

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

**File Ref: F1961999  
Decision Ref: D0451999**

Participants: **Ljiljana Maria Ravlich**  
Complainant

- and -

**Building and Construction Industry Training  
Fund Board**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – operational plan – notional proposals – clause 6(1) – deliberative processes of agency – identification of the particular deliberative process – whether disclosure would be contrary to the public interest.

*Freedom of Information Act 1992 (WA)* section 3(1); Schedule 1 clauses 6(1) and 6(3).

*Building and Construction Industry Training Fund and Levy Collection Act 1990 (WA)* ss 6 and 17.

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

*Manley v Ministry of Premier and Cabinet* (1995) 14 WAR 550.

*Ministry for Planning v Collins* (1996) 93 LGERA 69.

*Re Ravlich and State Supply Commission* [1999] WAICmr 37.

*Re Read and Public Service Commissioner* [1994] WAICmr 1.

*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 disputed matter is not exempt.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

10 December 1999

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Building and Construction Industry Training Fund Board ('the agency') to refuse the Hon Ms Ravlich MLC ('the complainant') access to a document requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. The agency is established as a body corporate under s.6(1) and (2) of the *Building and Construction Industry Training Fund and Levy Collection Act 1990*. The functions of the agency include, among other things, the control and administration of the Building and Construction Industry Training Fund established under s.17 of that Act. The agency is also required to formulate operational plans and to implement such operational plans as are approved by the Minister for Employment and Training ('the Minister').
3. On 19 April 1999, new amendments to the Act came into effect. A new agency was appointed under the legislation and its members met for the first time on 6 May 1999. Under the provisions of the legislation, the agency is required to produce an operational plan for approval by the Minister by 30 June each year. Given the time constraints for effective compliance in 1999-2000, the agency sought advice as to the most appropriate way for it to comply with its responsibilities under the legislation.
4. Consequently, the agency's Operational Plan for the 1999-2000 financial year ('the Plan') was produced and structured into 2 six-monthly components. The proposals for the first six months broadly maintained existing programs. The agency's proposals for the second six months were stated in the Plan to be notional only on the understanding that there would be ongoing deliberations and consultations with industry stakeholders during the first half of the financial year with a view to refining those proposals for the second half of the year. The Minister approved the Plan on 22 June 1999 and it took effect from that date. Beginning in June 1999, the agency conducted a series of workshops with stakeholders to assist it to prepare a submission and budget for Ministerial approval for the period January-June 2000 as a variation to the Plan.
5. On 27 July 1999, the complainant made an application to the agency under the FOI Act seeking access to a copy of the Plan. However, the agency failed to make a decision on access within the permitted period under the FOI Act. Thereafter, by letter dated 28 September 1999, the complainant sought an internal review of the agency's deemed refusal of access to the requested document.
6. The agency decided to grant the complainant access to an edited copy of the Plan from which certain matter had been deleted on the ground that it was exempt

under clause 6(1) of Schedule 1 to the FOI Act. The deleted matter related to the notional proposals and budget for the second half of the financial year. On 21 October 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

## **REVIEW BY THE INFORMATION COMMISSIONER**

7. I obtained the disputed document from the agency and directed my staff to conduct inquiries into this complaint. Discussions were held with both parties to determine whether this complaint could be resolved by conciliation. However, it became apparent that it could not. I also sought reasons from the agency to support its claims for exemption, as the agency's notice of decision following internal review was deficient in that respect. Those reasons were provided to me by the agency on 12 November 1999. Subsequently, a copy was given to the complainant.
8. On 19 November 1999, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the matter deleted from the Plan may not be exempt under clause 6(1) of Schedule 1 to the FOI Act. Nothing further was received from either the agency or the complainant.

## **THE DISPUTED MATTER**

9. The matter in dispute in this complaint consists of the material deleted from the Plan, being all of the information relating to the agency's proposals for the second half of the 1999-2000 financial year. The agency claims that that matter is exempt under clause 6(1) of Schedule 1 to the FOI Act.

