

## KOBELKE AND MIN. PLANNING

OFFICE OF THE INFORMATION  
COMMISSIONER (W.A.)

File Ref: 96055  
Decision Ref: D04396

Participants:

**John Charles Kobelke**  
Complainant

- and -

**Minister for Planning**  
Respondent

### DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - request for access to documents relating to planning appeal - documents of an agency when the agency is a Minister - clause 4(2) of the Glossary in Schedule 2 - whether documents "relate to the affairs of" an agency other than the Minister.

FREEDOM OF INFORMATION - clause 7 - legal professional privilege - request for legal advice from the Attorney General - salaried legal officers - clause 8(2) - confidential communications - whether information is information of a confidential nature obtained in confidence - prejudice to future supply - clause 6(1) - deliberative processes of agency - whether disclosure is contrary to the public interest - clause 3(1) - personal information about third parties - public interest factors for and against disclosure.

*Freedom of Information Act 1992 (WA)* ss. 3, 10(1), 72(1)(b), 75(1), 102; Schedule 1 clauses 3, 4(3), 6(1), 7, 8(2), 11(1)(a) & 11(1)(b); Glossary in Schedule 2 clauses 1, 4(2).

*Freedom of Information Act 1982 (Cwth)* s. 4(1).

*Town Planning and Development Act 1928 (WA)* ss. 39(1), 40(3).

*Re Taweel and Minister for Planning* (Information Commissioner, WA, 27 March 1996, unreported).

*Re Wiseman and Department of Transport* (1985) 4 AAR 83.

*Re Said and John Dawkins MP* (1993) 30 ALD 242.

*Attorney-General (N.T.) v Kearney* (1985) 158 CLR 500.

*Waterford v The Commonwealth* (1987) 163 CLR 54.

*Grant v Downs* (1976) 135 CLR 674.

*Re Kobelke and Minister for Planning and Others* (Information Commissioner, WA, 27 April 1994, unreported).

*Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported).

*Attorney General's Department v Cockcroft* (1986) 10 FCR 180.

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

## DECISION

The decision of the agency is set aside. In substitution it is decided that the requested documents are “documents of an agency” as defined in clause 4(2) of the Glossary in Schedule 2 to the *Freedom of Information Act 1992* and, accordingly, are documents to which that Act applies. Further, it is decided that:

- (i) Document 11 is exempt under clause 7;
- (ii) the parts of Documents 8, 9, 19, 20, 23 and 25 described in paragraph 59 of these reasons for decision are exempt under clause 3(1);
- (iii) the remaining parts of Documents 8 and 9 (excluding those parts described in paragraph 12 of these reasons for decision to which the complainant does not seek access) are not exempt;
- (iv) the remaining parts of Documents 19, 20, 23 and 28 are not exempt; and
- (v) Documents 10, 17, 18 and 25 are not exempt.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

22nd 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 Minister for Planning ('the Minister') to refuse Mr Kobelke MLA ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. In February 1994, an appeal was lodged with the Minister by Searsport Pty Ltd ('Searsport') against a planning decision of the City of Stirling ('the City') to refuse approval for the development of a McDonalds Family Restaurant on Lot 101 Scarborough Beach Road, Innaloo. The Minister, acting in his capacity as a body authorised under the *Town Planning and Development Act 1928* to determine such appeals, upheld the appeal by Searsport following his consideration of the appeal documents which included, *inter alia*, a report prepared by a member of the Town Planning Appeal Committee ('the TPAC').
3. On 12 February 1996, the complainant lodged with the Minister an access application under the FOI Act seeking access to the planning appeal file relating to the appeal lodged by Searsport. On 27 March 1996, the Minister refused the complainant access to the requested documents on the ground that the documents are not "documents of an agency" as defined in clause 4(2) of Schedule 2 to the FOI Act. That is, access was refused on the basis that the complainant has no right of access under the FOI Act to the requested documents. The Minister claimed, in the alternative, that the documents are exempt documents under clauses 3(1), 6(1), 8(2) and 11(1)(a) and 11(1)(b) of Schedule 1 to the FOI Act.
4. On 1 April 1996, the complainant lodged a complaint with the Information Commissioner seeking external review of the Minister's decision.

