OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: F2004061** **Decision Ref: D2006006**

Participants:

Paul Stanley Byrnes
Complainant

- and -

Department of Environment
First Respondent

- and -

Ross James Sheridan
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access - job application document - clause 3(1) - personal information - clause 3(3) - whether information is prescribed details - clause 3(6) - whether disclosure on balance is in the public interest.

Freedom of Information Act 1992: ss. 24, 102(3); Schedule 1, clauses 3(1), 3(3), 3(6); Glossary
Freedom of Information Regulations 1993: regulation 9(1)
Public Sector Management Act 1994: ss. 16, 21(1)
Public Sector Management (Examination and Review Procedures) Regulations 2001: regulation 4(2)(f), 5(2)
Public Sector (Breaches of Public Sector Standards) Regulations 2005
Freedom of Information Act 1982 **(Qld)**
Freedom of Information Act 1982 **(Cth)**
Interpretation Act 1994: s.18

Re Thomson and Department of Agriculture [2002] WAICmr 26
Re Bowden and Department of Land Administration [1996] WAICmr 32
Re Anderson and Department of Immigration and Ethnic Affairs (1986) 4 AAR 414
Re Dyki and Federal Commissioner of Taxation (1990) 22 ALD
Re Antony and Griffith University [2001] QICmr 3
Re Baldwin and Department of Education [1996] 3 QAR 251
Harris v Australian Broadcasting Corporation (1983) ALR 551
Re Queensland Electricity Commission; Ex Parte Electrical Trades Union of Australia (1987) 61 ALJR 393
McKinnon v Secretary, Department of Treasury [2005] FCAFC 142

***Sean Investments Pty Ltd v McKellar* (1981)** 38 ALR 363
Re Williams and Registrar of the Federal Court of Australia (1985) 8 ALD 219

DECISION

The decision of the agency is confirmed. The document is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*.

D A WOOKEY
A/INFORMATION COMMISSIONER

15 March 2006

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Environment ('the agency') to refuse Mr Paul Stanley Byrnes ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. The complainant is an employee of the agency. In December 2003, the agency called for expressions of interest from amongst its employees for a person to act in the position of Regional Manager, Kwinana-Peel ('the acting position'), for three months with a possible three-month extension. The complainant applied for that position.

3. I understand that due to an oversight by the agency the complainant's application was not assessed with that of the other applicants and the agency only became aware of the situation after it had selected an applicant for the acting position. The agency then re-assessed all of the applications but confirmed its original selection. Shortly thereafter, the successful applicant - the third party in this matter - vacated that position, which was then filled by two other officers of the agency who shared that role.

4. Following the appointment to the acting position, the complainant asked the Commissioner for Public Sector Standards ('the PSS Commissioner') to investigate whether the agency had breached the Public Sector Standards in Human Resource Management ('the Standards') in relation to that appointment.

5. Section 16 of the *Public Sector Management Act 1994* ('the PSM Act') creates the office of PSS Commissioner. Section 21(1) of the PSM Act provides that the PSS Commissioner's functions include, among other things, establishing public sector standards setting out minimum standards of merit, equity and probity to be complied with by public sector bodies in relation to various human resource management activities.

6. On 30 January 2004, the complainant applied to the agency under the FOI Act for access to documents relating to the calling and assessment of the expressions of interest from employees of the agency for the acting position, including the expression of interest documents themselves.

7. On 26 February 2004, the agency identified 16 documents as coming within the scope of the complainant's access application and gave him access in full to eight documents but claimed that three documents (the three expressions of interest other than the complainant's) and certain information in five other documents were exempt under clause 3(1) of Schedule 1 to the FOI Act. On 2 April 2004, the agency confirmed its decision but provided the complainant with an edited copy of an additional document sourced from its electronic records database (Document 17).

8. On 5 April 2004, the complainant applied to me for external review of the agency's decision to refuse him access to some documents and to give him access to edited copies of other documents, pursuant to clause 3(1).

REVIEW BY THE INFORMATION COMMISSIONER

9. Following the receipt of this complaint, I obtained the originals of the disputed documents and the relevant FOI file from the agency. Inquiries were made with the parties to determine whether this complaint could be resolved by conciliation. In the course of my dealing with this matter, the agency became aware that it had treated two identical documents - Documents 6 and 7 - as different documents and edited one more extensively than the other. Accordingly, I dealt only with Document 7, which was the less extensively edited version. Subsequently, the complainant withdrew his complaint in relation to two other documents but the complaint could not be resolved.

10. In the meantime, in August 2004, the PSS Commissioner determined that the agency had breached the Temporary Deployment (Acting) Standard ('the Acting Standard') in relation to the acting position.

11. On 28 September 2004, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint. My preliminary view was that two of the six documents remaining in dispute (the expressions of interest of the two other unsuccessful applicants for the acting opportunity) were exempt in full under clause 3(1); three were exempt in part under clause 3(1); and one document (the expression of interest of the successful applicant) was not exempt.

12. I also advised the successful applicant for the acting position - Mr Sheridan ('the third party') - of my preliminary view that his expression of interest for appointment to the acting position and a reference to him in another document were not exempt. I invited him to make submissions to me in response to my preliminary view. Subsequently, the third party was joined as a party to this complaint. In response to my preliminary view, the agency provided the complainant with access to additional information in Document 17 (that being a reference to the third party identifying him as an applicant for the acting position) but maintained its claims for exemption for Document 11 (the third party's expression of interest for the acting position).

13. After agreeing to several requests from the complainant for extensions of time for his response, I suspended my dealings with this complaint for a number of months at the request of the complainant in order to allow separate discussions between the agency and the complainant in relation to this and other matters, with a view to conciliating this complaint. However, although the complaint could not be conciliated the complainant withdrew his complaint in respect of all but one document - Document 11. The third party objected to the disclosure of Document 11 and the agency added to its earlier claim for exemption under clause 3(1) a claim for exemption for the whole document under clause 8(1) of Schedule 1 to the FOI Act.

14. The agency, the third party and the complainant all made submissions to me in response to my preliminary view, which was conveyed to each of them in my letter dated 28 September 2004. Following consideration of those submissions and further consideration of the issues raised, I changed my view in respect of the one document remaining in dispute. I informed the parties of my revised view and my detailed reasons by letter. On 27 February 2006, in response to my revised view, the complainant made further submissions to me.

THE DISPUTED DOCUMENT

15. Document 11 is an internal email from the third party, dated 18 December 2003, attaching a memorandum containing an expression of interest ('EOI') in appointment to the acting position.

THE EXEMPTIONS CLAIMED

16. The agency claims that Document 11 is exempt under clause 3(1) and clause 8(1) of Schedule 1 to the FOI Act. In summary, clause 3(1) provides exemption for matter that would reveal personal information about someone other than the access applicant; clause 8(1) provides exemption for matter if its disclosure would be a breach of confidence for which a legal remedy could be obtained. The third party did not refer to exemption clauses but his arguments appear to me to relate to clauses 3 and 8, as he argues, in summary, that disclosure would reveal personal and confidential information about himself.

Clause 3 - Personal Information

17. Clause 3 provides, insofar as it is relevant:

> *"(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*
>
> ***Limits on exemption***
>
> *(2) …*
>
> *(3) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -*
>
> *(a) the person;*
> *(b) the person's position or functions as an officer; or*
> *(c) things done by the person in the course of performing functions as an officer.*
>
> *(4) …*

(5) …

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

18. The term 'personal information' is defined in the Glossary in Schedule 2 to the FOI Act to mean:

"… information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –

(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or

(b) who can be identified by reference to an identification number or other identifying particular such as a finger print, retina print or body sample".

