



Office of the
Information Commissioner

Freedom of information for Western Australia

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29 September 2017

Mr John Langoulant AO
Special Inquirer
Special Inquiry into Government Programs and Projects
Locked Bag 3001
WEST PERTH WA 6872

By priority post and email to: stephanie.black@dpc.wa.gov.au

Dear Mr Langoulant

SUBMISSION TO INQUIRY INTO GOVERNMENT PROGRAMS AND PROJECTS
Discussion Paper – Transparency in Government Projects

I refer to your letter to the Information Commissioner dated 29 August 2017 and to my subsequent discussions with Ms Stephanie Black of your Inquiry staff. You have asked me to review your Inquiry's draft Discussion Paper 'Transparency in Government Projects' dated August 2017 (**Discussion Paper**) and provide my impressions and feedback. As the Western Australian Acting Information Commissioner, I am pleased to provide this submission to the Inquiry.

Outline

This submission seeks to highlight opportunities to increase transparency and vastly improve accountability in government projects. In particular, this submission will identify such opportunities that directly relate to the administration of the *Freedom of Information Act 1992* (WA) (**the FOI Act**) and to those of a more general nature.

This submission also draws to your attention information about the Office of the Information Commissioner (**OIC**); information about the proactive disclosure of information; recent decisions of the Information Commissioner which illustrate this office's view of the importance of transparency in government contracts; and other material that may be relevant to the Inquiry including Australia's involvement in the Open Government Partnership and National Action Plan, other published reports and examples in Western Australia, Australia and the United Kingdom that support a positive approach to transparency in contracting with government.

Context

The Information Commissioner (**the Commissioner**) is appointed by the Governor of Western Australia under the FOI Act and reports to the Western Australian Parliament.

The main function of the Commissioner is to undertake independent external review of the merits of decisions made by agencies on access applications and requests to amend personal information under the FOI Act.

Other functions of the Commissioner are outlined in section 63(2) of the FOI Act and include ensuring that agencies are aware of their responsibilities under the FOI Act and providing assistance to agencies and members of the public on matters relevant to the FOI Act. The OIC has a dedicated Advice and Awareness team that conducts briefings for agencies and the community and training sessions for agency staff.

I am supported by eleven staff in the OIC, the majority of whom deal with the external review function of the office.

In making this submission I draw on my experience with the OIC over the last five years and as an accredited Gateway reviewer for the Commonwealth and WA, having reviewed several major high profile ICT infrastructure projects. I also draw on the advice of a number of my senior staff with extensive public sector experience and expertise.

Correcting the record

Having considered the Discussion Paper, I would like to clarify the material on pages 10 and 11 that provides a summary of the OIC.

In the circumstances, I provide by way of substitution the following information, which in my view more accurately represents what I understand was the intent of the material in the Discussion Paper.

Office of the Information Commissioner

The Office of the Information Commissioner administers the Freedom of Information Act 1992 (the FOI Act). The objects of the FOI Act stated in section 3 are to:

- (a) Enable the public to participate more effectively in governing the State; and*
- (b) Make the persons and bodies that are responsible for State and local government more accountable to the public.*

Government agencies are to give effect to the FOI Act in a way that:

- (a) Assists the public to obtain access to documents; and*
- (b) Allows access to documents to be obtained promptly and at the lowest reasonable cost.*

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

A person's right to be given access is not affected by:

- (a) Any reasons the person gives for wishing to obtain access; or*
- (b) The agency's belief as to what the person's reasons for wishing to obtain access.*

If an agency decides to refuse access to a document or part of a document and claims that matter is exempt under one or more of the exemptions contained in Schedule 1 to the FOI Act, the onus is on the agency to provide sufficient reasons to justify the decision to refuse access. An access applicant does not have to provide any reasons in support of obtaining access.

The exemption clauses described in Schedule 1 to the FOI Act are summarised as follows:

Clause 1	<i>Deliberations or decisions of Cabinet and Executive Council</i>
Clause 2	<i>Inter-governmental relations</i>
Clause 3	<i>Personal Information</i>
Clause 4	<i>Trade secrets, commercial and business information</i>
Clause 4A	<i>Information given to Treasurer under Bank of Western Australia Act 1995</i>
Clause 5	<i>Law enforcement, public safety and property security</i>
Clause 6	<i>Deliberative processes of Government</i>
Clause 7	<i>Legal professional privilege</i>
Clause 8	<i>Confidential communications</i>
Clause 9	<i>The State's economy</i>
Clause 10	<i>The State's financial or property affairs</i>
Clause 11	<i>Effective operation of agencies</i>
Clause 12	<i>Contempt of Parliament or court</i>
Clause 13	<i>Adoption or artificial conception information</i>
Clause 14	<i>Information protected by certain statutory provisions</i>
Clause 15	<i>Information as to precious metal transactions</i>

Clauses 2, 3, 4(3), 5, 8(2), 9, 10 and 11 are subject to a public interest test. The public interest test is an element of the exemption in clause 6.

