

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

**File Ref: F2351999  
Decision Ref: D0312000**

Participants: **University of Western Australia**  
Complainant  
  
- and -  
  
**Water Corporation**  
Respondent

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – claim that body not an agency – whether respondent is an agency – whether body or office established for a public purpose

FREEDOM OF INFORMATION – refusal of access – strategic development plans – clause 10(4) – commercial affairs of agency – whether reasonable to expect disclosure to have adverse effect on commercial affairs of agency – public interest factors for and against disclosure.

*Freedom of Information Act 1992 (WA)* s.102(1), s.102(3); Schedule 1 clauses 4(2), 4(3), 10(3), 10(4), 10(6)

*Water Corporations Act 1995*

*Financial Administration and Audit Act 1985*

*Re Gallop and Water Corporation* [1999] WAICmr 36

*Re Bracks and Melbourne Port Corporation* (1998) 13 VAR 459

*Re Garbutt and Victorian Plantations Corporation* (1997) 13 VAR 83

*Re Slater and State Housing Commission of Western Australia* [1996] WAICmr13

*Police Force of Western Australia v Winterton* [1997] WASC 504

## DECISION

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

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

8 June 2000

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Water Corporation to refuse the University of Western Australia ('the complainant') access to a document requested by it under the *Freedom of Information Act 1992* ('the FOI Act').
2. The Water Corporation is established by s.4 of the *Water Corporation Act 1995* ('the Water Corporation Act') as a body corporate with perpetual succession. Section 27 of that Act describes the functions of the Water Corporation and s.29 prescribes its powers in performing its functions. Under the Water Corporation Act, the Minister is the sole shareholder in the Water Corporation (s.72(2)) which is subject to directions given by the Minister. Among other things, the Water Corporation must prepare and deliver to the Minister an annual report on its operations, which the Minister must present to the Parliament of Western Australia (s.60).
3. In addition, the Water Corporation must in each year prepare and submit to the Minister, for his or her agreement, a draft strategic development plan ('SDP') covering a forecast period of 5 years or a lesser period agreed with the Minister (ss.41(1) and 43(3)). The SDP must include, among other things, competitive strategies, pricing of products, productivity levels, financial requirements, capital expenditure, customer service arrangements, relevant government policy and personnel requirements (s.43(2)).
4. On 13 September 1999, solicitors for the complainant made an application to the Water Corporation under the FOI Act for access to its current SDP. Access was refused on the grounds that the SDP is exempt under clauses 4(2), 4(3), 10(3) and 10(4) of Schedule 1 to the FOI Act.
5. Following a request for internal review, two SDPs dated 2 March 1999 and 8 November 1999 were identified ('the disputed documents') by the agency. It appears that the latter document is the current SDP, being a revised version of the earlier one. The SDP dated 8 November 1999 was not in existence at the time the complainant's access application was made. However, it subsequently came into existence and the internal reviewer made his decision on access in respect of both documents. The internal reviewer confirmed the initial decision to refuse access, but claimed that the disputed documents are exempt under clauses 4(3), 10(3) and 10(4). By letter dated 2 December 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of that decision.

## REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained the disputed documents from the Water Corporation, together with other material. An initial examination of that material suggested to me that parts of the disputed documents had been reproduced in the Water Corporation's Statement of Corporate Intent ('the SCI'), a document publicly available, but other parts had not been reproduced in that document. Discussions took place to verify that this was the case and to determine the basis for the objection by the Water Corporation to the disclosure of material that was already in the public domain.
7. Further, it did not appear to me that the Water Corporation had established valid grounds for objection to disclosure under the exemption clauses relied upon by it. For example, although the notices of decision gave reasons for the refusal of access, those notices did not contain any findings on material questions of fact underlying those reasons, nor did they refer to the material on which any findings were based.
8. Therefore, I sought further reasons from the Water Corporation to justify its decision to refuse the complainant access to the disputed documents. That material was provided to me by letter dated 14 January 2000 together with a schedule containing reasons for exemption on a section by section basis, and underlying findings on questions of fact. The Water Corporation asserted, as it asserted to me on a previous occasion, that it is not an agency for the purposes of the FOI Act. However, it provided nothing that was not before me on that earlier occasion to support that claim.
9. On 14 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 remained my view that the Water Corporation is an agency under the FOI Act. My preliminary view of the claims for exemption was that, on the material then before me, the Water Corporation had not discharged the onus imposed on it by s.102(1) of the FOI Act to establish that its decision to refuse access was justified under clauses 4(3), 10(3) and 10(4). Although I was of the view that the disputed documents appeared to be business plans for the Water Corporation that might fall within the terms of clause 10(4), there was insufficient material from the agency to enable me to conclude that the documents may be exempt under clause 10(4) or any other exemption clause.
10. Subsequently, I received a detailed submission from solicitors on behalf of the Water Corporation containing, firstly, a claim that the Water Corporation is not an agency under the FOI Act and, in the alternative, reasons why it claims the disputed documents are exempt under clause 10(4) or, alternatively, under clause 10(3) of Schedule 1 to the FOI Act. The complainant was given a copy of that submission and provided a response to the claims made by the Water Corporation in respect of the question whether it is an agency under the FOI Act, and its claims for exemption.

