

COMBUSTION AIR AND ENERGY

OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)

File Ref: 95219
Decision Ref: D04196

Participants:

Combustion Air Pty Ltd
Complainant

- and -

Office of Energy
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to the status of products sold by the complainant - ambit of access application - request for information - sufficiency of search - record-keeping practices of the agency - whether agency has taken reasonable steps to locate documents.

FREEDOM OF INFORMATION - refusal of access - documents relating to an investigation under the *Gas Standards Regulations 1983* - clause 5(1)(b) - law enforcement - draft documents - clause 6(1) - deliberative process - whether disclosure is contrary to the public interest.

Freedom of Information Act 1992 (WA) ss. 72(1)(b), 74(2), 75(1), 102(1); Schedule 1 clauses 5(1)(b), 5(4)(a), 5(5), 6(1).

Gas Standards Act 1972 (WA)

Gas Standards Regulations 1983 (WA) regulations 20, 21.

Library Board of Western Australia Act 1951 (WA)

Re Brown and Police Force of Western Australia (Information Commissioner, WA, 14 July 1995, unreported).

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

Police Force of Western Australia v Kelly and Smith (Supreme Court of Western Australia, 30 April 1996, unreported, Library No. 960227).

Re Titelius and Ministry of Justice (Information Commissioner, WA, 18 June 1996, unreported).

Re Coastal Waters Alliance of Western Australia Incorporated and Department of Environmental Protection and Another (Information Commissioner, WA, 28 September 1995, unreported).

DECISION

The decision of the agency is varied. In substitution it is decided that:

- (i) Documents 28, 33 and 34 are exempt under clause 5(1)(b) of Schedule 1 to the *Freedom of information Act 1992*; and
- (ii) Documents 6, 19, 20 and 21 are not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

10th 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 Office of Energy ('the agency') to refuse Combustion Air Pty Ltd ('the complainant') access to various documents sought by the complainant pursuant to the provisions of the *Freedom of Information Act 1992* ('the FOI Act').
2. On 1 January 1995, the State Electricity Commission of Western Australia (SECWA) was replaced by two separate new agencies, Western Power and Alinta Gas. In addition, on 1 January 1995, the agency was formed and assumed control over the staff and functions of the Energy Policy and Planning Bureau, formerly a sub-department of the Department of Resources Development, and of the Regulatory Services Branch of SECWA.
3. The agency is responsible for policy advice, coordination and industry regulation, including technical and safety regulation, and reports to the Minister for Energy. The agency also acts as adviser to the Minister for Energy, at a strategic level, in the Minister's capacity as the representative owner of the two corporatised energy businesses, Western Power and Alinta Gas. The 1995 Annual Report of the agency discloses that the agency comprises 4 Divisions - Policy and Agreements, Industry Development, Energy Innovation and Technical and Safety. The Gas Inspection Branch of the Technical and Safety Division investigates reports of serious gas accidents; audits industry work practices; audits technical standards of utilities and independent gas producers, and monitors the activities of installation inspectors and gas fitters employed by gas utilities.
4. The complainant is a manufacturer of industrial gas appliances. In April 1995, as a result of an advertisement for the sale of an industrial appliance which was placed by the complainant in a trade magazine, a dispute arose between the agency and the complainant as to potential breaches of the *Gas Standards Regulations 1983* ('the Gas Regulations'). In the course of that dispute, on 2 June 1995, solicitors for the complainant applied to the agency under the FOI Act, seeking access to, *inter alia*, documents "...relating to the decision by [the agency] to review and/or monitor the status of products sold by [the complainant]."
5. On 3 July 1995, the agency provided the complainant with access to some documents that it had identified as falling within the ambit of the complainant's access application. However, access was refused to a number of other documents on the grounds that those documents are exempt under clauses 5(1)(b) and 6(1) of Schedule 1 to the FOI Act.

6. The complainant sought internal review of the agency's initial decision that the documents contained exempt matter. As a result of the internal review, the agency located 62 additional documents and listed and described those documents on a schedule provided to the complainant. The agency granted the complainant access to all but 7 of those documents, access being refused on the basis of the exemptions contained in clauses 5(1)(b) and 6(1).
7. On 2 November 1995, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision to refuse access to 7 documents. Further, the complainant also complained that there are other documents in the possession of the agency which are within the ambit of its access application which have not been identified by the agency and to which access is accordingly taken to have been refused.

