Commission ("Stateships") and Westpac Banking Corporation ("Westpac"). | Nil. |
| 59 | Letter to Mr L McCarrey, Commission to Review Public Sector Finances, about a limited review of the Ministry of Sport and Recreation | Page 2 - All. |
| 60 | Letter to Mr C W MacKinnon about the proposed review of the Department of Minerals and Energy | Nil. |
| 68 | Public Health in Western Australia: Notes for Commission Reviewing Public Sector Financing in WA | Nil. |

| Item No | Report Title or subject | Non-exempt factual/ statistical matter |
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| 70 | Submission on Government Expenditure on Aged Care to Commission to Review Public Sector Finances | Nil. |
| 71 | Submission on Government Expenditure on Disability Services to Commission to Review Public Sector Finances | Nil. |