

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

**File Ref: F0181999
Decision Ref: D0331999**

Participants:

**Alan Keith Black and Vanessa Marguerite
Black**
Complainants

- and -

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

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to compensation for land – whether documents of the agency – whether agency entitled to access documents of private contractor – whether documents under the control of the agency.

Freedom of Information Act 1992 (WA) s.23(1)(b); Schedule 1 clauses 4, 6, 8, 10; Schedule 2; Glossary, clause 4(1)

Rules of the Supreme Court 1971 Order 26, rule 1.

Re Edwards and Electricity Corporation (trading as Western Power Corporation) [1999] WAICmr 13.

Re Payne and another and Electricity Corporation (trading as Western Power Corporation) [1999] WAICmr 21.

Mount Lawley Pty Ltd v Western Australian Planning Commission (unreported; Supreme Court of Western Australia in Chambers; Lib. No. 990132; 19 March 1999).

Lonrho Ltd v Shell Petroleum [1980] 1 WLR 627 at 636 and 637.

Midalco Pty Ltd v Simpson (unreported; FCt SCt of WA; Library No 6747; 5 June 1987).

Re Miles and Another and Electricity Corporation (trading as Western Power Corporation) [1999] WAICmr 31.

DECISION

The decision of the agency to refuse access to the requested documents because they are not documents of the agency is confirmed.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

19 October 1999

REASONS FOR DECISION

BACKGROUND

1. This complaint arises from an access application made to the Electricity Corporation, trading as Western Power Corporation ('the agency') under the *Freedom of Information Act 1992* ('the FOI Act') by solicitors on behalf of Mr and Mrs Black ('the complainants').
2. The complainants are the registered proprietors of land situated in Coolup. In 1992, the agency made a verbal offer of compensation to the complainants for the construction of power transmission lines on their property. That verbal offer was rejected by the complainants. Although some contact between the agency and the complainants took place in 1998, the issue of compensation remains unresolved and no other offers have been made by the agency to settle this issue.
3. By letter dated 29 October 1998, solicitors acting for the complainants made an access application to the agency seeking access under the FOI Act to documents dating from January 1987 to October 1998 relating to the complainants' land. The agency granted the complainants access to some documents but refused access to 8 others on the grounds that those documents were either exempt under various clauses of the FOI Act or did not fall within the scope of the complainants' access application.
4. The complainants sought internal review of the agency's decision and, by letter dated 18 January 1999, the internal reviewer confirmed the refusal of access to the documents and informed the complainants that the disputed documents were exempt under clauses 4, 6, 8 and 10 of Schedule 1 to the FOI Act. In addition, the internal reviewer decided that 4 documents were outside the ambit of the access application.
5. By letter dated 15 February 1999, the complainants made a complaint to the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. The agency produced to me its file relating to the complainants' property, including the documents in dispute in this matter, and its FOI file maintained in relation to the complainants' access application. Various inquiries were made on my behalf with the agency, in particular with a view to exploring whether conciliation of the complaint was possible, given my then recent decision on a complaint about a decision of the agency concerning documents relating to similar issues, *Re Edwards and Electricity Corporation (trading as Western Power Corporation)* [1999] WAICmr 13. The agency was not prepared to conciliate the matter, nor did it make any submissions concerning the documents in dispute, merely choosing to rely on the submissions it had made to me in the

course with my dealing with the complaint that resulted in my decision in *Re Edwards*.

7. By letter dated 11 August 1999, I informed the parties to this complaint of my preliminary view. My preliminary view was that some of the documents for which exemption was claimed may be exempt and that others may not be exempt. The complainants subsequently withdrew their complaint in respect of those documents which, in my preliminary view, may have been exempt and the agency withdrew its claims for exemption for those documents which, in my preliminary view, may not have been exempt. Accordingly, none of the documents that have been identified by the agency as falling within the ambit of the complainants' access application remain in dispute between the parties.
8. However, in their response to my preliminary view, the complainants raised one outstanding issue. The complainants seek documents evidencing the date of actual entry onto their property by the agency. The complainants' solicitors referred to an earlier complaint to me, which resulted in my decision in *Re Payne and Another and Electricity Corporation (trading as Western Power Corporation)* [1999] WAICmr 21, concerning access to documents relating to a similar issue. The complainants pointed out that, in that matter, the agency had approached its sub-contractors who provided information as to the date on which the gates for the purposes of the transmission line were installed on Mr and Mrs Paynes' property, and submitted that the agency ought on this occasion, once again, approach its sub-contractors and ask them to provide the information concerning the date of installation of the gates. The complainants submitted that establishing the date of actual entry will be crucial to the issue of compensation when anticipated resumption proceedings commence.
9. I wrote to the complainants' solicitors explaining that, in the earlier matter, the agency had, in a effort to conciliate that matter, agreed to approach the private contractor in order to obtain that information for the complainants in that matter. On that occasion, the contractor was able to locate a diary entry recording a particular incident which the complainants in that matter were prepared to accept for their purposes to be the first physical entry of the agency onto the property. I explained that there is no obligation on the part of the agency to contact private companies and certainly no obligation on a private company to provide access to documents in its possession which may be the subject of an access application. I explained to the complainants the kinds of files held by the agency in relation to the construction of the power line and that those files do not contain documents relating to the activities of private contractors carrying out work for the agency with respect to its construction. I informed the complainants that, at my request, the agency had searched its records for documents of the kind that would contain the information sought, but none were found.
10. The complainants' solicitor responded by letter submitting that:

“It seems that all an agency has to do to shield information is to place conduct of that particular matter in the hands of a sub-contractor or contractor. In those circumstances, the information which properly is in the power (as defined

by discovery principles) of the agency ceases to be a public record which may be accessed through the normal processes. With respect, this is neither logical nor consistent with the spirit and philosophy of the Freedom of Information Act.”

