

COLLIER KNYN AND PERTH

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

**File Ref: 95032
Decision Ref: D06295**

Participants:

Collier Knyn and Associates Pty Ltd
Complainant

- and -

City of Perth
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to establishment of towns of Shepperton, Cambridge and Vincent - clause 6 - deliberative processes - public interest - factors for and against disclosure of documents - public interest in knowing processes by which agencies make decisions affecting general public - public interest in preserving integrity of agency decision-making processes - clause 5(1)(f) - property security - whether disclosure could reasonably be expected to endanger security of property - clause 4(2) - information having "commercial value" to a person - requirements to establish exemption under clause 4(2) - whether documents contain information of commercial value - clause 10(4) - requirements to establish exemption under clause 10(4) - whether documents contain information concerning the commercial affairs of the agency - public interest factors for and against disclosure.

Freedom of Information Act 1992 (WA) ss. 3(1)(b), 34, 68(1), 69(4), 72(1)(b), 75(1), 102(1), Schedule 1 clauses 4(2), 4(3), 5(1)(f), 6(1), 10(4).

Freedom of Information Act 1982 (C'wlth) s. 36(1)(a).

City of Perth Restructuring Act 1993 (WA).

Local Government (Tenders for Contracts) Regulations 1983 (WA).

Copyright Act 1968 (C'wlth).

Re Read and Public Service Commission (Information Commissioner, WA, 16 February 1994, unreported).

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

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

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.

Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 108 ALR 163.

De Beer v Graham (1891) 12 NSW (E) 144.

Re Hassell and Health Department of Western Australia (Information Commissioner, WA, 13 December 1994, unreported).

DECISION

The decision of the agency is set aside. In substitution it is decided that folios 9 and 10 of Document 227 are exempt under clause 5(1)(f) of Schedule 1 to the *Freedom of Information Act 1992*. However, the remaining folios in Document 227 and the whole of Document 305 are not exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

27th December 1995

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision of the City of Perth ('the agency') to refuse Collier Kyn Pty Ltd ('the complainant') access to various documents of the agency requested by the complainant under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 10 September 1994, the agency advertised in *The West Australian* newspaper, advising that the new Towns of Cambridge, Shepperton and Vincent would be setting up administration centres. Expressions of interest were invited for potential solutions for the following information systems: financial systems; payroll/personnel systems; library system; land information system; and records management system for the new towns. Interested parties were required to endorse applications "Expression of Interest for Information Systems - New Towns" and to lodge them with the agency by 3.00p.m. on Friday 23 September 1994.
3. The complainant was one of 38 companies or individuals who submitted an expression of interest in response to the agency's advertisement. On 19 October 1994, the agency informed the complainant that its proposal had not made the agency's short list and that it would not be required to participate in the next phase of the project. Fourteen other companies or individuals failed to make the agency's short list and were also eliminated from further consideration.
4. On 31 October 1994, the complainant's solicitors applied to the agency on behalf of the complainant, for access to documents consisting of:
 - "1. *the expressions of interest submitted by Collier Kyn & Associates and all other information systems providers in response to the City of Perth's invitation for the submission of expressions of interest published in the West Australian on 10 September 1994;*
 2. *the evaluation undertaken by the officers of the City of Perth and its consultant, Ernst and Young, of the expressions of interest submitted by Collier Kyn & Associates and all other information systems providers in response to the above invitation;*
 3. *any recommendations or reports made by officers of the City of Perth and its consultant, Ernst and Young, in relation to the expressions of interest submitted by Collier Kyn & Associates, and all other information system providers;*

