

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

**File Ref: F1191999
Decision Ref: D0371999**

Participants: **Ljiljana Maria Ravlich**
Complainant

- and -

State Supply Commission
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to review of the *State Supply Commission Act 1991* – clause 6 – deliberative processes – consultations, advice and opinion for the purpose of the deliberative process of an agency – whether contrary to the public interest to disclose.

Freedom of Information Act 1992 (WA) Schedule 1 clauses 3(1), 6(1) and 7.
State Supply Commission Act 1991 s.36

Re Read and Public Service Commission [1994] WAICmr 1

Re Collins and Ministry for Planning [1996] WAICmr 39

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

Ministry for Planning v Collins (1996) 93 LGERA 69

Re Ayton and Police Force of Western Australia [1999] WAICmr 8

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

Murtagh and Commissioner of Taxation (1984) 54 ALR 313

DECISION

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

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

11 November 1999

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the State Supply Commission ('the agency') to refuse Hon Ljiljana Ravlich MLC ('the complainant') access to documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. In October 1997, the Minister for Works; Services ('the Minister') appointed the Crown Solicitor, Mr P Panegyres, to conduct a review of the *State Supply Commission Act 1991* ('the State Supply Act'), as required by s.36 of that Act. Thereafter, a Review Group composed of Mr Panegyres, Mr L E Smith AM and Ms J E Eckert, Senior Assistant Crown Solicitor, assisted by an officer from the Department of Contract and Management Services, conducted the review.
3. Among other things, the Review Group published advertisements containing the terms of reference for the review in *The West Australian* and *The Sunday Times* newspapers inviting written submissions. In early November 1997, the Review Group wrote to 128 agencies and 22 private sector organisations, inviting written submissions from those organisations. The final report of the Review Group ('the Report') was prepared in May 1999 and, on 30 June 1999, the Minister tabled the Report in the Legislative Assembly of the Parliament of Western Australia.
4. Before tabling the Report, the Minister publicly stated that the Report had highlighted a number of difficulties and that he was in the process of establishing a ministerial consultative committee to undertake further consultation with relevant Government agencies, suppliers and other stakeholder groups. Subsequently, the consultative committee wrote to Government agencies and to private sector organisations inviting written submissions in relation to its work. The consultative committee also published press advertisements, seeking comments and submissions on the recommendations set out in the Report.
5. On 18 May 1999, the complainant made an application to the agency seeking access under the FOI Act to various documents associated with the review of the State Supply Act conducted by the Review Group. After clarifying the scope of the access application with the complainant, on 2 July 1999, the agency refused the complainant access to the requested documents on the grounds that those documents are exempt under clauses 6(1) and 7 of Schedule 1 to the FOI Act.
6. The complainant sought internal review of the agency's decision but the internal reviewer confirmed the initial decision to refuse access to the requested documents on the grounds that they are exempt under clauses 6(1)

and 7. On 27 July 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. I obtained the disputed documents from the agency, together with other material relevant to this complaint. Meetings were held with the parties to determine whether this complaint could be resolved by conciliation. In the course of those discussions, the complainant withdrew her request for access to a number of documents, including documents claimed to be exempt under clause 7 of Schedule 1 to the FOI Act. No concessions were made by the agency and there was, therefore, little scope to resolve this complaint by conciliation.
8. On 21 October 1999, I informed the parties in writing of my preliminary view of the agency's claims for exemption under clause 6(1) for the documents remaining in dispute, including my reasons. It was my preliminary that the agency had not established a valid claim for exemption for those documents. It was also my preliminary view that some information in the disputed documents, namely the names of third parties and the signatures of individuals, including officers of the agency, may be exempt under clause 3(1). However, I considered that it was practicable to delete that information from the documents.
9. The complainant has advised me that she does not seek access to any information that would identify individuals from private sector organisations, nor does she seek access to the signatures of any individual. Therefore, I do not consider that matter to be in dispute. The agency maintains it claims for exemption under clause 6(1), but made no further submissions in support of its claims.

