

Participants:

BGC (Australia) Pty Ltd
Complainant

- and -

Port Hedland Port Authority
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to the purchase or lease of the agency’s land – section 6 – whether document publicly available – clause 1(1)(b) – whether document contains policy options or recommendations – whether information to support claims under clauses 1(1), 1(1)(d)(i) or 1(1)(d)(ii) – clause 4(2) – whether correct claim should be clause 10(3) – clause 10(3) – whether information of commercial value to an agency – clause 10(4) – commercial affairs of an agency – whether adverse effect on commercial affairs – clause 6(1) – deliberative processes – whether disclosure on balance contrary to public interest – clause 3(1) – personal information – clauses 3(3) and 3(4) – prescribed details – clause 3(6) – whether disclosure on balance in the public interest.

Freedom of Information Act 1992: sections 4, 6, 102(1); Schedule 1, clauses 1(1)(b), 1(1)(d)(i), 1(1)(d)(ii), 3(1), 3(3), 3(4), 3(6), 4(2), 4(4), 6(1) and 10(3)

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

Port Authorities Act 1999: section 34

Interpretation Act 1984: section 5

Re Martin and Ministry for Planning; Martin and Department of Land Administration [2000] WAICmr 56

Re Ryan and City of Belmont [2000] WAICmr 42

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

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

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

Re Conservation Council of Western Australia (Inc) and Western Power Corporation [2006] WAICmr 7

Re Waterford and Department of the Treasury (N0.2) (1984) 5 ALD 588

Re Howard and Treasurer of Commonwealth of Australia (1985) 7 ALD 626

Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs (1993) 1 QAR 60

Re Edwards and Electricity Corporation t/a Western Power [1999] WAICmr 13

Re West Australian Newspapers Limited and Western Power Corporation [2005]

WAICmr 10

DPP v Smith [1991] 1 VR 63

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

WAICmr 2

DECISION

The respondent's decision is set aside. In substitution I find:

- Document 11 is available for free distribution to the public so that, pursuant to section 6, the access procedures of the *Freedom of Information Act 1992* do not apply to that document.
- Document 9 is not exempt under clauses 1(1), 1(1)(b), 1(1)(d)(i) or 1(1)(d)(ii) of Schedule 1 to the FOI Act.
- Document 9 and the disputed information in Document 4 are not exempt under clause 4(2).
- Documents 3 and 9 and the disputed information in Documents 2 and 4 are not exempt under clauses 10(3) or 10(4).
- Documents 3 and 9 and the disputed information in Documents 2 and 4 are not exempt under clause 6(1).
- With the exception of words 12-35 in paragraph 5 on page 3 of Document 9, none of the personal information identified in Documents 2, 3 and 9 is exempt under clause 3(1).

Sven Bluemmel
INFORMATION COMMISSIONER

31 October 2011

REASONS FOR DECISION

1. This complaint arises from a decision made by the Port Hedland Port Authority ('the agency') to refuse BGC (Australia) Pty Ltd ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. By way of background to this matter, the agency advised me that it operates on a commercial basis pursuant to the *Port Authorities Act 1999* ('the PA Act'); that the port of Port Hedland is a major State infrastructure facility through which a very great proportion of minerals from Western Australia is shipped; and that the port is the largest port by volume in the State and in Australia. The growth in export activity during the past decade has stretched port operations to capacity and created excess demand for access by port users. The agency is currently considering plans for expansion of the port including the realignment of the Great Northern Highway to further facilitate port activities to accommodate the increasing demand.
3. The agency also advised that it is involved in ongoing negotiations with the complainant (amongst numerous other port users) in relation to the sale or lease of port land and access to port facilities.
4. By letter dated 7 May 2010, the complainant applied to the agency for access to the following:
 - All reports and materials prepared for the agency's Board meetings held in or after December 2009 regarding the complainant's requests to the agency to purchase or lease land on or close to the agency's wharf and/or in or around Wedgefield.
 - The deliberations and decision of each of the agency's Board members in or after December 2009 regarding the above, including Board minutes, notes and email correspondence.
 - Any requests or recommendations made to any Minister by the agency, and any Ministerial directions or consents (or refusals of such) to the agency in or after December 2009 regarding the complainant's requests to purchase or lease land on or close to the agency's wharf and/or in or around Wedgefield.
 - Any valuations, assessment or calculation of the rental value of the land proposed to be leased to BGC in Wedgefield.
 - Details (including all plans and proposed plans) of any intended or proposed Great Northern Highway realignment in the vicinity of the agency's wharf and Wedgefield, and details of, or any assessment of, the impact or potential impact of that realignment on the agency's wharf or the Wedgefield area.