4. *decisions made by any and all officers of the City of Perth or the Towns of Cambridge, Shepperton and Vincent in relation to the expressions of interest;*
 5. *decisions made by the Commissioners appointed under the City of Perth Restructuring Act 1993 in relation to the expressions of interest; and*
 6. *resolutions made by the councils for the City of Perth or the Towns of Cambridge, Shepperton and Vincent in relation to the expressions of interest and the decision as to the which of the information system providers submitting an expression of interest would be invited to make a formal tender."*
5. After consultation between the agency and the complainant's solicitors, on 22 December 1994, the complainant reduced the ambit of its access application, by withdrawing its request for access to the documents referred to in paragraph 1 of its access application.
 6. On 27 December 1994, the agency's FOI decision-maker, Ms Lesley Ferguson, informed the complainant that 94 documents had been identified as falling within the ambit of the complainant's amended access application and that the agency had decided to grant access to complete copies of 88 of those documents. Ms Ferguson further advised the complainant that the 6 remaining documents contained matter that was claimed to be exempt under one or more of clauses 4, 5, 6 and 10 of Schedule 1 to the FOI Act. The complainant was granted access to edited copies of the 6 remaining documents from which matter claimed by the agency to be exempt matter had been deleted.
 7. The agency initially provided the complainant with an edited copy of one document identified as Document 305, but deferred giving access to the other 5 edited documents, pursuant to s.34 of the FOI Act, to enable third parties to exercise their right to seek internal review of the agency's decision. Several third parties objected to disclosure and advised the agency accordingly. However, none of those third parties sought internal review of the decision of the agency and none approached my office to be joined as a party to this complaint.
 8. On 6 January 1995, solicitors for the complainant applied to the agency for internal review of the decision to grant access to an edited copy of Document 305. On 20 January 1995, the agency confirmed that decision on the ground that the matter deleted from the document is exempt matter under clause 6 of Schedule 1 to the FOI Act. On 27 February 1995, the complainant applied for external review to the Information Commissioner in respect of that decision.
 9. The decision of the agency to grant access to edited copies of the 5 remaining documents became final on 26 January 1995. On 3 March 1995, the agency gave the complainant access to edited copies of those 5 documents. On 23 March 1995, solicitors for the complainant applied to the agency for internal review of the decision in respect of those 5 documents.

10. On 11 April 1995, the agency varied the initial decision and granted access to additional parts of the 5 documents. However, the agency maintained its claims that the matter to which access has been denied is exempt matter under one or more of clauses 4, 5, and 10 of Schedule 1 to the FOI Act. On 17 May 1995, the complainant applied to the Information Commissioner for external review in respect of the agency's decision to provide access to an edited copy of Document 227 only.
11. During the process of the agency dealing with the access application, the complainant also questioned the adequacy of the searches conducted by the agency to locate all the documents the subject of that application. In its complaint to the Information Commissioner, the complainant sought a review of the adequacy of the searches undertaken by the agency.

REVIEW BY THE INFORMATION COMMISSIONER

12. On 3 March 1995, in accordance with my statutory obligation under s.68(1) of the FOI Act, I notified the agency that I had formally accepted this complaint for review. Pursuant to my powers under s.75(1) and s.72(1)(b), I also required the agency to produce to me the originals of the documents in dispute and the agency's FOI file maintained in respect of the access application. Those documents were produced to my office on 10 March 1995.
13. During the review process, two of my investigations officers interviewed officers of the agency and one subsequently inspected, with the assistance of officers of the agency, the agency's records management and document storage facilities, for the purpose of dealing with that part of the complaint concerning the sufficiency of the searches undertaken by the agency. The agency's document storage facilities and document recording data base were inspected and the operation of those facilities was demonstrated to a member of my staff who subsequently provided a report to me on this aspect of the matter.
14. On 7 August 1995, after examining the documents in dispute and the contents of the agency's FOI file, and considering the submissions of the complainant and the agency and the report of my investigations officer, I provided the agency and the complainant with my preliminary view, and reasons for that preliminary view, of the agency's claims for exemption and the complaint concerning the adequacy of searches undertaken by the agency.
15. In respect of the matter concerning the adequacy of searches, it was my preliminary view that the additional documents which the complainant believed to exist, do not, in fact, exist. Thereafter, the complainant withdrew the part of the complaint concerning the sufficiency of the searches undertaken by the agency.
16. In respect of the matter for which the agency claimed exemption, it was my preliminary view that the agency had not discharged its onus, under s.102(1) of the FOI Act, of establishing that its decision was justified. The agency responded to my preliminary view and provided a further submission. Following my

consideration of that material, I took oral submissions from a representative of Ernst and Young ('the consultants') and I received additional material from the complainant. After considering all of that material, it remained my preliminary view that two folios in Document 227 were exempt under clause 5(1)(f) and that two other folios in that document were exempt under clause 4(3), but that the balance of the matter deleted from Document 227 by the agency was not exempt. However, the agency maintains its claims for the matter deleted from both Document 305 and Document 227 under clauses 4(2), 5(1)(f), 6(1) and 10(4) of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENTS

