

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

**File Ref: F2001051
Decision Ref: D0262001**

Participants:

Rodney Musulin
Complainant

- and -

**Potato Marketing Corporation of
Western Australia**
First Respondent

and

Domenic Della Vedova
Second Respondent

and

D Della & Sons Pty Ltd
Third Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to the delivery of potatoes to the agency – clause 5(1)(b) – scope and meaning – whether investigation into a contravention or possible contravention of the law – clause 4(2) – whether documents contain information of commercial value – whether disclosure could reasonably be expected to destroy or diminish commercial value – clause 6(1) – deliberative processes of agency – whether documents contain information of the kind described in clause 6(1) – whether disclosure would be contrary to the public interest – clause 3(1) – personal information about third parties – whether disclosure is in the public interest – clause 7 – legal professional privilege.

FREEDOM OF INFORMATION – documents that are not in existence at the date of the access application but which came into existence shortly thereafter.

Freedom of Information Act 1992 (WA) ss. 102(1), Schedule 1, clauses 3(1), 3(6), 4(2), 4(3), 5(1)(b), 6(1) and 7.

Marketing of Potatoes Act 1946 s.17A

Marketing of Potatoes Regulations 1987 Regulations 60 and 71

Police Force of Western Australia v Kelly and Another (1997) 17 WAR 9

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

Re Murtagh and Federal Commissioner of Taxation (1984) 54 ALR 313

Re Precious Metals Australia Limited and Department of Minerals and Energy [1997] WAICmr
12

Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor (1992) 36 FCR 111

Re Waterford and Department of the Treasury (No.2) (1984) 5 ALD 588

Ministry for Planning v Collins (1996) 93 LGERA 69

DECISION

The decision of the agency is set aside. In substitution it is decided that, save for Documents 23, 24 and 25, which I find are exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*, the disputed documents are not otherwise exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

7 August 2001

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Potato Marketing Corporation of Western Australia ('the agency') to refuse Mr Musulin ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The agency is established under the *Marketing of Potatoes Act 1946* ('the Marketing Act'). The preamble to that Act states that it is an Act to, among other things, '*...make provision for the marketing, sale and disposal of ware potatoes and to control their production; to require the registration of growers, and the licensing of areas of land used for the production of potatoes; and to constitute the [agency]*'.
3. The functions of the agency, as set out in s.17A of the Marketing Act, include to "*(a) regulate the production of ware potatoes so as to ensure the supply of the quantities, kinds and qualities preferred by consumers in the State; and (b) take delivery of, and otherwise deal with, potatoes in accordance with this Act and market potatoes in the State and elsewhere*".
4. I understand that potato growers are generally not permitted under the Marketing Act to sell or deliver potatoes to any other person other than the agency. The agency pays growers for the potatoes delivered to it, and is responsible for the marketing of those potatoes for sale to consumers in this State. I also understand that there is a working relationship between the agency and the Potato Growers Association ('the Growers Association'), a group representing the interests of potato growers in this state. The complainant is a potato grower and is also the Chairman of the Manjimup Zone of the Growers Association.
5. In August 2000, the agency received a shipment of potatoes from D. Della & Sons Pty Ltd. Upon assessment, those potatoes were considered to be below the acceptable standard for sale to the public. It appears that the agency made some inquiries with the owner of the company, Mr Della Vedova, and sought information from him relating to that shipment of potatoes. No response was received and, as a result, the agency decided not to pay Mr Della Vedova for the potatoes.
6. On 5 December 2000, the complainant made an application to the agency for access under the FOI Act to documents relating to the supply of potatoes by Mr Della Vedova or D. Della & Sons Pty Ltd, in or around August 2000. On 22 January 2001, the agency refused access to the requested documents on the ground that they are exempt under clauses 4(2) and 5(1)(b) of Schedule 1 to the FOI Act. On 2 March 2001, following an internal review, the complainant was granted access to 11 documents and access to edited copies of 6 other documents. However, access was deferred to allow Mr Della Vedova and D. Della & Sons Pty Ltd to exercise their rights of review as third parties.
7. Subsequently, I received a complaint from Mr Della Vedova and D. Della & Sons Pty Ltd about the agency's decision to release documents to the complainant. That particular matter was resolved by conciliation between the parties and the complaint was subsequently withdrawn. The complainant was given access to 11 documents containing complete details of the quantities of potatoes delivered and an assessment of

the percentages that were saleable and unsaleable. The complainant was also given access to edited copies of documents indicating that the defective potatoes were suffering from “Hollow Heart” disease.

