

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

**File Ref: F1132000
Decision Ref: D0392000**

Participants:

Judith Mary Edwards
Complainant

- and -

Minister for Transport
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – request for access to documents relating to review of Westrail’s use of timber sleepers – documents of an agency where the agency is a Minister – clause 4(2) of the Glossary in Schedule 2 – whether documents are documents of the Minister – clause 1 – purpose of exemption – limits on exemption – clauses 1(2) and 1(5) – clause 6 – scope and meaning – whether documents of a kind described in clause 6(1)(a) – whether disclosure contrary to the public interest – whether ongoing deliberations – section 102(1) – onus on agency.

Freedom of Information Act 1992 (WA) ss. 10, 30, 102(1); Schedule 1 clause 1(1), 6(1); Glossary in Schedule 2 clause 4.

Minister for Planning v Michael Taweel and Georgette Taweel (Supreme Court of Western Australia, 13 November 1996, unreported, Library No. 960654).

Re Environmental Defenders Office WA (Inc) and Ministry for Planning [1999] WAICmr 35

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

Re Waterford and Department of Treasury (No.2) (1984) 5 ALD 588

Ministry for Planning v Collins (1996) 93 LGERA 69

DECISION

The decision of the agency is set aside. In substitution, it is decided that the disputed documents are documents of an agency and, further, they are not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

20 July 2000

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Minister for Transport ('the Minister') to refuse Dr Edwards MLA ('the complainant') access to certain documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. By letter dated 21 March 2000, the complainant made an application to the Minister for access under the FOI Act to a copy of a review by the Acting Commissioner of Railways of the policy of Westrail concerning the use of timber sleepers, including supporting documents. By letter dated 8 May 2000, the Minister's FOI Coordinator informed the complainant that 3 documents had been identified and described those documents as:
 1. *"Procurement of Timber Sleepers" which is a report prepared by Westrail, on the use of timber sleepers by Westrail;*
 2. *Westrail's "Sleeper Procurement Policy" effective from November 1999; and*
 3. *Westrail Sleeper Specification – Australian Standard for Visually Graded Greensawn Western Australian Hardwood Sleepers.*
3. The Minister refused the complainant access to the documents on the ground that the documents had been used in a submission to Cabinet and were, therefore, exempt under clause 1 and clause 6 of Schedule 1 to the FOI Act. On 12 June 2000, the complainant applied to the Information Commissioner for external review of the decision of the Minister.

REVIEW BY THE INFORMATION COMMISSIONER

4. I obtained the disputed documents from the Minister, together with the FOI file maintained for the purpose of dealing with the complainant's access application. In my view, the notice of decision provided to the complainant did not comply with the requirements of s.30 of the FOI Act. In particular, it did not contain the Minister's reasons for his refusal, nor did it contain the findings on the material questions of fact underlying the reasons and no reference was made to the material on which those findings are based.
5. I required the Minister to provide me with further information and reasons to justify his claims for exemption for the disputed documents. Subsequently, the Minister informed me that he would be in a position to respond to my request when his policy officer returned from overseas. However, I did not consider the fact that the Minister's policy adviser was unavailable to be a sufficient reason why I should delay dealing with this complaint. Taking into account the fact that the onus is on the Minister to justify his decision to refuse access and the Minister had received the complainant's access application in March 2000, I

considered that the Minister had had ample opportunity to establish a claim for exemption. Therefore, I decided to proceed to deal with the complaint on the basis of the material then before me.

6. By letter dated 4 July 2000, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the disputed documents may not be exempt under clause 1(1) or clause 6(1) of Schedule 1 to the FOI Act. I invited the Minister to reconsider the matter and, if he maintained his claims for exemption, to provide me with material in support of those claims.
7. By letter dated 13 July 2000, I received a submission from the Minister's office in response to my preliminary view. The Minister submits that the requested documents are not accessible under the FOI Act because they are not "documents of an agency", as that term is defined in clause 4(2) of the Glossary in the FOI Act. In addition, I was informed that, as the Minister was of the view that the disputed documents are not documents of an agency, the previous claims for exemption under clause 1 and clause 6 are no longer relevant. Consequently, no submissions were provided to me in support of those claims.