- Details of any plans or proposals to restrict or relocate the cement trade to certain berths within the Port Hedland Port which have been made or were current during the period 1 July 2009 to present.
- 5. On 29 June 2010, the agency notified the complainant that it had identified eleven documents within the scope of the access application. The agency gave the complainant access in full or in edited form to six documents but refused access to five, claiming exemptions under clauses 1, 3, 4, 6 and 10 of Schedule 1 to the FOI Act.
- 6. By letter of 19 July 2010, the complainant sought internal review of the agency's decision to refuse access to Documents 2, 3, 4, 9 and 11. However, there is no information before me to show that the agency ever conducted an internal review. In such circumstances, s.43(2) of the FOI Act provides:

“If the agency fails to give notice of its decision on the application for review within 15 days after it is lodged, or such longer period as is agreed between the agency and the access applicant, the agency is to be taken to have decided to confirm the decision under review.”
- 7. As a result, on 16 September 2010, the complainant applied to me for external review of the agency's deemed decision to confirm the initial decision to refuse access to Documents 2, 3, 4, 9 and 11.

REVIEW BY INFORMATION COMMISSIONER

- 8. Following my receipt of this complaint, I required the agency to produce to me the originals of the disputed documents and its FOI file maintained in respect of the complainant's access application.
- 9. As a result of an unusually high number of complaints received by this office, which placed significant pressure on its limited resources, this complaint was not dealt with further until 28 April 2011. My Principal Legal Officer wrote to the agency and advised that the agency's notice of decision did not comply with the requirements of s.30(f) of the FOI Act, in that it provided insufficient information concerning the agency's claims for exemption, thus preventing the complainant from making meaningful submissions either to the agency, in seeking internal review, or to me, in its application for external review.
- 10. After further correspondence with the agency, in which my office attempted to obtain, among other things, information as to the exemptions claimed, I provided the parties with a letter setting out my preliminary view of the complaint on 2 September 2011. My preliminary view was that, in the absence of any probative evidence or persuasive submissions from the agency, the agency had not satisfied the onus placed on it by s.102(1) of the FOI Act to establish that its decision to refuse access to the disputed matter was justified.
- 11. The agency confirmed that it maintained its claims for exemption and, on 26 September 2011, provided me with submissions in support of its claims. On 3 October 2011 my office sought additional information in relation to the

agency's claim for exemption under clause 1, which the agency provided on 17 October 2011.

THE DISPUTED MATTER

12. The disputed documents are described in the agency's schedule of documents, which was provided to the complainant, as follows:
- Document 2: "*Board Minutes of Meeting - BGC Lease Application dated 11 December 2009*".
 - Document 3: "*Board Meeting Agenda Item 6.2 Commercial Report - PHPA Lease Valuations dated 11 December 2009*".
 - Document 4: "*Board Minutes of Meeting No 1 - 2010 of the Port Hedland Port Authority dated 28 January 2010*".
 - Document 9: "*Port Hedland Port Authority Briefing Note dated 11 June 2010*".
 - Document 11: "*Map - Great Northern Highway - Port Hedland Highway Realignment Concept (dated 9 November 2009)*".
13. Document 3 consists of two pages (pages 6 and 7). The only information in Documents 2 and 4 that comes within the scope of the complainant's access application is that contained in lines 9-26 on page 3 of Document 2 and in lines 30-33 on page 1 of Document 4.

THE EXEMPTION CLAIMS

14. As I understand it, the agency makes the following claims for exemption:
- Document 9 is exempt under clauses 1(1), 1(1)(b), 1(1)(d)(i) and 1(1)(d)(ii).
 - Documents 9 and 11 and the disputed information in Document 4 are exempt under clause 4(2).
 - The disputed information in Documents 2 and 4 and Documents 3, 9 and 11 are exempt under clause 6(1).
 - The disputed information in Documents 2 and 4 and Documents 3, 9 and 11 are exempt under clause 10(3) and 10(4).
 - The disputed information in Documents 2 and 4 and Documents 3, 9 and 11 contain matter that is exempt under clause 3(1).
15. Under s.102(1) of the FOI Act, the agency bears the onus of establishing that its decision is justified.

DOCUMENT 11

16. The agency claims that Document 11 is exempt in full under clauses 4(2), 6(1) and 10(3) and contains matter that is exempt under clause 3(1).
17. My office conducted a search on the internet of the words “*Port Hedland Highway Realignment*” which establishes that Document 11 is a public document that can be downloaded by any person from the website of Main Roads Western Australia at www.mainroads.wa.gov.au under ‘Rural Projects’ and ‘Great Northern Highway Realignment’.
18. Section 6 of the FOI Act provides that the access procedures of the Act do not apply to documents that are publicly available, whether for free distribution or purchase. Consequently, the complainant can access that document directly and it is not necessary for me to deal with it further. It would have been preferable for the agency to ascertain that Document 11 was available to the public and informed the complainant of this. Such an approach would have been more consistent with section 4 of the FOI Act which places an obligation on agencies to give effect to the Act in a way that assists the public to obtain access to documents.

