

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

**File Ref: 95242
Decision Ref: D02396**

Participants:

E & L Metcalf Pty Ltd
Complainant

- and -

Western Power Corporation
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letter to agency relating to contract between complainant and agency - clause 4(2) - information having a commercial value - whether disclosure would destroy or diminish commercial value of information - clause 4(3) - business, professional, commercial or financial affairs - whether disclosure of information could reasonably be expected to have adverse effect - whether disclosure could reasonably be expected to prejudice future supply of information - public interest factors for and against disclosure.

Freedom of Information Act 1992 (WA) ss. 3, 72(1)(b), 74, 75(1), 102; Schedule 1 clauses 4, 10(3).

Re Slater and State Housing Commission of Western Australia (Information Commissioner, WA, 22 February 1996, unreported).

Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, 15 June 1995, unreported).

Ryder v Booth [1985] VR 869.

DECISION

The decision of the agency is set aside. In substitution it is decided that the disputed document is not exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

7th May 1996

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of Western Power ('the agency'), which incorporates part of the former State Electricity Commission of Western Australia (SECWA), to refuse E & L Metcalf Pty Ltd ('the complainant') access to a document requested under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 10 August 1995, solicitors for the complainant requested access under the FOI Act to a particular letter sent to the agency by Company X. On 28 August 1995, the agency informed the solicitors that it was unable to locate the requested document. On 9 October 1995, after the complainant informed the agency that the document to which access was sought consisted of a letter from either Company X or Company Y sent to SECWA in 1994, the agency located the document - a letter from Company Y - and denied the complainant access to it on the ground that it was an exempt document under clause 8 of Schedule 1 to the FOI Act. I am unable to reveal the identity of Company X and Company Y without breaching my obligations under s.74 of the FOI Act.
3. On 31 October 1995, solicitors for the complainant sought an internal review of the agency's decision. By a notice of decision dated 23 November 1995, Mr J Tregonning, Corporate Lawyer of the agency, refused access to the requested document, and varied the grounds for exemption, claiming that the requested document is exempt under clause 4(2) and clause 4(3) of Schedule 1 to the FOI Act. On 28 November 1995, the complainant through its solicitors, applied to the Information Commissioner for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

4. On 1 December 1995, the agency was notified that I had received this complaint. Pursuant to my authority under s.75(1) and s.72(1)(b) of the FOI Act, I sought the production to me of the requested document, together with the agency's FOI file maintained in respect of the matter. It appeared to me that the author of the requested document might be a body affected by a decision made upon the complaint. Accordingly, on 12 December 1995, I sought the views of Company Y on the status of the requested document under the FOI Act.
5. On 19 December 1995, the agency provided me with a copy of a letter it had received from solicitors acting for Company X and Company Y. I received an identical letter in response to my letter of 12 December 1995, containing the objections of Company X and Company Y to the disclosure of the disputed document. After receiving that advice, I sought and obtained from the agency additional information to support its claims for exemption under clauses 4(2) and 4(3) of Schedule 1 to the FOI Act.

6. On 12 February 1996, after examining the disputed document and considering the submissions, I provided the agency with my preliminary view and reasons for that view. Based on the material before me it was my preliminary view that the document was not exempt under clause 4(2), nor was it exempt under clause 4(3). Both the agency and solicitors for Company X and Company Y responded to my preliminary view and provided further submissions for my consideration. This matter could not be resolved by conciliation and I was unable to make a decision upon this complaint within the statutory period of 30 days, as it was necessary to ensure that the parties and the companies be afforded a reasonable opportunity to make submissions. Accordingly, the matter for my determination is the agency's claim that the disputed document is exempt under clause 4(2) and clause 4(3) of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENT

7. The disputed document consists of a one page letter to SECWA, dated 13 October 1994, from Company Y. I am informed by the agency that in late 1994 SECWA was conducting construction work for a water supply system at its Muja Power Station. That work required the installation of certain pumps. The agency entered into a contract with the complainant for the supply of the pumps and also into a separate contract with the complainant for the installation of those pumps. At some stage during this work, the disputed document was received by SECWA. From the content of the document, SECWA understood that there may be some difficulty in the completion of the contract by the complainant. Some discussions took place between officers of SECWA and the complainant in relation to the matters referred to in the disputed document after the disputed document had been received. However, in due course, the complainant performed the contract to the satisfaction of SECWA.