17. Two documents remain in dispute in this matter, being the documents identified by the agency as Document 305 and Document 227. Document 305 is entitled "*Expression of Interest Respondents & Evaluation Summary*" and consists of 8 pages of information in the form of comparative tables. The agency claims that parts of this document are exempt under clause 6(1) of Schedule 1 to the FOI Act.
18. Document 227 dated October 1994, is a draft document of 70 pages including appendices, entitled "*Strategic Information Systems and Technology Plan - Towns of Shepperton, Vincent and Cambridge.*" Exemption is claimed under various clauses of Schedule 1 to the FOI Act for parts of Document 227, being:
 - (i) folios 11, 17 and 44 are claimed to be exempt under clause 4(2);
 - (ii) folios 9-12, 17, 44 and 56-61 are claimed to be exempt under clause 5(1)(f);
 - (iii) folios 49-51 and folio 55 (paragraphs 1, 4 and 6) are claimed to be exempt under clause 10(4).

THE EXEMPTIONS

(a) Clause 6 - Deliberative processes

19. Parts of Document 305 are claimed to be exempt under clause 6(1). 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."

20. There are two parts to this exemption. To establish an exemption under clause 6, the agency must satisfy the requirements of both paragraphs (a) and (b). Only when paragraph (a) of the exemption is satisfied is it necessary, in my view, to consider paragraph (b) and whether disclosure of the documents would, on balance, be contrary to the public interest.
21. I have discussed the meaning of clause 6 in a number of my formal decisions, initially in *Re Read and Public Service Commission* (16 February 1994, unreported), at paragraphs 12-26, and most recently in *Coastal Waters Alliance of Western Australia Incorporated and Department of Environmental Protection and Cockburn Cement Limited* (28 September 1995, unreported), at paragraphs 23-25. I repeat my comments and views on the scope and meaning of clause 6 since it is my view that agencies sometimes place too broad an interpretation upon their consideration of this exemption.
22. I consider the key words in clause 6(1)(a) to be the "*deliberative processes...of an agency*". The meaning of the phrase "deliberative processes" has been considered in a number of cases based on the equivalent section in the Commonwealth *Freedom of Information Act 1982* (s.36(1)(a)). In my view, assistance for agencies in the proper application of the exemption in clause 6(1) can be found in *Re Waterford and Department of Treasury* (No 2) (1984) 5 ALD 588, a decision of the Commonwealth Administrative Appeals Tribunal ('the Tribunal') relating to the equivalent Commonwealth provision. In that case the Tribunal said, at paragraphs 58-60:

"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. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing on 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. 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..."

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 appear 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 the agency...

It is documents containing opinion, advice, recommendations etc. relating to 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'..."

23. It is my understanding that Document 305 was created by officers of the agency for the purpose of assisting the agency to progress to the next stage of obtaining more detailed submissions from a more limited number of bodies interested in performing the work required. It is also my understanding that the agency provided each party that replied to its advertisement of 10 September 1994 with a copy of Document 305 in so far as it contained information about the perceived strengths and weaknesses of its own expression of interest, but that no party received information about the perceived strengths or weaknesses of any other party listed in Document 305.
24. The agency claims, and, having examined the document, I accept, that Document 305 contains opinion prepared and recorded in the course of, or for the purposes of, the deliberative processes of the Commissioners appointed under the *City of Perth Restructuring Act 1993*, relating to the implementation of the various information management systems required by the new Towns of Cambridge, Shepperton and Vincent. In particular, Document 305 contains evaluative opinions about the comparative strengths and weaknesses of each of the expressions of interest received by the agency from the 25 companies or individuals whose expressions of interest were further considered by the agency.
25. However, whilst I am satisfied that Document 305 contains matter of the kind described in clause 6(1)(a), I am not satisfied that its disclosure would be contrary to the public interest. It is the submission of the agency that the document provides evaluative opinions about short listed responses and non-conforming responses; is an executive summary prepared within a strict time limit; and was prepared as an executive summary for an audience familiar with all the criteria for establishing the information systems infrastructure for the new towns. Accordingly, the agency contends, the matter deleted from Document 305 is exempt under clause 6 for the following reasons, which I have summarised:
 - (i) the likely impact of the release of the document is to escalate the level of importance placed upon the opinions contained therein;
 - (ii) the opinions as to the perceived strengths and weaknesses of a respondent - formed on the basis of commercial and business information provided by

the respondent - may be unduly relied upon by other persons and result in negative effects on that respondent's business;

