

KOBELKE AND DOPLAR

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

**File Ref: 97190
Decision Ref: D0171998**

Participants:

John Charles Kobelke
Complainant

- and -

**Department of Productivity and Labour
Relations**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – Refusal of access – documents relating to a labour relations reform media education campaign – clause 4 – commercial or business information – 4(3) information concerning business, professional, commercial or financial affairs of a person – potential effects of disclosure – public interest.

Freedom of Information Act 1992 (WA) ss. 10(2), 102(3); Schedule 1 clauses 3; 4(2); 4(3); 4(7) and 7.

DECISION

The decision of the agency is varied. All of the disputed matter is exempt under clause 4(3) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

12th June 1998

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Department of Productivity and Labour Relations ('the agency') to refuse Mr Kobelke ('the complainant') access to certain documents requested by him under the provisions of the *Freedom of Information Act 1992* ('the FOI Act').
2. Following the 1993 State Election, the Government progressively introduced legislation into the Parliament to reform labour relations in Western Australia. The "first wave" of the reform process commenced in 1993 with the passage of relevant legislation. The "second wave" of the reform process commenced in 1995 and concluded with the passage of the *Labour Relations Legislation Amendment Act 1997* in May 1997. The passage of the latter Act in Parliament caused a great deal of controversy within the trade union movement and the Government launched an education campaign to inform the public about the effects and expected benefits of the legislation. That campaign involved a series of advertisements appearing in the press, on television and on the radio. However, the campaign was eventually terminated following complaints that the advertisements were political in nature and inaccurate.
3. On 28 August 1997, the complainant lodged an application with the agency seeking access under the FOI Act to documents relating to the media campaign launched by the Government. Initially, he was given full access to some documents; access to others was given in edited form; and he was refused access to others on the ground that those documents were exempt.
4. The complainant sought internal review of the agency's initial decision. Although some additional documents were released to him, access to others was refused on the ground that the documents are exempt under clauses 3(1), 4(2), 4(3) and 7 of Schedule 1 to the FOI Act. On 5 November 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. I obtained the disputed documents from the agency and directed a member of my staff to make further inquiries in respect of this matter. Two third parties, who had generated a number of the documents remaining in dispute, were consulted and made submissions as persons or bodies who might be affected by my decision on this complaint. However, they chose not to be joined as parties to the complaint. Various meetings and telephone discussions were held with the agency, the complainant and those two third parties in an attempt to resolve this complaint by conciliation and negotiation. As a result, a number of additional

documents were released to the complainant and he agreed to withdraw his complaint in respect of others. The number of documents in dispute was thereby reduced from 65 to 13.

6. On 2 April 1998, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the matter remaining in dispute between the parties may be exempt under clause 4(2) or clause 4(3) of Schedule 1 to the FOI Act. Therefore, I invited the complainant to consider the withdrawal of his complaint.
7. The complainant informed my office that, in his view, there were deficiencies in the FOI Act and that it was not designed to protect the kind of matter now in dispute from disclosure. He did not withdraw his complaint, but he made no submissions.

THE DISPUTED MATTER

8. All the disputed documents have been released to the complainant in edited form. The disputed documents, and the matter remaining in dispute in those documents, are described below. I have repeated the document numbering as used by the agency for ease of reference.

Volume 1

Document Number	Author	Description	Disputed matter
7	Benchmark Advertising	Cost estimate dated 21 March 1997 for writing and producing television commercials	Breakdown of budget amounts for various components of the estimate
11	Media Decisions	Table showing media schedule and financial information	Names of television stations and total cost of advertising for each station for April and May 1997
44	Media Decisions	Table showing agency Fair Industrial changes and football package expenditure	Names of television stations
52	Benchmark Advertising	Fax dated 3 June 1997 detailing media and production costs	Newspaper advertisement charges and agency service fee
56	Benchmark Advertising	Production invoices for April 1997	Components of production costs

79	Benchmark Advertising	Production invoices for May and June 1997	Components of production costs
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Volume 2

