

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

**File Ref: F2012138
Decision Ref: D0272013**

Participants:

Post Newspapers Pty Ltd
Complainant

- and -

Town of Cottesloe
Agency

- and -

ITH (WA) Pty Ltd
First Third Party

- and -

WA Restaurants Pty Ltd
Second Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – lease of premises commonly known as ‘Indiana Tea House’ – section 30(f) – the requirements of a notice of decision if the decision is to refuse access – section 102 – burden of proof – section 33 – safeguards for affected third parties - clause 4(3) – adverse effect on business affairs – clause 4(7) – public interest – clause 8(1) – breach of confidence – clause 8(2) – information of a confidential nature obtained in confidence.

Freedom of Information Act 1992: sections 27(2), 32, 33, 30(f), 74(2), 76(1)(b), 102(1) and 102(3); Schedule 1, clauses 3(1), 4(3), 4(7), 8(1), 8(2) and 8(4)

Freedom of Information Regulations 1993: regulations 9(1) and 9(2)

Interpretation Act 1984: section 5

Apache Northwest Pty Ltd v Department of Mines and Petroleum [2012] WASCA 167

Attorney-General's Department v Cockcroft (1986) 10 FCR 180

Re Kimberley Diamond Company NL and Department for Resources Development [2000] WAICmr 51

Re McGowan and Minister for Regional Development; Lands [2011] WAICmr 2

Re Pastoralists' and Graziers' Association and Department of Land Administration [1995] WAICmr 27

Re Pillsbury and Department of Mines and Petroleum [2013] WAICmr 1

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

Re West Australian Newspapers Limited and Westerrn Power Corporation [2005] WAICmr

10

DECISION

The agency's decision is set aside. In substitution, I find that:

- the disputed documents are not exempt under clause 4(3) of Schedule 1 to the *Freedom of Information Act 1992*; and
- the disputed documents are not exempt under either clause 8(1) or 8(2) of Schedule 1 to the *Freedom of Information Act 1992*.

Sven Bluemmel
INFORMATION COMMISSIONER

25 November 2013

REASONS FOR DECISION

1. This complaint arises from a decision made by the Town of Cottesloe (**the agency**) to refuse Post Newspapers Pty Ltd (**the complainant**) access to documents under the *Freedom of Information Act 1992* (**the FOI Act**). Two third parties, ITH (WA) Pty Ltd and WA Restaurants Pty Ltd (collectively **the Third Parties**) have each been joined as a party to this complaint.

BACKGROUND

2. I understand that a parcel of land located on Marine Terrace, Cottesloe has been vested in the agency by the State of Western Australia. In August 1995 the agency leased premises on part of that parcel of land commonly known as the 'Indiana Tea House' (**the Lease**).
3. By letter dated 8 March 2012, the complainant applied to the agency under the FOI Act for access to 'a copy of the lease between the Town and Indiana'.
4. By notice of decision dated 11 April 2012 the agency referred to a previous application made by the complainant in December 2010 under the FOI Act for the same document. The agency stated that, in dealing with the complainant's previous application, a relevant third party had not provided permission for release of the document and, as a result, the agency had refused access to the document. The agency stated that 'as there has been no change in circumstances since this time' the complainant's most recent application for access to the document was again 'declined' on the basis of the exemption in clause 4(3) of Schedule 1 to the FOI Act.
5. By email dated 19 April 2012, the complainant applied to the agency for internal review of its decision.
6. By letter dated 3 May 2012, the Chief Executive Officer of the agency (**the Principal Officer**) gave notice to the complainant that he upheld the agency's initial decision. The Principal Officer noted that the agency would be prepared to give the complainant access to an edited copy of the requested document, pursuant to section 24 of the FOI Act, upon advice from the complainant as to what parts of the document it was interested in, so that the agency could determine whether or not those parts contained exempt matter.
7. On 14 May 2012, the complainant applied to me for external review of the agency's decision to refuse access to the requested document.

REVIEW BY INFORMATION COMMISSIONER

8. Following my receipt of this complaint, I requested the original of the agency's FOI file maintained for the purposes of the access application and the originals of the disputed documents in this matter. The agency provided a copy of the agency's FOI file and copies of some documents identified as within the scope of the access application.
9. Having examined all of those documents, including the agency's notices of decision and the correspondence between the complainant and the agency about the application,

there are a number of procedural matters on which I comment below concerning the manner in which the agency dealt with the complainant's application.