## Preliminary issue

11. The first question that I must decide is whether the Water Corporation is an agency as defined in the FOI Act. If it is not an agency, then the complainant has no right of access to documents of the Water Corporation and I have no jurisdiction to deal further with its complaint. The question of the status of the Water Corporation under the FOI Act was dealt with in my reasons for decision in *Re Gallop and Water Corporation* [1999] WAICmr 36. As there is little, if anything, before me that was not raised on that occasion, my view on this point has not changed and I expressly include the reasons given in paragraphs 11-26 of *Re Gallop* as part of my reasons for decision on this complaint.
12. In addition to the reasons given in that decision, I have further considered the purpose of the establishment of the Water Corporation and, following that consideration I am strengthened in my view that it is an agency. In *Re Bracks and Melbourne Port Corporation* (1998) 13 VAR 459, the Victorian Civil and Administrative Tribunal considered and rejected, in respect of the Melbourne Port Corporation, similar arguments to those put forward by the Water Corporation in this matter. The Tribunal found the Melbourne Port Corporation to be an agency for the purposes of the Victorian FOI Act. In that case, after considering the relevant Victorian cases, the Tribunal decided that, in determining whether or not the respondent in that matter was an agency, the Tribunal should confine itself to the Act which established the respondent and the Parliamentary debate surrounding that Act. The Tribunal took the view that the matters to be considered in deciding whether the respondent was established for a public purpose were those referred to by another member of the Tribunal in *Re Garbutt and Victorian Plantations Corporation* (1997) 13 VAR 83 at 85 which were stated as follows:

*“What is clear from those cases is that in deciding the issue, it is necessary to look at the particular body in question and consider matters such as why it was established, its structure, how it operates and its relationship to the public.”*

13. I agree with that approach and, in addition to the particular provisions of the Act establishing the Water Corporation canvassed in my decision in *Re Gallop*, I have referred to the Parliamentary debate surrounding the enactment of the Water Corporation Act. The intended purpose of the establishment of the Water Corporation, and the public nature of that purpose, seems to me to be clear in the speech made to the Parliament by the relevant Minister, Hon C J Barnett MLA, on the Second Reading of the Bill when, on 28 September 1995, after giving examples of the corporate governance provisions similar to those in the Corporations Law which would apply to the Water Corporation, he said:

*“The corporation is clearly distinguishable from a corporation set up under the Corporations Law by the fact that its functions and powers are defined in the Bill. The primary function of the corporation is to supply water, collect and dispose of waste water and surplus water, and to operate an appropriate infrastructure to support those functions.”* (Hansard p 8865).

14. The Minister began his speech by explaining that the Government's policy for restructuring of the water industry was first suggested by the Water Authority of Western Australia when the Authority realised that it was no longer publicly acceptable for the water utility also to be a regulator. As a result, the government decided to replace the Water Authority, which had a virtual monopoly over the state-wide responsibility for conservation of water resources and the provision of water-related services, with three single-purpose entities, the first of those being the Water Corporation "...with a sharp focus on providing the water services utility functions of the Water Authority with a strong emphasis on customer service ..." (Hansard, p 8864-8865).

