

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

**File Ref: 95147
Decision Ref: D03896**

Participants:

John Raymond Martyr
Complainant

- and -

**Law Reform Commission of Western
Australia**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - request for copies of submissions that had been withdrawn from the agency - clause 4(1) of the Glossary in Schedule 2 - whether copy documents in the possession of the agency are documents of an agency.

FREEDOM OF INFORMATION - request for access to copies of submissions made to the agency - clause 6(1) - deliberative process - public interest for and against disclosure.

Freedom of Information Act 1992 (WA) ss. 10, 23(1)(b), 68(1), 69(4), 72(1)(b), 75(1), 102(1); Schedule 1 clause 6(1); Glossary in Schedule 2 clauses 1, 4(1).

Law Reform Commission Act 1972 (WA)

Re Birrell and Victorian Economic Development Corporation (1989) 3 VAR 358.

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

DECISION

The decision of the agency is confirmed. The documents are exempt under clause 6(1) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

3rd July 1996

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Law Reform Commission of Western Australia ('the agency') to refuse Mr Martyr ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The background to this complaint is as follows. In accordance with the provisions of the *Law Reform Commission Act 1972*, the agency is responsible for, *inter alia*, investigating and reporting on references given to it. In the course of its consideration of a reference to examine the law relating to medical treatment of minors, the agency investigated and prepared a report titled "Report on Consent to Sterilisation of Minors" ('the Report'). The Report was published in October 1994.
3. A number of organisations and individuals made submissions to the agency relating to the Report, including a number of organisations associated with the Roman Catholic Church in Western Australia ('the Catholic Church'). However, on 24 June 1993, prior to the publication of the Report by the agency, the Archbishop of Perth advised the agency that he wished to recall four submissions made by organisations associated with the Catholic Church, with the authority of the authors, as those submissions did not reflect in every respect the position of the Catholic Church. The Archbishop of Perth then made a submission to the agency on behalf of the Catholic Church.
4. In accordance with the request of the Archbishop of Perth, the originals of the four submissions were returned to the Catholic Church. The agency retained copies of the submissions which had been recalled. However, those copies were not retained on the file of submissions relating to the Report, but were retained on a separate correspondence file relating to the project, as part of the correspondence of the agency concerning the withdrawal by the Catholic Church of the submissions.
5. Appendix I of the published Report is a list of the submissions received by the agency relating to the Report. The submission of the Archbishop of Perth is listed, with the four submissions which had been recalled noted in a footnote as having been withdrawn.
6. On 25 May 1995, the complainant applied to the agency under the FOI Act for access to copies of seven submissions referred to in Appendix I of the Report. On 3 July 1995, the agency advised the complainant that it had decided to provide access to three of the documents requested by him. However, the agency refused access to the remaining four documents, on the ground that the documents were not documents of the agency pursuant to section 23(1)(b) of the FOI Act, as the submissions had been formally withdrawn.

7. On 18 July 1995, the complainant requested an internal review of the decision to refuse him access to the four documents. On 19 July 1995, the complainant was advised that, following the internal review, the initial decision of the agency to refuse access to those four documents was upheld. The agency confirmed that, although it had retained copies of the submissions, those documents were not “documents of an agency” as defined in the FOI Act as, from the time the submissions were withdrawn, they were no longer public documents and, therefore, not documents of the agency.
8. On 31 July 1995, the complainant sought external review by the Information Commissioner of the agency’s decision to refuse him access to the four documents.