10. In November 2012 my Investigations Officer asked the agency to confirm the description of the documents which the agency had identified as within the scope of the access application and to which it had refused access, as that was unclear to my office. In addition, after advising that there was insufficient information before me to establish a claim for exemption under clause 4(3) of Schedule 1 to the FOI Act, the agency was invited to provide me with additional information to support its claim for exemption.
11. On 26 November 2012, my Principal Legal Officer and Investigations Officer met with the agency's FOI Coordinator in order to progress the matter. Subsequent to that meeting, the agency was required to provide my office with copies of all of the documents which were within the scope of the access application. At that stage, the agency did not complete that task and failed to respond to follow-up correspondence from my office.
12. Ultimately, in July 2013, the agency confirmed the description of the documents which it had identified as within the scope of the access application. The agency also advised that it had been unable to locate a copy of two documents which were referred to in the documents which the agency had confirmed 'made up the "lease" that is the subject to the FOI request.'
13. In July and August 2013 the agency advised me of the searches that it and an external consultant had undertaken to locate a copy of those documents described in paragraph 12 which the agency had been unable to locate.
14. On 1 August 2013 my Senior Legal Officer sent correspondence to four third party companies – including the Third Parties – information about whose business, professional, commercial or financial affairs appeared to be contained in the documents identified by the agency. The third party companies were invited to provide written notice to me to be joined as a party to this complaint and/or provide written submissions in respect of the matters before me for determination by no later than 4pm on 16 August 2013. The third party companies were advised that, if no response was received by me by the due date, I would proceed to finalise the matter without further reference to them.
15. Copies of the letters sent to the four third party companies on 1 August 2013 were also sent to the agency for its information.
16. One third party company responded and advised my office that it consented to the disclosure of nine of the documents which contained information about that company and did not seek to be joined as a party to the complaint.
17. It subsequently came to my attention that another of the third party companies, information about whose business, professional, commercial or financial affairs appeared to be contained in the disputed documents, has been deregistered and, as a result, it is not possible to obtain information or receive submissions from that third party company in respect of this matter.

18. On three occasions after 16 August 2013, a lawyer contacted my Senior Legal Officer – consisting of two telephone conversations on 16 September 2013 and 23 October 2013 respectively and a returned telephone call on 5 November 2013 – and advised that he was aware of the letter that my Senior Legal Officer had sent to the third party companies on 1 August 2013 but was uncertain of whether or not he acted for only one or two of the third party companies. My Senior Legal Officer requested that the lawyer advise this office for whom he had instructions to act. He was also advised that in the event that his client(s) wished to be joined as a party or parties to the complaint, or otherwise make submissions in relation to this complaint, it would be necessary for the lawyer to also make submissions explaining the delay in response to my office.
19. As no notice to be joined or submissions had been received at my office by, or on behalf of, any of the third party companies, including the Third Parties, on 5 November 2013, after considering the material then before me, I provided the parties to the complaint – at that stage, the agency and the complainant – with a letter setting out my preliminary view (**my preliminary view letter**). My preliminary view was that:
 - the disputed documents (as defined in my preliminary view letter) are not exempt under clause 4(3) of Schedule 1 to the FOI Act as claimed by the agency;
 - the disputed documents contain a small amount of personal information which is prima facie exempt under clause 3(1) of Schedule 1 to the FOI Act;
 - Documents 1A, 1B, 1C, 2A, 2B, 3A and 4 are subject to copyright and access by way of inspection only would be appropriate, pursuant to section 27(2) of the FOI Act; and
 - the agency has taken all reasonable steps to find documents within the scope of the access application and that further documents cannot be found or do not exist.
20. In light of my preliminary view, I invited the agency to reconsider its claim for exemption. In the event that it maintained its claim that the disputed documents are exempt under clause 4(3) of Schedule 1 to the FOI Act, I invited it to provide me with any further relevant information or submissions to support that claim and I described the type of information which would be of assistance.
21. In response, the agency has maintained its exemption claim and made further submissions.
22. In light of my preliminary view, I invited the complainant to advise my office whether or not it accepted my preliminary view.
23. By email dated 12 November 2013, the complainant advised that it accepted my preliminary view and, in particular, it would accept access by way of inspection to Documents 1A, 1B, 1C, 2A, 2B, 3A and 4 and did not seek access to the personal information (including prescribed details listed in regulations 9(1) and 9(2) of the *Freedom of Information Regulations 1993*) in the disputed documents.
24. In light of the complainant's advice, the issues described at the second, third and fourth dot points of paragraph 19 are no longer in dispute. However, the agency should ensure

that any personal information contained in the disputed documents – as described in my preliminary view letter to the agency – is deleted before any access is given to the disputed documents and that access to Documents 1A, 1B, 1C, 2A, 2B, 3A and 4 is provided by way of inspection only.