CLAUSE 1 – CABINET AND EXECUTIVE COUNCIL

19. The agency claims that Document 9 is exempt under clauses 1(1)(b), 1(1)(d)(i) and 1(1)(d)(ii) of Schedule 1 to the FOI Act. Clause 1, insofar as it is relevant, provides:
 - “(1) *Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body, and, without limiting that general description, matter is exempt matter if it –*
 - (a) ...
 - (b) *contains policy options or recommendations prepared for possible submission to an Executive body;*
 - (c) ...
 - (d) *was prepared to brief a Minister in relation to matters -*
 - (i) *prepared for possible submission to an Executive body;*
or
 - (ii) *the subject of consultation among Ministers relating to the making of a Government decision of a kind generally made by an Executive body or the formulation of Government policy of a kind generally endorsed by an Executive body;*
 - (e) ...

...

(5) *Matter is not exempt by reason of the fact that it was submitted to an Executive body for its consideration or is proposed to be submitted if it was not brought into consideration for the purpose of submission for consideration by the Executive body.*

(6) *In this clause **Executive body** means –*

(a) Cabinet;

(b) a committee of Cabinet;

(c) a subcommittee of a committee of Cabinet; or

(d) Executive Council.”

20. Clause 1(1) contains a general description of matter that is exempt under clause 1 – that is, the deliberations or decisions of an Executive Body – and paragraphs (a)-(f) of clause 1(1) relate to specific kinds of documents or information included within that description but not limiting that description. The purpose of the exemptions in clause 1 is to protect the confidentiality of the deliberations and decisions of Cabinet and other Executive bodies, as listed in clause 1(6).

The agency’s submissions

21. The agency’s notice of decision dated 29 June 2010 provided only the following information in support of its claim:

“Document 9 is exempt from disclosure under clause 1 of Schedule 1 to the FOI Act as it is a Ministerial briefing to the Minister for Transport. None of the limits on the exemption is applicable.”

22. In its letter to me of 22 September 2011, the agency submitted that Document 9 is exempt under clauses 1(1)(b), 1(1)(d)(i) and 1(1)(d)(ii). The agency advises that Document 9 was submitted to the Minister for Transport (‘the Minister’) and was subsequently included in Cabinet papers for a meeting of Cabinet on 11 June 2010.

23. The agency also submits that the disclosure of Document 9 would reveal the deliberations of Cabinet and, accordingly, it is exempt under clauses 1(1)(b), 1(1)(d)(i) and 1(1)(d)(ii). In light of that submission, I have also considered whether clause 1(1) would apply.

Consideration

24. On its face, Document 9 is a briefing note to the Minister that makes recommendations. Although the agency claims that Document 9 was “*included in Cabinet papers*” for a meeting of Cabinet held on 11 June 2010, there is nothing before me to support that claim, other than the agency’s assertion. Inquiries made by my office with Cabinet Services at the Department of Premier and Cabinet indicate that Cabinet meetings are held on Mondays unless the

Monday is a public holiday. 11 June 2010 was a Friday. The Cabinet meetings held closest to 11 June 2010 were those of 8 and 14 June 2010.

25. In *Re Martin and Ministry for Planning; Martin and Department of Land Administration* [2000] WAICmr 56, the former Information Commissioner considered a claim made under clause 1(1)(b) and took the view that it related to policy options or policy recommendations, where the plain meaning of ‘policy’, according to its dictionary definition, is “*a course or principle of action adopted or proposed by a government, party, business or individual etc*”.
26. Having examined Document 9, I accept that it contains options and recommendations but I am not satisfied that they relate to matters of policy. In my view, those options and recommendations relate to the performance of the agency’s functions under s.30 of the PA Act rather than to matters of policy. Even if Document 9 had contained policy options or policy recommendations, there is no material before me to establish that those options or recommendations were prepared for possible submission to Cabinet or another Executive body. On the information before me, I am satisfied only that Document 9 was prepared to brief the Minister.
27. The agency has identified no material to support its claims that Document 9 was prepared to brief the Minister in relation to matters prepared for possible submission to an Executive body (clause 1(1)(d)(i)) or to matters the subject of consultation among Ministers relating to the making of a government decision of a kind generally made by an Executive body or the formulation of a government policy of a kind generally endorsed by an Executive body (clause 1(1)(d)(ii)). Nor, on the information before me, do I accept that the disclosure of Document 9 would reveal the deliberations of Cabinet, pursuant to clause 1(1).
28. Accordingly, for the reasons given above, I find that Document 9 is not exempt under clauses 1(1), 1(1)(b), 1(1)(d)(i) or 1(1)(d)(ii) of Schedule 1 to the FOI Act.

CLAUSE 4(2) – INFORMATION THAT HAS A COMMERCIAL VALUE

29. Clause 4 deals with the commercial or business information of a ‘person’, which term is defined in section 5 of the *Interpretation Act 1984* to mean bodies corporate or unincorporate, as well as natural persons. Insofar as it is relevant, clause 4 is as follows:

“4. Commercial or business information

(1) ...

(2) *Matter is exempt matter if its disclosure -*

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

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

(3) ...

(4) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional or commercial affairs of an agency.*”

30. The agency claims that Document 9 and the disputed information in Document 4 are exempt under clause 4(2), which is concerned with protecting from disclosure matter that is not a trade secret, but which has ‘commercial value’ to a person. The exemption consists of two parts and the requirements of both parts must be satisfied in order to establish a *prima facie* claim for exemption under that provision.

