

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

**File Ref: F2001093  
Decision Ref: D0372001**

Participants:

**Mitchell Sideris**  
Complainant

- and -

**City of Joondalup**  
Respondent

-and-

**RANS Management Group Pty Ltd**  
Third Party

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – documents relating to lease and contract tender negotiations – clause 4(2) – whether documents contain information of commercial value – whether disclosure of documents could reasonably be expected to destroy or diminish the commercial value of the information - clause 4(3) – whether information about business, professional, commercial or financial affairs – whether disclosure of requested documents could reasonably be expected to have an adverse effect on business, professional, commercial or financial affairs or to prejudice for the future supply of information to the Government or to an agency – clause 4(7) – whether disclosure would, on balance, in the public interest – clause 8(2) – whether information of a confidential nature obtained in confidence – whether reasonable expectation of prejudice to future supply of information to the Government or to an agency – clause 3(1) – personal information about third parties – public interest factors – deletion of exempt matter.

*Freedom of Information Act 1992 (WA)* s 102(2); Schedule 1 clauses 3(1), 4(2), 4(3), 4(7) and 8(2).

*Precious Metals Australia Ltd and Department of Minerals and Energy* [1997] WAICmr 12  
*Re Jones and Jones and the Town of Port Hedland* [2000] WAICmr 23  
*News Corporation v National Companies and Securities Commission* (1984) 57 ALR 350

## DECISION

I set aside the decision of the agency. In substitution, it is decided that, save for the matter described in the schedule, the disputed documents are not exempt.

B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

10 October 2001

## REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the City of Joondalup ('the agency') to refuse Mr Sideris ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 10 June 2000, the agency invited tenders for the lease and operational management of its three leisure centres (Tender No. 072-99/00). Two tender offers were received by the agency. At a meeting of the Council of the agency ('the Council') on 28 November 2000, the lease was awarded to the RANS Management Group (RANS). However, questions were raised at that meeting and the Council sought and obtained legal advice in respect of the tender process. After receiving legal advice that the agency had not complied with the provisions of s.3.58 and s.3.59(1) of the *Local Government Act 1995*, the Council required the agency to prepare a business plan, to advertise certain matters and, following that process, the Council would consider any submissions received from the public and obtain the approval of the Minister for Lands to enter into the lease with RANS.
3. Following the preparation and endorsement of the business plan and the conclusion of the advertising process, the Council authorised the execution of the lease with RANS at a meeting on 27 February 2001. I understand that the signed lease is a public document.
4. In the intervening months, on 16 September 2000, the agency invited tenders for the provision of security and patrol services (Tender No. 018-00/01). Eleven tenders were received. At a meeting on 24 October 2000, the Council accepted the tender submitted by Chubb Protective Services Australia ('Chubb') and the parties signed an agreement on 31 October 2000.
5. On 23 March 2001, the complainant made an application to the agency for access under the FOI Act to all documents relating to Tender No. 072-99/00 ('the lease documents') and to all documents relating to Tender No. 018-00/01 ('the contract documents'). Initially, the agency identified 43 documents and granted the complainant access, either in full or in edited form, to some, but not all, of those documents. However, the agency refused access to other documents on the ground that they were exempt under the FOI Act.
6. The complainant applied for an internal review and claimed that there should be more documents. The agency identified additional documents and decided to deal with the internal review in three parts: Part 1 related to the lease documents; Part 2 related to the contract documents; and Part 3 related to various public documents and correspondence between the agency and the complainant.
7. The agency granted the complainant access to all of the Part 3 documents and those are not in issue. The agency identified 44 Part 1 documents and granted the complainant full access to 18 documents; access to edited copies of 14 documents; deferred access to 1 document and refused access to 11 others. The agency identified 33 Part 2 documents and granted the complainant access to edited copies of 9 documents;

refused access to 12 documents; and the remainder were either disclosed to the complainant or were considered to be in the public domain.

8. Subsequently, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

## **REVIEW BY THE INFORMATION COMMISSIONER**

9. I obtained the disputed documents from the agency. In the course of my dealing with this complaint, the agency granted access to further documents and the complainant withdrew his complaint with respect to certain documents. I consulted both Chubb and RANS seeking further information and invited them to be joined as parties to this complaint. Chubb provided me with a submission concerning the documents relating to its business affairs, but did not seek to be joined as a party to the complaint. RANS sought to be joined as a party and was so joined. Henceforth, I refer to RANS as the third party.
10. Due to the nature of the disputed documents and the different business interests involved, I decided to deal with this complaint in 2 parts. The first part related to the lease documents and the second part related to the contract documents. I conveyed my preliminary view of each part of this complaint, in writing, to the parties involved. In respect of the lease documents, it was my preliminary view that those documents may be exempt either in full or in part. The agency and the complainant accepted my preliminary view. The third party did not respond.
11. In respect of the contract documents, it was my preliminary view that some documents may be exempt either in full or in part. The agency accepted my preliminary view. The complainant accepted my preliminary view and withdrew part of his complaint. However, the complainant made a further submission to me in respect of Documents 26 and 28. Chubb's solicitors responded in writing with a further submission.