REVIEW BY THE INFORMATION COMMISSIONER

9. On 7 August 1995, in accordance with s.68(1) of the FOI Act, I notified the agency that I had received this complaint. Pursuant to my powers under ss.75(1) and 72(1)(b) of the FOI Act, I sought and obtained the production to me of the originals of the documents in dispute, together with the agency’s FOI file maintained in respect of this matter. Those documents were produced to me on 10 August 1995.
10. On 23 August 1995, after considering the material before me, including the submissions of the agency and the documents themselves, I provided the parties with my preliminary view and the reasons for that view in relation to the initial issue of whether the requested documents are “documents of an agency” within the meaning of the FOI Act. It was my preliminary view that the documents in dispute are documents of an agency within the definition in clause 4(1) of the Glossary in Schedule 2 to the FOI Act, so that the documents are able to be the subject of an access application under the FOI Act. The agency was invited to make submissions on the point or, alternatively, to ensure that a notice of decision was provided to the complainant in relation to the disputed documents.
11. The agency subsequently provided a submission to me claiming that the documents are exempt under clause 6(1) of Schedule 1 to the FOI Act. The complainant was advised of the agency’s claim that the documents are exempt from disclosure under clause 6(1) and he provided a written response to me with respect to the claims of the agency.
12. Pursuant to s.69(4) of the FOI Act, which empowers me to obtain information or receive submissions from a person or body that might be affected by my decision on the complaint, I invited the authors of the disputed documents (‘the interested parties’) to make submissions to me with respect to the disclosure of the documents. Throughout my dealing with this complaint, the interested parties, either on their own account or through solicitors acting on their behalf, provided submissions to me regarding the initial issue as well as the question of the exempt status or otherwise of the disputed documents.
13. Following a consideration of the material then before me, by letter dated 3 January 1996, the parties were informed that it was my preliminary view that the

disputed documents did not contain any matter which is exempt from disclosure under the provisions of the FOI Act. The interested parties were also advised of my preliminary view as to the exempt status of the documents.

14. Following receipt of my preliminary view as to the exempt status of the disputed documents, both the agency and the interested parties made further written and oral submissions to me in support of their respective views. In light of the additional information provided to me, on 15 March 1996, I advised the parties and the interested parties that one of the disputed documents may be exempt from disclosure under clause 6(1) of the FOI Act but, that the remainder of the disputed documents may not be exempt from disclosure. The complainant responded to my letter of 15 March 1996 by providing an additional submission in support of his claim of access to all documents.
15. After further consideration of all the material before me, on 5 June 1996, the parties and the interested parties were advised that I was now of the view that each of the disputed documents may be exempt from disclosure under clause 6(1) of Schedule 1. On 5 June 1996, the complainant subsequently provided additional material for my consideration.

THE DISPUTED DOCUMENTS

16. The documents in dispute in this matter are as follows:
 1. Submission to agency from Director, L J Goody Bioethics Centre, dated 20 August 1992.
 2. Letter to agency from Deputy Executive Officer, Catholic Care for Intellectually Handicapped Persons, dated 25 August 1992, enclosing copy of notes written by Executive Director, Catholic Care for Intellectually Handicapped Persons.
 3. Letter to agency from Executive Director, Catholic Community Care, dated 27 August 1992.
 4. Letter to agency from Most Rev. Healy, Auxiliary Bishop, Archdiocese of Perth, dated 7 May 1993.
17. I understand from the material before me that the documents numbered 1, 3 and 4 were submissions voluntarily provided by each organisation to the agency in response to a newspaper advertisement placed by the agency seeking public comment on the reference. However, Document 2 is a letter from Catholic Care for Intellectually Handicapped Persons ('Catholic Care') enclosing a copy of notes which were not prepared for the purpose of submission to the agency, and which were only provided to the agency following a specific request from an officer of the agency. The initial issue for my determination in this matter is whether the documents are "documents of an agency" as defined in the FOI Act.

DOCUMENTS OF AN AGENCY

(a) The right of access

18. Section 10(1) of the FOI Act states that :

“10. (1) A person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with this Act.”

Therefore, an access applicant may only gain access to documents which fall within the definition of “documents of an agency” as provided by the FOI Act.

(b) The definition

19. The term “document” is defined in the Glossary in clause 1 of Schedule 2 to the FOI Act to mean:

- “(a) any record;*
- (b) any part of a record;*
- (c) any copy, reproduction or duplicate of a record; or*
- (d) any part of a copy, reproduction or duplicate of a record;”*

20. Further, clause 4(1) of Schedule 2 to the FOI Act defines the term “document of an agency” for the purposes of the FOI Act. Clause 4(1) states that:

“4. (1) Subject to subclause (2), a reference to a document of an agency is a reference to a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer.”