15. The Minister went on to explain the purpose of the Bill as follows:

*"This Bill will create a corporatised entity to carry out the water utility functions of supply of water, the collection and the disposal of sewage and surplus water and the provision of works required for those purposes. It will pave the way for a new competitive environment for the water industry and for the cultural changes which are necessary to allow this environment to prosper. The thrust of the legislation is to position the corporation so that it is able to compete against potential new entrants to the water services industry and at the same time permits the Government, as owner of the corporation, to provide broad policy direction. It must be stressed, however, that this structural reform process must not be perceived as a step along the path towards privatisation. That process, which would remove the corporation from government ownership and place it in the control of private shareholders, is not being considered by the Government."*(Hansard, p 8866).

16. As well as explaining the rationale for the corporatisation and the need for management autonomy and authority of the Water Corporation, throughout his speech the Minister stressed the overriding governmental control imposed by, *inter alia*, the Minister's power to give directions to the Corporation and to ensure that government policy is reflected in the way management of the corporation is conducted.

17. I note also the statement of the Minister in his speech on the Second Reading of the Bill relating to the funding of community service obligations. The Minister said:

*"Community service obligations generally embrace social or non-commercial objectives and may have a significant impact on the corporation's financial performance. These obligations may be funded from the Consolidated Fund or by reduction in the amount of dividend the corporation may otherwise be required to pay to government or by making some other appropriate form of allowance. In this context, the existing tariff policy which ensures that there is ministerial supervision of the amount paid by consumers for water services will be retained."* (Hansard, p 8868).

18. Finally, the Minister made it clear that the corporation was to be subject to the audit provisions of the *Financial Administration and Audit Act 1985* and thereby the authority of the Auditor General, and went on to say that:

*“As the corporation will not have the status of an agent of the Crown it must observe all State legislation including the Freedom of Information Act, the Parliamentary Commissioner Act and the Equal Opportunity Act. The legislation recognises that as the corporation is government owned, it is required to observe minimum standards of staff management and of staff conduct and integrity similar to those established for public sector bodies under the Public Sector Management Act.”* (Hansard, p 8869)

19. Those comments by the Minister, together with various provisions subsequently enacted setting out its functions and ensuring ultimate control by the Minister, acting on behalf of the Government, support my view that the generation of profit was not the primary purpose for which the Water Corporation was established and that the Water Corporation is indeed established for a public purpose and that it was always intended that it would exercise its objectives for the benefit of the State of Western Australia.
20. The degree of governmental control is reflected in a number of sections of the Water Corporation Act which gives the Government, through its Minister and Treasurer, a strong supervisory role over the Water Corporation. Of particular note in this context, s.30(1) of the Water Corporation Act compels the agency to act on commercial principles. However, section 30(2) provides that “[i]f there is any conflict or inconsistency between the duty imposed by subsection (1) and a direction given by the Minister under this Act the direction prevails”.
21. That provision again indicates to me that the generation of profit is not necessarily the primary, and certainly not the only, purpose of the Water Corporation. In my view, provisions such as that take the character of the Water Corporation outside that of a normal private or commercial organisation. As the Tribunal in *Re Bracks* considered in respect of similar provisions relating to the Melbourne Port Corporation, such a level of governmental control indicates to me that the Water Corporation was established so that it would exercise its objectives for the benefit of the State of Western Australia, that is, a public purpose.
22. Further examples of the provisions in the Water Corporation Act which, in my view, indicate a level of control which takes the Water Corporation outside the nature of a private or purely commercial venture include:
- the Corporation’s trading name is to be approved by the Minister (s.4(4));
  - the non-executive directors on the Board of Directors are to be appointed by the Governor on the nomination of the Minister (s.7(1)) and such directors’ remuneration and allowances are to be determined by the Minister (s.10(1));
  - the powers of the Board to appoint and remove the Chief Executive Officer of the Corporation and fix and alter the Chief Executive Officer’s terms and conditions of appointment are not to be exercised without the concurrence of the Minister (s.13(3));