- (iii) the release of the document may cause confusion; be liable to misinterpretation; cause unnecessary public debate; would prejudice the integrity of the decision making process and would be unfair to the decision maker and
 - (iv) if the document is released, tenderers may be less willing to supply commercially sensitive information and decision makers may be less candid and frank in their decisions.
26. However, other than making the claims summarized in paragraph 25, the agency has offered no evidence in support of them, nor is there is any other material before me that supports those contentions.
27. Once the agency had been notified of this complaint to me, the agency by letter informed the other 37 parties who had submitted expressions of interest of this complaint and that they were each entitled to be joined as a party to the complaint upon giving written notice pursuant to section 69(4) of the FOI Act. In each of those letters the agency clearly described the Document 305 and provided an edited copy of it to each third party. Notwithstanding the provision of that advice to each of the parties concerned, none sought to be joined as a party to this complaint. Only 9 of the 37 responded to the agency. Those responses have been produced to me as part of the agency's FOI file.
28. Of the 9 responses received by the agency, 6 were from parties whose expressions of interest were further considered by the agency. The remaining 3 were from parties eliminated at that early stage from further consideration by the agency, in the same manner as was the complainant. Of those 3, 2 informed the agency of their concerns that the complainant sought access to their expressions of interest and associated documents provided to the agency. However, neither objected to the release of Document 305 to the complainant. The third unsuccessful third party objected to the disclosure of Document 305 to the complainant on the basis that it could see no valid reason for disclosure of Document 305 and did not wish to have the document disclosed to a competitor.
29. Of the 6 respondents whose expressions of interest succeeded in gaining them further consideration, 2 did not object to the release of Document 305 and both further requested that the agency provide them with a complete copy of that document. Two others expressed concern that the information contained in the document may be used by the person receiving it to gain an unfair competitive advantage, with the result of a reduction in the commercial value of those parties' information and methodologies, due to the nature of the comments and opinions recorded by the agency. However, both further stated that if Document 305 were released to the complainant, they also would wish to be provided with a complete copy of the document.

30. The 2 remaining parties objected to disclosure of the document. The first objected on the basis that the document reflected only the opinions of the agency which the party claimed were not substantiated by fact, and that the unsubstantiated opinions of the agency could be misleading to the market. The party further claimed that the information contained in Document 305 is of a highly competitive and confidential nature which could, if disclosed, diminish or destroy the business of that third party. The other party claimed that the information contained in the document related to commercial affairs and it would have an adverse effect on those affairs. In addition, the party also claimed that the opinions of the agency, if not substantiated by fact, may be taken as misleading statements to the outside world.
31. None of the parties that objected to the disclosure of Document 305 to the complainant identified the particular information claimed to be of a commercially sensitive nature, nor any reasons why it was considered to be commercially sensitive. In addition, of the parties that objected to the disclosure of Document 305, only 3 claimed that disclosure would have an adverse effect on the business, professional, commercial or financial affairs of the party concerned. However, none of those parties identified the adverse effect that it was claimed would follow, nor - apart from making the bald assertions - did any of those parties provide any probative material in support of the claim that disclosure of the document could reasonably be expected to have an adverse effect on those affairs. The essence of the parties' claims appears to me to be that, if disclosed, Document 305 could be used by the complainant to gain an unfair competitive advantage and therefore may result in a reduction in the commercial value of the third parties' information and methodologies. However, none has explained how disclosure of the document would give the complainant an unfair competitive advantage, nor provided any material in support of that claim.
32. The first 2 of the agency's contentions, summarized in paragraph 25 above, are not, in my view, supported by the responses received by the agency from the respondents. Neither is the fourth of the agency's contentions summarized in that paragraph supported by those responses. Of the 25 parties about which opinions are recorded in that document, only 6 were concerned enough about disclosure of the document to respond and, as I have said, of those 6 only 4 objected and, of those 4, 2 further stated that if Document 305 were nonetheless to be released to the complainant, they also wished to be provided with an unedited copy of the document. Further, and more importantly, those that objected to disclosure of the document provided no probative material in support of their claims as to the consequences that could be expected to follow disclosure.
33. The complainant, through its legal representatives, argued that the object of accountability referred to in section 3(1)(b) of the FOI Act requires the processes of decision-making within local authorities to be open to public scrutiny unless there are exceptional circumstances, such as those recognized in Schedule 1 to the FOI Act, where such scrutiny would have a detrimental impact. The complainant submitted that, if local authority decision-making processes were not open to public scrutiny, it would create a context in which local authorities could improperly or inadvertently misuse their powers with little or no possibility for