THE DISPUTED DOCUMENTS

10. There are 81 documents remaining in dispute. Those documents have been described in a schedule prepared by the agency and provided to the complainant. I intend to refer to the disputed documents by the number assigned to each of them on that schedule. In my view, the disputed documents may be grouped into 3 categories:
 - Category 1 documents (Documents 3, 77, 136, 137, 156, 158 and 160) which consist of correspondence from the agency to the Minister in respect of the review;
 - Category 2 documents (Documents 1, 2, 5, 8, 18, 20, 27, 30, 32, 45, 47, 138, 146 and 159) which consist of requests from the Review Group to the agency for information concerning various aspects of its operations and the responses from the agency containing the information requested; and

- Category 3 documents (Documents 9-17, 19, 21, 22, 24, 26, 28, 29, 34, 42-44, 46, 51, 70-72, 75, 78, 80, 81, 107, 108, 110, 116, 118, 120-133, 135, 139, 140, 144, 145, 148-153 and 157) which record various discussions and actions taken within the agency that preceded the agency's preparation of its submission to the Review Group.

THE EXEMPTIONS

(a) *Clause 6 (Deliberative processes)*

11. Clause 6, so far as is relevant, 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."*

12. I have considered the purpose of the exemption in clause 6 and the meaning of the phrase "deliberative processes" in a number of my formal decisions: see, for example, *Re Read and Public Service Commission* [1994] WAICmr 1 and *Re Collins and Ministry for Planning* [1996] WAICmr 39. In *Re Read*, I stated that I agreed with the view expressed by the Commonwealth Administrative Appeals Tribunal ('the AAT') in *Re Waterford and Department of the Treasury (No.2)* (1984) 5 ALD 588 that the "deliberative processes" of an agency are its thinking processes, the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action: see also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69, at 72.

13. In my view, the comments of the AAT in *Re Waterford* assist in determining the scope of the exemption in clause 6(1) of Schedule 1 to the FOI Act in Western Australia and, for the purposes of this matter, I consider it worthwhile repeating those comments. In *Re Waterford*, the AAT said, at paragraphs 58-60:

"58. As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. "Deliberation" means "The action of deliberating; careful consideration with a view to decision": see the Shorter Oxford English Dictionary. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Deliberations on policy matters undoubtedly come within this broad description. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play.

59. It by no means follows, therefore, that every document on a departmental file will fall into this category...Furthermore, however imprecise the dividing line may first appear to be in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency...

60. It is documents containing opinion, advice, recommendations etc relating to the internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption under s.36 only attaches to those documents the disclosure of which is 'contrary to the public interest'..."

14. In order to establish a valid claim for exemption under clause 6(1), the requirements of both paragraphs (a) and (b) of clause 6(1) must be satisfied. It is not sufficient to establish a valid claim for exemption under this clause for an agency to show that the documents in question contain information of the type referred to in paragraph (a) of clause 6(1). The agency also bears the onus, in the first instance, of establishing that disclosure of the disputed documents would, on balance, be contrary to the public interest.
15. In the case of this exemption, the complainant is not required to demonstrate that disclosure would be in the public interest. Rather, the complainant is entitled to access unless the agency can establish that disclosure of the disputed documents would, on balance, be contrary to the public interest.

The agency's submissions

16. The agency contends that the Minister's review of the State Supply Act is ongoing and submits that the disputed documents relate to:
 - the deliberative processes of the Review Group;

- the deliberative processes of the agency in formulating responses to requests from the Review Group; and/or
 - the deliberative processes of the Minister in carrying out the review of the operation and effectiveness of the State Supply Act.
17. The agency submits that there are a number of public interest factors for and against disclosure of the disputed documents that must be considered. The agency submits that the public interest factors in favour of disclosure of the disputed documents include:
- the public interest in an applicant being able to exercise his or her right of access under the FOI Act; and
 - a possible public interest in ensuring that the Review Group provided the agency with an opportunity to make submissions to it and that the Review Group took those submissions into account when preparing the Report.
18. The agency also submits that there are several very strong public interest factors weighing against disclosure, namely:
- the public interest in preserving the integrity of the Minister's ongoing deliberative processes in relation to his review of the State Supply Act;
 - the public interest in preserving the integrity of the ongoing deliberative processes of the consultative committee;
 - the risk that disclosure of the disputed documents prior to the conclusion of the Minister's review has the potential to undermine or impede the deliberative processes of the Minister and the consultative committee; and
 - the need to preserve the confidentiality of the consultative process to enable the Minister to complete his review and present his report to Parliament after having received the frankest possible expression of views and ideas from interested parties, including those in the private sector.
19. The agency submits that the release of the disputed documents, at this stage, may tend to reduce the frankness and candour with which interested parties will provide advice to the Minister or to the consultative committee. The agency submits that the Minister is of the view that the review process has been extremely open and accountable from its inception, but that the review process is still ongoing and he does not believe that disclosure of the disputed documents would necessarily enhance that process.
20. I am informed that the Minister is of the view that early disclosure of the disputed documents could lead to secondary debate that would not be particularly helpful and may hinder the progress of the consultative committee. Taking the Minister's views into account, the agency claims that the public interest is, on balance, best served by non-disclosure of the documents, at least for the time being. However, the agency informs me that it is likely that the

public interest balance will change after the Minister's review has been completed.

