

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

**File Ref: F1681999  
Decision Ref: D0361999**

Participants: **Geoffrey Ian Gallop**  
Complainant  
  
- and -  
  
**Water Corporation**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – claim that body not an agency – clause 1 of the Glossary in Schedule 2 – definition of agency – whether respondent is an agency – body or office established for a public purpose under a written law – meaning of “public purpose”

FREEDOM OF INFORMATION – refusal of access – internal memoranda and filenotes – copies of correspondence – clause 10(4) – commercial affairs of agency – whether reasonable to expect disclosure to have adverse effect on commercial affairs – clause 6 – deliberative processes – identify particular deliberative process – advice and opinion obtained and recorded for the purpose of the deliberative processes of the agency – information already in public domain – whether contrary to the public interest to reveal deliberations of the agency – limits on exemptions – whether matter is merely factual or statistical.

*Freedom of Information Act 1992 (WA)* s. 10(1), Schedule 1 clauses 6(1), 7 and 10(4); Schedule 2, Glossary clause 1

*State Supply Commission Act 1991*

*The Water Corporation Act 1995*

*Re McNeill and Western Australian Trotting Association* [1996] WAICmr 20

*Re Christie and Queensland Development Corporation* (1993) 1 QAR 1

*Re Adams and the Tax Agents Board* (1976) 1 ALD 251

*State Government Insurance Office v City of Perth* (1990) 71 LGRA 123

*Thompson v Federal Commissioner of Taxation (1959)* 102 CLR 315

*Re English and Queensland Law Society (1995)* 2 QAR 714

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

*Re Read and Public Service Commission* [1994] WAICmr 1

*Re Miles and Anor and Electricity Corporation* [1999] WAICmr 31

*Re Waterford and Department of Treasury (no 2)* (1984) 5 ALD 588

*Ministry for Planning v Collins (1996)* 93 LGRA 69

*Re Collins and Ministry for Planning* [1996] WAICmr 39

## DECISION

The decision of the agency is set aside. In substitution it is decided that the documents are not exempt.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

9 November 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 Water Corporation ('the agency') to refuse Dr Geoffrey Gallop MLA ('the complainant') access to certain documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. In April 1999, the agency made an offer for the purchase of land adjacent to Wellington Dam, namely, the portion of Wellington Location 56 being Lot 104 on Plan 23203 and being part of the land comprised in certificate of Title Volume 2139 Folio 699. The offer was accepted and the transfer effected with the issue of new titles for the subject land.
3. On 2 June 1999, the complainant made an application to the agency for access under the FOI Act to copies of all documents relating to the purchase of the land in question. The agency granted access to some documents, either in full or in part. Access to other documents or parts of documents was refused on the ground that those documents contained matter that was exempt under clause 6(1), 7 and 10(4) of Schedule 1 to the FOI Act.
4. The complainant sought internal review of the agency's initial decision. However, with the exception of one document to which access was granted, the internal reviewer confirmed the initial decision to refuse access on the grounds that the documents are exempt under clause 6(1), 7 and 10(4).
5. On 13 September 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

### REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained the disputed documents from the agency. From the complainant, I was given copies of extracts from Hansard recording certain questions and answers in Parliament in respect of the purchase of the land in question. I also met with representatives of the agency.
7. Following my discussion with its representatives, the agency decided to release a number of documents to the complainant. In respect of the balance, I received a submission in writing from solicitors for the agency. The agency submitted that it is not an agency for the purposes of the FOI Act. In the alternative, it submitted, firstly, that the documents remaining in dispute are exempt under clauses 6(1) and 10(4) of Schedule 1 to the FOI Act. Secondly, it submitted that two documents are not documents of the agency.

8. On 22 October 1999, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. In summary, it was my preliminary view that:
- the Water Corporation is an agency for the purposes of the FOI Act;
  - two documents (folio 18 and folio 102) are documents of the agency, but folio 102 is outside the ambit of the complainant's access application;
  - none of the disputed documents may be exempt under clause 10(4); and
  - folios 18, 22, 46 and 48 may not be exempt under clause 6(1).
9. I received a further submission in writing from the agency's solicitor. The agency maintains its claim that it is not "an agency" as defined in the FOI Act. In the alternative, the agency maintains its claim that the disputed documents are exempt under clauses 6(1) and 10(4) of Schedule 1 to the FOI Act. Nothing further was received from the agency in respect of its claims that two folios are not documents of an agency for the purposes of the FOI Act.