Further details of each exemption clause are set out in Annexure 'A'.

Of all of the exemptions available that an agency may claim for refusing access to documents, the clauses that are most likely to relate to documents linked to disclosing information about Government projects and programs are clauses 1, 4, 6, 7, 8, 9, 10 and 12.

***Decisions made by WA State Government agencies in 2015/16
(excluding Local government, Ministers and Universities)***

<i>Decision type</i>	<i>No.</i>	<i>%</i>
<i>Access given in full</i>	6759	49.7%
<i>Access given to an edited copy</i>	6266	46.1%
<i>Access given via a medical practitioner</i>	56	0.4%
<i>Access deferred</i>	26	0.2%
<i>Access refused in full</i>	435	3.2%
<i>Documents not found (deemed access refused)</i>	53	0.4%
<i>Total</i>	<i>13595</i>	

Where a WA State Government agency decided to refuse access (either to part or all of a document):

*Clause 1 was claimed 51 times;
Clause 4 was claimed 117 times;
Clause 6 was claimed 75 times;
Clause 7 was claimed 142 times;
Clause 8 was claimed 176 times;
Clause 9 was claimed 5 times;
Clause 10 was claimed 18 times; and
Clause 12 was claimed 42 times.*

Proactive disclosure is usually more efficient than disclosure under the FOI Act

Although the FOI Act creates a general right of access to State and local government documents, in my view, the use of that right should supplement, rather than replace, other procedures for making information available. The FOI process should essentially be used as a last resort for those seeking government information. Agencies should make government information available outside the FOI process, both proactively and in response to a formal or informal request, unless there is a good reason not to do so. There is considerable variation in how well this is done across agencies.

Section 3(3) of the FOI Act provides that nothing in the FOI Act is intended to prevent or discourage the publication of information, or the giving of access to documents, other than under the FOI Act. In my view, there remain significant underutilised opportunities for agencies to disclose information outside of the formal FOI access procedures.

Well planned and coordinated information disclosure policies and procedures in agencies that reflect a default position of public disclosure, wherever practicable, would reduce the time and resources that would otherwise be required to process formal information access requests under the FOI Act.

There are a number of examples where an agency has changed its information disclosure practices to cope with a large number of formal FOI access applications for 'routine' high volume requests. This happened with great success with WA Police; the Department for Child Protection and the Department of Mines and Petroleum. In each case, the agencies developed and implemented extensive administrative disclosure regimes.

I am confident that many more agencies could streamline information disclosure procedures that would save time and resources if they adopted a similar approach to that of the agencies named above.

That would leave the formal FOI access procedure to deal with the more complex and non-routine requests for information disclosure, particularly where the public interest in disclosure needs to be weighed against genuine public interests in non-disclosure.

FOI Review 2010

In 2010 the Commissioner conducted a review of the manner in which Western Australian State and local government agencies administer the FOI process. The review arose from a commitment of the Barnett Government to review the manner in which government departments are administering the FOI process to ensure that Government is accountable and open in accordance with the spirit of the FOI Act. In his report titled 'The Administration of Freedom of Information in Western Australia'¹ tabled in Parliament on 8 September 2010, the Commissioner recommended, among other things, that:

- Agencies should, unless there is a good reason not to, disclose information on request without requiring a formal FOI application and should investigate means of more proactive, automated and timely disclosure of information, particularly through websites, using information stored in electronic records management systems and other records databases.

¹ <http://www.foi.wa.gov.au/Materials/FOI%20Review%202010%20-%20Comprehensive%20Report.pdf>

- As part of their annual review of Information Statements, agencies should periodically review what information they routinely make available to the public outside the FOI process.

Promoting transparency and using the provisions of the FOI Act as a last resort

The OIC actively encourages agencies to give access to as much information outside the FOI Act as possible and to use the FOI process as a last resort for those seeking government information. This message is promoted through the briefings and training sessions the OIC provides to agencies, the training materials and publications on its website including its guidelines for both agencies and the public, quarterly newsletter and annual reports: for example, see page 16 of this office's 2013 annual report,² page 22 of this office's 2014 annual report,³ the message from the Commissioner at page vi of the FOI Coordinators Manual,⁴ this office's publications 'Thinking outside the FOI box'⁵ and 'Is FOI my best option?',⁶ the May 2015 FOI Newsletter under the heading 'Rethinking FOI in agencies'⁷ and the July 2015 FOI Newsletter under the heading 'Proactive release of documents outside FOI'.⁸

In addition, the Information Commissioner's formal determinations of disputes regarding access to documents, which are published on the OIC's website, contain useful messages to agencies and the community about the importance of transparency and accountability for government decision-making.

