Lib No: 960668

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
CORAM	**:**	TEMPLEMAN J
HEARD	**:**	7 NOVEMBER 1996
DELIVERED	**:**	22 NOVEMBER 1996
FILE NO/S	**:**	SJA 1111 of 1996
BETWEEN	**:**	MINISTRY FOR PLANNING Appellant AND GORDON JAMES COLLINS Respondent

Catchwords:

Administrative law - Freedom of information - Appeal against decision of Information Commissioner - Access to documents - Government instrumentality and private individual - Public interest - Factors taken into consideration.

Representation:

Counsel:

Appellant	:	Ms J C Pritchard
Respondent	:	No appearance

Solicitors:

Appellant	:	State Crown Solicitor
Respondent	:	No appearance

Case(s) referred to in judgment(s):

Craig v The State of South Australia (1995) 184 CLR 163
Murtagh v Federal Commissioner of Taxation (1984) 54 ALR 313
Re Jones v Shire of Swan unreported; Information Commissioner WA; 9 May 1994
Re Little & Ors and Department of Natural Resources unreported; Information Commissioner Qld; 22 March 1996
Re Waterford & Department of the Treasury (No 2) (1984) 5 ALD 588

Case(s) also cited:

Attorney General's Department and Australian Iron & Steel Pty Ltd v Cockcroft (1986) 10 FCR 180
Hassell v Health Department of Western Australia, unreported; Information Commissioner WA; 23 December 1994
Police Force of Western Australia v Kelly & Smith, unreported; SCt of WA (Anderson J); Library No 960227; 30 April 1996
Re Howard and The Treasurer of The Commonwealth (1985) 3 AAR 169
Re Kaminga and Australian National University (1992) 26 ALD 585
Re Lianos and Secretary to Department of Social Security (1985) 7 ALD 475
Sankey v Whitlam (1978) 142 CLR 3
Slater v State Housing Commission, unreported; Information Commissioner WA; 22 February 1996

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TEMPLEMAN J:

This is an appeal pursuant to s85(1) of the *Freedom of Information Act 1992* ("the Act"). The appellant is the Ministry for Planning. It appeals against a decision of the Information Commissioner ("the Commissioner") who ordered that certain of the appellant's documents be produced to the respondent, Mr Gordon James Collins.

The material provided to me consists of the Commissioner's reasons for decision dated 5 July 1996. In addition, and at my request, the disputed documents were provided to me so that I might consider them to the extent necessary to enable me to understand fully the Commissioner's reasons.

As appears from those reasons, the respondent is the executor of the estate of the late Elsie Gladys Morgan. Included in the estate is land at Lots 616 and 617 Hamilton Street, Ashfield, of which the deceased was the registered proprietor.

I infer that the present dispute has arisen out of negotiations between the respondent and the Western Australian Planning Commission ("WAPC") concerning the possible sale of the land by the respondent to the WAPC.

The relationship between the WAPC and the appellant is summarised in the Commissioner's reasons. Put shortly, the WAPC and the appellant are both State agencies responsible for developing, reviewing and implementing the land use planning system in Western Australia. The WAPC was established by the *Western Australian Planning Commission Act 1985*. In carrying out its functions, it receives technical advice and assistance from the appellant, which is in possession of the disputed documents.

As the Commissioner noted, the WAPC has the power to acquire land in accordance with various Acts which it administers. Although it has power to acquire land compulsorily in certain circumstances, those circumstances have not arisen in the present case. Nor, as I understand it, is there any

suggestion that the land will be acquired compulsorily if agreement cannot be reached between the parties. At present, therefore, the WAPC and the respondent are dealing at arm's length although, of course, in so acting, the WAPC is exercising its statutory powers.

As I understand the position, negotiations between the WAPC and the respondent broke down when the WAPC declined to disclose to the respondent certain valuations and related documents which it had obtained in relation to the subject land. Following internal reviews by the appellant of the decision to withhold access to the documents, the respondent, through its solicitors, lodged a complaint with the Commissioner on 13 March 1996. There were then discussions between the Commissioner's officers and the appellant : and the Commissioner expressed a preliminary view. This resulted in the ambit of the dispute being narrowed marginally. However, some 15 documents remained in dispute. It was in relation to those documents that the Commissioner then gave her decision.

The Disputed Documents

There having been further consideration on the part of the appellant, there are now 12 documents in dispute. They were described by the Commissioner as follows:

"**Document**	**Folio**	**Description**
1	24-28	Valuation report dated 6/2/95.
2	38-41	Valuation report dated 14/2/95.
3	45	Handwritten memorandum of an officer of the agency, dated 20/2/95.
4	48-52	Copy of Document 1.
5	61-64	Copy of document 2.
6	81-85	Valuation report dated 3/4/95.
7	88	Handwritten memorandum of an officer of the agency, dated 11/4/95.

