



Decision D0072026 – published in note form only

Re McKenzie and Public Transport Authority and Alstom Transport Australia Pty Limited [2026] WAICmr 7

Date of Decision: 29 May 2026

Freedom of Information Act 1992 (WA): section 33, and Schedule 1 clauses 4(1), 4(2), 4(3), 8(1), 8(2)

Decision

1. For the reasons given to the parties and summarised below, the Information Access Deputy Commissioner (**Deputy Commissioner**) varied the decision of the Public Transport Authority (**agency**) to refuse access to certain parts of documents relating to procurement of Metronet C-Series railcars (**disputed documents**) under the *Freedom of Information Act 1992 (WA)* (**FOI Act**). The Deputy Commissioner found:
 - ‘Confidential Information’ under the contract between the agency and Alstom Transport Australia Pty Limited (**third party**) relating to the manufacture of C-Series rail cars (**Contract**) is exempt under clause 8(1) of Schedule 1 to the FOI Act; and
 - file numbering and administrative or contractual identification numbers, payment dates and sequences and other information about the way the agency deals with its financial obligations to the third party (**administrative information**) are exempt under clause 4(3) of Schedule 1 to the FOI Act.

Background

2. On 19 August 2022, Matthew McKenzie (**complainant**) applied to the agency under the FOI Act for access to, among other things, the third party’s monthly performance reports relating to the Contract.
3. In its initial decision, which was confirmed on internal review, the agency identified the disputed documents and refused access to certain information on the basis the disputed information was exempt under:
 - clauses 4(2) and 4(3) – information about the third party’s business, commercial and financial affairs that if disclosed could reasonably be expected to have an adverse effect on those affairs by destroying or diminishing the value of the information, potentially rendering the third party’s business to be less competitive, harming their reputation and their ability to win future government contracts, whilst providing an advantage to their competitors; and
 - clause 8(1) – it was ‘Confidential Information’ under the Contract and disclosure would be a breach of confidence.
4. On 23 March 2026, the Deputy Commissioner provided the parties with his preliminary view on the matter. The agency largely accepted the preliminary view but submitted additional matter was exempt. The complainant and third party did not respond to the

to the preliminary view, however it is understood the third party provided input to the agency's submissions.

5. To limit the need for additional third party consultation under section 33 of the FOI Act, the complainant agreed to remove some photographs in the disputed documents from the scope of his application.
6. The Deputy Commissioner considered the material before him and found as follows.

Clause 8 – confidential information

Clause 8(1) applies to some disputed information

7. Clause 8(1) of Schedule 1 to the FOI Act provides matter is exempt if its disclosure (other than under the FOI Act or another written law) would constitute a breach of confidence for which a legal remedy could be obtained. This exemption is not subject to a public interest limitation.
8. The Deputy Commissioner observed decisions of the Western Australian Supreme Court and former Information Commissioners confirm clause 8(1) can apply to documents where disclosure could lead to a breach of contract.¹
9. In this case, the Deputy Commissioner was satisfied the confidentiality provision in the Contract applied to some of the disputed information, including supplier information and financial reporting. He also accepted disclosure of such information could breach the Contract for which the third party could obtain a legal remedy.
10. However, not all supplier information is exempt under clause 8(1). The agency argued that due to the limited number of suppliers for certain specialised components, location information is sufficient to identify suppliers. It noted, one example, where a Google search for a particular component together with the supplier's location returned the supplier's website as 'one of the top results'.
11. The Deputy Commissioner did not completely accept that argument, noting the agency's example did not demonstrate sufficiently that location information in this context uniquely identifies the supplier in this instance. Search results reflect indexing and ranking algorithms, and do not show only one supplier operates in the area or that identification is inevitable. They may simply indicate a business has a strong online visibility. Where there is one supplier operating in the relevant location for the component in question then location information can be identifying.
12. In this case, only one supplier could be identified from location information due to the fact its multiple locations were listed making its identity obvious.

Clause 8(2) does not apply to the disputed information

13. Clause 8(2) of Schedule 1 to the FOI Act provides matter is exempt 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 to an agency.
14. Even where both of those criteria are satisfied, matter should only be disclosed if it is, on balance, in the public interest to do so (clause 8(4)).
15. The Deputy Commissioner acknowledged previous decisions concerning clause 8(2) and was satisfied certain disputed information was confidential in nature and obtained in confidence.²

¹ *BCG (Australia) Pty Ltd v Fremantle Port Authority* [2003] WASC 250; *Re Speno Rail Maintenance Australia Pty Ltd and Another and The Western Australia Government Railways Commission* [1997] WAICmr 29; *Re BGC (Australia) Pty Ltd and Fremantle Port Authority* [2002] WAICmr 23.

² *Re Kimberley Diamond Company and Department for Resources Development and Argyle Diamond Mines Pty Ltd* [2000] WAICmr 51, [26]-[27].