FOI in WA Conference

On 10 August 2017 the OIC held the inaugural 'FOI in WA Conference'⁹ which was attended by approximately 280 officers from State and local government agencies.

Recognising that agencies play a critical role in helping to achieve the legislative objects of the FOI Act of enabling greater public participation in our democracy and making government more accountable to the public, one of the key aims of this full-day conference was to encourage agencies to give access to government information outside the FOI process where possible. One session in particular focused on the proactive and administrative disclosure of information and documents outside of formal FOI processes. The session included observations from officers from WA Police and the Department of Mines, Industry Regulation and Safety of their experience in disclosing information in this manner. Participants heard about the Department's Online Systems which contain a vast amount of public information as well as the Department's Transparency Policy and its guiding principle that, if there is no legal reason to protect information, it should be open to public access. Participants also heard about WA Police's Information Release Centre and its 'Apply for Information' page on its website which people are encouraged to consider before applying for documents under the FOI Act.

² http://foi.wa.gov.au/Materials/OIC_AR13.pdf

³ http://foi.wa.gov.au/Materials/OIC_AR14.pdf#pagemode=bookmarks

⁴ <http://foi.wa.gov.au/Materials/FOI%20Coordinators%20Manual.pdf>

⁵ <http://foi.wa.gov.au/FA003>

⁶ <http://foi.wa.gov.au/FTP003>

⁷ <http://foi.wa.gov.au/materials/OICFOINewsletters/Newsletter%201%20-%20May%202015.pdf>

⁸ <http://foi.wa.gov.au/materials/OICFOINewsletters/Newsletter%202%20-%20July%202015.pdf>

⁹ See full conference program at <http://www.foi.wa.gov.au/Materials/Conference2017/Sessions.pdf>

Open Government Partnership and National Action Plan

The Discussion paper notes at pages 5 and 16 that New Zealand has joined the Open Government Partnership but has not referred to Australia's involvement.

The following extract is taken from the OIC's website at http://foi.wa.gov.au/Open_Government and I consider it appropriate to bring it to your attention.

Open Government Partnership and National Action Plan

Open Government

The Organisation for Economic Co-operation and Development (OECD) describes on its website that:

People are demanding transparency, accountability, access to information and competent service delivery from their governments. They also expect policies and services to be tailored to their needs and address their concerns.

Open government - the opening up of government processes, proceedings, documents and data for public scrutiny and involvement - is now considered as a fundamental element of a democratic society. Both greater transparency and public participation can not only lead to better policies and services, they can also promote public sector integrity, which is essential to regaining the trust of citizens in the neutrality and reliability of public administrations.

Open Government and the FOI Act

*A significant component to achieving Open Government is legislation to enshrine a person's right to access information and to require agencies to assist the public in that process. The public expects government decision-making to be open, transparent and accountable and the Freedom of Information Act 1992 (WA) (**the FOI Act**) represents part of WA Parliament's commitment to realising that expectation.*

In section 3 of the FOI Act, Parliament makes it clear that the objects of the Act are to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and local government more accountable to the public.

The Supreme Court of Western Australia noted in Water Corporation v McKay[2010] WASC 210 per Martin J at paragraph 38 that the objects of the FOI Act 'form the essential bedrock of open, democratic government whose policy importance cannot be overstated'.

Open Government Partnership and National Action Plan

The multilateral [Open Government Partnership](#) (OGP) was created to secure commitments from governments to promote transparency, empower citizens, fight corruption, and harness technologies to strengthen governance. There are now 70 countries – including Australia – participating in the OGP.

National Action Plan

On 7 December 2016, the Australian Government announced the finalisation of Australia's first Open Government National Action Plan. The Plan contains 15 ambitious commitments focused on: transparency and accountability in business; open data and digital transformation; access to government information; integrity in the public sector; and public participation and engagement.

State and Territory Information Access Commissioners and Ombudsmen, led by New South Wales, contributed to the development of the Plan through the inclusion of [Commitment 3.2](#) on information access rights utilisation.

Report of the Royal Commission into the Commercial Activities of Government and Other Matters 1992

In *Re McGowan and Department of the Premier and Cabinet* [2015] WAICmr 3, the Commissioner had regard to the 'Report of the Royal Commission into the Commercial Activities of Government and Other Matters 1992' (**the Report**) when deciding whether it was in the public interest to disclose certain documents concerning an inquiry into the conduct of a ministerial officer.