19. Clearly, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies.

20. The definition of 'personal information' in the Glossary makes it clear that any information or opinion about a person from which a person can be identified is personal information for the purposes of the FOI Act and, therefore, *prima facie* exempt information under clause 3(1). Thus, 'personal information' is information about an identifiable person.

21. With regard to officers of government agencies, the FOI Act makes a distinction between purely private personal information - such as an officer's home address or health details and certain information that relates solely to an officer's employment. Clauses 3(3) and 3(4) of Schedule 1 to the FOI Act and regulations 9(1) and 9(2) of the *Freedom of Information Regulations 1993* ('the Regulations') effectively provide that certain kinds of work-related information is not private 'personal information' about an officer and that that kind of information will not be exempt under clause 3(1).

The agency's submission

22. In its letter of 27 October 2004, in response to my letter of 28 September 2004, the agency noted that I had identified the following public interests:

<u>In favour of non-disclosure:</u>

(a) A strong public interest in the maintenance of personal privacy, which can only be displaced by some considerably stronger public interest that requires the disclosure of private information about another person.

(b) A public interest in attracting good-quality applicants for positions in the public sector, some of whom may be deterred from applying if it were to become known that they had applied.

In favour of disclosure:

(i) A public interest in access applicants exercising their rights of access under the FOI Act.

(ii) Public interests in exposing waste and error in government agencies and in ensuring that agencies adhere to the principles of natural justice, fairness, equity and merit in their decision-making processes, particularly in decisions relating to staff appointments.

23. The agency submits that I gave little or no weight to the public interests in (ii) because my preliminary view was that:

- those public interests were satisfied to a considerable extent by the inquiries made by the PSS Commissioner in this case and the explanation given by the agency to the complainant about its decision-making processes;

- the disclosure of Document 11 would not further the public interests referred to in (ii) because, in particular, the public interest in accountability had been satisfied by the investigation by the PSS Commissioner into the recruitment process; and

- the third party no longer occupies the acting position and the present incumbent was not selected through the selection process to which Document 11 relates.

24. Consequently, the agency submits, the only public interest in favour of disclosure that I took into consideration was that in (i) above and it is well recognised from previous decisions in this State that that public interest, on its own, will not outweigh the public interest in the maintenance of personal privacy.

25. The agency submits that the following public interests also favour the non-disclosure of Document 11:

- The public interest in the recognition and enforcement of the Standards as the principles applicable to decision-making in relation to human resources in the public sector.

- The public interest in supporting the authority of the PSS Commissioner as the arbiter of grievances in relation to human resource decision-making in the public sector.

- The public interest in the finality of decisions with respect to human resource management issues, after the expiry of the period for a review of

those decisions which was permitted under the *Public Sector Management (Examination and Review Procedures) Regulations 2001* ('the Review Regulations').

26. The agency advises that the Acting Standard applied in relation to the appointment to the acting position and that the PSS Commissioner was able to (and did) investigate whether that Standard was met in this case.

27. The agency submits that, if I find that the job application submitted by a successful applicant for an acting position is not exempt from disclosure under the FOI Act, I will effectively set up another avenue of review of that appointment process, over and above the Standards and that anyone who happens to be curious about a particular selection process will be able to obtain a successful applicant's job application for a government agency position.

28. The agency submits that this will result in anyone being able to question publicly the merit of an appointment by reference to the information contained in the job application itself, which will result in the Standards no longer being the sole reference point for determining whether a human resource decision is appropriate and this will undermine the role of the PSS Commissioner as the arbiter of grievances in relation to such decisions.

29. The agency submits that, if a successful applicant's job application is not exempt under the FOI Act, then third parties will be able to obtain access to that document and to express their views about the merit of the appointment, at any time, and potentially well outside the review period under the Review Regulations. The agency submits that this also has the potential to undermine the authority of a successful applicant for a position well after they are appointed, which may be destabilising for the agency.

30. The agency submits that, in the course of balancing the public interests in my preliminary view, I erroneously applied the fact that it is public knowledge that the third party was the successful applicant for the acting position to the totality of the personal information about the third party contained in Document 11. The agency submits that, although the third party's application for the acting position is public knowledge, other personal information about him in Document 11 is not and the public interests which support the non-disclosure of this information are not diminished by the fact that the third party was the successful applicant.

31. The agency also submits that my preliminary view that Document 11 is not exempt under clause 3(1) is at odds with the conclusion reached by the former Information Commissioner ('the former Commissioner') in *Re Thomson and Department of Agriculture* [2002] WAICmr 26. The agency says that, in that case, the applicant sought access to job applications submitted for two positions in the Department of Agriculture, including, it assumes, the applications submitted by the successful applicants for those positions. The agency notes that, in *Re Thomson*, the former Commissioner held that the requested documents were exempt under clause 3(1) and that the limit on

exemption in clause 3(6) did not apply because the public interest in protecting the privacy of the job applicants outweighed any competing public interests in favour of disclosure in that case.

32. The agency submits that the decision in *Re Thomson* is correct and cannot be distinguished on its facts from the present case and that my decision in this case should be consistent with that decision.

33. The agency submits that my preliminary view is inconsistent with the tenor of the decision in *Re Bowden and Department of Land Administration* [1996] WAICmr 32 in which the former Commissioner found that job applications submitted by applicants for positions in the Department of Land Administration, including details concerning the applicants' present employment and qualifications, was information that was exempt personal information.

34. In that case, the former Commissioner concluded that it was practicable under section 24 of the FOI Act to delete names and other information that would identify the applicants. The agency submits that, in the present case, it is not practicable to edit Document 11 because the third party's identity is known but that the tenor of the decision in *Re Bowden* is correct.

35. In light of the above, the agency submits that the public interests in favour of the non-disclosure of Document 11 outweigh the public interests in favour of its disclosure.

The third party's submission

36. In his letter to me of 13 October 2004, the third party advised that he strongly objects to the disclosure of Document 11 and that he has always understood that job applications are treated as confidential and only disclosed to the selection panel and other decision-makers for the purpose of the selection process.

37. The third party says that, under the PSM Act, job applications and the associated documentation of selection panels and appeals are not available to parties not directly involved in the decision-making process. Job applicants involved in those processes are not provided with information relating to other applicants and can only appeal against the process - not against the recommended applicant. The third party submits that a decision to release his job application undermines those important provisions.

38. The third party also objects to any person who may be a future competitor against him in selection processes having access to his application. He submits that, in a competitive process such as job selection, detailed knowledge by future competitors of his personal strengths in relation to the selection criteria would give them an unfair advantage in any future selection process. He submits that the disclosure of Document 11 would potentially unfairly disadvantage him in any future applications for positions.

39. The third party does not accept that, because he was the successful applicant, personal information concerning him should be accessible whilst that relating to the unsuccessful applicants is not. The third party accepts that his appointment is public information but does not accept that therefore his personal details - including how he argues his case against the selection criteria - are also public information.

40. The third party also says that the notion that disclosing the job applications of successful applicants would help ensure that correct information is supplied is not in line with the confidentiality clauses of the PSM Act relating to the conduct of selection processes. The third party submits that to make such a determination would be contrary to the privacy provisions of the PSM Act and would significantly undermine those important privacy measures.