8	89	Handwritten memorandum of an officer of the agency, dated 12/4/95.
9	93-95	Report dated 19/4/95 from Acting Property Managers to WAPC.
10	99-101	Copy of document 9 with date stamp and Committee stamp.
11	102	Extract from the minutes of the meeting of the Executive, Finance and Property Committee of WAPC held on 26/4/95.
15	130	Extract from the minutes of the meeting of Executive, Finance and Property Committee of WAPC, held on 5/12/95."

The Commissioner's Decision

In her decision, the Commissioner referred to the fact that the appellant claimed the disputed documents to be exempt from production under cl 6(1) of Schedule 1 to the Act. Clause 6 provides as follows:

> "6. Deliberate processes
>
> Exemptions
>
> (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 deliberate processes of the Government, a Minister or an agency;
>
> and
>
> (b) would, on balance, be contrary to the public interest.

> Limits on exemptions
>
> (2) Matter that appears in an internal manual of an agency is not exempt matter under subclause (1).
>
> (3) Matter that is merely factual or statistical is not exempt matter under subclause (1).
>
> (4) Matter is not exempt matter under subclause (1) if at least 10 years have passed since the matter came into existence."

The Commissioner went on to say that to establish an exemption under cl 6, the appellant was required to satisfy the requirements of both paras (a) and (b) of subcl (1). If the disputed documents contain matters of the kind described in para (a), it is then necessary to consider whether the disclosure of that matter would, on balance, be contrary to the public interest. The Commissioner went on to point out that the exemption is subject in any event to the limitations set out in subcls 6(2), (3) and (4).

The Commissioner then reviewed a number of decisions about the meaning and purpose of the exemption contained in cl 6(1). Those decisions included ***Re Waterford & Department of the Treasury (No 2)*** (1984) 5 ALD 588. The Commissioner said, and I respectfully agree, that the comments of the Commonwealth Administrative Appeals Tribunal ("the Tribunal") in relation to the Commonwealth provision which is equivalent to the Act, assist in determining the scope of the exemption in cl 6(1). The Tribunal said:

> "58. As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. "Deliberation" means "the action of deliberating: careful consideration with a view to decision": see the Shorter Oxford English Dictionary. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking

> processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Deliberations on policy matters undoubtedly come within this broad description. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play...
>
> 59. It by no means follows, therefore, that every document on a departmental file will fall into this category...Furthermore, however imprecise the dividing line may first appear in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of the agency...
>
> 60. It is documents containing opinion, advice, recommendations etc. relating to the internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption under s.36 only attaches to those documents the disclosure of which is 'contrary to the public interest'..."
>
> The Commissioner went on to say:
>
> "When considering the application of the exemption in cl 6, I consider it useful, if not necessary, to identify the deliberative processes of the agency to which the particular documents are claimed to relate in order to decide whether they are deliberative process documents in the sense described in *Re Waterford*, and to decide whether disclosure of such documents would, on balance, be contrary to the public interest."

Then, following a review of the relationship between the respondent and the WAPC, the Commissioner expressed the view that the disputed documents related to quite distinct, deliberative processes, namely:

1. the setting of a price at which an offer to purchase the land was initially made by the agency; and
2. determining which option to pursue when no agreement could be reached between the respondent and the appellant on the purchase price of the land in question.

The Commissioner went on to hold that documents 1-11 inclusive related to the first deliberative process, and that they were clearly with cl 6(1)(a).

The Commissioner then considered whether disclosure of those documents would, on balance, be contrary to the public interest. In considering that question, the Commissioner dealt with competing submissions which she had received.

The Commissioner recognised the public interest in the appellant and the WAPC having access to a wide range of advice and opinions in order that those agencies might carry out their functions and make informed planning decisions on matters that benefit the community as a whole. The Commissioner said:

> "I consider that public interest is served by preserving the integrity of the deliberative processes of both [the appellant] and the WAPC, but only to the extent that the disclosure of documents relied upon by either [the appellant] or the WAPC during deliberations would adversely affect those processes such that it would, on balance, be contrary to the public interest to do so, or that disclosure would, for some other reason, be demonstrably contrary to the public interest."