THE EXEMPTIONS

8. Clause 4 of Schedule 1 to the FOI Act, so far as is relevant, provides:

"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) *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) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*
 - (5) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant.*
 - (6) *Matter is not exempt matter under subclause (1), (2) or (3) if the applicant provides evidence establishing that the person concerned consents to the disclosure of the matter to the applicant.*
 - (7) *Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest."*
9. It is clear from the specific words of clause 4 that the exemptions in each of the sub-clauses are directed at protecting different types of information from disclosure under the FOI Act. Whilst it is open to an agency to make alternative claims for exemption for documents or parts of documents under more than one sub-clause of clause 4, in my view the same information cannot be exempt under more than one of those sub-clauses. However, different matter within a document may be exempt under different sub-clauses of clause 4. In this instance, following a request to do so, the agency particularised the specific information in the disputed document which it claims is exempt under each of sub-clauses (2) and (3) of clause 4. Having regard to my statutory obligations in s.74(2) of the FOI Act, I am able to refer to the contents of the disputed document in general terms only.

(a) Clause 4(2)

10. Clause 4(2) is concerned with the protection of information which has a "commercial value" to a person. In order to establish an exemption under clause 4(2), the matter for which a claim for exemption is made must have a commercial value, although, in my view, it is not necessary in order to satisfy the requirements of clause 4(2)(a) that the commercial value of that matter actually

be quantified or assessed. Further, it is only when the requirements of clause 4(2)(a) are satisfied that I must consider the effects of disclosing that kind of matter, to determine whether the potential effect of disclosure alleged by the agency is one that could reasonably be expected, in accordance with the requirements of clause 4(2)(b).

11. In paragraphs 10-13 of my decision in *Re Slater and State Housing Commission of Western Australia* (22 February 1996, unreported), I considered the meaning of the words “commercial value” in the context of a claim for exemption under clause 10(3) of Schedule 1 to the FOI Act. Clause 10 is directed at protecting the financial and property affairs of the State and its agencies and its wording is similar to that provided in clause 4(2) and clause 4(3). I am of the view that the discussion in *Re Slater* is equally applicable to the terms of clause 4(2).
12. Accordingly, I am satisfied that matter has a commercial value if it is valuable for the purpose of carrying on the commercial activities of an organisation. As I have previously stated, I consider that it is only by reference to the context in which the information is used, or exists, that the question of whether it has a commercial value to a person may be determined.

The agency’s submissions

13. The disputed document contains 5 brief paragraphs. The agency claims that each of the first 4 paragraphs is exempt under clause 4(2). The matter within the document for which exemption has been claimed includes, in general terms, details of information relevant or related to the performance by the complainant of the contract between the complainant and SECWA. I understand from the information before me that this contract was subsequently fully performed by the complainant.
14. I am unable to discuss the specific detail of the agency’s submission by virtue of the terms of s.74(2) of the FOI Act. However, the agency claims that the matter within the disputed document has a commercial value to the agency, Company X and Company Y, and potential suppliers and customers of each of those bodies. The agency also claims that some of the matter in the disputed document has a commercial value to the complainant.
15. The agency claims that the matter within the disputed document which has a commercial value includes information describing the nature of the relationships between the bodies referred to in the disputed document; certain requirements of the contract between the complainant and SECWA; information relating to the performance by the complainant of the contract, and information concerning the affairs of the complainant.
16. Further, the agency claims that disclosure of this matter could reasonably be expected to destroy or diminish that commercial value within the terms of clause 4(2)(b) of Schedule 1. The agency claims, *inter alia*, that disclosing the nature of the relationship between the parties would enable companies who deal with the parties referred to in the disputed document to obtain their product

elsewhere. In addition, the agency claims that the disclosure of matter relating to the performance of the contract would result in customers removing their business from two parties referred to in the document, and would enable others to compete with the parties referred to in the document in order to enter into commercial arrangements with the agency. It is also claimed that the disclosure of the matter within the document would enable that information to be used to commercial advantage by making suppliers aware of the agency's purchasing requirements.

The complainant's submissions

17. It was submitted on behalf of the complainant that officers of SECWA had discussed the contents of the disputed document with officers of the complainant, and had informed the complainant that Company Y had written to SECWA alleging that the complainant may have some difficulty in the performance of its contract with SECWA. The agency acknowledges that some discussion did take place between SECWA and the complainant regarding the contents of the disputed document, but submits that the disputed document was not read to the officers of the complainant in its entirety, so that it cannot now be said that the entire contents of the disputed document have been provided to the complainant. Further, the agency claims that, in any event, the format of the disputed document, and therefore all the information intrinsically contained within such a format, has not been disclosed to the complainant.