Document Number	Author	Description	Deleted Matter
1	Benchmark Advertising	Production invoices for April 1997 – Repeat of Document 56, Volume 1	Components of production costs
8 and 11	Media Decisions	Letter dated 21 July 1997 referring to refund of cancelled public education television campaign	Breakdown of negotiated credit summary
22	Media Decisions	Chart showing advertisements	Names of television stations
26	Agency	Table showing amounts committed to media advertising	Names of television stations and breakdown of costs for radio, television and press advertising
28	Media Decisions	Similar table to Document 26 with some handwritten annotations	Breakdown of costs for radio and television advertising
29	Media Decisions	Chart showing advertisements – Similar to Document 22 but with handwritten annotations	Names of television stations and breakdown of costs for radio, television and press advertising

9. Document 22 is similar to Document 29 and Document 26 is similar to Document 28. I note that the names of the television stations in the credit columns have been deleted from both Document 22 and Document 29. However, the breakdown of costs for advertising deleted from Document 29 has been disclosed to the complainant in Document 22. In the circumstances I deal only with the matter that has been deleted from both documents
10. The breakdown of costs for radio and television advertising has been deleted from Documents 26 and 28. However, the names of the television stations have been disclosed in Document 28 but deleted from Document 26. Further, the breakdown of costs for press has been deleted from Document 26 but disclosed in Document 28. In the circumstances I deal only with the breakdown of costs for radio and television advertising.

THE EXEMPTIONS

11. The agency claims that the disputed matter in Documents 7, 11, 44, 52, 56 and 79 of Volume 1 and Documents 1, 8 and 11 of Volume 2 is exempt under clause 4(2) of Schedule 1 to the FOI Act. The agency claims that the disputed matter in Documents 22, 26, 28 and 29 of Volume 2 is exempt under clause 4(3) of Schedule 1 to the FOI Act.
12. Clause 4, so far as it is relevant, provides:

“Clause 4 Commercial or business information

Exemptions

- (1) *Matter is exempt matter if its disclosure would reveal trade secrets of a person.*
- (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) *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.*

Limits on exemptions

- (4) ...
- (5) ...
- (6) ...
- (7) *Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest.”*

13. It is clear from the specific words of clauses 4(1), 4(2) and 4(3), in my view, that they are directed at protecting different types of information from disclosure under the FOI Act. Whilst it is open to an agency or to a third party to make

alternative claims for exemption under subclauses (2) and (3) of clause 4, in my view the same information cannot be exempt under more than one of those subclauses. However, different matter, either in the same or in different documents, may be exempt under different subclauses of clause 4.

14. The exemption in clause 4(3) is more general in its terms than that provided by clause 4(2) of Schedule 1 to the FOI Act. I consider that the primary purpose of the exemption in clause 4(3) is to protect from damage the business, professional, commercial or financial affairs of any person, including a company or incorporated body, that has business dealings with government agencies. In my view, the exemption in clause 4(3) is a recognition of the fact that the business of government is frequently mixed with that of the private sector and that neither the business dealings of private bodies, nor the business of government, should be adversely affected by the operation of the FOI Act.

The nature of the disputed matter

15. I understand that all but one of the disputed documents were created by two of the bodies involved in the media campaign, Benchmark Advertising and Media Decisions. Benchmark Advertising was responsible for the production of the advertising material for that campaign. Its work involved writing and producing the advertisements for all forms of media. The advertisements produced were then referred to Media Decisions which, pursuant to its contract with the Government, is responsible for the purchase of media space. I understand that Media Decisions negotiated the cost of advertising space with the various media suppliers and arranged for the advertisements to be published.
16. The documents created by Media Decisions consist mainly of tables and charts setting out the allocation of the advertising in the media campaign between media suppliers and the costs charged by the various suppliers. The matter deleted from the Media Decisions documents consists of the names of the suppliers, financial information related to payment rates and market share, and a credit summary for cancelled advertisements.
17. The documents created by Benchmark Advertising consist of production estimates and invoices. The matter deleted from those documents consists of the components of the cost of producing the advertisements paid for by the agency.

