

SPENO RAIL AND WA GOVT RAILWAYS

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

**File Ref: 96190
Decision Ref: D02997**

Participants:

**Speno Rail Maintenance Australia Pty
Ltd**
Complainant

- and -

**The Western Australia Government
Railways Commission**
First Respondent

Rail Technology International Pty Ltd
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - tender submission - confidential communications - clause 8(1) - scope of exemption - meaning of "legal remedy" - remedies for breach of confidence - jurisdictional basis for action for breach of confidence - whether breach of contractual obligation of confidence - whether breach of equitable obligation of confidence - clause 8(2) - whether reasonable expectation of prejudice to future supply.

FREEDOM OF INFORMATION - clause 4 - commercial or business information - 4(1) - trade secrets - 4(2) - commercial value - 4(3) - information concerning business, professional, commercial or financial affairs of a person - clause 11 - whether disclosure could reasonably be expected to impair the effectiveness of any method or procedure for the conduct of tests.

FREEDOM OF INFORMATION - section 27(2) - form of access - whether breach of copyright - reproduction - whether disputed matter is "substantial part" of document - whether giving edited copy of part of document is publication under the Copyright Act.

Freedom of Information Act 1992 (WA) ss. 27(2) 102(2); Schedule 1 clauses 4; 8; 11(1)(b),

Freedom of Information Act 1982 (Commonwealth) ss. 45(1)

Freedom of Information Act 1992 (Qld)

The Judicature Acts 1873-75

Supreme Court Act (WA) s.24

The Chancery Amendment Act 1858 s.2

Copyright Act 1968 (Commonwealth) s.10(1), 14, 29, 31(1), 32(4), 35, 36

Re Maher and Attorney-General's Department (No.2) (1986) 4 AAR 266.

Corrs Pavey Whiting and Byrne v Collector of Customs (Vic) and Another (1987) 74 ALR 428.

Re B and Brisbane North Regional Health Authority (1994) QAR 279 (QLD Information Commissioner).

Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd [1967] VR 37

Marine Power Australia Pty Ltd and Another v Comptroller-General of Customs and Others (1989) 89 ALR 561 and 572

Saltman Engineering Co Ltd v Campbell Engineering Co Ltd (1948) 65 RPC 203

Nicrotherm Electrical Co Ltd v Percy [1957] RPC 207

Seager v Copydex Ltd [1967] RPC 349

Interfirm Comparison (Australia) Pty Ltd v Law Society of New South Wales [1977] RPC 137

Talbot v General Television Corporation Pty Ltd [1981] RPC 1

Willing v Hollobone (1972) 3 SASR 532

Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310)

Precious Metals Australia Limited and Department of Minerals and Energy (Information Commissioner of Western Australia, 17 April 1997, unreported, D01297)

Re K and Department for Family and Children's Services (Acting Information Commissioner of Western Australia, 9 April 1996, unreported, D01996)

Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 All ER 465

Director General of Education v Public Service Association of New South Wales (1985) 79 FLR 15

General Rapid Transit v Greater Omnibus Services Limited (1911-16) MacG Cop Cas 95

S W Hart & Co Pty Ltd v Edwards Hot Water Systems (1985) 159 CLR 466

Autodesk Inc & Another v Dyason & Others (No 2) (1993) 176 CLR 300

DECISION

The decision of the agency is set aside. In substitution, it is decided that the disputed matter, described in the schedule to this decision, is not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

20th October 1997

SCHEDULE OF DISPUTED MATTER

The disputed document does not have page numbers, but consists of 204 folios. For the purpose of clearly identifying the disputed matter, I have assigned a number to each folio. Folio 1 is the cover page to the disputed document, folio 2 is a letter dated 25 July 1996, folio 3 is the Table of Contents and the remaining folios are referred to by consecutive numbers from there on.

FOLIO	DESCRIPTION OF DISPUTED MATTER
6	<ul style="list-style-type: none"> • all paragraph 6, including the heading, except for the last 8 words in the second sentence • paragraph 7, first sentence • paragraph 7, first bullet point, line 1, words 3-5 and words 12-14 • paragraph 7, first bullet point, line 2, words 1-2 • paragraph 7, first bullet point, line 4, words 4-15 • paragraph 7, first bullet point, line 5, words 1-7 • paragraph 7, second bullet point, line 1, words 5-9 • paragraph 7, second bullet point, line 3, words 6-12 • paragraph 7, second bullet point, line 4, words 1-3
7	<ul style="list-style-type: none"> • first bullet point, line 1, words 8-16 • first bullet point, line 2, words 1-11 • second bullet point, line 2, words 7-11 • second bullet point, line 3, words 1-11 • second bullet point, line 4, words 6-10 • third bullet point, line 3, line 3, words 7-12 • third bullet point, line 4, words 1-4 • first paragraph after third bullet point, the heading • first paragraph after third bullet point, line 1, words 1-5 and 10-13 • first paragraph after third bullet point, line 2, word 1
198	<ul style="list-style-type: none"> • all (cover page)
199	<p>all except:</p> <ul style="list-style-type: none"> • paragraph 1, line 2, word 5 • paragraph 1, line 3, word 9-13 • paragraph 2, words 5-6 • “Table”, first column, the numerical amount under the heading • “Graph”, the first column
200	<p>all except:</p> <ul style="list-style-type: none"> • paragraph 1, line 2, words 8-9 • “Table”, first column, the numerical amounts under the heading in row 1 and 2 • “Graph”, the first two columns • last paragraph, line 2, words 4-5 • last paragraph, line 3, words 11-12