The complainant's submission

21. The complainant submits that s.36 of the State Supply Act required a review of the Act and the operations of the agency to be carried out as soon as practicable after the expiration of 5 years from the commencement of the Act. The complainant submits that, given the Report was tabled in Parliament in May 1999, the deliberative processes associated with the review should have been completed at that time. The complainant submits that the disputed documents are not, therefore, exempt under the FOI Act as claimed by the agency.

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

22. I have examined the disputed documents and I am satisfied that those documents contain information of the kind described in clause 6(1)(a). In particular, of the Category 1 documents, Documents 3, 77, 156, 158 and 160 contain advice, opinions and recommendations obtained in the course of, and for the purpose of, the Minister's deliberative processes in determining the form and terms of reference of the review and in determining what action to take in response to the report following the review. Documents 136 and 137 may be considered, in my view, to reveal consultations by the agency that took place in the course of the agency's deliberative process of preparing and finalising its submission to the review.
23. The Category 2 documents contain information concerning consultations between the Review Group and the agency for the purpose of the Review Group obtaining information from the agency in the course of, and for the purpose of, the review. It appears to me that disclosure of that matter would reveal consultations that took place in the course of, and for the purpose of, the deliberative processes of the Review Group. I consider it doubtful that the Review Group could be considered an agency for the purposes of the FOI Act. However, I am prepared to accept that the Review Group carried out the review on behalf of the Minister, who was required by s.36(1) of the State Supply Act to carry out the review, and that the review of the State Supply Act was, therefore, a deliberative process of the Minister, *albeit* delegated to the Review Group. Accordingly, it is my view that disclosure of the Category 2 documents would reveal consultations that took place in the course of, and for the purpose of, a deliberative process of the Minister and, therefore, contain matter of a kind described in clause 6(1)(a).
24. The Category 3 documents contain information recording the internal discussions, deliberations and planning that occurred within the agency during the preparation of the agency's submission to the Review Group. As I have said, I consider the agency's preparation of its submission to the Review Group to be a deliberative process of the agency and those documents, therefore, contain information of a kind described in clause 6(1)(a).

Clause 6(1)(b) – whether disclosure would, on balance, be contrary to the public interest

25. As a general rule, I consider that it may be contrary to the public interest to prematurely disclose deliberative process documents while deliberations in an agency are continuing, if there is evidence before me to establish that disclosure of such documents would affect the integrity of the decision-making process, or that disclosure would, for some other reason, be demonstrably contrary to the public interest: see *Re Collins* and, most recently, *Re Ayton and Police Force of Western Australia* [1999] WAICmr 8. I do not consider that it is in the public interest for any agency to conduct its business with the public effectively “looking over its shoulder” at all stages of its deliberations and speculating about what might be done and why. I consider that generally the public interest is best served by allowing deliberations to occur unhindered and with the benefit of access to all of the material available so that informed decisions may be made.
26. I recognise a public interest in preserving the integrity of the Minister's deliberative processes in reviewing the State Supply Act and the operations of the agency. In my view, part of that public interest includes the public interest in preserving the integrity of the deliberative processes of the consultative committee. I also accept that the process of review is ongoing through the work of the consultative committee established by the Minister.
27. However, it is clear to me that the deliberative process of the Review Group concluded when the Report was tabled in the Parliament, and the deliberative processes of the agency involved in the agency preparing submissions for consideration by the Review Group concluded long before that. Therefore, I do not consider that disclosure could have any effect on either of those deliberative processes and it would not, therefore, be contrary to the public interest in protecting the integrity of those deliberations to disclose the disputed documents.
28. Further, there is nothing before me, either in the documents or from the agency, to link the disputed documents to the deliberative processes of the consultative committee. Each of those documents was created prior to the establishment of the consultative committee, and they would not, if disclosed, reveal anything of the deliberative processes of that committee. My inquiries have established that the consultative committee has a copy of Document 124, the agency's submission to the Review Group, which it is using for reference purposes. However, I understand that the consultative committee does not have, nor has it obtained and made use of, any of the other disputed documents. Given that the task of the consultative committee is to review the findings of the Review Group, it seems to me that the disputed documents bear little, if any, relevance to the ongoing work of that committee. Therefore, I do not consider that their disclosure would adversely affect the integrity of the consultative committee's deliberations or consultations. Accordingly, I have given less weight to this aspect of the public interest.