The agency’s submissions

31. In relation to its claim for exemption under clause 4(2), the agency’s notice of decision said:

“Documents 4, 9 and 11 contain information of commercial value to [the agency] and are relevant to ongoing issues under consideration by [the agency] and have commercial value to [the agency]. The provision of the information could reasonably be expected to destroy or diminish the commercial value of that information.”

32. In my letter to the agency of 2 September 2011, I suggested that the agency’s claim under clause 4(2) was more appropriately made under clause 10(3), which relates to information that has a commercial value to an agency. In that regard, I noted that clause 4(4) provides that matter is not exempt merely because it discloses the business, professional, commercial affairs or financial affairs of an agency.

33. In its letter to me of 22 September 2011, the agency submits that:

- the fact that clause 4(4) *“removes or carves out the exemption in relation to some information about an agency indicates an intention that other information about an agency falling within the ambit of clause 4(2) is covered by that exemption”*; and
- clause 4(2) applies to the disputed information in Document 4 and to Document 9 because all of that matter contains commercial and business information about both the agency and other State agencies.

Consideration

34. I disagree with the agency’s submissions of 22 September 2011. In my view, clause 4(4) specifically states that *“information about the business, professional,*

commercial or financial affairs” of agencies is not exempt under clause 4(2) (or clauses 4(1) and 4(3)). Commercial information is the very kind of information that the agency claims is exempt in this case. In addition, the fact that the disputed matter may also refer to different agencies does not change the situation, since clause 4(4) applies equally to the business, professional, commercial or financial affairs of all State and local government agencies.

35. In *Re Ryan and City of Belmont* [2000] WAICmr 42 at [19]-[21], the former Information Commissioner said:

“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.

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.

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.”

36. I agree with that view. Accordingly, I consider that the relevant exemption clause is clause 10(3), which deals with information having a commercial value to an agency, and I have considered the agency’s submissions in relation to Document 9 and the disputed information in Document 4 under that provision.
37. In any event, for the reasons outlined in paragraphs 38 to 56 below, I find that document 9 and the disputed information in Document 4 are not exempt under clause 4(2).

CLAUSE 10 – THE STATE’S FINANCIAL OR PROPERTY AFFAIRS

38. As I understand it, the agency claims that Documents 3 and 9 and the disputed information in Documents 2 and 4 are exempt under clauses 10(3) and 10(4). Clause 10, insofar as it is relevant, provides:

“10. The State’s financial or property affairs

- (1) ...
- (2) ...
- (3) *Matter is exempt matter if its disclosure -*
 - (a) *would reveal information (other than trade secrets) that has a commercial value to an agency; and*
 - (b) *could reasonably be expected to destroy or diminish that commercial value.*
- (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.*
- (5) ...
- (6) *Matter is not exempt matter under subclause (1), (2), (3), (4) or (5) if its disclosure would, on balance, be in the public interest.”*

The agency’s submissions

39. In its notice of decision, the agency advised the complainant that the disputed matter contained *“information of commercial value to [the agency] and the disclosure of that information would diminish that value and have an adverse effect on [the agency] commercial affairs. Specifically, Documents 3 and 9 contain information that has the potential to damage the agency’s commercial affairs if disclosed.”* The agency also said: *“The Documents contain information in relation to [the agency’s] consideration of proposals for development at the Port. Document 3 contains recommendations regarding reviews commissioned by [the agency] for the purpose of port development generally, the disclosure of which could disadvantage [the agency].”*

40. In that notice of decision, the agency did not identify which exemption clause it intended to rely upon and the wording of its decision appears to relate to both clauses 10(3) and 10(4).
41. By letter dated 22 September 2011, the agency submits that it is negotiating to sell or lease to the complainant land that has been vested in the agency by the State ('the Negotiations'). The agency submits that Documents 3 and 9 and the disputed information in Documents 2 and 4 have a commercial value to the agency because they include, among other things, potential future plans for the expansion of the port; information about other decisions considered by the agency in its commercial operations and factors relevant to the Negotiations.
42. The agency submits that the disclosure of those documents and that information would adversely affect the agency's negotiating position and its ability to act in accordance with prudent commercial practices in the course of the Negotiations. Disclosure also has the potential to interfere with the agency's commercial operations. Therefore, the agency submits that the disclosure of Documents 3 and 9 and the disputed information in Documents 2 and 4 could reasonably be expected to destroy or diminish the commercial value of the information to the agency.
43. The agency further submits that it would not, on balance, be in the public interest to disclose Documents 3 and 9 and the disputed information in Documents 2 and 4 because that would adversely affect its commercial affairs, for the reasons stated.

Consideration

44. The agency provided me with additional information in support of its submissions but has stated that that information is confidential and should not be disclosed. I have however taken that information into account in my consideration of this matter.