21. Therefore, whether a document is a document of the agency for the purposes of the FOI Act depends on whether the agency is in the possession of the document requested by an access applicant, or whether the document requested is under the control of the agency.

(c) The submissions of the interested parties

22. Submissions on the initial issue were made to me by the organisations responsible for documents 1, 2 and 4 as described in paragraph 16 above. Each of those organisations submitted that the documents which had been withdrawn from the agency were no longer “documents of an agency” within the terms of the FOI Act.

23. It was claimed on behalf of the L J Goody Bioethics Centre (‘the Bioethics Centre’) that the agency was not entitled legally, ethically or physically to make the withdrawn submission available to any access applicant under the FOI Act. The Bioethics Centre claimed that, from the time that its submission was withdrawn from the agency, the submission ceased to exist as a public document, and a copy should not have been retained on the files of the agency.

24. The Bioethics Centre made a subsequent submission to me claiming that, following the formal withdrawal of the documents from the agency, and the notification by the agency of such withdrawal, the documents were no longer the property of the agency, but became the private property of the authors of the documents. As the documents had no legal existence as a submission to the agency, it was alleged by the Bioethics Centre that no person had an ethical or legal right to access those documents without the permission of the authors of the documents.
25. In a submission made to me on behalf of the Catholic Church and Reverend Healy, it was claimed that upon the withdrawal and return of the documents to the Catholic Church, the submissions were no longer documents in the possession or under the control of the agency, but are in the possession and control of the Catholic Church. Accordingly, it was submitted that the documents are not ‘documents of an agency’ within the terms of clause 4(1) of Schedule 2 to the FOI Act.
26. Written and oral submissions on the initial issue were also made on behalf of Catholic Care. I was referred to the decision of the Victorian Administrative Appeals Tribunal (‘the Tribunal’) in *Re Birrell and Victorian Economic Development Corporation* (1989) 3 VAR 358, in which the Tribunal considered the provision in the Victorian FOI Act dealing with documents of an agency for the purposes of that Act. Based on that decision, Catholic Care submitted that the fact that a copy of the submission provided by Catholic Care is in the possession of the agency does not, of itself, mean that the document is a document of the agency. It was submitted that, in accordance with *Re Birrell*, the legal test for whether a document is in the possession of the agency “*is whether the agency has a right and power to deal with the document*”. Catholic Care submitted that the agency had no such right and power.

(d) Interpretation

27. In accordance with paragraph (c) of the definition “document” in clause 1 of Schedule 2 to the FOI Act, it is my view that a photocopy of a document placed on the files of an agency is a document which can be the subject of an access application under the FOI Act, even if the agency does not have the original of that document. As the copy record is a “document” for the purposes of the FOI Act, I am satisfied that the disputed documents, being copies of the withdrawn submissions, are documents within the terms of the FOI Act.
28. Therefore, I am required to consider whether the documents in dispute are “documents of an agency” within the terms of clause 4(1) of Schedule 2, in light of the circumstances surrounding the retention by the agency of the copies of the withdrawn submissions.
29. It is not necessary, in my view, for the original of a document to be in the possession of or under the control of an agency in order for a copy document to be a document of the agency within the terms of the FOI Act. Further, in my view, it is not necessary in order for a document to be a document of an agency that the document have been created by the agency, or that the “ownership” of

the document be with the agency. The question for determination is whether the copy documents can be said to be documents which are in the possession or under the control of the agency as required by clause 4(1) of Schedule 2.

