

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

**File Ref: F1221999  
Decision Ref: D0351999**

Participants: **Environmental Defender's Office WA (Inc)**  
Complainant  
  
- and -  
  
**Ministry for Planning**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – quantitative risk assessment report - clause 1 - whether disclosure would reveal the deliberations or decisions of an Executive body - whether body is a committee of cabinet - whether the disputed document contains policy options or recommendations prepared for possible submission to an Executive body - whether prepared to brief a Minister in relation to matter prepared for possible submission to an Executive body - whether any limits on exemption apply - clause 6 - deliberative processes - whether deliberations are at an end - whether contrary to the public interest to reveal deliberations of agency.

*Freedom of Information Act 1992 (WA)* Schedule 1 clauses 1(1)(b), 1(1)(d), 1(2), 1(5), 1(6) and 6(1).

*Re Porter and Department of Community Services and Health* (1988) 14 ALD 403

*Re Birrell and Department of the Premier and Cabinet (No 1)* (1986) 1 VAR 230

## DECISION

The decision of the agency is set aside. In substitution I decide that the document is not exempt.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

1 November 1999

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review arising out of a decision made by the Ministry for Planning ('the agency') to refuse the Environmental Defender's Office WA (Inc) ('the complainant') access to a document requested by it under the *Freedom of Information Act 1992* ('the FOI Act').
2. In March 1998, Cabinet agreed to, amongst other things, a proposal for financing the relocation of Claremont Speedway. An implementation committee chaired by the Minister for Planning and consisting of representatives of local government, the Department of Contract and Management Services and various motor sport operators was established to develop a formal proposal and to report back to Cabinet on the final site selection and financing arrangements.
3. In the course of its meetings on this issue, the implementation committee decided that a societal risk assessment should be conducted in respect of a proposed site for a motor sports complex in the Kwinana area. In December 1998, Environmental Risk Solutions Pty Ltd (ERS) was selected to undertake the risk assessment and was appointed as consultant to the WA Planning Commission for that purpose. However, the project was under the day to day management of the agency. Subsequently, the assessment project was completed by ERS and a report ('the disputed document') was submitted to the agency in March 1999.
4. On 10 May 1999, the complainant made an application to the agency seeking access to the disputed document. Access was refused on the ground that the disputed document is exempt under clause 1 and clause 6 of Schedule 1 to the FOI Act. The complainant sought internal review of the agency's decision. However, the internal reviewer confirmed the initial decision to refuse access on the ground that the document is exempt under clause 1(1)(b) and (d)(i) and clause 6. On 27 July 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

### REVIEW BY THE INFORMATION COMMISSIONER

5. I obtained the disputed document from the agency, together with the agency's FOI file in respect of this matter. My Senior Investigations Officer met with representatives of the complainant and received material in support of its access application. Inquiries were also made with the agency in an attempt to resolve this complaint by conciliation. However, the agency maintains its claims that the disputed document is exempt.

6. On 20 October 1999, after considering the material before me, including the disputed document, I informed the parties in writing of my preliminary view of this complaint. It was my preliminary view that the disputed document may not be exempt as claimed by the agency.

## THE DISPUTED DOCUMENT

7. The disputed document, dated 15 March 1999, is entitled “*Ministry for Planning, Kwinana Motor Sports Complex, Quantitative Risk Assessment*”. The document was prepared by Environmental Risk Solutions Pty Ltd and consists of a 41 page report together with 3 appendices of 12 pages.

## THE EXEMPTIONS

### (a) *Clause 1*

8. Clause 1, so far as is relevant, provides:

#### 1. *Cabinet and Executive Council*

##### *Exemptions*

(1) *Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body, and, without limiting that general description, matter is exempt matter if it –*

(a)...

(b) *contains policy options or recommendations prepared for possible submission to an Executive body;*

(c)...

(d) *was prepared to brief a Minister in relation to matters-*

*(i) prepared for possible submission to an Executive body”.*

The term “Executive body” is defined in clause 1(6) to mean Cabinet, a committee of Cabinet, a subcommittee of a committee of Cabinet or Executive Council.

9. I consider that the purpose of the exemption in clause 1 is to protect the confidentiality of Cabinet discussions and of consultations between Ministers. Among other things, the maintenance of Cabinet solidarity and collective responsibility is generally accepted to be an essential part of the Westminster system of government and the FOI Act recognises this in clause 1 and in the range of documents that are protected from potential disclosure by this exemption.

10. However, there are limits on the exemptions in clause 1. Clause 1(2) provides that matter that is merely factual, statistical, scientific or technical is not exempt under subclause 1, unless its disclosure would reveal any deliberation or decision of an Executive body and the fact of that deliberation or decision has not been officially published. Further, clause 1(5) provides that matter is not exempt by reason of the fact that it was submitted to an Executive body for its consideration or is proposed to be submitted if it was not brought into existence for the purpose of submission for consideration by the Executive body.

