

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

**File Ref: F1552000
Decision Ref: D0612000**

Participants:

Ljiljana Maria Ravlich
Complainant

- and -

**Department of Contract and
Management Services**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to the sale and hiring back of the Government's fleet vehicles - clause 8(1) - scope of exemption - whether breach of a contractual obligation of confidence - clause 8(3) - matter referred to in clause 6(1)(a) - obligation owed to private organisations - public interest.

Freedom of Information Act 1992 (WA) Schedule 1 clauses 6(1)(a), 8(1) and 8(3).

Re Speno Rail Maintenance Pty Ltd and The Western Australian Government Railways Commission and Another [1997] WAICmr 29.

DECISION

The decision of the agency is confirmed. The disputed documents are exempt under clause 8(1) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

21 November 2000

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Department of Contract and Management Services ('the agency') to refuse the Hon L M Ravlich MLC ('the complainant') access to documents requested under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 28 June 1996, the State Government entered into an arrangement with the Matrix Group Ltd ('Matrix') and a funding consortium in respect of the sale and hiring back of the Government's vehicle fleet valued at \$250 million ('the Contract'). The State Supply Commission is a party to the Contract. The agency was responsible for managing the Contract on behalf of the Government from the commencement of the facility in July 1996 until this role was transferred to the Treasury Department in mid 1998.
3. On 24 August 1999, the complainant made an application to the agency under the FOI Act for access to documents relating to the Contract. The application potentially involved a substantial number of documents. However, following discussions between the parties, the complainant reduced the scope of her access application. On 24 May 2000, the agency agreed to the disclosure of certain documents, but refused the complainant access to 68 documents. The documents to which access was refused were listed and described on a schedule designated by the agency as Appendix 3 ('schedule 1').
4. Around 10 July 2000, the State Supply Commission transferred to the agency part of an application made to it by the complainant for access to documents relating to the Contract. Subsequently, the agency provided the complainant with a second schedule listing 64 documents that were the subject of the transferred request ('schedule 2'). The agency refused the complainant access to the documents listed on schedule 2.
5. In July 2000, the Contract was tabled in the Parliament of Western Australia. Following that, the complainant applied to the agency for internal review of its decisions to refuse access to the documents in schedule 1 and schedule 2. An internal review was undertaken but the internal reviewer confirmed the agency's initial decisions to refuse access to the documents in schedule 1 and schedule 2. On 23 August 2000, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained the disputed documents from the agency. Discussions were held with the parties to determine whether this complaint could be resolved by conciliation. Following those discussions, the complainant withdrew part of her complaint. The agency reviewed the remaining documents and, after consulting with the Treasury Department and other third parties, maintained its claim that the documents are exempt.

7. On 2 November 2000, after examining the documents remaining in dispute and considering the material provided to me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that all of the disputed documents may be exempt under clause 8(1) of Schedule 1 to the FOI Act.
8. The complainant did not withdraw her complaint. The agency maintained its claim that the disputed documents are exempt under clauses 4(2), 4(3), 6(1), 7 and 8(1) of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENTS

9. There are 97 documents remaining in dispute between the parties. Those documents are listed and described in schedules 1 and 2, copies of which have been provided to the complainant by the agency. In general terms, the documents include correspondence between the agency, other government agencies and Matrix, internal correspondence and reports on financial, operational and other matters relating to the Contract. The agency claims that the documents listed and described in schedule 1 and schedule 2 are all exempt under clause 8(1) and that, in the alternative, some of the documents in schedule 1 are also exempt under clauses 4(2), 4(3), 6(1) and 7 of Schedule 1 to the FOI Act.

THE EXEMPTION

10. The agency claims that all of the disputed documents are exempt under clause 8(1). Clause 8, so far as is relevant, provides:

“(1) Matter is exempt matter if its disclosure (otherwise than under this Act or another written law) would be a breach of confidence for which a legal remedy could be obtained.

...

Limits on exemption

(3) Matter referred to in clause 6(1)(a) is not exempt matter under subclause (1) unless its disclosure would enable a legal remedy to be obtained for a breach of confidence owed to a person other than –

(a) a person in the capacity of a Minister, a member of the staff of a Minister, or an officer of an agency; or

(b) an agency or the State.”

11. In my decision in *Re Speno Rail Maintenance Australia Pty Ltd and The Western Australian Government Railways Commission and Another* [1997] WAICmr 29, I considered the scope and meaning of the exemption in clause 8(1). It is my view, for the reasons given in *Re Speno* at paragraphs 15-28, that the exemption in clause 8(1) applies only to documents the disclosure of which

would give rise to a cause of action for breach of a common law obligation of confidence, such as a breach of a contractual obligation, for which a legal remedy may be obtained.

The complainant's submission

12. The complainant submits that, since the Contract was tabled in Parliament during the last week of sitting, there should be no parts of the Contract or documents relating to the Contract that may be subject to claims of commercial confidentiality. The complainant also submits that once material is tabled in Parliament it becomes part of the public record and that the public interest is not served by the continuing refusal of the agency to disclose the disputed documents.