### **The preliminary question**

10. 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 with his complaint.
11. In *Re McNeill and Western Australian Trotting Association* [1996] WAICmr 20, the Acting Information Commissioner considered the question of the extent of the Information Commissioner's power to determine questions as to her own jurisdiction. The Acting Information Commissioner referred to and endorsed the decision of the Queensland Information Commissioner in *Re Christie and Queensland Development Corporation* (1993) 1 QAR 1.
12. In that case, the Queensland Information Commissioner referred to, *inter alia*, a passage in *Re Adams and the Tax Agents Board* (1976) 1 ALD 251 in which Brennan J said, at p. 254, that:
- "An administrative body with limited authority is bound, of course, to observe those limits. Although it cannot judicially pronounce upon the limits, its duty not to exceed the authority conferred by law upon it implies a competence to consider the legal limits of that authority, in order that it may appropriately mould its conduct. In discharging its duty, the administrative body will, as part of its function, form an opinion as to the limits of its own authority..."*
13. In *Re Christie*, the Queensland Information Commissioner concluded, at paragraph 13 on p.6, that it is well established law that an appeal tribunal of limited jurisdiction has both the power, and a duty, to embark upon a

consideration of issues relating to the limits of its jurisdiction, when they are raised as an issue in an appeal lodged with the tribunal. I agree with that view.

14. Clearly, upon complaint, and where it is in issue, I am required to determine whether the body or office concerned is an “agency” for the purposes of the FOI Act, in order to form a view as to whether or not I have jurisdiction to deal with the complaint and review the decision. In this matter, the preliminary question, therefore, is whether the Water Corporation is an agency, as defined in the FOI Act.
15. The agency submits that, for it to be covered by the FOI Act, it must fall within the definition in paragraph (e) of the definition of “*public body or office*” in the Glossary in Schedule 2 to the FOI Act, which is “*a body or office that is established for a public purpose under a written law*”. The agency concedes that, for the purpose of paragraph (e), it is a body established under a written law, namely, the *Water Corporation Act 1995*.
16. However, the agency claims that it was not established for a public purpose. The agency submits that its functions contained in s.27 of the *Water Corporation Act 1995*, together with its operation and organisational structure, indicate that it is subject to the overriding purpose of generating profits. Further, it is submitted that the generation of profit would not be a public purpose, and cites in support of that proposition the decision of the Supreme Court of Western Australia in *State Government Insurance Office v City of Perth* (1990) 71 LGRA 123, at 134 and 135.

### **Public purpose**

17. The nature of a “public purpose” has been discussed in various contexts in a number of decisions. For example, in *Thompson v Federal Commissioner of Taxation* (1959) 102 CLR 315, the High Court considered that a body can be said to have been set up for a public purpose if the organisation is intended to benefit the public as a whole, or a substantial section of the public, provided that the organisation has not been set up for a private purpose such as the private profit or advantage of an individual or class of individuals.
18. A similar point was made by Franklyn J in *State Government Insurance Office v City of Perth* when his Honour said, at 135:

“...For a purpose to be a “public purpose” within the meaning of the section in my view it must be a purpose which relates or pertains to the people of the State or of some particular region or locality as a whole and so relate or pertain in the sense of the provision of some service, utility or benefit to the public which would not be otherwise provided, and which is not provided with the primary purpose of producing profit, although profitability might well flow from charges or fees imposed or moneys collected or earned in respect of such provision. Such a definition accords with activities which are traditionally the province of government and with the meaning of the word “public”.”