201	<p>all except:</p> <ul style="list-style-type: none">• “Table”, first column, the numerical amount under the heading• “Graph”, the first column• paragraph immediately after the graph, line 2, words 5-6
202	<p>all except:</p> <ul style="list-style-type: none">• “Graph”, the first two columns• paragraph immediately after the graph, line 3, words 4-11• paragraph immediately after the graph, line 4 first word
203	<p>all except:</p> <ul style="list-style-type: none">• “Table”, first column, the numerical amount under the heading• “Graph”, the first column• paragraph immediately after the graph, line 1, word 13• paragraph immediately after the graph, line 2, word 1• last paragraph, line 1, word 17• last paragraph, line 2, word 1
204	<p>all except:</p> <ul style="list-style-type: none">• paragraph 1, line 1, words 9-13• paragraph 1, line 2, words 7-10• the three lines which identify the author of the document

REASONS FOR DECISION

BACKGROUND

1. This complaint arises out of a decision of The Western Australian Government Railways Commission ('the agency') to refuse Speno Rail Maintenance Australia Pty Ltd ('the complainant') access to a document under the provisions of the *Freedom of Information Act 1992* ('the FOI Act').
2. By letter dated 3 October 1996, solicitors representing the complainant applied under the FOI Act for access to all documents submitted to the agency by Rail Technology International Pty Ltd ('the third party') in relation to Tender No.15/95 for the provision of ultrasonic testing of rail. I understand that both the complainant and the third party submitted tenders for the contract. I also understand that the complainant was the successful tenderer.
3. By letter dated 14 November 1996, the agency advised the complainant that it had decided to refuse the complainant access to the requested document on the ground that it is exempt under clause 8(1) of Schedule 1 to the FOI Act. The complainant applied for an internal review of that decision and, on 10 December 1996, the agency's internal reviewer confirmed the initial decision.
4. On 20 December 1996, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision. The third party, which objects to disclosure of the document or any part of it, was subsequently joined as a party to the complaint.

REVIEW BY THE INFORMATION COMMISSIONER

5. A copy of the disputed document was produced to me by the agency. A preliminary conference was arranged between my office and the complainant's solicitor with a view to determining whether there was any scope for conciliation of this complaint. As a result of that conference the complainant reduced the scope of the initial request to include only any matter in the document which refers to the complainant.
6. During the process of dealing with this complaint, further efforts were made by my office to negotiate with the parties to the complaint in order to resolve the matter by conciliation. In particular, my office conducted a series of discussions with the third party for the purpose of having the third party reconsider its initial objection in light of the reduced scope of the request. To assist the third party, a copy of the relevant parts of the disputed document with the disputed matter indicated was provided to the third party. However, the third party maintained its objection to disclosure of any matter by the agency to the complainant.

7. On 10 June 1997, I informed the parties in writing of my preliminary view of this complaint and my reasons for that view. It was my preliminary view that it had not been established that the disputed matter was exempt for any reason. It was also my preliminary view, however, that access could only be given by way of inspection because the provisions of section 27(2)(c) of the FOI Act may apply to the disputed matter, as copying the document or any part of it may involve an infringement of copyright belonging to a person, in this case the third party.
8. My preliminary view of this complaint was provided to all three parties to this complaint for consideration. However, all parties maintain their respective positions.

THE DISPUTED DOCUMENT

9. The disputed document is the tender submission dated 25 July 1996 made by the third party to the agency in relation to Tender No.15/96.

THE DISPUTED MATTER

10. Initially, the disputed matter consisted of the entire contents of the disputed document. However, following negotiations with this office the scope of the request was significantly reduced. The complainant now seeks access only to that matter contained in the disputed document which refers to the complainant. After examining the disputed document, I have identified 9 folios which I consider may contain matter which falls within the scope of the reduced request. That matter is identified in the schedule attached to my decision.

THE EXEMPTIONS

11. The agency claims that the disputed document is exempt under clause 8(1) of Schedule 1 to the FOI Act. Further, the third party claims the disputed matter is exempt under clauses 4(1), 4(2), 8(2) and 11(1)(b) of Schedule 1 to the FOI Act.