The complainant's submissions

41. Prior to my letter to the parties of 28 September 2004, the complainant submitted that the agency has not hitherto treated the kind of information contained in Document 11 as confidential. In support of that claim, the complainant says that the invitation to make an "*Internal Expression of Interest*" for the position was extended to all agency staff on 12 December 2003 and he has provided me with copies of that document and the relevant Position Description Statement. The complainant notes that the former document says:

> "*Prior to applying for this opportunity it is required that you discuss your availability together with the likely impact on your current work environment with your supervisor.*"

42. The complainant understands that eleven or more officers were consulted during the assessment stage of the EOI process. Consequently, the complainant submits, the process could not be considered as a strictly private and confidential process from its commencement but was a process that encouraged openness about applications and discussion with others prior to the making of an application.

43. The complainant says that he is seeking access to the disputed matter to determine whether natural justice, fairness, merit and equity have been incorporated into the decision-making processes in the appointment to the acting position. The complainant submits that there is a strong public interest in understanding the workings of the Government's and its agencies' decision-making processes and that government decisions should be shown to be fair, equitable, based on merit, and free from bias and personal or political favour. The complainant submits that the decision-making of government agencies should be focused on the best delivery of services to the public and not be for personal or political favour.

44. In support of that submission, the complainant says that the acting position requires the incumbent to represent the agency in the State's premier industrial area. The complainant notes that some of the State's most contentious

environmental issues occur in the Kwinana-Peel industrial area, which means that the incumbent must have a range of skills in technical, managerial and socio-political areas. The complainant says that all of the decision-makers who considered the expressions of interest for that position are current or former employees of the Water and Rivers Commission and that there could be a degree of bias in the decision-making processes associated with the appointment to that position.

45. The complainant submits that there is a public interest in the fair treatment of individuals by public agencies. The complainant says that the agency's procedure in handling the EOIs was flawed and I note that that also was the finding of the PSS Commissioner. The complainant refers me to *Re Thomson* where the former Information Commissioner said:

> *"I recognise that there is a strong public interest in the maintenance of personal privacy. I also recognise that there is a public interest in ensuring the agency's selection processes are fair and equitable".*

46. The complainant submits that there is a public interest in the exposure of waste, wrongdoing and error in public agencies to ensure that corrective and preventative measures are put in place and that, in this case, the number and severity of errors that occurred in the EOI process was extraordinarily high.

47. The complainant submits that it is not proper to withhold information when an agency's decision-making processes have erred because this would prevent the public from being given an opportunity to scrutinise the workings of government agencies.

48. Following the receipt of my written preliminary view, the complainant made the following further submissions on 1 December 2004 and 2 May 2005:

- The Government's reports entitled *"Human Resource Management in the Royal Street Division of the Department of Health"* (Office of the PSS Commissioner, August 2004) and "*People Making a Difference: The Public Sector Strategic Directions"* ('the Public Sector Report') (Department of the Premier and Cabinet, November 2004) indicate that there is room for improvement in the recruitment and selection of public sector employees and show that there is a strong public interest in accountability for recruitment and selection to ensure that high calibre candidates apply for, and are appointed to, public sector positions.

- A high degree of openness and accountability would promote greater accountability and the disclosure of documents such as Document 11 would result in a more robust, competitive and service-orientated public sector which would drive continuous improvement in recruitment and selection processes and allow the public to scrutinise the Government's employment practices.

- The agency collects money from licence fees, most of which is expended on the wages of its employees. Consequently, the stakeholders who pay

directly for services have a direct interest in the type, number and skills of staff appointed by the agency.

- There is a conflict of interest between the agency's failure to comply with statutes and regulations and its discretion to disclose information in relation to such failure to comply.

- There is considerable public interest in documentation provided by candidates for public sector positions as illustrated by a media article dated 7 December 2004, concerning the résumé of a former Chief Executive Officer of the City of Joondalup and recent media attention on the hiring of overseas doctors without proper scrutiny of their qualifications and experience. Accordingly, it is in the public interest to disclose information such as that contained in Document 11 so that there is an opportunity to scrutinise an applicant's claim for a public sector position.

- In response to the agency's claim that the public interests that favour non-disclosure outweigh those favouring disclosure of Document 11, it is likely that much of the information in that document would be prescribed details of the kind referred to in clause 3(3) - which is work-related - and not private personal information about the third party. It is also likely that that information would be provided by the person appointed to the acting position as part of the functions of that position, for example, in presenting papers in public and professional forums where a brief précis of the speaker's professional career is usually given.

- The PSS Commissioner has limited powers which are restricted to monitoring and reporting on compliance with the Standards and has no power to ensure that an agency takes corrective and preventative measures to ensure compliance with the Standards.

- It is vital for public confidence in the working of government agencies that documentary evidence can be provided that shows appointed officers have the requisite qualifications, skills and experience to perform their roles as public servants, particularly officers in senior and high-profile positions, such as the acting position.

- While there may be a public interest in the finality of decisions, there is also a public interest in the final arbiters of human resource appointments (that is, those persons who come into contact with the appointees) having additional input into government appointments and that this is in line with advances in technology whereby electronic databases can be searched for information about the skills, qualifications and capabilities of service providers.

- The public will have greater confidence in government agencies, and there will be greater adherence to the Standards, if the applications of successful candidates are disclosed.

- In respect of the decisions in *Re Thomson* and *Re Bowden*, the complainant says that they differ from the present case because Document 11 has arisen in the context of a proven breach of the Standards.

49. The complainant submits that the public interests identified by him, on balance, outweigh the right to privacy of any individual.

50. Following the receipt of my written revised view, the complainant made the following further submissions on 27 February 2006:

- There are short-term appointments made where "employee interests" are not taken into consideration in the decision-making process.

- Access applicants who are not candidates for positions - either short term or permanent - may still have concerns about the decision-making in relation to those positions and those people do not have a right to scrutinize processes by claims of breaching Standards.

- People acting in short term positions have an advantage over future job applicants for permanent recruitment, which outweighs any advantage lost by having to release those persons' expressions of interest for the acting position. The complainant submits that agencies should "…*attest that an acting arrangement has no possibility of becoming long-term*".

- "Employee interests" could be excluded from the information disclosed. For an explanation of "employee interests" see paragraphs 108-110 below. The complainant accepts that the most meritorious candidate as required by the Recruitment, Selection and Appointment Standards is not automatically the preferred candidate for 'acting' positions because the Acting Standard allows "employee interests" to be taken into consideration. There is a public interest in ensuring that senior office holders have the necessary skills, qualifications and experience to perform in 'acting' positions even so.

- There is a stronger public interest in disclosure about short-term appointments than recognised by me because the PSS Commissioner in her 2003, 2004 and 2005 Annual Compliance Reports noted - at, respectively, pages 9 and 19; 39 and 44; and 38 - the following concerns in relation to the Acting Standard:

    - extended periods of 'acting' are a common occurrence and one specific review which revealed such extended periods could find no evidence of expressions of interest, merit based assessment or the required redeployment clearances;

    - there is a lack of transparency from insufficient documentation about acting decisions; and

    - the existence of widespread employee perceptions of unfairness and favourtism in the selection for higher duties.

- The weighting placed on "employee interest" is too high in light of the PSS Commissioner's concerns. The complainant cites from page 34 of a document published in 2001 by the Office of Equal Employment Opportunity, entitled "*Innovative Recruitment*" to support his argument that, in order to avoid capricious or indefensible decisions the criteria for any position should be provided to applicants and other strategies should be in place to allow for fairness, equity and probity when dealing with "employee interest" considerations. Such considerations should only be exempt if:

  (a) agencies can attest to proper policies being in place;

  (b) an acting decision incorporating 'employee interests' is shown to be compliant with the agency's 'employee interest' policy; and

  (c) the decision is - and is perceived to be - free from bias, favour, nepotism, patronage etc.

