



## Decision D0082026 – Published in note form only

### *Re Hart and Public Transport Authority [2026] WAICmr 8*

**Date of Decision: 4 June 2026**

**Freedom of Information Act 1992 (WA): Schedule 1, clauses 4(1), 4(2), 4(3), 8(2), clause 10(1), 10(3) and 10(4)**

#### Decision

1. For the reasons given to the parties and summarised below, the Information Access Deputy Commissioner (**Deputy Commissioner**) set aside the decision of the Public Transport Authority (**agency**) to refuse the complainant access to a financial report assessing her company, School Bus Logistics Ltd (**SBL**), as part of a tendering process (**disputed document**). The disputed document was authored by an external service provider (**third party**).
2. In substitution, the Deputy Commissioner found:
  - the disputed document is not exempt under clauses 4(1), 4(2), 4(3), 8(2), 10(1), 10(3) or 10(4) of Schedule 1 to the *Freedom of Information Act 1992 (WA)* (**FOI Act**);
  - some personal information in the disputed document is exempt under clause 3(1) of Schedule 1 to the FOI Act; and
  - it is practicable to delete the exempt personal information and for the agency to give the complainant access to an edited copy of the disputed document in accordance with section 24 of the FOI Act.

#### Reasons

##### Clause 3 – personal information

3. The Deputy Commissioner was satisfied the disputed document contained personal information, being the name, address, date of birth and email address of the complainant and another director of SBL; and the name of an analyst engaged by the third party.
4. The other director of SBL gave written consent to the disclosure of their personal information. Accordingly, the Deputy Commissioner was satisfied the consent requirements of clause 3(5) were met, and the personal information of the other director of SBL is not exempt under clause 3(1).
5. In relation to the analyst's name, the Deputy Commissioner considered clause 3(6) and found the strong public interest in upholding the privacy of other individuals outweighed any public interest in disclosing the analyst's personal information to the complainant.
6. Therefore, the Deputy Commissioner found the analyst's name is exempt under clause 3(1). The Deputy Commissioner also found it is practicable for the agency to delete that exempt information and to provide the complainant with an edited copy of the disputed document pursuant to section 24 of the FOI Act.

## Clause 4(1) – trade secrets

7. Clause 4(1) of Schedule 1 to the FOI Act provides matter is exempt if its disclosure would reveal trade secrets of a person.<sup>1</sup> The third party is a 'person' for the purposes of clause 4(1).<sup>2</sup>
8. The phrase 'trade secrets' is not defined in the FOI Act. However, the factors that may be relevant in determining the existence of a trade secret for the purposes of clause 4(1) are well established:<sup>3</sup>
  - the extent to which the information was known outside the business;
  - the extent to which the trade secret was known by employees and others involved in the business;
  - the extent of measures taken by the business to guard the secrecy of the information;
  - the value of the information to the business and its competitors;
  - the amount of effort or money expended by the business in developing the information; and
  - the ease or difficulty with which the information could be properly acquired or duplicated by others.
9. The third party submitted:
  - the disputed document applied its proprietary methodology;
  - the content of the disputed document is 'secret' in the relevant sense and is valuable to the third party and its competitors; and
  - it had expended effort and funds developing its proprietary methodology.
10. The Deputy Commissioner found the third party made high level claims that the disputed document was confidential but did not provide persuasive material to show it contains trade secrets. For example, the third party did not explain how the methodology is unique or how it differed from standard industry practice. Although the disputed document followed a structured approach to presenting information, the Deputy Commissioner did not consider that feature in itself remarkable.
11. Accordingly, the Deputy Commissioner found the disputed document is not exempt under clause 4(1).

## Clause 4(2) – commercial value

12. 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.
13. The principles for determining whether information has commercial value are well established.<sup>4</sup> Generally speaking:
  - information may have commercial value if it is useful for carrying on a person's or organisation's commercial activities, including for ongoing business operations or a pending 'one-off' commercial transaction;

---

<sup>1</sup> The term 'person' includes bodies corporate: *Interpretation Act 1984* (WA), s 5.

<sup>2</sup> See section 5 of the *Interpretation Act 1984* (WA).

<sup>3</sup> *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]. See also *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) FCR 111 and *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37.

<sup>4</sup> *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].