Clause 8 - Confidential communications

12. Clause 8 of Schedule 1 to the FOI Act provides:

“Exemptions

- (1) *Matter is exempt matter if its disclosure (otherwise than under this Act or another written law) would be a breach of confidence for which a legal remedy could be obtained.*
- (2) *Matter is exempt matter if its disclosure -*

- (a) *would reveal information of a confidential nature obtained in confidence; and*
- (b) *could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*

Limits on exemption

- (3) *Matter referred to in clause 6 (1) (a) is not exempt matter under subclause (1) unless its disclosure would enable a legal remedy to be obtained for a breach of confidence owed to a person other than -*
 - (a) *a person in the capacity of a Minister, a member of the staff of a Minister, or an officer of an agency; or*
 - (b) *an agency or the State.*
- (4) *Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest.”*

(a) Clause 8(1)

The agency’s claims

13. In its initial notice of decision, the agency refused access to the document, claiming exemption under clause 8(1) of Schedule 1. The agency based its claim on the following clause contained in the Conditions of Tendering for Tender 15/96:

“2.18 Confidentiality

Westrail shall regard tenders as confidential and undertakes to keep confidential any information provided by Tenderers responding to this request unless disclosure of any part of it is required by law.”

The agency claimed that, therefore, *“... release of the information would breach the undertaking to keep information received confidential.”*

14. On internal review, the initial decision was confirmed. The agency once again relied on clause 2.18 of the Conditions of Tendering as the basis for its claim. The agency’s claim is that disclosure of the document would be a breach of confidence for which a legal remedy could be obtained and that, therefore, the document is exempt under clause 8(1). Nothing more was provided by the agency in support of the claim.

The scope of the exemption

15. Each Australian jurisdiction provides exemption for “confidential communications”. However, the terms of the exemption provided vary in each jurisdiction. The wording of clause 8(1) is significantly different to other jurisdictions and unique to Western Australia.
16. In the *Freedom of Information Act 1982 (Commonwealth)* (the Commonwealth FOI Act), before its amendment in 1991, section 45(1) provided exemption for a document if its disclosure under that Act “...would constitute a breach of confidence.” That provision was considered in a number of decisions, including the decision of the Commonwealth Administrative Appeals Tribunal in *Re Maher and Attorney-General’s Department (No.2)* (1986) 4 AAR 266, and by the Federal Court of Australia in *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic) and Another* (1987) 74 ALR 428. Both the Tribunal in *Re Maher* and the majority of the Federal Court in *Corrs Pavey Whiting* decided that the term “breach of confidence” in the Commonwealth FOI Act as it then provided was not limited to a breach of confidence that would be actionable under the general law. The provision was considered to have a wider application, being directed at the protection of confidential information generally, so that it covered confidential information received in circumstances imposing an obligation of confidence, even if the protection of the confidence were unenforceable in a court.
17. In 1991 section 45(1) was amended to provide exemption for a document if its disclosure under that Act “...would found an action, by a person other than the Commonwealth, for breach of confidence.” Accordingly, the exemption provided by the Commonwealth FOI Act is now limited to circumstances in which disclosure would be actionable at general law. In Queensland and some other Australian jurisdictions, the equivalent exemption is also for documents which, if disclosed, would found an action for breach of confidence.
18. In his decision in *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 the Queensland Information Commissioner canvassed at some length the question of the jurisdictional basis of an action for breach of confidence (see pages 288-297). The complexities in both the law relating to breach of confidence and, consequently, the interpretation and application of the exemption were highlighted by the Commissioner in that decision. The Commissioner concluded that the words “an action for breach of confidence” in the *Freedom of Information Act 1992 (Qld)* (the Qld FOI Act) includes both, *inter alia*, a cause of action for breach of a contractual obligation of confidence and a cause of action for breach of an equitable duty of confidence. That is, the words include both an action at law and an action in equity.
19. The distinction between these jurisdictional bases for an action for breach of confidence is significant in relation to the Western Australian provision also.

However, because of the unique wording of the Western Australian provision, the significance is of a somewhat different nature.

Equity and the common law

20. Equity is the body of law which originated in the English courts of Chancery, initially developed as principles of fairness to provide redress where none was available at common law. Those principles evolved into a body of law. Since the 1873-75 *Judicature Acts* in England, both common law and equity are administered by the one court. By virtue of s.24 of the *Supreme Court Act 1935* (WA), that is also the case in Western Australia, as it is in the other Australian jurisdictions.
21. The effect of that “fusion” has been the subject of considerable judicial and academic debate, the extent and complexity of which I do not propose to canvas here. It appears to me that, for the present at least, the weight of opinion favours the view that, although now administered by the one court, the two bodies of principle remain separate, although clearly not unconnected in practice. I respectfully agree with the comments of the present Chief Justice of the Supreme Court of Western Australia in this regard, in his paper “The Fusion Fallacy”, delivered in 1992 at a seminar on “Law & Equity - The Fusion Fallacy” held by the Law Society of Western Australia, when His Honour said:

“There is nothing in [s.24 of the Supreme Court Act 1935], nor was there in the Judicature Act, which attempts to codify law and equity as one subject matter or to sever the roots of the conceptual distinction between law and equity. Rather, the purpose of the reforms was to combine the administration of law and equity in the one court. This was rather eloquently expressed in the well known statement in Ashburner on Equity (2nd ed, p18), quoted by Windeyer J in Felton v Mulligan (1971) 124 CLR 367 at 392, that “The result of the ‘fusion’ of law and equity by the Judicature Act is that “the two streams of jurisdiction though they run in the same channel, run side by side and do not mingle their waters””.”