THE DISPUTED DOCUMENTS

8. There are three documents in dispute in this matter. Document 1 is entitled "Westrail Review of Sleeper Procurement Policy". It is dated July 1999 and stamped "Draft". Document 2 is entitled "Westrail Sleeper Procurement Policy" marked "Effective November 1999". Document 3, a copy of which is appended to each of Document 1 and Document 2, is entitled "Westrail Sleeper Specification – Australian Standard for Visually Graded Greensawn Western Australian Hardwood Sleepers". The first question I must decide is whether those documents are documents of an agency to which the FOI Act applies.

DOCUMENTS OF AN AGENCY

9. The right of access created by s.10 of the FOI Act is a right of access to "*documents of an agency (other than an exempt agency)*" subject to and in accordance with the provisions of the FOI Act. The term "Documents of an agency" is defined in clause 4 of the Glossary in Schedule 2 to the FOI Act as follows:

“4. (1) Subject to subclause (2), a reference to a document of an agency is a reference to a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer.

(2) Where the agency is a Minister a reference to a document of an agency is a reference to a document that –

- (a) *is in the possession or under the control of the Minister in the Minister's official capacity; and*
- (b) *relates to the affairs of another agency (not being another Minister),*

and includes a document to which the Minister is entitled to access and a document in the possession or under the control of a member of the staff of the Minister as such a member, but does not include a document of an agency for which the Minister is responsible.

- (3) *A document in the possession or under the control of an agency on behalf of or as an agent for –*
 - (a) *the Commonwealth, another State or a Territory; or*
 - (b) *an agency or instrumentality of the Commonwealth , another State or a Territory,*

is not a document of the agency.”

10. The Minister argues that the terms of the FOI Act which apply to documents in the possession or under the control of a Minister are quite different from those applying to documents in the possession of other agencies, and referred me to the decision of the Supreme Court of Western Australia in *Minister for Planning v Michael Taweel and Georgette Taweel* (unreported, SCWA Library No. 960654) at page 8. The Minister referred me, in particular, to the following comments of Parker J at page 7, where His Honour said:

“Without wishing to rewrite the relevant provisions, when they are analysed it may fairly be observed that the policy revealed by the provisions of the FOI Act with respect to documents in the possession or control of a Minister is clearly one which excludes such documents from the right of access provided in the FOI Act, save for the one exceptional case (itself subject to exclusions) of a document held in the Minister's official capacity which relates to the affairs of another agency, not being another Minister or an agency for which the Minister is responsible.

Thus, the policy and context of the FOI Act in its application to documents in the possession or under the control of a Minister does not provide any support for the view that the legislature intended an expansive or generous provision for access.”

11. The Minister then referred to page 9 of that decision, where Parker J said that “[t]hus it is possible that the operation of cl 4 may prove to be that a document of an agency will be beyond the reach of the access provisions of the FOI Act while it remains in the possession of the Minister responsible for the agency.” The Minister submits that it follows that the only documents which are

accessible from the Minister under the FOI Act are documents which relate to the affairs of another agency for which the Minister is not responsible.

12. The Minister submits that the disputed documents are documents which are in his possession; that they concern the acquisition by Westrail of timber sleepers for use in the construction of railways; and that all of the documents were prepared by Westrail and/or relate to the affairs of Westrail. The Minister submits that Westrail is an agency for which the Minister is responsible and, therefore, the documents “ ... do not satisfy the requirement set out in clause 4(2) of the Glossary that the documents must be either the documents of, or documents which relate to, an agency for which the Minister is not responsible.” Therefore, the Minister argues, “[n]one of the three documents are “documents of an agency” as defined in clause 4(2) of the Glossary and as such, they are not accessible under s.10 of the Act.”
13. I do not accept the Minister’s argument in that regard. The Minister’s argument is based on a paraphrasing of the definition of “document of an agency” where the agency is a Minister. The Minister has paraphrased the definition as being “...documents which relate to the affairs of another agency for which the Minister is not responsible.” His Honour in the *Taweel* case paraphrased the definition in a similar way. However, with the greatest of respect to his Honour, the definition does not say that. In my respectful opinion, the definition cannot be paraphrased that way.
14. His Honour himself expressed some difficulty with the effect of interpreting the definition in that manner and sought assistance, which was clearly not forthcoming, from Counsel in respect of it, as is indicated by the following passage on page 8 of the decision:

