

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

**File Ref: F2111999
Decision Ref: D0282000**

Participants:

Highway Construction Pty Ltd
Complainant

- and -

**Department of Contract and
Management Services**
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 6 – scope and meaning – whether documents of a kind described in clause 6(1)(a) – whether disclosure contrary to the public interest – whether ongoing deliberations – disclosure to complainant of its own document – section 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), 6(1) and 7.

State Supply Commission Act 1991 (WA)

Re Highway Construction Pty Ltd and State Supply Commission [2000] WAICmr 25

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

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

Ministry for Planning v Collins (1996) 93 LGERA 69

DPP v Smith (1991) 1 VR 63

Re Murtagh and Commissioner for Taxation (1984) 54 ALR 313

DECISION

The agency's decision is varied. Documents 1, 15 and 16 are exempt under clause 1(1)(d)(i), but the disputed documents are not otherwise exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

25 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 Department of Contract and Management Services ('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. The background to this complaint is also described in my reasons for decision in *Re Highway Construction Pty Ltd and State Supply Commission* [2000] WAICmr 25. 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. In September or October 1998, the Minister for Works; Services established an independent review of the tender process in respect of Contract No. 573/97. Officers of the agency and officers of the State Supply Commission jointly conducted the review. At the end of October 1998, members of the review group met with the complainant and provided feedback on their findings. However, the complainant was not given a copy of the report of the review team.
3. On 26 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 22 September 1999, Mr N Williams, Acting Director Strategic and Business Services, advised the complainant that the agency had identified 27 documents as falling within the ambit of the access application. The agency granted the complainant access to 1 document (Document 6), but refused it access to 26 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 28 September 1999, the complainant applied for internal review of the agency's decision. On 11 October 1999, the internal reviewer confirmed the original decision. 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 before me, I informed the parties in writing of my preliminary view of this complaint including my reasons. It was my preliminary view that 1 document (Document 5) 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 Document 5. I received a further submission in writing from the agency maintaining its claim for exemption under clause 5(1)(b). In addition, the agency claimed exemption under clause 1(1)(d)(i) for the documents remaining in dispute. My office prepared a summary of the agency's reasons for those claims and provided a copy 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), I provided the parties with a supplementary preliminary view. I remained of the preliminary view that the disputed documents may not be exempt under clause 5(1)(b), although certain documents might be exempt under clause 1(1)(d)(i).
8. On 14 April 2000, the agency responded to my letter of 6 April 2000. The agency informed me that it had come to the view that works contracts issued by the MRWA were not subject to supply policies issued under the provisions of the *State Supply Commission Act 1991*. As a result, the agency withdrew its claim for exemption for the documents under clause 5(1)(b). However, the agency maintained its claim for exemption under clause 1(1)(d)(i) and, in addition, claimed exemption for some of the documents under clause 6(1).

THE DISPUTED DOCUMENTS

9. There are 25 documents in dispute in this matter (Documents 1-4, 7-27). Those documents are listed and described on a schedule prepared by the agency and given to the complainant and to my office. Although the agency's schedule lists Documents 20-27 separately, in its submissions the agency refers to those documents as one document, Document 20 (folios 51-72), with the cover sheet to that document (folio 73) as Document 19. I refer to the documents by the numbers assigned to them in that schedule. In general terms, the disputed documents consist of working papers of the review team, including handwritten notes, lists of questions, working draft summaries of issues and findings and notes for a meeting with the complainant, correspondence between Ministers, various correspondence between the agency and Ministers, letters and a submission from the complainant to Ministers, and a working draft report containing a summary of the findings of the review.

THE EXEMPTIONS

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

10. 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.”*

11. 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. The FOI Act recognises that in clause 1 and in the range of documents that are protected from potential disclosure by this exemption.
12. 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.