## **THE DISPUTED DOCUMENTS**

12. There are 9 lease documents in dispute between the parties (Documents 4, 5, 6, 32, 35-39). All are letters between the agency and the third party. Documents 36, 37 and 38 are copies of, respectively, Documents 4, 6 and 5 and for the sake of convenience I refer to them as Documents 4/36, 5/38 and 6/37. Exemption is claimed for those documents under clause 4(2) and clause 8(2) of Schedule 1 to the FOI Act.
13. There are 2 contract documents in dispute between the parties (Documents 26 and 28). Those documents relate to the tender evaluation process conducted by the agency. Initially, the agency claimed that Document 26 was exempt under clauses 3(1) and 4(2) and that Document 28 was exempt under clauses 4(2) and 8(2). My preliminary view was that some matter in Documents 26 and 28 may be exempt under clauses 3(1), 4(2) and 4(3), but that Document 28 was not exempt under clause 8(2). However, as a result of the responses from the agency and the complainant, the only information in dispute between the parties is the information in Documents 26 and 28 that, in my preliminary view, may be exempt under clause 4(3). Therefore, the only issue for

determination in respect of Documents 26 and 28 is whether they are exempt under clause 4(3).

## THE EXEMPTIONS

### Part 1 - The Lease Documents

#### (a) *Clause 4(2) – Commercial or business information*

14. Clause 4(2) provides:

*“Matter is exempt matter if its disclosure –*

*(a) would reveal information (other than trade secrets) that has a commercial value to a person; and*

*(b) could reasonably be expected to destroy or diminish that commercial value.”*

15. Clause 4(2) is concerned with the protection of information which is not a trade secret but which has a ‘commercial value’ to a person. Under the *Interpretation Act 1984*, the word ‘person’ includes a public body or company, corporate or unincorporate.

16. In my opinion, information may have a ‘commercial value’ if it is valuable for the purpose of carrying on the commercial activities of a person or organisation, although it is not a requirement that the commercial value be quantified or assessed: see *Re Precious Metals Australia Ltd and Department of Minerals and Energy* [1997] WAICmr 12; *Re Jones and Jones and the Town of Port Hedland* [2000] WAICmr 23. Further, I consider that it is by reference to the context in which the information is used, or exists, that the question of whether it has a ‘commercial value’ may be determined. The exemption in clause 4(2) consists of two parts and the requirements of both parts (a) and (b) must be satisfied in order to establish a *prima facie* claim for exemption.

### The submission of the third party

17. The third party submits that the disputed documents (Documents 4/36, 5/38, 6/37, 32, 35, and 39) contain, among other things, details of its financial position, current and previous contracts, former clients, insurance, audits, staff qualifications and training, together with details of its negotiations with the agency concerning the lease. The third party claims that this information has commercial value because the information is either specific financial information or information about how the company negotiates its contracts. The third party submits that disclosure would allow competitors to gain access to information of a sensitive financial nature and matters relating to its contract negotiations.

18. The third party also submits that Documents 4/36, 5/38, 6/37 and 39 are confidential. Although I asked the third party to provide submissions on each of the disputed documents, it appears that Document 4/36 was omitted from the list and, accordingly,

no submissions were received in relation to that particular document. In my view, Document 4/36 falls into the same general category of documents as Documents 5/38 and 6/37. I consider the third party's submissions relating to those documents to be equally applicable to Document 4/36.

