

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)		File Ref: F0892000 Decision Ref: D0422000
	Participants:	Michael James Ryan Complainant - and - City of Belmont Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – valuation reports – proposed land exchange – clause 10(3) – whether information has a commercial value to an agency – clause 10(4) – whether the documents contain information concerning the commercial affairs of an agency – clause 6(1) – opinion and advice obtained in the course of and for the purpose of the deliberative process of an agency – public interest factors for and against disclosure.

Freedom of Information Act 1992 (WA) ss.30, 102(1), Schedule 1 clauses 3(1), 4(2), 6(1)-6(4), 10(3), 10(4), 10(6).

Freedom of Information Regulations 1993 regulation 9(1)

Land Act 1933

Land Administration Act 1997

Interpretation Act 1984

Local Government Act 1995

Re Slater and State Housing Commission of Western Australia [1996] WAICmr 13

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

Ministry for Planning v Collins (1996) 93 LGERA 69

Harris v Australian Broadcasting Corporation (1983) 50 ALR 551

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550

DECISION

The decision of the agency is varied to the extent that:

- the matter specified in paragraph 72 of my reasons for this decision is exempt under clause 6(1); and
- the matter specified in paragraph 84 of my reasons for this decision is exempt under clause 3(1)

of Schedule 1 to the *Freedom of Information Act 1992*, but the documents are not otherwise exempt.

B KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

21 July 2000

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 Belmont ('the agency') to refuse Mr Ryan ('the complainant') access to six valuation reports requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. In December 1991, the agency published a report (prepared by the agency's Working Group on Open Space Rationalisation) entitled "Public Open Space Strategy" ('the Report'). Recommendation 1.1 of the Report proposed that approximately 40% of Hardey Park (an A class recreation reserve, originally vested on 23 July 1909), be retained along the Swan River foreshore for recreation purposes and that the remaining 60% ('the Hardey Park land') be disposed of for residential purposes. The Hardey Park land is Crown reserve land and, thus, is not the property of the agency, although administered by it for the benefit of the community. The Report also recommended that replacement open space land be provided within the locality and noted that, as it stood, Hardey Park had little utility in its current form because of its location, difficulties associated with access, and its isolation from user groups.
3. In December 1994, the agency's Planning and Development Committee considered the relocation of the Hardey Park land by way of a land exchange. By November 1997, the minutes of the Council of the agency ('the Council') record that a concept plan for the proposed land exchange had been prepared and Lot 712 of Ascot Waters, Great Eastern Highway ('Lot 712') had been identified as being suitable for the proposed land exchange. Lot 712 was at that time, and still is, owned by Cityscape Holding Pty Ltd ('Cityscape'), a private company.
4. The Department of Land Administration (DOLA) advised the agency that, since the land exchange involved an A class reserve, the proposal required the approval of the Minister for Lands ('the Minister') as well as the approval of both Houses of Parliament by way of a Reserves Bill under the *Land Act 1933*. DOLA also advised the agency that a public consultation programme should be undertaken to obtain community support for the proposed land exchange.
5. Accordingly, in December 1997, the agency commenced a 42-day advertising period as part of its public consultation programme. Notices were placed in two newspapers, *The West Australian* and *The Southern Gazette*. Letters were posted to 799 affected land owners and brochures explaining the proposal were issued. Notice of the proposal was given to various resident/ratepayer committees and to the descendants of the Hardey family. The Council minutes for March 1998 record that, at the conclusion of the consultation period on 16 January 1998, the agency had received 207 responses of which 94% expressed approval of the proposal.

6. Between 1997 and 1999, the agency developed the concept plan for the proposed land exchange, obtained current market valuations for Lot 712 and the Hardey Park land and initiated a scheme amendment to the relevant Town Planning Scheme. The minutes record that regular updates were provided to the Council on the progress of the agency's negotiations with the owners of Lot 712 on the Hardey Park land exchange proposal.
7. In August 1998, Cityscape put a development application for that land before the Council. The accompanying report from the agency stated that the proposed land exchange would be based on the current market value of Lot 712, as determined by the Valuer General's Office, and that a development approval for Lot 712 would assist in determining its market value.
8. In August 1999, the minutes record that Cityscape was still willing to consider the land exchange, but required additional incentives from Council to ensure that they would suffer no financial loss from the transaction. The Council minutes of December 1999 state:

“Council, at its meeting of the 22 November 1999 agreed to the terms of an offer which was to be made to the owners of Lot 712 Great Eastern Highway.

