

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

**File Ref: F2002158
Decision Ref: D0402002**

Participants:

Geoffrey Charles Ogden
Complainant

- and -

City of South Perth
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to ‘Civic Triangle’ – clause 6(1) – deliberative processes of agency – whether documents contain information of the kind described in clause 6(1) – whether disclosure would be contrary to the public interest – clause 10(3) – whether documents contain information that has a commercial value to an agency – whether any commercial value could reasonably be expected to be diminished or destroyed by disclosure.

Freedom of Information Act 1992 (WA) ss.8, 10; Schedule 1 clause 6(1), 10(3).

Local Government Act 1995 (WA) ss.3.58, 3.59, 5.97, Division 7 of Part 5.

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

Ministry for Planning v Collins (1996) 93 LGERA 69.

Re Cannon and Australian Quality Egg Farms Limited (1994) 1 QAR 491.

DECISION

The decision of the agency is set aside. In substitution, it is decided that the disputed matter is not exempt under clause 6(1) or clause 10(3) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

27 November 2002

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 South Perth ('the agency') to give Mr Ogden ('the complainant') access to edited copies of two documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The agency owns a number of lots of land in the area bounded by Mends Street, Labouchere Road and Mill Point Road, South Perth, known as the Civic Triangle, excluding the land where the South Perth Police Station and Post Office are situated. The complainant is the beneficial owner of the Windsor Hotel, which is situated diagonally opposite the Civic Triangle. Since 1998, the agency has been considering its options for acquiring further lots within the Civic Triangle and for developing or otherwise dealing with land in the Civic Triangle. For the purpose of assisting the agency with its deliberations, the agency engaged consultants to prepare two reports outlining various development options. Those reports are the disputed documents.
3. In 1997, the Council of the agency endorsed a draft Town Planning Scheme No 6 ('the Scheme'), which was then referred to the relevant Minister for consent to advertise. Following advertisement in 1998, the agency received numerous submissions and the Council subsequently made further recommendations to the Minister. In January 2002, the agency received final confirmation from the Minister on certain modifications to the Scheme and, during February and March 2002, the modified Scheme was re-advertised.
4. After further submissions were received, an amended Scheme was re-submitted to the Minister for Planning and Infrastructure ('the Minister') in June 2002. I understand that the agency is awaiting formal approval of the Scheme by the Minister. When approved, the Scheme will define the development standards applicable to the precincts within the agency, including the Civic Triangle.
5. The complainant's land is zoned "Commercial C3" and "Residential R60" with a height limitation of 13 metres. The height limitation affects the complainant's development options and I am informed that the height limit is significantly less than the height limit recommended for land within the Civic Triangle.
6. On 10 July 2002, the complainant made an application to the agency under the FOI Act for access to the disputed documents. The agency granted the complainant access to edited copies of the disputed documents, from which certain matter had been deleted. The agency claimed that the deleted matter is exempt under clause 6(1) and clause 10(3) of Schedule 1 to the FOI Act. The agency's initial decision was confirmed following an internal review. On 2 September 2002, the complainant lodged a complaint with me seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. I obtained the disputed documents from the agency and made inquiries into this complaint. In the course of dealing with this complaint, I also received a written submission from a third party, who is not joined as a party to these proceedings.
8. The complainant's solicitor advised me that the complainant does not seek access to certain kinds of information, namely the actual figures representing values assessed by the authors of the reports attributable to any particular development option or to any financial information in the disputed documents. The only relevant information of that kind is recorded in the first of the disputed documents. I have identified that specific information to the agency, where it appears on pages 7, 8, 36, 37 and in Appendix 1. That specific information is no longer in dispute between the parties and I have conducted my review on that basis.
9. On 4 November 2002, after considering the material before me, I informed the parties in writing of my preliminary assessment of this complaint, including my reasons. It was my view that the disputed matter in the documents may not be exempt under clause 6(1) or under clause 10(3) as claimed by the agency. Following that, I received a further written submission from the agency, in which it maintains its claims that the disputed matter is exempt.

THE DISPUTED DOCUMENTS

10. The first disputed document is dated February 1998 and entitled "Civic Triangle Development Options, Stage 1" (Document 1). The second is dated May 1999 and entitled "Civic Triangle Assessment Report" (Document 2). Both documents have been released to the complainant in edited form. The disputed matter consists of the information deleted from pages 7-40 of Document 1, but excluding the information referred to in paragraph 8 above, and all of pages 2-18 and Attachment 2 of Document 2.