### Consideration

19. I have examined Documents 4/36, 5/38, 6/37, 32, 35 and 39 and I have considered the submissions made by the third party. The third party is a company engaged in the operational management of various businesses and it competes in a commercial environment for work of that kind. Taking into account the tender process for Tender No. 072-99/00, I am satisfied that the third party operates in a competitive commercial environment. In my opinion, information about the third party's financial position, its clients, current and previous contracts, audits, insurance and staff is information of a kind that is valuable to the third party in the commercial context in which it conducts its business. I accept that the commercial value of that kind of information to the third party derives from the fact that it is confidential to the third party and that its continued confidentiality provides a "competitive edge" to the third party.
20. I consider that details of contract negotiations may also have commercial value in particular circumstances, for example, where they concern a particular negotiation strategy or tactics or where the details consist of confidential information that assists the third party to conduct its business. Clearly, the information in the disputed documents came into existence because it was prepared in the context of a commercial undertaking, which was the award of a tender for the lease of the leisure centres, and the finalisation of negotiations for the ensuing lease. In that context, any information, which relates to the core of the business competitiveness of one company vis-à-vis another, would, in my opinion, have commercial value.
21. Having examined the disputed documents, I consider that they contain some information about, or references to, the negotiations between the agency and the third party concerning the contents of the lease document prior to the award of the tender by the agency; the third party's finances, insurance arrangements, professional advisors, audits, staff, staff training, clients and contracts. However, although I accept that some of that information clearly has a commercial value to the third party, I am not persuaded that all of the disputed information has a commercial value. For example, suggested changes to the wording of clauses in the lease or a reference to an insurance policy or to an audited financial statement, with no further details or explanation, is not enough, in my view, to confer a commercial value on that information. In those and other instances, I am unable to identify what the nature of the commercial value, if any, may be. Accordingly, although I have found that some of the disputed matter is exempt under clause 4(2), I do not accept that to be the case with respect to all of the disputed matter in the disputed documents.
22. Although the complainant is not, to my knowledge, a competitor of the third party, the disclosure to him of the disputed information that has a commercial value to the third party is, in effect, disclosure to the whole world, including the business competitors of the third party: see the comments of Woodward J in *News Corporation v National Companies and Securities Commission* (1984) 57 ALR 350 at 559. It follows that the

commercial value of that information could reasonably be expected to be destroyed or diminished by disclosure.

23. I am not persuaded that all of the disputed information in Documents 4/36, 5/38, 6/37, 32, 35 and 39 has commercial value to the third party. Accordingly, I find that some of the disputed information in the disputed documents is exempt under clause 4(2) of Schedule 1 to the FOI Act. I have described that information in the schedule attached to my reasons for decision. Save for the matter described in the schedule, I find that the balance of the disputed matter is not exempt under clause 4(2).

**(b) Clause 4(3)**

24. In my opinion, some of the disputed matter in Document 35 falls within the terms of the exemption in clause 4(3), rather than clause 4(2). Clause 4(3) provides that:

*“ Matter is exempt matter if its disclosure -*

- (a) would reveal information (other than trade secrets or information referred to in sub-clause (2)) about the business, professional, commercial or financial affairs of a person; and*
- (b) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.”*

25. In my opinion, the last two paragraphs on page 3 and the first three paragraphs on page 4 of Document 35, consist of information about the business, professional or commercial affairs of the third party, because it is information provided to the agency as part of the clarification process undertaken prior to the award of Tender No. 072-99/00.
26. Taking into account the nature of the commercial environment in which the third party conducts its business, I consider that disclosure of that information could reasonably be expected to have the effect of making the third party less commercially competitive in the future. However, I am unable to describe the nature of the information and the likely effects of its disclosure without breaching my duty under s.74(2) of the FOI Act. Notwithstanding that, I am satisfied that the last two paragraphs on page 3 and the first three paragraphs on page 4 of Document 35 fall within the terms of the exemption in clause 4(3).
27. Clause 4(3) is subject to the limit on exemption in clause 4(7) which provides that matter is not exempt under clause 4(3) if its disclosure would, on balance, be in the public interest. None of the parties has made submissions to me on this point. As I am satisfied that there exists a *prima facie* claim for exemption under clause 4(3), I consider that the public interest in ensuring that the business, commercial or financial affairs of third parties who provide information to local government agencies is not adversely affected by the operation of the FOI Act should prevail over any other public interest. Accordingly, I find that the last two paragraphs on page 3 and the first three paragraphs on page 4 of Document 35 is exempt matter under clause 4(3).

**(c) Clause 8(2)- Confidential information**

28. The third party claims that Documents 4/36, 5/38, 6/37 and 39 consist of confidential communications between it and the agency. Accordingly, I have also considered whether those documents are exempt under clause 8(2) of Schedule 1 to the FOI Act. Clause 8(2) provides that matter is exempt matter if its disclosure would reveal information of a confidential nature obtained in confidence and could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.
29. In order to establish a *prima facie* claim for exemption under clause 8(2), it must be shown that the documents under consideration would, if disclosed, reveal information of a confidential nature that was obtained in confidence, and also that such disclosure could reasonably be expected to prejudice the future supply to the Government or to an agency of the same or similar kind of information to that contained in the disputed documents.