The submissions

18. I understand that Media Decisions provides media buying services to the Government of Western Australia under a whole Government Contract administered by the Department of Contract and Management Services. The current contract is for three years expiring on 30 June 1999. Media Decisions informs me that one of its key responsibilities under the contract is the negotiation of media contracts and rates with media suppliers. Within those contracts, one of the major negotiating points is the total share of Government business each media supplier receives and the ability of Media Decisions to maintain the confidentiality of each individual rate. Media Decisions informs me that it has managed the media contract for almost 11 years and, to date, it has been successful in maintaining the integrity and confidentiality of its media contracts and, as a consequence, has been able to improve on the media discounts offered to Government on a year on year basis.

19. Media Decisions claims that disclosure of the disputed matter would reveal the station shares purchased on this occasion and, if that information were to be made public, could compromise its future negotiating position by revealing its preferred negotiating position with a key media supplier and the extent to which that supplier was prepared to assist the Government on the particular occasion concerned. Media Decisions points out that the documents already disclosed to the complainant in edited form show the total media expenditure and the only information being withheld is the split of media expenditure and credits from individual media suppliers.
20. Benchmark Advertising submits that the release of the disputed matter from its documents will cause it to be commercially disadvantaged. It states that the rates detailed in the disputed matter are commercially sensitive as they set out the competitive production rates offered to the agency in order to get its business in comparison to the usual commercial rates on offer. Benchmark Advertising submits that it could suffer financial disadvantage if its rates become public knowledge.

Clause 4(3)(a)

21. Taking into account my own examination of the disputed matter and the submissions made to me by the third parties, I am satisfied that the disputed matter is information relating to the business, commercial and financial affairs of Media Decisions, Benchmark Advertising and the various media suppliers named in the documents. The breakdown of its charges clearly relates to Benchmark Advertising's commercial activities in providing its services to the Government in respect of the relevant advertising campaign. The breakdown of costs for the radio and television advertising relates to Media Decisions' business and commercial activities in providing its services in respect of the campaign pursuant to its contract with the Government. That information also relates to the commercial and financial affairs of the radio and television stations named, revealing both their respective shares of the campaign and what they were paid.
22. The information clearly, in my view, relates to the business, commercial and financial affairs of those persons. Accordingly, I accept that all of the disputed matter meets the requirements of clause 4(3)(a) of Schedule 1 to the FOI Act.

Potential effects of disclosure

23. Both Media Decisions and Benchmark Advertising submit that the disclosure of the disputed matter will reveal the commercial arrangements that have been made with the media outlets and with the agency. Media Decisions submits that its disclosure could have an impact on existing media contracts. Benchmark Advertising submits that the value of its business dealings with its commercial clients could be disadvantaged by the release of the information. It relates directly to their business operations and commercial activities.

24. I understand that the contract between Benchmark Advertising and the agency for the production of the media campaign is now at an end. However, I accept the submission of Benchmark Advertising that the component production charges negotiated with the agency and set out in the disputed documents are known only by Benchmark Advertising and the agency. The total charge in each instance has been disclosed; it is only the component charges making up each total that are in dispute. Benchmark Advertising submits that one factor in its being able to act for its current clients and being successful in attracting new clients and negotiating competitive future contracts is the continuing confidentiality of the information.
25. I understand that there is strong competition between the various media suppliers and the advertising agencies and, in that context, that the continuing confidentiality of commercial rates is important to those businesses. Based on the material before me, I accept that the disclosure of some parts of the disputed matter would enable the respective market shares of media work to be calculated and that that in turn, could reasonably be expected to put pressure on Media Decisions for a greater share of the work to be distributed in the market place. Although market competition may be desirable, I accept that the disclosure of the different payment rates negotiated by Media Decisions could compromise its future negotiating position.
26. The release of the names of the television stations in Documents 22 and 29 would reveal some information about the credit arrangements which Media Decisions negotiated with the media suppliers following the cancellation of some of the scheduled advertisements. Disclosure of that and disclosure of the breakdown of the cost of radio and television advertising in Documents 26 and 28 may enable the media suppliers to compare overall charges and lead them to re-open negotiations with Media Decisions to seek more favourable arrangements. In my view, disclosure could reasonably be expected to adversely affect Media Decisions' negotiating position with these and other media suppliers in the future in respect of contracts for advertising campaigns.
27. In my view, it may also be reasonable to expect that if the commercial clients of Benchmark Advertising become aware of the competitive production rates charged to the agency they may seek to renegotiate their own rates. Further, if the rates become public, that could diminish the strength of Benchmark Advertising's position in future negotiations to secure contracts with new clients in a highly competitive advertising market. I accept that it would also be reasonable to expect that disclosure of the breakdown of its charges could adversely affect its commercial affairs by giving its competitors a commercial advantage, that Benchmark Advertising would not have, in enabling its competitors to undercut it in negotiations and/or tendering with Government in respect of such projects in the future.
28. Accordingly, I am inclined to accept that disclosure of the disputed matter could reasonably be expected to have an adverse effect on the respective business, commercial or financial affairs of Media Decisions and Benchmark Advertising.