16. The more critical question in this case is whether disclosure of the disputed information could reasonably be expected to prejudice the future supply of that kind of information. The phrase 'could reasonably be expected to' requires a decision-maker to assess whether it is reasonable, rather than irrational, absurd or ridiculous, to expect the relevant outcome.³
17. The Deputy Commissioner found disclosure in this case could not be reasonably expected to prejudice the future supply of information to the government or to an agency. Contractors reporting under an agreement with the State would have no legal basis to withhold information it is contractually required to report. Further, a tenderer wishing to be awarded a government contract would have little incentive to refuse to provide the type of information requested, particularly where its competitors are likely to provide it, as refusal would reduce the attractiveness of their tender.
18. Accordingly, clause 8(2) did not apply to any matter in the disputed documents.

Clause 4 – commercial or business information

19. The Deputy Commissioner observed there are three mutually exclusive exemptions in clause 4 – subclauses 4(1), 4(2) and 4(3). Information found to be exempt under one subclause cannot also be exempt under one of the other subclauses.⁴
20. The Deputy Commissioner considered each of the clause 4 exemptions.⁵

Clause 4(1) does not apply to the disputed information

21. Clause 4(1) of Schedule 1 to the FOI Act provides matter is exempt if its disclosure would reveal trade secrets of a person. The factors relevant in determining the existence of a trade secret for the purposes of clause 4(1) are well established.⁶
22. The Deputy Commissioner found the disputed information contained no trade secrets. Although the agency once referred to the third party's trade secrets, this was a mere assertion. Neither the agency nor third party identified any secret formula, pattern or device or compilation used in the third party's business.

Clause 4(2) does not apply to the disputed information

23. Clause 4(2) of Schedule 1 to the FOI Act provides matter is exempt if its disclosure:
 - would reveal information (other than trade secrets) that has a commercial value to a person; and
 - could reasonably be expected to destroy or diminish that commercial value.
24. The principles for determining whether information has commercial value are well established.⁷ In this case, the Deputy Commissioner was not satisfied the disputed information had commercial value for the following reasons:
 - the information is high level and general (for example, subcontractor disciplines). It does not amount to methodology and even if it did, it is project-specific and lacks broader commercial value;
 - it is not essential to the third party's viability or profitability, nor is it the type of information a genuine 'arms-length' buyer would be prepared to pay to obtain; and

³ *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167, [60]; *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, 190.

⁴ See, e.g. *Re Rogers and Water Corporation* [2004] WAICmr 8, [37].

⁵ FOI Act, s 76(1)(b). See also *Pearlman v WA A/Information Commissioner* [2019] WASC 257, [74]-[76]; *Re Kabay and City of Armadale* [2026] WAICmr 4, [7].

⁶ *Re Greg Rowe & Associates and Minister for Planning* [2001] WAICmr 4, [14]-[16]; *Re West Australian Newspapers Ltd and Salaries and Allowances Tribunal* [2007] WAICmr 20, [97].

⁷ *Re West Australian Newspapers Limited and Salaries and Allowances Tribunal* [2007] WAICmr 20, [115]-[125]; *Re McGowan and Minister for Regional Development; Lands and Mineralogy Pty Ltd* [2011] WAICmr 2, [33].

- the information is now outdated, and any potential commercial value it might have had has significantly diminished.
25. The agency made detailed submissions regarding certain photographs in the disputed documents. The Deputy Commissioner found the images depict only general aspects of a manufacturing facility. While they may allow limited inferences about the supplier's manufacturing capabilities and scale of operations, they do not reveal detailed proprietary processes, workflow integration or operational information. Some images only show equipment delivery and partial installation. Accordingly, clause 4(2) does not apply to the photographs.⁸
26. In light of the above, there was no need to consider whether disclosure could reasonably be expected to destroy or diminish commercial value.

Clause 4(3) applies to some disputed information

27. Clause 4(3) of Schedule 1 to the FOI Act provides matter is exempt if its disclosure:
- would reveal information about the business, professional, commercial or financial affairs of a person;⁹ and
 - could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the government or to an agency.
28. Even where both of those criteria are satisfied, matter is not exempt if its disclosure is, on balance, in the public interest (clause 4(7)).

Disputed information relates to business, professional, commercial and financial affairs of the third party

29. The Deputy Commissioner found the nature of the documents, and the fact they were created in the context of a major infrastructure project clearly indicates they relate to the business, professional, commercial and financial affairs of the third party.

Disclosure will not prejudice the future supply of information

30. For reasons discussed above in relation to clause 8(2), the Deputy Commissioner found disclosure of disputed information could not reasonably be expected to prejudice future supply of similar information.
31. The agency also argued disclosure might lead to less full, frank and robust reporting from contractors going forward to avoid media scrutiny. However, the Deputy Commissioner noted reporting requirements are a contractual matter. Agencies should ensure reporting requirements are sufficiently robust to meet the needs of their projects and programs.