The Commissioner also recognised a public interest in the respondent being able to exercise his rights of access under the Act. The Commissioner referred to the respondent's assertion that release of the valuation documents would enable him to understand the position adopted by the WAPC with respect to the acquisition of the land. The respondent had submitted that disclosure might expedite a settlement between the parties and might avoid the need for litigation. Given that the parties are negotiating on a voluntary basis and that no compulsory acquisition was envisaged, a reference to litigation seems somewhat out of place. It is explained by the fact that the appellant had offered to have the matter resolved by arbitration. However, the respondent

told the Commissioner that he was not prepared to proceed to arbitration without knowing the basis upon which the purchase price of the land had been set by the appellant. The respondent stated that:

> "arbitration would not be an option until there were some common ground between the parties."

The Commissioner went on to refer to the appellant's contention that the breadth of its responsibilities to the general community for the efficient management of public moneys outweighed the private interests of the respondent. The appellant contended that it would be contrary to the public interest to disclose the disputed documents because:

> "... it is the experience of the [appellant] that property negotiations become extremely protracted when individuals are provided with information about the [appellant's] reasoning and assumptions on property transactions and land values."

The Commissioner went on:

> "27. The final submission of the agency referred to "long established experience" of this nature, and asserted that its view is based on experience. However, the agency provided no specific examples and, other than those general references to its experiences, the agency did not provide any material to support its claims about the adverse effects of disclosure of documents of the type in dispute. In the absence of supporting material, I have not attached much weight to the agency's assertions. The agency did inform me that it had taken into account my decision in *Re Jones and Shire of Swan* (9 May 1994, unreported), but it considered that the circumstances of that matter were sufficiently different to those in this instance not to be relevant [In *Re Jones* I decided that a valuation report was not exempt under clause 6(1) because, *inter alia*, negotiations between the parties had broken down]. The agency maintains that, until its dealings with the complainant are finalised, no documents should be disclosed. However, the agency acknowledges that once negotiations have been finalised, a decision on access may be different."

The agency referred to in the passage set out above is, of course, the appellant.

The Commissioner then went on to set out her conclusions, as follows:

> "29. Taking into account the power of the WAPC with respect to the acquisition of private property for planning purposes, I am of the view, as I was in *Re Jones*, at paragraph 25 of that decision, that it is not in the public interest for negotiations of this nature to be conducted in "mutual half-light": see also *Murtagh v Commissioner of Taxation* (1984) 54 ALR 313, at 329. In my view, the agency's submission that a distinction should be made between the complainant's private interest and "*...the agency's responsibility to the broader public interest of the general community...for efficient management of public monies*" fails to recognise any public interest in the agency dealing fairly with a private citizen and in being seen to deal fairly in transactions with all citizens. Given the agency's extraordinary powers and resources in respect of the acquisition of property, powers which are not available to private organisations or citizens, I certainly recognise such a public interest.
>
> 30. I am reinforced in that view by a decision of the Queensland Information Commissioner that concerned access to similar documents. In *Re Little and Others and Department of Natural Resources* (Information Commissioner Qld, 22 March 1996, unreported) the access applicants sought access to valuation reports of the department. Although he was dealing with the compulsory acquisition of private property, I endorse the following comments of the Information Commissioner in *Re Little* which I consider to be equally apposite to the matter before me. He said, at paragraph 48:
>
> > "I do not accept the respondent's argument...to the effect that, as agent for the wider public interest in attempting to acquire property for public purposes, the greater public interest is served by maximising its negotiating advantage against a property-owner who is trying to "maximise his benefit". It would, in my opinion, be short-sighted and erroneous to suggest that the public interest in saving public money would justify a government agency in

> seeking to negotiate the acquisition of a citizen's property on less than just terms. The greater public interest lies in preserving the principle of public acquisition of private property on just terms. Any citizen may be affected by a government proposal to acquire private property for public purposes. The interest in fair treatment of citizens by government in the course of acquisition processes is an interest which is common to all citizens and for their benefit."
>
> 31. Although the matter before me does not involve the compulsory acquisition of private property, I agree that disclosure of valuation reports would give the complainant the opportunity to subject the agency's offer to a detailed critical analysis by informing him of the assumptions, evidence and methodology upon which the purchase price offered by the agency was based. He would then be in a position to satisfy himself that the valuations and, in turn, the offer, are reasonably based or not. In that way he may be either reassured that he is being fairly dealt with by the agency or if, in his view, the basis of the valuations is not sound, he will be in a position to point out his concerns to the agency. To gain access to such information only after the completion of the negotiations, as suggested by the agency, would not be just and would not assist to open the process to public scrutiny in accordance with the objects of the FOI Act. Therefore, in balancing the competing interests, I am not persuaded that disclosure of Documents 1-11 would be contrary to the public interest, and I consider the balance lies in the disclosure of those documents to the complainant."