8. On 1 May 2001, following the resolution of the complaint lodged by Mr Della Vedova, the complainant made a complaint to the Information Commissioner seeking an external review of the agency’s decision to refuse him access to the matter deleted from Documents numbered 2, 3, 4, 5, 6 and 7. The complainant also alleged that certain documents created before August 2000 had not been identified by the agency, including offering sheets, quota sheets and correspondence between the third parties and the agency.

REVIEW BY THE INFORMATION COMMISSIONER

9. I obtained the disputed documents from the agency, together with additional material to support the agency’s claims for exemption for the matter that had been deleted from the documents released to the complainant. Mr Della Vedova and D Della & Sons Pty Ltd (‘the third parties’) were notified that I had received this complaint and, upon request, were each joined as parties to these proceedings. Submissions were received from the complainant and the third parties in support of their respective positions.
10. During the course of this review, I considered the complainant’s claim that documents created before August 2000 fell within the scope of his access application. I sought and obtained additional information from the agency about the complainant’s claim that additional documents should exist. In respect of the first issue, my view is that the terms of the access application are clear and unambiguous. The complainant described the requested documents as being those relating to the supply of potatoes to the agency by the third parties, in or around August 2000. Accordingly, I do not accept that any documents created before the delivery of potatoes in August 2000 could be covered by the terms of the access application.
11. In respect of the second issue, inquiries were made with the agency concerning documents described by the complainant as an “offering sheet” and a “quota sheet”. The agency informed me that one of the third parties, Mr. Della Vedova, had spoken by telephone to the Operations Manager regarding the delivery of potatoes and, as a result, the agency did not receive an offering sheet from Mr Della Vedova. The agency also informed me that the Operations Manager verbally instructed Mr. Della Vedova to deliver the potatoes and, as a result, the delivery was not recorded on a quota sheet.
12. The complainant was advised of the outcome of those inquiries. Based on the information available to me and the inquiries made with the agency, I am satisfied that the offering sheets and quota sheets do not exist.
13. However, in the course of my inquiries, another 12 documents were identified which appeared to me to fall within the scope of the complainant’s access application. Those documents include extracts of relevant minutes of meetings of the Board of the agency; internal agency memoranda; correspondence and other documents. The agency submitted that documents created between the date of the complainant’s access

application and the date of the initial decision on access, 22 January 2001, were not considered because those documents are not within the scope of the access application.

14. On 16 July 2001, after examining the disputed documents and considering the material then before me, I informed the parties, in writing, of my preliminary view of this complaint, including my reasons. It was my preliminary view that the disputed documents may not be exempt under clause 4(2) or under clause 5(1)(b). However, it was also my preliminary view that certain of the disputed documents contained some information that may be exempt under clause 3(1), but that it appeared practicable to delete that matter from those documents. I also considered that the additional documents identified by my Investigations Officer fell within the scope of the access application and, for similar reasons, it was my preliminary view that those documents may not be exempt.
15. I received a written response from the agency, the complainant and from the third parties, through their legal adviser. The agency did not claim exemption for 3 documents (Documents 27, 28 and 29) and the complainant withdrew his complaint in respect of those 3 documents, copies of which were in his possession. The agency maintained its claims for exemption under clauses 4(2) and 5(1)(b) in respect of 6 documents (Documents 2, 3, 4, 5, 6 and 7). Without conceding that the additional documents created or received after the date of the access application (Documents 23, 24, 25 and 26) are within the scope of the access application, the agency submitted that those documents are exempt under clause 5(1)(b) and clause 6(1), and also appeared to claim that some matter in Documents 25 and 26 is exempt under clause 3(1) and clause 7.
16. In the submission from the third parties' legal adviser, the third parties maintained their claims for exemption for the disputed documents, for reasons similar to those previously given.