- The giving of access to the disputed document is consistent with the intent of the FOI Act as noted in the Second Reading of the FOI Bill on 28 November 1991.

Consideration

51. I have examined Document 11, the agency's FOI file and the submissions and information provided to me by the parties to this complaint. In my opinion, the disclosure of Document 11 would reveal personal information about the third party, as defined in the FOI Act, which is *prima facie* exempt under clause 3(1).

52. Specifically, Document 11 contains information including the third party's academic qualifications; details concerning past and present employment with government agencies; examples of relevant duties, roles and dealings; information about his approaches to management, conflict resolution and communication.

53. In the letter advising the parties of my preliminary view, I advised that a number of decisions to which the complainant had referred me related to jurisdictions that have exemption provisions in their FOI legislation which differ significantly from the wording in clause 3(1) of the FOI Act. For example, the equivalent exemption in the *Freedom of Information Act 1992* (Qld) refers to "*information concerning the personal affair*s [a term which is not defined in that Act] *of a person*".

54. In 1991, the *Freedom of Information Act 1982* (Cth) was amended by deleting the phrase *"information relating to the personal affairs of any person"* from the equivalent exemption and replacing it with the defined term 'personal information'. However, the Commonwealth decision to which the complainant referred me predated that change. In the view of the

Commonwealth Administrative Appeals Tribunal, the former term in the Commonwealth FOI Act was a term *"…inherently incapable of precise or exhaustive definition"*: *Re Anderson and Department of Immigration and Ethnic Affairs* (1986) 4 AAR 414 at 430, and one that has been given varying interpretations.

55. By contrast, clause 3(1) of Schedule 1 to the FOI Act concerns 'personal information' which term is clearly defined in the Glossary and which includes a much wider range of information than those other terms have been interpreted as including.

56. In my letter of 28 September 2004, I noted that the decisions in other jurisdictions to which the complainant had referred me were to be approached with some caution, given the significant differences in the relevant exemption clause in each. For example, in *Re Dyki and Federal Commissioner of Taxation* (1990) 22 ALD (a decision which predated the amendment to the Commonwealth FOI Act) and *Re Baldwin and Department of Education* [1996] 3 QAR 251, the job applications and curricula vitae of unsuccessful job applicants were held to contain information concerning or relating to the 'personal affairs' of their authors. If I agree that those kinds of document fall within that narrower definition - and I do - it is likely that they will fall within the broader definition in the Western Australian legislation.

57. In both *Re Dyki* and *Re Baldwin*, the documents of successful applicants were found not to be information concerning 'personal affairs'. However, for the reasons I have explained above, those cases do not assist in determining whether such information is 'personal information' under the FOI Act and are of limited assistance in determining whether such information is exempt.

Limits on exemption

58. Clause 3(1) of Schedule 1 to the FOI Act is subject to the limits on exemption set out in clauses 3(2)-3(6). In the circumstances of this complaint, I consider that only clauses 3(3) and 3(6) are relevant.

Clause 3(3)

59. Clearly the third party, as an internal applicant for a position with the agency, is an officer of the agency. Clause 3(3) provides that information is not exempt as personal information under clause 3(1) merely because its disclosure would reveal certain prescribed details about a person who is or has been an officer of an agency. In my opinion, the use of the term 'merely' in clause 3(3), according to its ordinary dictionary meaning, means 'solely' or 'no more than' prescribed details about an officer.

60. The prescribed details are set out in regulation 9(1) of the Regulations as follows:

> *"In relation to a person who is or has been an officer of an agency, details of -*

> *(a) the person's name;*
> *(b) any qualifications held by the person relevant to the person's position in the agency;*
> *(c) the position held by the person in the agency;*
> *(d) the functions and duties of the person, as described in any job description document for the position held by the person; or*
> *(e) anything done by the person in the course of performing or purporting to perform the person's functions or duties as an officer as described in any job description document for the position held by the person".*

61. Regulation 9(1) relates to individuals who are or have been officers of 'an' agency. That is, it is not restricted to the prescribed details that relate to this particular agency but may also cover prescribed details relevant to officers of the agency in connection with their service with another government agency.

62. However, where an officer of an agency has applied for a position, I consider that disclosure of information which comes within regulation 9(1) in that person's job application may reveal more than 'merely' prescribed details in the context in which it appears because, for example, the information that an officer has applied for a post is, of itself, personal information which is not 'merely' a prescribed detail. In any event, some of the information in Document 11 is not information which is listed as a prescribed detail, for example, details of how the third party perceived he had performed his work.

63. Some of the information in Document 11 does constitute prescribed details, in my view. For example, previous public sector positions held by the third party, his qualifications and things done by him in the course of performing his duties as an officer are prescribed details under regulation 9(1)(c), (b) and (e) respectively. However, in the context in which they appear, I am of the view that disclosing those parts of the document which contain information about things done by the third party in the course of his duties as an officer would reveal more than merely the things done as that information appears in the context of the third party's argument for his suitability for the acting position and its disclosure would also reveal his own assessment of his achievements and particular skills. Therefore, for the reasons given here, I consider that the limit on the exemption in clause 3(3) does not apply to that information in this case.

64. It does, however, apply to some of the other information viewed in isolation in the document, for example, the titles of previous positions held by the third party. However, although the document could be edited to delete all but those prescribed details, all that would remain would be meaningless, in my view. Therefore, I do not consider that editing the document to remove all but solely prescribed details would be practicable.

Clause 3(6)

65. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Section 102(3) of the FOI Act provides:

> "*If, under a provision of Schedule 1, matter is not exempt matter if its disclosure would, on balance, be in the public interest, the onus is on the access applicant to establish that disclosure would, on balance, be in the public interest.*"

66. Consequently, the onus is on the complainant in this case to persuade me that, on balance, it would be in the public interest to disclose personal information about the third party in Document 11, which is *prima facie* exempt under clause 3(1). Determining whether or not disclosure would, on balance, be in the public interest involves identifying those public interests that favour disclosure of the particular documents and those that favour non-disclosure, weighing them against each other and making a judgment as to where the balance lies.

67. In the present case, a relevant fact is that the acting position was not publicly advertised and was only open to then current employees of the agency. Also, it is public knowledge that the third party was the successful applicant.

68. Favouring non-disclosure in this case, I recognise that there is a strong public interest in maintaining personal privacy. That public interest is recognised by the inclusion in the FOI Act of the exemption in clause 3(1) and, in my view, that public interest may only be displaced by some other considerably stronger public interest that requires the disclosure of private information about another person.

69. I note that the third party strongly objects to the disclosure of Document 11 and submits that the disclosure of that document has the potential to unfairly disadvantage him in any future applications by giving competing applicants detailed information about his personal strengths in relation to particular selection criteria which, together with how he presents that case in relation to those criteria, is not, he submits, public information but personal information about himself.

70. As I have said, I accept that Document 11 contains personal information about the third party. I understand his submission to be that it is not in the public interest to place a potential candidate for a public sector position at a disadvantage to other candidates. However, it is not clear to me how the disclosure of the third party's view of his particular strengths in relation to specific selection criteria, or his past achievements, could be used to his disadvantage by future competitors for a position. Candidates can either demonstrate that they have the particular strengths sought or they cannot. In the unlikely event that all parties have equal strengths then the matter will be decided upon other relevant criteria such as experience and qualifications. Further, there does not appear to me to be anything unique or remarkable in

the presentation or structure of the third party's EOI as set out in Document 11 such that its disclosure could advantage any future competitors in terms of the presentation of their claims for appointment.