- information may have a commercial value if a genuine arms-length buyer would pay to obtain it;
  - it is not necessary to quantify the commercial value;
  - commercial value is determined by the context in which the information is used or exists;
  - investment of time and money alone does not establish commercial value;
  - aged, out-of-date information has no remaining commercial value; and
  - information that is publicly available generally has no commercial value.
14. The Deputy Commissioner accepted the third party's reports, of which the disputed document is one example, are commercially valuable to it. The reports are provided for a fee and generate a significant portion of the third party's revenue. However, this does not itself establish disclosure of the disputed document would reveal commercially valuable information.
  15. The Deputy Commissioner considered the information with commercial value is the third party's proprietary methodology. The key question was therefore whether disclosure of the disputed document would reveal that methodology.
  16. For the methodology to be revealed, it would need to be possible to distil information such as the variables used to calculate the score, or the weight given to those variables, from the disputed document. The material before the Deputy Commissioner did not persuade him this was possible.
  17. The Deputy Commissioner also observed if information such as variables and their weighting were apparent from the reports, every report provided to a client would reveal the proprietary methodology. In those circumstances, the proprietary methodology would likely become well known in the industry and the third party's business model would likely be compromised.
  18. Accordingly, the Deputy Commissioner was not satisfied disclosure of the disputed document would reveal information of commercial value to the third party. As a result, it was not necessary to consider whether disclosure of the disputed document could reasonably be expected to destroy or diminish commercial value.

### **Clause 4(3) – business, professional, commercial or financial affairs**

19. 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;<sup>5</sup> 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.
20. The Deputy Commissioner observed the expression 'business, professional, commercial or financial affairs of a person' is broad in meaning. However, information simply derived from a person or body engaged in business activities is not sufficient. The information itself must be of the character described in clause 4(3).<sup>6</sup>
21. The Deputy Commissioner was satisfied the disputed document contained information about the business affairs of the third party, namely the professional opinion it provided under a services contract and delivered in the course of its business.
22. However, the Deputy Commissioner did not consider the third party clearly explained how disclosure of the disputed document could reasonably be expected to adversely affect the future supply of information to the government or agency.
23. The Deputy Commissioner observed entities such as SBL already have a strong incentive to present their financial position in the best possible light to increase the likelihood of achieving a favourable assessment. There may also be contractual or other legal consequences for providing

<sup>5</sup> The term 'person' includes bodies corporate: *Interpretation Act 1984 (WA)*, s 5.

<sup>6</sup> *Re Oset and Office of Racing and Gaming* [2000] WAICmr 2, [27].

false or misleading information. Further, failure to provide the required information may itself negatively impact the assessment outcome. In those circumstances, the Deputy Commissioner was not persuaded disclosure of the disputed document would materially increase the risk of inaccurate or incomplete information being provided to service providers such as the third party (and, indirectly, to government).

24. Alternatively, if disclosure of the disputed document enabled entities such as SBL to improve their operations and become more competitive as government contractors, it is not apparent how that would be detrimental to any party or discourage entities such as the third party from providing similar reports in the future.
25. Accordingly, the Deputy Commissioner was not satisfied the disputed document is exempt under clause 4(3).

### Clause 8(2) – confidential communications

26. 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 an agency.
27. Matter is not exempt under clause 8(2) if its disclosure would, on balance, be in the public interest (clause 8(4)).
28. The agency claimed the disputed document is exempt under clause 8(2) because it contains confidential information obtained in confidence. However it did not provide persuasive material to support that claim. Instead, the agency's submissions focused on why releasing the document would not be in the public interest.
29. The Deputy Commissioner accepted some of the information in the disputed document appeared to be of a confidential nature because it contained analysis of business information. He also noted the agency restricted access to the disputed document to a small number of agency officers.
30. However, the Deputy Commissioner was not persuaded the disputed document was given and received on the basis of an express or implied undertaking of confidence.
31. The fact the disputed document was marked 'Strictly Confidential – Commercial in Confidence', does not on its own establish it is confidential or communicated in confidence.
32. The Deputy Commissioner also observed that since the commencement of the FOI Act, government agencies cannot give absolute assurances of confidentiality because information may still be subject to freedom of information requests.<sup>7</sup>
33. Further, the Deputy Commissioner did not accept the agency's submission that information in the disputed document was provided in confidence under the agency's contract with the third party. The third party provides audit and financial advisory services under a Common Use Agreement, which incorporates the Request Conditions and General Conditions of Contract provided by the Department of Treasury and Finance (**General Conditions**). There was no material before the Deputy Commissioner that any special confidentiality terms had been added to that contract beyond the standard confidentiality conditions.
34. The Deputy Commissioner was unable to identify anything in the General Conditions to support the agency's claim that information in the disputed document is protected by the contract. In fact, under one provision in the General Conditions, the third party acknowledges information held by the agency or the State is subject to the FOI Act.
35. Accordingly, the Deputy Commissioner was not satisfied the disputed document was given or received in confidence by virtue of the agency's contract with the third party, or otherwise.