Therefore, I consider that the disputed matter is *prima facie* exempt under clause 4(3).

Public Interest

29. The application of the exemption in clause 4(3) is subject to the limit on exemption contained in clause 4(7) which contemplates that certain matter which otherwise falls within the exemption in clause 4(3) may be disclosed if, on balance, its disclosure would be in the public interest. Section 102(3) of the FOI Act provides that the onus of persuading me that disclosure would, on balance, be in the public interest, is on the complainant.
30. I recognise a public interest in maintaining the confidentiality of information about the business, professional, commercial or financial affairs of third parties recorded in documents held by State and local government agencies and in ensuring the viability of commercial bodies that do business with government agencies. Against that public interest, I recognise that there is a public interest in the accountability of the agency for the proper discharge of its duties and expenditure of public moneys, and a public interest in the complainant being able to exercise his right of access under the FOI Act.
31. Pursuant to s.10(2) of the FOI Act, a person's right to be given access is not affected by any reasons the person gives for wishing to obtain access or the agency's belief as to what the reasons for wishing to obtain access might be. However, when I am considering where the public interest balance should lie, an applicant's reasons for wishing to obtain access may become relevant.
32. I have limited information from the complainant on that point. I understand that he wishes to obtain access to the scheduling and costs of advertisements and the credits which were allowed for the advertisements that were cancelled to ensure that the third parties are not receiving any unauthorised payments. I also understand that he wishes to obtain access to details of the arrangements between the agency and the third parties for payment of the third parties' accounts to ensure that correct accounting practices are being used by the agency.
33. In my view, a substantial part of the information sought by the complainant has already been disclosed to him. To that extent, I consider that the public interest factors in favour of disclosure have already been satisfied by the disclosure of the documents in edited form, and other documents already released to him by the agency. Considerable information about the campaign and the costs incurred by the agency in respect of it has already been disclosed. I also consider that the public interest in accountability is satisfied by the role and function of the Auditor General whose function includes that of auditing the accounts and payments made by the agency. In balancing the competing interests, I am not persuaded that the public interest in disclosure outweighs that of protecting the business and commercial interests of the third parties. Accordingly, I find that all of the disputed matter is exempt under clause 4(3) of Schedule 1 to the FOI Act.

34. Although the agency also claims exemption for some of the disputed matter under clause 4(2), I need not consider that claim since I have found that it is exempt under clause 4(3) of Schedule 1 to the FOI Act.
35. This finding varies from my preliminary view, which was that the disputed matter in Documents 7, 11, 44, 52, 56 and 79 of Volume 1 and in Documents 1, 8 and 11 of Volume 2 may be exempt under clause 4(2), and the disputed matter in Documents 22, 26, 28 and 29 of Volume 2 may be exempt under clause 4(3) of Schedule 1 to the FOI Act. Upon further consideration of the nature of the information contained in the documents claimed to be exempt under clause 4(2), I formed the view that they are exempt under clause 4(3), for the reasons I have given, rather than clause 4(2).
36. However, I did not consider it necessary to refer this revised view to the parties to the complaint or Media Decisions and Benchmark Advertising before making this decision. The agency, Media Decisions and Benchmark Advertising are not affected because the decision is that matter they have each claimed to be exempt is found to be exempt. Further, although he made no submissions in respect of either exemption claimed, I consider that the complainant was given reasonable opportunity to make submissions in respect of the requirements of clause 4(3) and the limit in clause 4(7).