### REVIEW BY THE INFORMATION COMMISSIONER

5. On 4 April 1996, I notified the Minister that I had received this complaint 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 FOI file maintained by the Minister in respect of this matter. Those documents were delivered to my office on 12 April 1996.
6. After examining the documents and the submissions of the parties, and considering the decision and reasons for decision of the Acting Information Commissioner in *Re Taweel and Minister for Planning* (27 March 1996, unreported), on 9 May 1996, I provided the parties with my preliminary view and my reasons for that view. It was my preliminary view that, for similar reasons to those given in the decision in *Re Taweel*, the documents to which the

complainant seeks access are “documents of an agency” within clause 4(2) of the Glossary in Schedule 2 to the FOI Act, so that the documents can be the subject of an access application under the FOI Act. Further, it was my preliminary view that the requested documents contain some matter which may be exempt under clause 3(1) of Schedule 1 to the FOI Act. However, it was my preliminary view that the documents did not contain any matter which is exempt under clauses 6(1), 8(2) or 11(1) of Schedule 1.

7. I received further submissions from both parties in response to my preliminary view. Following further negotiations, the complainant withdrew his claim for access to a number of the documents in dispute because he had already obtained copies of those documents from the City. He also withdrew his claims in respect of other documents of an administrative nature, and his claims for 2 documents which I considered to be exempt under clause 7 of Schedule 1 to the FOI Act. However, the complainant maintains his claim for access to the remainder of the documents, which number 11 in total.
8. The Minister maintains his claim that the disputed documents are not “documents of an agency” within the terms of the FOI Act. Further, the Minister maintains his claims for exemption relating to certain matter under clauses 3(1), 6(1), 7 and 8(2). However, the Minister withdrew his claims for exemption under clauses 11(1)(a) and 11(1)(b).
9. I also sought and received submissions from other parties who were likely to be affected by a decision made upon this complaint, regarding whether certain matter in the disputed documents is exempt matter under clause 4 of Schedule 1.
10. Following receipt of additional information and submissions from one of the third parties, I informed the parties to this complaint that it was my preliminary view that certain of the matter in Documents 8 and 9 is exempt under clause 4(3) of Schedule 1 to the FOI Act. Following being informed of that view, the complainant withdrew his complaint in respect of that matter.

## THE DISPUTED DOCUMENTS

11. The documents to which the complainant maintains his claim for access (‘the disputed documents’), numbered in accordance with the schedule prepared by the Minister, are described as follows:

Document	Description
8	Letter dated 10/5/94 to TPAC member on behalf of Searsport (except those parts specified in paragraph 12 below).
9	Report dated 28/6/94 from TPAC member to the Minister (except those parts specified in paragraph 12 below).
10	Addendum to report dated 21/7/94 from TPAC member to the Minister.

- 11 Copy letter dated 21/7/94 from the Minister to the Attorney General seeking legal advice.
- 17 Facsimile message dated 16/9/94 from the City to TPAC member.
- 18 Copy memorandum dated 20/9/94 from TPAC member to officer of the Minister's office.
- 19 Letter dated 7/9/94 from McDonald's Australia Ltd to the Minister.
- 20 Letter dated 29/9/94 from the Minister to McDonald's Australia Ltd.
- 23 Report dated 17/10/94 from TPAC member to the Minister.
- 25 Original of document 18.
- 28 Facsimile message dated 3/4.95 to an officer of the Minister's office on behalf of Searsport.

12. The matter in Documents 8 and 9 in respect of which the complainant has withdrawn his complaint is:

- the second and third paragraphs of the text on page 1 and the two tables on page 2 of Document 8; and
- the third to twelfth words inclusive of the thirty sixth line and the first eight words of the thirty seventh line on page 15 of Document 9.

As the complainant no longer seeks access to that matter, it is no longer in dispute and is not dealt with in this decision or these reasons for decision.

## DOCUMENTS OF AN AGENCY

### The right of access

13. Section 10(1) of the FOI Act gives every person a right of access to documents of an agency (other than an exempt agency). In accordance with the definition of "agency" in clause 1 of the Glossary in Schedule 2 to the FOI Act, a Minister is an "agency" for the purposes of the FOI Act. Clause 4(2) of the Glossary defines "documents of an agency" with specific reference to the situation where an applicant is seeking access to documents of a Minister. Clause 4(2) provides:

*"(2) Where the agency is a Minister a reference to a document of an agency is a reference to a document that -*

*(a) is in the possession or under the control of the Minister in the Minister's official capacity; and*

*(b) relates to the affairs of another agency (not being another Minister),*

*and includes a document to which the Minister is entitled to access and a document in the possession or under the control of a member of the staff of the Minister as such a member, but does not include a document of an agency for which the Minister is responsible.”*

14. Thus, the FOI Act sets out the statutory criteria which must be satisfied in order for documents in the possession or under the control of a Minister to be accessible under the FOI Act. The requirements of clause 4(2) mean that the documents must be in the possession or under the control of a Minister in his or her official capacity, with the further requirement that the documents must also relate to the affairs of another agency, not being another Minister.