25. Accordingly, the only issue remaining for my determination in respect of this complaint is whether the disputed documents are exempt as claimed by the agency and the Third Parties.
26. On 15 November 2013, the lawyer referred to at paragraph 18 applied, on behalf of the Third Parties, to be joined as parties to the complaint and made submissions in support of a claim that the disputed documents are exempt under clause 4(3) of Schedule 1 to the FOI Act.
27. By letters dated 20 November 2013, I advised all of the parties to the complaint that the Third Parties had been joined as parties to this complaint, pursuant to section 69(2) of the FOI Act, and that I would proceed to finalise this matter by way of published decision.

PROCEDURAL ISSUES

The agency's notices of decision

28. Section 30 of the FOI Act sets out the details that must be included in a notice of decision given to an access applicant. If an agency decides to refuse access to a document, section 30(f) of the FOI Act provides that the agency must include the following details in its notice of decision:
 - the reasons for the refusal;
 - the findings on any material questions of fact underlying those reasons; and
 - reference or references to the material on which those findings were based.
29. The notice of decision should explain how and why the disputed documents meet each element of the exemption clause – in this case both paragraphs (a) and (b) of clause 4(3) – with reference to, and explanation of, the material facts. The material facts are those which are necessary to constitute the exemption claimed.
30. In its notice of decision dated 11 April 2012, the agency claimed that there had been 'no change in circumstances since' the agency sought permission from a third party when dealing with an earlier application made by the complainant for the same document as the basis for refusing access to the requested document. The agency also stated that:

the lessee ha[d] indicated that the disclosure of the information

(a) would reveal information about the business, professional, or commercial or financial affairs of a person; and

(b) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or its agency.*

31. In the agency's internal review decision dated 3 May 2012 the Principal Officer stated at paragraphs 10 and 11 respectively:

In my examination of the document, I confirm [the initial decision-maker's] original observation that the document requested contains information that could reasonably be considered commercial or business information about a third party, as set out in Clause 4(3) of Schedule 1 to the Act.

I can also confirm, that as required by clause 33 of the Act, [the initial decision-maker] did make contact with the third party requesting from them whether they believed the information contained did meet the exemption requirements, which they indicated that they did.

32. To comply with the requirements of section 30(f) of the FOI Act, it was necessary in the circumstances of this matter for the notices of decision to identify how disclosure of information in the disputed documents would reveal information about the business, professional, commercial or financial affairs of a person and explain how the disclosure of any particular information identified in the disputed documents could reasonably be expected to have the adverse effects claimed, other than by simply forwarding such an assertion made by another person.
33. The obligation to provide an access applicant with a notice of decision that contains all of the information prescribed by section 30 of the FOI Act is intended to ensure that the true basis of a decision is clearly and intelligibly explained. An applicant should be able to understand all of the elements involved in applying a particular exemption and why access is being refused.
34. In this case, I consider that both the agency's initial and internal review decisions are deficient because they do not comply with the statutory requirements of section 30 of the FOI Act.

Onus on agency

35. Section 102(1) of the FOI Act provides that, except where subsection (2) or (3) applies, in any proceedings concerning a decision made under the FOI Act by an agency, the onus is on the agency to establish that its decision was justified or that a decision adverse to another party should be made. The onus is on the agency to establish that access to the disputed documents should not be given.
36. In the course of correspondence and communications with my office, the agency contended that it was entitled to rely upon the view expressed by a third party consulted by the agency as to whether or not a document is exempt or contains exempt matter. In particular, the agency advised that it did not have 'the time or the resources to undertake the studies required to ascertain whether releasing the information would cause detriment to the third party.'