71. The third party says that the disclosure of his EOI would undermine the privacy provisions of the PSM Act relating to the conduct of selection procedures but he has not identified those provisions. I can find nothing of relevance in the PSM Act, although the compliance requirements of the Standards provide that "[a]*ppropriate confidentiality* [be] *observed."* What the term "appropriate confidentiality" is intended to mean is not stated. In my view, "appropriate confidentiality" is confidentiality which is appropriate to the circumstances. Since 1993 confidentiality in the Western Australian public sector has always been in the context of the FOI Act and always balanced against the public interest in the accountability of government.

72. I do not accept the complainant's submission that the application process for the acting position was not confidential because, although I accept that applicants were required to discuss the question of their application with their supervisors, information about those applicants and applications was known only to a small number of people and was not in the public domain. Disclosure under the FOI Act, on the other hand, is considered to be disclosure to the world at large as no conditions as to, for example, their further dissemination can be attached by an agency to documents released under the FOI Act.

73. Also favouring non-disclosure, I recognise that there is a public interest in attracting good-quality applicants for positions in the public sector, some of whom may be deterred from applying if it were to become known that they had applied for a particular position and been unsuccessful and that their unsuccessful applications might be released into the public domain.

74. Favouring disclosure, I recognise that there is a public interest in the complainant being able to exercise his right of access under the FOI Act. I also accept the complainant's submission that there are public interests in exposing waste and error in government agencies and in ensuring that government agencies adhere to the principles of natural justice, fairness, merit and equity in their decision-making processes, particularly - in this case - with respect to the appointment of staff.

75. However, in this particular case, I understand that the PSS Commissioner has investigated the complainant's complaint; determined that there was a breach of the Standards; and recommended remedial action. In addition, the agency has provided the complainant with an explanation of its decision-making procedure - insofar as it concerns the acting position - and also given him a number of documents relevant to that process. In my view, those actions go a considerable way to satisfying the public interests in demonstrating that the principles referred to have been adhered to.

76. It seems to me therefore that the public interest in the accountability of the agency in that regard has been satisfied by those actions and does not of itself

require the disclosure to the complainant of the personal information about the third party. I am also not persuaded that disclosure of the third party's application would in any way further any public interest in exposing "waste and error in government agencies".

77. I do not accept that the agency's submission summarised (in paragraphs 22-24 above) concerning the public interests referred to in my preliminary view is an accurate summary of my discussion of the application of clause 3(6). In respect of documents relating to the unsuccessful applicants, I recognised a public interest in the protection of the privacy of the unsuccessful applicants and a public interest in maintaining the ability of agencies to attract high quality applicants for positions, some of whom may be deterred from applying were it to become known that the fact of them having unsuccessfully applied would become public information. My preliminary view was that the public interest in the protection of the personal privacy of the unsuccessful applicants outweighed the other public interests identified, which included the public interests in people being able to exercise their rights under the FOI Act and the public interests in exposing waste and error in government agencies and in ensuring that government agencies adhere to the principles of natural justice, fairness, merit and equity in their decision-making, since the latter can largely be satisfied in other ways, in this case.

78. However, with regard to the position of the successful applicant, I noted that, in my opinion, the situation was different. In my view, the balance of competing public interests changes in respect of information relating to the successful applicant, in part because there is no longer any sensitivity attached to the fact that the third party applied for the acting position. The fact that he was successful and took up the acting position necessarily reveals that he applied for it. Confidentiality of the fact that he applied for the position is no longer an issue, as it may be for the unsuccessful applicants. That information is no longer private or confidential to the third party and, in consequence, it may affect the way in which the information in Document 11 is viewed so that the balance of the public interests may change.

79. The reason I gave for that view was that, although I consider that Document 11 contains more than merely prescribed details about the third party, all of the information in that document - other than what appears to be a private e-mail address - relates to the third party's work history and experience and his claims for the acting position. It does not contain any information about the third party's personal circumstances, private life or private contact details. I do not consider that Document 11 contains any 'private' personal information about the third party. In my view, it is, on the whole, the kind of information which, as the complainant suggests, would be used in public and professional forums to illustrate the third party's previous work history and experience.

80. The public interest in access applicants exercising their rights of access under the FOI Act was not, as the agency submits, the only public interest factor I took into account favouring disclosure. In my letter of 28 September 2004, I said:

> "*It seems to me that there may be a public interest in making public a successful applicant's application (or, in this case, EOI) thereby revealing the kinds of skills, experience and claims that were required to win the position in question. If it were to become known that a successful applicant's application may be released into the public domain, that may also further the public interest in ensuring that such applications are accurate in their particulars and claims."*

81. I remain of that view. The complainant's comments on the media interest in matters relating to the scrutiny of the curricula vitae of government employees - and in particular the recent public exposure of false claims in the curriculum vitae of a chief executive officer of a local government - illustrate a matter that is of interest to the public, which is different from the public interest in ensuring the accuracy of job applications made by applicants for public sector jobs. However, I agree that there is a public interest in the proper scrutiny of applications for senior government positions and a public interest in maintaining community confidence that people appointed to such positions, often to exercise significant governmental functions and powers, are appropriately qualified to do so. Were it to become known that such applications may be released into the public domain, a likely effect in my opinion is that great care will be taken by applicants to ensure that their claims are accurate. In saying that I am not suggesting that the successful applicant's EOI in this case is anything other than accurate in its particulars and claims.

Effect on the role and authority of the PSS Commissioner

82. The agency also submits that there are additional public interests relevant to the recognition and enforcement of the Standards; the maintenance of the PSS Commissioner's authority as the arbiter of grievances over decisions concerning human resources in the public sector; and the finality of the decisions on human resource management issues, after the expiry of the prescribed period for review under the Review Regulations. The agency submits that, by disclosing the job applications of successful candidates, I will be setting up an avenue of review which supersedes the Standards with the consequence that they and the role of the PSS Commissioner will be undermined. I do not accept those claims.

83. I accept that the three factors relating to the Standards and the PSS Commissioner's functions are all relevant public interests but I do not accept that the disclosure of the EOIs of successful candidates for temporary positions in government agencies would have the adverse effects on those public interests claimed by the agency.

84. In my opinion, disclosure of relevant EOIs would not set up an avenue of review which supersedes the Standards. It would not establish any avenue of

review. The PSS Act and the *Public Sector (Breaches of Public Sector Standards) Regulations 2005* ('the PSS Regulations'), which replaced the Review Regulations in September 2005, establish the process for having such decisions reviewed where there is an alleged breach of the Acting Standard. That does not change merely because information about the successful applicant is disclosed. The agency has not explained how that establishes another avenue of review, by whom or by what process and I do not accept that it does. Once the prescribed period for review under the PSS Regulations has passed, as far as I am aware, there is no other avenue of review.

85. Nor do I accept that the disclosure of Document 11 would undermine the public interest in recognising and enforcing the Standards, which set out the minimum standards expected of Western Australian public sector bodies and employees and those applying for jobs in the public sector. In my view, the disclosure of Document 11 would build upon those minimum standards. If disclosure of a successful internal applicant's EOI means that more scrutiny will be given by decision-makers to those EOIs then I consider that that is a factor which favours disclosure.

