

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

**File Ref: F1741998
Decision Ref: D0311999**

Participants:

**Ronald Charles Miles and Stephanie Amy
Miles**
Complainants

- and -

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

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – valuation report relating to compensation for land – clause 6 – deliberative processes – advice and opinion obtained and recorded for the purpose of the deliberative process of the agency – whether contrary to the public interest to reveal deliberations of agency.

FREEDOM OF INFORMATION – section 26 – whether documents exist – whether searches undertaken by the agency were sufficient – meaning of "document of an agency" – whether agency entitled to access documents of private contractor.

Freedom of Information Act 1992 (WA) s.26; 102(3); Schedule 1 clause 6(1); Schedule 2; Glossary, clause 4(1).

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

Ministry for Planning v Collins (1996) 93 LGERA 69 at 72.

Re Edwards and Electricity Corporation [1999] WAICmr 13.

Re Payne and Others and Electricity Corporation [1999] WAICmr 21.

DECISION

The decision of the agency that:

- the matter deleted from Document 120 is exempt under clause 6(1) of Schedule 1 to the *Freedom of Information Act 1992*; and
- no document of the kind described in paragraph 21 of my reasons for this decision exists in the agency

is confirmed.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

4 October 1999

REASONS FOR DECISION

BACKGROUND

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 Mr and Mrs Miles ('the complainants') access to parts of a document requested by them under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainants are the registered proprietors of land situated at Lot 83 Brownes Road, Coolup. For some time, the agency and the complainants have been discussing the question of compensation payable for the construction by the agency of power transmission lines on the complainants' property. In August 1998, the agency made the complainants an offer of a particular amount as compensation. However, that offer was rejected and the complainants' solicitor suggested that the agency should officially resume part of the complainants' land. I understand that no steps have been taken by the agency to commence the resumption process.
3. On 27 August 1998, an access application was made to the agency in which the complainants sought access under the FOI Act to various documents dating from 1 April 1987 to the date of the application, relating to the land in question. The agency identified 9 documents, but decided that 4 of those did not fall within the scope of the complainants' access application. The agency claimed the other documents, or parts of documents were exempt because they contained commercial or business information.
4. An internal review of that decision was conducted by the agency on 13 November 1998. The internal reviewer described the documents in more detail and cited exemption clauses 4, 6, 8 and 10 as grounds for the decision to refuse access to those documents. The documents to which access was refused were identified as Document 60 (an undated internal calculation sheet); Document 80 (letter from Valuer General's office dated 6 November 1996); Document 90 (letter from external valuer dated 9 March 1998); and Document 120 (letter from external valuer dated 20 May 1998).
5. On 25 November 1998, the complainants lodged a complaint with the Information Commissioner seeking external review of the agency's decision.
6. I obtained the disputed documents from the agency. After examining those documents and considering the material before me, the parties were informed of my preliminary view of this complaint. Following that step, both parties made concessions. As a result, the only matter remaining in dispute consists of parts of Document 120. The agency claims that the matter deleted from pages 6 and 7 of Document 120 is exempt under clause 6(1) of Schedule 1 to the FOI Act.

THE EXEMPTION

7. 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.”*

8. There are two parts to this exemption. To establish that the disputed matter is exempt under clause 6(1) an agency must satisfy the requirements of both paragraphs (a) and (b). Only when paragraph (a) of the exemption is satisfied is it necessary to consider paragraph (b) and whether disclosure of the disputed matter would, on balance, be contrary to the public interest. In the case of this exemption, the complainants are not required to demonstrate that disclosure of deliberative process matter would be in the public interest; they are entitled to access unless the agency can establish that disclosure of the particular matter would be contrary to the public interest.

9. I agree with the view taken by the Commonwealth Administrative Appeals Tribunal, in *Re Waterford and Department of Treasury (No 2)* (1984) 5 ALD 588, that the deliberative processes involved in the functions 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.

10. In my view, the matter deleted from pages 6 and 7 of Document 120 consists of professional opinions concerning the amount of compensation that the agency may offer to the complainants. I consider that the process of determining a price to be paid by way of compensation for land lawfully entered upon by the agency is a deliberative process of the agency: see *Re Edwards and Electricity Corporation* [1999] WAICmr 13, at paragraph 60: *Re Payne and Others and Electricity Corporation* [1999] WAICmr 21, at paragraph 37. I accept,

therefore, that the deleted matter comprises opinion obtained in the course of and for the purpose of a deliberative process of the agency and falls within the terms of clause 6(1)(a).

