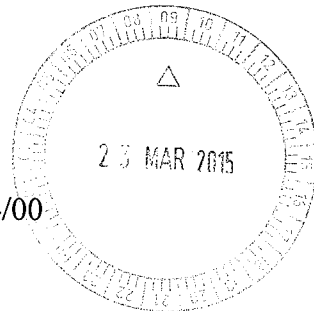




Office of the **Information Commissioner**

Our Ref: 07/054/00
Your Ref: PIP



20 March 2015

Hon K Travers MLC
Chair of the Standing Committee on
Estimates and Financial Operations
Legislative Council
Parliament House
PERTH WA 6000

Dear Chair

INQUIRY INTO THE PROVISION OF INFORMATION TO PARLIAMENT

I refer to the above matter and to your letter to me dated 11 March 2015, enclosing a transcript of my evidence before the Committee on Monday 9 March 2015.

At the hearing, the Committee asked me to provide supplementary information on the following two matters:

- A1: Information regarding agencies that have recently reviewed and improved the efficiency and effectiveness of their management of FOI issues.
- A2: Information and/or cases that concern clauses 4(2) and 4(3) of Schedule 1 to the *Freedom of Information Act 1992* (**the FOI Act**) relating to tenders or contracts and hourly rates for services.

Please find enclosed the requested additional information for the Committee together with the transcript of evidence, correcting a minor error on page 7. I have no objection the enclosed information, or my evidence before the Committee on 9 March, being made public.

Yours faithfully

Sven Bluemmel
INFORMATION COMMISSIONER

Encl

PUBLIC
30/3/15

SUPPLEMENTARY INFORMATION FROM THE INFORMATION TO THE STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS

A1: Information regarding agencies that have recently reviewed and improved the efficiency and effectiveness of their management of FOI issues.

Western Australia Police (WAPol)

In about 2010, WAPol undertook a significant organisational review of its information disclosure processes. As a result, WAPol created the Information Release Centre and within that area was a designated Permissible Information Unit. One of the main reasons for this was to relieve the FOI Unit at WAPol of dealing with many 'routine' applications for information. For example, that unit took on dealing with all information requests relating to:

- National Police Certificates
- Spending a Conviction
- Record of Traffic Infringement Notice
- Abridged Crash Report
- Abridged Incident Report
- Statement of Material Facts
- Personal Statement
- History for Court.

That left the FOI Unit within the Information Release Centre to deal with other, more complex and less routine, matters.

In addition, in about 2013, the WAPol website was restructured. The current homepage has 'Information Access' as a prominent item under the 'popular links' heading. It places FOI at the bottom of options, which is consistent with FOI being a last resort information disclosure tool.

Department of Mines and Petroleum (DMP)

In the last few years, there has been a noticeable response by DMP to the demand within the mining and exploration industry for access to information held by DMP. To address this, DMP has initiated a number of significant changes to the way it provides access to certain information. The following are some examples that have received media coverage:

- In December 2014, DMP is reported to have launched a revamped eBookshop to help explorers and developers of Western Australian minerals, oil and gas. The new service includes free electronic access to almost 5,000 products from the Geological Survey of Western Australia.
- In February 2015, DMP is reported to have acted to counter 'data mining' of its computer systems by big companies, to the disadvantage of other smaller companies. To ensure equity, DMP proposes to establish an online system where availability of tenements will be provided free of charge, following the registration of surrender.

- In March 2015, DMP is reported to have launched a free new application making available on mobile phones and tablets Western Australia's advanced mapping, measuring and geological information.

In addition, the DMP website, in relation to Freedom of Information, states that:

DMP aims to make documents available as soon as possible and at the least possible cost. Whenever possible, documents will be provided outside the Freedom of Information (FOI) process.

DMP's Online Systems contain a vast amount of public information covering all business areas of the department, including mining tenements, mining projects, petroleum projects and geoscientific information. The library officers can provide assistance with the use of the department's Online Systems and conduct Mining Register searches (charges apply).

Details of documents available for purchase from DMP can be found online in the eBookshop.

A2: *Information and/or cases that concern clauses 4(2) and 4(3) of Schedule 1 to the FOI Act relating to tenders or contracts and hourly rates for services.*

Copies of each of the decisions referred to below are enclosed for the Committee's reference.

In *Re Butcher and Department of Parks and Wildlife and Another* [2014] WAICmr 6, the access applicant requested the quote submitted by a tenderer (**the third party**) for a project run by the agency, excluding pricing information. Although the agency initially refused access to the requested document, it withdrew its exemption claim during the external review process. However, the third party maintained that the document was exempt and should not be disclosed.

I found that disclosure of the disputed document would not reveal information that is a trade secret as claimed by the third party (clause 4(1) of Schedule 1 to the FOI Act). I was also not persuaded by the third party's claim that disclosure of the disputed document could reasonably be expected to give the third party's competitors a commercial advantage or that disclosure of the disputed document would enable the third party's competitors to ascertain its costs and likely level of remuneration for its activities. I found that the disputed document was not exempt under clause 4(2) of Schedule 1 to the FOI Act.