It is of pleasure to advise Council that the offer was accepted and confirmed in a letter dated 24 November 1999.”

Following this, DOLA was asked to prepare the necessary documentation for presentation to the Minister and, subsequently, to Parliament.

9. On 6 April 2000, the complainant made an application to the agency for access under the FOI Act to copies of documents described as “*valuation reports held by the City of Belmont or any valuation reports still due to Council relating to the land exchange of Hardey Park A Class Reserve for Lot 712 Great Eastern Highway Belmont*”. On the same day, the Acting Chief Executive Officer of the agency refused access to the requested documents on the ground that the proposed land exchange was still in the process of negotiation between the agency and the owners of Lot 712.
10. On 11 April 2000, the complainant sought an internal review of the agency's decision. On 27 April 2000, the Chief Executive Officer of the agency confirmed the initial decision to refuse access to the requested documents on the ground that disclosure could reveal information of a commercial value to a person and could diminish the commercial value of that information. On 10 May 2000, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.
11. On 23 May 2000, a submission setting out the reasons for the proposed land exchange was tabled in both Houses of Parliament, pursuant to s.42(4) of the

Land Administration Act 1997 ('the Submission'). The Submission states, in part:

"Because of a requirement for alternative access to the proposed subdivisions of adjoining lands to the west and the Sandringham sites, and with associated road safety issues due to the volume of traffic on Great Eastern Highway adjacent to Class "A" Reserve 12237 Hardey Park, the City of Belmont approached Cityscape Holdings Pty Ltd, the owners of Lot 712, which is situated on Great Eastern Highway in Ascot, for an exchange of land of "equal value" between Lot 712 and portion of Class "A" Reserve 12237 to help solve these problems.

A current market valuation by the Valuer General was obtained, which allowed for estimates for rezoning and the construction of subdivisional roads and included the statement that the land exchange was deemed to be of "equal value". This was accepted by Cityscape Holdings Pty Ltd and the City of Belmont."

The Submission indicates that approximately 42% of Hardey Park will be retained as public open space.

12. The situation, as I understand it, is that under the *Land Administration Act 1997*, the proposed land exchange cannot proceed until Parliament approves the cancellation of the "A" class reserve classification over the Hardey Park land. The agency is not the owner of the Hardey Park land or Lot 712. Its interest in the proposed land exchange lies in the benefits it perceives will accrue to the community if the exchange proceeds. That exchange is subject to fundamental conditions precedent which are outside the agency's control: for example, the gaining of Parliamentary approval for the land exchange and the rezoning of the Hardey Park land. The agency's role, to date, has been to negotiate with Cityscape in relation to Lot 712, in order to facilitate the land exchange.

REVIEW BY THE INFORMATION COMMISSIONER

13. In my opinion, the two notices of decision provided to the complainant by the agency do not comply with s.30 of the FOI Act (in particular, see section 30(f)). Neither notice contains sufficient reasons for the decision to refuse access or includes sufficient findings on the material questions of fact underlying those reasons. Further, the agency did not identify the documents that came within the ambit of the complainant's access application.
14. In fact, the internal reviewer simply cited clause 4(2) of Schedule 1 to the FOI Act and paraphrased that provision without giving any reason for the decision to refuse access to the requested documents. Therefore, I required the agency to provide me with further information to justify its decision to refuse access to the documents. In the course of discussions with the agency, a claim for exemption under clause 6(1) was made on the basis that the proposed land exchange is still part of an ongoing deliberative process, as referred to in the agency's original notice of decision. The agency produced for my inspection copies of the

requested documents and, in the course of my dealing with this complaint, a further document was located.

15. The complainant informed me that he was prepared to accept edited copies of the valuation reports with the valuation sums deleted. However, the agency refused to give access in that form or to allow the complainant to inspect the documents. The complainant is now seeking access to those valuation amounts.
16. On 28 June 2000, after considering the material before me, 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.

THE DISPUTED DOCUMENTS

17. The disputed documents consist of six valuation reports, described below:

Document	Date	Description
1	14/9/98	Report and valuation by Valuer General's Office for DOLA.
2	14/9/98	Valuation report by licensed valuers and property consultants prepared for the owner of Lot 712.
3	30/11/98	Valuation report compiled for the agency.
4	18/2/99	Addendum to Document 3.
5	17/9/99	Revaluation for land exchange compiled for the agency.
6	11/8/97	Valuation report compiled for the agency.