Legal remedies and equitable remedies

22. One significant difference between the two jurisdictions - common law and equity - is the remedies available in each. Legal remedies are almost all monetary, damages being the traditional remedy for breach of a legal right, whereas many equitable remedies are not, and - most importantly - legal remedies are available as of right, whereas equitable remedies are discretionary. This distinction gives particular significance to the use of the term “legal remedy” in clause 8(1) of the FOI Act. Generally, the remedy for a breach of confidence where the obligation arises from contract will be common law damages, that is, a legal remedy (see *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37 at page 43). If a breach is found to have occurred, then some damages must be awarded. Equitable remedies (such as specific performance or injunction) may also be available in respect of such a breach as a result of equity’s auxiliary

- jurisdiction which enables a court to grant an equitable remedy in aid of a legal right.
23. As well as its auxiliary jurisdiction, equity also operates in respect of breaches of confidence independently of any right at common law. Equitable remedies for breach of confidence include: injunction to restrain the breach or prevent further breaches; restitution including an account to the confider of profits made by the confidant from an authorised use of the information provided in confidence; equitable damages; and delivery up and cancellation of documents. These are all equitable and not legal remedies.
 24. There has been considerable debate arising out of interpretation of s.2 of *The Chancery Amendment Act 1858*, commonly referred to as *Lord Cairns' Act* - which bestowed upon the courts of Chancery the power to award damages in equity and is reflected in the various Australian Supreme Court Acts - and several more recent cases (in particular, the English cases: *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203; *Nicrotherm Electrical Co Ltd v Percy* [1957] RPC 207; *Seager v Copydex Ltd* [1967] RPC 349; and the Australian cases: *Interfirm Comparison (Australia) Pty Ltd v Law Society of New South Wales* [1977] RPC 137; *Talbot v General Television Corporation Pty Ltd* [1981] RPC 1), as to the jurisdictional basis for an award of damages for a purely equitable breach of confidence. Comprehensive and helpful discussions of this complex issue are to be found in *Breach of Confidence* by F. Gurry (Clarendon Press, 1984) and *The Action for Breach of Confidence in Australia* by J. Kearney (Legal Books Pty Ltd, 1985), amongst others (see also re equitable damages: *Equitable Damages* by P.M. McDermott and *Remedies for Torts and Breach of Contract*, 2nd ed., by A Burrows (Butterworths, 1994)).
 25. Having adverted, in his work cited above, to the suggestion that in the action for breach of confidence there is a fusion of law and equity, the learned author Gurry said, at pages 439-440:

“However, it must be remembered that the authority for such a fusion is rather tenuous, and there are few areas of the law which raise such difficult and controversial legal problems as the fusion of law and equity. Until a definite position is adopted by the courts, one can only point to the existence of the authority which suggests that, in this area, the courts can grant damages either in addition to or in substitution for breach of an equitable obligation. And the prudent approach in every case is still to establish clearly which jurisdiction the court has invoked to determine the defendant’s liability, and to isolate first what remedies should be available on traditional rules to the plaintiff on that basis.”
 26. Having considered the matter at length, I am of the view that it can be said with certainty only that a legal remedy is available for a breach of a common law obligation of confidence. A common law action for breach of confidence appears most often to be founded in contract. Although there is some confusion as to the jurisdictional basis of damages awarded for a purely equitable breach of confidence, it does not appear to me presently to be able to be said that a legal

remedy could be obtained for such a breach, and the jurisdictional distinction remains significant.

Interpretation of “legal remedy” in clause 8(1)

27. It can be seen therefore that, as far as the law is concerned, there is a distinction between a legal remedy and an equitable remedy. Although the general principle is that words in statutes are to be given their ordinary or popular meaning, if there is something in their context, phrasing or the subject matter with which they deal that leads to the conclusion that they are intended to assume a technical meaning, then that is the meaning that should be given them. The presumption that a technical word is used in a technical sense is even stronger where the word in question is a technical legal term: *Marine Power Australia Pty Ltd and Another v Comptroller-General of Customs and Others* (1989) 89 ALR 561 at 572. When a statute includes a well known legal expression, it would normally be taken to be interpreted in its ordinary legal sense: *Willing v Hollobone* (1972) 3 SASR 532 at 537.
28. Given the context in which the term “legal remedy” appears in clause 8(1), the significance of which I have endeavoured to indicate briefly in the preceding paragraphs, I am of the view that it should be given its technical legal meaning. Accordingly, in my opinion, the exemption provided by clause 8(1) of the FOI Act extends only to documents the disclosure of which would give rise to a cause of action for breach of a common law obligation of confidence such as a contractual obligation of confidence, and not those the disclosure of which would give rise to a cause of action for breach of an equitable duty of confidence only.

