

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

**File Ref: F0802000  
Decision Ref: D0472000**

Participants: **Donald Euan Robertson**  
Complainant

- and -

**Curtin University of Technology**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – clause 6 – deliberative processes – identification of particular deliberative process – whether document contains information of the kind described in clause 6(1) – whether disclosure contrary to public interest – application of limit on exemption in clause 6(3) – clause 8(2) – confidential communications – whether information of a confidential nature obtained in confidence – whether disclosure could reasonably be expected to prejudice future supply.

*Freedom of Information Act 1992 (WA)* ss. 13(2), (3), 21, 26, 102(1), Schedule 1 clauses 3(1), 6(1), 6(3), 8(2), 8(4).

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

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

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

*Re Edwards and Minister for Transport* [2000] WAICmr 39

*Re Veale and Town of Bassendean* [1994] WAICmr 4

*Re Gahan and City of Stirling* (1994) WAICmr 19

*Re Rindos and University of Western Australia* [1995] WAICmr 20

*Re Murtagh and Commissioner of Taxation* (1984) 54 ALR 313

## **DECISION**

The decision of the agency is set aside. Subject to the deletion of the matter described in paragraph 39 of my reasons for decision, which matter is not in dispute between the parties, the disputed document is not exempt.

B W DENHAM  
ACTING INFORMATION COMMISSIONER

29 August 2000

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner ('the Commissioner') arising out of a decision made by the Curtin University of Technology ('the agency') to refuse Professor Robertson ('the complainant') access to various documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant formerly occupied the position of Deputy Director of Muresk College. When the position of Director of Muresk College became vacant, the complainant unsuccessfully applied for promotion to that position.
3. By letter dated 6 September 1999, the complainant made an application to the agency under the FOI Act, seeking access to:
  - “1. *The complete transcript of the proceedings of the Review conducted by Commissioner Kenner on 26 March 1999.*
  2. *All records of matters pertaining to the decision to seek to make my position redundant and subsequent events.*
  3. *All records of matters pertaining to the selection process leading to the appointment of Murray McGregor as Muresk Director in 1995.*”
4. The agency did not provide the complainant with a notice of decision within the permitted period of 45 days, as required by s.13(3) of the FOI Act. As the complainant did not receive the agency's notice of decision on his access application within the permitted period, pursuant to s.13(2) of the FOI Act the agency is taken to have refused to give him access to the requested documents and he is taken to have been given written notice of that refusal, on the day on which the permitted period expired. The complainant did not seek internal review from the agency, but sought the intervention of this office. As a result of negotiations between my office and the agency, the agency undertook to give the complainant a decision on internal review by 25 February 2000.
5. The agency identified a substantial number of documents that fell within the scope of the complainant's access application and, on 25 February 2000, granted him access in full to the majority of those documents. However, the complainant was refused access to some documents, on the ground that those documents are exempt under clauses 3(1), 6(1) and 8(2) of Schedule 1 to the FOI Act. The complainant was also refused access to two documents pursuant to s.26 of the FOI Act, on the ground that those two documents either cannot be found or do not exist.
6. Following further correspondence between the complainant and the agency's FOI coordinator in relation to the matter, on 26 April 2000, the complainant lodged a complaint with the Commissioner, seeking external review of the agency's decision on access.

## REVIEW BY THE INFORMATION COMMISSIONER

7. After receiving this complaint, the Commissioner required the agency to produce to her, for her inspection, the disputed documents and the FOI file maintained by the agency for the purpose of dealing with the complainant's access application. Various inquiries were then made with the agency and with the complainant, in order to determine whether this complaint could be resolved by conciliation between the parties. As a result of those discussions, the agency reconsidered its position and granted the complainant access to edited copies of some additional documents.
8. Following the conciliation process between the parties to this matter, the scope of the complainant's complaint was narrowed to two specific issues. The first issue concerned the agency's decision to refuse the complainant access to one document (described as Document 2.66 in the schedule of documents attached to the agency's decision), on the ground that that document is exempt under clauses 6(1) and 8(2) of Schedule 1 to the FOI Act. The second issue concerned the agency's decision to refuse the complainant access to two documents, pursuant s.26 of the FOI Act, on the ground that those documents either cannot be found or do not exist.
9. By letter dated 21 July 2000, the Commissioner informed the parties, in writing, of the Commissioner's preliminary view of this complaint, including her reasons. It was the Commissioner's preliminary view that Document 2.66 may not be exempt under clauses 6(1) and 8(2), as claimed by the agency. It was also the Commissioner's preliminary view, on the evidence then before her, that the agency had taken all reasonable steps to find the two documents to which access had been refused on the ground that those documents either cannot be found or do not exist and that the agency's decision to refuse access to those two documents, pursuant to s.26 of the FOI Act, appeared to be justified.
10. The complainant advised the Commissioner that he withdrew his complaint with respect to the "missing" documents but maintained his complaint in relation to Document 2.66. In addition, the complainant subsequently advised the Commissioner, in writing, that he does not seek access to any information consisting of the names of any third parties, wherever such names appear in Document 2.66. Accordingly, that information is no longer in dispute between the parties.
11. The agency also responded to the Commissioner. The agency advised the Commissioner that it maintains its claim that Document 2.66 is exempt under clauses 6(1) and 8(2) of Schedule 1 to the FOI Act and provided submissions to the Commissioner in support of its claims. Accordingly, the only issue remaining in dispute between the parties to this complaint is the agency's claims for exemption for Document 2.66.