the public to become aware of such processes. It was contended that such a provision would severely diminish the accountability of local authorities to their rate-payers and the public in general and that, accordingly, the public interest is served by the disclosure of documents which are associated with the decision-making processes of local authorities.

34. It was also submitted that, as the agency expended public funds in engaging in the process of inviting and evaluating expressions of government under the *Local Government (Tenders for Contracts) Regulations 1983* and would expend further funds in purchasing and installing the software of the successful tenderer, the public interest would be served in the disclosure of documents associated with the evaluative process so that the public has an opportunity to assess whether the agency has applied those public funds to acquire the most appropriate and suitable software in the circumstances.
35. In my view, the public interest factors in favour of disclosure identified by the complainant may well have been satisfied by the release of an edited copy of the document, with the names of the persons or companies who submitted an expression of interest to the agency deleted from that document. That form of disclosure would have demonstrated the assessment method adopted by the agency, and shown the factors taken into account and the emphasis given them, without any need to identify the particular parties that submitted expressions of interest and to which each of the evaluative opinions of the officers of the agency relates. However, as the agency has already given the complainant access to an edited copy of the document, that option is not available to the agency.
36. I consider that there is a public interest in revealing the processes by which State and local government agencies make decisions that affect the public and, in particular, the spending of public funds. In my view, there is a public interest in disclosure of documents that inform the public about how State and local government agencies perform their functions because such disclosure enhances accountability. That public interest is clearly reflected in the objects and intent of the FOI Act.
37. I recognize a public interest in preserving the integrity of an agency's deliberative processes and consider that it may be contrary to the public interest to disclose documents in circumstances where disclosure would affect those deliberations, either by limiting the quality or quantity of information available, or by hindering the process of deliberation by creating unnecessary and undue criticism during the actual deliberative process. In particular, when those deliberations are current, or have not concluded, disclosure of deliberative process documents may, on balance, in the particular circumstances, be contrary to the public interest. However, after a decision has been made, the sensitivity of deliberative process documents should no longer be an issue unless the documents contain information of such a sensitive nature that its disclosure, after balancing the competing public interests, would be contrary to the public interest.

38. Taking into account the number of responses received from the parties contacted by the agency; the nature of those responses and the fact that none of the respondents applied to be joined as a party to this complaint; and that there is no evidence before me to support the bald assertions of the agency and the other parties of the consequences that might follow from disclosure of Document 305, I am not satisfied that the agency's claims of the adverse consequences that would follow from the disclosure of the document have been established. I am also not satisfied that disclosure would cause any damage to the agency's deliberative processes, either in relation to the particular deliberative process of which Document 305 is part or its deliberative processes generally.
39. Further, I consider that there is a public interest in those who have or seek to have business dealings with government being, and being seen to be, dealt with fairly by government. I also recognize a public interest in the accountability of government for the decisions it makes, and accordingly its process of decision-making being open to scrutiny, particularly to those affected by its decisions. It is, therefore, my view that, on balance, disclosure of Document 305 would not be contrary to the public interest and I find that it is not exempt under clause 6(1) of Schedule 1 to the FOI Act, or at all.

(b) Clause 4(2)- Information having a commercial value

40. The agency claims that folios 11, 17 and 44 of Document 227 are exempt under clause 4(2) of Schedule 1 to the FOI Act. Clause 4, in so far as it is relevant, provides:

"4. Commercial or business information

(1)...