13. 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.
14. 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

15. The submissions of the agency in this matter are similar to the submissions made to me by the State Supply Commission in *Re Highway Construction Pty Ltd and State Supply Commission*. The agency submits that each of the disputed documents was prepared by its officers for possible submission to Cabinet, and in order to brief the Minister for Transport. 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 relating to 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*”. The agency submits that the exemption is not limited to documents such as written Ministerial briefing notes but applies to any document prepared for the purposes of briefing a Minister including, for example, notes prepared for a verbal briefing.

The complainant’s submissions

16. 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.

17. The complainant submits that it considers that the review was not for that purpose. 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.
18. 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

19. I have examined the disputed documents. As to the general exemption in clause 1(1), in my view, none of the documents records any deliberation or decision of an Executive body and their disclosure would not reveal any such deliberations or decisions.
20. 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.
21. 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.
22. 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.

23. 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 159). 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. It is the matter prepared for the purpose of that briefing that will be exempt under clause 1(1)(d)(i).
24. 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. Document 17 is a letter from the complainant to the Minister for Works; Services enclosing a copy of a letter sent by the complainant to the Minister (Document 18) together with the complainant's submission to the Minister (Documents 19-27). Taking into account the fact that those documents originated with the complainant and clearly were not prepared for the purpose of briefing a Minister, I do not consider that they are exempt under clause 1(1)(d)(i) from disclosure to the complainant and I find accordingly.
25. Clearly, in my view, the memoranda passing between the Minister and the Minister for Works; Services (Documents 3 and 4) were not prepared for the purpose of providing a briefing to a Minister. I consider that those documents are routine administrative communications made for the purpose of obtaining agreement about a review that crossed Ministerial portfolios and was to be jointly conducted by officers of the agency and officers of the State Supply Commission. Similarly, Document 2 appears to me to be an administrative communication from a Minister to the Executive Director of the agency. In my view, none of those documents contains matter that was prepared for the purpose of providing a briefing to a Minister. Accordingly, I find that Documents 2, 3 and 4 are not exempt under clause 1(1)(d)(i).
26. Documents 1, 15 and 16 appear to be advice from the Executive Director of the agency to the Minister following the review and a subsequent debriefing given to the complainant by the agency. I accept that those documents contain information that was prepared to brief the Minister in relation to a matter about which the Minister intended to report to Cabinet. In my view, it is clear that those documents were brought into existence for that purpose. Accordingly, I find that Document 1, Document 15 and Document 16 are exempt under clause 1(1)(d)(i).

27. Documents 7 and 8 contain questions, and notes in respect of questions, that were to be put to certain people by the review team. Those documents appear to me to have been prepared as *aides-memoire* for the review team rather than for the purpose of briefing the Minister, and there is no material from the agency to persuade me that the documents were prepared for the purpose of briefing a Minister. Document 12 appears to me to be an *aide-memoire* prepared for the briefing session with the complainant. In my view, its heading and contents indicate the purposes for which it was created. There is no information in that document or from the agency that persuades me that Document 12 was prepared for the purpose of briefing a Minister. Accordingly, I find that Document 7, Document 8 and Document 12 are not exempt under clause 1(1)(d)(i).
28. Documents 9, 10 and 11 appear to be administrative documents. Document 10 consists of two copies of a comparative table of issues, one with handwritten additions. Document 11 is a 13-page working draft report containing a summary of findings. Given that Document 9 and Document 11 are stated on their face to be working drafts, and the agency has provided nothing to establish that their intended ultimate purpose was to brief a Minister, I do not consider that those documents were prepared for that purpose. On their face, none of the three documents appears to me to have been prepared for the purpose of briefing a Minister. To the contrary, the form and contents of those particular documents suggest that they were prepared for the purposes understood by the complainant. Accordingly, I find that Documents 10 and 11 are not exempt under clause 1(1)(d)(i).
29. Document 9 lists, in table form, issues raised by the complainant and summarises the findings made by the review team in respect of each of those issues. It includes a working draft copy of a 14-page report containing a summary of findings. The agency submits that folio 128 of Document 9 is the same as the attachment to Document 1. I have found, in paragraph 26 above, that Document 1 is exempt under clause 1(1)(d)(i). Although folio 128 is similar to the attachment to Document 1, clearly, in my view, they are not copies of the same document. Folio 128 bears handwritten notations and other marks that do not appear on the attachment to Document 1. Although Document 1 and its attachments were prepared to brief the Minister, it does not follow, necessarily, that folio 128 of Document 9 was prepared for that purpose. There is nothing before me that establishes the purpose for which Document 9 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 9 was justified. Accordingly, I find that Document 9 is not exempt under clause 1(1)(d)(i).
30. The agency's submission to me dated 14 April 2000 makes no reference to Document 13 and it appears to me that the agency might have withdrawn its claims for exemption for that document. In any event, Document 13 consists of a facsimile cover sheet and a one-page attachment sent from Westrail to the State Supply Commission. It appears to me that the attachment was sent to the agency to assist in the review process and there is no material put before me by the agency that persuades me that the facsimile cover sheet or the attachment