#### **Documents in the possession or under the control of a Minister in his or her official capacity**

15. I am informed by the Minister that the disputed documents are in his possession because the functions he performs under the *Town Planning and Development Act 1928* include the determination of appeals lodged with him against planning decisions of local government agencies. Accordingly, the Minister does not dispute the fact that the documents are in his possession in his official capacity as the Minister for Planning.

#### **Documents that relate to the affairs of another agency**

16. The Minister submits that the documents requested by the complainant relate only to the affairs of the Minister in that they relate to the exercise of his appellate powers under the *Town Planning and Development Act 1928*. The Minister contends that the documents do not relate to the affairs of any agency other than those of the Minister, and that no agency other than the Minister is entitled to access those documents.
17. The issue of whether documents held by the Minister concerning a planning appeal can be said to be documents that “relate to the affairs of another agency” as required by clause 4(2) was considered by the Acting Information Commissioner in the decision of *Re Taweel*. That case involved an application for access to documents in the possession of the Minister for the purpose of an appeal from a planning decision made by the City of Canning. At paragraphs 10-37 of *Re Taweel*, the Acting Information Commissioner discussed the question of whether the documents in dispute in that matter were documents of an agency. In that instance, the Acting Information Commissioner determined that the documents related to the affairs of a local government agency and were, therefore, documents which were able to be the subject of an access application under the FOI Act. With respect, I agree with that determination and the reasons

for the decision of the Acting Information Commissioner in that matter, and I adopt those reasons in this instance.

18. In my view, the phrase “relates to the affairs of” in clause 4(2) denotes a relationship between two or more things. I consider that those words should be interpreted in the context in which they are found and in accordance with the object and intent of the FOI Act set out in s.3 of that Act. Taking into account those objects and intent and the fact that Parliament clearly intended certain documents held by a Minister to be accessible under the FOI Act, I am of the view that the phrase “relates to the affairs of” should be given a broad interpretation: see *Re Wiseman and Department of Transport* (1985) 4 AAR 83.
19. I am satisfied that it is not necessary, in order for documents to relate to the affairs of another agency within the terms of clause 4(2), that the other agency should be entitled to access those documents. Rather, clause 4(2)(b) requires simply that, to be potentially accessible under the FOI Act, documents in the possession or under the control of a Minister in his or her official capacity must also relate to the affairs of another agency (other than another Minister).
20. In my view, the requirement that the documents relate to the affairs of another agency (other than another Minister) excludes from the operation of the FOI Act, personal documents and documents of a party political kind and those that concern the Minister as a Member of Parliament. I do not consider that Parliament intended for those kinds of documents to be accessible under that Act.
21. I consider my view on that issue is supported by the decision of the Commonwealth Administrative Appeals Tribunal (‘the Tribunal’) in *Re Said and John Dawkins MP* (1993) 30 ALD 242. In that case, the applicant sought access under the Commonwealth *Freedom of Information Act 1982* (‘the Commonwealth Act’) to certain documents held by the respondent. The documents requested by the applicant consisted of documents held by the respondent at his electorate office pertaining to various enquiries made by the applicant, as a constituent of the respondent, over a period of years dating back to the respondent’s election to parliament in 1977.
22. In the Commonwealth Act the right of access is limited to “a document of an agency” or to “an official document of a Minister”. Section 4(1) of the Commonwealth Act defines “official document of a Minister” as follows:

*“...official document of a Minister means a document in the possession of a Minister, or in the possession of the Minister concerned, as the case requires, in his capacity as a Minister, being a document that relates to the affairs of an Agency or a Department of State.”*
23. In the course of its decision in *Re Said*, the Tribunal referred to the explanatory memorandum to the Senate which accompanied the Commonwealth Freedom of Information Bill 1981, which states at page 4:

*“Official document of a minister is defined as a document in the possession of a minister that relates to the affairs of an agency or department of State. It does not include documents of a party political or personal kind, or that relate to a minister’s activities as a member of parliament.”* (My emphasis).