The claim for exemption under clause 8(1)

29. There is nothing before me that suggests that the confidentiality clause contained in the conditions of tendering issued by the agency to all prospective tenderers, including the complainant and the third party, established a contractual obligation of confidence. I understand the terms and conditions are distributed routinely to parties involved in arrangements of a similar nature with the agency. There is no evidence before me that those terms and conditions form part of any contract between the parties, nor more particularly that there is or ever has been any contractual relationship between the third party and the agency.
30. Even if I were to accept that a breach of confidence in equity were the kind of breach referred to in clause 8(1), I would not consider the claim for exemption to have been made out. In order to found an action for breach of confidence in the equitable jurisdiction, certain criteria must be established. Those were explained by Gummow J in *Corrs Pavey Whiting and Byrne*, at page 437, as follows:

“It is now settled that in order to make out a case for protection in equity of allegedly confidential information, a plaintiff must satisfy certain criteria. The plaintiff (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question, and must also be able

to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge), (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence, and (iv) there is actual or threatened misuse of that information: Saltman Engineering Co Ltd v Campbell Engineering Co (1948) 65 RPC 203 at 205; Commonwealth v John Fairfax and Sons Ltd (1980) 147 CLR 39 at 50-51; 32 ALR 485 at 491-2; and O'Brien v Komisaroff (1982) 150 CLR 310 at 326-8; 41 ALR 255 at 266-8. It may also be necessary, as Megarry J thought probably was the case (Coco v Clark (AN) (Engineers) Ltd [1969] RPC 41 at 48), and as Mason J (as he then was) accepted in the Fairfax decision was the case (at least for confidences reposed within government), that unauthorised use would be to the detriment of the plaintiff.”

31. Although the existence of clause 2.18 of the Conditions of Tendering may go towards establishing that the information contained in the tender document was received by the agency in such circumstances as to import an obligation of confidence, neither the agency nor the third party has provided me with material addressing the other criteria necessary in order to make out a case for protection in equity.
32. In any event, as I have said, it is my view that clause 8(1) applies only to protect documents the disclosure of which would be a breach of confidence for which a legal remedy, as opposed to an equitable remedy, could be obtained. As I am of the view that it has not been established that there was any contractual obligation of confidence between the agency and the third party, nor any other basis upon which a legal remedy could be obtained if the document were to be disclosed, I do not accept that the document is exempt under clause 8(1).

(b) Clause 8(2)

33. In order for matter to be exempt from disclosure under clause 8(2), the requirements of both clause 8(2)(a) and 8(2)(b) must be satisfied. Further, matter is not exempt under 8(2) if its disclosure would, on balance, be in the public interest. It is not sufficient to establish only that information is of a confidential nature and obtained in confidence as provided by clause 8(2)(a). Paragraph (b) must also be satisfied to claim the exemption. The requirement in 8(2)(b) that the future supply of information of that kind could reasonably be expected to be prejudiced is a reference to similar information or information of the class or character contained in the disputed documents. It is the third party's responsibility to persuade me that the disclosure of the disputed matter could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.
34. The third party submits that the information sought by the complainant is confidential and commercially sensitive, having been obtained in confidence for use by the third party. The third party also submits that the release of the information to the complainant would jeopardise the ability of the third party to obtain that type of information from the same source in the future. Finally, the

third party submits that disclosure would also jeopardise the integrity of both the third party and source of the information.

35. Information is inherently confidential if it is not in the public domain. That is, it must be known to only a small number or limited class of people. To be considered to have been obtained in confidence, the information must have been both given and received on the basis of either an express or implied understanding of confidence. On the basis of the submissions provided to me, and the nature of the information itself, I accept that the information may be, *prima facie*, confidential in nature. I have only the third party's assertion that the disputed matter was obtained by it in confidence. No evidence in support of that assertion has been provided.
36. However, whether or not the information was obtained by the third party in confidence, I accept that it was obtained by the agency in confidence. The agency has submitted that it gave an undertaking to keep all tender documents submitted to it confidential. The third party submits that its tender document was provided to the agency in confidence. I consider that clause 2.18 of the Conditions of Tendering, reproduced in paragraph 13 above, evidences an express agreement of confidentiality between the agency and the tenderers in respect of information provided to the agency by tenderers in the tendering process. I accept, therefore, that all the information in the disputed document was both given to the agency on an understanding that it would be treated confidentially and received by the agency on that basis. Accordingly, I accept that the disputed matter was obtained in confidence by the agency.
37. However, I am not persuaded on the evidence before me that the future supply of the kind of information contained in the disputed matter could reasonably be expected to be prejudiced by the disclosure of that matter, in the context of the terms of the exemption. The third party claims that, if the disputed matter were disclosed, it would prejudice the future supply of that kind of information to the third party from its sources. No evidence in support of that claim was provided. Mere assertions with nothing to support them are not sufficient to establish a claim. In *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310), at page 44, in respect of a claim for exemption under clause 4(3), Owen J expressed it thus:

“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 decisionmaker that he or she had “real and substantial grounds for thinking that the production of the document could prejudice that supply”...? 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.”