Although the Report is now some 25 years old, it laid down important principles for government and the public sector for the conduct of their activities that remain current, and which have led to, among other things, the establishment of the FOI Act, the creation of the *Public Sector Management Act 1994*, a Public Sector Standards Commissioner and today's Public Sector Commission.

Part 2 of the Report relevantly addresses topics that include Open Government, accountability and the administrative system. In particular, at Part 2, Chapter 2 – Open Government at paragraph 2.1.2, the Commissioners spoke about the importance, to the democratic process, of public access to information and referred to *Commonwealth of Australia and John Fairfax & Sons Ltd* (1980) 32 ALR 485 at 493 in which the then Chief Justice said, speaking of Australia's common law:

It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice in that information is that it enables the public to discuss, review and criticise government action.

At [1.2] the Commissioners identified 'two complimentary principles [that] express the values underlying our constitutional arrangements.' The second of those, also known as the trust principle, states that 'the institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public.'

At [2.1.10] of the Report, the Commissioners stated that information is the key to accountability. To fulfil its purpose, four information conditions must be satisfied. I consider that the first two conditions are particularly relevant:

- (a) *Information of, or about, government must be made optimally available or accessible to the public. We emphasise 'optimally' since, as we have said, official secrecy has its proper place in the conduct of government. Secrecy, however, should not be the norm, with openness the exception. Rather the contrary must be the case.*

- (b) *Information must have integrity. It must give a proper picture of the matter to which it relates. It must not aim to mislead or to create half-truths.*
- (c) ...
- (d) ...

The Commissioner's view of the importance of transparency in government projects

This office's view of the importance of transparency in government projects is best illustrated by the recent decision of the Commissioner in *Re MacTiernan and Main Roads Western Australia [2017] WAICmr 2*. In this matter, the Commissioner found that certain documents relating to the Perth Freight Link project were not exempt from disclosure under the FOI Act.

The Commissioner noted that there is a strong public interest in the public, as a whole, being informed about the costs and benefits of major public infrastructure projects and how they are to be delivered, and that responsible government requires an appropriate degree of transparency and capacity for public scrutiny of important projects and government decisions.

The Commissioner also observed that it is the role of government to make and effectively communicate project decisions that are in the best interests of the public. The Commissioner referred to the object of the FOI Act of enabling the public to participate more effectively in governing the State. He noted that the public's ability to do so is reduced if the public is only informed about the analysis underpinning major projects after decisions have been made and contracts signed. The Commissioner found that disclosure of the disputed documents would not, on balance, be contrary to the public interest.

The Commissioner also found that the documents did not contain information that had a commercial value to an agency or, if they did, that disclosure could reasonably be expected to destroy or diminish that value.

The agency claimed that it was engaged in commercial activities because it contracts with private sector entities and lets large contracts to deliver services. However, the Commissioner was not satisfied that disclosure of the documents would reveal information concerning the commercial affairs of an agency when the agency's primary function is to construct, maintain and supervise roads, using a budget allocated by the Parliament for that purpose.

Other recent decisions of the Information Commissioner involving documents associated with government projects

- In *Re John Holland Pty Ltd and Department of Treasury [2016] WAICmr 17* the then Leader of the Opposition (now the Premier) applied to the agency for documents relating to the commissioning and opening of the Perth Children's Hospital. The complainant, a third party, sought review of the agency's decision to give access to the documents that contained information about the third party. The Commissioner found that the disputed documents were not exempt and confirmed the agency's decision to give access to them.

The Commissioner was not satisfied that the disputed documents had a commercial value to the third party that could reasonably be expected to be destroyed or diminished by disclosure. The Commissioner also considered that the agency had given the complainant no reason to believe that the information it provided to the agency was provided on a

confidential basis or that disclosure of the disputed information could be reasonably expected to prejudice the future supply of information of that kind to the Government or to an agency.

- In *Re Johnston and Department of State Development* [2017] WAICmr 1, the complainant sought access to documents relating to a proposed gas pipeline between Bunbury and Albany, including the agency's draft invitation for expressions of interest to perform work on the pipeline project. The agency refused access to the requested documents.

The Commissioner found that the documents were not exempt and set aside the agency's decision. The Commissioner considered that there is a strong public interest in the disclosure of a document that is fundamental to the agency's accountability for the performance of its functions and expenditure of public funds relating to the development of a major infrastructure project of this nature.

The agency contended that disclosure would compromise negotiations for the State awarding contracts and tenders for the project by providing commercial advantage to private sector proponents bidding to supply infrastructure or services. The Commissioner was not persuaded that disclosure of the disputed documents would provide a commercial advantage to private sector proponents and therefore compromise negotiations for the State awarding contracts and tenders as the agency claims.