I did not consider that disclosure of the disputed document, edited to remove all pricing information, could reasonably be expected to have an adverse effect on the business or commercial affairs of the third party. In addition, I was not persuaded that disclosure of the disputed document could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency and noted that potential future tenderers will continue to submit tenders where they feel it is in their commercial interest to do so. Consequently, I found that the disputed document was not exempt under clause 4(3) of Schedule 1 to the FOI Act as claimed by the third party.

Finally, while the third party submitted that it prepared and provided the disputed document to the agency in circumstances of confidentiality, the third party provided no evidence to establish that the disputed document was obtained in confidence as required by clause 8(2)(a). Accordingly, I found that the disputed document was not exempt under clause 8(2) of Schedule 1 to the FOI Act.

In Re Audio Visual Image 'Nation Pty Ltd and Department of the Attorney General and Another [2010] WAICmr 33, the access applicant requested a copy of the successful tender for a contract to install an audiovisual system in the Central Law Courts in Perth. The agency refused access to the tender claiming it was exempt under clause 4(2) of Schedule 1 to the FOI Act. Following negotiations conducted by my office, the successful tenderer consented to the agency disclosing an edited copy of the tender to the access applicant. After receiving that edited document, the access applicant still sought access to some but not all of the information deleted from the tender (**the disputed information**). I found that the disputed information was not exempt under either clause 4(2) or clause 4(3) of Schedule 1 to the FOI Act.

My published decision did not note whether the disputed information included hourly rates for services in the tender.

In Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Anor [2006] WAICmr 12 an access application was made for the tender submitted by the successful tenderer (**the third party**) for the development of a sporting and equestrian complex. During the external review process, the third party agreed to the disclosure of an edited copy of the tender documents. Among other things, details of the total price quoted and the total contract sum quoted by the third party were released to the access applicant. However, information about the third party's price schedules and schedules of rates for earthworks and clearing; price rates for various miscellaneous items; a schedule of day works labour rates; a schedule of rates for plant hire and a schedule of plant and equipment hire rates was not disclosed and the access applicant sought access to that information.

The former A/Information Commissioner decided that the disclosure of specific information about the third party's tender prices and information about its plant, labour and hire rates could reasonably be expected to have an adverse effect upon the business, commercial and financial affairs of the third party by allowing its competitors to undercut the third party in future tenders, thereby reducing its competitiveness in any future tender process. In weighing the competing public interest factors, the Commissioner found that the public interest factors weighing against disclosure outweighed those in favour of disclosure. Accordingly, the Commissioner found that the information was exempt under clause 4(3): see [136] to [141] for the Commissioner's consideration of the public interest factors for and against disclosure.

In Re Rogers and Water Corporation and Others [2004] WAICmr 8, the access applicant sought access to documents relating to the tender and construction of a sewer. The

information in dispute included tender or contract pricing information relating to a third party's contract with the agency. The documents contained information about changes in the third party's hourly rates, its charges and its tender prices, over a period of eight years and in relation to various tenders, with different tender criteria and pricing requirements.

The former A/Information Commissioner accepted that, having regard to the competitive commercial environment in which the third party operated, disclosure of certain information about the third party's hourly rates, its charges and its tender prices relating to its then most recent contracts with the agency could reasonably be expected to have an adverse effect on the third party's business, commercial or financial affairs, because that information included the most recent and relevant commercial information about the third party's pricing structure, costs and rates. In weighing the competing public interest factors, the Commissioner found that the public interest factors weighing against disclosure outweighed those for disclosure. Accordingly, the Commissioner found that the information was exempt under clause 4(3): see [78] to [83] for the Commissioner's consideration of the public interest factors for and against disclosure.

However, the Commissioner took a different view in relation to the disclosure of the documents that contained information about tender/contract prices that was more than three years out of date and found that information was not exempt under clause 4(3) – see [76].

In Re QMS Certification Services Pty Ltd and Department of Land Administration and Another [2000] WAICmr 48, the former Information Commissioner held that the disclosure of fees paid by the agency to the successful tenderer (**the third party**) for particular services could reasonably be expected to have an adverse effect on the third party because, in future business dealings, competitors of the third party, armed with that knowledge, would be in a position to undercut the third party in future tenders, whilst not being obliged to disclose similar information to the third party. Although the Commissioner found that the information concerning the fees charged for itemised services was exempt under clause 4(3), the Commissioner was also of the view that, in those documents in which individual fees were added together to form a total amount, disclosure of the total amount, in the absence of information as to the number of personnel engaged in that work and the costs of individual items of work, could not reasonably be expected to have an adverse effect on the business or commercial affairs of the third party. Accordingly, the Commissioner found that the total amounts in those documents were not exempt under clause 4(3).

In Re Maddock, Lonie and Chisholm and Department of State Services [1995] WAICmr 15, the former Commissioner accepted that the disclosure of detailed information as to how the unsuccessful tenderers calculated their respective tender prices, detailed descriptions of the systems and equipment proposed by the unsuccessful tenderers and the specific proposals and processes of how that equipment would be used could reasonably be expected to have had an adverse effect on the business, commercial and financial affairs of the unsuccessful tenderers by reducing their competitiveness in any future tender process. As a result, the Commissioner found that information was exempt under clause 4(3).