38. In this matter, it is the third party, rather than the original decision-maker, who seeks to persuade me that the disputed matter is exempt under clause 8(2). Therefore, pursuant to s.102(2), it is the third party that bears the onus of establishing that the disputed matter is exempt and access to it should not be given in respect of this claim. The third party has merely proffered the view and provided no supporting material.
39. Further, clause 8(2) is concerned with prejudice to the future supply of information to an agency or the Government. It is not concerned with the future supply of information to any other body, such as the third party. Even if the argument were that the ability of the agency to obtain such information in the future may be prejudiced if the third party's ability to obtain such information were prejudiced, because the third party would not be able to provide such information in the future, I would nonetheless reject it. Firstly, there is no evidence before me which establishes that the third party's ability in that regard could reasonably be expected to be impaired in the future. Secondly, I find it difficult to accept that, if such information remained available in the future, tenderers would not continue to provide all the information available to them in support of their endeavours to win contracts.
40. Accordingly, I find that the disputed matter is not exempt under clause 8(2) of Schedule 1 to the FOI Act. Given my determination regarding clause 8(2), it is not necessary that I consider the public interest limitation on the exemption contained in clause 8(4).

Clause 4 - Commercial or business information

41. Clause 4 provides:

"4. Commercial or business information

- (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) *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.”*

(a) Clause 4(1)

42. The third party submits that the disputed matter is confidential, commercially sensitive information which contains trade secrets concerning statistics on the effectiveness of its testing technology.
43. Clause 4(1) is concerned with protecting information which would reveal the trade secrets of a person. In order to establish an exemption under clause 4(1), the matter for which the claim is made must contain some information which could clearly be considered to be a trade secret of a person.
44. The third party has not identified the particular information in the disputed matter that it claims to be a trade secret or trade secrets. Having examined the disputed matter, and in the absence of any evidence or helpful submission in support of the claim, there does not appear to me to be any information contained in the disputed matter which might be characterised as a trade secret.
45. Accordingly, as it is not established that any of the information in the disputed matter is a trade secret, I find that none of the disputed matter is exempt under clause 4(1) of Schedule 1 to the FOI Act.

(b) Clause 4(2)

46. The third party submits that the disputed matter has commercial value to the complainant as it gives the complainant information contained within the tender document of the third party which is used as justification for government authorities to choose the third party above other contractors. The third party also submits that if the complainant were to have this information it would diminish the commercial value of the information.
47. Clause 4(2) is concerned with the protection of information which is not a trade secret but 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 be shown to 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 be quantified or assessed. However, that alone is not sufficient to establish the exemption. It must also be shown that disclosure could reasonably be expected to destroy or diminish the commercial value of the information in question. Only when the requirements of clause 4(2)(a) are satisfied am I required to consider the effects of disclosing that kind of matter, to determine whether the potential effect of disclosure claimed is one that could reasonably be expected, in accordance with the requirements of clause 4(2)(b).
48. In *Re Precious Metals Australia Limited and Department of Minerals and Energy* (17 April 1997, unreported, D01297), I considered the meaning of the words "commercial value" in the context of a claim for exemption under clause 4(2) of Schedule 1 to the FOI Act. I am of the view that the discussion in *Re Precious Metals Australia Limited* is equally applicable to the matter now before me. 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.
49. The first difficulty with the third party's claim for exemption under this sub-clause is that the third party claims that disclosure of the disputed matter would reveal information having a commercial value to the complainant. If it were the case that the disputed matter has a commercial value to the complainant, then the limit on sub-clause (6) would apply and the matter could not be exempt under sub-clause (2). Sub-clause (2)(a) requires the information in question to have a commercial value to a person. Sub-clause (6) renders that information not exempt if the person - that is, the person to whom the information has a commercial value - consents to its disclosure to the applicant. In this matter, the complainant is the applicant and, if the information in question has a commercial value to the complainant, the complainant is also the person referred to in sub-clause (6). It would be a nonsense to suggest that the complainant, who is seeking access to the disputed matter, does not consent to disclosure of that matter to itself.

50. Further, if the argument were, rather, that the information has a commercial value to the third party on the basis that it is information that persuades rail authorities to choose the third party above other contractors, then I remain of the view that it is not established that the information has any commercial value to any person. Following the reduction of the scope of the information sought by the complainant, the disputed matter comprises only information in the document that may refer to the complainant. That matter clearly did not persuade the agency in this instance to choose the third party above another contractor, as the complainant was the successful tenderer.
51. Having inspected the 9 folios containing relevant matter, edited so as to delete any matter which does not refer directly to the complainant, nothing in that material appears to me to be capable of having a commercial value to any person other than, perhaps, the complainant. As no other evidence or submission as to the claimed commercial value has been provided by the third party, despite the third party being given ample opportunity to do so, I am not persuaded that the disputed matter meets the requirements of clause 4(2)(a).
52. In any event, even if I were so satisfied, there is no evidence before me that persuades me that disclosure of the disputed matter could reasonably be expected to destroy or diminish its commercial value as required by clause 4(2)(b) in order to establish the exemption. I do not consider that the third party has discharged the onus it bears under s.102(2) and has not established that the disputed matter is exempt under clause 4(2).
53. Accordingly, I find that the disputed matter is not exempt under clause 4(2) of Schedule 1 to the FOI Act.