## THE DISPUTED DOCUMENT

12. The disputed document, Document 2.66, comprises a facsimile cover sheet plus 17 pages, a total of 18 folios. Document 2.66 is described on the schedule provided by the agency to the complainant as a “*Facsimile and attachments from Murray MacGregor to Ken Severson (sic) marked strictly confidential undated*”. In the Commissioner’s preliminary view letter to the parties, Document 2.66 was described as comprising 19 folios in total. However, further inquiries at this office have established that the 19th folio was, in fact, a newly prepared facsimile cover sheet that was forwarded together with Document 2.66, when that document was sent to this office by the agency by facsimile transmission. I will refer to Document 2.66 as the disputed document.

## THE EXEMPTIONS

### *Clause 6(1) - Deliberative processes*

13. The agency claims that the disputed document is exempt under clause 6(1) of Schedule 1 to the FOI Act. Clause 6 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*

##### *Limits on exemptions*

(2) *Matter that appears in an internal manual of an agency is not exempt matter under subclause (1).*

(3) *Matter that is merely factual or statistical is not exempt matter under subclause (1).*

(4) *Matter is not exempt matter under subclause (1) if at least 10 years have passed since the matter came into existence."*

14. The Commissioner has previously considered the scope of the exemption in clause 6(1) and the meaning of the phrase "deliberative processes" in a number of her formal decisions. The Commissioner has previously stated that she agrees with the view taken by the Commonwealth Appeals Tribunal ('the Tribunal') in *Re Waterford and Department of the Treasury (No. 2)* (1984) 5 ALD 588, that the deliberative processes involved in the functions of an agency are its "thinking processes", the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action: see also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69 at 72. I agree with the Commissioner's view of the scope of the exemption in clause 6(1) and the meaning of the phrase "deliberative processes".
15. There are two parts to this exemption and the agency must satisfy the requirements of both paragraphs (a) and (b) of clause 6(1). If the disputed document contains matter of the kind described in paragraph (a), then it is necessary to consider the requirements of paragraph (b), that is, whether disclosure of that matter would, on balance, be contrary to the public interest. Further, the exemption is subject to the limits on exemption in subclauses (2) – (4) and regard must be had to whether any of those limits apply.

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

16. I have examined the disputed document. In my opinion, it contains information of the kind described in clause 6(1)(a). It consists of budgetary figures for Muresk College. In my view, disclosure of the disputed document would reveal opinions and advice that have been obtained, prepared and recorded in the course of, and for the purposes of, the deliberative processes of the agency. Therefore, I am satisfied that the requirements of clause 6(1)(a) are established.
17. Given that I accept that the requirements of paragraph (a) of clause 6(1) are established in respect of the disputed document the requirements of paragraph (b) must be satisfied in order to establish a valid claim for exemption.

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

18. 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 matter would, on balance, be contrary to the public interest.
19. The Commissioner has previously expressed the view that it may be contrary to the public interest to prematurely disclose deliberative process documents whilst deliberations in an agency are continuing, if there is evidence that disclosure of such documents would adversely affect the decision-making process such that it

would, on balance, be contrary to the public interest to do so, or that disclosure would, for some other reason, be demonstrably contrary to the public interest: see: *Re Collins and Ministry for Planning* [1996] WAICmr 39 and, more recently, *Re Edwards and Minister for Transport* [2000] WAICmr 39. I agree with that view.