## **THE EXEMPTION**

10. Clause 6(1) 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.”*

11. There are two parts to this exemption. To establish that the disputed matter is exempt under clause 6(1), an agency must satisfy the requirements of both paragraphs (a) and (b). Only when paragraph (a) of the exemption is satisfied is it necessary to consider paragraph (b) and whether disclosure of the disputed matter would, on balance, be contrary to the public interest. In the case of this exemption, the complainant is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; she is entitled to access unless the agency can establish that disclosure of the particular matter would be contrary to the public interest.
12. I have considered the purpose of the exemption in clause 6 and the meaning of the phrase “deliberative processes” in a number of my formal decisions (see: *Re Read and Public Service Commission* [1994] WAICmr 1 and, most recently, *Re Ravlich and State Supply Commission* [1999] WAICmr 37). In *Re Read*, I expressly agreed with the view of the Commonwealth Administrative Appeals Tribunal (‘the Tribunal’) in *Re Waterford and Department of the Treasury (No.2)* (1984) 5 ALD 588, that the deliberative processes of an agency are its “thinking processes”; the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action: see also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69 at 72.
13. In my view, the comments of the Tribunal in *Re Waterford* assist in determining the scope of the exemption in clause 6(1) of Schedule 1 to the FOI Act in Western Australia and, for the purposes of this matter, I consider it worthwhile repeating those comments. In *Re Waterford*, the Tribunal said, at paragraphs 58-60:

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

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

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

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

14. In order to consider whether the disputed matter is of the kind described in clause 6(1)(a), I consider that it is necessary to identify the particular process to which it relates.
15. The agency contends that the disputed matter refers to notional proposals and that its deliberations on those notional proposals have not yet concluded. The agency submits that the notional proposals in the Plan cover identified program areas, for example, apprenticeship funding and funding for skills training. The agency informs me that, over the last five months, a series of workshops were held for the express purpose of examining the notional issues and proposals set out in the Plan for the second half of the financial year and deliberating on those matters. As a result of consultations with industry representatives, I am informed that a number of changes have been made to the proposals originally contained in the Plan for January-June 2000, but these have yet to be approved by the Minister.
16. As I understand it, the agency considers that the relevant deliberative process is the ongoing consideration of the notional proposals set out in the Plan. The agency contends that disclosure of the disputed matter would reveal its ongoing deliberations on the proposed variations to the Plan. The agency submits, and I accept, that its members and the Minister were aware that the funding proposals for the second half of the financial year would be fully evaluated and developed during the first half of the financial year in consultation with industry stakeholders. The agency further submits that it was never intended that the funds allocated in the Plan to the proposed programs for the second half of the financial year were anything other than “best estimates”.
17. I am advised that the agency views the setting of notional proposals for the second half of the financial year as a technical mechanism to enable it to comply with the provisions of the legislation. In effect, the agency views the Minister’s approval as relating only to the first six months of the Plan, with the opportunity for variations and amendments to occur for the second six months, subject to a further approval being given. I am also informed that there is no requirement

under the legislation for the agency's operational plans to be made public, either by publication in the Government Gazette or by tabling in Parliament.

18. I am advised that, in normal circumstances, the Plan would be widely published to inform stakeholders in the industry of various programs that are available. In the present case, industry representatives are aware of the key issues confronting the agency through the workshops conducted. However, the industry representatives are not aware of the details of the original proposals in the Plan because matters have progressed since then and the agency's latest draft documents contain very different proposals. I understand that, currently, each member of the agency and the Minister has a copy of the Plan but that it otherwise has not been made public.
19. I have examined the Plan, the requirements of the relevant legislation and the Minister's Notice of Approval of the Plan. I consider that the material deleted from the Plan may be described as statements made by the agency and information about its notional proposals and budget estimates. In my opinion, the disputed matter is not information in the nature of opinion, advice or recommendations. Neither does it appear to me to consist of information of the kind that would, if disclosed, reveal any consultations or deliberations that have taken place in the course of, or for the purposes of, the deliberative processes of the Government, a Minister or an agency. The contents of the document appear to be the outcomes resulting from a deliberative process, rather than information of the requisite kind obtained, prepared or recorded in the course of, or for the purposes of, the deliberative process described by the agency.
20. The disputed matter is clearly stated to be notional only. In essence, I consider that it is in the nature of a "stepping-off" point for further deliberations. I accept that the deliberative processes in relation to those notional proposals are continuing and will only be complete when the Minister approves the proposed variations. However, I consider that the disputed matter relates to an earlier stage of the deliberative process leading to the proposed amendments to the Plan. In my view, that particular deliberative process was complete when the agency decided to include notional proposals and figures in the Plan for the second half of the financial year and submitted the Plan for approval. I consider that the Minister's subsequent approval of the whole Plan concluded that particular deliberative process.
21. Therefore, I do not consider that the disputed matter is matter of the kind described in clause 6(1)(a) of Schedule 1 to the FOI Act. In any event, even if it were, the agency must satisfy the requirements in clause 6(1)(b) and show that disclosure of the disputed matter would, on balance, be contrary to the public interest.