“One intriguing aspect of cl 4(2) of the Glossary is the exclusion of documents of an agency for which the Minister is responsible, but the inclusion of documents which relate to the affairs of another agency ie an agency for which the Minister is not responsible that agency not being a Minister, from the concept of a “document of an agency”. The reason for this has not been satisfactorily explained.

While counsel could not offer a satisfactory policy reason for this strange provision, it was somewhat tentatively suggests [sic] that it may have been thought more convenient for access applications for documents of an agency in the possession of the Minister responsible for that agency to be dealt with by the agency rather than the Minister. In other words, it was only where a document of an agency had reached a Minister who was not responsible for the agency that there was a need to bother a Minister with the access procedures of the FOI Act. There appears to be some difficulty with that reasoning.”

15. In my respectful opinion, the confusion and difficulties perceived by his Honour arise from proceeding from the basis of an erroneous paraphrasing of the definition. A document of an agency where the agency is a Minister (which, for the sake of clarity and brevity I shall refer to as “a document of a Minister”) is

defined as a document that is in the possession or under the control of the Minister (in the Minister's official capacity) and relates to the affairs of another agency (not being another Minister), "...but does not include a document of an agency for which the Minister is responsible." In my opinion, the definition cannot be paraphrased to mean that a document is only a document of a Minister if it relates to the affairs of an agency for which the Minister is not responsible.

16. In my view, if the legislature had intended to exclude from the reach of the FOI Act documents in the possession of a Minister that relate to the affairs of another agency "*not being another Minister or an agency for which the Minister is responsible*", then it would have framed the definition in those terms. However, the definition is not stated in those terms. The qualification excludes a "document of an agency" for which the Minister is responsible. The term "document of an agency" is defined in the preceding subclause of clause 4 of the Glossary and, as a matter of statutory construction, in my view, was clearly intended to be given the meaning given to it by the definition in the preceding subclause.
17. A document of an agency is defined in clause 4(1) of the Glossary to mean a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer. Therefore, a document of an agency for which the Minister is responsible is a document that is in the possession or under the control of that agency, or an officer of that agency, or which that agency is entitled to access.
18. For example, a document of Westrail (Westrail being an agency for which the Minister is responsible), would be, according to the definition in clause 4(1) of the Glossary, a document that is either in the possession or under the control of Westrail, including a document to which Westrail is entitled to access and a document that is in the possession or under the control of an officer of Westrail in his or her capacity as such an officer. However, once Westrail has given the document to the Minister, then in my opinion it is no longer a document of Westrail as that term is defined in the FOI Act. Clearly, that particular document would no longer be in the possession of Westrail and it would no longer be under the control of Westrail because Westrail would neither be entitled to access it, nor entitled to demand the Minister return it. As his Honour pointed out in the *Taweel* case at page 8:

"As a matter of ordinary government administration, while a Minister may be said to have control of a document of the Minister which is in the possession of a department or other agency for which the Minister is responsible, the reverse is not usually the case. A document of a department or other agency which is in the possession of the Minister responsible for the agency is no longer in the possession or under the control of the department or other agency. The department or other agency may ask the Minister to return the document but if that is not done the Minister cannot be compelled to return the document, whereas the Minister can compel a department or other agency under the Minister's control to deliver up documents to the Minister."