Consideration

18. Whilst I am prepared to accept that information describing the commercial or business relationships between parties may, in certain circumstances, have a commercial value, I do not consider that to be the case in this instance. I am not persuaded that information regarding the nature of the relationship between the companies, or details of the products with which the companies are concerned, is information having a commercial value within the meaning of that phrase in the FOI Act. I consider that kind of information generally to be common knowledge in the private sector.
19. The disputed document is now some 18 months old. Certain matter for which the agency has claimed exemption under clause 4(2) is information which is out of date, the significance of which has been superseded by the performance of the contract with the agency by the complainant. For that reason, taking into account the nature of the particular information concerned, I am not satisfied, based on the evidence before me, that this matter can be said to be information having a commercial value to any person.
20. I am not satisfied that the document contains any information which is of the kind referred to in clause 4(2)(a). Accordingly, I find that the document is not exempt under clause 4(2) of Schedule 1 to the FOI Act. However, even if I were satisfied that the disputed document contained matter the disclosure of which would reveal information that has a commercial value to a person within the terms of clause 4(2)(a), there is insufficient evidence before me to satisfy me that

disclosure of the matter could reasonably be expected to destroy or diminish that commercial value as required by clause 4(2)(b).

21. Following my examination of the disputed document, and my consideration of the submissions of the agency, I do not consider that the agency has discharged the onus it bears under s.102(1) to establish that the disclosure of the document could reasonably be expected to result in the commercial value, if any, of the information being diminished or destroyed.
22. Some of the matter in the disputed document relating to the relationships between the parties, and information regarding the business operations of the parties, is information which I consider would be known to customers and suppliers who participate in the businesses of Company X and Company Y. Therefore, I consider that it could not be said that disclosure of the disputed document could reasonably be expected to have the negative effects on the commercial value of that information, if any, to Company X or Company Y as required by clause 4(2)(b). Even if this information is not in fact known, one would expect that, in the ordinary course of events, public knowledge of the existing business arrangements of the parties, including Company X and Company Y, would be of benefit to the parties concerned, unless there were a clearly identifiable reason for secrecy. There is no evidence before me of any such reason in this case.
23. A number of the submissions of the agency in support of the claim for exemption appear to me to be made on the basis that the disclosure of the matter within the disputed document would have the required detrimental effect by enabling other persons to compete for the work required by the agency. In my view, any commercial value of the information would not be diminished if it simply disclosed factual information which enabled other persons to compete with the existing commercial suppliers of the agency. The suppliers involved would still be able to perform any commercial agreements they may have with the agency, and also to seek to maintain such involvement. Further, the agency would remain in a position to accept or reject any offers made to it by any organisation, based on an assessment of how to best meet the needs of the agency. The disclosure of the document would not, in my view, alter that fact.
24. Further, the complainant is aware of the nature of the matter in dispute and, therefore, it could not, in my view, be reasonably expected that disclosure to the complainant of matter which is already within its knowledge could destroy or diminish any commercial value previously possessed by that matter. If such a reduction in the commercial value of the information, if any, were to occur, it would have occurred, or did occur, at the time the substance of the contents of the disputed document were made known to officers of the complainant by officers of SECWA. As to that information claimed to have a commercial value to the complainant, it could not seriously be suggested that disclosure to the complainant of information having a commercial value to the complainant could reasonably be expected to diminish or destroy that value.

25. Finally, as I have said, the matter in dispute relates to a contract between SECWA and the complainant which, since the time the disputed document was received by SECWA, has been successfully performed by the complainant. Therefore, taking into account the particular matter in dispute, the disclosure of the matter relating to the contract now could not, in view of the particular matter in dispute, in my view, be expected to destroy or diminish any commercial value that that information may have had at an earlier time, when the contract was still on foot. Accordingly, I am not satisfied that the effect of disclosure of the matter in the disputed document could reasonably be expected to be of the type described in clause 4(2)(b) of Schedule 1.

(b) Clause 4(3)

26. The exemption in clause 4(3) is more general in its terms than that provided by clause 4(2). I consider its purpose is primarily to protect from disclosure 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 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.

27. In order to establish the exemption under clause 4(3), disclosure of the matter in dispute must reveal information of the type mentioned, and it must be reasonable to expect that disclosure would produce some kind of adverse effect on the person's business, professional, commercial or financial affairs, or would prejudice the future supply of information of that kind to the agency. However, it is not sufficient that sub-clauses (a) and (b) of clause 4(3) are satisfied. Clause 4(7) contemplates that certain information that is otherwise within the exemption provided by clause 4(3) may be disclosed if the public interest, on balance, requires this to occur.

