

**GALLOP AND PREMIER/CABINET  
OFFICE OF THE INFORMATION  
COMMISSIONER (W.A.)**

**File Ref: 96104  
Decision Ref: D06596**

Participants:

**Geoffrey Ian Gallop**  
Complainant  
  
- and -  
  
**Ministry of the Premier and Cabinet**  
Respondent

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - documents relating to an attitude monitoring survey conducted in Western Australia - documents of an agency - whether documents in possession or control of agency - clause 4(1) of the Glossary in Schedule 2 - whether agency is entitled to have access to requested documents.

*Freedom of Information Act 1992 (WA)* ss. 6(a), 10(1), 23(1)(b), 32, 33, 66(6);Glossary in Schedule 2 clause 4(1).

## **DECISION**

The decision of the agency is confirmed. The documents to which access is sought are not documents of an agency to which the FOI Act applies.

**B. KEIGHLEY-GERARDY**  
**INFORMATION COMMISSIONER**

20th December 1996

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Ministry of the Premier and Cabinet ('the agency') to refuse Dr Gallop MLA ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. In December 1993, the State Supply Commission ('the Commission') placed an advertisement in *The West Australian* newspaper inviting tenders from interested companies and individuals for the conduct of an Attitude Monitoring Survey ('the AMS') in Western Australia. The tender was No.251B of 1993. The Commission received two tender offers in response to that advertisement, including one from Computerized Holdings Pty Ltd, trading as West Coast Field Services ('WCFS'). The Commission assessed the two tender offers against the advertised selection criteria and the tender specifications. On 11 March 1994, the then Chairman of the Commission advised WCFS that its tender offer had been accepted in accordance with the terms of its offer, the specifications prepared for the tender, and the Commission's General Conditions of Contract for Services.
3. In November 1994, the complainant asked a number of questions in the Legislative Assembly of the Parliament of Western Australia about the AMS then being conducted by WCFS. In particular, the complainant asked the Premier whether the Government would make the results of the first stage of the AMS publicly available. In December 1994, the Government tabled in the Legislative Assembly the first report received from WCFS of the results of the first wave of the AMS.
4. In November 1995, the then Leader of the Opposition, Mr McGinty, and the complainant asked a further series of questions in the Legislative Assembly about the AMS. In particular, the complainant asked the Premier whether he would table all documents relating to briefings, correspondence and reports received in relation to the AMS. In response, the Premier offered the Opposition members the opportunity to receive the same briefing the Government had received about the AMS. On 6 December 1995, the Government tabled all of the documents to which the complainant had referred. Since then, the complainant has lodged with the agency two separate applications under the FOI Act seeking access to documents relating to the AMS.

### **The first access application**

5. In November 1995, the complainant applied to the agency under the FOI Act for access to all documents relating to the polling conducted by WCFS and any analysis performed by Nexus Quantum Pty Ltd, trading as AMR Quantum Harris ('AMR'). In particular, the complainant informed the agency that he required access to the "raw data" collected from the respondents to the AMS.
6. After receiving the complainant's access application, and pursuant to its obligations under ss.32 and 33 of the FOI Act, the agency consulted with a number of third parties, including AMR, in order to ascertain the views of those parties as to whether the requested documents contain any personal, commercial or business information about the third parties, which may be exempt. AMR informed the agency that some of the material annexed to the WCFS tender proposal included sensitive commercial information of considerable commercial value to AMR and that the disclosure of that kind of commercial information would adversely affect AMR's commercial and business interests.
7. After the agency received the first application, but before it had made a decision on access, a substantial number of documents requested by the complainant were tabled in the Legislative Assembly. Pursuant to s.6(a) of the FOI Act, the access procedures under the FOI Act do not apply to those documents. On 31 January 1996, the agency gave the complainant access to a number of other documents, either in full or in part. However, among other things, the agency refused access to the raw data collected by WCFS during the AMS under s.23(1)(b) of the FOI Act because the raw data was not contained in any documents in the possession or under the control of the agency.
8. After seeking internal review of the agency's decision, the complainant lodged a complaint with the Information Commissioner seeking external review of that part of the agency's decision which refused him access to the raw data collected by WCFS during the AMS. Inquiries carried out by my office in respect of that complaint established that the raw data was not held in any documentary form by the agency. Those inquiries also established that the raw data was not held by WCFS in any documentary form either. The complainant was informed of the outcome of those inquiries and he subsequently withdrew his complaint in respect of that matter.