The agency's claims

11. In *Re Edwards* the agency claimed that disclosure of deliberative process documents would be contrary to the public interest for a number of reasons. The agency has informed me that it relies on similar arguments in this matter. I repeat the grounds advanced by the agency as set out in paragraph 63 of my reasons in *Re Edwards*.

- In negotiations for compensation, although a wide variety of advice is sought, that advice is used by the agency to formulate and revise its position, to make an offer, and then to negotiate for compensation.
- Not all the advice given is taken and some is superseded by more detailed or up-to-date advice and opinions. Disclosure of that advice does not necessarily disclose the agency's basis for negotiation. It is only a small part of the deliberative process by which that basis was determined. Even a full disclosure of all documents on the file will not reveal that part of the deliberative process that was involved in the assimilation of those documents and evaluation of their respective worth.
- The business of obtaining advice and opinions is ongoing while an FOI access application must necessarily be frozen in time at the time when it was made. Disclosure of information and documents available at one date is not necessarily indicative of the agency's current view. In fact it could be misleading. In this case it would be misleading, as the purpose of the advice is to obtain current market value at a date which is not relevant to the current date or the date of entry.
- In the course of an offer and negotiation, the agency does usually set out the basis of any offer made to the claimant in some particularity and with more clarity than is to be found in the background materials and advice. That advice may be written or oral or a mixture of both. The agency's offer to the claimant is necessarily a synthesis of information and experience, not all of which can be recorded on the file as a document.

The complainants' submission

12. Although the agency submits that it would be contrary to the public interest to disclose documents related to its deliberative process whilst the agency is still negotiating with the complainants over the amount of compensation, the complainants' submit that negotiations between the parties have broken down and that the agency has been requested to resume the land in question.

13. The complainants inform me that, in September 1998, they wrote to the agency refusing its offer of compensation because it fell short of the valuation placed on

the land by their own valuer. That letter also requested that the agency resume the land in question. I understand that no further offers of compensation have been made by the agency, but the process of resumption has not been initiated.

14. The complainants inform me that they are disadvantaged by this inactivity and submit that the failure by the agency to continue negotiations strongly indicates that the process of negotiation is at an end. In the circumstances, the complainants submit that, therefore, it is in the interests of both parties that each is aware of the negotiating basis of the other.

Public interest

15. In *Re Edwards*, at paragraph 66, I expressed the view that it would be contrary to the public interest to disclose documents whilst the deliberative process of determining appropriate compensation for land is continuing, if there is evidence that disclosure would adversely affect that process. For example, if parties are negotiating and the premature disclosure of a settlement figure that an agency is prepared to offer, or a negotiation range that an agency is prepared to operate within, could put the agency at a disadvantage in that process, then I consider that the public interest would be served by non-disclosure.
16. In my view, the factual circumstances in this matter are different from the circumstances in *Re Edwards* and in *Re Payne* where I considered that negotiations were clearly at an end and that the disclosure of documents that were out of date would not be contrary to the public interest. Although the complainants in this matter claim that negotiations are at an end, the agency considers that further discussions are possible.
17. Unlike the circumstances in *Re Payne*, there is no evidence before me that the agency understands the negotiations to be at an end, nor that the offer made in August 1998 was a final offer. Although some discussions ensued between the parties following a private valuer submitting an “informal claim” for compensation on behalf of the complainants in 1996, the documents before me indicate that the offer was the first offer made by the agency. The complainants’ solicitor’s response was to reject the offer without endeavouring to enter into negotiation. I am not prepared to accept the complainants’ submission that negotiations have broken down, when it appears to me that the complainants have made no effort to enter into negotiations and it appears to me that negotiations have not commenced.
18. As I understand it, the document on the basis of which the offer was made in this matter has been disclosed to the complainants. If the agency were to make a new and increased offer to the complainants, then it seems to me that negotiations could recommence. Unlike the situations in *Re Edwards* and in *Re Payne*, no offer has been made to the complainants based on the valuation advice in Document 120, nor has the valuation in that document to my knowledge been disclosed to the complainants. In those circumstances, I accept that the agency is entitled to refuse access to material that may jeopardise its future negotiating position.