The scope of the access application

17. Of the additional documents identified during my external review, the material before me indicates that Documents 18-22, and Document 26 were in the possession of the agency before the complainant lodged his access application. Clearly, those documents are within the scope of his request and should have been identified by the agency in the first instance.
18. Documents 23, 24 and 25 are undated. However, it appears that those documents were created after the complainant lodged his access application, but before a decision was made on access. The agency informs me that Document 23 was created on or about 12 January 2001. Document 24 forms part of the set of papers that were before the Board of the agency at a meeting held on 19 January 2001. Document 25 forms part of the set of papers held by the Chief Executive Officer of the agency relating to that meeting. Document 25 includes hand written notes, but is otherwise a copy of Document 24. All three documents, whilst not identical contain, essentially, identical information.

19. In my view, it is clear from the provisions of the FOI Act that an access application applies to existing documents. However, the access provisions of the FOI Act may also apply to documents, which come into the possession of an agency after the date of an access application, but before the decision on access, has been made.
20. In my view, a decision-maker should take into account and make a decision on all documents that the decision-maker could reasonably be expected to have known existed in the agency at the date that he or she made the decision on access. Clearly, a common-sense approach to this matter would eliminate the need for successive applications and thereby reduce the administrative burden on an agency: see *Re Murtagh and Federal Commissioner of Taxation* (1984) 54 ALR 313 at 316.
21. In this instance, 3 documents (Documents 23, 24 and 25) appear to have been created by officers of the agency after the date of the access application, 5 December 2000, but before the date of the initial decision, 22 January 2001. Those 3 documents appear to have been in the possession of the agency at the date of the decision. In a relatively small agency such as this one, I consider that the decision-makers could reasonably be expected to have been aware of the existence of those additional documents and that an application for access to documents of that kind had been made to the agency. As I have the power under s.76(1)(b) of the FOI Act, to decide any matter that could have been decided by the agency in relation to an access application, I have decided that Documents 23, 24 and 25 are within the scope of the complainant's access application and I deal with them accordingly.

THE DISPUTED DOCUMENTS

22. The documents in dispute between the parties and the exemptions claimed by the agency and by the third parties in respect of each of those documents are described below. Documents 2-7 contain disputed matter but have been released in edited form. Only certain parts of Documents 18, 19, 20, 21 and 22 contain matter that is within the scope of the access application and I have identified that matter to the agency. Documents 23, 24 and 25 are claimed to be exempt in full.

Doc.	Description	Exemption clause(s)
2	Letter, undated, from third party to agency	Clause 4(2)
3	Letter dated 31 August 2000, from agency to third party	Clauses 4(2) and 5(1)(b)
4	Letter dated 28 August 2000, from agency to third party	Clauses 4(2) and 5(1)(b)
5	Agency memorandum dated 15 August 2000	Clauses 4(2) and 5(1)(b)
6	Agency memorandum dated 14 August 2000	Clause 5(1)(b)
7	Inter-office memorandum dated 8 August 2000	Clauses 4(2) and 5(1)(b)
18	Part of the minutes of meeting of the Board of the agency held on 18 August 2000.	Clause 6(1)
19	Part of a Management Report considered by the Board of	Clause 6(1)

	the agency in September 2000.	
20	Part of minutes of meeting of the Board of the agency held on 15 September 2000.	Clause 6(1)
21	Letter dated 11 September 2000 from agency to a third party	Clause 6(1)
22	Part of an Action Report arising from compliance meeting held by agency on 22 August 2000	Clause 6(1)
23	Compliance Report, undated	Clause 5(1)(b) and clause 6(1)
24	Part of an Operations and Compliance Report relating to matters considered by the Board of the agency in January 2001	Clause 5(1)(b) and clause 6(1)
25	Copy of document 24 with hand written notes	Clauses 3(1), 5(1)(b), 6(1) and 7
26	Action report resulting from meeting of the board of the agency held on 15 August 2000. Document includes handwritten notes	Clauses 3(1), 6(1) and 7

THE EXEMPTIONS

(a) Clause 4(2)

23. Clause 4(2) of Schedule 1 to the FOI Act provides:

"4. Commercial or business information

(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."*

24. Clause 4(2) exempts information that has a "commercial value" to a person. In order to establish an exemption under clause 4(2), the information must have some commercial value, although, in my view, it is not a requirement that the commercial value be quantified or assessed. I have previously expressed the view that information may have a commercial value if it is valuable for the purpose of carrying on the commercial activities of a person or organisation: see *Re Precious Metals Australia Limited and Department of Minerals and Energy* [1997] WAICmr 12. Further, I consider that 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.