### **The agency's submission**

11. In support of its claims for exemption under clause 1 and clause 6, the agency informed the complainant of the following:
- The disputed document was commissioned by it for submission to the Minister for Planning.
  - The disputed document was prepared to brief the Minister and Cabinet and to aid the Minister's consideration of matters on the motor sports complex and those considerations are still ongoing. Further, the proposal for the complex is out for public comment and a final determination has not been made.
  - The report forms part of the advice and recommendations that will be presented to the Minister for Planning and Cabinet.

### **Deliberations or decisions of an Executive body**

12. I have examined the disputed document. As to the general exemption in clause 1(1), in my view, the document does not record any deliberations or decisions of an Executive body and its disclosure would not reveal any such deliberations or decisions.
13. I agree with Deputy President Todd in *Re Porter and Department of Community Services and Health* (1988) 14 ALD 403, when he said at 407:
- “‘Deliberation’ of Cabinet seems to me to connote what was actively discussed in Cabinet. It is not the agenda for a meeting of Cabinet, nor is it what Cabinet formally decided. What the words ‘deliberation or decision’ of Cabinet cover is debate in Cabinet (deliberation), and formal decisions made in Cabinet. It is not to be concluded that there was deliberation in respect of matter contained in a document merely because a document was before Cabinet at a meeting thereof.”*
14. There is no material before me that the disputed document has been before Cabinet or that it is intended that it be considered by Cabinet. Rather, the agency's files contain references to the contrary. For example, the minutes of a meeting of the implementation committee dated 4 December 1998 record that a consultant's brief had been forwarded to ERS and another company to carry out

a risk assessment to enable an environmental report to be prepared for the Environmental Protection Authority (EPA).

15. The question then arises whether the implementation committee is an Executive body and whether disclosure of the disputed document would reveal the deliberations or decisions of an Executive body. The definition of “Executive body” in clause 1(6) includes “a committee of Cabinet”. The agency’s files contain a copy of a Cabinet Decision Sheet of March 1998 dealing with the financing and relocation of the Claremont Speedway. That document directs the creation of an implementation committee to be administered by the agency containing representatives from various State and local government agencies and certain motor sports operators to deal with certain key issues relating to the proposed motor sports facility and with a direction to report back to Cabinet on the proposal.
16. My office made inquiries with the Cabinet Services Branch of the Ministry of the Premier and Cabinet in respect of this issue. I am informed that there are generally considered to be two main types of committees of Cabinet: standing committees and Cabinet subcommittees. Standing committees are usually comprised of several Ministers and may also include one or more key senior public service officers. Those committees are established on an ongoing basis to deal with regularly recurring matters of Cabinet business. Cabinet subcommittees are generally established to deal with particular, finite matters or projects. Cabinet subcommittees are composed of at least one Minister, and include senior public service officers from relevant areas and representatives of relevant industry or other community interests. Such subcommittees are required to report back to Cabinet at various stages and to obtain Cabinet approval for each strategic stage of a particular project.
17. I am also informed that the Cabinet Services Branch has a record of the implementation committee as being a Cabinet Subcommittee. That Branch administers all matters relating to the implementation committee as a committee of Cabinet. Although not entirely conclusive, the information now before me indicates that the implementation committee may be a committee of Cabinet and, therefore, an Executive body as that term is defined in the FOI Act.
18. However, if I were to accept that the implementation committee were a committee of Cabinet – and, therefore, an Executive body – as defined in clause 1(6) – the disputed document would not, in my view, if disclosed, reveal its deliberations or decisions. It is a report that may or may not have been taken into account by the committee in the course of its deliberations and in reaching its decisions but what those deliberations or decisions were is not revealed in the document.
19. I also concur with the comments in *Re Birrell and Department of the Premier and Cabinet (No 1)* (1986) 1 VAR 230, at p 239, when the Victorian AAT commented on this point and said:

*“It was submitted on behalf of the respondent that the word “deliberation” encompassed any act of Cabinet including its mere receipt of information*

*such as, for instance, a report without the need for debate or consideration. It is our opinion that “deliberation” encompasses more than the mere receipt of information in the Cabinet room for digestion by Cabinet Ministers then or later. The word “deliberation” connotes careful consideration with a view to the making of a decision. The mere acceptance of material which may or may not provide the basis for further action or decision-making (certainly if there is not discussion or consideration concerning its worth or merit) does not in our view amount to “deliberation”.*”