30. In the decision in *Re Birrell* to which I was referred by the interested parties, the Tribunal discussed the meaning of the phrase “in the possession of” in the context of the equivalent provision of the Victorian FOI Act. The Victorian FOI Act defines “a document of an agency” as being “*a document in the possession of an agency...whether created in the agency or received in the agency*”.
31. The decision in *Re Birrell* concerned documents of an agency that had been taken over by a non-governmental body, into whose physical possession the documents had been placed subsequent to an access application having been made to the relevant agency. The basis of the Tribunal’s decision that those documents remained documents of an agency, being the government agency in question, was that the term “document in the possession of the agency” embraces not only actual possession, but also legal and constructive possession. The case is authority, although not binding on me, for that point, and I respectfully agree with the Tribunal on that point. However, that point is not the issue in the matter presently before me.
32. At page 377 of the decision in *Re Birrell*, the Tribunal stated that:

“I continue to hold the view that possession, for the purposes of whether a document is the document of an agency, embraces legal or constructive possession: that is, a right and a power to deal with the document in question. A document in the control of an agency is a document of an agency.”

The test of whether “*the agency has a right and power to deal with the document*” is the test of whether the agency has constructive possession of the document. It is not, in my view, as asserted by Catholic Care, the test of whether a document is in the possession of the agency.

33. Further, in that case, the original documents were located with the non-government body and no copies were retained by the relevant agency. In the matter before me, the relevant documents are not the originals, which are no longer in the possession of agency in any way, but the copy documents which remain in the physical possession of the agency. Accordingly, I do not consider that I need to decide whether the interpretation of clause 4(1) of Schedule 2 is governed by the principles suggested by the Tribunal in *Re Birrell*, in order to determine whether the disputed documents are documents of an agency within the terms of the FOI Act.
34. I am satisfied on the material before me that the agency was, at the time the access application was lodged, in physical possession of the copies of the withdrawn submissions. The agency may not have considered it appropriate to deal with the documents as valid submissions made to the agency for the purpose of the investigation of the reference before it. However, the agency was, in my view, entitled to deal with the documents as an administrative record

of correspondence received by it in the course of the project. In any event, any real or perceived restriction upon the manner in which an agency may deal with particular documents in its possession or custody does not necessarily affect their status as “documents of an agency”. For example, an agency may be constrained from dealing in a certain way with documents the subject of an express or implied understanding of confidentiality, yet the documents may nonetheless be “documents of the agency”, albeit possibly exempt under clause 8(1) of Schedule 1 to the FOI Act.

35. Accordingly, I am satisfied that the agency is able to deal with the disputed documents as documents of the agency, accepting that the agency may not have been permitted to deal with the documents as if the documents had effect as submissions to the agency on the reference before it. Therefore, I am satisfied that the documents are documents of an agency within the definition in clause 4(1) of Schedule 2 to the FOI Act, and are therefore able to be the subject of a valid access application made under the FOI Act.

THE EXEMPTION

The claim for exemption

36. In light of my decision that the disputed documents are documents of an agency, so as to be accessible under the FOI Act, I am now required to consider the claims of the agency that the documents contain matter which is exempt matter under clause 6(1) of Schedule 1 to the FOI Act.

37. Clause 6(1) of Schedule 1 provides that:

“(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.”

38. Clearly, clause 6(1) protects from disclosure matter which forms part of the deliberative processes of an agency. In my view, the deliberative processes of an agency are its thinking processes.: see in *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588, at paragraphs 58-60.

39. As I have discussed in previous decisions, to establish an exemption under clause 6(1), the agency must satisfy the requirements of both paragraphs (a) and

(b) of clause 6(1). If the disputed documents contain matter of the type referred to in clause 6(1)(a), then it is necessary to consider the requirements of clause 6(1)(b), that is, whether disclosure of the documents would, on balance, be contrary to the public interest.

40. The agency informs me that in the course of the performance of its statutory functions, and at various stages of deliberating on a reference made to it, comments are sought from the public and other interested groups on the issues referred to it, or on provisional proposals for reform of the law. The submissions received are then considered by the agency during its deliberations.
41. The documents for which the agency claims exemption under clause 6(1) are submissions that were made to it in the course of the agency considering the reference relating to the consent to sterilisation of minors. Accordingly, the agency claims that the documents contain matter of the type referred to in clause 6(1)(a) of Schedule 1.
42. I am satisfied that the consideration by the agency of a reference before it is part of the deliberative process of the agency. Further, following my examination of the documents in dispute, and the submissions of the parties and the interested parties in this matter, I am satisfied that the disputed documents, which were obtained by the agency in the course of its deliberative process, contain advice and opinion obtained from the interested parties in the course of, or for the purpose of, the deliberative process of the agency. Accordingly, I am satisfied that the disputed documents contain matter of the kind referred to in clause 6(1)(a) of Schedule 1.