- the Board is required, after consulting with the Commissioner for Public Sector Standards, to prepare and issue an instrument setting out minimum standards of merit, equity and probity applicable to the management of the staff of the Corporation (s.16(1)) and the Commissioner for Public Sector Standards may report to the Minister on the content or observance of the minimum standards in force under s.16 (s.17(3));
  - the Board is required, after consulting with the Commissioner for Public Sector Standards, to prepare and issue a code or codes of conduct setting out minimum standards of conduct and integrity to be observed by members of staff (s.24(1)) and the Commissioner for Public Sector Standards may at any time report to the Minister on any matter relating to the observance by members of staff of a code of conduct in force under s.24 that the Commissioner thinks should be brought to the Minister's attention (s.25(3));
  - the Board, when it delivers to the Minister its Annual Report, is also to deliver to the Minister a separate report on the observance by members of staff of any code of conduct in force under s.24 (s.26(1)) and to give a copy of that report to the Commissioner for Public Sector Standards (s.26(2)).
23. Further, as I mentioned above, if there is any conflict or inconsistency between the duty imposed on the Corporation by s.30(1) to act in accordance with prudent commercial principles and endeavour to make a profit, consistently with maximising its long term value, in performing its functions, and a direction given by the Minister, the direction prevails (s.30(2)). The Corporation must obtain the approval of the Minister before it acquires a subsidiary or enters into any transaction that will result in the acquisition of its subsidiary (s.31(1)) and must obtain the approval of the Minister before entering into a transaction that is not exempt under s.33 and whether the Corporation's liability exceeds the prescribed amount. Exemption under s.33 is by order of the Minister (s.33(1)).
24. The Corporation must consult the Minister before entering into a major initiative or a course of action likely to be of significant public interest (s.34). The Board is required by s.41(1) to submit to the Minister each year a draft strategic plan for the Corporation and any subsidiary, containing the matters prescribed by s.43. The Minister and the Board must try to agree on the plan as soon as possible (s.44); the Minister is intimately involved in the development of the plan (ss 45 and 46) and, when agreed by the Minister, the draft strategic plan becomes the strategic development plan for the Corporation (s.47). The Board may only modify the plan with the agreement of the Minister (s.48(1)), but the Minister may direct the Board to modify the plan (s.48(2)). The Minister may only agree to, or agree or direct the modification of, the plan with the concurrence of the Treasurer (s.49).
25. The Board must prepare and submit to the Minister each year a SCI (s.50(1)) to include the matters prescribed by s.52(1). The Minister has a similar role in respect of the SCI as in respect of the SDP (ss.53 to 58). The Corporation is required to submit to the Minister quarterly financial reports (s.59(1)) and to submit copies of those reports to the Treasurer (s.59(4)). The Corporation is also required to submit to the Minister an annual report (s.60(1)) and the Minister is required to lay that report before each House of Parliament (s.60(3)). The report is to contain such information as is required to be included by the



Minister to enable an informed assessment to be made of the operations of the Corporation or its subsidiary and other prescribed information (s.61(1)).

26. The Minister may give directions to the Corporation with respect to the performance of its functions and, subject to s.65, the Corporation is to give effect to any such direction (s.64(1)). Where the Board determines that such a direction is inconsistent with s.30(1) or that, for some other reason, the Corporation should not comply with the direction, it must notify the Minister (s.65(1)). The Minister must then consult with the Treasurer and then it is for the Minister to cancel or confirm the direction (s.65(2)).
27. The Board and the Minister are to consult at the request of either of those parties in respect of any aspect of the operations of the Corporation (s.67). The Minister is entitled to have information, and to make and retain copies of documents containing information, held by the Corporation and any of its subsidiaries (s.68(1)) and the CEO or the Board must comply with, and facilitate, any such request by the Minister (s.68(3)). The Corporation must keep the Minister reasonably informed of the operations, financial performance and financial position of the Corporation and its subsidiaries including the assets and liabilities, profits and losses and prospects of the Corporation and its subsidiaries (s.69(a)) and other matters prescribed in that section. The Board must notify the Minister if the Corporation or its subsidiary is unable to, or is unlikely to be able to satisfy any financial obligation when it falls due (s.70(1)) and the Minister is then to confer with the Treasurer and the Board to determine the action required and to initiate that action to ensure that the Corporation is able to satisfy the obligation when due (s.70(3)). The Minister may direct the Corporation or any subsidiary to cease or limit the performance of any of its functions (s.70(4)) and the Board must comply (s.70(5)).
28. This level of governmental control is also reflected in the financial provisions in Part 5 of the Water Corporation Act, which provides, *inter alia*, that all of the shares in the Corporation are to be allotted to the Minister (s.72(2)) and shares in the authorised capital of the Corporation are not to be held otherwise than by the Minister (s.72(3)). I note also the roles of the Minister and the Treasurer in respect of how the funds of the Corporation are to be dealt with (ss.73 to 82) and s.83(1) which provides that the Treasurer may, with the concurrence of the Minister, in the name and on behalf of the Crown, guarantee the performance by the Corporation, in the State or elsewhere, of any financial obligation of the Corporation arising under s.80.
29. While some of the objectives of the Corporation may be said to be those of a commercial venture, all of these provisions evidence, in my view, a degree of governmental control over the operation of the Corporation which clearly indicates that, whilst it is intended that the Corporation operate in a commercial and profitable manner, its primary purpose is not the generation of profit but the provision of an essential service for the benefit of the State of Western Australia. These provisions show a level of control that is not required or exercised by the shareholders of a private and purely commercial enterprise.