were prepared for the purpose of briefing the Minister. Accordingly, I find that Document 13 is not exempt under clause 1(1)(d)(i).

31. Document 14 consists of pages of handwritten notes. The document is unsigned and undated. Document 14 appears to consist of working notes made by a member of the review team. In my view, Document 14 was not prepared for the purpose of briefing a Minister. Accordingly, I find that Document 14 is not exempt under clause 1(1)(d)(i).
32. As I have found that Documents 1, 15 and 16 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 6 - deliberative processes

33. The agency also claims exemption under clause 6(1) for Documents 2-4, 7-12, 14-16 and 20-27. I need not deal with that claim in respect of Documents 15 and 16 because I have found those documents to be exempt under clause 1(1)(d)(i).
34. Clause 6, so far as is relevant, 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."

35. Clearly, the requirements of both paragraphs (a) and (b) must be satisfied in order to establish a valid claim for exemption under clause 6(1). I have discussed and considered the purpose of the exemption in clause 6 and the meaning of the phrase "deliberative processes" in a number of my formal decisions. I agree with the view of the Commonwealth Administrative Appeals Tribunal ('the Tribunal') in *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 that the deliberative processes of an agency are its "thinking processes", the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action: see also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69 at 72.

36. I also agree with the Tribunal's view that:

"It by no means follows, therefore, that every document on a departmental file will fall into this category...Furthermore, however imprecise the dividing line first may appear to be 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 an agency..."

It is documents containing opinion, advice, recommendations etc. relating to the 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"..."

37. In my view, it would be contrary to the public interest to prematurely disclose documents while deliberations in an agency are continuing, if there is evidence that the disclosure of such documents would adversely affect the decision-making process, or that disclosure would, for some other reason, be contrary to the public interest. In either of those circumstances, I consider that the public interest is served by non-disclosure. I do not consider that it is in the public interest for any agency to conduct its business with the public effectively "looking over its shoulder" at all stages of its deliberations and speculating about what might be done and why. I consider that the public interest is generally best served by allowing deliberations to occur unhindered and with the benefit of access to all of the material available so that informed decisions may be made.