The public interest

43. As I am satisfied that the disputed documents contain matter of the type referred to in clause 6(1)(a), I am required to consider whether disclosure of the disputed documents would, on balance, be contrary to the public interest, so as to meet the requirements of clause 6(1)(b).

(a) The submissions of the agency

44. Throughout my dealing with this complaint, the agency made a number of submissions to me, in accordance with the onus on it under s.102(1) of the FOI Act, in support of its claim that disclosure of the disputed documents would be contrary to the public interest. The agency claims, *inter alia*, that disclosure is not in the public interest, because when the agency decided to retain copies of the recalled submissions, the agency took upon itself an obligation to regard those documents as confidential. In addition, the agency informed me that the authors of each of the disputed documents do not wish their respective submissions to be released.
45. Accordingly, the agency claims that to release the disputed documents “*in the knowledge that it is contrary to the wishes of the authors would be contrary to the public interest, because it would prejudice the chances of the [agency] obtaining the views of members of the public on present or future references.*”

The agency also claims that disclosure of the disputed documents would “*deter the Catholic Church and associated organisations from participating in the consultation and deliberative processes of the [agency] on other projects, present or future, and so make it extremely difficult for the [agency] to obtain their views.*” Therefore, the agency claims that, if these documents are disclosed, it will be denied the benefit of the views of the public on matters where such views may be vital.

46. In addition, the agency submits that disclosure of the disputed documents is contrary to the public interest, because the complainant does not require the documents for any purpose which is in any way connected with the public interest, but rather, requires the documents for some private purpose.

(b) The submissions of the interested parties

47. The interested parties also submit that disclosure of the disputed documents is contrary to the public interest. It was submitted on behalf of the Bioethics Centre that, *inter alia*, the organisation may wish to offer advice to individuals, to medical and nursing associations, to hospitals, and to the agency as part of its service in the community. At times, such advice may be sensitive in nature. It was submitted that to disclose the disputed documents would be contrary to the public interest, as to disclose such sensitive advice to the complainant would gravely impair the freedom of the Bioethics Centre to make full and honest submissions in the future.
48. Catholic Care submitted, *inter alia*, that disclosure of its correspondence with the agency would be contrary to the public interest. Catholic Care submitted that, taking into account the recall of its submission from the agency prior to the access application being lodged by the complainant, if the disputed document is disclosed, its contents could be taken out of context, which may cause the public to be misled, causing detriment to Catholic Care. Catholic Care claims that disclosure of the disputed document “*could lead to unjust public criticism of Catholic Care, damage to our reputation, and unnecessary undermining of our clients’ and the community’s confidence in the organisation. This would not be in the public interest.*”

(c) The submissions of the complainant

49. The complainant has also made submissions to me regarding why, in his view, the balance of the public interest lies in favour of disclosure. The complainant submits that, *inter alia*, the inquiry conducted by the agency in the course of which the disputed documents were obtained was a public inquiry, and the disputed documents remained on the public record for over a year prior to their being withdrawn. The complainant claims that no guarantee of confidentiality or privacy was ever given or requested with respect to the disputed documents. The complainant also notes that the disputed documents are referred to in Appendix I of the Report.
50. With respect to the claim that future communications between the various organisations and the agency may be prejudiced if the disputed documents are

disclosed, the complainant claims that nothing could hinder in any way the future capacity or willingness of those organisations to communicate with each other verbally or in writing, provided that each takes appropriate safeguards which are necessary or prudent if confidentiality is required. The complainant states that no such steps to ensure confidentiality were taken in this case, and that for the agency to withhold the documents in an endeavour to protect any special relationship it may have with any organisation or body would be contrary to the public interest.