37. In my view, the effect of the burden of the onus expressed in section 102(1) of the FOI Act is that if an agency cannot establish the particular elements of an exemption clause under Schedule 1 to the FOI Act, it is not open to the agency to refuse an access applicant access to that document on the basis that the document is an exempt document.
38. If an agency proposes to give access to a document that contains information concerning the business, professional, commercial or financial affairs of a person, the procedures prescribed in section 33 of the FOI Act must be followed.
39. However, as my office has consistently explained to agencies, the processes provided for under section 33 of the FOI Act do not give a third party a right of veto in respect of whether or not an agency makes a decision to give access to a document. The onus remains with the agency.
40. The consultation procedure prescribed in section 33 of the FOI Act enables an agency to obtain additional information from a third party for the purpose of informing the decision the agency is required to make and sets up a procedure by which a relevant third party may invoke the review rights available to it under the FOI Act. If a third party, in due course, exercises its review rights, the onus may shift to that third party to establish that access should not be given or that a decision adverse to the access applicant should be made.
41. Accordingly, there are safeguards built into the FOI Act which give affected third parties the right to seek review of an agency's decision in cases where an agency proposes to give access to documents containing information about the business, professional, commercial or financial affairs of that third party.

THE DISPUTED DOCUMENTS

42. Section 74(2) of the FOI Act provides that I must not include exempt matter in my decision or in my reasons for decision. As I consider that this obligation extends to matter that is claimed to be exempt, I am constrained from describing the disputed documents in detail, because to do so may be a breach of my obligations under section 74 of the FOI Act.
43. There are 10 documents in dispute in this matter. They are broadly described as follows:
 - Document 1** Landgate Form L1C entitled 'Lease of Crown Land';
 - Document 1A** 'Agreement for Lease';
 - Document 1B** 'Lease';
 - Document 1C** 'Sub-lease';
 - Document 2** Landgate Form E 2 entitled 'Extension of Lease'
 - Document 2A** 'Renewal and Variation of Lease';

- Document 2B** 'Release of cause of action';
- Document 3** Landgate Form L2C entitled 'Sub-Lease';
- Document 3A** An incomplete copy of 'Ratification Agreement'; and
- Document 4** 'Deed'.

CLAUSE 4 – COMMERCIAL AND BUSINESS INFORMATION

44. The agency and the Third Parties claim that the disputed documents are exempt under clause 4(3) of Schedule 1 to the FOI Act.
45. The relevant parts of clause 4(3) of Schedule 1 to the FOI Act are as follows:
- 4. Trade secrets, commercial and business information**
- (1) ...
- (2) ...
- (3) *Matter is exempt matter if its disclosure —*
- (a) *would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
- (b) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*
- (4) ...
- (5) ...
- (6) ...
- (7) *Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest.*
46. Clause 4 recognises that the business of government is frequently mixed with that of the private sector and that such business should not be adversely affected by the operation of the FOI Act: see *Re Kimberley Diamond Company NL and Department for Resources Development* [2000] WAICmr 51 which was followed in *Re Pillsbury and Department of Mines and Petroleum* [2013] WAICmr 1. However, private organisations or persons having business dealings with government must necessarily expect greater scrutiny of, and accountability for, those dealings than in respect of their other dealings: see *Re West Australian Newspapers Limited and Westerrn Power Corporation* [2005] WAICmr 10 at [101] which was followed in *Re Mc Gowan and Minister for Regional Development; Lands* [2011] WAICmr 2 at [44].

Clause 4(3) – business, professional, commercial or financial affairs

47. To establish a claim for exemption under clause 4(3), the agency must demonstrate that the disputed documents contain information about the business, professional, commercial or financial affairs of a person (which, pursuant to section 5 of the *Interpretation Act 1984*, includes a company) and also that the disclosure of that information could reasonably be expected to have an adverse effect on those affairs or, in the alternative, to prejudice the future supply of information of that kind to the Government or to an agency.
48. Finally, if the requirements of both paragraphs (a) and (b) of clause 4(3) are satisfied, the limits on exemption set out in clauses 4(4) to 4(7) must also be considered. In this case, I consider that only the limit on exemption in clause 4(7) may be relevant.