THE EXEMPTIONS

(a) Clause 4 – Commercial or business information

18. The agency claims that the disputed documents are exempt under clause 4(2) on the basis that the disclosure of those documents would reveal information that has a commercial value to the agency and that disclosure could reasonably be expected to destroy or diminish that commercial value.
19. Clause 4 of Schedule 1 to the FOI Act deals with the exempt nature of commercial or business information of “a person”. The definition of the word “person” in the *Interpretation Act 1984* makes it clear that the exemption in clause 4 applies to bodies corporate or unincorporate, as well as to natural

persons. On the other hand, clause 10 of Schedule 1 to the FOI Act deals with the exemption of certain information concerning the financial, commercial or property affairs of government or local government agencies.

20. Clause 4(2) is drafted in substantially similar terms to clause 10(3) with the difference that clause 10 refers to agencies and not to “persons”. I consider that clauses 4 and 10 are intended to protect different kinds of information from disclosure under the FOI Act. In my opinion, as a matter of statutory construction, the inclusion in Schedule 1 to the FOI Act of an exemption clause specifically directed at protecting the financial, commercial or property information of government or local government agencies means that the appropriate exemption to be used by those agencies seeking to protect their commercial or business information is clause 10 rather than clause 4.
21. Although the agency may be a “legal person”, given the inclusion of the clause 10 exemption, I consider that clause 4 is the exemption that applies to documents containing information about the commercial or business information of any natural person, body or organisation, other than government or local government agencies. In my view, clause 4 is primarily intended to protect certain of the commercial or business affairs of private individuals and organisations having business dealings with the government or local government. Accordingly, as I understand the agency’s claim for exemption under clause 4(2) to be on the basis of a claim that the documents contain information having a commercial value to the agency, I have considered that claim as a claim under clause 10(3), which is the exemption clause that deals with information of that specific kind.

(b) Clause 10 (3) – information that has a commercial value to an agency

22. Clause 10(3) provides:

"10. The State's financial or property affairs

Exemptions

(1)...

(2)...

(3) Matter is exempt if its disclosure -

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

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

23. Clause 10(3) protects matter from disclosure if it has a commercial value to an agency, which value could reasonably be expected to be destroyed or diminished by disclosure. Whilst I do not consider that the commercial value of the disputed matter needs to be quantified or assessed in order for it to be covered

by clause 10(3), the exemption nonetheless consists of two parts and the requirements of both paragraphs (a) and (b) of clause 10(3) must be satisfied in order to establish a *prima facie* claim for exemption. If the requirements of both paragraphs (a) and (b) are satisfied, the disputed documents will be exempt, subject to the limit on exemptions contained in clause 10(6).

24. In my view, information has a commercial value if it is valuable for the purposes of carrying on the commercial activities of an agency: see my comments in *Re Slater and State Housing Commission of Western Australia* [1996] WAICmr 13 at paragraphs 10-13. As I stated in that decision, 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 to an agency may be determined. It is only when that question is determined in the positive that consideration must be given to the requirements of paragraph (b) of the exemption.
25. Under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision on access was justified or that a decision adverse to another party should be made.

The agency's submissions

26. The agency submits that the disputed documents are valuations of the Hardey Park land and Lot 712 obtained as part of its deliberations on the proposed land exchange. The agency submits that "*All the documents contain a commercial value, which is the pivotal point of negotiations between the parties for the land exchange.*" The agency submits that, once the disputed documents are disclosed, it can no longer negotiate with the owner of Lot 712 in relation to possible concessions or incentives, with the result that the agency would be less able to minimise its costs.
27. As I understand it, the agency's argument in support of its claim under clause 10(3) is that the information contained in the valuation reports has a commercial value to the agency because it consists of expert advice and opinions obtained to establish the market value of the land involved in the proposed land exchange. The disclosure of those valuation amounts (and the bases upon which those amounts were calculated) would undermine the agency's negotiating position in relation to any future proposals it might put to the owner of Lot 712 to assist in the finalisation of the land exchange process, with consequential financial loss to the agency.
28. In addition, the agency has advised me that the negotiations with Cityscape have been time-consuming, complex and sensitive. It submits that, in light of the sensitivity of those negotiations, disclosure of the disputed documents has the potential to subvert the current status quo and, in that event, the only option would be to commence the process of compulsorily acquiring Lot 712, pursuant to the *Land Administration Act 1997*. This would mean that the agency would have to find funds for this purpose and this would mean an enormous financial impost on the Belmont community. In my opinion, these submissions are more relevant to a claim for exemption under clause 10(4) and I have, therefore, also

considered whether the documents are exempt under that clause and have considered these submissions in that context.