THE EXEMPTIONS

(a) Clause 6(1) – Deliberative process

11. The agency claims that the disputed matter is 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.”*

12. Clearly, there are two parts to this exemption and the agency must satisfy the requirements of both paragraphs (a) and (b) in order to establish a *prima facie* claim for exemption. 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 disputed matter would, on balance, be contrary to the public interest.
13. The deliberative processes 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 *Re Waterford and Department of the Treasury (No.2)* (1984) 5 ALD 588; also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69 at 72.
14. Because the exemption in clause 6(1) potentially applies to a large range of administrative documents, the decision in *Re Waterford* makes it clear that documents disclosing deliberative processes must be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency. The exemption in clause 6(1) will only apply to documents containing opinion, advice or recommendations, or which would reveal consultations or deliberations and disclosure would, on balance, be contrary to the public interest.
15. Taking into account the context in which the disputed documents were created, I accept that they contain opinion and advice that has been obtained, prepared and recorded in the course of, and for the purposes of, the deliberative processes of the agency, namely, a consideration of the various development options for the Civic Triangle. I also accept that disclosure of the disputed documents would reveal that opinion and advice. Accordingly, I am satisfied that the disputed documents contain matter of the kind described in clause 6(1)(a).

The Public Interest

16. As I understand it, the agency submits that the deliberative process relating to the Scheme is ongoing and, to the extent that the Scheme has yet to be formally adopted, it may be returned to the agency for further action. Further, if the Minister accepts the new Scheme, I am advised that the agency will use the material in the disputed documents to weigh up its different options for dealing with the land in the Civic Triangle under proposed Town Planning controls.

17. Against that background, the agency submits that the disclosure of unedited copies of the disputed documents would be contrary to the public interest, for the following reasons, which I have summarised:
- Disclosure may prejudice the current integrity of decision-making and may be likely to mislead;
 - The agency is currently negotiating with third parties to purchase properties within the Civic Triangle and the public release of the disputed documents may lead to unreasonable speculation on which development proposal may go ahead;
 - The agency is responsible for the good governance of the district, especially on behalf of the ratepayers who finance the operations of the agency and, accordingly, it must ensure that it protects the financial interests of ratepayers;
 - There is a public interest in ensuring that the agency is able to negotiate in good faith and from an equal bargaining position and the release of the disputed documents is contrary to the public interest of the ratepayers in ensuring the agency is able to protect their financial interests, as the disputed documents contain information about the value and development potential of the Civic Triangle; and
 - The disputed documents were prepared at a cost to the agency and are a valuable tool in the negotiation process. The release of the disputed documents may have an adverse impact on the agency's ability to negotiate on an equal footing.
18. The agency also submits that it is required, under clauses 3.58 and 3.59 of the *Local Government Act 1995*, to provide the public with an opportunity to be involved in the decision to acquire or dispose of land in certain transactions and that any acquisitions or disposal of land within the Civic Triangle will be subject to these requirements, after a decision has been made. The agency submits that it is not appropriate to release the disputed documents at this point and that any documents released to the public should be an accurate display of the current decision-making considerations of the agency.
19. Finally, the agency submits that the FOI Act generally has no greater priority than the *Local Government Act 1995* and that, when making my decision, I ought not to consider that the FOI Act takes priority. The agency submits that where a State legislative instrument (such as the *Local Government Act 1995*) has been drafted with objects and intents in line with the FOI Act, and which provides for public participation in decision-making processes, the FOI Act should not be able to be used to circumvent those other methods of public participation. The agency also submits that the FOI Act should not be interpreted in a manner that undermines the objects and intent of other State legislation, in this instance, the intent of better decision-making by local governments under the *Local Government Act 1995*. The agency informs me that it is still considering its options with regards to the Civic Triangle, as identified in its current Strategic Plan, and that it will do so with the full participation of the public and in accordance with clause 3.59 of the *Local Government Act 1995*. The agency submits that it should not be hampered in this process by the early release of information under the FOI Act.