---

<sup>7</sup> See *Re Conservation Council of Western Australia (Inc) and Western Power Corporation* [2006] WAICmr 7, [117].

36. As clause 8(2)(a) was not met, it was not necessary to consider whether disclosure could reasonably be expected to prejudice the future supply of information of that kind to government or an agency, nor whether disclosure is in the public interest.
37. Accordingly, the Deputy Commissioner was not satisfied the disputed document is exempt under clause 8(2).

#### **Clause 10(1) – substantial adverse effect on financial or property affairs**

38. Clause 10(1) of the FOI Act provides matter is exempt 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.
39. The agency submitted disclosure of the disputed document would reveal some of the assumptions of the financial assessment model, therefore this could reasonably be expected to have an adverse effect on the financial affairs of the agency. However, the Deputy Commissioner was not satisfied disclosure of the disputed document would reveal the third party's methodology and, even if so, the agency did not explain how disclosure would have the effect claimed.
40. Consequently, the Deputy Commissioner was not persuaded the disputed document is exempt under clause 10(1).

#### **Clause 10(3) – information that has a commercial value to an agency**

41. Clause 10(3) provides matter is exempt 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.
42. The agency submitted disclosure of the disputed document would reveal its financial assessment model (or rather, the third party's financial model on which the agency relied), which has a commercial value to it, and disclosure of the disputed document would adversely impact the agency's commercial and business activities.
43. The Deputy Commissioner did not consider the agency sufficiently explained how the disputed document contains information that has a commercial value to the agency.
44. The Deputy Commissioner was therefore not satisfied the disputed document is exempt under clause 10(3).

#### **Clause 10(4) – commercial affairs of an agency**

45. Clause 10(4) provides matter is exempt 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.
46. 'Commercial affairs' of an agency may include its business and financial affairs.<sup>8</sup>
47. The agency submitted disclosure of the disputed document would reveal information about the agency's and other agency's financial assessment model, thereby affecting the commercial affairs of the agency.
48. The Deputy Commissioner did not consider the agency sufficiently explained how the disputed document contains information concerning the commercial affairs of the agency. The mere fact there are commercial aspects to relevant operations of the agency is not sufficient.<sup>9</sup> In this case, the agency used the disputed document to assess a potential contractor's financial capacity to carry out a contract. While this may inform a procurement decision, it does not itself concern the agency's commercial affairs.

---

<sup>8</sup> *Re Conservation Council of Western Australia (Inc) and Western Power Corporation* [2006] WAICmr 7, [32].

<sup>9</sup> *Re Slater and The State Housing Commissioner of Western Australia* [1996] WAICmr 13, [30].

49. The Deputy Commissioner was therefore not satisfied that the disputed document is exempt under clause 10(4).

### Background to the complaint

50. On 9 March 2022, the complainant applied to the agency under the FOI Act for access to the disputed document.
51. By notice of decision dated 14 April 2022, the agency refused the complainant access to the disputed document on the basis it is exempt under clause 8(2).
52. The complainant sought internal review. By notice of decision dated 11 May 2022, the agency confirmed the initial decision to refuse access to the disputed document under clause 8(2). The agency claimed the disputed document was also exempt under clause 10.
53. On 20 June 2024, the former Information Commissioner (**former Commissioner**) provided the parties with her preliminary view on the matter. Each of the parties provided written submissions in response. The former Commissioner also invited the third party to be joined to the complaint and to make submissions as to whether the disputed document is exempt under clause 4 of Schedule 1 to the FOI Act. The third party made written submissions arguing the disputed document is exempt under clause 4.