86. With regard to the agency's argument that disclosure of the EOIs of successful applicants will place any curious person in a position to question publicly the merit of that appointment by reference to the information contained in the job application, the fact is that people are currently able to question publicly the merit of any appointment. In my view, having access to the relevant EOI does not necessarily mean that people will be more likely to question appointments; it may equally mean that they will be less likely to do so.

87. I do not accept that the disclosure of relevant EOIs would undermine the role of the PSS Commissioner or the finality of that officer's decisions because, as noted, it does not affect the procedures currently in place and additional transparency may make it less likely rather than more likely that decisions will be queried. In my view, the agency's claim that such disclosure has the potential to undermine the authority of a successful applicant, which may be destabilising for the agency, is speculative. It is not clear to me how disclosure of a successful applicant's qualifications, experience and skills to do the job could be expected to undermine his or her authority. It could equally be speculated that it may have the opposite effect.

Unsuccessful applications and successful applications

88. The agency further submits that my preliminary view of this matter was incorrect because, in balancing the public interests, I erroneously applied the fact that the third party was the successful applicant to all of the information in Document 11. The agency says that, although the fact that the third party applied for the acting position is publicly known, that is not the case for the information in Document 11 and submits that the public interests which support the non-disclosure of that document are not diminished by the fact that the third party was the successful applicant.

89. With regard to that submission, I consider that the agency has misunderstood my reasoning on that issue and has misconstrued the 'public interest test' which is used to balance competing public interests. The application of that test involves identifying all of the public interests for and against disclosure, weighing them against each other and deciding where the balance lies: see *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551 at 561.

90. As I have said, in my opinion, the fact that the third party was known to have applied for, and been appointed to, the acting position, had the effect that the public interest considerations in respect of Document 11 were different from those relating to the documents concerning the unsuccessful applicants. Although the public interest in protecting personal privacy remains a factor to be considered in respect of the third party when balancing the competing public interests, what it requires in respect of the third party is different from what it requires in respect of the unsuccessful applicants, in respect of whom even the fact that they applied is not public knowledge. There are public interests favouring disclosure of Document 11 which do not apply to similar documents relating to the unsuccessful applicants and those include public interests in revealing the kinds of skills, experience and claims required to win particular positions, maintaining public confidence that only appropriately skilled, experienced and qualified people hold public sector positions which are funded by the public purse and ensuring that applications for similar positions are accurate in their particulars and claims.

91. In balancing those public interests, together with the public interest in applicants exercising their rights of access under the FOI Act, my preliminary view was that those interests, taken together, outweighed the public interests in the privacy of the third party and that the public interest in attracting good quality applicants may be furthered rather than hindered. In relation to the process of determining where the public interest lies in a particular case, the majority of the High Court (Mason CJ, Wilson and Dawson JJ) said, in *Re Queensland Electricity Commission; Ex Parte Electrical Trades Union of Australia* (1987) 61 ALJR 393 at 395:

> *"Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree."*

92. Tamberlin J, in the Federal Court decision in *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 at paragraph 12 explained the process of determining where the public interest lies as follows:

> *"The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where the public interest resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that the public interest can be ascertained and served. In some circumstances, one or*

> *more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable."*

93. In *Sean Investments Pty Ltd v McKellar* (1981) 38 ALR 363 at 375 Deane J, when considering the process of determining the relevant considerations to take into account in the exercise of a broad statutory discretion, made the following comment which Tamberlin J (at paragraph 11**)** considered equally relevant to the application of the public interest test, as do I:

> *"In a case such as the present, where relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards."*

94. I note the agency's arguments with reference to the decisions of the former Commissioner in *Re Thomson* and *Re Bowden.* There are points of difference in those cases. For example, in *Re Thomson*, the complainant did not provide submissions relevant to the public interest and therefore did not provide anything that went to discharging his onus of establishing that disclosure would, on balance, be in the public interest. However, I accept that in those cases both successful and unsuccessful applications were found to be exempt.

95. I agree that consistency in decisions emanating from the Office of the Information Commissioner is highly desirable. However, I am not bound by the former Commissioner's decisions or, indeed, by my own previous decisions. Each complaint to me will be dealt with on its own merits. If, in a particular case, arguments are put to me that were not put to, or considered by, the former Commissioner or have not previously been considered by me, it is always possible that I may be persuaded by those arguments in a particular case. It appears to me that in none of her previous decisions concerning applications for job vacancies in the public sector did the former Commissioner turn her mind to the possibility of different considerations being relevant to the application of the successful candidate as opposed to the applications of the unsuccessful candidates. As I explained in my preliminary view, I have formed a view that there are different considerations to be taken into account in respect of each.

96. In respect of the applications of unsuccessful applicants, I agree with the following comments of Senior Member McMahon of the Commonwealth Administrative Appeals Tribunal in *Re Williams and Registrar of the Federal Court of Australia* (1985) 8 ALD 219 at 224:

> *"If their documents became public and their identity was consequently disclosed, their present employment could be destabilised. If there were any applicants outside the public service and it became known to their employer that they were considering moving to another position, this could have adverse effects on their present employment and their*

> *prospects for promotion. Even in the case of applicants within the public service, an application of this nature, if widely known, could indicate some dissatisfaction or restlessness which could have an effect on the applicant's career…One must ask oneself - is it reasonable to trumpet to X's friends, employers, rivals, associates, family, or enemies that X is applying for a new job? It certainly cannot be said that such disclosure would be in the public interest. How then can it be said to be reasonable when there is no countervailing consideration to the privacy to which one would normally expect to be entitled?"*

97. I also agree with the comments of the Queensland Information Commissioner in *Re Baldwin*, at paragraph 21, that *"…for the reasons recognised by Mr McMahon in* Re Williams*, the fact that a person has made an application for employment would ordinarily be information, the further dissemination of which, any applicant would wish to have tightly controlled pending the outcome of the selection process, and the unsuccessful applicants would wish to have tightly controlled thereafter…Thus, privacy considerations which are at the heart of the s.44(1) exemption, are present in this context."*

98. Both Senior Member McMahon and the Queensland Information Commissioner, however, took the view that those considerations do not apply to the successful applicant. In *Re Williams* at page 224, Senior Member McMahon said of the document relating to the successful applicant:

> *"He has since been appointed to the position and the fact of his application must now be taken as public knowledge…For* [the successful applicant]*, the entitlement of anonymity has passed. It is now known that he applied, that he must previously have intended to leave his former position, that he intended to pursue a career in circumstances different from his previous employment."*

99. In *Re Baldwin*, at paragraph 22, the Queensland Information Commissioner expressed the view that, although he considered that the fact that a person had applied for a position of employment was information concerning that person's personal affairs, "[i]*f the application is successful, however, the person's employment in the new position will become, in effect, a matter in the public domain (and in the case of an appointment to a government agency, a matter of public record) and the fact that the person applied for the position could no longer be regarded as information about a private aspect of the person's life."* In *Re Dyki*, Deputy President Gerber of the Commonwealth Administrative Appeals Tribunal, after having agreed with the reasoning of Senior Member McMahon in *Re Williams* and finding that disclosure of the contents of the job application of an unsuccessful candidate would constitute an unreasonable disclosure of personal affairs, expressed the following view, at pages 134-135:

> *"The two successful candidates have since been appointed to the advertised positions and their new status has entered the public domain. I am satisfied that it is both in the public interest and reasonable that promotions must not only be just, but seen to be just. It follows that those*

> *applications, having achieved their aim, are opened up to public scrutiny and their authors' claim to promotion is henceforth in the public domain. It follows that the applicants' claim to privacy must be deemed to have been abandoned, if only because it is public knowledge that they applied for promotions and were successful. Thus, the job applications for the two successful candidates have lost whatever entitlement to anonymity they had (subject to deletion of matters adjudged to be purely personal)."*

100. As I indicated at paragraphs 53-57 above, those views were expressed in the context of whether or not the applications in question constituted "information about the personal affairs" of the applicant in each case. That is not an issue for me as the exemption in the FOI Act is not for information concerning the personal affairs of a person but, rather, for "personal information", as defined. Clearly, all of the documents in issue in those cases and the document in issue in this case contain personal information as defined in the FOI Act. The relevance of the comments from those cases to my consideration, however, is that I consider that they articulate some of the different considerations that apply to successful applications and unsuccessful applications when contemplating the potential effects of disclosure.