Consideration

20. I recognise that there is a public interest in an agency being able to gather information and seek professional advice, so that it can carry out its functions and make decisions, which benefit the community, as a whole or sections of it. I also consider that it may be contrary to the public interest to disclose deliberative process documents while deliberations in an agency are continuing, especially if there is material to indicate that disclosure of documents relied upon by an agency during the decision-making process would adversely affect that process, or if disclosure would, for some other reason, be demonstrably contrary to the public interest. In either of those circumstances, I consider that the public interest is best served by allowing deliberations to occur unhindered and with the benefit of access to all material so that informed decisions may be made.
21. Although the agency claims that disclosure may prejudice the integrity of its decision-making and be likely to mislead, I consider that those claims are mere conjecture. Nothing has been put before me to support that conclusion. I fail to see how any harm to the agency's decision-making processes could follow from informing the public or the complainant about the nature of the external advice obtained by the agency, or the redevelopment options and relevant town planning controls for the land.
22. I also reject the claim that disclosure of the disputed documents may lead to unreasonable speculation about development. In the event that any public speculation or community or media pressure were to result from disclosure, in my opinion, it is clearly within the control of the agency to publicly explain that no decisions have been made and that the disputed documents contain options only. Further, I consider that the public, as a whole, and the complainant would be able to properly distinguish between proposals that are options only and a proposal that represents a final decision. In any case, it is not clear to me just how the claimed adverse consequences, if they were to occur, would necessarily harm the decision-making process.
23. The complainant submitted that there is no real prospect of disclosure undermining the deliberative process of the agency, because the Council of the agency completed its deliberations and made its recommendation to the relevant Minister in June 2002. I agree. In any event, even if I accept that the agency is still considering its options with regards to the Civic Triangle, the agency has not persuaded me that its current or future deliberations will be hampered by the disclosure of information under the FOI Act, such that it would be contrary to the public interest for the documents to be disclosed. The agency has not explained to me the nature of the expected harm, or how disclosure would prevent the agency from conducting proper and informed deliberations about this issue.
24. In the present case, the complainant's solicitor informs me that disclosure of the disputed documents may reveal the reasons for the agency deciding on different height limitations for the Civic Triangle land as opposed to the complainant's land. Generally, I consider that there is a public interest to be served by the disclosure of documents, which contain reasons for decisions or explanations of preferred courses of action by State and local government agencies.

25. I accept that there is a public interest in the agency being able to make informed decisions, which protect and enhance the financial interests of its ratepayers. However, I am not persuaded that disclosure of the disputed documents would adversely affect those financial interests or that it would affect the agency's ability to negotiate on behalf of its ratepayers. There is simply nothing before me from the agency to support the claims that disclosure would have such an effect and I do not consider that the effect claimed by the agency could reasonably be expected to follow from disclosure. The disputed documents were created in 1998 and 1999 on the basis of information gathered from sources published by certain Commonwealth and State agencies in 1996 and 1997. Nothing in either of those documents suggests to me that disclosure of the disputed documents in 2002 could produce the consequences claimed by the agency, such that it would be contrary to the public interest to do so. Accordingly, I have given those factors less weight.
26. I do not consider that this complaint raises any issues of inconsistency or conflict between the provisions of the FOI Act and those of the *Local Government Act 1995*. The former creates a general right of access to documents of State and local government agencies. Division 7 of Part 5 of the *Local Government Act 1995* deals, among other things, with a limited right of the public to inspect records of the agency. However, section 5.97 specifically provides that nothing in Division 7 of Part 5 of the *Local Government Act 1995* affects the operation of the FOI Act. In my view, there is nothing in the FOI Act, which undermines or is in conflict with the very limited and specific right to inspect documents under Division 7 of Part 5 of the *Local Government Act 1995*.
27. Further, s.8(1) of the FOI Act expressly provides that access to documents is to be given under Parts 2 and 4 of the FOI Act despite any prohibitions or restrictions imposed by other enactments on the communication or divulging of information, whether enacted before or after the commencement of the FOI Act, unless there is an express statement in the enactment to the contrary. I have not found any such statement in the *Local Government Act 1995*. My statutory obligations require me to consider and apply the provisions of the FOI Act in my decision-making and I have done that.
28. In favour of access, I recognise that there is a public interest in people being able to exercise their rights of access under the FOI Act, which was enacted to further the public interest in more open and accountable government and to increase public participation in government. I also recognise a public interest in local communities being informed of development proposals under consideration, which have the potential to significantly impact on the nature and ambience of a local community.
29. The agency claims that the complainant's request for access to the disputed documents would serve a private interest, rather than a wider public interest. The agency claims that the private interests of the complainant would be served by disclosure and that the end use to which the disputed documents may be put by the complainant could be for a private profit motive without any demonstrable benefit to the public.
30. I do not accept the agency's claim that disclosure would serve a private interest rather than a public one. Under s.10 of the FOI Act, a person's right to be given access is not affected by an agency's belief as to what are the person's reasons for wishing to obtain

access, or any reasons the person gives for wishing to obtain access. However, those reasons may be given some weight when I am making my decision because they might be related to a relevant public interest, which I must consider and weigh in the balancing process. In my view, the private interests of an individual, such as the complainant, may also be a part of the public interest. Disclosure of a document to an access applicant is a clear demonstration that the FOI Act actually works to achieve its objects. In my opinion, each disclosure, which occurs under the FOI Act, serves the general public interest recognised by the Parliament of Western Australia in providing members of the public with a legally enforceable rights of access to documents of State and local government agencies.

31. I have not been able to identify any other public interest, which favours non-disclosure of the disputed documents and none has been identified to me by the agency. Therefore, in the balancing process, I have given more weight to the public interests in favour of disclosure. I find that the disputed matter is not exempt under clause 6(1).