25. When the elements of clause 4(2)(a) are established, then I must consider the effects of disclosing that kind of information, to determine whether the potential effect of disclosure alleged by the agency and the third parties is one that could reasonably be expected, in accordance with the requirements of clause 4(2)(b). In *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor* (1992) 36 FCR 111, the Full Court of the Federal Court said, at p.123, that the question to be considered under s.43(1)(b), the Commonwealth FOI equivalent of clause 4(2)(b), “...is not whether there is a reasonable basis for a claim for exemption but whether the commercial value of the information could reasonably be expected to be destroyed or diminished if it were disclosed....The decision-maker is concerned, not with the reasonableness of the claimant’s behaviour, but with the effect of disclosure.”

The submission of the third parties

26. The third parties submit that the information in Documents 2, 3, 4, 5 and 7 is commercially valuable because it relates to their main business of selling potatoes. The third parties claim that disclosure would give information to their competitors that would not otherwise be available and would prejudice the third parties’ commercial arrangements with the agency.
27. The third parties also submit that the purpose of the access application is to obtain an unfair commercial advantage. The third parties claim that they would suffer loss and damage, which cannot be quantified, and that the loss of that commercial advantage would erode substantially the value of the goodwill of their business and prejudice their ability to compete with other growers.

The agency’s submission

28. The agency adopts the submissions made to me by the third parties. The agency also contends that the fact that potatoes were delivered in an unsaleable condition could be used by other growers to denigrate the quality of potatoes produced by the third parties in the industry, as well as to consumers. The agency further contends that the price sought by the third parties is information of a confidential commercial value.
29. The agency submits that the confidentiality of commercial arrangements between it and individual growers is very important and that, because of the structure of the Growers Association, potato growers tend to think they have a right to know about the business of other potato growers and dealings with the agency. The agency claims that, unless confidentiality of commercial dealings is maintained, disclosure would have an adverse impact on potato growers and consumers in Western Australia.
30. Following my preliminary view, the agency made the following submission in support of its claims for exemption under clause 4(2):

“The release of documents 2, 3, 4, 5 and 7 may diminish the commercial value of the Third Party’s potato crop in the future. In practice, the grower (the Third Party) negotiates with a Washpacker (Potato Wholesaler) to purchase his potato crop. The Washpacker then receives the potatoes, issues a grading statement (Packout Statement) to Western Potatoes and pays Western Potatoes for the potatoes. Western Potatoes then pays the Grower.”

If the Washpacker considers the Grower may supply poor quality potatoes, the Washpacker has the right to refuse delivery. The Grower is then obliged to find another Washpacker to take his potatoes. There are five Washpacking businesses. Should none of the Washpackers agree to purchase the potatoes, Western Potatoes is bound to accept delivery of those potatoes in accordance with the Marketing of Potatoes Act, if they are grown in an area licensed by Western Potatoes.

Because Western Potatoes only receives delivery of potatoes not accepted by Washpackers, the price paid for potatoes is usually less than if paid for by a Washpacker. It is of concern that Washpackers may not even contemplate acceptance of potatoes from the Third Party through the perception of poor quality, due to the release of the documents. Potatoes received into Western Potatoes' store receive a reduced payment because the potatoes are used for different purposes, such as Processing, which achieves a lower price, or are Dumped.

Should Documents 2, 3, 4, 5 and 7 be released, the Washpackers may consider the Third Party to be a poor Grower If the Washpackers refuse to accept the Third Party's potatoes, then a diminution of the commercial value of the potatoes will result."