(2) *Matter is exempt matter if its disclosure -*

(a) *would reveal information (other than trade secrets) that has a commercial value to a person; and*

(b) *could reasonably be expected to destroy or diminish that commercial value.*

(3) *Matter is exempt matter if its disclosure -*

(a) *would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*

(b) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*

Limits on exemptions

- (4) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*
 - (5) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant.*
 - (6) *Matter is not exempt matter under subclause (1), (2) or (3) if the applicant provides evidence establishing that the person concerned consents to the disclosure of the matter to the applicant.*
 - (7) *Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest."*
41. To establish an exemption under clause 4(2), both parts of clause 4(2) must be established. That is, it must be shown that disclosure of the documents in question would reveal information of the kind specified in paragraph (a) of clause 4(2), being information that has a commercial value to a person and, also, that disclosure of that information could reasonably be expected to destroy or diminish that commercial value.
42. I have examined folios 11, 17 and 44. In my view those folios are properly described as schematic diagrams. Figure 2 on folio 11 is entitled "*Current City of Perth Information Systems Architecture*"; Figure 4 on folio 17 is entitled "*Recommended Information Systems Architecture for the Towns*"; Figure 5 on folio 44 is entitled "*Recommended Information Systems Implementation Priorities*". There is nothing on the face of either folio 11, 17 or 44 that appears to be information having a "commercial value" to any person, nor is there any indication that one or more or all were created by a particular third party.
43. The agency claims that the figures in folios 11, 17 and 44 are data models that are highly valued commodities whose informational content is valued for both commercial and security reasons. The agency further claims that the owners of those data models have taken a great deal of care to prevent their publication to competitors and that the models are the intellectual property of third parties. It was the submission of the agency that the deleted matter was information that had a commercial value to the consultants which, if disclosed, would provide the complainant, a direct competitor of the consultants, with an unfair competitive advantage. The agency argued, therefore, that the outcome of providing a competitor of the consultants with this information would diminish its commercial value. A representative of the consultants confirmed that folios 11, 17 and 44 contain material developed by the consultants and provided to the agency as part of its contractual obligations. However, I was also informed by that

representative that those folios do not, on their face, contain information that has a commercial value to the consultants.

44. Accordingly, I am not satisfied, from the material before me, that folios 11, 17 and 44 contain matter of a type described in paragraph (a) of clause 4(2). Therefore, I find that folios 11, 17 and 44 of Document 227 are not exempt under clause 4(2) of Schedule 1 to the FOI Act.

(c) Clause 5 - Law enforcement, public safety and property security

45. The complainant has been provided with a copy of the Document 227 from which certain folios have been deleted. The agency claims that folios 9-12, 17, 44 and 56-61 of Document 227 are exempt under clause 5(1)(f) of Schedule 1 to the FOI Act. Clause 5(1)(f) 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)...
 - (c)...
 - (d)...
 - (f) *endanger the life security of any property;"*

46. Clause 5(1)(f) exempts from disclosure matter which, if disclosed, could reasonably be expected to endanger the security of any property. The words "could reasonably be expected to" appear in other exemptions and in like provisions in the FOI Acts of the Commonwealth and the other States. 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."