51. In any event, the complainant maintains that disclosure of the disputed documents in this case could “*work to ensure that future Catholic submissions [to the agency] are totally in line with the Catholic teaching*”. Further, the complainant claims that disclosure in this case is in the public interest, as it would enable Catholics and any others, including the agency, who may have been misled by the disputed documents, to correct their perception of Catholic teaching.

(d) Consideration

52. There is a clear public interest in people being able to exercise their general right of access under the FOI Act. Further, I recognise that there is a public interest in members of the community having access to information about the processes of government decision-making, in order that there may be public participation in the democratic process.
53. I also accept that there is a public interest in the disclosure of submissions taken into account by the agency when considering references and preparing reports in accordance with its statutory obligations, or when commenting on law reform proposals. In my view, that public interest is recognised to some extent by the identification of individuals and bodies who make submissions to the agency on any particular reference being listed in any final report prepared by the agency.
54. In this case, the disputed documents no longer stand as submissions to the agency intended by the interested parties to be relied on by the agency in its deliberations. While it is recorded in Appendix I to the Report that those submissions were initially made to the agency, it is also acknowledged by the agency in the Appendix that those submissions were withdrawn and replaced with a submission from the Archbishop of Perth. Further, the agency has advised me that the submissions were not taken into account by the agency in the course of its preparation of the Report.
55. In those circumstances, it is clear on the material before me that the disputed documents had no bearing on the deliberations of the agency at the time of the preparation of the Report. There is, in my view, a public interest in submissions to the agency being able to be recalled or withdrawn - in circumstances such as those in this instance - prior to the finalisation by the agency of a matter, without the author of a submission fearing the public release of that submission in circumstances when the particular submission was not relied on by the agency. Further, although the complainant submits that the documents were “on the public record” for over a year before being withdrawn, it is not clear that that is

- in fact the case. They were with the agency for that period of time, but it appears that they were not necessarily freely and publicly available.
56. I do not accept the submission of the complainant that disclosure of the disputed documents could work to ensure that future submissions to the agency from Catholic organisations are in line with Catholic teaching. It is my understanding that the submissions were withdrawn because they do not represent the views or policies or teachings of the Roman Catholic Church and both the Church and the authors of the documents sought to have them withdrawn in order that there could be no perception that they did.
57. In my view, it may be contrary to the public interest to disclose documents in circumstances where disclosure could result in members of the public being misled. As I am satisfied that the disputed documents in this case were not relied upon by the agency in the preparation of the Report, and bearing in mind that the interested parties object to the release of the documents, I accept that disclosure may result in the position of the Catholic Church being misrepresented, thereby misinforming the public on a very sensitive issue. I also consider that disclosure has the potential to cause damage to the non-governmental agencies of the Catholic Church and its associated organisations. Further, I accept that there is a potential, if the documents are disclosed, for the Catholic Church and the interested parties to be subject to unjust criticism and negative comment.
58. I consider that in some circumstances a complainant's reasons for seeking access to documents may have some relevance to the public interest factors to be taken into account, in determining where the balance of the public interest lies. However, I do not accept the claims of the agency or the interested parties that it is relevant in balancing the public interest factors for and against disclosure in this instance, to take into account their belief that the documents to which the complainant has sought access are sought by him for a private purpose, and not for any purpose which is connected with the public interest. Section 10(2) of the FOI Act provides that, subject to the FOI Act, a person's right of access to documents is not affected by the reasons of the person in seeking access, or the agency's belief as to those reasons. Accordingly, the speculation of the agency as to the use to which the complainant might put the documents is not relevant in determining whether access is to be granted to the disputed documents, and I have not taken into account any of the submissions made to me based on the agency's belief as to the complainant's reasons for seeking access.
59. Having balanced the relevant public interest factors, I am of the view that the factors against disclosure outweigh the factors in favour of disclosure. Accordingly, I am satisfied disclosure of the disputed documents would, on balance, be contrary to the public interest and I find that the disputed documents are exempt under clause 6(1) of Schedule 1 to the FOI Act.