11. The complainants’ solicitors requested that I reconsider my position and offered to prepare legal submissions on “... *analogous discovery processes as to the meaning of “power and control”.*” They also queried whether the agency had made enquiries of the contractor in this instance and why the contractor was not prepared to make a similar conciliatory gesture on this occasion.
12. By letter dated 24 September 1999, the complainants were informed that it is my view that the purpose of the agency placing the conduct of the installation of the gates for the transmission line in the hands of a private contractor was to have the private contractor install the gates, not to shield information. It has become clear to me from my inquiries that the agency retains those records relating to the construction of the transmission line that it requires for its purposes. The agency has informed me that it has no need to know the dates upon which certain specific events, such as the installation of a particular gate, occurred. On the previous occasion, the agency voluntarily agreed to approach the contractor to obtain the information. On this occasion the agency did not agree to do so.
13. However, the question the complainants have raised is whether or not the agency is, or should be, entitled to access that information. Although not specifically submitted by the complainants, that raises the question for my consideration of whether or not the agency is entitled to access to documents of the contractor. Pursuant to s.23(1)(b) of the FOI Act, an agency may refuse access to a document if it is not a document of the agency. That is in effect what the agency has done on this occasion. However, if the agency can be said to have control over, or is entitled to access, documents held by the contractor, then those documents may be documents of an agency as that term is defined in the FOI Act.

The complainants’ submission

14. The complainants submit that the FOI process is analogous to the discovery process and that in both cases the focus is on the control which the agency has over the documents of its agent. The complainants submit that the word “control” in clause 4(1) of the Glossary in Schedule 2 to the FOI Act is without material difference to the word “power” in the interpretation of Order 26 rule 1 of the *Rules of the Supreme Court 1971* in relation to discovery. The complainants provided me with a copy of a Supreme Court Master’s decision in the matter of *Mount Lawley Pty Ltd v Western Australian Planning Commission* (unreported; Supreme Court of Western Australia in Chambers; Lib. No. 990132; 19 March 1999) and drew my attention to the last page where a contractual relationship between the Ministry for Planning and/or the Western Australian Planning Commission, as the client or clients, and the Valuer General was discussed, a situation which the complainants claim is similar to that existing between the agency and its contractors.

15. In that decision, Master Bredmeyer said that, by Order 26 rule 1, a party is required to give discovery of all documents which are or have been in his possession, custody or power relating to any matter in question therein, and that the word “power” means a presently enforceable legal right to obtain from whoever holds the document, inspection of it without the need to obtain the consent of anyone else: *Lonrho Ltd v Shell Petroleum* [1980] 1 WLR 627 at 636 and 637; *Midalco Pty Ltd v Simpson* (unreported; FCt SCt of WA; Library No 6747; 5 June 1987, Wallace J dissenting).
16. The documents there in issue were a valuation prepared by the Valuer General for the Ministry for Planning and related costs estimates supplied by engineers to the Valuer General. Master Bredmeyer decided that the Ministry for Planning was the client of the Valuer General and was entitled to keep the valuation and, if it had lost a copy, entitled to obtain a copy from the Valuer General’s Office, and that the same was so in respect of the costs estimates supplied by the engineers, which should properly be regarded as part of the valuation. Master Bredmeyer considered the Ministry for Planning to be the principal and the Valuer General the agent and that, hence, on normal principles of agency, the principal would have the right of obtaining a copy or replacement copy of the valuation and any supporting document, such as the engineers’ report, from its agency.
17. I do not consider the circumstances of that matter to be analogous to the matter before me. In that case, the documents in question were documents prepared for the Ministry for Planning by the Valuer General’s Office, not the Valuer General Office’s own records made for its own purposes. The documents in that matter were the documents specifically obtained and prepared for the Ministry for Planning, the client, at the request of the Ministry for Planning. In the matter before me, the contractor was not engaged to prepare documents for the agency and the documents to which the complainants now seek access are the contractor’s own records made at its own discretion, for its own purposes and not for the agency.
18. In addition, although I do not understand it to be the complainants’ submission, I do not consider the discovery process in the Supreme Court to be directly analogous to the right of access under the FOI Act. Discovery in the Supreme Court is regulated by the rules of the Court. Access under the FOI Act is a separate process, governed by the provisions of the FOI Act and different considerations apply.

Contractor’s records

19. For the reasons I gave in my recent decision in *Re Miles and Another and Electricity Corporation (trading as Western Power Corporation)* [1999] WAICmr 31, in paragraphs 21 to 25, I accept that the agency does not hold within its files details of the dates of installation of gates on the particular properties along the transmission line. As in *Re Miles*, the complainants in this matter argue that, as was done in *Re Payne*, the agency ought to obtain that information from the contractor and provide it to them.

20. As I explained in *Re Miles*, 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.*”
21. As in *Re Miles*, 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. Further, nothing before me establishes that the agency has any control over the records created by the contractor for its own purposes and not for the agency.
22. Accordingly, it appears to me that the agency has no control over, nor 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, at my request, 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.