30. For the reasons I gave in *Re Gallop* at paragraphs 11-26, together with the foregoing, I find that the Water Corporation is an agency and that I have jurisdiction to deal with this complaint. Henceforth, in these reasons I shall refer to the Water Corporation as 'the agency'.

### **THE DISPUTED DOCUMENTS**

31. The disputed documents consist of the two SDPs referred to in paragraph 5 above, dated 2 March 1999 and 8 November 1999 respectively. The agency claims that both documents are exempt under clause 10(4) or, alternatively, under clause 10(3).

### **THE EXEMPTIONS**

32. 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)**

33. 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.

***Clause 10(4)(a) - information relating to the commercial affairs of an agency***

34. 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)."*

35. The disputed documents appear to me to be of the nature of business plans of the agency. Taking into account s.43(2) of the Water Corporation Act, which prescribes the kinds of information to be included in a SDP, and having considered the contents of the disputed documents, I am satisfied that they contain information of the kind described in clause 10(4)(a), being information concerning the commercial affairs of the agency. However, that is not sufficient to establish a claim of exemption. The requirements of clause 10(4)(b) must also be satisfied and then consideration must be given as to whether the limit on exemption in clause 10(6) applies.

***Clause 10(4)(b) - adverse effect of the commercial affairs of an agency***

*The agency's submission*

36. The agency submits that it is a requirement of the Water Corporation Act for the agency, in performing its functions, to act in accordance with prudent commercial principles and endeavour to make a profit, consistently with maximising its long-term value. The agency also submits that it operates in a significantly de-regulated environment promoted by government policies

(Federal and State) to increase competition within the economy. The agency informs me that, traditionally, its operations were only concerned with the regulatory water and related services. However, the disputed documents indicate a significant change in direction for the agency, including details of markets and new projects within those markets.

37. The agency submits that the disputed documents are both versions of its five-year plan which sets out various economic financial objectives and operational targets. It includes such matters as competitive strategies, pricing of products, productivity levels, financial requirements, capital expenditure, customer service arrangements, policies and personnel requirements. The agency claims that disclosure would, among other things, result in the agency suffering a commercial disadvantage because the agency's competitors enjoy confidentiality and secrecy concerning such matters.
38. The agency informs me that it has outsourced part of its operations in the Perth Region, specifically maintenance, which has been outsourced to two local engineering companies. The agency submits that they are both significant engineering companies with the capacity to compete with the agency for other areas of the agency's operations. The agency further informs me that it is also in competition with other large international companies in respect of seeking new business opportunities, both locally and overseas. Presently, the agency is one of five proponents being invited to bid for major water projects in another country.
39. Against that background, the agency claims that:
  - disclosure is incompatible with the general commercial principles that the agency is required to observe and it will not be able to operate effectively if future plans are exposed prematurely in the market place potentially affecting the commercial behaviour of other players in the market to the detriment of the agency and/or the commercial advantage of competitors;
  - disclosure of certain details in the SDP would prematurely reveal the strategy, direction, financial drivers and expenditure by the agency and would hamper the managerial discretion and decision-making ability of the agency; and
  - disclosure would enable competitors to obtain information and to exploit it to their own commercial advantage by enabling competitors to undercut the agency in negotiations and in the tendering process, to improve upon prices offered by the agency and to diminish the ability of the agency to compete successfully in the market place.

*The complainant's submission*

40. The complainant refers to the corporate governance provisions similar to those in the Corporations Law which the Minister, in his Second Reading speech, indicated would apply to the agency and submits that corporate governance of private corporations pre-supposes disclosure to stakeholders of information of the kind the agency says is contained within the SDP. The complainant submits that the information contained in an SDP, as described in the agency's

submission, is no more than a public company would be required to include in its prospectus under the Corporations Law or a private company would be required to disclose to its stakeholders, which include shareholders, creditors, consumers and employees.