REVIEW BY THE INFORMATION COMMISSIONER

8. On 15 November 1995, I notified the agency that I had received a complaint against its decision and, pursuant to my powers under ss.75(1) and 72(1)(b) of the FOI Act, I sought the production to me of the documents in dispute, together with the file maintained by the agency in respect of this matter.
9. One of my officers met with representatives of the agency and the complainant on separate occasions to clarify the matters in dispute between the parties. The complainant raised a number of issues relating to the existence of documents not identified by the agency. Those concerns were put to the agency and, in the course of conducting further searches, the agency located some additional documents. Although the agency is of the view that the additional documents it subsequently located are outside the ambit of the original access application, copies of those documents were provided to the complainant. However, in respect of other documents, the searches by the agency were not successful.
10. After examining the disputed documents and the material before me, on 30 May 1996, I provided the parties with my preliminary view and reasons for that view. It was my preliminary view that the searches conducted by the agency were, in all the circumstances, reasonable. In respect of the 7 documents remaining in dispute, it was my preliminary view that 3 documents may be exempt under clause 5(1)(b), but that 4 documents for which exemption was claimed under clause 6(1) may not be exempt. I received further submissions from the parties in support of their respective claims after providing my preliminary view, with neither party making any further concessions. Therefore, this decision concerns two issues. The first is the sufficiency of the searches conducted by the agency to locate all the documents of the agency which are within the ambit of the access application. The second issue for my determination is the exempt status or otherwise of the 7 disputed documents.

THE SUFFICIENCY OF THE SEARCHES

11. If a complainant raises the issue of the existence of additional documents which have not been identified by the agency, in my opinion, the first question to be answered is whether the agency has identified all of the documents in its possession which fall within the ambit of the access application. In this case the answer to that question involves an assessment of the interpretation of the ambit of the access application taken by the agency, as well as an assessment of the searches undertaken by the agency.
12. A number of the issues raised by the complainant in the application for external review concerning the sufficiency of the searches conducted by the agency, in my view, constitute a request for information rather than a request for access to documents. As I have discussed in previous decisions, an agency is not obliged under the FOI Act to create a document in order to satisfy an access application: *Re Brown and Police Force of Western Australia* (14 July 1995, unreported). Therefore, in assessing the ambit of the access application and the sufficiency of the searches conducted by the agency, I am limited to a consideration of existing documents of the agency.
13. With respect to the complainant's view that the agency has not identified all relevant documents, the complainant contends that additional documents must exist in the agency. Such a claim is based on a broad interpretation of its access application.
14. The complainant's solicitors submit that the access application relates to products of the type sold by the complainant, but not necessarily limited to the particular appliances manufactured or supplied by the complainant. However, the agency interpreted the request made by the complainant for access to documents relating to the "*status of the products sold by [the complainant's] business*" as being a reference to documents relating to the particular products sold by the complainant. Accordingly, in dealing with the access application, the agency limited the application to documents relating to the complainant, and excluded documents relating to the affairs of other manufacturers or suppliers of gas appliances.
15. In my view, it was open to the agency to construe the access application as being a request for access to documents concerning the particular products sold by the complainant, rather than a request for access to documents concerning products of a similar type sold by other businesses. It is not, in my view, apparent on the face of the access application that what was sought by the complainant was general documentation on any policy or legislative monitoring or review processes relating to the *Gas Standards Act 1972* ('the Gas Act') or the Gas Regulations. If access to documents of that type was specifically sought by the complainant, as contended for by the complainant's solicitors, then it was open for the access application to expressly request access to those types of documents. Further, the matter does not appear to have been raised by the complainant with the agency during the processing of the access application and internal review.