19. The question has also been considered by the Queensland Information Commissioner in the context of the definition of an agency in the decision in *Re English and Queensland Law Society* (1995) 2 QAR 714. In that decision, the Information Commissioner considered whether the Queensland Law Society is an agency for the purposes of the Queensland FOI Act. The definition of agency in that Act includes a “public authority”, which is defined in section 9 to mean, *inter alia*, “(a) a body (whether or not incorporated) that - (i) is established for a public purpose by an enactment...”
20. At paragraph 74 of the decision, the Information Commissioner stated that he considers that the meaning of the phrase “public purpose” in the Queensland FOI Act is relatively straightforward. He said:

*“The word “purpose” directs attention to the objects or aims for which a body has been established as evidenced by the relevant powers, functions or duties conferred on it by Parliament. The word “public” imposes a requirement that a purpose be one for the benefit of members of the community generally (or a substantial segment of them, e.g. those who have dealings with solicitors).”*
21. The Information Commissioner also discussed the inclusion of the word “a” in the phrase “for a public purpose.” He considered, at paragraph 78, that the effect of this is that the correct test to be employed is “*whether at least one of the major purposes for its establishment (as distinct from minor or ancillary purposes) is a public purpose.*” I agree and accept that to be the correct test for determining the question of whether a body is an agency under paragraph (e) of the definition in the FOI Act.
22. The long title of the *Water Corporation Act 1995* states that the purpose of the legislation is “*...to establish a corporation with the function of providing water services, and with functions necessary for and related to that purpose, and for connected purposes.*” The corporation is established by s.4 of that Act as a body corporate with perpetual succession. Section 27 of that Act describes the functions of the corporation and s.29 prescribes the powers of the corporation in performing its functions.
23. After examining those sections of that Act and that Act as a whole, I am satisfied that the main purpose of the corporation is to provide water services. I am also satisfied that the provision of water services is essentially a public purpose for the benefit of the public as a whole as opposed to a private purpose for the private profit of an individual or class of individuals.
24. I accept that the *Water Corporation Act 1995* requires the corporation to perform its functions in accordance with prudent commercial principles and to endeavour to make a profit, consistently with maximising its long-term value. However, I cannot agree with the claim that the generation of profit is the overriding purpose of the Water Corporation. Clearly, its primary purpose is the supply of water, an essential service and clearly a public purpose, in my view.

25. I consider that the operation and structure of the corporation, as detailed in the *Water Corporation Act 1995*, point to the fact that the corporation exists for the benefit of the public at large and not for the benefit of private shareholders. For example, the Minister is the sole shareholder in the corporation (s.72(2)), and the corporation is subject to directions given by the Minister and 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). It appears to me that any profits made by the corporation (whilst not required to be returned to the Consolidated Fund but available to be used for capital expansion of the corporation's assets) are held and used by the corporation, ultimately for the benefit of the public of Western Australia, and certainly not for the benefit of the board of directors of the corporation or any of its employees or other private individuals.
26. In my view, it is clear that the Water Corporation is established by legislation for a public purpose. Accordingly, I find that it is an agency for the purposes of the FOI Act and that I have jurisdiction to deal with this complaint under the FOI Act.

### **Documents of an agency**

27. The agency claimed that two documents, folio 18 and folio 102, are not documents of the agency. Folio 18 is a letter dated 2 December 1998 from the Under Treasurer to the Chief Executive Officer, Waters and Rivers Commission. Folio 102 is an uncorrected proof copy of Hansard dated 2 June 1999. A document of an agency is defined in clause 4 of the Glossary by reference to a document that is in the possession or under the control of an agency and the phrase includes a document to which the agency is entitled to access. Further, the word "document" is defined to mean any record, any part of a record, any copy, reproduction or duplicate of a record, or any part of a copy, reproduction or duplicate of a record.
28. In my view, a copy of any document that is in the possession or under the control of an agency at the time an access application is made is a document of the agency for the purposes of the FOI Act. Except in certain circumstances, the right of access in s.10(1) of the FOI Act does not depend on whether an agency holds the original of the document sought, or whether the document was created or sourced from within the agency. The essential criterion in determining whether a document is a document of an agency for the purposes of the FOI Act is the element of possession or control. Therefore, as folios 18 and 102 are in the possession of the agency, I consider that both folios are documents of the agency to which the FOI Act applies.
29. Insofar as the contents of folio 102 appear in Hansard, it cannot, in my view, be exempt for any reason as that matter is already in the public domain and no harm could therefore follow from its disclosure in folio 102. However, folio 102 does not, in my view, relate to the purchase of the land in question. Therefore, although that particular parcel of land is mentioned in folio 102, along with other forestry reserves, I do not consider that it falls within the terms



of the complainant's access application and it need not be dealt with any further in this decision.