20. As to the claim for exemption under clause 1(1)(b), the document does not appear to me to contain policy options or recommendations. It is a risk assessment. It contains facts, opinions and conclusions, not policy options or recommendations. It may be that policy options might subsequently be developed, and recommendations made, based on the assessment but none are contained in the document. In my view, therefore, the document is not exempt under clause 1(1)(b).
21. As to the claim under clause 1(1)(d)(i), the disputed document does not appear to me to be of the kind protected by that exemption. The disputed document does not appear to me to have been prepared to brief the Minister. As I have said, the agency’s documents indicate that it was prepared to enable a report to be prepared for the EPA. It may be that the Minister was, or was intended to be, briefed as to its conclusions and a document – such as a briefing paper in respect of the assessment – prepared for that purpose may well have been caught by the exemption; the assessment itself is not, however, in my view. Therefore, it is my view that the disputed document is not exempt under clause 1(1)(d)(i).
22. Further, having examined the disputed document, it is clear to me that it contains a great deal of technical, scientific and statistical data that would appear to fall within the limits on exemption in clause 1(2). Therefore, for the reasons given, I find that the disputed document is not exempt under clause 1 of Schedule 1 to the FOI Act.

**(b) Clause 6 - Deliberative processes**

23. Clause 6(1) 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.”*

24. 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, in my view, 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 complainant is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; the complainant is entitled to access unless the agency can establish that disclosure of the particular deliberative process matter would be contrary to the public interest.
25. In its notices of decision to the complainant, the agency stated that the report contains data that formed part of the general information collated in readiness for presentation to the public in the form of a Public Environmental Review, and that the public consultation process is continuing and no final decision has been made.
26. I accept that the disputed document was prepared or obtained by the agency in the course of, or for the purposes of, the deliberative processes of the implementation committee. That is, I accept that it falls within the terms of clause 6(1)(a). However, the exemption is not established unless the disclosure of the disputed document would, on balance, be contrary to the public interest.

### **Public interest**

27. In a number of my formal decisions I have consistently expressed the view that it would be contrary to the public interest to prematurely disclose documents while deliberations in an agency are continuing, if there is evidence that the disclosure of such documents would adversely affect the decision-making process, or that disclosure would, for some other reason, be contrary to the public interest. In either of those circumstances, I consider that the public interest is served by non-disclosure. As I have said before, I do not consider that it is in the public interest for any agency to conduct its business with the public effectively “looking over its shoulder” at all stages of its deliberations and speculating about what might be done and why. I consider that generally the public interest is best served by allowing deliberations to occur unhindered and with the benefit of access to all of the material available so that informed decisions may be made.
28. In the initial notice of decision, dated 23 June 1999, the agency informed the complainant that “*the report contains data which forms part of the general information being collated in readiness for presentation to the public*” and that that presentation would “*take the form of a Public Environmental Review*



(‘PER’) ... *due to be released shortly.*” The agency also claimed that the final determination by the Government in respect of the motor sports complex has not been made and that there is no public interest in releasing documents where the deliberations associated with those documents have not been finalised.

29. It is my understanding that the disputed document has been superseded by a second report, which the implementation committee commissioned to be prepared by another company. It is also my understanding that the second report was made available to the public at the same time that the PER was released. I understand that the PER has been released for public comment and a copy of the second report was released to the complainant at the same time.
30. On the information before me, it appears that the second report was the document used in the deliberative process involved in the preparation and subsequent approval process relating to the PER. Therefore, the disputed document was not used for the intended purpose for which it was prepared because the second report was used for that purpose in its place. Although it is not entirely clear, it appears that, after receiving the disputed document, the agency decided that it was not suitable to be used as part of the PER and the disputed document was “shelved”. In those circumstances, any deliberations that may otherwise have been associated with the disputed document are clearly at an end. Accordingly, in my opinion, disclosure of the disputed document could not affect the integrity of the deliberative process in any way.
31. I recognise that there is a public interest in ensuring that government decisions that affect the quality of life of citizens are soundly based and that due consideration is given to environmental factors in the decision-making process. I consider that that public interest is part of the general public interest in the accountability of government agencies that is recognised in s.3 of the FOI Act which sets out the objects and intent of the legislation.
32. The agency states that the proposal to site the motor sports complex at Kwinana is presently “out for public comment”. Clearly, in my view, there is a public interest in public comment being informed comment. There is also a public interest in ensuring that there is a meaningful process of consultation with the public at large and those members of the public in the Kwinana area most likely to be affected by the proposal.
33. In my view, the public interest in accountability would be served, not hindered by disclosure of the disputed document. I consider that the public is entitled to have access to all available information that has been paid for out of the public purse and not merely the information that the agency chooses to release, unless there is very good reason that it should not. As presently informed, I am of the view that there is no good reason that it should not. I find that the disputed document is not exempt under clause 6(1).

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