41. The complainant submits that none of the submissions of the agency shows how the adverse effect claimed could reasonably be expected to follow from disclosure of the documents. As an example, the complainant refers to the agency's submission that the disclosure would prematurely reveal the direction, strategy, financial drivers and expenditure expected or planned by the agency and would hamper the managerial discretion and decision-making ability of the agency, given that fundamentals of the business would be accessible by FOI applicants, to the potential advantage of those applicants.
42. The complainant submits that the agency appears to be concerned that information released to applicants could be used in respect of property market dealings, construction contracts and tender processes, against the agency, but that the submissions are in such broad terms that they cannot justify a denial of access. The complainant submits that the agency is required by s.43(1) of the Water Corporation Act to include in an SDP its economic and financial objectives and its operational targets and how those objectives and targets will be achieved, and that other matters, such as the pricing of products, productivity levels and financial requirements are only matters which, in accordance with s.43(2), are to be considered in the preparation of the SDP. The complainant submits that it is not clear from the agency's submissions that the information referred to in s.43(2) is in fact included in the SDP and, finally, submits that no case has been made as to how disclosure of the information in the document would give competitors a competitive edge and thereby harm the organisation.

### *Consideration*

43. I accept the fact that the agency exists as a corporatised structure and operates in a commercial environment according to legislation that requires its board of management to make prudent commercial business decisions that provide, ultimately, a benefit to the people of Western Australia and to the Government. Based on the material before me from the agency, I also accept that the agency is in competition with private sector companies, both locally and overseas, in respect of certain aspects of its operations. I also acknowledge that local and overseas companies are not subject to the same accountability requirements of either the FOI Act or the Water Corporation Act.
44. I accept that another agency, the Waters and Rivers Commission, owns the water supply and not the agency. I also accept that, in a significantly deregulated marketplace, other private operators can apply for a licence to provide water services and thereby act in competition with the agency for the provision of such services. The agency informs me that this has already occurred in various areas of the State and I accept that that is the case. I also understand that, whilst the agency has a licence for the provision of water services in the metropolitan area that is valid until 2021, the licence is subject to

an excision clause that would allow private operators to compete locally with the agency for the provision of water services.

45. Against that background, I accept that Part 5.5 of the disputed documents refers to strategic objectives of the agency and indicates, in general terms, the areas where the agency is seeking new business opportunities. Details of planned capital investment by the agency in specific projects is contained in the disputed documents. In my view, disclosure of that information would confirm the location of future potential markets to competitors and would allow a competitor to exploit those markets to its advantage ahead of the agency, especially a competitor that is not required to comply with the legislative requirements of the Water Corporation Act.
46. I have considered the kinds of reports that private sector organizations are required to publish and lodge with the Australian Securities Investments Commission under the relevant parts of the Corporations Law (s.286-301 and s.319-320). It is my understanding that financial reports containing, among other things, profit and loss statements, balance sheets and cash flows are required by that legislation to be prepared, as well as directors' reports containing information about, among other things, a company's operations and activities during the year reported on, likely developments in future financial years and expected results, dividends paid or recommended and options granted.
47. However, I do not consider that those requirements result in the publication of the kind of information that is in the disputed documents. It does not appear to be a requirement of the Corporations Law that private sector bodies disclose details of their short to medium term business plans in the same detail that the agency is required to present to the Minister in its SDP. Further, s.299(3) permits information regarding likely developments in a company's operations in future financial years and their expected results to be omitted from a director's report if it is likely to result in unreasonable prejudice to the company.
48. I accept that the agency is actively seeking new business opportunities and that the disputed documents contain business and planning financial details and assumptions that support those strategies. In my view, disclosure of that information would identify to a potential competitor areas of interest to the agency and possible markets or future commercial partners. I consider that it is reasonable to expect that a competitor that is not under the same legislative restrictions as the agency would use that kind of information to its own commercial advantage and to the possible detriment of the agency. For example, private sector bodies are not required to obtain the approval of a Minister before acquiring a subsidiary or entering into a transaction that will result in the acquisition of a subsidiary (s.31(1) of the Water Corporation Act). Further, private sector bodies do not have to consult with a Minister before entering into a major initiative (s.34). The absence of such restrictions on private sector bodies gives those bodies, in my view, a commercial advantage over the agency.