30. Folio 18 is altogether different and, in my view, it falls within the terms of the complainant's access application. Although the agency has made no specific claims for exemption for folio 18, I have, nonetheless, considered whether it might be exempt under clause 6(1) or 10(4).

### THE DISPUTED DOCUMENTS

31. There are, therefore, 9 documents in dispute between the parties. To avoid confusion, I have used the agency's numbering system. However, I note that the agency has used the word "folio" to describe a document. Some of the documents in fact consist of more than one page. The disputed documents are:

Folio 18	Letter dated 2 December 1998 from the Under Treasurer to the Chief Executive Officer, Waters and Rivers Commission.
Folio 22	Letter dated 9 December 1998 from Managing Director of agency to Chairman.
Folio 24	Internal memorandum dated 9 December 1998 from Managing Director to General Manager, Finance and Administration.
Folio 32	Receipt dated 10 December 1998 issued to agency.
Folio 35	Letter dated 22 January 1999 from third party to Manager, Corporate Real Estate.
Folio 41	Internal memorandum dated 7 April 1999 from Manager, Corporate Real Estate to General Manager, Engineering and Contracts.
Folio 45	Undated document entitled "Wellington Land" containing Valuer General's valuation.
Folio 46	File note dated 8 April 1999 by General Manager, Engineering and Contracts.
Folio 48	File note dated 13 April 1999 by Chairman, Board of Directors of the agency.

The agency claims that each of those documents is exempt, either in full or in part, under clause 10(4) of Schedule 1 to the FOI Act, and that folios 22, 46 and 48 are also exempt under clause 6(1).

### THE EXEMPTIONS

#### (a) *Clause 10(4)*

32. Clause 10, so far as is relevant, provides:

**"10. The State's financial or property affairs**

***Exemptions***

(1)...

(2)...

(3)...

(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."*

33. The exemption provided by 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 accountability requirements under FOI. 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 not necessarily so.

**The agency's submission**

34. The agency informs me that it operates in a significantly de-regulated environment promoted by government policies to increase competition. I am informed by the agency that it supplies only 50% of total water used in the metropolitan area and less than 25% in Kalgoorlie. The agency submits that private operators and owners supply the balance and the agency must compete for its business.
35. The agency contends that it is subject to competitive pressures promoted by the *Water Corporation Act 1995* and its operational licence requirements. It is submitted that, therefore, the agency's position may be distinguished from the position of the Electricity Corporation which I discussed in my decision *Re Edwards and Electricity Corporation trading as Western Power* [1999] WAICmr 13.

36. The agency claims that the disputed documents record the approach taken by it in its commercial negotiations. I am informed that those documents disclose elements of the first offer made, including the relationship between offer price, valuation and other crucial elements. It is submitted that the disclosure of that information could be used to considerable advantage by other landowners currently negotiating with the agency. It is claimed that such disclosure could reasonably be expected to have an adverse effect on the commercial affairs of the agency by denying it the ability to negotiate openly but confidentially and by potentially inflating a vendor's asking price resulting in delays and protracted negotiations which could jeopardise tight time frames in the agency for its accelerated works programme.
37. The agency claims that it is in a delicate position with its land acquisition programme and that it must assess the likely impact of any action on its future prospects. The agency submits that many sensitive commercial negotiations involving the agency are currently ongoing and that the agency has significant concerns that those negotiations could be protracted and undermined by disclosure of the disputed documents, which would have the effect of materially disadvantaging the agency's negotiating position. Therefore, it submits, disclosure could reasonably be expected to have an adverse effect on the commercial affairs of the agency.
38. The agency informs me that there has already been significant media and political attention surrounding the purchase of the subject land. Further, the agency contends that it is reasonable to conclude that release of information relating to that transaction would be viewed with significant interest by landholders and could be used to their commercial advantage. The agency claims that such a result would be to its detriment, as well as that of the State and the public interest.
39. The agency submits that disclosure of the disputed material would give a commercial advantage to vendors of land because such transactions do not operate in a commercial vacuum. It is submitted that it is not in the public interest for potential vendors to have an unfair commercial advantage in negotiations with the agency.