47. The meaning of the phrase "could reasonably be expected to" was also discussed in the decision of the Full Federal Court in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163. In that case it was held that, on an objective view of the evidence, there must be real and substantial grounds for expecting certain consequences to follow from the disclosure of documents.
48. The submissions of the agency in support of its claims for exemption clearly indicate concerns of the agency that the disclosure of those folios would endanger the security of the agency's information data bases which contain, among other things, confidential information collected by the agency about individual ratepayers, property information, permit and licensing data and the financial and administrative data used by the agency in its day to day operations. In this matter the agency has informed me that it restricts access to the kind of information about the agency's information systems contained within the disputed documents to a third party only where the agency has entered into a formal agreement not to disclose that information, in order to ensure that unauthorised users cannot gain access to the information contained in the agency's data bases.
49. The question then arises whether the agency's data bases are "property" within the meaning of clause 5(1)(f) of Schedule 1 to the FOI Act. The term "property" is not defined in the FOI Act. In its widest sense "property" signifies items and rights having value, such as land and items like cars, buildings and other goods. In addition, the *Copyright Act 1968* (Cwth) protects intangible rights over "intellectual property", which includes, among other things, the copyright in literary works. In recognition of the fact that the *Copyright Act 1968* gave copyright protection to tangible, written records but not to records stored on magnetic tape or in a computer, the *Copyright Act 1968* was amended in 1984. The Explanatory Memorandum that accompanied the amending Act said that the Commonwealth Parliament had expressly amended the definition of "literary work" in the *Copyright Act 1968* to make it clear that a computerised data bank, for example, may be treated as a compilation being a literary work, the copyright of which is protected by that Act. It appears therefore that computer programs and data stored in a computer can be intellectual property. However, that will depend upon, *inter alia*, how they are created.
50. In any event, whether or not the agency's computer data bases, or any part of them, are protected by copyright, I am satisfied that they are "property" for the purposes of clause 5(1)(f). In *De Beer v Graham* (1891) 12 NSW (E) 144, Owen C J said at p 146: "*Property may be defined to be the exclusive right to the possession or enjoyment of something; such a right may be limited in time or by conditions, but while it lasts, it must be exclusive*". I am satisfied that the agency has the exclusive right to possess and use the data collected and stored in the agency's computerised information systems, to the exclusion of all others without the written consent of the agency. Although some of the information contained therein may be available to other parties from other sources, it is not available in the form or context in which it is held in the agency's records. In my view,

therefore, the agency's records, which are stored on its computer data bases, may be described as the "property" of the agency. Further, in my view, those records may also be properly described as "property", within the meaning of clause 5(1)(f) of Schedule 1 to the FOI Act.

51. It is the submission of the agency that, if the folios deleted from the disputed documents were disclosed, the release of the information contained therein could reasonably be expected to endanger the security of the agency's information data bases, because that information could be used by an unauthorised user to gain access to the property of the agency, being its computer records and, among other things, to invade the privacy of ratepayers and obtain unauthorised access to the administrative, financial and other information stored in the data base maintained by the agency. It is the further submission of the agency that access to information of the kind contained in the folios concerned is restricted, specifically to prevent unauthorised users gaining access to the agency's information system and that lack of security of that kind of information is considered an invitation to unauthorised users to access an information system such as that of the agency.
52. From my examination of the disputed documents, and taking all of the material before me into account, including the submissions of both parties, I am satisfied that disclosure of folios 9 and 10 could reasonably be expected to endanger the security of the agency's records contained in its computer data bases. Folios 9 and 10 contain specific detailed information about the applications architecture of the agency's information systems, referring to the operational areas of the agency in which particular computer equipment and software packages are used. In my view, if that kind of detailed information were disclosed, it would reveal a very detailed "road map" to the agency's information systems. Therefore, I accept the submissions of the agency that the release of the matter contained in folios 9 and 10 could reasonably be expected to endanger the security of the agency's records held in its computer data bases. Accordingly, I therefore find that the matter contained in folios 9 and 10 to be exempt under clause 5(1)(f) of Schedule 1 to the FOI Act.
53. However, I am not satisfied that the same conclusions may be reached with respect to folios 11, 12, 17, 44 and 56-61. As previously noted in paragraph 42 above, folios 11, 17 and 44 are schematic diagrams. Folio 12 is also a schematic diagram of the current information technology architecture of the agency. Further, folios 56-61 are an appendix to Document 227, identifying the required level of application data integration for the information systems of the new towns. The folios contain no references to the agency's current information systems. They do not describe in detail the operational areas of the new towns, nor do they detail the particular types of computer equipment and software packages that will be used by the new towns. Those folios appear to me to be nothing more than a descriptive table indicating what level of data integration will be desirable for the proposed information systems of the new towns to operate successfully.

54. In my view, none of folios 11, 12, 17, 44 and 56-61 contain any of the detailed kind information set out in folios 9 and 10. I am, therefore, not satisfied that the agency's claim that the release of those folios could reasonably be expected to endanger the security of the property of the agency. Accordingly, I find that folios 11, 12, 17, 44 and 56-61 are not exempt under clause 5(1)(f) of Schedule 1 to the FOI Act.