Consideration

29. The six disputed documents are valuation reports dated between August 1997 and September 1999, which contain opinions of the market value of Lot 712 and the Hardey Park land. Document 1 was commissioned by DOLA. Document 2 was commissioned by the owner of Lot 712. Documents 3-6 were commissioned by the agency.
30. The Australian Concise Oxford Dictionary of Current English (3rd edition, 1997) defines “commercial” as “of, engaged in, or concerned with, commerce” and “commerce” as “financial transactions, especially the buying and selling of merchandise, on a large scale”. There is, in the FOI Act, a recognition of the increasing commercial reality of government and local government business in contemporary society. The exemptions in clause 10 reflect that commercial reality and ensure that the commercial affairs of local government agencies, which are conducted by those agencies for, and on behalf of, the public of Western Australia, are not jeopardised by the disclosure of documents under the FOI Act, without good reason.
31. I accept that, in respect of the buying, selling or exchange of land, the agency operates within a commercial environment. In my view, any commercial value in documents such as valuation reports lies in their contents and, in this case, in the use that the agency can make of the valuation information during negotiations with Cityscape. For example, depending on the stage that the negotiations have reached, the premature disclosure of the upper and lower limits of a negotiating range or a particular valuation amount may frustrate an agency’s attempts to reach a fair settlement in all the circumstances. Accordingly, I accept that the upper and lower limits of a negotiating range, or that valuation amounts, might have a commercial value.
32. In the present case, I understand that negotiations between the agency and the owner of Lot 712 are currently suspended, at least for the period of the tabling of the Submission in Parliament. However, I accept the agency’s submissions that it is likely (if the conditions precedent are satisfied) that there will be further negotiations with Cityscape before the land exchange is finalised. In those circumstances, I consider that the valuation amounts set out in the disputed documents are capable of having a commercial value.
33. However, other than the valuation amounts stated in the valuation reports, the agency has not persuaded me that the methodology for establishing a market price for Crown land and comparable privately owned land for the present purpose has a “commercial value” in the sense in which that term is used in clause 10(3). Much of it is merely factual information available from public records and, if disclosed, would reveal only the factual basis on which the valuation amounts were calculated which, it appears to me, would be more likely to assist in, rather than hinder, any future negotiations by clarifying the basis on which the agency has proceeded.

34. Further, the agency has not explained how the particular valuation information is valuable for the purpose of the business of the agency in negotiating a fair and equitable exchange for the Hardey land. As I understand it, valuation reports are a guide to market value. They are useful when the Council, acting in good faith, decides to purchase land or, as in the present case, to support the exchange of land with private owners. However, Council is not obliged to accept the valuation reports and may choose to disregard them and set its own parameters for negotiations.
35. Other than the valuation amounts set out in the disputed documents, the agency has not persuaded me that any of the remaining information in those documents could have a commercial value to the agency that could be destroyed or diminished by disclosure. Even if the requirements of clause 10(3)(a) were satisfied, there is no material presently before me from the agency which persuades me that it is reasonable to expect any commercial value in that information to be destroyed or diminished by disclosure, as required by clause 10(3)(b).
36. Accordingly, I find that the information in the disputed documents, other than the valuation amounts, is not exempt under clause 10(3).

(c) Clause 10(4) – information concerning the commercial affairs of an agency

37. Clause 10(4), 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.”

38. The exemption provided by clause 10(4) is more general in its terms than that provided by clause 10(3). It is directed at protecting from adverse effects certain of the activities of State or local government agencies, so that the commercial position of those agencies will not be undermined by accountability requirements under the FOI Act. 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 clause 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

39. As noted in paragraph 28 above, I understand the agency's submission to be that in light of the sensitivity of those negotiations, disclosure of the disputed documents has the potential to subvert the current status quo and, in that event, the only option would be to commence the process of compulsorily acquiring Lot 712, pursuant to the *Land Administration Act 1997*. The agency submits that this would mean that it would have to find funds for this purpose and, in turn, this would result in a financial impost on the Belmont community. Accordingly, I have considered whether the disputed documents contain information relating to the commercial affairs of the agency, and whether disclosure of those documents could reasonably be expected to have an adverse affect on those affairs.