(b) Clause 10(3) – The State’s financial or property affairs

32. The agency also claims exemption for the disputed matter under clause 10(3), which provides that matter is exempt if its disclosure would reveal information (other than trade secrets) that has a commercial value to the agency and could reasonably be expected to destroy or diminish that commercial value. Clause 10(3) also consists of two parts and it is subject to the limit on exemption in clause 10(6), which provides that matter is not exempt under subclause (3) if its disclosure would, on balance, be in the public interest.

The agency’s submission

33. The agency submits the disputed matter is commercially valuable for two reasons. Firstly, the disputed matter is valuable because the agency paid a substantial sum to consultants for the reports and, secondly, because the disputed documents contain assessments of regulatory regimes, financial projections, valuations and other commercial considerations and contain evaluations of potential options for dealing with land that has a commercial value to the agency. The agency claims that this information has commercial value because it provides information on the most effective method of the agency dealing with the land and that other property owners could use the information to undertake their own developments to increase the potential value of their own properties.
34. The agency submits that disclosure would not only diminish the commercial value of the information itself but, also, if other property owners in the vicinity of the Civic Triangle used the disputed matter as well, the value of the land in that area to the agency could be reduced. The agency also submits that, since it paid substantial sums for the two disputed documents, disclosure would diminish the value of the consultants’ reports. The agency did not consider that private landowners ought to be able to profit from information that has been prepared at a cost to the wider community.

35. The agency submits that the information in the disputed documents was collated to provide it with a commercial overview of development options and to provide the agency with a commercial advantage in the development of the land. It is the submission of the agency that disclosure would diminish that commercial advantage. Further, the agency submits that the information is requested by a neighbouring property owner who may wish to use the information in the same manner as outlined in the disputed documents, or otherwise for private financial gain. The agency claims that the commercial value of the information is clearly diminished by releasing it to direct competitors and that the end use to which the information will be put means that disclosure is not in the public interest.

Consideration

36. I accept the agency's claim that it paid for the disputed documents to be prepared by consultants. However, I do not consider that that fact alone means that the disputed matter has a commercial value, which, if disclosed, could reasonably be, expected to be destroyed or diminished by the fact of disclosure. A similar claim was made to the Queensland Information Commissioner in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491. The Information Commissioner rejected such a claim as being too wide. He said, at paragraph 52:

"It could be argued on that basis that most, if not all, of the documents produced by a business will have a commercial value because resources were invested in their production, or money expended in their acquisition. This is surely too broad a proposition. At best, the fact that resources have been expended in producing information, or money has been expended in acquiring it, are facts that may be relevant to take into account in determining whether information has a commercial value for the purposes of s.45(1)(b) of the Queensland FOI Act."

37. I agree with those comments, in so far as they are applicable to the equivalent exemption in clause 10(3) of the FOI Act. The mere fact that an agency acquires documents, for a price, is not in my opinion, a sufficient reason for me to conclude that such documents have a commercial value to the agency concerned. In any case, it seems to me that ratepayers, including the complainant, have indirectly paid for the disputed documents through the impost of taxes and charges levied by the agency.
38. I acknowledge that, in respect of the buying, selling or exchange of land, the agency may in a broad sense be operating in a commercial environment. However, I do not accept that the agency engages in commercial activity in the ordinary sense. I acknowledge that information about the value of the different options for dealing with or developing the land in the Civic Triangle may be commercially valuable to the agency in its negotiations. However, the complainant has clearly advised that he does not seek access to information about values of assessable options and that matter is not in dispute.
39. I received a submission from a third party (who has not been joined as a party to these proceedings) in which it is claimed that the value of commercial or business information such as leasing/rental details and certain economic evaluations to the agency could reasonably be expected to be destroyed or diminished by disclosure, but it was not explained to me how that could be so. In any event, I have not attached

much weight to those claims because the complainant is not seeking access to that kind of information.

40. It appears to me that the agency's claim for exemption is based on the view that the commercial value of the information in the disputed documents lies in its continued secrecy and in keeping that information out of the hands of the agency's competitors. I reject the claim that the complainant is in commercial competition with the agency. Clearly, any development options, which the complainant may choose to make in respect of his land, must be submitted to and approved by the Council of the agency. In those circumstances, it can hardly be said that the complainant is a commercial competitor of the agency.
41. I am not satisfied that the agency has established that the disputed matter is matter of the kind described in clause 10(3)(a). Therefore, I consider that the requirements for exemption based on clause 10(3) have not been established. In any event, clause 10(3) is subject to the public interest test in clause 10(6) and, for the reasons given in paragraphs 20-31 above, I consider that disclosure would, on balance, be in the public interest. Accordingly, I find the disputed information is not exempt under clause 10(3).