The agency's record-keeping practices

16. As I have said previously, where a question for determination is the sufficiency of the searches for documents requested by an access applicant, I must decide whether there are reasonable grounds to believe that the requested documents exist or should exist, and, if that question is answered in the affirmative, then the failure to give access to those documents or to refer to them at all amounts to a deemed refusal of access on the basis that the documents do not exist or cannot be found. In those circumstances, I must consider whether the searches conducted by the agency to locate those documents are reasonable in all the circumstances. In this case, I consider that it is relevant in determining that issue to examine the record-keeping practices of the agency.
17. I am informed by the agency that, when it was created as a separate agency on 1 January 1995, many original documents relating to past approvals of gas appliances which originated in SECWA remained within Alinta Gas. However, some documents were brought into the agency's record-keeping system at the discretion of staff transferring to the agency from SECWA. A formal records system was established in the agency approximately 3-4 months following the agency's creation and, at that stage, documents held by officers of the agency were incorporated into the formal record-keeping system.
18. In order to locate documents within the ambit of the complainant's access application as interpreted by the agency, the agency searched files relating to the complainant identified from the file index of the agency. A search of the offices of staff who had dealt with the complainant since 1 January 1995 was also undertaken. All documents located as a result of those searches were listed on the agency's schedule and disclosed to the complainant following internal review.
19. I am informed by the agency that officers who have had dealings with the complainant confirm that, with respect to their dealings with the complainant, no documents other than those identified on the schedule which are within the terms of the complainant's access application exist in the agency. I am also informed by the agency that no documents were created following many of the discussions involving officers of the agency relating to the complainant. In the course of the external review, the complainant's solicitor was given an explanation in respect of the searches undertaken by the agency and the results of those searches, and other requests for information and explanations concerning various issues raised by the complainant were also answered by the agency.
20. Based on the material before me, I do not consider that the assertion of the complainant as to the existence of additional documents is reasonable, bearing in mind the interpretation of the access application taken by the agency. Further, I am satisfied that the searches conducted by the agency were, in all the circumstances, reasonable. Accordingly, I confirm the agency's deemed refusal of access to any other documents within the ambit of the access application on the ground that those documents either do not exist or cannot be found.

THE DISPUTED DOCUMENTS

21. There are 7 documents remaining in dispute between the parties. Those documents are described below using the numerical system used by the agency on its schedule of documents.

Document	Description	Exemption claimed
6	Unsigned and undated draft letter from Minister for Energy to complainant.	6
19	Unsigned and undated draft letter from Minister for Energy to complainant.	6
20	Draft memorandum dated 15/5/95 from Coordinator of Energy to Minister for Energy, unsigned.	6
22	Unsigned and undated draft letter from Minister for Energy to complainant.	6
28	Facsimile message dated 23/5/95, from Alinta Gas, Engineering Branch, to agency.	5(1)(b)
33	Letter dated 12 April 1995 from Utilisation and Approvals Coordinator, Alinta Gas to agency.	5(1)(b)
34	Copy of internal memorandum of Alinta Gas dated 11/4/95.	5(1)(b)

THE EXEMPTIONS

(a) Clause 5(1)(b)

22. Clause 5, so far as is relevant, provides:

“5. Law enforcement, public safety and property security

Exemptions

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

(a)...

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

...
Limits on exemptions

(4) *Matter is not exempt matter under subclause (1) or (2) if -*

(a) *it consists merely of one or more of the following -*

(i) *information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by the law;*

(ii) *a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law; or*

(iii) *a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law;*

and

(b) *its disclosure would, on balance, be in the public interest.”*

Definitions

(5) *In this clause -*

...
“the law” *means the law of this State, the Commonwealth, another State, a territory or a foreign country or state.”*

23. The scope and meaning of the exemption in clause 5(1)(b) has been considered by the Supreme Court of Western Australia in *Manly v Ministry of Premier and Cabinet* (15 June 1995, unreported, Library No. 950310) and *Police Force of Western Australia v Kelly and Smith* (30 April 1996, unreported, Library No. 960227). In *Manly v Ministry of Premier and Cabinet* Owen J. said, at page 25, that in order to be exempt under clause 5(1)(b) a document “...*must reveal something about the content of the investigation*”. In *Police Force of Western Australia v Kelly and Smith*, Anderson J., after referring to the decision in *Manly*, said, at page 9:

“...documents which reveal that there is an investigation, the identity of the people being investigated and generally the subject matter of the investigation probably would satisfy the requirement stipulated by Owen J. that the document “must reveal something about the investigation”.”