### ***The agency's submissions***

20. The agency submits that disclosure of the disputed document would, on balance, be contrary to the public interest. In response to the Commissioner's preliminary view, the Vice Chancellor of the agency advised the Commissioner that:

*"An agency such as Curtin University of Technology is required to make significant decisions with regard to funding and budgets. The level of public financial support through Commonwealth government Grants is decreasing, and decisions have to be made as to how to best deal with such decreases and continue to provide quality university education. Wages and salaries form a significant part of Curtin's expenditure, accounting for more than 60% of the University expenses (when attributed to functions).*

*It is considered that to release the information in Document 2.66 may limit Curtin's preparedness to analyse a range of options in these matters in the future. Officers of Curtin need to be free to examine a full range of options when considering ways to make the best use of limited resources. The University would therefore submit that to release information such as that contained in Document 2.66 may prejudice the generation of documents of this type in the future, and perhaps then limit the prudent management of public funds".* However, no probative material was put to the Commissioner by the agency in support those claims.

21. It is apparent to me that the agency's claims amount on this aspect of the matter to a "candour and frankness" argument. That is, it is the submission of the agency that, if the disputed document is disclosed, then the preparedness of the agency to consider a range of options, and to make significant decisions with regard to matters concerning funding and budget options, may be impaired and, further, that officers of the agency need to be free to consider all possible options for the use of limited resources which they may be less prepared to do in the future, if the disputed document is disclosed.
22. That argument has been consistently rejected by the Commonwealth Administrative Appeals Tribunal and the Commissioner has also rejected it (see *Re Veale and Town of Bassendean* [1994] WAICmr 4; *Re Gahan and City of Stirling* [1994] WAICmr 19; and *Re Rindos and University of Western Australia* [1995] WAICmr 20. In *Re Murtagh and Commissioner of Taxation* (1984) 54 ALR 313, at 326, the Commonwealth Tribunal said:

*"The candour and frankness argument is not new. It achieved pre-eminence at one time but now has been largely limited to high level decision-making and to policy-making...No cogent evidence has been given to this Tribunal either in this review or, so far as we are aware, in any other, that the enactment of the FOI*

*Act 1982 has led to an inappropriate lack of candour between officers of a department or to a deterioration in the quality of the work performed by officers. Indeed, the presently perceived view is that the new administrative law, of which the FOI Act 1982 forms a part, has led to an improvement in primary decision-making."*

23. If I were to accept the agency's arguments based on "candour and frankness", that would mean that I acknowledge as reasonable its claim that professional officers of the agency, and other like agencies, will only undertake the task of considering options and make significant decisions with regard to matters concerning funding and budget options, and provide the agency with full and frank assessments of the budgetary options available to the agency, if they can do so behind the cloak of confidentiality. In my view, such a claim is inconsistent with the ethical standards expected of professionals in the academic world and elsewhere. Further, that claim by the agency is unsupported by any credible evidence.
24. All agencies, including universities consider, either periodically, or as an ongoing agency activity, all the options and alternatives for achieving the optimum use of their resources and the budgetary and funding issues that arise from those reviews. Therefore, for example, reviews which examine the relevant value of various sections or parts of an agency, assess the costs involved and whether or not restructuring or other action should be made to save or re-direct resources elsewhere, will in my opinion, continue across agencies in response to changing levels of public or government financial support. Educational institutions such as universities will, in my opinion, have to continue to make decisions as how to best deal with any decreases in public funding, such as Commonwealth Government grants, as this is an integral part of management practice.
25. In favour of disclosure, I note that the FOI Act gives a general right of access, subject to a valid claim for exemption to documents held by State and local government agencies. I recognise the public interest in members of the community having access to information about the processes of government decision-making. This clearly accords with one of the objects of the FOI Act, that is, to promote informed public participation in the processes of government. In my opinion, such information includes the basis on which decisions are made. 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.
26. The disputed document also contains some personal information about the complainant. In respect of those parts of the disputed document containing that personal information about the complainant, the agency stated:

*"In deciding upon the public interest of these matters, it is recognised that persons have the right to documents that concern them, however, it is recognised that those folios of the document which contain personal information*



*are available to the applicant through other avenues. It is contended that to release even the personal information within the context of this application would be contrary to the public interest because it could affect the efficient and economical conduct of the agency.”*

27. However, no other material was provided to support the agency’s claim that the release of the personal information about the complainant, to him, would be contrary to the public interest on the ground that it could affect the efficient and economical conduct of the agency. Given that s.21 of the FOI Act provides that the fact that matter is personal information about the applicant must be considered as a public interest factor in favour of disclosure, the agency’s claim that it would be contrary to the public interest to disclose that personal information to the complainant, is in my view, not justified.
28. No probative material has been put forward by the agency to establish that deliberations about the matters canvassed in the disputed document are continuing in the agency such that disclosure of the disputed document would adversely affect the agency’s decision-making processes. Similarly, the agency has presented no probative material to establish that disclosure of the disputed document would, for some other reason, be demonstrably contrary to the public interest. Therefore, in weighing up the competing public interest factors, I consider that the agency has not discharged the onus placed upon it by s.102(1) of the FOI Act to establish that the disputed document is exempt under clause 6(1) of Schedule 1 to the FOI Act. Accordingly, I find that the disputed document is not exempt under clause 6(1) of Schedule 1 to the FOI Act.