49. Having considered all of the material before me, including the disputed documents in context with other published material, I am satisfied that disclosure of the disputed documents would place the agency in the position of having its short to medium term business plans, including detailed financial data and planning assumptions, in the public domain. That result, in my view, would give the agency's competitors access to information about the agency's operations in circumstances where the agency does not have access to the same information about its competitors. I accept that a competitor, armed with such knowledge, would be likely, as a matter of prudent business practice, to undercut the agency in negotiations and in the tendering process for new business and to improve upon prices offered by the agency, if possible. In my view, the capacity of the agency to compete successfully in the market place would be adversely affected by that outcome and its commercial affairs would suffer as a result. Accordingly, I am satisfied that a *prima facie* claim for exemption based on clause 10(4) has been established.

***Limit on exemption - public interest***

50. The limit on exemption in clause 10(6) provides that matter is not exempt under clause 10(4) if its disclosure would, on balance, be in the public interest. Pursuant to s.102(3) of the FOI Act, the complainant bears the onus of persuading me that disclosure would be in the public interest. The complainant's submission to me largely centred around the question of whether disclosure would have the result of revealing information about the commercial affairs of the agency and would adversely affect those commercial affairs.
51. The agency submits that there is a public interest in maintaining confidentiality with respect to its projected commercial operating and financial information and its strategic marketing plans. The agency submits that it would be contrary to the public interest to disclose such information in the absence of explanatory material or approvals for planned expenditure and projects because it would be potentially misleading because those matters are subject to change. The agency also submits that the public interest in accountability of government agencies has been met by the disclosure of the SCI and its Annual Report, which are public documents that have been tabled in Parliament.
52. I recognise that there is a public interest in the accountability of Government agencies for the manner in which they perform their functions and spend public monies. The role of independent agencies, such as the Auditor General and also the Parliamentary process itself are some of the means by which that public interest is satisfied. The right of access under the FOI Act is another means to serve the public interest in ensuring agencies are accountable and, to that end, I also recognise a public interest in ensuring that people are able to exercise their right of access and to obtain access to documents.
53. On the other hand, there is also a public interest in ensuring that agencies that operate in a commercial manner are not unduly disadvantaged or hampered in their operations by the accountability requirements under the FOI Act. Clearly, there is a public interest in the commercial viability of the agency, a

government-owned service provider, and its continuing effective operations in providing an essential service to the State.

54. To some degree, the public interest in the accountability of the agency has been served by the statutory requirement that the agency prepares and publishes an annual report and its SCI. In my view, those documents inform the public, in a general sense, if not in detail, about the activities of the agency during the reporting year and also about its planned activities and future strategies. There is the opportunity for the Minister to be questioned about any aspect of those documents, either in Parliament or by the Estimates Committees of the Parliament during the budget process.
55. I note that s. 62 of the Water Corporation Act provides that the Board may request the Minister to delete from the copies of quarterly or annual reports provided to the Minister that are to be made public, information that is of a commercially sensitive nature. In my view, that is an indication that Parliament recognises that there is a need for some of the agency's commercial information to remain confidential. Taking all of those matters into consideration, and balancing them against the public interest in the commercial viability and effective operation of the agency, I am not persuaded that disclosure of the disputed documents would, on balance, be in the public interest, in this instance.

#### **Edited Access**

56. I have also considered whether it is practicable to give the complainant access to edited copies of the disputed documents, bearing in mind that some of the information in those documents is already in the public domain. I do not consider that it would be practicable to do so. Although some of that information has already been made public and is repeated *verbatim* in the SCI or the agency's annual report, in my opinion, to delete everything but that from the documents would render them nonsensical and meaningless. In the case, *Police Force of Western Australia v Winterton* [1997] WASC 504, Scott J said:

*"It seems to me that the reference to the word "practicable" is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context. In that respect, where documents only require editing to the extent that the deletions are of a minor and inconsequential nature and the substance of the document still makes sense and can be read and comprehended in context, the documents should be disclosed. Where that is not possible, however, in my opinion, s24 should not be used to provide access to documents which have been so substantially altered as to make them either misleading or unintelligible."*

57. In my view, it would be impracticable to provide access to edited copies of the disputed documents. Therefore, I find the disputed documents are exempt under clause 10(4) and confirm the decision of the agency to refuse access to those documents. Given that finding, there is no need for me to deal with the agency's claim for exemption under clause 10(3).