- In *Re Travers and Public Transport Authority* [2015] WAICmr 20, the Commissioner found documents associated with the potential extension of the Thornlie passenger railway line were not exempt as claimed by the agency. While the Commissioner agreed with the agency that sectional interests may seek to use information in the documents to support or undermine options according to their own interests, he considered that it is part of the role of government to make project decisions that are in the best interests of the public, even in the face of various lobbying efforts.

Productivity Commission Report and the Grattan Report

The Productivity Commission in its report to Government titled 'Public Infrastructure – Productivity Commission Inquiry Report' dated 27 May 2014 (**the Productivity Commission Report**) considered transparency and accountability and specifically discussed cost benefit analyses.

At page 104 the Productivity Commission Report concluded:

[p]ublicly released analyses are available to private entities that bid for the delivery of projects. While such entities will inevitably need to do their own analysis, public disclosure of the government's analysis can avoid the need to duplicate some aspects. Disclosure can also help bidders to develop more accurate estimates ...

It is sometimes argued that there are commercial-in-confidence reasons for not making cost-benefit analyses public ... [e]ven where data are provided by private participants, the normal presumption of transparency should prevail as a condition of involvement in government-backed projects.

The Victorian Government [in its submission to the Productivity Commission] argued that there were occasions where public disclosure of cost-benefit analyses could jeopardise a government's ability to optimise value for money through competitive tender

processes. The concern appears to be that disclosure might prompt firms to 'bid-up' to the cost estimates included in the analyses.

However, if the bidding process is truly competitive this is unlikely to occur because firms will have an incentive to bid based on their true willingness to enter into a contract. The benefits created through transparency are likely to be substantial and significant effects on bids are unlikely, provided there is effective competition in procurement.

While referring generally to governance arrangements on large projects and in particular to tendering and contract arrangements, the Productivity Commission Report argues that greater transparency and public disclosure are necessary preconditions to accountability for major projects. It also notes that it leads to improved project outcomes.

Page 271 of the Productivity Commission Report under the heading Lack of Transparency states:

Some participants have suggested that greater transparency around project selection is key to improved outcomes in public infrastructure. For example ... there are several gains that arise from open and transparent evaluations. These include that analysis can be independently tested, key assumptions can be debated and additional studies may be commissioned to improve understanding of the underlying policy problem. Transparency can also be considered necessary to demonstrate that stakeholders have been consulted and that value is seen to be delivered to the public. (Institute of Value Management, sub DR 125)

Also at pages 284-85:

The normal expectation in the future should be that tendering for a Government contract will result in the public release of full cost-benefit information. This includes full details of cost-benefit assessments used by IA (Infrastructure Australia) which support a funding request by a state or territory Government and all relevant underlying assumptions and methodologies used in the estimation of wider economic benefits.

and

In addition to the disclosure of cost-benefit information, the practice of publishing benchmark costs based on the performance of similar projects should be encouraged, similar to initiatives introduced in the United Kingdom (chapter 9). In the Commission's view, greater public sector scrutiny of projects compared with cost benchmarks would facilitate competition between tenderers and improve the public's understanding of the very expensive nature of some investments.

The Grattan Institute's report on 'Cost overruns in transport infrastructure' (**the Grattan Report**), published in October 2016, traverses similar ground in respect of its emphasis on the importance and significance of transparency and disclosure of key information about major infrastructure projects to the public.

Recommendation 2 at page 7 of the Grattan Report states:

The Commonwealth should enable and facilitate better public understanding of infrastructure commitment by:

(a) *Requiring Infrastructure Australia to publish*

- (i) *summaries of all transport infrastructure projects funded by the Commonwealth within the previous quarter, completed to the extent that Infrastructure Australia has the information to do so and otherwise left blank; and*
 - (ii) *business cases and cost benefit analyses for all transport infrastructure proposals receiving Commonwealth funding during the previous quarter, if these have not already been published by a state government;*
- (b)...

and at page 22:

The best incentive for high quality disinterested project analysis is detailed, timely publication. Although some will be concerned that publication may reduce the competitiveness of tenders by anchoring expectation, the cost of poor project selection is likely to far outweigh a marginal reduction in tendering competitiveness.

The Commissioner referred to the above observations from the Productivity Commission Report and the Grattan Report in his decisions in *Re Johnston and Department of State Development* [2017] WAICmr 1 and *Re MacTiernan and Main Roads Western Australia* [2017] WAICmr 2, referred to on pages 8 and 9 of this submission.