***Limit on exemption***

29. Finally, based on my examination of the disputed document, I am of the view that the majority of the information contained within that document could be considered merely factual and statistical. By virtue of the limit imposed by clause 6(3), that matter would not, in any event, be exempt under clause 6(1).

***Clause 8(2) – Confidential communications***

30. The agency also submits that the disputed document is exempt under clause 8(2) of Schedule 1 to the FOI Act. Clause 8, so far as it is relevant provides:

“(2) *Matter is exempt matter if its disclosure —*

- (a) would reveal information of a confidential nature obtained in confidence; and*
- (b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.”*

31. There are two limbs to the exemption in clause 8(2). To establish a *prima facie* claim for exemption under clause 8(2), the requirements of both paragraphs (a) and (b) of clause 8(2) must be met. That is, it must be shown that the disputed document would, if disclosed, reveal information of a confidential nature obtained in confidence and also that disclosure could reasonably be expected to

prejudice the future supply to the Government or to an agency of information of the kind under consideration. Further, even if the requirements of paragraphs (a) and (b) are satisfied, then the limit on exemption in clause 8(4) must also be considered.

**8(2)(a) – would disclosure “...reveal information of a confidential nature obtained in confidence; and”**

32. The first question which must be asked in respect of this paragraph is whether or not disclosure would “*reveal information of a confidential nature*”. If the information is not in the public domain and is known only by a small number or a limited class of persons, it may be concluded that it is inherently confidential. I accept that this is the case in respect of some but not all of the information in the disputed document. This is because in response to the Commissioner’s preliminary view that some parts of the document contain personal information about the applicant, the Vice Chancellor said “*...it is recognised that those folios of the document which contain personal information are available to the applicant through other avenues ...*”
33. However, the second question required to be answered in respect of this paragraph is “*was the information obtained in confidence*”. Other than the facsimile cover sheet being marked “strictly confidential”, there is no other evidence before me to establish that the information was given by one officer in confidence to the other and received by the other in confidence. It may be implied that this was the case but, it is open to interpretation as to whether the information was given and received in confidence. Even if I was satisfied that this requirement has been met (which I am not), the second paragraph of this subclause still must be satisfied in order for the disputed document to be exempt under subclause 8.

**8(2)(b) – “could reasonably be expected to prejudice the future supply of information of that kind to the government or to an agency”**

34. This requirement is not concerned with the question of whether the particular author or authors of a document would refuse to supply information to the agency in the future. Rather, the question is directed at the ability of the Government or an agency to obtain the relevant kind of information from the sources generally available to it.
35. The agency’s submissions did not specifically address this matter other than to say “*that to release information such as that contained in [the disputed document] may prejudice the generation of documents of this type in future and perhaps then limit the prudent management of public funds.*” However, no probative material to support this claim was provided.
36. I dealt with essentially the same issue in this decision when considering the claims in respect of clause 6(1)(b) of Schedule 1 to the FOI Act because the same claim was made as being a public interest factor against disclosure. The Commissioner also addressed in the preliminary view issued to the agency, the lack of evidence to support the view that future supply of information of the kind in the disputed document to government or an agency would be prejudiced, if the disputed document was released. However, no further submissions on the

issue were received from the agency, and I am not persuaded that officers of the agency or any other will cease providing documents of the sort in dispute, if the disputed document were to be disclosed in this instance under the FOI Act.

37. Agencies will continue to require, and request from their staff, input to the budget process by creating documents containing the type of information contained in the disputed document. This is normal management practice and, in my view, disclosure of the disputed document will not lead to documents of this type ceasing to come into existence.
38. I therefore conclude that, based on the material before me, and the content and context of the document in dispute, that the release of the disputed document will not prejudice the future supply of information of that kind to the Government or to an agency. The requirements for exemption under clause 8(2) of the FOI Act have not been met and, therefore, I find that the disputed document is not exempt.
39. Therefore, subject to the deletion of the names of all third parties (because it is outside the scope of the complaint), other than the name of the complainant, I find that the disputed document is not exempt and an edited copy should be given to the complainant.

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