The agency's submission

13. The agency claims that the disputed documents are exempt pursuant to clause 8(1) because they are covered by the terms of a confidentiality obligation set out in an Interpretation Deed ('the Deed'), which forms part of the Contract. The agency contends that, although it is not a party to the Contract, the agency is covered by the confidentiality obligation "*by virtue of its role as Contract Administrator at the time and because of this role falls within those parties set out in the Deed (sic)*".
14. The agency acknowledges that the Contract was tabled in Parliament. However, the agency claims that the tabling of the Contract does not affect the operation of the confidentiality obligation in clause 9.10 of the Deed. The agency submits that the confidentiality obligation remains binding upon the agency and that the agency would be in breach of the Contract if it were to disclose the disputed documents to the complainant.

Consideration

15. The Contract consists of an Agreement, the Deed and other transaction documents. Clause 1 of the Deed defines the term "Confidential Information" as:
 - “(a) the terms and conditions of the Transaction Documents;*
 - (b) any information provided ... with respect to the Transaction by any party to this deed or any other person on behalf of any such party;*
 - and*
 - (c) all details of the Transaction which are otherwise known”*
16. It appears to me that the definition of the term "Confidential Information", as that term relates or applies to the Contract, is very broad and that it covers more than merely the contents of the Contract. Further, the obligation of confidence is imposed on all parties to the Contract and to various other persons acting for, or on behalf of, the parties. Therefore, I accept the claim made by the agency that it is bound by the terms of clause 9.10 of the Deed. In my view, the tabling of the Contract in Parliament does not affect the continuing operation of the

confidentiality obligation imposed on the parties to the Contract, and on others, under clause 9.10 of the Deed.

17. The only exceptions to the operation of the confidentiality obligation in clause 9.10 of the Deed are those specified in paragraphs (a) to (o) of clause 9.10. In my opinion, only paragraph (f) of those exceptions is relevant to this matter. Clause 9.10(f) provides that information that “*is generally and publicly available*” is not “Confidential Information”.
18. In view of the fact that the Contract has been tabled in Parliament, I consider that “*the terms and conditions of the Transaction Documents*” is information that is generally and publicly available pursuant to clause 9.10(f). In that regard, the agency submits that none of the information in the disputed documents is generally and publicly available. I have also examined the disputed documents. In my view, the disputed documents do not contain any information about the terms and conditions of the Contract. Further, I have been unable to identify any other information in those documents that is publicly available information.
19. I consider that the kind of information referred to in parts (b) and (c) of the definition of “Confidential Information” in clause 1 of the Deed remains covered by the confidentiality obligation in the Contract, notwithstanding the tabling of the Contract in Parliament. In my view, the agency is obliged under the Contract to keep confidential the information referred to in parts (b) and (c) of the definition of “Confidential Information” in clause 1 of the Deed.
20. Having examined the disputed documents, I consider that each of those documents contains information of the kind referred to in parts (b) and (c) of the definition of “Confidential Information” in clause 1 of the Deed. Accordingly, I consider that the disclosure of the disputed documents by the agency would be a breach of a contractual obligation (clause 9.10 of the Deed) and such a breach may be a breach of confidence for which a legal remedy could be obtained.

Limit on exemption – clause 8(3)

21. Clause 8(1) of Schedule 1 to the FOI Act is subject to the limit on exemption in clause 8(3). However, the limit on exemption in clause 8(3) only applies to matter of the kind referred to in clause 6(1)(a) of schedule 1 to the FOI Act, and then only if the disclosure of that kind of matter would enable a legal remedy to be obtained for a breach of confidence owed to a person other than the State, a Minister, an agency, the staff of a Minister or an officer of an agency. That is, information consisting of opinion, advice or recommendation that has been obtained, prepared or recorded in the course of, or for the purposes of, the deliberative processes of the agency, or any consultation or deliberation that has taken place in the course of, or for the purpose of, those deliberative processes, is not exempt under clause 8(1) unless the obligation of confidence is owed to someone other than a government agency or those persons specified in paragraph (a) of clause 8(3).

22. Even if any of the information in the disputed documents could be said to be information of that kind, the obligation of confidence in respect of it is owed by the agency to the other parties to the Contract. Those parties are private organisations and, in my view, do not come within the categories set out in clause 8(3)(a) and (b). In my opinion, therefore, the limit on exemption in clause 8(3) of Schedule 1 to the FOI Act does not apply to the disputed documents.

Public interest

23. The complainant also submits that there is a public interest in the public being informed of what the agency is doing in its business dealings with respect to the Contract because the Contract is supported by government money and that, since the Contract has been tabled in Parliament, the public interest is best served by the disclosure of all material related to it.
24. The exemption in clause 8(1) is not limited by a “public interest test”. Therefore, if the disputed documents are exempt under clause 8(1), then they are exempt, whether or not the disclosure of any or all of them would, on balance, be in the public interest.
25. For the reasons given, I find that the disputed documents are exempt under clause 8(1) of Schedule 1 to the FOI Act and confirm the decision of the agency to refuse access to those documents.
26. As I have found that all of the disputed documents are exempt under clause 8(1), I need not determine whether any of those documents are also exempt under clauses 4(2), 4(3), 6(1) or 7.