Consideration

31. I have examined the disputed matter, which has been deleted from Documents 2, 3, 4, 5 and 7, and considered that matter in light of the submissions made to me by all the parties. I have also examined the agency's Annual Report for 1999/2000. Among other things, it is reported by the agency in respect of Pool 5 that, "*Serious quality problems including hollow heart, internal fleck and after harvest darkening were encountered, resulting in lower wholesale prices and reduced grower returns. Average returns were 18% less than the previous year. This was the lowest return since 1995/96.*"
32. The agency also reported, at page 25, that it had experienced a problem with the quality of potatoes over the summer months with considerable amounts of potatoes being delivered to the washpackers with internal or external disorders. The agency researched the problem to determine the causes and, as a result, summer production of potatoes has been reduced and winter production, when potatoes are at their highest quality level, has increased. Notwithstanding the problems of past years, the agency reports an optimistic outlook for the future, including overall increased grower yields and improving financial returns to growers (page 7).
33. Taking all of that into account, I have some difficulty accepting that conditions of the past year, which might have contributed to the production of sub-standard potatoes by some growers, including the third parties, will necessarily prevail in future years to the extent that information about the production levels and quality in the 1999/2000 season would have any commercial value.
34. I do not accept the claims by the agency and the third parties that disclosure of the disputed matter in Documents 2, 3, 4, 5 and 7 would reveal information that has a commercial value. I consider it unlikely that washpackers or other growers could use information, which is, effectively, information that has already been published by the

agency, to the commercial detriment of the third parties. Further, the claim that it is the perception of poor quality potatoes grown in a previous season by one grower that would result in lower prices being paid to that grower is, in my view, without merit. It ignores the fact that the price paid, whether by a washpacker or by the agency, depends on the quality and grade of potatoes delivered in a current season and not in some earlier period.

35. In any event, even if I were to accept that the disputed matter has commercial value (which I do not), I do not consider that disclosure could reasonably be expected to destroy or diminish that commercial value. In my view, any connection between disclosure of the disputed matter and future commercial loss to the third parties is too remote to be a result that could reasonably be expected. Further, taking into account the contents of the documents, I do not consider that disclosure of the disputed matter would give any other grower a commercial advantage over the third parties. It is not apparent to me, nor has it been explained to me by the agency or the third parties, how disclosure of the disputed matter could prejudice the ability of the third parties to compete with other growers. In my view, those claims are unsupported by any probative material. Accordingly, I find that the disputed matter in Documents 2, 3, 4, 5 and 7 is not exempt under clause 4(2) of Schedule 1 to the FOI Act.
36. Having decided that the documents are not exempt under clause 4(2), I accept that those documents contain information about the business affairs of the third parties. I have therefore considered whether the documents might be exempt under clause 4(3). However, for similar reasons to those given in paragraphs 31-35 above, I do not consider that disclosure of the disputed matter could reasonably be expected to have an adverse effect on the business affairs of the third parties, as required by clause 4(3)(b) (there being no basis, in my view, for the alternative claim for exemption in clause 4(3)(b)). Therefore, I do not consider that the documents are exempt under clause 4(3) either.

(b) Clause 5(1)(b)

37. Clause 5(1)(b) provides:

“5(1) Matter is exempt matter if its disclosure could reasonably be expected to -

(b) reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted;”

38. The scope and meaning of the exemption in clause 5(1)(b) has been the subject of three decisions by the Supreme Court of Western Australia and I am bound by those decisions. The Supreme Court has decided that documents which reveal that there is an investigation, the identity of the people being investigated and, generally, the subject matter of the investigation probably would satisfy the requirement that a document “must reveal something about the content of the investigation” in order to be exempt under clause 5(1)(b): see *Police Force of Western Australia v Kelly and Another* (1997) 17 WAR 9; *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550.

39. The Supreme Court decisions have also made it clear that the scope of the exemption in clause 5(1)(b) is very broad and that the exemption can apply regardless of the state of knowledge an access applicant has about the particular investigation. This means that once it appears that disclosure of a document could reasonably be expected to reveal something about the investigation, regardless of what other material might reveal it and regardless of how much the applicant may already know of it, the document will be exempt: *Kelly's case* at pages 14 and 15.
40. The term "the law" in clause 5 is used in a broad sense and is not limited in its application to the criminal law only. Clearly, the Marketing Act and its subsidiary legislation are relevant laws as defined in clause 5(5) for the purposes of the exemption in clause 5(1)(b).