28. The agency submits that disclosure of the matter within the disputed document would reveal information of the type referred to in clause 4(3)(a) about the agency, Company Y and other parties named in the disputed document. I am satisfied that the matter within the disputed document can be described as information which relates to the business, professional, commercial or financial affairs of Company X and Company Y. I am also satisfied that the disputed document contains information about the business, professional, commercial or financial affairs of SECWA and of the complainant, which matter, by virtue of clauses 4(4) and 4(5) respectively, is not exempt merely for that reason. However, I am satisfied that this matter is inextricably intertwined with the matter concerning Company X and Company Y. Accordingly, I consider that the requirements of clause 4(3)(a) have been established. Nevertheless, the requirements of paragraph (b) must also be satisfied in order to establish the exemption.

The agency's submission

29. In order to discharge the onus it bears under s.102(1) of the FOI Act with respect to the requirements of clause 4(3)(b), the agency claims that disclosure of the matter in the disputed document will have an adverse effect on the affairs of either Company X or Company Y because the most likely outcome is that the complainant will commence legal action against Company X or Company Y or, alternatively, boycott their products. The agency also claims that it is reasonably likely that information from a third party relating to the performance by a party under a contractual obligation to the agency would not be forthcoming to the agency in the future because of the risk of disclosure of the matter under the FOI Act.
30. Further, the agency claims, *inter alia*, that the disclosure of the disputed document could be reasonably expected to have an adverse effect on the relevant affairs of the agency and the other parties referred to in the disputed document, as competitors of the agency could ascertain the activities of the agency; Company Y could cease doing business with the agency as there will be no guarantee that its affairs would remain confidential; and companies in general would be reluctant to deal with the agency because of the concerns about confidentiality.

The submissions of the companies

31. In their submissions to me, the solicitors acting on behalf of Company X and Company Y advised that Company X and Company Y consider that, as well as being exempt under clause 4(2), the matter within the disputed document is exempt under clause 4(3) of Schedule 1, as it relates to the business, professional, commercial or financial affairs of Company X, Company Y, and the agency. It was submitted that disclosure could reasonably be expected to have an adverse effect on those affairs by enabling a competitor of Company X to ascertain the relationship between Company X, Company Y and the agency, and could result in the loss to Company X of the agency as a customer. Further, it was submitted that disclosure of the matter may affect the business relationship between Company X, Company Y and the agency as there will be no guarantee of the confidentiality of information communicated between these parties.
32. The solicitors for Company X and Company Y also claimed that disclosure of the matter within the disputed document would prejudice the future supply of information of that kind by Company X to Company Y and the agency, for fear of it being revealed.

Consideration

33. As I have said, I am informed by the agency that the disputed document came into existence when SECWA was conducting work at a power station. I understand that the complainant was providing goods and services to SECWA pursuant to its contractual obligations, and SECWA was provided with

information about that work by Company Y. I further understand that neither Company X nor Company Y had any contractual obligations in relation to this matter with SECWA at the time the disputed document was provided to SECWA.

34. Something more is required in order to satisfy the requirements of clause 4(3)(b) than simply a claim by the agency that the relevant affairs of a person will be disclosed. It must be shown that disclosure could be reasonably expected to result in an adverse effect on those affairs.
35. In order to displace the statutory right of access, an agency or a third party must establish a case for exempting from disclosure the particular documents to which access is sought. Whilst an agency or a third party is not required to establish a case for exemption on the balance of probabilities, there must be some material provided to me that is capable of supporting its claims. On this point I respectfully refer to the comments of Owen J. in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported). His Honour said, at p.44:

"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."

Adverse effect

36. Following my examination of the document and my consideration of the material put before me by the agency and on behalf of Company X and Company Y, I am not satisfied that the claims of the agency and of Company X and Company Y that disclosure would have an adverse effect on their respective business, professional, commercial or financial affairs are substantiated.
37. The agency has not provided me with any evidence, other than its assertions to that effect, to support its claims that disclosure of this document may result in litigation between the complainant and Company X or Company Y, or both, or a boycott of their products. Further, there is nothing before me which suggests that the agency is likely to refuse to deal with Company X or Company Y if this matter is disclosed, or that Company X and Company Y and other companies will refuse to deal with the agency, or that the agency could reasonably be expected to be in any way disadvantaged in its future commercial dealings in respect of such

contracts. In the absence of such material, I consider the claims of the agency and of Company X and Company Y to be merely speculative.