(d) Clause 10 - The State's financial and property affairs

55. The agency also claims that folios or parts of folios 49-51 and 55 of Document 227 are exempt under clause 10(4). Clause 10, so far as is relevant, provides:

"10. The State's financial or property affairs

Exemptions

(1)...

(2)...

(3)...

(4) *Matter is exempt matter if its disclosure -*

(a) *would reveal information (other than trade secrets or information referred to in subclause (3)) concerning the commercial affairs of an agency; and*

(b) *could reasonably be expected to have an adverse effect on those affairs.*

Limit on exemptions

(6) *Matter is not exempt matter under subclause (1), (2), (3), (4) or (5) if its disclosure would, on balance, be in the public interest.*

56. I have previously considered the meaning of clause 10(4) in my decision in *Re Hassell and Health Department of Western Australia* (13 December 1994, unreported), at paragraph 74. In my view, clause 10(4) is directed at protecting from adverse effects certain of the activities of an agency itself, so that the competitive position of State agencies and instrumentalities will not be undermined. It is also a recognition of the fact that many of the activities of government are themselves becoming more commercial and business-like. However, unlike FOI legislation in other jurisdictions, in which the term "business, professional, commercial or financial affairs" is used, the exemption in sub-clause 10(4) is concerned only with information relating to the "commercial affairs" of the agency. Nevertheless, as I have said before, it is my view that the commercial affairs of an agency may also include its business and financial affairs, although not necessarily so.

57. The Concise Oxford Dictionary of Current English, 8th Edition, defines "commercial" as meaning "of, engaged in, or concerned with, commerce" and "commerce" as meaning "financial transactions, esp. the buying and selling of merchandise, on a large scale". It is the submission of the agency that the disclosure of folios 49-51 and 55 of Document 227 would have an adverse effect on the existing business affairs of the agency because:
- (i) the agency was negotiating with a supplier of support services for the information systems used by the agency in its daily operations;
 - (ii) the premature release of the information in these folios is likely to have an adverse effect on the existing business affairs of the agency; and
 - (iii) the premature release of this information is likely to disadvantage the agency in future negotiations and that the existing business affairs and future negotiations do not relate to matters within the ambit of the access application.
58. In the matter before me there is no evidence that the agency is operating in a commercial environment or facing commercial competition from any person or company. I do not consider the mere fact that the agency, along with other State and local government agencies, must purchase commodities and services in the market place to fulfill its operational needs, to be an indication that the agency's operations constitute its "commercial affairs". Nor do I consider the fact that many government agencies must operate efficiently and are doing so along increasingly commercial lines, to be decisive on that point. There is simply no evidence put before me by the agency to establish that the disputed folios concern the agency's business or commercial affairs as those terms are commonly understood, nor is there any evidence before me to establish that the agency is engaged in commerce or business at all.
59. I reject the submissions of the agency that folios 49-51 and 55 relate to its business affairs. I have examined those folios and, in my view, the information contained in them does not have the essential quality or character of information which concerns the commercial affairs of the agency. The folios themselves appear to contain no more than a series of recommended implementation options for the information systems of the new towns, comparing the strengths and weaknesses of each recommended option against the other recommended options. There is nothing on the face of those folios to indicate that they are related to the commercial affairs of the agency, or for that matter, to the commercial affairs of any organisation or body.
60. The fact that the agency negotiates with suppliers of goods and services and that those negotiations may ultimately lead to the agency deciding about where it will spend its money is not, in my view, any evidence that the information within the folios is information about the commercial affairs of the agency. The folios do not contain any cost effectiveness assessments. Further, they do not contain any information, options or recommendations about the letting or negotiation of the

service contracts, which might perhaps, although I draw no conclusion, be argued to concern the commercial affairs of the agency.

61. In my opinion, for the reasons I have given, the agency has failed to persuade me that the information contained in the disputed folios concerns the commercial affairs of the agency as required by sub-clause (4)(a) of clause 10. It is, therefore, unnecessary that I consider the arguments of the agency with respect to subclause 4(b) and where the balance of the public interest lies. I find that folios 49-51 and 55 of Document 227 are not exempt under clause 10(4).