The agency's submissions

38. The agency submits that the working papers of the review are, *prima facie*, part of the deliberative process. However, the agency does not specify any current deliberative process to which those documents relate. The agency submits that “*matter that would reveal the deliberative process is exempt if its disclosure would not be in the public interest*”. However, I do not consider that to be the correct test under clause 6. Clearly, the exemption in clause 6 applies to matter of a particular kind, specifically matter which would reveal opinion, advice, or recommendation, or consultation or deliberation that has taken place in the course of, or for the purposes of, the deliberative processes of the Government, a Minister or an agency, but only if its disclosure would, on balance, be contrary to the public interest. It is not sufficient to show that disclosure would not be in the public interest; it must be shown that disclosure would be contrary to the public interest, a different test in my view.
39. The agency informs me that the actions of government agencies in dealing with contracts and tendering are subject to challenge by contractors either administratively or in the courts. The agency submits that it is clearly in the public interest for agencies and Ministers to have access to independent and robust advice on matters that are in dispute. In preparing that advice, an investigator may identify and analyse possible weaknesses in an agency’s actions in order to form an opinion on them. The agency submits that such an analysis in the hands of a potential litigant would provide a checklist of possible claims and the bases on which such claims could be made. The agency submits that the disclosure of such information under the FOI Act would severely inhibit agencies and Ministers from seeking such reviews.
40. The agency also submits that, since the disputed documents canvass a wide range of issues and alternative conclusions that were to be tested by interview and further research, there is a danger in releasing information of that type which could be taken out of context or represented as official opinion when it is not.
41. The agency recognises that there is some public interest in releasing deliberative process matter used in an investigation to demonstrate that the investigation was thoroughly carried out. However, the agency submits that, balanced against that public interest, must be the detriment to the public interest that would be caused if investigators were inhibited from full and frank analysis of issues. In the circumstances of this matter, the agency submits that it is not in the public interest for the detailed workings of the review to be publicly revealed.

Clause 6(1)(a) - the nature of the information

42. I have examined each of the disputed documents. In my view, Documents 2, 3 and 4 are routine administrative documents relating to the mechanics of establishing the review. I do not consider that those documents contain matter of the kind described in clause 6(1)(a). Even if I did consider the information contained in those documents to be of a kind described in clause 6(1)(a), I would not consider their disclosure to be contrary to the public interest, given their

routine nature and, in any event, for the reasons given in paragraphs 45-55 below. Accordingly, I find that Documents 2, 3 and 4 are not exempt under clause 6(1).

43. Documents 7-12 and 14 are working papers as described in paragraph 9 above, and I accept, in a general sense, that those documents contain opinion and advice recorded in the course of and for the purpose of the review process and, if disclosed, would reveal something of the deliberations of the review team in the course of the two agencies' deliberative process of determining whether the tender was properly conducted. Therefore, in my view those documents contain information of the kind referred to in clause 6(1)(a).
44. Although the agency claims exemption under clause 6 for Documents 20-27, as I have explained in paragraph 24 above, those documents appear to me to have originated with the complainant. Together they comprise a submission by the complainant to the Minister for Transport detailing the complainant's points of complaint concerning the tender process. I cannot see how it would be contrary to the public interest to give the complainant access to its own documents, and the agency has made no submission on that point.

Clause 6(1)(b) - contrary to the public interest

45. The public interest is not defined in the FOI Act, nor in any other similar legislation but, when it appears in the FOI Act as a limit on exemptions, it is used to balance competing interests, specifically the public interest in applicants being able to exercise their rights of access under the legislation and the public interests contained in the exemption clauses. 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.
46. 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 *DPP v Smith* [1991] 1 VR 63, the Victorian Supreme 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."

47. In *Re Murtagh and Commissioner for Taxation* (1984) 54 ALR 313, the President of the Tribunal outlined the general principle applying to the public interest test under s.36(1)(b) in the *Freedom of Information Act 1982* (Commonwealth), the equivalent to clause 6(1), and said, at p.323:

"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."