Transparency in contracting

There is information available both in Western Australia, Australia and the United Kingdom to support a positive approach to transparency in contracting with government. Some examples are set out below:

Western Australia

The Audit Practice Statement of the Office of the Auditor General (OAG)¹⁰ provides a set of criteria by which the question of whether information is commercial in confidence is determined. At page 18 the Practice Statement states:

‘The legislation (the AG Act 2006) does not provide an interpretation of ‘commercially confidential’. In the absence of such instruction to help form an opinion, we use commercial confidentiality criteria developed by the Australian National Audit Office from a 2007 Guidance Note produced by the federal Department of Finance and Deregulation. We also draw on a 2002 legal briefing published by the Australian Government Solicitor on identifying and protecting confidential information.’¹¹

As noted on page 12 of the Discussion Paper, the OAG applies four criteria to determine whether information is commercial-in-confidence as follows:

1. If the information is commercial-in-confidence to a commercial counterparty, it must be specifically identified.
2. The information must be ‘commercially sensitive’. This means that the information should not generally be known or ascertainable.
3. Disclosure would cause unreasonable detriment to the owner of the information or another party.

¹⁰ Office of the Auditor General Audit Practice Statement updated March 2017

¹¹ Legal Briefing Number 64, 4 July 2002 Australian Government Solicitor

4. The information was provided under an understanding that it would remain confidential.

If criterion 1 is not met, the other criteria are not assessed. The Practice Statement also says ‘This approach supports a culture of openness and accountability for the expenditure of public money, efficient and effective management of government departments, and the most appropriate and beneficial use of public funds.’

Australia

The Australian National Audit Office (ANAO) has standard contract clauses to provide ANAO Access to contractors’ Information (**copy attached**). The Tender Clause at clause 1 provides that the Tenderer, if chosen to enter into a contract with Government, is required to provide the Auditor General access to information, documents and records.

United Kingdom

The United Kingdom Government has a Model Services Contract, prepared by UK Government Legal Services, which contains at Clause 22, detailed provisions relating to Transparency and Freedom of Information (**copy attached**).

Commercial-in-confidence

The Discussion Paper notes at page 20 that ‘Government needs a precise working definition of commercial-in-confidence approved by Cabinet.’

The term ‘commercial-in-confidence’ is not defined in the FOI Act and none of the exemptions in Schedule 1 to the FOI Act refer to or use that term. The Commissioner noted in *Re McGowan and Minister for Regional Development; Lands and Anor* [2011] WAICmr 2 at [37] that the fact that information may be described as ‘commercial in confidence’ or confidential does not necessarily mean that it is of commercial value, though it may be an indicator.

My predecessors have consistently expressed the view in published decisions that the exemptions in clause 4 of Schedule 1 to the FOI Act recognise that the business of government is frequently mixed with that of the private sector and that such business should not be adversely affected by the operation of the FOI Act. However, private organisations or persons having business dealings with government must necessarily expect greater scrutiny of, and accountability for, those dealings than in respect of their other dealings: see, for example *Re Post Newspapers Pty Ltd and Town of Cottesloe* [2013] WAICmr 27 at [46].

The FOI Act and confidentiality clauses in contracts

The inclusion of confidentiality clauses in contracts entered into by government agencies can operate to restrict the disclosure of information under the FOI Act, as shown by the Commissioner’s decision in *Re MacTiernan and Department of the Premier and Cabinet* [2010] WAICmr 2. In that case, the agency refused the complainant access to a State development agreement between the State and six private companies. The development agreement contained a confidentiality clause that imposed broad obligations of confidence on all parties to the agreement. The exemption in clause 8(1) of Schedule 1 to the FOI Act protects documents from disclosure if their disclosure would be a breach of a contractual obligation of confidence for which a legal remedy could be obtained. The Commissioner was satisfied that disclosure of the agreement by the agency would be a breach of a contractual obligation of confidence for which a legal remedy could be obtained by the other parties to the agreement. Accordingly, the Commissioner found that the agreement was exempt under clause 8(1). Although the

complainant claimed that disclosure of the agreement was in the public interest, the Commissioner noted that the exemption in clause 8(1) is not subject to a public interest test – in contrast to the exemption in clause 8(2) – and therefore the Commissioner did not have discretion to decide whether disclosure of the agreement was in the public interest.

The complainant also submitted that the Government should not be allowed to undermine the FOI Act by including confidentiality provisions in agreements of this type. However, the Commissioner noted that his role is to determine the facts and to apply the law as he finds it and that it is the responsibility of Parliament to amend the FOI Act if more transparency is required in the dealings of Government.

Significantly, the effect of section 76(4) of the FOI Act is that once the Commissioner is satisfied that a document is exempt from disclosure under the FOI Act - for example because it contains a confidentiality clause and is exempt under clause 8(1) - the Commissioner does not have discretion to decide that access should be given to the document.