19. The matter deleted from pages 6 and 7 of Document 120 appears to me to be the most recent record of recommendations made to the agency concerning the compensation issue. Some of that matter may also be relevant to the agency's current negotiating position and acquisition strategy. I consider that it would be contrary to the public interest to disclose that matter in the circumstances of this case because the disclosure of a settlement figure that an agency is prepared to offer, or a negotiation range that an agency is prepared to operate within, could put the agency at a disadvantage in any future negotiations with the complainants or the agency's attempts to resolve the outstanding issue of compensation.
20. Therefore, I find that the disputed matter is exempt under clause 6(1) of Schedule 1 to the FOI Act

Contractor's records

21. One additional matter raised by the complainants is that they seek documents evidencing the actual physical entry of the agency onto their property. The agency has indicated that it does not hold any documents containing that information. Section 26 of the FOI Act deals with the situation where, despite an agency taking all reasonable steps to locate them, the requested documents either do not exist or cannot be found. Section 26 provides as follows:

"26. (1) The agency may advise the applicant, by written notice, that it is not possible to give access to a document if -

(a) all reasonable steps have been taken to find the document; and

(b) the agency is satisfied that the document -

(i) is in the agency's possession but cannot be found;

or

(ii) does not exist.

(2) For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document."

22. When considering a deemed refusal of access in accordance with s.26, I consider that there are two questions to be asked. The first is whether or not it is reasonable to expect that the requested documents exist, or should exist, within the agency. If that question is answered in the affirmative, then the next question is whether the agency has taken all reasonable steps to locate them.

23. In this case, the agency has explained that its Transmission Division holds records related to the transmission line which was installed between Muja and Kemerton. The agency informs me that there are two kinds of files relating to the installation of the 330 kv transmission line which are relevant to this matter.
24. Firstly, there are general project files which contain documents relating to the physical construction of the entire line. Those files contain documents concerning the various construction stages of that line. However, the general project files do not contain documents relating to construction activities on any specific property. The agency informs me that the construction of the line was undertaken in various and progressive stages and that construction activities were not started and completed on an individual property before proceeding to the next property to conduct the same work. Rather, a series of construction activities were completed over a section of the line (sometimes the entire line) before proceeding to the next stage of construction. The second kind of file held by the agency is the individual property file, which contains documents about all land owner-related matters.
25. The agency informs me that it does not hold within its files details of the dates of installation of gates on the particular properties along the transmission line. As part of the project, several hundred gates were installed and the agency had no need to obtain data related to the date of specific installation and consequently never received such information from the gate contractor.
26. In an endeavour to achieve a conciliated resolution of a previous complaint by another land owner concerning a similar issue, the agency approached the private contractor who had installed some of the gates and the contractor located a diary note of the date on which occurred the particular incident which the complainants in that matter were prepared to accept as the first physical entry onto the property. The agency provided that information to the complainant in that matter. The complainants in this matter argue that, as was done on that earlier occasion, the agency ought to obtain that information from the contractor and provide it to them.
27. The FOI Act is concerned with access to documents of agencies. The FOI Act imposes no obligation upon an agency to provide particular information unless that information is contained in a document of the agency, which is not exempt. The term “document of an agency” is defined in clause 4(1) of the Glossary in Schedule 2 to the FOI Act to mean “... *a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer.*”
28. In this instance, in the absence of any evidence to the contrary, I accept the agency’s submission that it does not hold any documents containing that particular information sought by the complainant. As to whether the agency is entitled to access to documents of the contractor, I have examined the “conditions of contract” contained in the contract for the installation of the gates for the transmission line. The contract does not give the agency any entitlement

to access documents of the contractor. It does oblige the contractor to give the agency copies of certain of its documents but only for the purpose of enabling the agency to assess the work under the contract.

29. Accordingly, it appears to me that that the agency has no entitlement to access documents held by the private contractor, and is entitled to be given copies for that one limited purpose only. That being the case, documents held by the private contractor are not, in my view, documents of the agency and the agency is under no obligation to endeavour to access them or to obtain the particular information sought from the contractor. On a previous occasion the agency voluntarily agreed to do so. On this occasion it has not and it cannot be required to do so under the FOI Act.
30. Accordingly, I find that the agency has taken all reasonable steps to locate documents containing that information which may be held by the agency but that none exists.