Disclosure will have an adverse effect on business or commercial affairs

32. However, the Deputy Commissioner was satisfied disclosure of some disputed information could reasonably be expected to have an adverse effect on the third party's affairs.¹⁰

Administrative information

33. In some cases, disclosure would reveal certain details about payments under the Contract. This could provide the third party's competitors with insight into its current operating circumstances, the financial arrangements under the Contract, and the terms and risks it has accepted. While the information did not provide a complete picture, the

⁸ And for similar reasons, clause 4(3).

⁹ The term 'person' includes bodies corporate: *Interpretation Act 1984 (WA)*, s 5.

¹⁰ The phrase 'could reasonably be expected to' is given its ordinary meaning by the courts. It requires a decision-maker to assess whether it is reasonable, rather than irrational, absurd or ridiculous, to expect the relevant outcome: *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167, [60]; *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, 190.

Deputy Commissioner concluded disclosure is likely to be sufficient to place the third party at a disadvantage in performing the Contract and in future tender processes for similar projects.

Third party's status as self-insured

34. The agency submitted references to the third party's status as self-insured for certain risks is exempt because, if disclosed, it could reasonably be expected to have the following effects:
- future clients may expect the third party to self-insure based on precedent, therefore transferring a commercial risk to the third party it would not ordinarily accept; and
 - an insurance provider may refuse to provide the third party insurance in the future based on precedent, as the third party has the capability to self-insure.
35. The Deputy Commissioner found the agency's submissions overstated because:
- implicit in the agency's submissions is the assumption the cost of insurance purchased through an insurance provider would be passed onto the client, but that the cost of self-insurance would not. That is not necessarily the case;
 - underwriting decisions are typically based on factors such as risk profile, claims history and level of exposure rather than the fact an organisation has retained risk at some point; and
 - insurance companies have a commercial imperative to sell insurance products and it was not clear the fact an organisation had sufficient means to self-insure in the past would be a disincentive to selling it an insurance product in the future.
36. However, the Deputy Commissioner identified other potential consequences. For example, it is arguable insurers may price or structure insurance products differently in future for the third party because it has previously self-insured. Likewise future clients may seek broader indemnities in contractual negotiations, or require higher liability limits and stricter enforceability thresholds. The Deputy Commissioner noted the Contract and project form part of a broader class of large-scale government procurement arrangements from which insurers and other commercial parties may derive insights. Therefore, on balance, he considered disclosure of self-insurance status could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the third party.

Clause 4(7) – disclosure is in the public interest in most cases

37. Clause 4(7) states matter is not exempt under subclause (3) if its disclosure would, on balance, be in the public interest. The expression 'public interest' is understood as follows:¹¹

The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals.

38. The agency submitted other accountability mechanisms, such as parliamentary processes and Auditor General review, already ensure accountability of public spending. However, the Deputy Commissioner observed those mechanisms are not mutually exclusive to freedom of information, and are not readily available to the public.
39. The Deputy Commissioner recognised:

¹¹ See, e.g. *Re V and Curtin University* [2020] WAICmr 3, [55] which adopts the decision of the Victorian Supreme Court in *Director of Public Prosecutions v Smith* [1991] 1 VR 63, 65.

- the strong public interest in the public knowing whether public money was properly accounted for and that public projects and programs are properly administered,¹² including transparency in the management of strategic government projects and whether local content targets are met;
 - a public interest in the efficient management of the project to achieve value for money and quality outcomes, noting disclosure could potentially affect the agency's ability to manage a complex, ongoing project effectively and economically;
 - in relation to matters of insurance, the public interest in understanding how risk is allocated and managed in the delivery of significant public projects, how this is assessed at the procurement stage, how variations to contractual arrangements are managed, and in enabling scrutiny of government procurement and contract management processes; and
 - the public interest in protecting the commercial interests of third parties contracting with government.
40. On balance, other than set out below, the Deputy Commissioner found the public interest factors in favour of disclosure outweigh those against disclosure. Therefore, clause 4(3) did not apply to most of the disputed information, including the third party's status as self-insured for some risks.

Administrative information

41. The disputed information includes administrative information. For such information, the Deputy Commissioner recognised an additional public interest in mitigating the risk of fraud related to government payments. He was satisfied disclosing the administrative information, concerning the size and timing of large payments, could give rise to a risk of fraud committed by external parties. For instance, disclosure of such information would increase the ease by which an external party could impersonate an authorised person of the agency, the third party or a subcontractor.
42. In light of release of the other disputed information, the administrative information provided limited additional transparency in the way government administers the project. Therefore, on balance, the Deputy Commissioner found the public interest favoured non-disclosure, and therefore administrative information is exempt under clause 4(3).

¹² *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494. See also *Re Rogers and Water Corporation and Ors* [2004] WAICmr 8.