Recommendations

You indicated in your letter to me dated 29 August 2017 that you would like to include some recommendations around transparency in your final report and that my support would be valuable. It is not entirely clear whether you seek my input regarding those recommendations. My legislative remit is limited by the FOI Act. However, from this office's extensive experience in dealing with matters concerning government transparency and accountability, and in light of my office's important role in promoting the objects of the FOI Act of enabling the public to participate more effectively in governing the State and making the persons and bodies that are responsible for State and local government more accountable to the public, I offer the following points for the Inquiry to consider when drafting its recommendations around transparency:

- Explore how Australia's involvement in the Open Government Partnership can drive transparency at State level.
- Limit the use of confidentiality provisions in government contracts.
- Consider the inclusion of a standard clause in government contracts relating to transparency and freedom of information.
- Refrain from having a legislative definition of the term 'commercial in confidence' on the basis that it will take away flexibility and discretion.
- Investigate the practicalities of how cultural change will be achieved.
- Explore the continued role the OIC and other accountability agencies in promoting transparency and information disclosure to agencies and in the community.

Conclusion

In my view, with the provisions of the FOI Act, as described above, section 81 of the *Financial Management Act* and the Auditor General's approach to dealing with claims that information is commercial in confidence, as set out in his Audit Practice Statement, the WA Government already has substantial pillars in place to support transparency and disclosure.

While matters of organisational culture are outside the domain of the Information Commissioner, as detailed above, the office supports a pro disclosure approach to information by agencies, encourages agencies to consider disclosure outside of the FOI Act where possible, and will continue to do so through published decisions, through education and publicly available guidance notes on its website at www.foi.wa.gov.au.

I would be pleased to provide further information or to discuss this submission and provide more specific examples to support my views.

I have no objection to this submission being made public without further reference to me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Su Lloyd'. The signature is fluid and cursive, with the first name 'Su' and the last name 'Lloyd' clearly distinguishable.

Su Lloyd
A/INFORMATION COMMISSIONER

Annexure ‘A’

Schedule 1 to the *Freedom of Information Act (1992) (WA)* contains 15 exemption clauses. They are summarised as follows.¹²

Exemption clause	Description	Subject to a public interest test
Clause 1	Exempts matter if its disclosure would reveal the deliberations and decisions of Cabinet and other Executive bodies as defined in clause 1(6). It also protects from disclosure matter of the kind described in paragraphs (a)-(f) of clause 1(1). The exemptions in clause 1(1) are limited by clauses 1(2)-1(5).	No
Clause 2	Exempts matter if its disclosure could reasonably be expected to damage relations between the Government and any other government or would reveal information of a confidential nature communicated in confidence to the Government (whether directly or indirectly) by any other government. Matter is not exempt matter under clause 2 if its disclosure would, on balance, be in the public interest.	Yes
Clause 3	Exempts matter if its disclosure would reveal personal information about an individual. The exemption is limited by clauses 3(2)-3(6).	Yes
Clause 4	Contains three separate exemptions. <ul style="list-style-type: none"> • Clause 4(1) exempts matter if its disclosure would reveal trade secrets. • Clause 4(2) exempts matter if its disclosure would reveal information that has commercial value to a person and its disclosure could reasonably be expected to destroy or diminish that commercial value. • Clause 4(3) exempts matter if its disclosure would reveal information about the business, professional, commercial or financial affairs of a person, and its disclosure could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information to the government or an agency. • All three exemptions are limited by clauses 4(4) – 4(6). That is, matter is not exempt under the above clauses if its disclosure would merely reveal information about the business, professional, commercial or financial affairs of an agency or the applicant (clauses 4(4) and 4(5); or if the applicant provides evidence that the person concerned consents to the disclosure of the matter to the applicant (clause 4(6)). • In addition, matter is not exempt under clause 4(3) if its disclosure would, on balance, be in the public interest. The exemptions in clauses 4(1) and 4(2) are not subject to a public interest test. 	Only clause 4(3) is subject to a public interest test

¹² Matter is a piece of information contained in a document; it can be part of the document, or the whole document.