Consideration

40. In *Re Slater and State Housing Commission of Western Australia* [1996] WAICmr 13, at paragraph 30, I said:

"...the mere fact that there are commercial aspects to the agency's operations is not sufficient, in my view, to conclude that a document acquired to assist the agency in making commercial decisions necessarily contains information "concerning the commercial affairs of the agency". Whether a particular document is one that concerns the commercial affairs of the agency depends on a proper characterisation of the contents of the document. A business plan, for example, may be a document that contains information falling within the description of clause 10(4)(a)."

41. Although I understand that some of the valuation reports were provided to the agency on a commercial basis – that is for a fee – that does not necessarily mean that the documents contain information concerning the commercial affairs of the agency. The fact that the disputed documents relate to a commercial dealing which concerns the agency, or to a dealing which has a commercial impact on the agency, does not necessarily mean that they concern the "commercial affairs of the agency".
42. Under section 2.7(1)(b) of the *Local Government Act 1995*, the Council of the agency is responsible for the performance of the local government's functions. Section 3.1(1) of that Act provides that the general function of a local government is to provide for the good government of the persons in its district. Whilst I do not accept that the agency's functions are primarily commercial in character, I accept that there may be certain activities of the agency which can be characterised as commercial activities, for example, the deriving of revenue from the provision of various community services, the hiring of plant or equipment and the leasing of buildings. However, the agency does not appear to me to be in the business of negotiating for the exchange of land for the purpose

of commercial profit. Rather the agency is in the business of providing appropriate public open space for the benefit of the community as an aspect of its function to provide good government. In this case, I am not persuaded, on the material before me, that the disputed documents contain information concerning the commercial affairs of the agency.

43. In any event, even if the information in the disputed documents could be said to be information concerning the commercial affairs of the agency, the agency must also show that their disclosure could reasonably be expected to have an adverse effect on those affairs. Having examined those documents, there is nothing on their face that suggests to me that any such adverse effect as claimed by the agency could reasonably be expected to follow from their disclosure.
44. I do not consider that there is any probative material before me, other than the agency's assertions, that disclosure of the documents could reasonably be expected to have any of the adverse effects identified by the agency where the owner of the land and the agency have accepted that the proposed exchange is of deemed equal value and have reached an understanding as to certain of the terms and conditions of that exchange.
45. In any event, even if paragraphs (a) and (b) of clause 10(4) were both satisfied, I consider that the limit on exemption set out in clause 10(6) would apply in this case. Clause 10(6) provides that matter is not exempt matter under subclauses (1), (2), (3), (4) or (5) if its disclosure would, on balance, be in the public interest. I have set out the public interest arguments in paragraphs 67 to 79 below. In my view, even if I were satisfied that disclosure of the disputed documents had the potential to subvert the status quo with the consequences outlined by the agency, I consider, for the reasons set out below, that the disclosure of the disputed documents would, on balance, be in the public interest.

(d) Clause 6(1) – deliberative processes

46. The agency also submits that the disputed documents are exempt under clause 6(1) of Schedule 1 to the FOI Act. Clause 6, so far as is relevant, 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."

47. There are two parts to this exemption. To establish that the disputed matter is exempt under clause 6(1), the agency must satisfy the requirements of both paragraphs (a) and (b) of that provision. Only when paragraph (a) of the exemption is satisfied is it necessary to consider paragraph (b) and whether disclosure of the disputed matter would, on balance, be contrary to the public interest. If the requirements of both paragraphs (a) and (b) are satisfied, the disputed documents will be exempt, subject to the limits on exemption contained in clauses 6(2) – 6(4).
48. In the case of this exemption, s.102(1) of the FOI Act provides that the onus is on the agency to establish that its decision was justified. 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 matter would be contrary to the public interest.
49. I have considered the purpose of the exemption in clause 6 and the meaning of the phrase “deliberative processes” in a number of my formal decisions. I agree with the view of the Commonwealth Appeals Tribunal (‘the Tribunal’) in *Re Waterford and Department of the Treasury (No. 2)* (1984) 5 ALD 588 that the deliberative processes of the Government, a Minister or 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.
50. I agree with the Tribunal in *Re Waterford* when it said that:
- “58. *As a matter of ordinary English, the expression “deliberative processes” appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. “Deliberation” means “the action of deliberating; careful consideration with a view to a decision”; see The Shorter Oxford English Dictionary. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one’s course of action.*”
51. When considering the application of the exemption in clause 6(1), I regard it as necessary to identify the particular deliberative process of the agency to which the disputed document or documents are claimed to relate. As I understand it, the agency claims that the particular deliberative process in this instance is the