The Tribunal took this into account in the course of determining that the documents sought by the respondent were not official documents of a Minister.

24. I am satisfied, in accordance with the discussion at paragraphs 20-33 in *Re Taweel*, that the definition in clause 4(2) of Schedule 2 to the FOI Act is directed at similar issues to those identified in the definition of “*an official document of a Minister*” in the Commonwealth Act. Further, the types of documents which, in accordance with the discussion in the explanatory memorandum cited in paragraph 24 above, are not considered to be accessible under the Commonwealth Act are not, in my view, accessible under clause 4(2) of Schedule 2 to the FOI Act.
25. Further, I do not consider that documents that relate to the affairs of one agency cease to be documents of that kind because they also relate to the affairs of another agency. Therefore, although the disputed documents may relate to the affairs of the Minister, I am satisfied that those documents also relate to the affairs of the City, an agency as defined in the FOI Act. Accordingly, I am satisfied that the disputed documents are documents of an agency, being the Minister, within the terms of clause 4(2) and the complainant has a right to be given access to those documents subject to and in accordance with the FOI Act.

## THE EXEMPTIONS

### (a) Clause 7

26. The Minister claims that Document 11 is exempt under clause 7. Clause 7 provides:

*"7. Legal professional privilege*

#### *Exemption*

*(1) Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege."*

27. Document 11 is a request from the Minister to the Attorney General for legal advice from the Crown Solicitor’s Office. Legal professional privilege applies to, *inter alia*, confidential communications between a client and his or her professional legal adviser for the purpose of obtaining or giving legal advice or assistance.



28. The High Court of Australia has decided that legal professional privilege may be claimed by the Crown: *Attorney-General (N.T.) v Kearney* (1985) 158 CLR 500. It was accepted by the High Court in *Waterford v The Commonwealth* (1987) 163 CLR 54 that a letter from the Commonwealth Attorney-General to the Commonwealth Treasurer containing the Attorney-General's professional legal opinion in respect of a matter could attract legal professional privilege provided that it was created for the sole purpose of giving or receiving legal advice. That case is authority that communications between government instrumentalities and their salaried legal officers will be privileged provided that they meet the "sole purpose test" established in *Grant v Downs* (1976) 135 CLR 674.
29. Accordingly, it is clear that confidential communications between an agency or a Minister and the Crown Solicitor's Office for the sole purpose of giving or seeking legal advice will be privileged. I understand, however, that it is the convention in Government that such a request by a Minister is made through the Attorney-General.
30. I accept, therefore, that the requisite solicitor and client relationship arises when a Minister seeks legal advice from the Attorney-General, the senior law officer in the State. Whether the advice provided is provided by the Crown Solicitor or by the Attorney-General, I consider that it will be privileged if the sole purpose of its creation is to give legal advice. I am satisfied that a request from the Minister for legal advice would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that Document 11 is exempt under clause 7 of Schedule 1 to the FOI Act.

**(b) Clause 8(2)**

31. The Minister claims that documents 9 and 10 are exempt under clause 8(2). Clause 8, so far as is relevant, provides:

**"8. Confidential communications**

(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**

...

(4) *Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."*

32. Document 9 is a 17 page report prepared by the TPAC member and submitted to the Minister for his consideration. Document 10 is a 3 page addendum to the TPAC member's report submitted to the Minister in order to clarify aspects of the parking situation relating to the land the subject of the appeal before the Minister.
33. In order to maintain a claim for exemption under clause 8(2) for Documents 9 and 10, it must be established that the disclosure of the information in those documents would reveal information of a confidential nature obtained in confidence and also that disclosure could reasonably be expected to prejudice the future supply of that kind of information to the Minister. If those elements of the exemption are established, then consideration must be given to whether clause 8(4) operates to limit the exemption, that is, whether disclosure would, on balance, be in the public interest.

#### **8(2)(a) - Confidential information obtained in confidence**

34. Information is inherently confidential if it is not in the public domain. That is, the information must be known only by a small number or limited class of persons. Further, where the person supplying the information specifically requests that the information should not be disclosed, and the person receiving it agrees, or there is an implicit understanding by both parties, then an obligation of confidence arises.
35. The Minister submits that TPAC members accept that their reports to him are confidential. Based on my examination of Documents 9 and 10, I am not satisfied that either document contains confidential information communicated in confidence. The Minister has not identified any particular information which is claimed to be confidential. Rather, he claims exemption for the whole of each report. Although the reports may be given to and received by the Minister in circumstances of an understanding of confidentiality, not all of the information contained in the documents is, in my view, confidential in nature. Some the information in the documents is factual information describing the zoning characteristics of the land in question and detailing the history of the City's dealing with the planning application. I do not consider that type of information to be confidential in the sense described in clause 8(2)(a).