Clause 10(3)

45. Clause 10(3) is concerned with the protection of information that is not a trade secret but which has a 'commercial value' to an agency. Information may have a commercial value if it is valuable for the purpose of carrying on the commercial activities of an agency. For example, the information may be important or essential to the profitability or viability of an agency's business operations. 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 may be determined: *Re Slater and State Housing Commission of Western Australia* [1996] WAICmr 13 at [12]-[13] citing *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491.
46. I have examined Documents 3 and 9 and the disputed information in Documents 2 and 4. It seems to me that all of the disputed information in Document 4, most of the disputed information in Document 2 and most of the information in Documents 3 and 9 is factual matter that would, on its face, be known to the

complainant. I also note that some of the information in Documents 2, 3 and 9 is information that was in Documents 5 and 10, which were released in edited form by the agency to the complainant on 29 June 2010.

47. From the face of the documents and the other information before me, and from the information given to me by the agency, I am not persuaded that the disputed matter has a commercial value to the agency since most of that matter appears to be information that is known to the complainant from the Negotiations. The agency has provided me with no information to show that there are any restrictions on the complainant making that information public if it chooses to do so. That information is thus potentially in the public domain.
48. The agency has not identified the information it has referred to concerning its potential future plans for the expansion of the port; other decisions considered in relation to its commercial operations; or factors relevant to the Negotiations.
49. If I have understood the agency's submissions correctly, it appears that they are primarily directed at the information in lines 14-16 on page 3 of Document 2, the same information in Document 3, and the information in line 16 on page 3 of Document 2 that also appears in Document 9. However, it is clear that the information in line 16 on page 3 of Document 2 is known to the complainant and it seems to me that the information in lines 14-15 on page 3 of Document 2 would also be known to a number of other persons and organisations. The agency has not established that any of that information is confidential.
50. As stated, under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision was justified or that a decision adverse to another party should be made. I refer to the comments of Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at page 573, in relation to 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.”

51. In my view, the agency has not satisfied the requirements of paragraph (a) of clause 10(3). In light of that, it is not necessary for me to consider whether the agency has established the requirements of paragraph (b) of clause 10(3). Consequently, I do not consider that Documents 3 and 9 and the disputed

information in Documents 2 and 4 are exempt under clause 10(3), as the agency claims.

Clause 10(4)

52. The exemption provided by clause 10(4) is more general in its terms than that in clause 10(3) and is directed at protecting the commercial affairs of the State or an agency from adverse effects. I understand from the agency that its 'commercial affairs' are the operation of port facilities and that, pursuant to s.34 of the PA Act, it must endeavour to make a profit.
53. In the present case, the disputed matter, as described in the agency's document schedule and in the agency's submissions, relates to leases of land held by the agency and the Negotiations. I am satisfied that the agency is in the business of operating port facilities on a commercial basis and that the lease and sale of land the subject of the Negotiations concern the agency's commercial affairs. Consequently, I consider that the requirements of paragraph (a) of clause 10(4) have been met in this case.
54. The next question is whether the disclosure of the disputed matter could reasonably be expected to have an adverse effect on the agency's commercial affairs. I understand that the agency's submissions relate in the main to the Negotiations. The agency has not explained how or in what way the Negotiations could be adversely affected by the disclosure of the disputed matter or how such disclosure could similarly affect its other commercial affairs. As I have said, most of the information in the disputed documents would already be known to the complainant. In *Re Conservation Council of Western Australia (Inc) and Western Power Corporation* [2006] WAICmr 7 at [78], the former A/Information Commissioner, in considering a claim made under clause 10(4) noted:

"It cannot logically be argued that any adverse effect could be expected to follow from making available information that is already available."
55. Since the agency has provided me with no explanation of its claims that disclosure could reasonably be expected to have adverse effects on its commercial affairs, I consider that it has not established the requirements of paragraph (b) of clause 10(4).
56. In my view, Documents 3 and 9 and the disputed information in Documents 2 and 4 are not exempt under clauses 10(3) or 10(4) of Schedule 1 to the FOI Act.

CLAUSE 6(1) – DELIBERATIVE PROCESSES

57. The agency claims that Documents 3 and 9 and the disputed information in Documents 2 and 4, are exempt under clause 6(1). Clause 6, insofar as it is relevant, provides as follows:

“6. *Deliberative processes*

(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.”*

58. The deliberative processes of the Government, a Minister or an agency are their ‘thinking processes’, the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action: see *Re Waterford and Department of the Treasury (No. 2)* (1984) 5 ALD 588.
59. In my view, the exemption in clause 6(1) is designed to protect the integrity of those ‘thinking processes’ – especially in circumstances where deliberations have not concluded – so that an agency’s deliberations are not jeopardised by the disclosure of documents.
60. There are two parts to the exemption and the agency must establish the requirements of both paragraphs (a) and (b).