19. As the definition of a document of a Minister specifically includes a document to which the Minister is entitled to access then, if the definition were not limited by excluding documents of an agency for which the Minister is responsible, for the purposes of the FOI Act nearly all documents of all agencies for which a Minister is responsible would be documents of a Minister, because the Minister is entitled to access to them. If that were the case, then access applications for documents of all agencies under the control of the Minister could be directed to the Minister, rather than to the relevant agency. In my respectful opinion, it is clear that the purpose of the Parliament in qualifying the definition in that way was to ensure that access applications for documents of an agency for which a Minister is responsible are made to that agency, which in almost every case is significantly better equipped in terms of staff and resources to deal with them, rather than the agency's Minister.
20. The disputed documents are in the possession of the Minister in his official capacity and they relate to the affairs of Westrail, an agency for which the Minister is responsible. That much is not disputed. While it may be that Westrail has in its possession copies or originals of the disputed documents, the access application was made to the Minister and it is the documents presently held by the Minister that are the subject of that application and this complaint. In my view, so long as those documents remain in the possession of the Minister they are not documents of Westrail, because they are not documents of that agency as that term is defined in the FOI Act. They are not in the possession of Westrail or under the control of Westrail, or any officer of Westrail and, while they are held by the Minister, Westrail is not entitled to access to them. They are not, therefore, documents of an agency for which the Minister is responsible.
21. Accordingly, I find that the disputed documents are in the possession of the Minister in his official capacity and relate to the affairs of another agency, Westrail, not being another Minister, and are not documents of an agency for which the Minister is responsible. Therefore, I find that the disputed documents are documents of the Minister to which the right of access in s.10 of the FOI Act applies.

THE EXEMPTIONS

(a) *Clause 1*

22. Although the Minister appears to have abandoned his claims for exemption under clause 1 and clause 6, in light of my finding in paragraph 21 above, I have considered whether the disputed documents are exempt as originally claimed by the Minister. Clause 1 provides as follows:

“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) *is an agenda, minute or other record of the deliberations or decisions of an Executive body;*
- (b) *contains policy options or recommendations prepared for possible submission to an Executive body;*
- (c) *is a communication between Ministers on matters relating to the making of a Government decision or the formulation of a Government policy where the decision is of a kind generally made by an Executive body or the policy is of a kind generally endorsed by an Executive body;*
- (d) *was prepared to brief a Minister in relation to matters —*
 - (i) *prepared for possible submission to an Executive body; or*
 - (ii) *the subject of consultation among Ministers relating to the making of a Government decision of a kind generally made by an Executive body or the formulation of a Government policy of a kind generally endorsed by an Executive body;*
- (e) *is a draft of a proposed enactment; or*
- (f) *is an extract from or a copy of, or of part of, matter referred to in any of paragraphs (a) to (e).*

Limits on exemptions

(2) *Matter that is merely factual, statistical, scientific or technical is not exempt matter under subclause (1) unless —*

- (a) *its disclosure would reveal any deliberation or decision of an Executive body; and*
- (b) *the fact of that deliberation or decision has not been officially published.*

(3) *Matter is not exempt matter under subclause (1) if it, or, in the case of matter referred to in subclause (1) (f), the original matter, came into existence before the commencement of section 10*

and at least 15 years have elapsed since it or the original matter (as the case may be) came into existence.

(4) Matter is not exempt matter under subclause (1) if it, or, in the case of matter referred to in subclause (1) (f), the original matter, came into existence after the commencement of section 10 and at least 10 years have elapsed since it or the original matter (as the case may be) came into existence.

(5) 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."

23. I consider that the purpose of the exemption in clause 1 is to protect the confidentiality of, *inter alia*, Cabinet discussions and consultations between Ministers: see my decision in *Re Environmental Defenders Office WA (Inc) and Ministry for Planning* [1999] WAICmr 35. The maintenance of Cabinet solidarity and collective responsibility for decisions made by Cabinet is generally accepted as an essential part of the Westminster system of Government. The FOI Act recognizes that fact in clause 1 and in the range of documents that are protected from potential disclosure by the exemption.
24. None of the disputed documents is of a kind described in paragraph (a), (b), (c), (e) or (f) of clause 1(1) and, although they may have been submitted to the Minister for the purpose of briefing him, it is clear from the nature and contents of the documents that they were not prepared for that purpose. The disputed documents are not, therefore, in my opinion, documents of a kind described in paragraph (d) of clause 1(1).
25. I accept that Documents 2 and 3 were attached to a submission taken to Cabinet. However, as to the general exemption in clause 1(1), in my view, none of the documents records any deliberation or decision of an Executive body and their disclosure would not reveal any such deliberations or decisions. 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."