The agency's submission

41. The agency originally claimed that it had carried out an investigation to determine whether the third parties had breached any of the provisions of the Marketing Act and that the inquiries did not focus on any particular section or regulation. Notwithstanding that submission, I was also informed that it is not an offence for a grower to supply potatoes which are below standard, either because the potatoes are infected with a disease or some other defect, nor is it an offence to deliver potatoes that have been harvested from an earlier growing season.
42. The agency subsequently submitted that it carried out an investigation of a possible contravention of the law by the third parties concerning the claim for payment for the supply of potatoes in August 2000, which were unsuitable for sale, in possible contravention of regulations 60 and 71 of the *Marketing of Potatoes Regulations 1987*.

The third parties' submission

43. The third parties submit only that disclosure of the documents would reveal the agency's investigation into a contravention of the law and chose to adopt and rely upon the submissions made to me by the agency.

Consideration

44. I do not dispute the fact that the agency made inquiries into the circumstances surrounding the delivery of potatoes to it by the third parties in August 2000. However, for the purpose of establishing the exemption, the question is not whether the agency made inquiries about the delivery of potatoes to it. The question is whether disclosure of the disputed matter in each of the disputed documents could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law.
45. I have examined Documents 3, 4, 5, 6 and 7. In my view, there is nothing in those documents that would reveal that the agency conducted an investigation into a contravention or possible contravention of the law, as defined in clause 5(5), or the subject matter of any such investigation. I do not consider that disclosure of those documents could reasonably be expected to reveal anything about an investigation into a contravention or possible contravention of the law, or the identity of the people being

investigated or the subject matter of the investigation. Accordingly, I find that Documents 3, 4, 5, 6 and 7 are not exempt under clause 5(1)(b).

46. The agency also claims that Documents 23, 24 and 25 are exempt under clause 5(1)(b). However, I consider that those documents are exempt for different reasons and I have dealt with them in paragraphs 56-57 below.

(c) Clause 6(1)

47. The agency claims exemption under clause 6(1) for the disputed matter in Documents 18-22 and Document 26. Clause 6(1) provides:

"6. Deliberative processes

Exemptions

(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."

48. Clearly, the requirements of both paragraphs (a) and (b) must be satisfied in order to establish a valid claim for exemption under clause 6(1). I consider that the deliberative processes of an agency are its "thinking processes", the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action: *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588; see also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69 at 72.

49. I have examined Documents 18-22 and 26. I accept that Documents 18, 19, 20, 22 and 26 record decisions of, and actions taken by, the Board of the agency at its meetings. Although the documents clearly relate to the deliberative processes of the Board of the agency, they record the resolutions of the Board and actions to implement those decisions. In my view, they do not disclose opinion, advice or recommendation that has been obtained, prepared or recorded in the course of, or for the deliberative processes of the agency. They disclose the final decision of the Board taken after the Board has deliberated on an agenda item. Document 21 is a letter to a third party. In my view, that document does not contain information of the kind referred to in clause 6(1)(a).

Rather, it informs the addressee about particular action taken by the agency in respect of the delivery of potatoes by the third parties.