The agency’s submissions

61. In its notice of decision and in its letter to me of 22 September 2011, the agency makes the following submissions:
- (a) The purpose of this exemption is to ensure effective public administration by protecting from disclosure materials comprising any opinions, advice or recommendations or forming part of the deliberations or thinking processes of an agency.
- (b) Documents 2, 3, 4 and 9 contain options that the agency is considering in relation to developments at the port. Specifically, the disputed information in Documents 2 and 4 record certain advice received and/or the deliberations of the agency’s Board in making recommendations; Document 3 records advice and recommendations given to the Board and the Board’s deliberative process; and Document 9 records the Board’s

deliberations and its recommendation to the Minister and reflects the content of the Minister's deliberative process.

- (c) Favouring disclosure, the agency recognises public interests in making its decision-making processes transparent and to allow interested parties to contribute to that process where possible. However, in the present case, the complainant has been notified of the agency's decisions relevant to it including, where possible, the agency's reasons for those decisions.
- (d) Against disclosure is the sensitivity of the documents and the seniority of the persons involved. The higher the office and the more sensitive the issues the more likely it will be that the documents should not be disclosed: *Re Howard and Treasurer of Commonwealth of Australia* (1985) 7 ALD 626 at 634. The disclosure of the information in the documents has the real potential to prejudice the proper and orderly ongoing operations at the port of Port Hedland.
- (e) Matters to which the information relates are still ongoing and are merely opinions at this time. There is a need to preserve confidentiality taking into account the subject matter of the communication and the circumstances in which it was made: *Re Lianos and Secretary, Department of Social Security* (1985) 7 ALD 475. In particular, the agency's negotiating position would be diminished in regard to its current negotiations with the complainant and possibly future negotiations with other parties if the information is disclosed
- (f) Disclosure may be counterproductive as the information contained may not be well understood and may lead to ill-informed debate or criticism of the agency: *Re Howard*.
- (g) Disclosure of the documents would, on balance, be contrary to the public interest and none of the limits on the exemption is applicable.

Consideration

62. Although the agency submits that the purpose of clause 6(1) is to protect the agency's deliberative processes, the agency must establish the requirements of both paragraphs (a) and (b). There is no presumption that because a document is found to be a deliberative process document, it would be contrary to the public interest to disclose it. The onus is on the agency to satisfy me that the requirements of both parts of the exemption are made out.

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

63. In dealing with clause 6(1)(a), I regard it as necessary to identify the particular deliberative process to which the disputed documents are claimed to relate. In the case of Documents 2, 3 and 4, the agency advises that the relevant deliberative processes are the Board's deliberations at its meetings in December 2008 and January 2009. I accept the agency's submission that the disputed

matter in Documents 2, 3 and 4 record advice and recommendations obtained and recorded for the purpose of the Board's deliberations at those meetings.

64. The agency also submits that the disclosure of Document 9 would reveal the Board's deliberations that led to the making of a recommendation prepared for the purpose of the deliberative processes of the Minister.
65. I have examined the disputed matter and I accept that the disclosure of Documents 3 and 9 and the disputed information in Documents 2 and 4 would reveal advice and recommendations that have been obtained and recorded in the course of, and for the purpose of, the deliberative processes of the Minister and the agency. Therefore, I am satisfied that the agency has established the requirements of clause 6(1)(a).

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

66. Pursuant to s.102(1) of the FOI Act, the agency bears the onus of establishing that the disclosure of the disputed matter would, on balance, be contrary to the public interest. The public interest test is intended to cover those cases where public disclosure would be prejudicial to the proper operation of government or to the proper working of an agency such that the right of access under the FOI Act is subordinate.
67. In my view, it may be contrary to the public interest prematurely to disclose deliberative process documents relied upon by the agency or the Minister while their deliberations are continuing but only to the extent that disclosure would either adversely affect the decision-making process or be otherwise demonstrably contrary to the public interest.
68. I consider that it would be contrary to the public interest to disclose documents whilst the Negotiations between the agency and the complainant are continuing, if there is evidence that disclosure would adversely affect that process.
69. In the present case, I understand that the agency's deliberative processes that relate to the advice in Document 9 and to the advice and recommendations in Documents 2, 3 and 4 have all concluded. The agency has given me no information as to whether the Minister's deliberations on the recommendation in Document 9 have concluded. However, research by my office discloses that on 20 April 2010, the Parliamentary Secretary representing the Minister answered certain questions in the Legislative Assembly (recorded in *Hansard* at p1689b) and from that information I am satisfied that the Minister's deliberations in respect of the recommendation in Document 9 have concluded. It is also evident from *Hansard* that additional information referred to in Documents 3 and 9 and the disputed information in Documents 2 and 4 is public information.
70. Accordingly, it is not evident to me that the matters referred to in Documents 2, 3, 4 and 9 have continuing relevance to the Negotiations. Although the Negotiations may be ongoing, the information in Documents 2, 3, 4 and 9 appears in the main to be known to the complainant so that disclosure could not realistically affect the Negotiations to the agency's detriment. The agency has

provided me with no information as to how disclosure might affect possible future negotiations with other parties.