29. The principal officer of the agency informs me that he had formed the view that there was a risk that disclosure would undermine or impede the deliberative processes of the consultative committee. Accordingly, he was concerned to preserve the confidentiality of that process, to ensure the candour and frankness of any advice to both the Minister and the consultative committee during the ongoing review process. It appears to me that the principal officer may have been reinforced in his view by the comments of the Minister that disclosure would not necessarily “*enhance the deliberative/consultative process*” and that in fact it “*could lead to secondary debate that is not particularly helpful and may hinder the progress of the Ministerial Committee.*”

30. The "candour and frankness" argument has been frequently raised in other jurisdictions to deny access to documents. It has been consistently rejected by the AAT as being without foundation and it was also rejected by the Queensland Information Commissioner in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60. In *Murtagh and Commissioner of Taxation* (1984) 54 ALR 313 at 326, the AAT said:

"The candour and frankness argument is not new. It achieved pre-eminence at one time but has now been largely limited to high level decision-making and to policy-making..."

No cogent evidence has been given to this Tribunal either in this review or, so far as we are aware, in any other, that the enactment of the FOI Act 1982 has led to an inappropriate lack of candour between officers of a department or to a deterioration in the quality of the work performed by officers. Indeed, the presently perceived view is that the new administrative law, of which the FOI Act 1982 forms a part, has led to an improvement in primary decision-making."

31. I accept that there is a public interest in bodies such as the Review Group and the consultative committee having access to as much relevant and accurate information as possible in order to properly advise the Minister on the effectiveness of a law of the State. However, I do not consider there to be any material before me which establishes that disclosure of the disputed documents could have the effect of causing professional public officers to be any less candid or frank in the comments they make or information they supply for the purpose of, or in the course of, such a review in the future.

32. In my view, the unsupported assertions of the principal officer of the agency based on the “candour and frankness” argument are insufficient to discharge the onus placed upon the agency under s.102(1) of the FOI Act to establish that disclosure of the disputed documents would, on balance, be contrary to the public interest. In the absence of any persuasive material to establish that information of the kind contained in the disputed documents – including correspondence from the agency to the Minister, information concerning various aspects of the agency’s operations, and records of various discussions and actions within the agency that preceded the agency’s preparation of its

submission to the Review Group – could be expected to be less forthcoming in the future, I have also given less weight to the agency’s claims in that respect.

33. One of the stated objects of the FOI Act in clause 3(1)(a) is to enable the public to participate more effectively in governing the State. Effective public participation in that process requires, in my opinion, that the public has access to information. Therefore, I recognise a public interest in obtaining timely access to as much relevant information as is possible in order to further the aims of democratic government. I consider that there is a strong public interest favouring the disclosure of documents that would enable the public to understand the review process and to effectively contribute to the ongoing deliberations and consultations of the consultative committee.
34. I also recognise a public interest in the general accountability of government agencies for the discharge of their responsibilities under legislation. In this instance, the Group 2 and Group 3 documents in particular relate to the functions of the agency and its operations, its priorities and its view of its place in the overall scheme of government in this State. In my view, the disclosure of that kind of information would not be contrary to any public interest. Rather, I consider that the public interest favours disclosure of information about the processes of government and, taking into account the nature of the information, I have given more weight to that public interest.
35. I have weighed each of those public interest factors for and against disclosure in order to determine where the balance lies. I have had regard to the contents of the disputed documents themselves and the fact that the first stage of the review has been completed and that the disputed documents clearly relate to that first stage of the review rather than the work of the consultative committee. For the reasons expressed, I have given more weight to the public interests served by disclosure under FOI legislation and less weight to the public interests in ensuring the integrity of ongoing deliberations by the consultative committee, given that I do not consider it established that disclosure could have an adverse effect on those deliberations.
36. I am not persuaded that the agency has discharged the onus placed on it by s.102(1) of the FOI Act and I am not persuaded that disclosure of the disputed documents would, on balance, be contrary to the public interest. Therefore, I find that the disputed documents are not exempt under clause 6(1) of Schedule 1 to the FOI Act.