#### **8(2)(b) - Prejudice to the future supply of that kind of information to the Minister**

36. However, even if I were persuaded that the documents contain matter of the type referred to in clause 8(2)(a), the only material before me to satisfy the requirements of clause 8(2)(b) is the claim by the Minister that he is assured by the members of the TPAC that disclosure would prejudice the future supply of that kind of information.

37. The TPAC is a statutory committee consisting of 18 members with professional expertise in town planning, engineering and related matters who are appointed to assist the Minister in determining appeals made to him under s.39(1) of the *Town Planning and Development Act 1928*. Pursuant to s.40(3) of that Act, the Minister may require a member of the TPAC to consider and report and make a recommendation to him on an appeal, and the Minister, after considering the report and the recommendation made, shall determine the appeal.
38. As I outlined in my decision in *Re Kobelke and Minister for Planning and Others* (27 April 1994, unreported), at paragraphs 55-58, the Minister determines an appeal based upon information provided to him by an appellant, interested members of the public and the TPAC member. The Minister may also take into account factors that are personal to an appellant. In my view, it is clearly of assistance to the Minister in deciding an appeal to have advice and a recommendation from the TPAC member available to him. However, information in documents 9 and 10 will only be exempt matter if it is of the type described in clause 8(2)(a) and its disclosure could reasonably be expected to prejudice the future supply of information of that kind to the government or to an agency.
39. The meaning of the phrase "could reasonably be expected to" was considered by Owen J in a decision of the Supreme Court of Western Australia, *Manly v Ministry of Premier and Cabinet* (15 June 1995, unreported). Owen J, referred to the judgment of Sheppard J in *Attorney General's Department v Cockcroft* (1986) 10 FCR 180 and said, at page 44:

*"How can the [Information] 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 decision maker that he or she had "real and substantial grounds for thinking that the production of the document could prejudice that supply" or that disclosure could have an adverse effect on business or financial affairs? 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 reasoned decision-maker."*

40. There is no material before me, other than the claim by the Minister, which is not of itself sufficient, which persuades me that the ability of the Minister in the future to obtain the kind of information provided in the TPAC member's report could reasonably be expected to be prejudiced by the disclosure of Documents 9 and 10. I do not accept that disclosure of these two documents could reasonably be expected to cause members of the TPAC to refuse or fail to provide the Minister with the kind of information for which they are appointed to the TPAC and remunerated from the public purse to provide. Therefore, in the absence of any material to persuade me that there are real and substantial grounds for

thinking that disclosure of Documents 9 and 10 could prejudice the future supply of information of the relevant kind to the Minister, I find that the disputed parts of Document 9 and Document 10 in its entirety are not exempt under clause 8(2) of Schedule 1 to the FOI Act.

(c) **Clause 6 - Deliberative processes**

41. Documents 9 and 10 are also claimed by the Minister to be exempt under clause 6, as are Documents 8, 17, 18, 19, 20, 23, 25 and 28. Clause 6 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."*

42. 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": *Re Waterford and Department of the Treasury (No. 2)* (1984) 5 ALD 588, at paragraph 58. To establish this exemption, a document must contain matter of the type described in clause 6(1)(a) and it must also be established that disclosure would, on balance, be contrary to the public interest.
43. Based on my examination of the disputed parts of Document 8 and of Documents 9, 10, 17, 18, 19, 20, 23, 25 and 28, I am satisfied that those documents contain matter of the type described in clause 6(1)(a). Clearly, the determination of appeals under the *Town Planning and Development Act 1928* is a deliberative process of the Minister. Each of the documents for which exemption is claimed under clause 6 contains opinion or advice or both, and some contain recommendations, that have been obtained, prepared or recorded in the course of, or for the purposes of, the deliberative processes of the Minister. Pursuant to s.102(1) of the FOI Act, the onus is on the Minister to satisfy me that his decision to deny the complainant access to those documents is

justified and, accordingly, that disclosure of those documents would, on balance, be contrary to the public interest.