It is to be noted that, thus far, the Commissioner had dealt with documents 1-11. She went on to deal with the remaining documents and other matters. I shall return to the remaining matters in due course. However, it will be convenient now to turn to the appeal in relation to the first part of the Commissioner's reasons.

The Appeal

The appeal was instituted by notice of motion of appeal dated 26 July 1996. At the hearing, the appellant appeared by counsel. There was no

appearance by the respondent. He had instructed solicitors to act for him in relation to the complaint to the Commissioner. However, before the hearing of the appeal, those solicitors telephoned the court to say that they would not be appearing because their client was without funds.

It is accepted by the appellant that, in order to succeed on the appeal, it must identify an error of law on the part of the Commissioner. The appellant contends, in ground 1 of its notice of appeal, that:

> "The learned Commissioner erred in law in that she misinterpreted the meaning of, and misapplied, the public interest test in relation to documents 1-11 ..."

There are then set out nine matters relied on in support of the substantive grounds.

Before dealing with each of those grounds, I note that the Act does not itself contain any "public interest test". There is no definition of the term "public interest" in the glossary to the Act. In cases such as the present, the Commissioner is required to decide whether access should be given to documents which have been withheld by the relevant agency. In so doing, the Commissioner will be required frequently, as she has been in this case, to decide whether the matter is exempt because it falls within one of the categories of Schedule 1 to the Act. Many of the exemptions set out in Schedule 1 are limited by provisions in the following terms:

> "Matter is not exempt matter under subclause ... if its disclosure would, on balance, be in the public interest."

In relation to those provisions, s102(3) of the Act imposes on the "access applicant" the onus of establishing that disclosure would, on balance, be in the public interest. However, cl 6(1)(b) provides that matter is exempt if its disclosure would, on balance, be *contrary* to the public interest. That being so, it seems to me that the onus lies with the appellant. Hence the Commissioner's

statement, to which I referred above, that the appellant is required to satisfy the requirements of both paras (a) and (b) of cl 6(1).

In reaching a decision on the public interest question, the Commissioner must make a judgment. And unless it is shown that the Commissioner has erred in law in so doing, that judgment will stand even though the court hearing an appeal from the Commissioner pursuant to s85(1) of the Act might have reached a different conclusion.

In the present case, the appellant submits that a question of law within s85(1) of the Act will arise if the Commissioner has made a mistake of law in the following circumstances:

> "(a) Where there is no evidence to support a finding even though the finding is one of fact.
>
> (b) Where the Commissioner in the course of making her adjudication misstates a rule of law or betrays a wrongful interpretation of the Act.
>
> (c) Where the facts have been found or have been admitted and the Commissioner makes an error in applying a statutory description or formula to such set of facts; or
>
> (d) Where the Commissioner adverts to irrelevant considerations or disregards relevant considerations."
>
> (Sykes, Lanham and Tracey, General Principles of Administrative Law, 3rd ed., para 2564.)

The appellant then puts the submission on an alternative basis, taken from the recent case of ***Craig v The State of South Australia*** (1995) 184 CLR 163, 179:

> "In alternative language, if the Commissioner falls into an error of law which causes her to identify a wrong issue, to ask herself a wrong question, to ignore relevant material, to rely on irrelevant material, or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and her exercise or

> purported exercise of power is thereby affected, she has exceeded her authority or power."

Applying those principles to the present case, I understand the gravamen of the appellant's submission to be that, in reaching her decision, the Commissioner took into account irrelevant considerations and failed to take into account, or give sufficient weight to, relevant considerations.

With those matters in mind, I turn to the particular matters relied on by the appellant in its grounds of appeal.

It is said first that the Commissioner erred in limiting the public interest in the nondisclosure of the documents (to the extent that the Commissioner found there was such a public interest) by reference to whether the deliberative processes of the appellant and the WAPC would be affected adversely by disclosure of the documents.

This, I think, is a reference to that passage in the Commissioner's reasons in which she said:

> "I consider that public interest is served by preserving the integrity of the deliberative processes of both the [appellant] and the WAPC, but only to the extent that the disclosure of documents relied upon by either the [appellant] or the WAPC during deliberations would adversely affect those processes such that it would, on balance, be contrary to the public interest to do so ..."
>
> However, the Commissioner went on to say:
>
> "... or that disclosure would, for some other reason, be demonstrably contrary to the public interest."

The last part of the quotation demonstrates that the Commissioner did not limit the public interest in the way complained of. I do not therefore accept that the complaint is justified.

The appellant then contends that the Commissioner gave undue weight to the private interests of the respondent in obtaining access to the documents.

The answer to this contention is, I think, to be found in para 29 of the Commissioner's reasons, which is set out above.