(c) Clause 4(3)

54. Neither the agency nor the third party has claimed exemption for any of the disputed document under clause 4(3) of Schedule 1 to the FOI Act. However, in my preliminary view, I indicated that it was apparent from the contents of the document itself that some of the disputed matter may be described as information which relates to the business, professional, commercial or financial affairs of the third party and, therefore, the requirements of clause 4(3)(a) may be satisfied. However, in the absence of any submissions from the third party at the time, I was unable to form a view on whether the requirements of paragraph (b) are also satisfied in relation to that matter. In responding to my preliminary view, the third party did not provide any material which might have assisted me in that regard.
55. The third party claimed that the ability of the third party to obtain such information in future would be jeopardised by its disclosure. For the reasons I have given at paragraphs 37-39 above, in respect of the exemption claim under clause 8(2), I do not consider that claim to have been established. The alternative requirement of clause 4(3)(b) is that disclosure could reasonably be expected to have an adverse effect on the business, professional, commercial or

financial affairs of a person. No evidence or helpful submission was provided by the third party that disclosure of the disputed matter could reasonably be expected to have such an adverse effect, or as to what any such adverse effect might be.

56. Therefore, on the basis of my examination of the disputed matter alone, and in the absence of any probative evidence or helpful submission, I am unable to determine whether any of the disputed matter satisfies all the requirements to establish the exemption provided by clause 4(3). Accordingly, I find that none of the disputed matter is exempt under clause 4(3).

Clause 11(1)(b)

57. Clause 11(1)(b) provides:

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

(a)...

(b) prevent the objects of any test, examination or audit conducted by an agency from being attained;”

58. The third party submits that the release to the complainant of the disputed matter, which contains information obtained from a certain source, would jeopardise the third party from obtaining any results from further tests, examinations or audits. This, it is submitted, would affect the third party's ability to improve its operations based on the results of these tests, examinations or audits.

59. On the basis of my examination of the disputed matter and the submissions of the third party, I am unable to identify any of the disputed matter which may in any respect relate to matter with which clause 11(1)(b) is concerned. Firstly, the exemption provided by clause 11(1)(b) is stated to be in respect of a test, examination or audit conducted by an agency. “Agency” is defined in the Glossary to the FOI Act. There is no evidence before me to establish that any of the sources specified by the third party is an agency for the purposes of the FOI Act.

60. Further, I do not consider the exemption to be concerned with the ability of any party to access test results. Rather, in my opinion, it is concerned with the ability of an agency to achieve the objects of any test, examination or audit it conducts (see for example the Acting Information Commissioner's decision in *Re K and Department for Family and Children's Services* (9 April 1996, unreported, D01996). Therefore, I consider the exemption claim made by the third party to be misconceived and I find the disputed matter is not exempt under clause 11(1)(b).

Section 27(2) - Copyright

61. In addition to the exemption claims made by the third party, the third party also submits that all of the contents of the disputed document, which include the disputed matter, are the subject of copyright and any reproduction of that matter in part or whole without the express permission of the third party would constitute a breach of copyright.
62. In accordance with s.27(2) of the FOI Act, if an access applicant has requested that access to a document be given in a particular manner, an agency is required to comply with that request unless doing so satisfies the terms of one or more of the paragraphs of s.27(2) of the FOI Act. In light of the complainant's request for access to a copy of part of the disputed document, the third party contends that s.27(2)(c) of the FOI Act applies. Section 27(2) provides:

“(2) If the applicant has requested that access to a document be given in a particular way the agency has to comply with the request unless giving access in that way -

(a) would interfere unreasonably with the agency's other operations;

(b) would damage or harm the document or would be inappropriate because of the physical nature of the document; or

(c) would involve an infringement of copyright belonging to a person other than the State,

in which case access may be given in some other way.”

63. Copyright subsists in a work if it is an original literary, dramatic, musical or artistic work within the terms of the *Copyright Act 1968 (Commonwealth)* (‘the Copyright Act’). Whilst there is no comprehensive definition of “literary work” in the Copyright Act, the term is defined in s.10(1) to include “a table or compilation”. However, the Copyright Act does not define “table” or “compilation”. Those words have been interpreted as meaning an arrangement or selection of materials in a particular form: *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465. The selection or arrangement of the materials constitutes the literary work and it is not necessary for the material itself to be new or original.
64. The use of the adjective “literary” does not mean that the work must be of a particular style or standard. It is sufficient that the work provides information and a number of works, including a government report (*Director General of Education v Public Service Association of New South Wales* (1985) 79 FLR 15) and a company prospectus (*General Rapid Transit v Greater Omnibus Services Limited* (1911-16) MacG Cop Cas 95) have been held to be literary works.