### **The Minister's submission**

44. The Minister identified and weighed a number of public interest factors for and against disclosure of the documents and decided that, on balance, disclosure would be contrary to the public interest. The matters identified by the Minister which might favour disclosure are as follows:

*“While there may be some interest in the community about the decisions, I do not believe that this is serious interest in the decision making process to the extent of needing access to the Members [sic] report to me. The actual decision is probably the real subject of real interest in the community.*

*There is no perceived benefit from disclosure that will flow to the general community.*

*The documents will not make a valuable contribution to public debate on the outcome of this appeal. Generally speaking if my decision is contrary to the Member's report there could be accusations of not accepting the advice of my Member. However, if my decision is the same as the Member's recommendation there could be accusations that the Member's report was inadequate or wrong. In either case it would not be a valuable contribution to any public debate over a specific appeal.*

*The information will not assist public understanding of the processes of government. To understand the process of government in this case, it is sufficient for the public to know that I do, in fact, receive a report and recommendation from a Member of the Town Planning Appeal Committee. The content of that report would not add to the public's understanding of the process.*

*The information in the Members report will not disclose the reasons for the appeal decision. The reasons for the decision are already disclosed in the body of the appeal decision. In fact the Members report and recommendation may mislead the public because that advice may well be contrary to the final decision.*

*The right of a person to have access to documents that concern them is recognised but all parties to the appeal do receive a copy of the decision letter which includes the full reasons for the decision.”*

45. The factors identified by the Minister which might weigh against disclosure are:

*“Disclosure will affect the proper workings of government. It would make it even more difficult than it is already to get appropriately qualified and experienced people to take on the job of being a Member of the Town Planning Appeal Committee if their reports were open to public criticism in the press or the Parliament.*

*There is a need to protect the integrity and the viability of the appeal decision-making process of government. If it is made less attractive for appropriate people to become Members of the Appeal Committee this avenue of appeal would cease to be viable. The alternate [sic] avenue of appeal is more expensive and significantly less popular with the public of Western Australia.*

*Disclosure would not significantly effect [sic] the efficient and economical conduct of the Appeal Committee but it would add to the time and cost involved by Members and staff checking reports due to the possibility of external scrutiny.*

*The content of the reports may be different to, or in conflict with the final decision.*

*Certainly, it is was decided to release such reports prior to a decision being made on the appeal, the premature release of tentative and partially considered policy matter would mislead and encourage ill-informed speculation.”*

## **Public interest**

46. I recognise that there is a public interest in the accountability of State and local government agencies, including Ministers, for the decisions made on behalf of the public. In my view, that public interest includes being informed of the basis for decision-making, including the matters taken into account, the weight given to those matters and the kinds of matters considered irrelevant. Bearing in mind the fact that the Minister is not required to give or to publish reasons for his decision on a planning appeal determined by him, I consider this aspect of the public interest to have considerable weight in the balancing process.
47. On the other hand there is a public interest in the existence of an effective and efficient alternative appeal system under the *Town Planning and Development Act 1928*. However, based on the material before me, I am not persuaded that the Ministerial appeal system would be adversely affected by the disclosure of the disputed documents, such that it would be contrary to the public interest to disclose them.
48. I accept the reasonableness of the claim that it may be difficult to persuade suitably qualified people to be appointed as members of the TPAC. However, I reject the suggestion that the prospect of the possible disclosure of part or all of the TPAC members' reports would render it more difficult to attract suitable

appointees. There are other reasons why retirees may not wish to be appointed as TPAC members. In this instance, there is no evidence before me that the reports of TPAC members to the Minister are likely to be criticised by the public or the media if they are disclosed to access applicants. In any event, as the TPAC members are professional people appointed because of their particular expertise, one would expect their reports to be able to withstand public scrutiny, if any.