The agency's submissions

49. In its notice of decision dated 11 April 2012 the agency claimed that there had been 'no change in circumstances since' the agency sought permission from a third party when dealing with an earlier application made by the complainant for the same document as the basis for refusing access to the disputed documents. The agency also stated that:

the lessee ha[d] indicated that the disclosure of the information

- (a) *would reveal information about the business, professional, or commercial or financial affairs of a person; and*
- (b) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or its agency.*

50. In the agency's internal review decision dated 3 May 2012, the Principal Officer of the agency stated at paragraphs 10 and 11 respectively:

In my examination of the document, I confirm [the initial decision-maker's] original observation that the document requested contains information that could reasonably be considered commercial or business information about a third party, as set out in Clause 4(3) of Schedule 1 to the Act.

I can also confirm, that as required by clause 33 of the Act, [the initial decision-maker] did make contact with the third party requesting from them whether they believed the information contained did meet the exemption requirements, which they indicated that they did.

51. By email to my office dated 5 November 2013, in response to my preliminary view letter of the same date, the agency stated, among other things:

The Town itself has no objection to the release of the information ... [However] [t]he Town believes that releasing this information could be reasonably expected to, at the very least inconvenience the third party, and at the worst, reveal

information to their competitors about their operating restrictions and competitive disadvantages.

52. In its further letter to me dated 15 November 2013, the agency stated, among other things:

The Town still believes that information contained within the disputed documents, if released, could reasonably be expected to cause loss or harm to the third party. This view has been formed as the documents contain the operating constraints and conditions on the third party, that may give their competitors an unfair advantage if it were to be published.

53. The agency has not specified who the ‘third party’ is but I have proceeded on the understanding that the agency is referring to the Third Parties.

The Third Parties’ submissions

54. By letter to my office dated 15 November 2013, lawyers for the Third Parties claim that the disputed documents are exempt or contain exempt information on the basis that their disclosure:

- (i) would reveal information about the business, professional, commercial or financial affairs of the Third Parties;
- (ii) could reasonably be expected to have an adverse effect on those affairs of the Third Parties; and
- (iii) would be contrary to the public interest.

55. In support of this claim, the lawyers for the Third Parties submit:

- *[o]ur clients are part of a group of related entities involved in the restaurant and liquor industries around Australia.*
- *Those are highly competitive industries.*
- *The group of which our clients are a part has been successful over a long period of time. Clearly they do not wish to disclose or have disclosed any aspect of their business model to competitors or potential competitors.*
- *As such our clients believe that any information concerning their business model, including the terms and conditions of the lease arrangements, and the rental terms and conditions, should remain confidential.*
- *This is information which would and is normally regarded as commercial and in confidence. Certainly in all its dealings with the Town of Cottesloe our clients believed that those dealings were confidential and not to be made public. It appears that was also the Town of Cottesloe’s view in light of its response to the access applicant seeking the documents in question.*

- *Whilst the parties' position on the confidential nature of the lease terms and conditions is not characterised as confidential expressly it is clearly implied on the basis that such a term gives business certainty and efficacy to the agreement which is required in such arrangements.*

Consideration

Clause 4(3)(a)- would disclosure reveal information about the business, professional, commercial or financial affairs of a person?

56. From my examination of the disputed documents, I am satisfied that they contain information concerning the business, professional, commercial or financial affairs of the Third Parties. Therefore, I accept that the information contained in the disputed documents satisfies the requirement of paragraph (a) of clause 4(3). However, in order to establish a prima facie claim for exemption under clause 4(3) it is necessary to satisfy both paragraphs (a) and (b) of that clause.

Clause 4(3)(b) – could disclosure reasonably be expected to have an adverse effect on the person's business, professional, commercial or financial affairs?

57. I have examined the disputed documents and carefully considered the submissions made by the agency and the Third Parties.
58. I consider that the agency has not specified or explained how the Third Parties could suffer the loss or harm which it asserts could reasonably be expected from the disclosure of the disputed documents, namely, inconvenience.
59. Whilst the agency asserts that the disclosure of the disputed documents would reveal the operating constraints, restrictions, conditions and competitive disadvantages on the Third Parties, the agency has not identified or explained what those limits are. Nor has the agency identified who the Third Parties' competitors are or explained how the Third Parties' competitors would receive an unfair advantage – or what that unfair advantage is – if the disputed documents were disclosed.
60. The agency has not provided any material, information or evidence to support its submission that the disclosure of the disputed documents 'could reasonably be expected to cause loss or harm' to the Third Parties or 'may give their competitors an unfair advantage.'
61. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 the Full Federal Court of Australia said, at page 190, that the words 'could reasonably be expected to' in the Commonwealth FOI Act were intended to receive their ordinary meaning. That is, they require a judgment to be made by the decision maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the relevant outcome. That approach was accepted as the correct approach in *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167.
62. Accordingly, I consider that the agency's claim that a certain adverse effect 'may' result from disclosure of the disputed documents falls short of the test of whether disclosure 'could reasonably be expected to' have the relevant effect, as required by clause 4(3)(b).