### **Public interest**

22. As a general rule, I consider that it may be contrary to the public interest to prematurely disclose deliberative process documents while deliberations in an agency are continuing, if there is evidence before me to establish that disclosure

of such documents would affect the integrity of the decision-making process, or if disclosure would, for some other reason, be demonstrably contrary to the public interest: see *Collins's* case and, most recently, *Re Ayton and Police Force of Western Australia* [1999] WAICmr 8. I do not consider that it is necessarily in the public interest for any agency to conduct its business with the public effectively “looking over its shoulder” at all stages of its deliberations and speculating about what might be done and why. I consider that generally the public interest is best served by allowing certain deliberations to occur unhindered and with the benefit of access to all of the material available so that informed decisions may be made.

23. The agency submits that it is not in the public interest to disclose the disputed matter since its release has the potential to mislead the public because the disputed matter records notional and outdated proposals in view of the variations to the Plan currently under consideration. The agency submits that release of the disputed matter has the capacity to inflame relations with some of its stakeholders. The agency submits that the group training schemes, which provide for the training of apprentices, is a particularly sensitive part of its Plan and provided me with an example of this in relation to a specific scheme.
24. The agency advises me that the notional proposal in the Plan concerning that training scheme is based on a simplistic model. However, over the last five months a far more sophisticated transitional funding model has been developed and the arrangements in the proposed amendments to the Plan now bear no relationship to the notional proposals approved by the Minister in June 1999. The agency submits that it would be contrary to the public interest to disclose the disputed matter because it would be misleading.
25. I reject the claim that disclosure of the disputed matter would be contrary to the public interest because it would serve to mislead, rather than inform, the public. It is clearly contemplated in the Plan that variations will be made to some of the proposals. At various points throughout the Plan, it is stressed that the proposals and budget allocations are of a notional or provisional nature. I consider that the public, including the industry stakeholders that may be affected by the Plan, is able to understand the difference between notional proposals and final proposals and would not, therefore, be misled by the disclosure of such information. It is always open to any agency to release additional information and to explain (for example, via the industry workshops) the agency’s thinking processes behind such proposals in order to dispel and clarify any misconceptions that might arise.
26. Moreover, the agency has provided no material to support its claim that the disclosure of notional strategies and budgets would inflame relations with its stakeholders such that it would be contrary to the public interest to disclose the disputed matter. The agency merely asserts that this is the case but offers nothing more. In *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at p573 Owen J discussed the nature of the proof required in support of a claim for exemption and said:

*“How can the Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker ... In my opinion it is not sufficient for the original decision maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker.”*

27. I recognise a public interest in the accountability of agencies and that public interest is enshrined in s.3(1) of the FOI Act. Access laws are generally designed to open the decision-making processes of government agencies to scrutiny by the public, and to allow the public to effectively participate in those processes and in government itself. In my view, effective public participation requires that the public has access to relevant and timely information. I consider that there is a public interest in the disclosure of information that would explain priorities, clarify resource allocations, and prompt debate and discussion about the operations of a government agency.
28. I do not consider that it is necessarily contrary to the public interest to disclose strategies and budgets formulated at an early stage in the planning process simply because those earlier strategies have been discarded or remodelled as part of a process following consultation and refinement. If anything, disclosure of that kind of information should assist the public and relevant stakeholders to understand how agencies function and how decisions are made. In my view, disclosure of information of that kind serves the public interest rather than detracts from it.

### **Limit on exemption**

29. Finally, having examined the disputed matter, I am of the view that a good deal of it could be considered merely factual. By virtue of the limit imposed by clause 6(3), that matter would not, in any event, be exempt under clause 6(1).

### **Conclusion**

30. Therefore, based on the material before me, I do not consider that the disputed matter in the Plan falls within the terms of the exemption in clause 6(1). Accordingly, I find that it is not exempt.

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