101. Clearly, weighing against disclosure of each is the public interest in the protection of personal privacy. However, in the case of applications of unsuccessful applicants that privacy consideration extends not only to the content of their applications but also to the very fact that they applied. In the case of successful applicants, the fact that they applied becomes publicly known when they are appointed and, therefore, the public interest in the protection of personal privacy can no longer extend to the fact that they applied.

102. Also weighing against disclosure is the public interest in public sector agencies maintaining the ability to attract high-quality candidates to apply for positions. I consider that public interest to weigh strongly against the disclosure of the applications of unsuccessful applicants, not least because their disclosure would reveal the fact that those people had applied and the disclosure of that fact could reasonably be expected in many cases to have the kinds of effects articulated by Senior Member McMahon in *Re Williams.* I do not consider that public interest factor to weigh as strongly against the disclosure of the applications of successful applicants, because the fact that they applied for the positions enters the public domain upon their appointment, and high-quality candidates for senior positions who are well-qualified for the positions to which they are appointed, are unlikely to have anything to fear from the prospect of disclosure of information about their skills, experience and qualifications. As the complainant has submitted, in respect of senior officers that information is likely to be disclosed in other ways in any event.

103. As I have said, weighing in favour of disclosure of the applications of successful applicants are the public interests in:

- maintaining public confidence in the public sector by opening to scrutiny the claims for appointment or promotion to public sector positions so that the public can have confidence that suitably skilled, experienced and qualified people are appointed to those positions;
- maintaining confidence within the sector that appointments and promotions are made on the basis of merit with only suitably skilled, experienced and qualified officers being appointed; and
- the accountability of government agencies for the appointments they make and pay for from the public purse.

104. In my view, none of those public interest factors is relevant to the applications of unsuccessful applicants; in those cases, the person has not been appointed to the public sector position applied for, and the contents of their application have not had the desired effect in that they have not succeeded in winning them such a position. None of those public interest factors, therefore, is to be balanced against the public interests in preserving the privacy of those unsuccessful applicants.

105. There may be an argument that, for example, the public interest in the accountability of agencies for their decisions could be furthered by disclosure of the applications of all applicants (in order, for example, to open to public scrutiny whether or not there were better qualified people in the field of applicants than the successful applicant). However, in my opinion, given the potential real adverse effect on an unsuccessful applicant's professional life if the fact of his or her having unsuccessfully applied for a position were disclosed, I do not consider that that public interest would outweigh the public interest in the protection of the unsuccessful applicant's personal privacy and the public interest in maintaining the ability of government agencies to attract quality applicants to apply for positions in the public sector.

106. Those public interest factors do, however, in my view weigh strongly in favour of disclosure of the appointee's application or other documents that reveal the skills, experience and qualifications for the appointment of the successful applicant, particularly in respect of appointments to senior positions. The public interest in the protection of personal privacy is, for the reasons I have given above, less strong in my opinion in respect of such applications, other than in respect of purely private information such as home contact details, family details, personal interests and so forth. Similarly, the public interest in maintaining agencies' ability to attract high quality applicants weighs less strongly against disclosure of the successful applicant's applications. All applicants know that it will become a matter of public record and public knowledge that they applied for the particular position if they are successful and are appointed to the position. They must also be aware that information concerning their skills, experience and qualifications for the appointment is not likely to be treated as secret and is likely to be disclosed in various contexts once they are appointed.

107. For those reasons, I consider that the balance of the public interest in respect of unsuccessful applications and successful applications for public sector positions is quite different. Whether or not, in each particular case, it would

be, on balance, in the public interest to disclose the particular application concerned, will turn on the facts of the particular matter. For example, it is likely in my view that the higher the seniority of the position in question, the stronger the public interest will be in disclosing documents revealing the claims on that position by the successful applicant.

Application for short-term acting position

108. In the present case, however, the appointment concerned was not a substantive appointment. It was a temporary appointment in an acting capacity for a period of three months, with the possibility of an extension of three months. In the event, the successful applicant occupied the position for less than three months. I note that the Acting Standard differs from the Recruitment, Selection and Appointment Standard in only one - but significant - respect. That is that the latter requires that *"*[a] *proper assessment matches a candidate's skills, knowledge and abilities with the work-related requirements of the job and the outcomes sought by the public sector body, which may include diversity"*, whereas the corresponding requirement of the Acting Standard is that the decision *"…is based on a proper assessment of the work-related requirements of the job* ***and identified employee interests****"* (my emphasis.

109. The explanatory notes relating to the Acting Standard explain that "employee interests" could include: career considerations; opportunity for development; and workplace location (eg metropolitan to country location). The Office of the PSS Commissioner ('the OPSSC') in a document entitled *HR Principles in Human Resource Management - Questions and Answers* published in September 2005 (and available on the OPSSC website), advises that *"…for some shorter term acting opportunities decisions may not be solely on an assessment of merit."* It goes on to say that, while acting appointments must be in accord with the Acting Standard, reasons for offering an acting opportunity *"…may include personal circumstances, developmental needs, convenience of location and diversity strategies and ability to carry out the work with limited briefing (eg for short term acting)."* By contrast, in respect of the Recruitment, Selection and Appointment Standard the document advises that decisions about appointment nominations must be *"…based upon merit and identified business needs."*

110. It is apparent, therefore, that, whereas in respect of a substantive appointment the selection process involves assessing whether a candidate has the skills, knowledge and abilities required for the position and the agency's business needs, the process of selection a person for a temporary appointment may involve also taking into account other considerations, namely the employee interests. It appears to me, therefore, that in making a decision in respect of a short-term temporary appointment an agency may consider the benefit to a particular officer as well as the benefit to the agency of temporarily appointing that officer into the acting position. A short-term period of acting may be used for professional development purposes and/or to allow an agency to observe how a particular officer performs in a higher level position. It seems to me that the Acting Standard allows an agency to consider not only an

applicant's current claims against the work requirements but also an officer's potential to perform, rather than solely whether that officer currently has the highest level of skills, experience and qualifications for the acting position.

111. In those circumstances, where the purpose of the selection process and the criteria on which the decisions may be made are significantly different, and the appointment was for a short term only, the public interests in favour of disclosure of the successful EOI on this occasion do not, in my opinion, weigh as strongly as they would in favour of disclosure of an application for a substantive position, or even perhaps a long-term acting appointment.