63. Other than to state that the Third Parties are part of a group of related entities involved in the restaurant and liquor industries around Australia which are highly competitive industries, the Third Parties have not identified their competitors or potential competitors.
64. I consider that even if the group, of which the Third Parties are a part, has been successful over a long period of time, the fact that they do not wish to disclose or have disclosed any aspect of their business model to competitors or potential competitors is not a sufficient ground to justify non-disclosure of documents under the FOI Act.
65. *In Re Pastoralists' and Graziers' Association and Department of Land Administration* [1995] WAICmr 27, the Information Commissioner stated at [25]:

It appears to me that the concerns expressed by the complainant are largely the result of entrenched attitudes in a conservative community that reflect the days of pre-FOI legislation. Those community attitudes, and indeed the attitudes in government agencies, must change to accommodate the culture of openness, accountability and responsibility inherent in FOI. I can understand that the complainant and the pastoralists whom the complainant represents may be uneasy with the effects of the FOI legislation. However, as I have said before, FOI has ushered in a new era of government accountability. It is no longer sufficient to rely on previous conventions of confidentiality as a reason to refuse to disclose documents.

I agree with those comments.

66. From my examination of the disputed documents, I am not persuaded that the disclosure of documents which relate to specific leased premises could reveal the Third Parties' business model. Moreover, the Third Parties have not provided any material, information or evidence to support their submission in this regard.
67. The Third Parties have not identified any adverse effect that could reasonably be expected by the disclosure of the disputed documents and have not provided any material of substance in support of its assertion that disclosure of the disputed documents could reasonably be expected to have an adverse effect on the Third Parties' business, professional, commercial or financial affairs.
68. I understand that even if the disputed documents were disclosed to a competitor, the Third Parties would continue to benefit from the terms of the Lease as they currently stand and the Third Parties have not provided any material to indicate otherwise.
69. The Third Parties claim that the information in the disputed documents are 'commercial and in confidence' between themselves and the agency. However, they have not explained how the concept of 'commercial and in confidence' relates to the exemption provided in clause 4(3).
70. There is no probative material currently before me to satisfy me that disclosure of the disputed documents could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the Third Parties. In the

absence of such material, I consider the claims of the agency and the Third Parties to be merely speculative.

71. Based on all of the material before me, including my examination of the disputed documents, I am not persuaded that the disclosure of the disputed documents could reasonably be expected to have an adverse effect on the Third Parties' business, professional, commercial or financial affairs. Consequently, I am not persuaded that the requirements of clause 4(3)(b) have been met.

Clause 4(3)(b) – could disclosure reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency?

72. Neither the agency nor the Third Parties submit that disclosure of the disputed documents could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. However, I have considered whether the requirements of clause 4(3)(b) are made out on this basis.
73. On the information before me, including from my examination of the disputed documents, and in the absence of any probative material in support, there is nothing to suggest that disclosure of the disputed documents could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. Accordingly, I find that the disputed documents are not exempt under clause 4(3).

Clause 4(7) – would disclosure, on balance, be in the public interest?

74. In its internal review decision dated 3 May 2012, the agency considered whether or not disclosure of the disputed documents would, on balance, be in the public interest.
75. The Third Parties assert that disclosure of the disputed documents would be contrary to the public interest under clause 4(7) of Schedule 1 to the FOI Act, although they have not provided any submissions or material in support of that assertion.
76. If clause 4(7) were to be considered in this matter, pursuant to section 102(3) the complainant would bear the onus of establishing that disclosure would, on balance, be in the public interest. In this regard, I note that the test in clause 4(7) is not whether disclosure would be contrary to the public interest as asserted by the Third Parties. Rather, the test is whether it would, on balance, be in the public interest to disclose an otherwise exempt document.
77. However, as I am not persuaded that the disputed documents are prima facie exempt, I am not required to consider the operation of clause 4(7) and whether disclosure of the disputed documents would, on balance, be in the public interest.
78. Notwithstanding the above, by way of comment I consider that there is a strong public interest in the public, and ratepayers in particular, being able to scrutinise agreements entered into by a local government on behalf of its ratepayers. I consider that there is a public interest in local government agencies being accountable for the decisions they make and there should be as much transparency as possible regarding the use of Crown land. I consider it to be in the public interest for the public to have confidence that such transactions are dealt with properly by State and local government agencies.