**Consideration**

30. Having examined Documents 4/36, 5/38, 6/37 and 39, I accept that the information in those documents was provided by the third party to the agency after the tender process and in the course of negotiations about the final contents of the lease documents. In that context, I accept that that information is inherently confidential between the parties.
31. However, taking into account the circumstances in which it was obtained by the agency, namely, as part of the finalisation of the tender process and in circumstances where the information was necessary to conclude negotiations with the successful tenderer prior to the execution of the contract, I do not consider that, in the future, the ability of an agency or the Government to obtain similar information could reasonably be expected to be prejudiced by the disclosure of the information that is in the lease documents. In my view, it is unlikely that future tenderers would be unwilling to supply information of the same general kind to an agency, where the information is essential for the completion of a tender negotiation process so that a business or organization can enter into a commercial arrangement with an agency.
32. In my view, it is not reasonable to expect that disclosure of the disputed documents would have the effect stipulated in clause 8(2)(b), because any failure or refusal on the part of a tenderer to provide that kind of information to an agency would inevitably lead to the failure to conclude negotiations with the successful tenderer. Accordingly, I do not consider that the requirements of clause 8(2)(b) are satisfied and I find that Documents 4/36, 5/38, 6/37 and 39 are not exempt under clause 8(2).

**(d) Clause 3 – Personal information**

33. In addition, there is some information in the lease documents, which consists of personal information as defined in the FOI Act, including names, titles and signatures of people who are not officers of an agency. In my view, that information is, on its face, exempt matter under clause 3(1) of Schedule 1 to the FOI Act. In the circumstances of this complaint, I consider that the public interest in protecting privacy



is not outweighed by any other public interests. However, I also consider that it would be practicable to delete personal information from the disputed documents. Accordingly, I find the personal information to be exempt matter under clause 3(1) and I have described that matter in the schedule also.

## **Part 2 - The Contract Documents**

34. Since Chubb has not sought to be joined as a party, the parties to this part of the complaint, which deals with the contract documents, are the agency and the complainant. Following my preliminary view concerning the contract documents, the complainant made submissions to me concerning the public interest test, which limits the exemption in clause 4(3) in relation to Documents 26 and 28. The complainant claimed that certain information in Documents 26 and 28, which I considered may be exempt under clause 4(3), should be disclosed in the public interest. Although Chubb is not a party, I have also considered its submissions about that matter in deciding whether Documents 26 and 28 are exempt.
35. Document 26 contains information about the scores awarded during the tender evaluation process. Document 28 sets out selection criteria scores compiled by the agency's tender evaluation team for Tender No. 018-00/01.

### **(e) Clause 4(3)**

36. I am satisfied that the evaluation scores of each of the tenderers constitute information about the business, commercial or financial affairs of those parties. In order for the exemption in clause 4(3) to apply, it must be established that disclosure of the disputed information could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the successful tenderer (Chubb) or the unsuccessful tenderers or, in the alternative, that disclosure of that information could reasonably be expected to prejudice the future supply of that kind of information to the agency or to the Government.
37. With regard to the evaluation scores of the unsuccessful tenderers in Documents 26 and 28, I consider that the business, commercial or financial affairs of those parties could be adversely affected by disclosure of that information. The evaluation scores contain key information about aspects of business activities and a ranking of each of the parties against the set criteria. In my view, taking into account the commercial environment in which the providers of security services operate, I accept that the disclosure of that kind of information, which was compiled in response to the specific requirements of the agency, could be misleading and could affect the competitiveness of any or all of the unsuccessful tenderers if the information were to be relied upon and taken out of context. I am satisfied that an adverse effect on the business, commercial or financial affairs of those parties is one that could reasonably be expected to follow if the evaluation scores in Documents 26 and 28 were to be disclosed. Accordingly, in my view, that information in Documents 26 and 28 falls within the terms of the exemption in clause 4(3).
38. However, I am not persuaded that the disclosure of Chubb's evaluation scores in Documents 26 and 28 could reasonably be expected to have that result. Chubb submits

that the disclosure of its evaluation scores would reveal the areas in which it did not score well and that this would enable its competitors to focus on those areas in respect of future tenders. Chubb submits that that outcome would have the effect of disadvantaging Chubb.