24. At pages 12 and 13 of the decision of *Police Force of Western Australia*, His Honour said that “[o]nce it appears that disclosure of the matter could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case, the matter is exempt...”. Although both of those cases involved police investigations and possible contraventions of the criminal law, I consider the comments to be applicable to the matter presently before me.
25. There is nothing in clause 5(1)(b) itself or elsewhere in the FOI Act which limits the operation of that clause to police investigations of possible contraventions of the criminal law. In my view, based on the comments of Anderson J. in *Police Force of Western Australia*, and the definition of “the law” in clause 5(5) of Schedule 1 to the FOI Act, I consider that the Gas Regulations is law to which clause 5(1)(b) may apply.
26. The agency claims that Documents 28, 33 and 34 if disclosed, would reveal the essential matter which formed the basis of the agency’s investigation into a possible contravention by the complainant of regulations 20 and 21 of the Gas Regulations. The complainant submits that the exemption under clause 5(1)(b) should not be available to an agency which is itself acting unlawfully, and clause 5(1)(b) could not exempt material relating to an illegal investigation. The complainant’s solicitor submits that the complainant manufactures component parts for industrial gas fired appliances and, according to the definition of “appliances” in the gas regulations, the complainant does not sell, hire or advertise “gas appliances”. Therefore, to the extent that the investigation by the agency relates to a breach or possible breach of the Gas Regulations by the complainant, the solicitor submits that the exercise by the agency of powers under the Gas Act is an illegal exercise of those powers.
27. Although, having regard to my obligations under s.74(2) of the FOI Act, I am unable to discuss the contents of Documents 28, 33 and 34 in any detail, I consider that the agency’s notice of decision provided to the complainant following internal review provides sufficient explanation of the basis of the claim for exemption under clause 5(1)(b). I am satisfied, from my own examination of Documents 28, 33 and 34, that their disclosure could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law in this particular case, even though no prosecution or disciplinary proceedings have resulted.
28. As I observed in *Re Titelius and Ministry of Justice* (18 June 1996, unreported), at paragraph 23, clause 5(4) operates to limit the exemption in clause 5(1)(b) if the matter claimed to be exempt is information of the kind described in clause 5(4)(a)(i), (ii) or (iii) and its disclosure would, on balance, be in the public interest. The complainant has not claimed - and, having inspected the documents, I do not consider - that the documents contain matter of the kind described in subparagraphs (ii) or (iii) of clause 5(4)(a). Accordingly, in light of the solicitor’s claims, clause 5(4) will only operate as a limit on the exemption in clause 5(1)(b) if the disputed documents contain matter consisting merely of information revealing that the scope of a law enforcement investigation has

exceeded the limits imposed by the law and its disclosure would, on balance, be in the public interest. If the disputed documents do not contain matter of that description, clause 5(4) will not apply and there will be no scope for my consideration of whether disclosure would, on balance, be in the public interest.

29. Although the submissions made on behalf of the complainant indicate that the complainant disagrees with the basis on which the investigation was conducted by the agency, no evidence was placed before me to support the view that the scope of the investigation had exceeded the limits imposed by the law. Further, I have examined the disputed documents. I am satisfied that Documents 28, 33 and 34 do not contain matter revealing that the investigation by the agency has exceeded any limits imposed by the law. Whether the Gas Regulations are applicable to the complainant in this instance is not an issue for my determination, and that claim alone does not found a sufficient basis for a finding that the limitation in clause 5(4) applies. In my view, clause 5(4) does not arise for my consideration in this instance because Documents 28, 33 and 34 do not contain matter of the type described in clause 5(4)(a)(i). Accordingly, I find that Documents 28, 33 and 34 are exempt documents under clause 5(1)(b) of Schedule 1 to the FOI Act.

(b) Clause 6

30. The agency claims that Documents 6, 19, 20 and 22 are exempt under clause 6(1) of Schedule 1 to the FOI Act. 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.”

31. To establish an exemption under clause 6, an agency must satisfy the requirements of both paragraphs (a) and (b) of the exemption. If the disputed document contains matter of a type described in paragraph (a), then it is necessary to consider the requirement of paragraph (b), that is, whether the disclosure of the document would, on balance, be contrary to the public interest. Pursuant to section 102(1) of the FOI Act, the onus is on an agency to establish that the requirements of clause 6(1)(b) have been met.
32. Documents 6, 19 and 22 are draft letters from the Minister for Energy to the complainant. Document 20 is a draft memorandum from the agency to the Minister for Energy enclosing a draft letter.
33. All records created or received by an officer of an agency in the course of his or her public duties are deemed to be public records and are covered by the *Library Board of Western Australia Act 1951*. A publication issued in 1995 by the Public Records Office of Western Australia entitled "*Public Records Management - A Guide to Normal Administrative Practice*" ('the guidelines') contains important guidelines for establishing standards of "best practice" with respect to record management in the public sector agencies.
34. Part 3.6 of the guidelines deals with draft records as follows:

"A draft record is the preliminary form of any writing that has been formally submitted to another officer for comment or revision. Draft records include preparatory notes and calculations and earlier versions of significant documents, the final versions of which become the official statement, policy or decision of an organisation.