ongoing process of negotiation with the owner of Lot 712 in relation to the proposed land exchange.

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

52. The first step is to establish whether, if disclosed, the information in the disputed documents would reveal any opinion, advice or recommendation that has been obtained, prepared or recorded, or 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. The agency submits that the documents contain commercially sensitive information that, if released, would jeopardise the ongoing negotiation process between the agency and Cityscape.
53. In my opinion, the disputed documents, if disclosed, would reveal the valuers' opinions that may have been obtained or recorded, in the course of, or for the purpose of, a number of separate deliberative processes. I consider that those deliberative processes may include:
- (i) the agency's deliberations relating to the negotiations between the agency and the owners of Lot 712 concerning the identification of certain incentives and the determination of whether the land, the subject of the proposed land exchange, is deemed to be of equal value;
 - (ii) the Minister's deliberations in relation to his decision to cancel the "A" class reserve classification for the Hardey Park land and place the Submission before each House of Parliament; and
 - (iii) the deliberations of the Parliament in relation to the tabled Submission.
54. In my opinion, all six of the disputed documents contain opinion and advice obtained or prepared in the course of, and for the purpose of, the agency's deliberations concerning the proposed land exchange with the owner of Lot 712.
55. With regard to the Minister's deliberations described in paragraph (ii) above, I have no information as to whether all or any of the disputed documents were obtained or prepared in the course of, or for the purpose of, that particular deliberative process.
56. With regard to the deliberative process described in paragraph (iii) above, I have examined the Submission which consists of a report setting out the proposal and the reasons for it. The Submission refers to 'a current market valuation' by the Valuer General, but I conclude from that reference that it is not a reference to Document 1 or any other of the disputed documents. There is nothing in the Submission to indicate that the disputed documents were obtained, prepared or recorded in the course of, or for the purpose of, the Government's deliberations on the tabled Submission, nor that they would reveal any consultation or deliberation that has taken place in the course of, or for the purpose of, any such deliberative process.
57. My view is that the six disputed documents were prepared in the course of, and for the purpose of, the agency's deliberations on the negotiations for the proposed land exchange. As a result, I am satisfied that they contain

information of a kind described in clause 6(1)(a). However, I am not persuaded that the requirements of clause 6(1)(a) are satisfied in respect of the Minister's or the Government's deliberative processes described in paragraphs (ii) and (iii) above.

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

58. In *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551 at 561, Beaumont J said, concerning the public interest:

“In evaluating where the public interest ultimately lies ... it is necessary to weigh the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper working of government and its agencies on the other ...”.

59. The public interest test is intended to cover those cases, amongst others, where public disclosure would be prejudicial to the proper operation of government or the proper workings of one or more of its agencies. Under s.102(1) of the FOI Act, the onus is on the agency to establish that disclosure would, on balance, be contrary to the public interest.

The agency's submissions

60. The agency submits that there is a public interest in ensuring agencies that operate in a commercial environment are not unduly disadvantaged or hampered in their operations by the accountability requirements of the FOI Act. It submits that those negotiations are essentially ongoing, although it concedes that there are none currently on foot, and that there will undoubtedly be further matters to be settled. The agency pointed to the fact that there are, as yet, a number of hurdles to be overcome before the land exchange is finalised and that its previous negotiations with the owners of Lot 712 have been complex and sensitive. It is concerned not to have those previous negotiations undermined.

61. The agency submits that the successful completion of the land exchange will be of great benefit to the community in that public access to the river will be improved, there will be extra parking available and public usage of the new public open space will be greater than the current usage of Hardey Park. The land exchange would also benefit the public and visitors to the State by providing a river vista along the Great Eastern Highway. It submits that these are major public benefits which would be jeopardised by the failure of the land exchange to go ahead. The agency submits that this is a significant public interest consideration.