### **Consideration**

40. From my examination of the disputed documents, I accept that those documents contain information relating to the commercial affairs of the agency, specifically, its negotiations over the purchase of the land in question. Therefore, I accept that the disputed documents meet the requirements of paragraph (a) of clause 10(4).
41. In respect of folios 22, 24, 32, 35, 41, 45 and 46 the only information to which access has been denied consists of various dollar amounts relating to the initial offer and valuation. To my knowledge, those figures are already in the public domain having been the subject of various media reports in *The Sunday Times* newspaper on 24 October 1999, and *The West Australian* newspaper on 25 and 27 October 1999.

42. Therefore, I have some difficulty accepting the claim that the disclosure of the dollar amounts in those folios could reasonably be expected to have any adverse effect on the commercial affairs of the agency. It seems to me more likely that if there were to be any adverse effect on the agency's commercial affairs it would be the result of the disclosure that has already occurred in the newspapers rather than any disclosure under the FOI Act.
43. In my view, the edited copies of the documents already released to the complainant disclose the approach taken by the agency in its negotiations. Those documents disclose, for example, the various stages in the negotiations, the discussions that took place and the parties involved, the matters considered relevant in determining an appropriate offer to be made and the basis for the initial offer.
44. The only information in folios 22, 24, 32, 35, 41, 45 and 46 being withheld relates to the first offer made by the agency and that information is now in the public domain, having been disclosed via other sources and not through the FOI process. I am not persuaded that current negotiations being conducted by the agency for the purchase of other areas of land could, therefore, be prolonged or delayed by the disclosure of the disputed matter in those folios. Further, since that information is in the public domain, any commercial advantage or disadvantage flowing to other vendors or to the agency could not reasonably be expected to follow from disclosure under FOI.
45. Further, I do not consider that folios 24, 32 or 35 contain any other information relating to the agency's commercial affairs. Those documents are concerned with the payment of a deposit. I do not consider that their disclosure could have any of the adverse effects claimed by the agency.
46. There is nothing before me that persuades me that disclosure of folio 48 could reasonably be expected to have an adverse effect on the commercial affairs of the agency. Once again, it contains details relating to a now finalised transaction. The significant figures mentioned have already been publicly disclosed and the balance of the matter in the document relates to that specific transaction. The agency claims that the information in the document could be used by other landholders to their commercial advantage, but doesn't explain how, or what the commercial advantage might be. The agency claims that its other ongoing negotiations could be protracted and undermined by disclosure of the documents, but offers nothing in support of that claim.
47. Further, it is not sufficient to establish an exemption to merely make the claim that a document is exempt under one of more of the exemption clauses in Schedule 1 to the FOI Act. The claim must be supported in some way. On this point, I respectfully refer to the comments of Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550, where His Honour said in respect of a claim for exemption under clause 4(3):

*“How can the Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to*

*assess the conclusion of the original decision maker that he or she had “real and substantial grounds for thinking that the production of the document could prejudice that supply...”? In my opinion it is not sufficient for the original decision-maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds, and must commend itself as the opinion of a reasonable decision-maker.”*

48. Even if the agency had been able to establish that the disputed documents were *prima facie* exempt under clause 10(4), that exemption is limited by clause 10(6) which provides that matter is not exempt if its disclosure would, on balance, be in the public interest. My view of the competing public interest factors in this matter is discussed at paragraphs 62-70 below.
49. For those reasons, I consider that the agency has not established a *prima facie* claim for exemption under clause 10(4) in respect of folios 22, 24, 32, 35, 41, 45, 46 and 48. Accordingly, it is my view that those documents are not exempt under clause 10(4).
50. Folio 18 is a different kind of document. That document is essentially an administrative document prepared, it seems, for the purpose of the Under Treasurer giving advice to the Waters and Rivers Commission as to certain matters that would need to be considered in relation to the purchase of certain land. Whilst it may contain information relating to the commercial affairs of the agency, I do not consider that the disclosure of that document could reasonably be expected to have an adverse effect on those affairs. Its contents have not been disclosed publicly, but it does not seem to me to concern the current and ongoing negotiations being conducted by the agency for its land acquisition programme. It concerns matters related to the specific transaction that is now concluded. I do not consider that there is any probative material before me that establishes that its disclosure could reasonably be expected to have any of the adverse effects identified by the agency. Accordingly, I find that folio 18 is not exempt under clause 10(4).