Drafts of significant documents may be of administrative, fiscal, legal, evidential or historical value. Draft documents are public records and, as such, are subject to the same conditions as any other public record..."

It is clear that draft documents form part of an agency's records, and are accessible under the FOI Act, subject to any exemption being established.

6(1)(a)

35. I am satisfied from my own examination of Documents 6, 19, 20 and 22 that they contain advice, opinion and recommendations prepared for the purposes of the deliberative processes of the Minister for Energy. That is, I am satisfied that the documents contain matter of the type referred to in clause 6(1)(a).

6(1)(b) - The agency's submissions

36. The agency claims that the draft letters and the memorandum were not sent to the Minister, were not signed by the nominated signatory and were not sent to the complainant. The agency claims that the documents cannot be taken to be an

accurate representation of the views of the Minister, and nor are they necessarily representative of the final views of the officer of the agency who drafted each document. Further, the agency claims that the release of documents which are for internal purposes and which do not necessarily represent the views of the intended signatory is highly likely to lead to confusion and uncertainty.

37. Although the agency agrees that it is in the public interest that members of the community have access to information about the process of government decision-making, the agency claims that the disclosure of these draft documents will not assist the achievement of that objective. The agency contends that, therefore, disclosure of draft documents is contrary to the public interest.
38. As I have said, at paragraphs 33 and 34 above, draft documents such as those in dispute in this matter form part of the public record of how the agency dealt with a particular matter. That record includes the advice to, and suggested responses prepared for the Minister, whether or not the Minister ultimately accepted the advice provided or sent the suggested responses, and includes the response ultimately sent by the Minister. In my view, the fact that documents to which access is sought may not contain a true and accurate representation of the views of government agencies or Ministers as the case may be is not sufficient of itself to render their disclosure contrary to the public interest. To the extent that the contents of a document may be misleading, out of date or inaccurate, those facts may be relevant to a consideration of where the balance of the public interest should lie in particular circumstances. However, I do not consider the mere fact that documents are draft documents is sufficient to justify a finding, on that fact alone, that it would be contrary to the public interest to disclose such documents. In my view, such a conclusion is a simplistic view of the public interest and it ignores other competing interests, including the right of access granted by the FOI Act.

The public interest

39. I recognise that there is a public interest in maintaining the ability of agencies to function properly and that includes officers of agencies being able to draft and redraft documents on behalf of Ministers and senior managers. I am aware that such a practice is commonplace and a routine administrative occurrence. I also recognise that there is a public interest in a Minister being able to obtain from officers of an agency a wide range of advice and information in order that he or she be adequately informed of matters that come before him or her for attention. In the matter before me, there is no evidence other than the assertions of the agency that disclosure of Documents 6, 19, 20 and 22 would jeopardise those public interests.
40. I recognise that there is a public interest in members of the community having access to information about the processes of government decision-making. That public interest is embodied in the objects and principles of the FOI Act. I discussed the application of those principles and clause 6(1) with respect to the disclosure of draft documents in my decision in *Re Coastal Waters Alliance of*

Western Australia Incorporated and Department of Environmental Protection and Another (28 September 1995, unreported). I remain of the view that, except in circumstances where essential public and private interests may be harmed by disclosure of documents, the general right of access in the FOI Act is a strong public interest in favour of disclosure.

41. I repeat my observations, expressed at paragraph 34 in *Re Coastal Waters Alliance of Western Australia*, that it is not sufficient to claim exemption on the grounds that the disclosure of draft documents would lead to confusion and uncertainty. Not only is there no material before me in this case to support such a claim, I do not accept the inference to be drawn from such a claim that the public is unable to recognise the difference between a draft document that is unsigned and a document that is signed and despatched to an addressee. In any event, it is within the scope and power of the agency to release other information, whether by way of a press release or other documents, to counter any confusion or uncertainty that may exist following disclosure under the FOI Act.
42. Therefore, I am not satisfied that disclosure of Documents 6, 19, 20 and 22 would, on balance, be contrary to the public interest. Accordingly, I find that Documents 6, 19, 20 and 22 are not exempt under clause 6(1) of Schedule 1 to the FOI Act. As there is nothing in the documents themselves and no other material before me which suggests that they may be exempt for any other reason, I find that they are not exempt.