CLAUSE 8 – CONFIDENTIAL COMMUNICATIONS

79. Although neither the agency nor the Third Parties have referred to clause 8 of Schedule 1 to the FOI Act, under section 76(1)(b) of the FOI Act, I have the power to decide any matter in relation to an access application that could, under the Act, have been decided by the agency.
80. Accordingly, as the Third Parties have made submissions which refer to the purported confidential nature of the disputed documents, I have considered whether the disputed documents are exempt under either clause 8(1) or 8(2) of Schedule 1 to the FOI Act.
81. Clause 8, insofar as is relevant, provides:

8. *Confidential communications*

- (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.*
- (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.*
- (3) ...
- (4) *Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."*

The agency's submissions

82. The agency has not made any submissions relating to a breach of confidentiality or to any claim that the disputed documents contained confidential information.

The third parties' submissions

83. By letter to my office dated 15 November 2013, the lawyers for the Third Parties submit:
- *[O]ur clients believe that any information concerning their business model, including the terms and conditions of the lease arrangements, and the rental terms and conditions, should remain confidential.*
 - *This is information which would and is normally regarded as commercial and in confidence. Certainly in all its dealing with the Town of Cottesloe our clients believed that those dealings were confidential and not to be made public. It*

appears that was also the Town of Cottesloe's view in light of its response to the access applicant seeking the documents in question.

- *Whilst the parties' position on the confidential nature of the lease terms and conditions is not characterised as confidential expressly it is clearly implied on the basis that such a term gives business certainty and efficacy to the agreement which is required in such arrangements.*

Consideration

84. Past decisions of this office have held that the exemption in clause 8(1) applies to documents if their disclosure would give rise to a cause of action, such as a breach of a contractual obligation of confidence, for which a legal remedy would be available: see *Re Speno Rail Maintenance Australia Pty Ltd and The Western Australian Government Railways Commission and Another* [1997] WAICmr 29.
85. Neither the agency nor the Third Parties have provided me with any information or evidence to support a claim that a contractual obligation of confidence exists in respect of the disputed documents and I have not found any material to support such a claim. Accordingly, I am not satisfied that the disputed documents are exempt under clause 8(1).
86. For the exemption in clause 8(2) to apply, I must be satisfied that the requirements of both paragraphs (a) and (b) are met. If both paragraphs are established then, pursuant to section 102(3) of the FOI Act, the onus would shift to the complainant to persuade me that disclosure of the disputed documents would, on balance, be in the public interest.
87. Apart from making assertions, the Third Parties have provided me with no supporting material or evidence to establish that the information in the disputed documents is of a confidential nature obtained in confidence as required by clause 8(2)(a). Moreover, the agency has not provided any material to support a claim that the agency is of the opinion that the disputed documents were provided to or received by the agency on a confidential basis as claimed by the Third Parties.
88. I do not accept the Third Parties' submission that the agency's response to the complainant's access application demonstrates that the agency believed or considered that the dealings were confidential and not to be made public. As previously noted, the agency has not claimed that the disputed documents were exempt under clause 8.
89. On the information before me, I am not persuaded that the requirements of clause 8(2)(a) have been met. Accordingly, I find that the disputed documents are not exempt under clause 8(2)(a).
90. In light of that, I am not required to consider whether the requirements of clause 8(2)(b) have been met or whether the disclosure of the disputed documents would, on balance, be in the public interest, pursuant to clause 8(4). However, by way of comment, I refer to my comments concerning the public interest at paragraph 78.

CONCLUSION

91. For the reasons set out above, the decision of the agency is set aside. In substitution, I find that:

- the disputed documents are not exempt under clause 4(3) of Schedule 1 to the FOI Act; and
- the disputed documents are not exempt under either clause 8(1) or 8(2) of Schedule 1 to the FOI Act.
