

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

**File Ref: F1651999
Decision Ref: D0292000**

Participants:

Geethanjali Mendis
Complainant

- and -

**Electricity Corporation trading as
Western Power Corporation**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to a wind farm feasibility study – clause 10(4) – whether the documents contain information relating to the commercial affairs of the agency – meaning of “commercial” – whether the commercial affairs of the agency could reasonably be expected to be adversely affected by disclosure – public interest.

Freedom of Information Act 1992 (WA) s.102(3); Schedule 1 clauses 4(2), 10(3), 10(4).

Electricity Corporations Act 1994 (WA) ss. 28 and 31

Electricity Distribution Regulations 1996

Electricity Transmission Regulations 1997

Re Slater and State Housing Commission of Western Australia [1996] WAICmr 13

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

Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 108 ALR 163

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

DECISION

The decision of the agency is varied. The disputed matter is exempt under clause 10(4) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

1 June 2000

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Electricity Corporation trading as Western Power Corporation ('the agency') to refuse Dr Geetha Mendis ('the complainant') access to documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. I understand that the agency has been researching the feasibility of using wind-generated power as an alternative energy source. As a result of those inquiries, one of the sites identified by the agency for possible development as a wind farm is in Albany. The complainant is the owner of a property adjacent to the proposed wind farm site in Albany.
3. On 17 March 1999, the complainant made an application to the agency under the FOI Act for access to certain documents relating to the wind farm feasibility study. In particular, the complainant sought access to those documents containing details of options under consideration for the location of overhead power lines, and details of the evaluation of alternative sites considered by the agency near Geraldton.
4. The agency gave the complainant full access to 129 documents and access to edited copies of 22 documents, and refused her access to 11 other documents. The agency also gave the complainant a schedule listing the documents that it had identified as falling within the scope of the access application and the exemption clauses claimed in respect of those documents to which access was refused, either in full or in part. On 3 May 1999, the agency informed the complainant that an additional document had been found. However, the agency refused access to that document.
5. The complainant applied to the agency for an internal review of its decision. On 15 July 1999, the internal reviewer informed the complainant that he had decided to release some additional material, but otherwise confirmed the agency's initial decision refuse access to the documents, either in full or in part. However, exemption for some of the documents was claimed under different clauses to those previously cited.
6. On 14 September 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. I obtained the disputed documents from the agency. Inquiries were made with the parties to determine whether it was possible to resolve this complaint by conciliation. Although conciliation did not appear initially to be an option, after I had informed the parties in writing of my preliminary of this complaint, both parties made considerable concessions. The agency released some additional material to the complainant and the complainant withdrew part of her complaint.

8. The result of the parties making those concessions is that the disputed documents have been reduced in number from 18 to 2 and only parts of those 2 remain in dispute. The agency claims that the disputed matter is exempt under clauses 4(2), 10(3) and 10(4) of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENTS

9. Document 4 on the agency's schedule is an internal agency memorandum dated 30 April 1998 containing a report on the assessment of the Albany Wind Project. Document 6 on the agency's schedule is an economic analysis of the Albany Wind Project, and consists of six pages.

THE EXEMPTIONS

10. The agency claims that the matter deleted from Document 4 is exempt under clause 10(3) and 10(4) and the matter from Document 6 is exempt under clause 10(4) and 4(2) of Schedule 1 to the FOI Act. Clause 10, so far as is relevant, provides:

"10. The State's financial or property affairs

Exemptions

(1)...

(2)...

(3) *Matter is exempt if its disclosure -*

(a) *would reveal information (other than trade secrets) that has a commercial value to the agency; and*

(b) *could reasonably be expected to destroy or diminish that commercial value*

(4) *Matter is exempt matter if its disclosure -*

(a) *would reveal information (other than trade secrets or information referred to in subclause (3)) concerning the commercial affairs of an agency; and*

(b) *could reasonably be expected to have an adverse effect on those affairs.*

(5)...

