

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

**File Ref: F1252000  
Decision Ref: D0582000**

Participants:

**Ljiljana Maria Ravlich**  
Complainant

- and -

**Department of Productivity and  
Labour Relations**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access – documents relating to an agreement between the State and Commonwealth Governments – clause 2(1) – two separate grounds for exemption – clause 2(1)(a) – whether disclosure could reasonably be expected to damage inter-governmental relations – clause 2(2) – whether disclosure, on balance, in the public interest.

*Freedom of Information Act 1992 (WA)* s. 102(3); Schedule 1 clauses 2(1)(a), 2(1)(b) and 2(2).

*Re Angel and Department of Arts, Heritage and Environment* (1985) 9 ALD 113

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

*Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607

*Re Guy and Department of Transport* (1987) 12 ALD 358

## DECISION

The decision of the agency is confirmed to the extent that the disputed matter in Documents 5, 10, 14, 16, 24, 36, 43, 47, 50 and 55 is exempt under clause 2(1)(a) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

8 November 2000

## REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Department of Productivity and Labour Relations ('the agency') to refuse the Hon L M Ravlich MLC ('the complainant') access to documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act').
2. The agency informs me that its primary function is to promote productive, flexible and fair employment practices in Western Australian workplaces. The agency provides advisory services to the private and public sectors in Western Australia and also acts as the State Government's representative in State workplace relations matters. From 1 July 1998, the agency assumed responsibility for the delivery of Federal award and compliance services from the Federal Department of Employment, Workplace Relations and Small Business ('the DEWRSB'). A Deed of Agreement, dated 7 May 1998, between the Commonwealth of Australia, represented by the DEWRSB, and the State of Western Australia, represented by the agency ('the Agreement'), governs the delivery of those services.
3. On 23 March 2000, the complainant made an application to the agency for access under the FOI Act to documents relating to the Agreement. Following discussions between the parties, the scope of the access application was reduced. On 10 May 2000, the agency refused the complainant access to 55 documents that were within the scope of the reduced application. The agency claimed that the documents were exempt under clauses 8(1) and 2(1) of Schedule 1 to the FOI Act.
4. The complainant applied for an internal review. Following the internal review, the agency's initial decision to refuse access under clauses 8(1) and 2(1) was confirmed. On 3 July 2000, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

## REVIEW BY THE INFORMATION COMMISSIONER

5. I obtained the disputed documents from the agency. Meetings were held with representatives of the agency and also with the complainant to determine whether this complaint could be resolved by conciliation and negotiation between the parties.
6. Following those meetings, the agency granted the complainant access to some additional documents, either in full or in part, and the complainant withdrew part of her complaint. As a result, the number of documents remaining in dispute between the parties was further reduced. In addition, the agency withdrew its claim for exemption under clause 8(1) for the remaining documents and released edited copies of those 13 documents to the complainant. However, the agency maintained its claim that the matter deleted from the documents is exempt under clause 2(1).

7. On 9 October 2000, after considering the 13 disputed documents and other material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that some of the matter claimed to be exempt may be exempt under clause 2(1)(a) and that some of that matter may also be exempt under clause 2(1)(b), but that the matter claimed to be exempt under clause 2(1) in 3 of the disputed documents and some of the matter claimed to be exempt in 2 of the other 10 documents may not be exempt.
8. Subsequently, the agency provided the complainant with access to some of the disputed matter from 2 of the disputed documents and all of the matter claimed to be exempt in 3 of the documents. Accordingly, 10 documents remain in dispute between the parties. The complainant did not make any further submissions to me and did not withdraw her complaint in respect of the balance of the disputed matter.

## **THE DISPUTED DOCUMENTS**

9. The disputed matter is the matter deleted from 10 documents. For clarity and convenience, I refer to the documents by the numbers assigned to them in the schedule of documents prepared by the agency and given to the complainant. The agency claims that the matter deleted from the documents numbered 5, 10, 14, 16, 24, 36, 43, 47, 50 and 55 is exempt under clause 2(1) of Schedule 1 to the FOI Act.
10. Document 10 is a facsimile to the agency from the DEWRSB, to which is attached a copy of the Agreement. An edited copy of that document has been given to the complainant by the agency and the only matter deleted from it is the breakdown of the service fee and information about certain funding and payment arrangements in Schedule 2. Accordingly, the only matter to which access has been refused, and which therefore is in dispute, in that document is the matter deleted from Schedule 2. The information deleted from Documents 5, 14, 16, 24, 36, 43, 47, 50 and 55 is information that relates to the cost breakdown of the service fee and other matters relating to the payments under the Agreement, referred to in the matter deleted from Schedule 2.

