

# Clause 6 – the deliberative processes exemption

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## Elements of the exemption

The exemption will only apply if the matter is **either**:

- opinion, advice or recommendation that has been obtained, prepared or recorded;  
or
- any consultation or deliberation that has taken place

**AND**

- it was obtained, prepared, recorded or it took place in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency

**AND**

- disclosure would, on balance, be **contrary** to the public interest.

## The Legislation

Clause 6 of Schedule 1 to the *Freedom of Information Act 1992* (WA) provides:

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

(a) *would reveal –*

(i) *any opinion, advice or recommendation that has been obtained, prepared or recorded; or*

(ii) *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*

(b) *would, on balance, be contrary to the public interest.*

## What is Matter?

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

## What are Deliberative Processes?

- ‘Deliberative processes’ are ‘thinking processes’.
- Commonwealth Administrative Appeals Tribunal in *Re Waterford and Department of the Treasury (No. 2)* (1984) 5 ALD 588: the deliberative processes of an agency are its ‘thinking processes’, the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or a course of action.
- Involves gathering information from a wide variety of sources, including consulting with people inside and outside agencies, weighing or considering all of the information and facts obtained with a view to making a decision or reflecting upon the reasons for or against a particular choice.

## ‘In the course of, or for the purpose of’

- Information has to be in the nature of opinion, advice, recommendation, consultation or deliberation.
- Obtained, prepared, recorded or taken place in the course of, or for the purpose of, the particular deliberative process of an agency.
- This means there must be a connection between the information and the particular deliberative process.

## Identifying the particular deliberative process

- Agencies make decisions every day, but not all will be covered by the exemption in clause 6.
- To decide whether information is of the relevant kind, an agency should identify or describe the particular deliberative process.
- It may be helpful to:
  - describe the context in which a document was created or information was obtained or recorded; and
  - identify the stage the deliberations have reached and whether or not a decision has been made.

## What kind of documents may contain information relating to the deliberative processes?

- Documents about the formulation and making of policy.
- Records of discussions of agency committees (internal and external).
- Interim and draft reports.
- Documents relating to the ‘give and take’ of decision-making.

## Contrary to the public interest

- Much information held within an agency will relate to decisions taken by the agency and will reveal the deliberative processes of the agency.
- However, for such information to be exempt under clause 6, an agency must establish that its disclosure would, on balance, be **contrary** to the public interest.
- This is different to the requirement in other exemptions where disclosure must, on balance, be **in** the public interest.

## Weighing the competing public interests

- Need to identify and weigh the competing public interest factors for and against disclosure and decide where the balance lies.
- Beaumont J in *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551 at 561:  

[I]n evaluating where the public interest ultimately lies ... it is necessary to weigh the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper working of government and its agencies on the other ...

## When might it be contrary to the public interest to disclose deliberative process documents?

- If the agency's deliberations are ongoing **and** disclosure would **adversely affect** the agency's decision making process. E.g. if disclosure would undermine, hamper or interfere with ongoing or continuing deliberations.
- If disclosure would be prejudicial to or detrimental to the proper operation of government or the proper workings of an agency.
- If some other essential public interests are likely to be harmed in some way.

## Some points to consider

- The exemption is intended to cover cases where public disclosure would be prejudicial to the proper operation of government or the proper workings of an agency such that the right of access under the FOI Act is subordinate: see *Re BGC (Australia) Pty Ltd and Port Hedland Port Authority* [2011] WAICmr 38 at [66].
- The fact that a particular deliberative process is still continuing does not mean that disclosure of documents relating to that deliberative process will necessarily be contrary to the public interest: see *Re MacTiernan and Main Roads Western Australia* [2017] WAICmr 2 at [61].
- There is a strong public interest in the accountability of agencies for the manner in which they discharge their obligations on behalf of the public in Western Australia. This includes informing the public of the basis for decision-making and of the material considered relevant to that process.

## Some more points to consider

- Disclosure of information about options may serve the public interest by promoting discussion and debate and informing the public about matters of public importance. Informed debate and discussion about such matters can only occur if the public has access to relevant information.
- Responsible government requires an appropriate degree of transparency and capacity for public scrutiny of important projects and government decisions: see *Re Johnston and Department of State Development* [2017] WAICmr 1 at [70] and *Re MacTiernan and Main Roads Western Australia* [2017] WAICmr 2 at [79].
- It is the role of government to make and effectively communicate project decisions that are in the best interests of the public: see *Re MacTiernan and Main Roads Western Australia* [2017] WAICmr 2 at [66].

## Case Study - Scenario

- Disputed document – Minutes of a review meeting for an individual prisoner (**complainant**).
- Meeting to assess the complainant's risk of violent behaviour while incarcerated and the risk to the agency's employees.
- Complainant submits he has a right to see the document because it contains personal information, and recommendations about him.
- Complainant submits he wants to establish if his prison transfer was conducted in a fair manner and considers the document contains misleading and inaccurate information about him.

## Limits on the exemption

- There are limits on the exemption set out in clauses 6(2)-6(4).
- Even if the requirements of clause 6(1)(a) and (b) are established, matter will not be exempt under clause 6(1) if:
  - the information is in an agency's internal manual (clause 6(2)). Internal manuals include policy manuals, guidelines and administrative instructions (section 95);
  - the information is merely factual or statistical (clause 6(3)); or
  - the information came into existence more than 10 years ago (clause 6(4)).

## Case Study – Decision of the Information Commissioner

### *Re Thompson and Department of Corrective Services* [2012] WAICmr 4

#### Clause 6(1)(a)

- The Information Commissioner was satisfied that the disclosure of that document would reveal opinion and advice that had been obtained, prepared and recorded in the course of, and for the purpose of, a deliberative process of the agency - its assessment of risks in relation to the ongoing management of the complainant within the prison system.

## Case Study – Decision of the Information Commissioner

### Clause 6(1)(b)

- public interest in people being informed as fully as possible of the basis upon which decisions directly affecting them have been made by government agencies. Agency had explained reasons to the complainant - public interest substantially satisfied.
- public interest in maintaining the ability of prison authorities to properly assess and develop strategies for the management of prisoners. Disclosure of the document **contrary** to public interest because it would reveal information about the day to day management of prisoners that could reasonably be expected to lessen effectiveness of management strategy introduced on the basis of the information.

## Tips for good practice

- Disclose outside the FOI Act wherever possible
- Talk to the parties, try to negotiate a good outcome
- Consult third parties only where necessary
- The agency makes the decision on access, not third parties
- Issue clear and comprehensive decisions

## Decision of interest

### ***Re Travers and Public Transport Authority [2015] WAICmr 20***

- The Commissioner found that documents associated with the potential extension of the Thornlie passenger railway line were not exempt under clause 6(1).
- While the Commissioner recognised that sectional interests may use the information in the documents to support or undermine options according to their own interests, the Commissioner was of the view 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.