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

51. The agency also claims that folios 22, 46 and 48 are also exempt under clause 6(1). 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.”*

52. 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; he is entitled to access unless the agency can establish that disclosure of the particular deliberative process matter would be contrary to the public interest.
53. I have discussed the purpose of the exemption in clause 6(1) and the meaning of the phrase “deliberative processes” in a number of formal decisions, initially in *Re Read and Public Service Commission* [1994] WAICmr 1 and most recently in *Re Miles and Anor and Electricity Corporation* [1999] WAICmr 31. 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.
54. I also agree with the Tribunal’s view that:

*It by no means follows, therefore, that every document on a departmental file will fall into this category...Furthermore, however imprecise the dividing line first may appear to be in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency...*

*It is documents containing opinion, advice, recommendations etc. relating to the internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption under s 36 only attaches to those documents the disclosure of which is “contrary to the public interest”... ”*

### **The agency’s submission**

55. The agency submits that folios 22, 46 and 48 record certain deliberations and consultations that have taken place in the course of the agency deciding the appropriate amount to be offered for the purchase of the land. The agency claims that those folios record the early deliberations in that process and that the deliberative records of early steps in the negotiation should be shielded from

disclosure in order to ensure the integrity of current ongoing negotiations with other land owners. Further, in respect of folio 48, the agency submits that it records the negotiating approach taken by it and deliberations over the purchase price.

56. It is the submission of the agency that disclosure of initial strategies and positions could reasonably be expected to have the potential for misconstruction and adversely affect current and future negotiating strategies in the absence of explanatory material. The agency also claims that disclosure would assist landholders by disclosing the agency's steps, positions and concessions and this could be detrimental by increasing the likelihood of exaggerated asking prices being demanded by vendors.
57. The agency informs me that the integrity of its decision-making processes could be adversely affected by disclosure because negotiations are continuing and its commercial dealings are not one-off transactions. I am also advised that some land owners have already approached the agency demanding an increase in the purchase price for their land because of some of the details publicly disclosed relating to the agency's purchase of the Wellington Dam land.
58. The agency claims that the commercial sensitivity surrounding its negotiating strategy, including the relationship between an offer and a valuation does not end with the finalisation of one purchase. Rather, the information is more commercially sensitive when the final price is agreed. As I understand the argument, the agency claims that the disclosure of commercially sensitive details such as the agreed price will assist other vendors and disadvantage the agency. In this instance, it is submitted that the combined effect of disclosing the dollar figures together with the material already disclosed would be contrary to the public interest in ensuring that the agency is not disadvantaged in its commercial dealings with third parties.
59. The agency submits that it would be contrary to the public interest to disclose those documents while discussions are continuing with other landowners. It is submitted that such disclosure would be unhelpful and could give vendors an unfair competitive advantage. The agency claims that the information available on the public record together with the material already disclosed to the complainant is sufficient to satisfy the accountability requirements of the agency.

*Clause 6(1)(a)*

60. I have examined folios 22, 46, 48 and folio 18. The only matter deleted from folio 22 and folio 46 consists of dollar figures. I do not accept that that matter can be described as matter that falls within the terms of the exemption in clause 6(1)(a). Whilst the whole of each of those two documents may have satisfied the description in clause 6(1)(a), in my opinion the dollar amounts alone (being all that has not been disclosed) do not. In the context in which those dollar amounts appear, they are not opinion, advice or recommendation, nor do they reveal consultations or deliberations; those have already been revealed by disclosure of the balance of each document. In any event, I consider that those

figures may be merely factual or statistical matter that is not exempt by virtue of clause 6(3). It is also information that is already in the public domain. Its disclosure therefore, could not, on balance, be contrary to the public interest, in my view.