48. In the circumstances of this complainant, the particular deliberative process to which the disputed documents relate is the review of the tender process. That process is clearly at an end and both the complainant and the Minister for Transport have been informed of the review team's findings. Therefore, I do not consider that disclosure of the disputed documents could adversely affect the decision-making process of the review team. As I understand it, following completion of the review, the contract for the widening of Loftus Street was formally awarded, having been deferred pending the outcome of the review and that major works pursuant to that contract have been carried out. There is nothing before me to indicate that the Minister proposes to take any further action in respect of the matter, or that there are any other deliberative processes on foot in respect of it. In those circumstances, it seems that there are no current deliberations that would be adversely affected by the disclosure of the disputed documents such that it would be contrary to the public interest to disclose the documents.
49. I recognise a public interest in the accountability of agencies and officials of agencies for the manner in which they perform their public duties. Part of that accountability, in my view, includes a requirement that established policies and procedures are adhered to unless there is good reason not to do so. I also recognise, as the agency appears to, a public interest in ensuring that complaints about alleged breaches of policy and procedure by an agency are properly investigated and that reviews, such as occurred on this occasion, are thorough and fair. In my view, those public interests weigh in favour of disclosure.
50. I also recognise a public interest in persons (including organisations) being as fully informed as possible of the basis of government decisions that directly affect their interests and of persons who make serious complaints to government being properly informed of the action taken in respect of the complaints, the findings and the basis of the findings. In the particular circumstances of this matter, I recognise a public interest in a person in the position of the complainant - an unsuccessful tenderer for a major government contract - being properly informed of the reasons why its tender was not accepted. Although there have clearly been several "debriefing sessions" between the complainant and the relevant agencies, the complainant submits that it has not received any written

advice as to the outcome of the review, and there is nothing in the material before me which contradicts that submission.

51. Balanced against those public interests, the agency submits that disclosure would inhibit a full and frank analysis of issues by investigators. I do not accept that that claim is reasonably based. It seems to me that the adequacy of an administrative investigation is more likely to be dependent on the skills of the investigator, rather than on maintaining secrecy. Further, I consider that the likelihood of disclosure of documents through the FOI process is likely to enhance rather than detract from the quality of such an inquiry. After all, public scrutiny of, and participation in, the decision-making processes of government is one of the stated aims of FOI legislation and, to give effect to that goal, access to relevant information is a necessity.
52. It appears to me that the agency is relying primarily on a variant of the "candour and frankness" argument as a reason for non-disclosure. The "candour and frankness" argument has been frequently raised in other jurisdictions to deny access to documents and it has been consistently rejected by the Tribunal as being without foundation. For example, in *Re Murtagh*, the Tribunal said at 326:

"The candour and frankness argument is not new. It achieved pre-eminence at one time but has now been largely limited to high level decision-making and to policy-making.

...

No cogent evidence has been given to this Tribunal either in this review or, so far as we are aware, in any other, that the enactment of the FOI Act 1982 has led to an inappropriate lack of candour between officers of a department or to a deterioration in the quality of the work performed by officers. Indeed, the presently perceived view is that the new administrative law, of which the FOI Act 1982 forms a part, has led to an improvement in primary decision-making."

53. I agree with those comments. After six years of operation of the FOI Act in Western Australia, and considering the material disclosed under the FOI Act by agencies, both in the first instance and following the external review process, I would expect there to be some persuasive material available to support the agency's claims, other than a mere statement of expected detriment to a public interest, if those claims were reasonably based. Nothing of that nature is before me. Certainly, the contents of the documents do not suggest any such outcome.
54. In the case of this exemption, the complainant is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; the complainant is entitled to access unless the agency can establish that disclosure of the particular deliberative process matter would be contrary to the public interest. In the absence of any material of that kind, I do not consider that the agency has discharged the onus on it under s.102(1) of the FOI Act to establish that disclosure would be contrary to the public interest.

55. In balancing all of those competing interests, I have reached the view that the public interests favouring disclosure, and particularly the public interest in the accountability of agencies, outweigh those favouring non-disclosure in this instance. In respect of Documents 20-27, as I have said in paragraph 24 above, they comprise a submission by the complainant to the Minister for Transport. I fail to see how any detriment to the public interest could result from disclosure to the complainant of its own document, and I consider the claims for exemption for those documents nonsense. For the foregoing reasons, I am not persuaded that the disclosure of Documents 7-12, 14 and 20-27 would be contrary to the public interest. Accordingly, I find that those documents are not exempt under clause 6(1).