### **The second access application**

9. However, on 26 April 1996, the complainant made a second access application to the agency in the following terms:

*"...I would now like to submit a new request for information - in this case the final reports from AMR Quantum in relation to all the questions asked as part of the survey. This request applies to all of the surveys performed by AMR as part of the Attitude Monitoring Survey..."*

*When I received the briefing in the Office of the Premier on 15 March the pollster presented overheads which outlined the results from each question asked. I ask access to these results and note that the Government can access them as part of its contract with the pollsters.*

*Unfortunately, the information tabled in Parliament only contained the results of some of the questions. I seek access to all of the answers from all of the surveys.”*

10. On 13 June 1996, Mr M Wauchope, Chief Executive, Office of State Administration, informed the complainant that the agency did not hold any of the requested documents. Accordingly, access was again refused under s.23(1)(b) of the FOI Act, on the basis that the requested documents are not documents of the agency. Mr Wauchope provided the complainant with detailed reasons for his decision.
11. On 3 July 1996, the complainant lodged a second complaint with the Information Commissioner, seeking external review of the agency’s decision. However, the complainant had not applied to the agency for internal review. Taking into account the previous history of this matter, and the particular circumstances of it, I considered that the complainant had shown sufficient cause to be allowed to lodge a complaint without having applied for internal review. I decided, therefore, to exercise my discretion under s.66(6) of the FOI Act and accept the complaint.

## **REVIEW BY THE INFORMATION COMMISSIONER**

12. On 19 July 1996, I notified the agency that I had received this complaint. Pursuant to my powers under the FOI Act, I required the agency to produce to me, for my examination and consideration, a copy of each of the tender documents related to the contract between the Commission and WCFS for the conduct of the AMS. I also required the agency to produce to me a copy of the documents related to the AMS which were tabled in the Legislative Assembly, a copy of the agency’s FOI file related to this matter, and the agency’s FOI files concerning the complainant’s previous access application.
13. I have examined the tender documents and considered the written terms of the tender contract between the Commission and WCFS. Additional information was also obtained from the agency about the conduct of the AMS in Western Australia. After considering all of the material before me, on 15 November 1996, I informed the parties in writing of my preliminary view of this complaint. It was my preliminary view that the documents requested by the complainant are not documents of an agency to which the FOI Act applies. Therefore, I invited the complainant to reconsider his complaint.

14. At this time the date for a State Election had been set. The complainant requested an extension of time, until mid January 1997 in order to respond to my preliminary view. However, I am satisfied that the complainant has been given a reasonable opportunity to make submissions to me. As at the date of this decision, no submissions have been received from the complainant and the complainant has not withdrawn his complaint. Therefore, I must determine this matter formally in accordance with my statutory obligations.

## **THE RIGHT OF ACCESS**

15. Freedom of information legislation is designed to provide a general right of access to government documents. Section 10 of the FOI Act is in the following terms:

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

*(2) Subject to this act, a person's right to be given access is not affected by -*

*(a) any reasons the person gives for wishing to obtain access;  
or*

*(b) the agency's belief as to what are the person's reasons for wishing to obtain access."*

16. The right of access provided by s.10(1) is a right of access to documents of an agency. Clause 4 of the Glossary defines the meaning of the phrase "documents of an agency". Specifically, clause 4(1) provides:

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

## **The complainant's submission**

17. The complainant does not dispute the agency's claim that the requested documents are not in its possession. However, in a submission included with his request for external review, the complainant contends that the fact that the agency does not hold the requested documents is not a valid reason for refusing him access to them. The complainant contends that the requested documents are documents of an agency within the meaning of the FOI Act because, in his view, the agency has a right of access to the requested documents in accordance with the terms of the tender contract between WCFS and the Commission.