61. Folio 48, in my view, is a routine administrative file note recording things done by the chairman of the board of the agency and discussions that took place over the purchase of the land. Much of it is merely a factual account of what occurred. However, I accept that it contains some material that may fall within the terms of paragraph (a) of clause 6(1). It reveals consultations that took place and advice obtained in the course of the agency's deliberative process relating to the price to be paid for, and the timing of, the purchase of the land. I also accept that folio 18 contains material that falls within paragraph (a) of clause 6(1). It reveals opinion and advice and consultation that has taken place in the course of, and for the purpose of, the deliberative process of the Waters and Rivers Commission in determining whether or not to purchase a particular piece of land.

*Clause 6(1)(b)*

**Public interest**

62. 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. I do not generally 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.
63. For example, in *Re Edwards* I said 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. An example might be in the circumstances previously identified where the premature disclosure of a purchase price that an agency is prepared to pay, or a negotiation range that an agency is prepared to operate within, could put an agency at a disadvantage in the negotiating process.
64. I also recognise a public interest in the agency making prudent commercial decisions that will ultimately return a benefit to the people of Western Australia. In the context of such decision-making, I consider that the public interest may require some degree of confidentiality, at least whilst such negotiations are on foot. However, in this instance, the material for which exemption is claimed relates to a decision to purchase land that has been taken and is now finalised. In those circumstances, clearly, the disclosure of figures relating to the offer



price and purchase price and the particular steps taken in negotiating the transaction could not adversely affect the integrity of the decision-making process or the agency's negotiating position relating to that particular purchase.

65. In this instance, the agency claims that it is the integrity of its other negotiations that could be adversely affected by disclosure. However, it seems to me that the disclosure of the disputed matter together with the material already disclosed would merely reveal the agency's negotiations and negotiating strategy in that instance. I do not see how the disclosure of that strategy could affect the integrity of any decision-making process, nor adversely affect the agency's negotiating position in any other negotiations to purchase land, related or not. What was done on that occasion does not bind the agency to any particular course of action in any other negotiations with other parties.
66. Further, I do not consider that the disclosure of material that would show, among other things, that an initial offer was made and rejected and that a subsequent offer was accepted would necessarily reveal anything secret or sensitive or that it would give an unfair advantage to any other vendor. The documents do not appear to me to reveal any remarkable tactical strategy.
67. Folio 18 reveals nothing of the agency's, or any other agency's, negotiations or strategies and could not, therefore, adversely affect such matters, in my opinion. The disclosure of that document would not, therefore, be contrary to the public interest on that basis.
68. I do not accept the agency's argument that disclosure of folios 22, 46 and 48 will adversely affect its negotiating position by revealing such matters as the relationship between its offer and a valuation given that both have already been disclosed publicly. Disclosure of that information in those documents could not, therefore, cause any harm to the agency's position as, if any harm were to be caused, it would have already been caused by the earlier disclosure.
69. I also recognise that there is a public interest in government agencies dealing fairly with private citizens and being seen to deal fairly with such people so that the community can maintain its confidence in the fairness of such dealings. In my view, the public interest in government agencies acting fairly is not inconsistent with the public interest in the efficient management of public monies: see the comments of Templeman J, at page 77, in *Ministry for Planning v Collins* (1996) 93 LGERA 69 (the decision on appeal to the Supreme Court confirming my decision in *Re Collins and Ministry for Planning* [1996] WAICmr 39). In a case such as this, where there is a question raised as to the process followed by the agency in the transaction, I consider that it is clearly in the public interest for the agency to open that process to public scrutiny.
70. I am not persuaded that the disclosure of the disputed matter, all of which concerns a transaction that is finalised and has become subject to some controversy, would, on balance, be contrary to any public interest. Rather, I consider that the public interest in the accountability of agencies, an object of the FOI Act, would be served by such disclosures so that the public can judge for itself whether appropriate decisions have been taken. Based on the material

before me, I do not consider that disclosure of those documents would be contrary to the public interest.

71. Therefore, I find that folios 18, 22, 46 and 48 are not exempt under clause 6(1) of Schedule 1 to the FOI Act.

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