112. In my view, the complainant's submissions that "employee interests" are not always taken into consideration in temporary appointments and that employee interests could be excluded from the information disclosed are not to the point. Firstly, the point is that, whether or not they are taken into account on every occasion, any identified employee interests must be considered and assessed and may form part of the basis of deciding the appointment. In respect of substantive appointments they play no part at all and may not be taken into account; those decisions must be based solely on merit and identified business needs. Clearly, it is intended that agencies have greater flexibility in making temporary appointments.

113. It is also clear from the material published by the OPSSC, however, that the greater flexibility is on the basis that temporary appointments are generally intended to be for short terms and should not be used as a substitute for filling a position through a recruitment, selection and appointment or transfer process (see pp 35 and 37 of the *Questions and Answers* publication referred to in paragraph 109 above). Although the Acting Standard and relevant criteria apply to temporary appointments of any duration, I note that the OPSSC makes a distinction between temporary appointments for less than six months and those for more than six months. In respect of the latter, the OPSSC recommends that they be advertised and an assessment of merit conducted (*Questions and Answers*, pp 35, 36). Redeployment clearance is required for temporary appointments of more than six months (*Questions and Answers* pp 36, 38). In short, more formal processes are recommended in respect of longer-term temporary appointments.

114. Those requirements appear to me to reflect a need for greater accountability for longer-term acting appointments than for shorter-term acting appointments (that is, for less than six months). In the event, as I have said, the acting appointment in question was for a term of three months and the successful applicant occupied it for less than that period. I do not consider that the public interest in the accountability of agencies for the appointments they make is as strong in this case as it may be in respect of a long-term acting appointment or as it would be in respect of a substantive appointment. Accordingly, that public interest weighs less heavily in favour of the disclosure of the disputed document.

115. Secondly, few of the public interests identified above as favouring disclosure would be furthered, in my view, by disclosure of the disputed document with

information about any employee interests taken into account in this case deleted. Most of the public interests favouring disclosure relate to opening to scrutiny the process followed by the agency and the basis for its decision. To delete from the document information of that kind would reveal only part of the picture and not the whole basis on which the decision was made. In any event, the disputed document does not contain information of that kind and nor would I necessarily expect applications to do so even in cases where employee interests are identified and taken into account; in some cases employee interests may be identified by the agency.

116. As I have said, disclosure of the disputed document would reveal neither the process followed by the agency (other than that it called for EOIs) in reaching its decision, nor the reasons for its decision. I would expect that both would be recorded in a document or documents of the agency - even for a short-term appointment - and, in this case, that information was recorded in Documents 6 and 7 which the agency disclosed in edited form to the complainant.

117. The relevance of the complainant's submission that access applicants who are not candidates for positions have no right to have the appointment process scrutinised by way of a breach of Standards claim is not clear to me. Agencies can be called to account for their decisions in respect of appointments to acting positions - whether short-term or long-term - by way of a breach of Standards claim by any officer directly affected by the decision, that is, an unsuccessful applicant. That occurred in this case. While there may be a public interest in any officer of an agency - whether or not directly affected by the decision - being able to scrutinise the process by which an appointment decision was reached and the basis of the decision, I am not persuaded that it extends to allowing any officer not directly affected by the decision to inspect the application or EOI of the successful applicant, particularly, as in this case, where the decision was for a very short-term appointment only. In any event, as I have already explained, disclosure of the disputed document would not reveal to any significant degree either the process or the basis for the decision on this occasion.

118. With regard to the complainant's submission that the giving of access to Document 11 is consistent with the intent of the FOI Act, section 10(1) of the Act provides that a person's right of access is subject to and in accordance with the FOI Act. That is, the right of access is subject to the exemptions in Schedule 1 to the FOI Act. It is not an unfettered right and the FOI Act recognises the need to balance competing interests when considering disclosure of documents.

119. The complainant submits that people who act in temporary positions have a significant advantage over future job applicants for permanent recruitment which outweighs any advantage lost by the disclosure of those persons' expressions of interest for the acting position. Firstly, I am not sure that a short term of acting in a position does give a person any significant advantage in a subsequent competitive selection process and the complainant has offered nothing in support of the proposition. Secondly, in my opinion, although that may be an argument in favour of disclosure where a person is appointed to a

temporary position and afterwards gains permanency, or is appointed to a long-term temporary position, neither is the case in this instance.

120. Nor do I accept the complainant's view that, since the PSS Commissioner has raised concerns in her Annual Compliance Reports about the operation of the Acting Standard, there is a greater need for disclosure of Document 11 in this particular case, which should outweigh all other interests. In my view, the disclosure of that document would not reveal whether the agency had followed the appropriate processes or allay or confirm any concerns the complainant may have about the reasons for the appointment, as it would reveal only the third party's claims and not the agency's reasons for appointing him.

121. As I have said, in this case the acting appointment was for three months and the third party actually occupied the position for a period of less than three months. In the interim the complainant made a claim to the PSS Commissioner of a breach of standards which was investigated by the PSS Commissioner. In that way the agency was held to account for the process it adopted in selecting an officer for the temporary deployment opportunity; the EOI, while revealing the claims as to relevant skills, experience and qualifications of the successful applicant, would not provide the same picture of why that particular applicant was selected as would a successful application for a substantive appointment where only the applicant's claims against the selection criteria are assessed and not the employee interests. In those circumstances, I do not consider that disclosure of the disputed document would further the public interest in the accountability of the agency for the process it adopted and the decision that it made.

122. Most (although, I accept, not all) of the complainant's submissions appear to me to focus in the main on the accountability of the agency for the process it adopted. As I have said, that public interest has been satisfied to a large degree by the PSS Commissioner having investigated the process following the complainant's claim of a breach of the Standards, and to some, lesser, degree by the release of other documents the agency has disclosed to the complainant. It is not clear to me how disclosure of Document 11 would shed any further light on the process - rather than the merits of the successful applicant - and how, therefore, its disclosure would further the public interest of the accountability of the agency for the particular process followed.

123. Further, the public interests in maintaining public confidence that only suitably qualified people are appointed to senior public sector positions and maintaining confidence within the sector that appointments and promotions are solely based on merit would not be furthered, in my opinion, by disclosure of the third party's EOI in a short-term internal acting position which, in the event, he only held for a very short time and does not now occupy.

124. In support of his contention that the disclosure of the EOIs of successful job applicants would promote a high degree of public accountability and openness, the complainant refers me to various government publications. In particular, I note that the *Public Sector Report* - which is a report of a project

established in June 2004 by the Government *"… to develop strategic directions that will encourage and promote a skilled, capable and dynamic public sector able to implement government reform and committed to the best interests of the community"* - states that "[w]*hile the process is important, particularly where transparency needs to be demonstrated, it is ultimately the outcome which is paramount."*

125. I agree with the complainant that making the job applications of successful job applicants publicly available would be likely to enhance public confidence in public sector appointments, particularly to senior positions, and enhance adherence to the Standards. However, for the reasons I have given above, I am not persuaded that the disclosure of successful applications for short-term internal acting opportunities would have the same effect to any significant degree.

126. My view may well have been different had the document in dispute been a successful application for a substantive senior position or a successful EOI for a long-term acting position or had the third party subsequently occupied the acting position for a longer period than that for which it was advertised. However, for the reasons I have given above, I am not persuaded that, in respect of Document 11, the public interests favouring disclosure outweigh the public interests favouring privacy and confidentiality on this occasion. Therefore, I find that Document 11 is exempt under clause 3(1) of Schedule 1 to the FOI Act. In view of my decision that the disputed document is exempt under clause 3(1), I need not consider the agency's claim for exemption under clause 8(1) of Schedule 1 to the FOI Act.

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