## **THE EXEMPTION**

11. The exemption provided by clause 2 is stated as follows:

“2. *Inter-governmental relations*

*Exemptions*

(1) *Matter is exempt matter if its disclosure —*

- (a) *could reasonably be expected to damage relations between the Government and any other government; or*
- (b) *would reveal information of a confidential nature communicated in confidence to the Government (whether directly or indirectly) by any other government.*

***Limit on exemptions***

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

12. The term “other government” is defined in clause 2(3) to include the Commonwealth Government and another State or Territory. Clearly, clause 2 operates to preserve, amongst other things, the relationship and the flow of information between the Western Australian Government and other State and Territory Governments and the Commonwealth Government.
13. Although clause 2(1) protects two distinct aspects of inter-governmental relations: relations in general and the communication of confidential information, I consider that situations may arise where a document could be exempt under clause 2(1)(a) and clause 2(1)(b). An example might be where there is a reasonable expectation that the disclosure of confidential information communicated in confidence would damage inter-governmental relations: see *Re Angel and Department of Arts, Heritage and Environment* (1985) 9 ALD 113. Nevertheless, in my view, clause 2(1)(a) is not confined to protecting confidential information communicated in confidence but extends to include information the disclosure of which might cause damage to inter-governmental relations.
14. Notwithstanding that clause 2(1) provides two separate grounds of exemption, in this matter the agency did not identify whether its claims for exemption were made under paragraph (a) or paragraph (b) of clause 2(1). I have considered, firstly, whether the disputed matter is exempt under clause 2(1)(a).

**Clause 2(1)(a)**

15. To establish an exemption under clause 2(1)(a), the agency must show that disclosure could reasonably be expected to damage relations between the State Government and any other government. In *Attorney-General’s Department v Cockcroft* (1986) 10 FCR 180 the Full Federal Court said, at page 190, that the words “could reasonably be expected” were intended to receive their ordinary meaning and a decision-maker is required to judge whether it is reasonable (as distinct from irrational, absurd or ridiculous) to expect the stated consequences to follow if the documents in question are disclosed.

16. In *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607, at page 616, the Federal Court explained the rationale for an exemption to protect inter-governmental relations in the following terms:

*“... the words “relations between the Commonwealth and a State” refer to the total relationship between the Commonwealth and the relevant State. As is essential in a federation, there exists a close working relationship, over a wide spectrum of matters and at a multitude of levels, between representatives of the Commonwealth and representatives of each State. The word “relations” includes all of those contacts.”*

***The agency’s submission***

17. In its notices of decision the agency claimed that disclosure of the disputed matter would:

- create difficulty in the conduct of relations between Western Australia and the Commonwealth;
- disclose negotiating positions in relation to the obligation under the Agreement and the amount paid for the provision of services;
- breach the confidentiality of arrangements currently in place with the other States that are similar to the arrangements with the agency; and
- substantially impair good working relations between the agency and the DEWRSB, for example, by impairing the development of future programs.

18. The agency also claims that the DEWRSB considers that the Agreement, information about the services to be performed under the Agreement and payment for those services is confidential information that should not be disclosed.

19. In support of those claims, there is before me a letter dated 17 April 2000, to the agency from the Assistant Secretary of the National Office of Workplace Services (‘the OWS’). I understand that the OWS is established under the DEWRSB and is responsible for overseeing the contract management of the Agreement. In the letter, the Assistant Secretary stated that the DEWRSB had previously refused to allow the Agreement to be tabled in the Western Australian Parliament *“based on possible implications for other contracted States who had similar contractual arrangements with the Commonwealth for the provision of central services...The contract is a commercial-in-confidence document and disclosure could reasonably be expected to give rise to complications for the Commonwealth in relation to contracts with other States’*.

20. Similar concerns were expressed in another letter, dated 11 May 2000, to the agency from the Assistant Secretary. The Assistant Secretary reiterated that the Commonwealth objects to the release of the Agreement by the agency and stated:

*“ Schedule 2 to the Contract sets out commercially sensitive information relating to payments made by this Department to DOPLAR for the performance of [the services under the Agreement]...The Department’s concern in relation to release of the terms of the Contract may result in increased costs to the Department in purchase of similar services from other States in the future ... Furthermore, the Department believes that disclosure of the Contract in the face of its opposition to such disclosure would in fact impair the good working relations between it and DOPLAR. It would certainly be reluctant to enter into further contractual relations with DOPLAR in the future”.*

21. In the course of my dealing with this complaint, the agency reviewed its position in consultation with the DEWRSB and, as a result, the Federal Minister for Workplace Relations, the Hon Peter Reith MHR, approved the release of the Agreement except for Schedule 2. I am informed that the Minister considers that Schedule 2 should not be disclosed because it provides the basis for the contract fees payable under the Agreement and the Minister is of the view that release of Schedule 2 might compromise arrangements between the Commonwealth and other States.