71. Nor am I persuaded that there would be any prejudice to the proper and orderly ongoing operations at the Port of Port Hedland, as the agency claims, and the agency has provided me with no information in support of that submission.
72. With regard to the agency's submission in (d), the Administrative Appeals Tribunal in *Re Howard* identified certain 'general principles' that indicated when disclosure of a deliberative process document under the Commonwealth *Freedom of Information Act (1982)* was likely to be contrary to the public interest. However, those principles were critically analysed in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs (1993)* 1 QAR 60 and their correctness questioned by the Queensland Information Commissioner who said at [121]:

"Deputy President Todd made the same point in Re Rae and Department of Prime Minister and Cabinet (1986) 12 ALD 589 in which he sought to characterise the Howard criteria (at p.597) as 'empiric conclusions ... not intended to be used as determinative guidelines for the classification of information'. At p.603, Deputy President Todd said:

'... I do not consider that because the documents are 'high-level' correspondence their disclosure is necessarily contrary to the public interest. It may be that high-level correspondence is more likely than lower-level material to have characteristics which make its disclosure contrary to the public interest. If so, it is those characteristics, and not the mere fact of it being high-level, which makes its disclosure contrary to the public interest.'"

73. I agree with that view insofar as the disputed matter relates to information before the Board of the agency and provided to the Minister. In the present case, I consider that the disputed matter relates to the routine functions of the agency and the information contained in that matter does not appear to me to have characteristics that would make its disclosure contrary to the public interest.
74. I acknowledge that the agency is required by legislation to act on commercial principles but I am not persuaded that disclosure of the disputed matter would compromise the agency's ability to act prudently in relation to those principles in performing its functions under the PA Act. The former Commissioner in *Re Edwards and Electricity Corporation t/a Western Power [1999]* WAICmr 13 dealt with a similar argument and said, at [74]:

"Whilst the agency operates in a commercial environment and on a commercial footing, it is not in the same position as a private enterprise. Its primary function is to provide an essential service to the people of the State and, in order to enable it to do that, it has resources and powers available to it that are not available to private enterprise..."

75. I do not accept the agency's claim that the disputed matter is sensitive or confidential, especially in view of the fact that most of it appears to be known already to the complainant and to others and that some, at least, is in the public domain. Nor am I persuaded by the agency's submission in (f), as there is nothing before me to suggest that any of the disputed matter would be likely to lead to ill-informed debate or criticism of the agency. Even if that were the case, it would be open to the agency to release countervailing information to correct any misperceptions.
76. In favour of disclosure, I consider that there is a general public interest in persons being able to obtain access to information held by the government and in the exercise of their rights of access under the FOI Act. The FOI Act is intended to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and local government more accountable to the public.
77. I recognise a public interest in individuals or organisations affected by agencies' decisions, such as the complainant in this matter, being fully informed of the basis of those decisions, especially where those decisions have the potential to affect the operation of a person's livelihood or business. I agree with the agency that, in favour of disclosure, there are public interests in the transparency of its decision-making processes and in enabling interested parties to contribute to those processes where possible.
78. I accept that those interests are satisfied to some extent by the information that the agency has already given to the complainant but I do not consider that to be an argument for refusing further access. In *Re West Australian Newspapers Limited and Western Power Corporation* [2005] WAICmr 10, the former A/Information Commissioner commented at [95]:
- "I acknowledge that the agency has disclosed information in relation to those issues but that, of itself, is not enough to justify refusing further access. Since the introduction of the FOI Act, people are no longer entitled only to whatever information an agency chooses to disclose ... Provided that disclosure of none of the information in [the] documents would cause any demonstrable harm to the public interest, there is no reason why the public should not be aware of their contents in full."*
79. In balancing the competing public interests in this case, I am not persuaded that the disclosure of the disputed matter would be prejudicial to the proper working of the agency, including the conduct of the Negotiations, as the agency claims. Therefore, I consider that the factors favouring disclosure carry more weight than those favouring non-disclosure. Consequently, the agency has not established that disclosure would, on balance, be contrary to the public interest. Accordingly, I find that Documents 3 and 9 and the disputed information in Documents 2 and 4 are not exempt under clause 6(1).

CLAUSE 3 – PERSONAL INFORMATION

80. The agency claims that Documents 3 and 9 and the disputed information in Documents 2 and 4, contain matter that is exempt under clause 3(1). Clause 3, insofar as it is relevant, provides:

“3. Personal information

- (1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*
- (2) ...
- (3) *Matter is not exempt matter 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 —*
 - (a) *the person;*
 - (b) *the person’s position or functions as an officer; or*
 - (c) *things done by the person in the course of performing functions as an officer.*
- (4) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to —*
 - (a) *the person;*
 - (b) *the contract; or*
 - (c) *things done by the person in performing services under the contract.*
- (5) ...
- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

81. In the Glossary to the FOI Act, the term ‘personal information’ is defined 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.”*

82. The definition of ‘personal information’ makes it clear that any information or opinion about a person, from which that person can be identified, is *prima facie* exempt under clause 3(1), subject to the application of the limits on exemption in clauses 3(2)-3(6).