38. Although the agency claims that its business, professional, commercial or financial affairs could reasonably be expected to be adversely affected by the disclosure of the disputed document, I am not satisfied, based on the submissions made by the agency and bearing in mind the nature of the information in the disputed document, that disclosure would or could produce the effects claimed. Further, even if I were satisfied on that point, the agency has not provided any material to convince me that the effects alleged to be reasonably expected to result from disclosure are adverse effects of the type referred to in clause 4(3)(b).
39. Further, after considering the material before me and my own examination of the disputed document, I am not satisfied that the disclosure of the disputed document to the complainant could reasonably be expected to have an adverse effect on the relevant affairs of the complainant.
40. In addition, as I have said previously, the agency acknowledges that the contents of the disputed document have been discussed with officers of the complainant. I consider that - if they could reasonably be expected to occur (and I do not accept that they could) - the adverse effects contended for by the agency could reasonably be expected to have occurred as a consequence of those discussions by officers of SECWA and not merely as the result of disclosure of a document under the FOI Act.

Prejudice to future supply

41. Both the agency and the solicitors for Company X and Company Y have claimed that disclosure of the disputed document will prejudice the future supply of information of that kind to the agency. In my view, and in order to assess such a claim, it is important to properly characterise the nature of the information in the disputed document.
42. The requirement that, in order for matter to be exempt, disclosure must be shown to be reasonably expected to prejudice the future supply of information of that kind is directed at the ability of the agency or the Government to obtain such information in the future: see the comments of Young J. in *Ryder v Booth* [1985] VR 869 at 872. I consider that the test of whether the future supply of such information could reasonably be expected to be prejudiced is not concerned with whether the author of this particular document will provide information of this kind to the agency in the future. Rather, the test is whether the agency will be able to obtain such information from a wide field of possible sources of such information.
43. The disputed document was provided to the agency by Company Y at a time when Company Y had no relationship with the agency with respect to this matter. The subject matter of the document is the performance by the complainant of its contractual obligations with the agency. There is nothing before me to suggest

that the particular information in the disputed document was confidential or given and received in confidence.

44. The company provided information to the agency concerning the performance of a contract to which the company was not a party. The provision of such information may thereby assist the company to further its own interests in terms of its future dealings with the agency. I do not accept that companies in that position could reasonably be expected not to provide that kind of information to the agency in the future. Accordingly, I am not satisfied that disclosure could reasonably be expected to prejudice the future supply to the agency of information of this kind.
45. As I am not satisfied that the requirements of clause 4(3)(b) have been established, I find that the document is not exempt under clause 4(3) of Schedule 1.

The public interest

46. As the application of the exemption in clause 4(3) is limited *inter alia* by the terms of clause 4(7), even if I were satisfied that the matter within the disputed document is *prima facie* exempt under clause 4(3), I would be required to consider whether disclosure of the disputed document would, on balance, be in the public interest. The onus of persuading me that the public interest favours disclosure lies on the complainant under section 102(3) of the FOI Act. In my view, however, the onus on the complainant with respect to clause 4(7) clearly does not arise until the agency has satisfied me that the matter is *prima facie* exempt under clause 4(3).
47. The agency submitted in its response to me dated 10 January 1996 that it is not in the public interest to disclose the disputed matter as there is “...no “*public interest*” in *private commercial matters between a few parties relating to the supply of equipment*”. A similar submission was made on behalf of Company X and Company Y. Further, the agency submitted that it is not in the public interest for documents of a corporatised body to be disclosed, when that body must compete against other electricity suppliers and must act in accordance with commercial principles in order to attempt to make a profit. The agency said:

“The contents of the exempt document are clearly and manifestly commercial and business information. The exempt document came into existence during the course of commercial business dealings. The information is of commercial value and the information clearly and manifestly deals with business, professional, commercial and financial affairs. To disclose this information runs the risk of setting a precedent that will jeopardise the future commercial and business activities of Western Power. Western Power has a statutory obligation to perform its functions in accordance with prudent commercial principles and to endeavour to make a profit consistent with maximising its long term value. It is entirely inconsistent with these statutory obligations for Western Power to be required to reveal confidential commercial information.”