### ***Consideration***

22. I have examined the matter deleted from the disputed documents and considered it in light of the material from the agency and from the Commonwealth Government. I understand that the claims for exemption are based on perceived difficulties that may arise in the working relations between both the agency and the Commonwealth, and between the latter and other States, with regard to the provision of services similar to those in the Agreement if the details contained in the disputed matter were to be disclosed.
23. In *Re Guy and Department of Transport* (1987) 12 ALD 358, Deputy President Todd found that, on the evidence, the Government of Queensland had strong objections to the disclosure of the document in question and that whether that view was reasonable or otherwise was not to the point. In that case, the Tribunal considered that disclosure of a document against the wishes of the State of Queensland could reasonably be expected to cause damage to relations between it and the Commonwealth. The extent of such damage was a matter to be considered in balancing the public interest factors for and against disclosure.
24. I concur with those views. Based on my view of the disputed documents and on the information before me, I consider that disclosure of information against the express wishes of the Commonwealth Government could reasonably be expected to damage relations between it and the State of Western Australia, at the very least in the manner described by the Assistant Secretary of OWS. There is material before me that clearly establishes consistent objections by the Commonwealth Government to the disclosure of the information in Schedule 2 and, therefore, by implication, to the disclosure of the same or related information in the other disputed documents. In my opinion, and in those circumstances, the expectation of damage to inter-governmental relations is not irrational, absurd or ridiculous.

25. I accept that disclosure of information considered to be commercially sensitive, against the express views of the Commonwealth Government, could reasonably be expected to impair future working relations to the extent that the Commonwealth Government would be reluctant to enter into further agreements with the agency. In line with *Arnold's* case, I consider that the word 'relations' includes the contact between the OWS, the DEWRSB and the State and that that contact is part of the "wide spectrum of matters" referred to by the Federal Court in that case.
26. Therefore, I consider that the disputed matter in Documents 5, 10, 14, 16, 24, 36, 43, 47, 50 and 55, being information relating to the cost breakdown of the service fee and other matters relating to the payments under the Agreement, is matter that falls within the terms of the exemption in clause 2(1)(a) of Schedule 1 to the FOI Act.

### **Public interest**

27. Clause 2(1) is subject to the limit on exemption in clause 2(2) of Schedule 1 to the FOI Act which provides that matter is not exempt matter under clause 2(1) if its disclosure would, on balance, be in the public interest. Pursuant to s.102(3) of the FOI Act, the onus is on the complainant to establish that disclosure would be in the public interest.

### ***The complainant's submission***

28. The complainant submits that there is a strong public interest argument in favour of disclosure and states that:

*"The WA Royal Commission in 1992 emphasises that "it is only the protection of important public and private interests that can justify official secrecy". It is difficult to imagine that an arrangement between two government agencies in the area of entitlements and protections of workers covered by Federal Awards should fall within the realm of "important public and private interests".*

*It is my view that this is an area of public policy that is of legitimate and ongoing public interest and the public interest is best served by ensuring openness and accountability in decision making".*

29. The complainant submits that the agency's refusal to give access to the documents is a misuse of the notion of commercial confidentiality because a claim of "commercial confidentiality" is not supportive of the philosophy of open and accountable government. The complainant submits that, therefore, on balance, disclosure of the documents is in the public interest.

### ***Consideration***

30. I recognise that there is a public interest in individuals, such as the complainant, being able to exercise their rights of access under the FOI Act. I also recognise that there is a public interest in understanding the operation of financial



agreements and arrangements made between the State and Federal Governments to ensure that those agreements and arrangements benefit the community. There is also a public interest in the accountability of the agency for the efficient and effective provision of services provided under the Agreement.

31. The Agreement has been disclosed, and made publicly available, save for some of the matter in Schedule 2. Edited copies of a number of other documents, with only minor deletions, have also been disclosed. In my view, that level of disclosure largely satisfies those public interests.
32. Weighing against disclosure, I recognise that there is a public interest in preserving the flow of information between governments and inter-governmental cooperation so that joint initiatives can be effectively and efficiently implemented. I also consider that there is a strong public interest in maintaining the capacity of governments to communicate in confidence with each other and with the knowledge that confidences will be honoured.
33. In balancing the competing interests, I do not consider that the complainant has persuaded me that disclosure of the disputed matter would, on balance, be in the public interest. Accordingly, I find that the disputed matter is exempt under clause 2(1)(a). As I have found that all of the disputed matter is exempt under clause 2(1)(a), I need not determine whether any of it is also exempt under clause 2(1)(b).

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