26. That fact that the disputed documents were taken to a Cabinet meeting as part of a Cabinet submission, or used in a submission to Cabinet as claimed by the Minister, is not sufficient to establish that the disputed documents are exempt under clause 1(1). The documents must contain matter of the kind described in

clause 1(1). In my opinion, they do not. In any event, even if the disputed documents were of a kind described in clause 1(1), there are limits on the exemption 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. In my view, both of those limits would be relevant in this matter.

27. There is nothing before me either from the Minister or that is evident from the contents of Document 1 or Document 2, to indicate that either document was brought into existence or prepared for possible submission for consideration by Cabinet. To the contrary, Document 2 is a copy of Westrail's Sleeper Procurement Policy. It appears to me to contain a statement of the current policy relating to the sleeper replacement program. Document 1 appears, on its face, to be an earlier version of Document 2. Document 3 is nothing more than the specifications for timber sleepers purchased by Westrail for use in its sleeper replacement program. In my view, Document 3 is subject to the limit on exemption in clause 1(2) because it consists of factual or technical information, namely sleeper specifications.
28. Policy documents of an agency are required to be published under the publication requirements in Part 5 of the FOI Act. It may be that the publication requirements apply to the disputed documents. However, that point was not raised in arguments before me and I need not decide that question. In any event, I am satisfied that the disputed documents do not fall within the terms of the exemption in clause 1(1) and, if they did, I consider that the limit on exemption in clause 1(2) applies to Document 3 and that the limit on exemption in clause 1(5) applies to Documents 1 and 2. Accordingly, I find that the disputed documents are not exempt under clause 1.

(b) Clause 6 – Deliberative processes

29. Clause 6 of Schedule 1 to the FOI Act provides as follows:

“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

(iii) *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.”

30. I have previously expressed my view concerning the scope of the exemption in clause 6(1) and the meaning of the phrase “deliberative processes” in a number of my formal decisions. I agree with the view taken by the Commonwealth Administrative Appeals Tribunal (‘the 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 or 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.
31. There are two parts to this exemption and an agency must satisfy the requirements of both paragraphs (a) and (b) of clause 6(1). Further, 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.

Clause 6(1)(a) – the nature of the information

32. I have examined the disputed documents. I do not consider that those documents contain information of the kind described in clause 6(1)(a). They are policy documents and the specifications for timber sleepers. In my view, the disclosure of the disputed documents would not reveal any opinions, advice or recommendations that have been obtained, prepared or recorded, in the course of, or for the purposes of, the deliberative processes of the Government, a Minister or an agency, nor would they reveal any consultations or deliberations that have taken place in the course of, or for the purposes of the deliberative processes of the Government, a Minister or an agency.
33. However, even if I were to accept that the documents met the requirements of clause 6(1)(a), the requirements of paragraph (b) of clause 6(1) must be satisfied in order to establish a valid claim for exemption.

Clause 6(1)(b) – contrary to the public interest

34. In my view, it would be contrary to the public interest to prematurely disclose deliberative process 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 demonstrably contrary to the public interest.

35. There is no material before me from the Minister or that is evident from the documents themselves, to persuade me that the Government or any agency is currently deliberating about the subject matter of the disputed documents. Therefore, it appears to me that there are no deliberations upon which the disclosure of the disputed documents would impact. Further, there is no other material before me to establish that disclosure of the disputed documents would be prejudicial to the proper operations of Government or to the proper workings of an agency, or any other public interest, such that it would be demonstrably contrary to the public interest to disclose those documents.
36. Accordingly, I find that the disputed documents are not exempt under clause 6(1).