Limit on exemptions

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

(a) Clause 10(4)

11. In my view, the exemption in clause 10(4) is directed at protecting from adverse effects certain of the activities of State Government agencies so that the commercial position of those agencies will not be undermined by the accountability requirements of the operation of the FOI Act. However, unlike FOI legislation in other jurisdictions, in which the term "business, professional, commercial or financial affairs" appears in the equivalent exemption provisions, the exemption in subclause 10(4) is concerned only with information relating to the commercial affairs of an agency. Nevertheless, it is my view that the commercial affairs of an agency may also include its business and financial affairs, although that is not necessarily the case in every instance.
12. The Concise Oxford Dictionary of Current English, 8th Edition, defines "commercial" as meaning "of, engaged in, or concerned with, commerce" and "commerce" as meaning "financial transactions, esp. the buying and selling of merchandise, on a large scale". In my decision in *Re Slater and State Housing Commission of Western Australia* [1996] WAICmr 13, at paragraph 30, I considered the scope and meaning of the words "commercial affairs" and said:

“... the mere fact that there are commercial aspects to the agency’s operations is not sufficient, in my view, to conclude that a document acquired to assist the agency in making commercial decisions necessarily contains information “concerning the commercial affairs of the agency”. Whether a particular document is one that concerns the commercial affairs of the agency depends on a proper characterisation of the contents of the document. A business plan, for example, may be a document that contains information falling within the description of clause 10(4)(a).”

The agency’s submission

13. The agency submits that it is a commercial organisation operating in a commercial marketplace where it competes with private companies to supply electricity in Western Australia. The agency submits that, under s.28 and s.31 of the *Electricity Corporations Act 1994*, it is required to return a profit wherever possible. The agency informs me that, under Part 6 of the *Electricity Corporations Act 1994*, the *Electricity Distribution Regulations 1996*, the *Electricity Transmission Regulations 1997* and related Orders, private companies may supply electricity to their customers. Private companies have a statutory right of access to the agency’s power grid to enable them to transfer electricity and, as a consequence, the agency is no longer the only supplier of electricity in Western Australia.

14. The agency informs me that there are a number of private companies in Western Australia who are interested in producing power from wind farms and that at least one of those companies has taken steps towards the establishment of wind farms in certain areas of the State. The agency submits that another of those companies has publicly stated that it has chosen a site for a wind farm and that it will compete directly with the agency for the sale of electricity to consumers.
15. The agency also claims that fuel is the major cost of electricity production and that much of the disputed matter consists of details about the amount and type of fuel used, and intended for use, by the agency in its power stations. The agency submits that disclosure of that kind of information would result in an adverse effect on the agency's commercial affairs. I summarise potential the adverse effects identified by the agency as follows:
 - The agency's bargaining position with fuel suppliers would be less effective if information about the agency's intended use and mix of fuel is in the public domain because suppliers would adjust their prices based on the agency's own projections, making certain fuels more costly to purchase.
 - Disclosure of information relating to costs of capital, fuel and maintenance would enable a competitor to calculate the running costs of the wind farm and undercut the agency in its financial dealing with suppliers and financiers.

Consideration

16. The agency is the approved trading name of a body corporate called the Electricity Corporation established under s.4(1) of the *Electricity Corporation Act 1994*. The Electricity Corporation is an agent of the Crown, but it is not part of the Public Service. The functions of the agency are set out in s.28 of the *Electricity Corporation Act 1994* and include, among other things, the generation, acquisition, exchange, transportation, distribution, marketing and supply of electricity.
17. As the agency has itself submitted, its primary function is to generate, acquire, exchange, transport, distribute, market and otherwise supply electricity. It appears to me, therefore, that the agency is in the business of producing and selling electricity. I accept that there are commercial aspects to the agency's business. Further, having examined the disputed matter and considered it in context, I am satisfied that it relates to the agency's commercial affairs concerning the supply of electricity in Western Australia and that its disclosure would reveal information about the commercial affairs of the agency. The next question is whether its disclosure could reasonably be expected to have an adverse effect on those affairs.
18. I accept the claim that the agency is required, wherever possible, to return a profit to the State and, ultimately, to the people of Western Australia. I also accept that there are private companies interested in developing businesses that would supply wind-generated power to consumers in Western Australia. To the

extent that the agency and private companies are pursuing the same goal of producing and selling wind-generated power, I accept that the agency is in competition with the private sector to supply power at competitive rates. I also accept that the cost of fuel is a major cost in the production of electricity.