62. The agency also submits that the proposed exchange is particularly sensitive and that it is likely that disclosure of the disputed documents would jeopardise any future negotiations.

The complainant's submissions

63. The complainant submits that there is a public interest in the disclosure of the disputed documents to allay concerns that the proposed land exchange is not based on the exchange of land of equal or 'deemed' equal value. The complainant takes the view that the Hardey Park land may be of greater value than Lot 712, and considers that the methodology of the valuation reports may be flawed. If that is the case, the complainant submits that the State and the ratepayers of Belmont will be disadvantaged if he is denied an opportunity to test his opinion by an examination of the documents.
64. The complainant also informed me that the community and ratepayers in Belmont supported the land exchange proposal on the basis that 60% of Hardey Park would be retained whereas, in reality, only 42% is proposed to be retained. A copy of a brochure provided to me by the complainant, and apparently distributed as part of the public consultation programme by the agency, includes a reference to the retained portion of Hardey Park as being 60% of the total parkland area.
65. In this regard, I note that, from 1991-1997, both the Report and Council minutes refer to the agency retaining 40% of Hardey Park (or 45% in the Council minutes of 10 November 1997). I understand from the agency that some loss of land occurred from the requirement for a river reserve on the foreshore and the need to widen Great Eastern Highway to accommodate the proposed changes.
66. The complainant submits that it is in the public interest for the community to be made aware of the information in the disputed documents so that interested persons can make informed representations on these or other issues, to their Members of Parliament who are currently considering the Submission on the land exchange proposal.

Public Interest

67. I recognise that there is a public interest in the agency carrying out its sensitive, commercial negotiations without the risk of those negotiations being undermined by the disclosure of relevant documents. As a general rule, I consider that it may be contrary to the public interest to prematurely disclose deliberative process documents while deliberations are current, if there is material before me to establish that disclosure of such documents would affect the integrity of the decision-making process or that 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 generally served by non-disclosure
68. However, it appears to me that the deliberative process to reach agreement on the deemed equal value of the proposed land exchange has been finalised and, although there may be further negotiations necessary, following the satisfying of certain fundamental conditions precedent, there are, at the present time, no on-going discussions between the agency and the owner of Lot 712. Whilst I accept

that it may be contrary to the public interest for any ongoing negotiations between the agency and the owners of Lot 712 to be adversely affected, the agency has acknowledged that negotiations between it and Cityscape are suspended for the time being.

69. Further, with one exception discussed in paragraph 72 below, the agency has not explained to me how disclosure of the particular disputed documents could adversely affect any ongoing negotiations, nor provided me with any probative material to support its claim. It seems to me, therefore, that the agency is merely speculating about future occurrences. Further, I am not persuaded that disclosure of the disputed documents would be demonstrably contrary to the public interest for any other reason.
70. In this regard, I refer to the comments of Owen J, in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at page 573, in respect of a claim for exemption under clause 4(3) of the FOI Act, when he expressed the nature of the onus the agency bears in the following way:
- “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” or that disclosure could have an adverse effect on business or financial affairs? 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.”*
71. Whilst I accept that it may be contrary to the public interest for the land exchange proposal not to proceed and for the agency to be subject to expense as a result, I do not consider that the agency has provided any persuasive support for its assertion that the disclosure of the disputed documents would be likely to jeopardise any future negotiations or subvert the status quo.
72. The only information contained in the documents that I am prepared to accept, on the material before me, could have an effect on any ongoing negotiations is the valuation amount in each document and, therefore, also any other figures in the documents which, if disclosed, would enable the total valuation amount to be calculated. The agency argues that disclosure of those figures would seriously undermine its position in future negotiations with the owners of Lot 712 because, as I understand the agency’s argument, it would reveal the parameters of its negotiating range in respect of various terms and conditions of the exchange yet to be finally settled.
73. The FOI Act gives a general right of access, subject to the exemptions, to documents held by government and local government agencies. The public is no longer required to accept only the information that agencies choose, for

whatever reasons, to provide to it. I consider that members of the public (many of whom are ratepayers who ultimately paid for some of the valuation reports and who have an interest in the disposition of public land) have an interest in evaluating the decisions of the agency and in assessing for themselves whether the decision to exchange public open space is an appropriate decision for the agency to take. This clearly accords with one of the objects of the FOI Act, which is to promote informed public participation in the processes of government.