39. Clearly, as the successful tenderer, Chubb was awarded the contract. It appears to me that the disclosure of information about how Chubb was scored by the evaluation team members against the set criteria could not reasonably be expected to have the adverse effect on Chubb's business, commercial or financial activities claimed. Presumably, Chubb is in the position of being able to work on areas of its tender where it may be lacking so that any future tenders which it might submit would be strengthened. Further, in my view, unless the scores of the unsuccessful tenderers were also disclosed, the disclosure of Chubb's scores would be meaningless. Therefore, I am not persuaded that information about Chubb's scores falls within the terms of the second part of the exemption in clause 4(3)(b).

### **The complainant's submission**

40. The complainant submitted that the tender evaluation scores should be disclosed in the public interest because the agency was required to evaluate the submissions against two options, *with vehicle* and *without vehicle*. The complainant claims that the evaluation panel short-listed two tenders on a *without vehicle* basis and only those tenders were invited to make a presentation to the panel before a recommendation was made to the agency. The complainant claims that the panel accepted one of those tenders based on the *with vehicle* option.
41. The complainant also claims that the report made to the Council contains five *with vehicle* tenders, only one of which was short-listed. It is the submission of the complainant that disclosure of the tender evaluation material would enable public scrutiny of the agency's actions and ensure that due and proper processes had occurred. The complainant submits that disclosure of the evaluation scores of the unsuccessful tenderers will clearly indicate that only those ranked highest in compliance and capability had been short-listed.

### **Public interest**

42. Determining whether or not disclosure would be in the public interest involves identifying the public interest factors for and against the disclosure of information about the tenderers' evaluation scores, weighing those factors and deciding where the balance lies. In favour of disclosure, I recognise that there is a public interest in the accountability of government agencies for the decisions that they make, which affect third parties. I also recognise that there is a public interest in the complainant being able to exercise his rights of access under the FOI Act.
43. On the other hand, I recognise that there is a public interest in ensuring the viability of private sector bodies that do business with government agencies by maintaining the confidentiality of business, professional, commercial or financial information provided to agencies by those organizations in circumstances where disclosure could adversely affect their business and commercial interests.

44. In the circumstances of this complaint, I am satisfied that the public interests favouring disclosure have been satisfied, to some extent, by the disclosures already made to the complainant and by the amount of information regarding the agency's tender process, which is already in the public domain. Whilst the public interest in the accountability of the agency is a strong reason in favour of disclosure, I do not consider that that requires the disclosure of the evaluation scores of the unsuccessful tenderers. It seems to me that proper public scrutiny of the actions of the agency, which the complainant claims is necessary and desirable in respect of this matter, and with which I generally concur, can be made through a consideration and examination of the material that has been made public by the agency or through the FOI process. I do not consider that the disclosure of the evaluation scores of the unsuccessful tenderers is necessary to satisfy the public interest in accountability.
45. Therefore, in balancing the competing public interests, I have given more weight to the public interest in maintaining the confidentiality of the business, professional, commercial or financial information of private sector bodies. Accordingly, I find that the tender evaluation scores of all tenderers, except those of Chubb, are exempt under clause 4(3).

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## Schedule of exempt matter

### The lease documents

Document No.	Exemption clause	Description of matter to be deleted
4/36	3(1)	The signature and the signature block.
5/38	3(1)	The signature and the signature block.
6/37	3(1)	The signature and the signature block.
32	3(1) 4(2)	The signature and the signature block; The last 8 lines on page 1 and the whole of page 2.
35	3(1) 4(2) 4(3)	The signature and the signature block; the title and name in paragraph 6 on page 5; All that material under point 1 on pages 4 to 5; The last 2 paragraphs on page 3 and the first 3 paragraphs on page 4.
39	3(1) 4(2)	The signature and the signature block; the name in line 2 on page 4; The dollar amounts in point 1 on page 1; points 10-11 on pages 2-3 and all of the attachments to Document 39.

### The contract documents

Document No.	Exemption clause	Description of matter to be deleted
26	3(1) 4(2) 4(3)	Words 15 and 16 in the second paragraph on page 1 and the name in the signature block on page 2; Pages 1-2: under item 3.1 – the information on prices (except the base tender price) and time, and the information in the first 4 paragraphs on page 2; Page2: under item 3.2 – the information on prices (other than the base tender price) and time and the 5 paragraphs before item 4; Page 1: under item 2 – the percentage ratings for the unsuccessful tenderers; under item 3.1 – the percentage rating for “First round score”.
28	3(1) 4(2) 4(3)	The name of the private consultant, wherever it appears; Any prices that are not in the public domain; The evaluation scores for the unsuccessful tenderers.