19. The phrase “*could reasonably be expected to*” appears in a number of other exemption clauses in the FOI Act. In *Attorney-General’s Department v Cockcroft* (1986) 10 FCR 180 at page 190, the Full Federal Court said that the words “*could reasonably be expected*” in the Commonwealth FOI Act were intended to receive their ordinary meaning and require a judgement to be made by a decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the stated consequences to follow if the documents in question were disclosed.
20. The meaning of the phrase was also considered by the Full Federal Court in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163. In that case it was held that, on an objective view of the evidence, there must be real and substantial grounds for expecting certain consequences to follow from the disclosure of documents. I accept that *Cockcroft* and *Searle* correctly state the test that is to be applied when considering the application of the exemptions in the WA FOI Act that contain the phrase “*could reasonably be expected*”. The standard of proof required does not have to amount to proof on the balance of probabilities. However, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasoned decision-maker: see the comments of Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 573.
21. I accept the submission that the disclosure of information in Document 4 relating to the type and amount of fuel projected for use by the agency would be likely to affect the price charged by suppliers. I accept that a supplier armed with knowledge about the agency’s preferred mix of fuel for power generation in the short and medium term could be expected to increase its current charges to the agency, especially if the agency intended to reduce its consumption in the future.
22. In my view, it is reasonable to expect that a supplier may adjust its fuel charges according to market demand and to maximise costs where demand for its products is limited. I accept the claim by the agency that the adverse effect of that action by suppliers is increased costs for fuel and, ultimately, a reduced return on investment for the agency and the State. Therefore, I am satisfied that that result is one that could reasonably be expected to follow from the disclosure of the disputed matter which is data concerning, among other things, fuel costs and comparison of fuel costs, and that the matter deleted from Document 4 is *prima facie* exempt under clause 10(4).
23. I also accept the submission that the information in Document 6 dealing with capital costs, fuel costs and maintenance, which includes projections concerning savings that could be achieved by the agency, is information of the kind that would enable a competitor to determine the agency’s costs in running the wind

farm. In my view, it is reasonable to expect that a competitor might use that information to its advantage in its financial dealings with financiers.

24. I accept the claim by the agency that a competitor would be able to compare its operating costs to those of the agency, reduce its charges to appear more competitive than the agency, and thereby negotiate a more favourable financial arrangement in its business dealings than the agency could achieve. The disputed matter in Document 6 includes financial projections based on fuel costs and I accept that the adverse effect on its commercial affairs includes increased costs for fuel that I have described in paragraph 22 above. Accordingly, I am satisfied that the deleted matter in Document 6 is, *prima facie*, exempt under clause 10(4) of Schedule 1 to the FOI Act.

Public interest

25. Pursuant to s.102(3) of the FOI Act, the onus is on the complainant to establish that disclosure of the disputed matter would, on balance, be in the public interest. I have not received any submissions from the complainant on that point. It is my understanding that the complainant is the owner of property adjoining the site of the wind farm at Albany. She has expressed concern that the public has not been fully informed by the agency of its reasons for choosing that particular site rather than some other site, either in Albany or elsewhere in the State.
26. The agency submits that there has been an ongoing public consultation process and a large amount of information has been given to the public and to the complainant in particular. The agency informs me that information about the site of the wind farm and why that site was chosen, details of machines to be used and the successful tenderer have all been made public. The complainant has not disputed those claims. I have been provided with a document by the agency that explains the agency's reason for choosing Albany as a site for the wind farm. The agency informs me that that document is publicly available. The agency also informs me that meetings have been held with landowners and other affected parties, including the complainant. In November 1998, a referral document concerning the wind farm proposal was submitted to the Department of Environmental Protection and that document was available for inspection in the agency's library in 1998. In the absence of any contradictory material from the complainant, I accept that information concerning the wind farm has been publicly released by the agency.
27. I recognise that there is a public interest in the accountability of the agency for its decision-making processes and in ensuring that the public is fully informed about the reasons for decisions, and the accountability of the agency, as a Government utility, for the manner in which it conducts its operations that directly affect the public. Those public interests favour disclosure of the disputed documents.

28. Balanced against disclosure, I recognise a public interest in the ongoing viability and effective operation of the agency, and in its continuing ability to deliver efficiently an essential service to the community, and a public interest in maintaining the confidentiality of some parts of the agency's operations so that the agency can maximise the return to the State and keep the cost of supplying power to consumers at a reasonable level.
29. In balancing the competing public interests in respect of the particular information remaining in dispute, I am not persuaded that the former outweighs the latter in this instance. I am satisfied that the agency has made available to the public generally, and to the complainant in particular, information concerning the wind farm and the reasons for Albany being chosen as the preferred site. In addition, relevant material was released to the complainant by the agency during the external review process that satisfies, as far as it is possible to do so, the public interest in informing her of the reasons for the selection of the site and other information concerning the operation of the project. I do not consider that the public interest in the accountability of the agency necessarily requires the disclosure of the kind of financial and technical details concerning the wind farm proposal that are contained in the deleted matter. Accordingly, I find that the disputed matter is exempt under clause 10(4) of schedule 1 to the FOI Act.
30. The agency also claims that Document 4 is exempt under clause 10(3) and that part of Document 6 is exempt under clause 4(2). In light of my finding that the disputed matter is exempt under clause 10(4), I need not consider whether it is exempt for any other reason.