Clause 4A	Exempts matter if it consists of information provided to the Treasurer under the <i>Bank of Western Australia Act 1995</i> section 22 or Minister under the <i>Bank of Western Australia Act 1995</i> section 42O.	No
Clause 5	Exempts matter relating to law enforcement, public safety and property security if its disclosure could reasonably be expected to have any of the effects described in paragraphs (a) to (h). The exemptions in clause 5(1) are limited by clauses 5(2)-5(4).	Yes but only in the limited circumstances described in clause 5(4)
Clause 6	Exempts matter if its disclosure would reveal any opinion, advice or recommendation that has been obtained, prepared or recorded; or any consultation or deliberation that has taken place, in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency and would, on balance, be contrary to the public interest.	The public interest test is an element of the exemption
Clause 7	Exempts matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege. The exemption in clause 7(1) is limited by clause 7(2).	No
Clause 8	Contains two separate exemptions. <ul style="list-style-type: none"> • Clause 8(1) exempts matter if its disclosure would be a breach of confidence for which a legal remedy could be obtained. • Clause 8(2) exempts matter if its disclosure would reveal information of a confidential nature obtained in confidence and could reasonably be expected to prejudice the future supply of information of that kind to the government or an agency. <p>Matter is not exempt under clause 8(2) if its disclosure would, on balance, be in the public interest. However, the exemption in clause 8(1) is not subject to a public interest test.</p>	Only clause 8(2) is subject to a public interest test
Clause 9	Exempts matter if its disclosure could reasonably be expected to have a substantial adverse effect on the ability of the Government or an agency to manage the economy of the State, or result in an unfair benefit or detriment to any person or class of persons because of the premature disclosure of information concerning any proposed action or inaction of the Parliament, the Government or an agency in the course of, or for the purpose of, managing the economy of the State. Matter is not exempt matter under clause 9 if its disclosure would, on balance, be in the public interest.	Yes
Clause 10	Contains five separate exemptions. <ul style="list-style-type: none"> • Clause 10(1) exempts matter if its disclosure could reasonably be expected to have a substantial adverse effect on the financial or property affairs of the State or an agency. • Clause 10(2) exempts matter if its disclosure would reveal trade secrets of an agency. 	Yes

	<ul style="list-style-type: none"> • Clause 10(3) exempts matter if its disclosure would reveal information that has a commercial value to an agency and could reasonably be expected to destroy or diminish that commercial value. • Clause 10(4) exempts matter if its disclosure would reveal information concerning the commercial affairs of an agency and could reasonably be expected to have an adverse effect on those affairs. • Clause 10(5) exempts matter if its disclosure would reveal information relating to research that is being, or is to be, undertaken by an officer of an agency or by a person on behalf of an agency and would be likely, because of the premature release of the information, to expose the officer or person or the agency to disadvantage. <p>Matter is not exempt under clauses 10(1), (2), (3), (4) or (5) if its disclosure would, on balance, be in the public interest.</p>	
Clause 11	<p>Exempts matter if its disclosure could reasonably be expected to impair the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency; prevent the objects of any test, examination or audit conducted by an agency from being attained; have a substantial adverse effect on an agency's management or assessment of its personnel; or have a substantial adverse effect on an agency's conduct of industrial relations.</p> <p>Matter is not exempt matter under clause 11 if its disclosure would, on balance, be in the public interest.</p>	Yes
Clause 12	<p>Exempts matter if its public disclosure would, apart from the FOI Act and any immunity of the Crown be in contempt of court, contravene any order or direction of a person or body having power to receive evidence on oath or infringe the privileges of Parliament.</p>	No
Clause 13	Exempts matter relating to adoption or artificial conception	No
Clause 14	<p>Contains six separate exemptions</p> <ul style="list-style-type: none"> • Clause 14(1) exempts matter if it is of a kind mentioned in the specified sections of the <i>Equal Opportunity Act 1984</i>, the <i>Legal Aid Commission Act 1976</i>, the <i>Parliamentary Commissioner Act 1971</i> or the <i>Inspector of Custodial Services Act 2003</i>. • Clause 14(2) exempts matter if it is matter to which a direction given under section 23(1a) of the <i>Parliamentary Commissioner Act 1971</i> or section 48 of the <i>Inspector of Custodial Services Act 2003</i> applies. • Clause 14(3) exempts matter if its disclosure would reveal anything said or admitted for the purposes of negotiating the settlement of or conciliating a complaint under the specified provisions of the <i>Health and Disability Services (Complaints) Act 1995</i>. 	No

	<ul style="list-style-type: none"> • Clause 14(4A) exempts matter if its disclosure would reveal anything said or admitted for the purposes of negotiating the settlement of or conciliating a complaint under Division 2 of Part 6 of the <i>Disability Services Act 1993</i>. • Clause 14(4) exempts matter if it is of a kind mentioned in section 29(3) of the <i>Industry and Technology Development Act 1998</i>. • Clause 14(5) exempts matter if its disclosure would reveal or tend to reveal the identity of the persons described in paragraphs (a)-(f). 	
Clause 15	Exempts matter if its disclosure would reveal information about gold or other precious metal received by Gold Corporation from a person, or held by Gold Corporation on behalf of a person, on current account, certificate of deposit or fixed deposit, or a transaction relating to gold or other precious metal received or held by Gold Corporation.	No