48. I do not find those claims particularly convincing in respect of the particular information in dispute, nor are they supported by any material before me that would satisfy the onus the agency bears under s.102(1) of the FOI Act. The

statutory obligation on the agency under its own legislation relating to the conduct of its commercial activities must, in my view, be seen in light of the comments of the Royal Commission Into Commercial Activities of Government and Other Matters ('the Royal Commission') when it said, at page 2-14 of Volume II:

“Of direct interest to the Commission, however, are claims made by agencies of government for commercial secrecy in respect of their own activities, information and dealings, claims the object of which is to prevent the public being informed of those activities. We acknowledge that circumstances can exist when such a claim can properly, and should, be made...The obvious difficulty such claims raise, however, is that secrecy is being asserted against the public ostensibly for reasons associated with the interests of the public. The two matters of real concern this creates relate to, first, the circumstances in which such a claim legitimately can be made and, secondly, the legitimacy of the claim when made. Both of these matters arise most sharply when government is involved in commercial activity either directly as a participant or indirectly as a utility supplier to, an investor in, or as a contractor with, business, or else as an agent facilitating particular business activity.

The legal structure through which government conducts commercial activity can take a variety of forms...Irrespective of the form adopted, the activity...is being conducted for the public, its ultimate “shareholders”, using and risking public resources. The activity cannot be treated, particularly for accountability purposes, in a manner identical to that expected of private sector businesses. It is affected with a public interest in a way in which private sector business activity is not. This is the case no matter how much a Government may wish to equate its commercial businesses with those of the private sector.”

49. Although the agency's claims for exemption in this particular instance are directed at protecting allegedly commercial and business interests of other parties as well as the agency, the claims to immunity based on commercial confidentiality must, in my view, be treated with some caution and subjected to close scrutiny in view of the comments of the Royal Commission. As I have said before, it is not sufficient to establish an exemption to merely paraphrase the words of an exemption clause, nor is it sufficient to quote an exemption clause in full. Further, when considering commercial secrecy of information held by government agencies, I respectfully agree with the Royal Commissioners when they said, at page 3-29:

“...the use of a private sector business form to conduct an activity using resources owned by the public, no matter how “commercially” the company is expected to conduct its affairs, does not in any way remove or diminish the public's interest in the conduct and affairs of that company. For so long as it remains publicly owned and/or its operation involves the use of public resources its actions are a public and not a private matter. We would add that these comments are applicable equally to statutory

authorities expected to conduct their affairs on a commercial basis or in a commercially prudent fashion.”

50. I accept that there is a public interest in members of the private sector being able to enter into business and commercial enterprises with government agencies, and being able to exchange information in the course of such arrangements. I also recognise that there is a public interest in maintaining the confidentiality of sensitive commercial and business information about third parties which is in the hands of government agencies. Against these interests must be balanced the public interest in the accountability of government agencies for the decisions made by them.
51. The agency claims that there are no “principles of accountability” set out in the FOI Act and, further, that there is no obligation to take any such principles into account when determining whether a document is exempt under the FOI Act. In my view, such a claim is not supported by a reading of the legislation. Section 3(1)(b) of the FOI Act states an object of the FOI Act is to “*make the persons and bodies that are responsible for State and local government more accountable to the public*”. Further, as part of his second reading speech to the Western Australian Parliament with respect to the FOI Bill, the then Minister for Justice, the Honourable David Smith MLA, said:
- “Freedom of Information legislation represents a fundamental reform of the relationship between the State and local governments and the communities they serve. It enshrines in legislation rights which are at the very heart of the democratic processes...Freedom of Information strengthens democracy, promotes open discussion of public affairs, ensures the community is kept informed of the operations of government and opens government performance to informed and rational debate.”*
52. In my view, the need for government agencies to be accountable for their activities, whether or not they are corporatised bodies, is a public interest factor in favour of the disclosure of documents. The agency is a public body, utilising public funds in the course of its operations. Therefore, in my view, the agency is required for accountability purposes, to ensure that the public are aware of the products and services it obtains and the manner in which such products and services are obtained. Further, there is also, in my view, a public interest in the public being able to have access to documents in order to be satisfied that any contract entered into by the agency is in the best interests of the agency and the public, having regard to other potential suppliers of the agency.
53. In addition, I consider that there is a public interest in the complainant being made aware of allegations made to the agency regarding its ability to perform its contractual obligations with the agency, particularly when those allegations are made by a body which is not a party to the contract in issue. In my view, the public interest factors in favour of disclosure of the matter in the disputed document, if such matter was in fact *prima facie* exempt under clause 4(3), would outweigh the public interest factors against disclosure.