18. The complainant also contends that, under the provisions of the Australian Marketing Research Society's Code of Professional Behaviour ('the Code'), the agency has a right of access to access the requested documents. It is the complainant's view that WCFS is bound by the provisions of the Code and, given the agency's advice that there is no written or express contractual term which specifically deals with the agency's right of access to the requested documents, the Code should prevail. In the complainant's view, the agency is entitled to access all of the data collected by WCFS, as well as AMR's analysis and interpretation of that data.
19. Therefore, whether the requested documents are ones to which the complainant has a right of access under the FOI Act will depend on whether the agency is entitled to have access to those documents. To determine that question, I have examined the terms of the contract between WCFS and the Commission, and I have considered the effect of the Code, if any, on the contractual rights of the respective parties.

**Are the requested documents "documents of an agency"?**

20. The tender documents provided to me by the agency identify the parties to that contract as WCFS and the Commission, on behalf of the agency. AMR did not submit a tender for the contract, nor is AMR a signatory to the contract. Therefore, I consider that AMR was not a party to that contract.
21. Further, having examined the tender documents, I do not consider that the Code can be relied upon in support of the complainant's contention that it forms part of, or can be relied upon to imply the existence of a term, of the tender contract between WCFS and the Commission. There is no express statement in any of the tender documents which incorporates the Code into the contract between WCFS and the Commission, nor is there any evidence to establish that the Commission or WCFS intended the Code to be incorporated into the tender contract for the conduct of the AMS, so as to govern, *inter alia*, the rights of ownership of certain documents. In my view, the Code cannot be used or referred to in order to determine the respective rights of the parties to that contract. In any event, even if the Code were incorporated into the terms of the contract, I am not persuaded that it would affect the question of whether or not the agency is entitled to access documents of AMR.
22. The tender submitted by WCFS indicates that WCFS engaged AMR as its consultant, for the purpose of assisting WCFS in conducting the AMS. Based upon the information obtained by my office, it is my understanding that AMR was required to analyse the data collected by WCFS and to report the results and its findings to WCFS. However, neither the agency nor the Commission is privy to the private commercial arrangements between WCFS and AMR.
23. The documents, if any, provided by AMR to WCFS pursuant to its consultancy agreement are not, in my view, the reports which WCFS was required to

produce, and did produce, under the terms of the tender contract between WCFS and the Commission. During my preliminary inquiries into this complaint, the agency informed me that WCFS produced and provided the required reports to the agency in accordance with its contractual obligations. The agency further informed me that each successive report has been tabled in the Legislative Assembly. The Tabling Office of the Legislative Assembly has provided me with copies of those reports which are publicly available.

24. Any documents created by AMR in the course of its commercial arrangement with WCFS are created pursuant to a private agreement. They are not, in my view, documents which the agency is entitled to access, and are not, therefore, in my view, "documents of an agency" as defined in the FOI Act. Accordingly, I do not consider the FOI Act applies to those documents.
25. In the absence of any express or implied term of the contract, and as AMR is not a party to the tender contract between WCFS and the Commission, I am of the view that the agency has no rights in respect of any documents created by AMR. In my view, that would include any documents prepared and used by the AMR representative during the briefing provided to the complainant on 15 March 1996.
26. On 7 December 1995, Mr McGinty accepted the Premier's offer of a briefing referred to in paragraph 4 above. In a letter dated 29 February 1996 to Mr McGinty, Mr Wauchope expressly advised Mr McGinty that WCFS and AMR agreed to provide the briefing only on the condition that any documents brought to that briefing by WCFS and AMR representatives remained their property and that neither WCFS nor AMR would provide copies of those documents to any person. It is my understanding that Mr McGinty accepted and agreed to that arrangement before the briefing took place.
27. Finally, I am satisfied that the AMR representative who attended the briefing at the request of WCFS was not acting as an officer of the agency, within the meaning of the FOI Act, by providing the briefing to the complainant on 15 March 1996. In my view, if AMR was obliged to provide such a briefing at all, the briefing was provided by the AMR representative under a private commercial arrangement between AMR and WCFS, and not pursuant to any contractual obligation to the agency to do so.

## CONCLUSION

28. I am satisfied that the requested documents are not in the possession of the agency. I am also satisfied that those documents are not under the control of the agency and the agency is not entitled to access those documents because the agency has no contractual rights in respect of those documents. Accordingly, I find that the requested documents are not documents of an agency to which the FOI Act applies. It follows, therefore, that the complainant has no right of access to those documents.



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