74. I recognise a public interest in members of the community having access to information about the processes of government decision-making. In my opinion, such information includes an understanding of how decisions are made and the matters taken into account. I also recognise that there is a public interest in the accountability of agencies for the manner in which those agencies discharge their obligations on behalf of the public in Western Australia. In my view, that accountability includes informing the public, wherever possible, of the basis for decision-making and of the material considered relevant to the decision-making process. I consider that, in the circumstances of this complaint, disclosure would serve rather than detract from those public interests.
75. In the particular circumstances of this matter, I consider that there is a public interest in interested members of the community being able to satisfy themselves that the proposed land exchange is a fair exchange, for the benefit of the community, and the basis on which the agency makes that assertion. That public interest favours disclosure of the disputed documents, in my view.
76. In weighing the public interests for and against disclosure, I have taken into account the information provided by the agency to the community concerning its public open space strategy and the proposed land exchange, and I have noted that interested members of the public may make their views about the land exchange known to their local Councillors and Members of Parliament. However, I consider that informed debate and discussion about such matters can only occur if the public has access to relevant and timely information. Therefore, I have given more weight to the public interests that favour disclosure. The agency has not persuaded me that disclosure of the disputed documents would, on balance, be contrary to the public interest.
77. Weighing those public interests against each other in respect of the valuation amounts and related figures, however, I reach a different conclusion. I accept the agency's argument that disclosure of those figures could adversely affect the agency's ongoing negotiations with the owners of Lot 712 and, therefore, the public interest in allowing sensitive negotiations to be conducted without being undermined or jeopardised by disclosure of information of that kind weighs against disclosure of that matter.
78. Most of the public interests favouring disclosure will be satisfied to a large extent, in my view, by disclosure of edited copies of the disputed documents revealing the valuation methodology but with the valuation amounts and related figures deleted. Given that, I consider that the public interests favouring

disclosure of those figures are outweighed by the public interest in maintaining the agency's ability to negotiate effectively in respect of the outstanding matters to be settled with the owners of Lot 712.

79. Accordingly, I find that the valuation amounts and other figures which, if disclosed, would enable the total valuation amounts to be calculated are exempt under clause 6(1), but that the disputed documents are not otherwise exempt under clause 6(1).

Clause 3(1)

80. There is some information, although a minimal amount, contained in the documents which is personal information, as that term is defined in the FOI Act, about individuals. The term "personal information" is defined in the FOI Act to mean:

"... information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead —

(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or

(b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample;"

81. Clause 3(1) of Schedule 1 exempts from disclosure matter that would reveal personal information about an individual. That exemption is, however, subject to a number of limits including those in subclause (3) and subclause (6). Subclause (3), provides that matter is not exempt under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to the person, the person's position or functions as an officer, or things done by the person in the course of performing functions as an officer. The relevant details are prescribed in regulation 9(1) of the *Freedom of Information Regulations 1993*. Subclause (6) provides that matter is not exempt under subclause (1) if its disclosure would, on balance, be in the public interest.

82. The names and signatures of a number of individuals appear in the disputed documents. Where the names are names of officers of agencies, then by virtue of subclause (3), those names are not exempt under clause 3(1) as, in my opinion, in the context in which they appear in the documents, they are clearly prescribed details for the purposes of clause 3 as they relate to things done by those persons in the course of performing or purporting to perform their functions or duties as an officer. However, I consider their personal signatures to be information that is peculiarly personal to them and is not prescribed details for the purposes of clause 3. Therefore, I find the personal signatures appearing in the documents, whether they are the signatures of officers of agencies or of other people, exempt under clause 3(1).

83. Other names appearing in the documents are names of individuals who are not officers of agencies. Except where those names appear as part of a company or business name, I consider that they are personal information as defined in the FOI Act and *prima facie* exempt under clause 3(1). Having considered the competing public interests discussed above in respect of clause 6(1), I do not consider that any of the public interests favouring disclosure of the disputed documents requires disclosure of the names of individuals, who are not officers of agencies, contained in the documents.
84. Therefore, I find that the names of individuals who are not officers of agencies and all the personal signatures, whether of officers of agencies or not, appearing in the documents are exempt under clause 3(1) of Schedule 1.