83. The purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies. I consider that clause 3 is a recognition by Parliament that State and local government agencies collect and hold sensitive and private information about individuals and that the FOI Act is not intended to open the private and professional lives of its citizens to public scrutiny without the consent of the individuals concerned where there is no demonstrable benefit to the public interest in doing so.
84. I have examined the disputed documents and information. In my view, the following information in Documents 2, 3 and 9 is personal information that is *prima facie* exempt under clause 3(1):
- Document 2: The names of officers of the agency in lines 10, 12 and 23 of page 3.
- Document 3: The officer's name in the headings at the top of pages 6 and 7; and the officer's title in the last sentence in paragraph 2 and the first sentence in paragraph 4 on page 7.
- Document 9: The title of the officer and the title of the third party in sentence 1 of paragraph 3; and the third party title in sentence 1 of paragraph 4 of page 1.
The title of the officer in line 3 of paragraph 2 on page 2 and line 3 of paragraph 3 on page 3.
Words 12-35 in paragraph 5 of page 3.
85. The exemption in clause 3(1) is, however, subject to a number of limits which are set out in clauses 3(2) - 3(6) of Schedule 1 to the FOI Act. In my opinion, only the limits on the exemption in clauses 3(3), 3(4) and 3(6) apply in this case.
86. Clauses 3(3) and 3(4) provide that certain information - termed 'prescribed details' - about persons employed by government agencies (such as their names, job titles and things done by them in course of performing their functions or services under a contract) is not exempt under clause 3(1). The information that is prescribed details is set out in regulations 9(1) and 9(2) of the *Freedom of Information Regulations 1993*.
87. The personal information identified in Documents 2 and 3 is prescribed details because it consists of the names or titles of officers or contractors of government agencies. Similarly the titles of the officers that appear in paragraph 3 on page 1; paragraph 2 on page 2; and paragraph 3 on page 3 of Document 9 are prescribed details. Consequently, that information is not exempt under clause 3(1) because the limits on the exemption in clauses 3(3) or 3(4) apply to that information.
88. However, in my view, the remaining personal information in Document 9 is not prescribed details because it identifies persons who are not officers of, or contractors to, an agency. Accordingly, I have considered whether that personal information is subject to the limit on exemption in clause 3(6).

Clause 3(6) – the public interest

89. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Determining whether or not disclosure would, on balance, be in the public interest involves identifying the public interests for and against disclosure, weighing them against each other and deciding where the balance lies.
90. The term ‘public interest’ is not defined in the FOI Act. In my view, it is best described in the decision by the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63, at page 75, where the Court said:

“The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals...”

91. In favour of disclosure, I recognise that there is a public interest in applicants being able to exercise their rights of access to documents under the FOI Act. I also recognise that such access is subject to and in accordance with the FOI Act.
92. In favour of non-disclosure, I recognise a very strong public interest in the maintenance of personal privacy, which interest may only be displaced by some stronger public interest that requires the disclosure of personal information about one person to another person. The protection of a person’s privacy is a public interest that is recognised in clause 3. As noted, the FOI Act is not intended to open the professional and private lives of citizens to public scrutiny where there is no demonstrable public benefit in doing so.
93. In weighing the competing public interests, I consider that the public interest in privacy outweighs the applicant’s right of access in relation to words 12-35 in paragraph 5 on page 3 of Document 9. Accordingly, I find that the limit on exemption in clause 3(6) does not apply to that information and that information is exempt under clause 3(1).
94. However, I consider that the situation is reversed in respect of the title of the third party in paragraphs 3 and 4 on page 1 of Document 9. In my view, if disclosed, that information could not be said to intrude on the individual’s privacy because it is so closely related to the actions of the complainant that it would be possible to substitute the complainant’s name for that of the particular individual, in those two instances: see *Re McGowan and Minister for Regional Development; Lands and Anor* [2011] WAICmr 2 at [97]-[99]. Accordingly, I consider that disclosure of that information would, on balance, be in the public interest and, therefore that the limit on the exemption in clause 3(6) applies to that information.

95. Consequently, I consider that, with the exception of words 12-35 in paragraph 5 on page 3 of Document 9, none of the personal information identified in Documents 2, 3 and 9 is exempt under clause 3(1) of Schedule 1 to the FOI Act.

CONCLUSION

96. The agency's decision to refuse access is set aside. In substitution, I find:

- Document 11 is available for free distribution to the public so that, pursuant to section 6, the access procedures of the *Freedom of Information Act 1992* do not apply to that document.
- Document 9 is not exempt under clauses 1(1), 1(1)(b), 1(1)(d)(i) or 1(1)(d)(ii) of Schedule 1 to the FOI Act.
- Document 9 and the disputed information in Document 4 are not exempt under clause 4(2).
- Documents 3 and 9 and the disputed information in Documents 2 and 4 are not exempt under clauses 10(3) or 10(4).
- Documents 3 and 9 and the disputed information in Documents 2 and 4 are not exempt under clause 6(1).
- With the exception of words 12-35 in paragraph 5 on page 3 of Document 9, none of the personal information identified in Documents 2, 3 and 9 is exempt under clause 3(1) of Schedule 1 to the FOI Act.