50. Therefore, I am not persuaded that Documents 18-22 and 26 fall within the terms of the exemption in clause 6(1)(a). However, if they do, the agency must also establish that disclosure would, on balance, be contrary to the public interest. The only submission made to me by the agency on that point is the bald statement to the effect that *“Given the clear intention of the legislature that documents falling within clauses 5 and 6 would be exempt, there are no good public policy reasons why it would be in the public interest that that information contained therein be disclosed.”*
51. Clearly, that statement demonstrates a misunderstanding of the terms of clause 6 and of the onus the agency bears under s.102(1) of the FOI Act to establish that its decision was justified. In respect of the exemption in clause 6(1), I consider that it may be contrary to the public interest to prematurely disclose documents while deliberations in an agency are continuing, if there is evidence that the disclosure of such documents would adversely affect the decision-making process, or that disclosure would, for some other reason, be contrary to the public interest.
52. There is nothing, either in the disputed documents, or that has been put before me by the agency, to establish that disclosure would be contrary to the public interest. In the circumstances of this matter, I am not aware of any ongoing deliberations that would be adversely affected by the disclosure of the documents.
53. In my view, there is a public interest in informing the community of the decisions made by agencies in the exercise of their statutory functions. I also consider there to be a public interest in the agency demonstrating the processes employed by it to deal with sub-standard potatoes, which serve the interests of the growers and the community. Balanced against those factors, I consider that there is a public interest in ensuring effective public administration and in bringing issues that arise from time to time to a close. However, in the circumstances of this complaint, I have given more weight to the public interests favouring disclosure. In my view, disclosure would not be contrary to the public interest. Rather, I consider that it would enhance accountability and serve the public interest.
54. In the case of the exemption in clause 6(1), the complainant is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; he is entitled to access unless the agency can establish that disclosure of the particular deliberative process matter would be contrary to the public interest. In my view, the agency has not done so. Accordingly, for the reasons given, I find that the disputed matter in Documents 18-22 and Document 26 is not exempt under clause 6(1).

(d) Clause 3 (Personal information)

55. The complainant informed me that he does not seek access to personal information about any person, other than the third parties. However, he did not make any submissions to me in support of his request for access to personal information about one of the third parties, Mr Della Vedova. Accordingly, I have examined the disputed documents in light of that advice and in light of the submissions made to me by the agency and the third party.

56. In my view, Documents 23, 24 and 25 contain a considerable amount of personal information, including opinion, about one of the third parties. I consider that that information is, *prima facie*, exempt matter under clause 3(1). Pursuant to s.102(3) of the FOI Act, the onus of persuading me that the disclosure of personal information would be in the public interest rests on the complainant. However, the complainant made no submissions to me on that point.
57. In my view, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals. I consider that there is a strong public interest in maintaining personal privacy, which can only be displaced by some stronger countervailing public interest that requires the disclosure of personal information. Whilst I recognise a public interest in the accountability of the agency, in this instance I do not consider that public interest requires the disclosure of personal information. I have, therefore, given more weight to the public interest in protecting privacy. Accordingly, I find that Documents 23, 24 and 25 are exempt under clause 3(1). In light of that finding, I need not consider whether those documents are exempt under any other clause.
58. In respect of Document 21, taking into account the complainant's advice that he does not seek access to personal information about individuals other than the third parties, I consider that it would be practicable to delete the details of the name and address of the addressee from Document 21. Documents 18, 19, 20, 21, 22 and also 26 mention one of the third parties by name, and the names of some other individuals appear in Documents 2-7. However, I do not consider that the mere mention of a person's name in a document is sufficient to make the information "personal information" as that term is defined in the FOI Act. To be exempt under clause 3(1), the information must be about the person named (my emphasis). Taking into account the context in which the names appear, I do not consider that the information is personal information about the persons named in those documents. Accordingly, I find that the names of the individuals concerned are not exempt under clause 3(1) of schedule 1 to the FOI Act.
59. The agency claimed that it might be possible that some handwriting in Documents 25 and 26 may enable the complainant to identify the person from the handwriting. I have found that Document 25 is exempt in full under clause 3(1). I have examined Document 26. It is not apparent to me that the handwriting would identify any person. In any event, the hand written notes do not, in my opinion, consist of information about a person. Rather, it appears to me that they are notes of an administrative nature about action that the agency intended to take in respect of various matters. Accordingly, I find that Document 26 is not exempt under clause 3(1).
60. Finally, the agency also claimed that Document 26 is exempt under clause 7. Clause 7 provides that matter is exempt matter if it would be privileged from production in legal proceedings on the grounds of legal professional privilege. I can find nothing in Document 26 that would be protected from disclosure by legal professional privilege and the agency has not made any submissions to me on that point. Accordingly, I find that Document 26 is not exempt under clause 7 of Schedule 1 to the FOI Act.