49. Unless there is very good reason - and none has been demonstrated to me - I consider that documents created by persons employed in, by, or for the purposes of an agency, should be available for public scrutiny. Documents of that kind and, specifically, reports prepared by members of the TPAC have been paid for by the public purse and generally concern matters which may directly or indirectly affect a significant part of the public, or relate to matters in which a significant part the public has an interest. In fact, external scrutiny may improve the quality of such reports. For example, the Minister has himself suggested that disclosure may result in additional checking of reports before disclosure.
50. Further, because the Minister is able to consider factors personal to an appellant and, therefore, to accept or reject a recommendation of the TPAC member, I do not consider the fact that the report may be in conflict with the final decision as a sufficient reason to find that disclosure would be contrary to the public interest. If the Minister has good reason for not following the advice and recommendation of the TPAC member, then one would expect that he would be prepared to say so and should have no difficulty in explaining his decision. In those circumstances, I consider the public interest would be served by fully disclosing the material on which the Minister's decision is based, so far as that can be achieved without breaching personal privacy.
51. An additional factor in favour disclosure, in my view, is that this particular appeal related to an area of land utilised by the community at large. Therefore, apart from the public interest in the right of access to documents of government agencies, there is a general public interest in the disclosure of documents which relate to issues affecting the wider community.
52. Further, provided that sensitive personal information provided to the Minister in confidence and necessarily confidential commercial information is protected from disclosure, I do not accept the claim that disclosure of these documents which reveal the process followed by the Minister in respect of a particular appeal could be expected to damage in any way "*...the integrity and the viability of the appeal decision-making process of government.*" If anything, disclosure ought to demonstrate the integrity and viability of that process.
53. Finally, I note that there was some speculation in the media concerning the Minister's decision on this appeal. In my view, in circumstances such as those, the disclosure of material which would enable proper scrutiny of the processes of decision-making and which would fully inform the public of the facts tends to be in the public interest.

54. In balancing these competing interests I am not persuaded that disclosure of the disputed documents would be contrary to the public interest and, accordingly, I find that the disputed documents for which exemption is claimed under clause 6, are not exempt under that clause. However, I consider some of the disputed documents contain matter which is personal information about third parties and may, therefore, subject to the limitations applicable, be matter which is exempt under clause 3(1).

**(d) Clause 3 - Personal information**

55. Clause 3, so far as is relevant, provides:

**“3. Personal information**

***Exemption***

*(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*

***Limits on exemption***

...

*(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

56. I consider the exemption in clause 3(1) is designed to protect the privacy of persons whose personal information may be contained in documents held by State and local government agencies. The definition of “personal information” in the Glossary in Schedule 2 to the FOI Act makes it clear that any information or opinion about a person from which that person can be identified is, *prima facie*, exempt matter under clause 3(1).

57. From my examination of the disputed documents. I am satisfied that the signatures and the private addresses of officers of agencies, including the TPAC member, together with the signatures, names, addresses and occupations of third parties who are not officers of agencies are, *prima facie*, exempt matter under clause 3(1). However, clause 3(1) is limited by clause 3(6) which provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Pursuant to s.102(3) of the FOI Act, the complainant bears the onus of persuading me that the disclosure of that kind of information would, on balance, be in the public interest.

**The complainant’s submission**

58. The complainant’s submission to me on that point is as follows:



*“When a person or company such as Searsport Pty Ltd make a planning appeal to the Minister for Planning, they are seeking a decision to their own advantage which should be made in the light of the public interest. Good Government requires that such decision making be undertaken in such a way as to be publicly open and able to be substantiated by rational argument based on the facts of the matter. In cases such as this the definition of personal information should be treated narrowly.*

*A person involved in either making the appeal or opposing the appeal has the ability to make representation to the Minister in a matter which is clearly of public interest. In taking such representations either for or against the appeal these people are involving themselves directly in the public planning process. I do not believe that such material should be classified as personal information accept in the narrowest of terms.”*

59. I am not satisfied that there is any public interest in disclosing personal information about third parties in this instance. The mere fact that personal information is disclosed during a planning appeal process does not, in my view, mean that the person concerned has waived any right to have his or her privacy protected, so far as that may be possible or necessary. Further, I do not consider that disclosure of the personal information I have identified as *prima facie* exempt in this instance, goes towards satisfying those public interest identified by the complainant. Accordingly, I find the following matter to be exempt matter under clause 3(1) of Schedule 1 to the FOI Act:

- |             |   |
|-------------|---|
| Document 8  | The address of the addressee on page 1; the signature, name and position of the author on page 4; and the name of the person on page 4 to whom a copy was sent. |
| Document 9  | The signature of the TPAC member on page 17.  |
| Document 19 | The name in lines 1 and 5; the signature, name and position of the author.  |
| Document 20 | The name and position of the addressee and the name in the salutation.  |
| Document 23 | The signature of the author.  |
| Document 25 | The name of the person on page 1 of the Memorandum and the name and signature of that person on page 3.   |

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