65. Following my examination of the disputed document I am satisfied that much of the disputed matter consists of a compilation of information together with graphs and tables. The knowledge, skill and industry of its author have clearly been used in its preparation. On that basis, I accept that the disputed document would be a work within the definition of “literary work”. In order to establish the subsistence of copyright in a literary work the general requirements are that the work must be original and there must be a connection with Australian law.
66. The term “original” does not necessarily mean that the work must be an expression of original or inventive thought. It is sufficient that the work is the result of the application of knowledge, judgement, skill or labour by the author and is not simply copied. In this case the disputed matter is partly compiled from information which the third party has obtained from other sources. However, I am of the opinion that the author has utilised a sufficient level of skill, labour and judgement in analysing and applying the information to justify the document being described as an original work.
67. The connection with Australian law is made, in the case of unpublished works such as this, if the author is a “qualified person” when the work is made. Section 32(4) of the Copyright Act defines a “qualified person” as meaning an Australian citizen or a person resident in Australia. I understand that the disputed document was prepared by the third party, which I understand to be an all-Australian company.
68. For those reasons, I am satisfied that copyright subsists in the disputed document under the provisions of the Copyright Act.
69. The ownership of copyright is dealt with by s.35 of the Copyright Act. Section 35(6) provides as follows:
- “where a literary, dramatic or artistic work ... is made by the author in pursuance of the terms of his or her employment by another person under a contract of service or apprenticeship, that other person is the owner of the copyright subsisting in the work by virtue of this Part”.*
- In this instance, the third party claims to be the owner of the copyright and without any evidence to the contrary before me I accept that claim.
70. Having reached the view that copyright subsists in the disputed document, the question here to be considered is whether, if the agency were to comply with the complainant’s request to be given access by being given an edited copy of that part of the document containing the disputed matter, it would involve an infringement of the third party’s copyright. An owner of copyright in a literary work has the exclusive right to do a number of acts in relation to the work. These are listed in s.31(1) of the Copyright Act and include the right to “reproduce the work in a material form” (s.31(1)(a)(i)) and the right to “publish the work” (s.31(1)(a)(ii)). “Material form” is defined in s.10(1) of the Copyright Act as including any form of storage from which the work can be reproduced.

71. Thus the third party as owner of the copyright in the document was entitled to reproduce the disputed document to supply a copy of it to the agency. Any other person, not being the owner or with authority of the owner, of the copyright would infringe copyright by doing any of the acts listed in s.31(1) of the Copyright Act, including reproducing the work in a material form and publishing the work (s.36(1)).
72. Copyright may also be infringed by an unauthorised dealing with a substantial part of the work (s.14(1)(a)). In order to determine whether the part of the work is “substantial”, the circumstances of each case are to be taken into account: *S W Hart & Co Pty Ltd v Edwards Hot Water Systems* (1985) 159 CLR 466. The term “substantial” refers to the quality of what is taken rather than its quantity: *Ladbroke (Football) Ltd v William Hill (Football) Ltd*. Whether the portion copied is an essential or material part of the work is also important in determining whether it is a “substantial part”: *Autodesk Inc & Another v Dyason & Others (No 2)* (1993) 176 CLR 300.
73. In the *Ladbroke (Football) Ltd* case, Lord Pearce stated, at page 293:

“The reproduction of a part which by itself has no originality will not normally be a substantial part of the copyright and therefore will not be protected. For that which would not attract copyright except by reason of its collocation will, when robbed of that collocation, not be a substantial part of the copyright and therefore the courts will not hold its reproduction to be an infringement.”
74. In my opinion, the disputed matter in this instance, does not comprise a substantial part of the disputed document. The disputed matter comprises information obtained by the third party from another source and that information, in that sense, cannot be said to be original. Taken out of the context in which the third party has used it in the disputed document, the disputed matter is not in my view original. Whilst clearly intended to add weight to the third party’s case that it should be awarded the contract for which it tendered, the disputed matter does not, in my view, form an essential or material part of the disputed document. Accordingly, I do not consider that reproducing those parts of the disputed document containing the disputed matter only would constitute an unauthorised dealing with a substantial part of the work.
75. The final question for consideration is whether there will be an infringement of copyright if the agency gives that reproduction of those parts of the disputed document which contain the disputed matter to the complainant.
76. Section 29 of the Copyright Act states that a literary work is deemed to have been published if reproductions of the work have been supplied (whether by sale or otherwise) to the public. Whilst the third party cannot be said to have published the work by providing a copy of it to the agency, any release of the disputed document by the agency pursuant to the FOI Act would, in my opinion, be a publication of the document. Disclosure under the FOI Act is considered to be disclosure to the public at large in accordance with achieving the objects of the FOI Act by creating a general right of access for all persons. However, it is

not proposed that the agency release the whole of the document but rather an edited copy of the pages containing the disputed matter only.

77. The supply of a reproduction of a part of a work, even a substantial part, is not a publication in the terms of s.31(1)(a)(ii). Section 29(2) of the Copyright Act states that in determining whether reproductions of a literary work have been supplied to the public s.14 of the Copyright Act does not apply. As I have stated earlier s.14 relates to dealing with a substantial part of the work. Whether or not the disputed matter constitutes a “substantial part” of the disputed document, providing a copy of that part of the document only is not a publication for the purposes of the Copyright Act, because s.14 is specifically excluded in relation to publication of a document. Thus, for the purposes of the Copyright Act, there would be no publication of the disputed document, and therefore no breach of copyright, if the disputed matter only were to be given to the complainant because only the whole of a document can be “published”.
78. Therefore, I find that giving access by providing the complainant with a copy of those pages of the disputed document that contain the disputed matter, edited so that only the disputed matter appears in the copy, would not involve an infringement of the third party’s copyright and access may be given in that way.