Although undoubtedly the respondent has a private interest in obtaining access to the documents, the Commissioner regarded it as being in the public interest that the appellant should deal fairly with a private citizen and be seen to deal fairly in transactions with all citizens. That being so, I do not think it right to say that the Commissioner gave undue weight to the respondent's private interests.

The next ground of appeal is that the Commissioner failed to take into account, or to give sufficient weight to, the public interest in the appellant's efficient management of public moneys, in circumstances where the appellant and the respondent were negotiating a voluntary commercial transaction.

I have set out above para 30 of the Commissioner's reasons, in which she referred to ***Re Little & Ors and Department of Natural Resources***, unreported; Information Commissioner Qld; 22 March 1996.

That case was concerned with the compulsory acquisition of private property, a fact recognised by the Commissioner. However, she considered it to be applicable equally to the present dispute. I understand the Commissioner to mean that there is a public interest in ensuring that government agencies deal fairly with citizens in the course of acquisition processes, whether they be voluntary or compulsory. It could hardly be said that government agencies must deal fairly when engaged in compulsory acquisition, but that there is no such obligation when negotiating for the voluntary acquisition of land. I see no inconsistency between what the appellant describes as "the efficient management of public moneys" and acting fairly in its dealings with private citizens.

Having regard to the way in which the Commissioner dealt with this aspect of the matter, I do not think it right to say that she failed to take into

account the public interest in the appellant's efficient management of public moneys. The Commissioner clearly did take that matter into account. She accorded it less weight than the appellant would have wished. However, that was a matter for the Commissioner's judgment and does not, in my view, amount to an error of law.

These considerations apply equally, in my view, to the next ground of appeal. It is contended that the Commissioner took into account an irrelevant consideration: namely, that in circumstances of the compulsory acquisition of land, there may be a public interest in the agency dealing fairly with a private citizen and being seen to deal fairly in transactions with all citizens.

As I have noted above, I understand the Commissioner to have extracted from the decision in ***Re Little*** a principle which is applicable in all circumstances in which government agencies seek to acquire land from private citizens.

It is then said by the appellant that the Commissioner took into account an irrelevant consideration, namely, the powers and resources of the appellant in respect of the compulsory acquisition of land.

I refer again to para 29 of the Commissioner's reasons, in which she referred to the power of the WAPC with respect to the acquisition of private property for planning purposes and to the fact that the appellant had extraordinary powers and resources in respect of the acquisition of property, powers which are not available to private organisations or citizens. That was the context in which the Commissioner dealt with ***Re Little***, a compulsory acquisition case. However, I do not think the Commissioner was referring in either of those instances to powers of compulsory acquisition. The Commissioner was well aware that this is not a compulsory acquisition case. Neither was ***Re Jones v Shire of Swan***, unreported; Information

Commissioner WA; 9 May 1994, in which the Commissioner took a similar view.

I therefore consider that, in referring to the WAPC's powers and resources, the Commissioner had in mind only the fact that the WAPC is a government agency. In my view, this ground has not been made out.

The next ground is that the Commissioner failed to take into account, or to give sufficient weight to, a relevant consideration, namely, the public interest in maintaining the integrity of the deliberative processes of the appellant and the WAPC until such time as the appellant and the respondent had concluded their dealings in relation to the sale of the land.

I have noted above that the Commissioner made express reference to the public interest in preserving the integrity of the deliberative processes of both the appellant and the WAPC. The Commissioner referred also to the appellant's contention that the integrity of the deliberative process ought to be maintained, at least until its dealings with the respondent had been finalised. In my view, therefore, the appellant is not justified in asserting that the Commissioner failed to take these matters into account. The weight given to these matters by the Commissioner is, it seems to me, a matter for her judgment.

I note the appellant's acknowledgment referred to in the Commissioner's reasons, that once negotiations had been finalised, a decision on access might be different. The situation would then be analogous to that which arose in ***Re Jones v Shire of Swan*** where the Commissioner ordered that access be given to valuations obtained by the Shire of Swan after negotiations between the parties had broken down. The appellant apparently accepts the correctness of that decision.

In the present case the appellant contends that negotiations have not come to an end. As counsel for the appellant put it, negotiations had only

"stalled". However, that seems to me to be a somewhat unrealistic attitude. I think it to be implicit in the appellant's offer to go to arbitration that negotiations have come to an end.

In these circumstances, I do not think there is any substance to this ground.

It is then said by the appellant that the Commissioner gave undue weight to the consideration that the parties' negotiations in relation to the sale of the land would be conducted in "mutual half-light", in circumstances where the appellant was not entitled to access to the respondent's documents.

The expression "mutual half-light" is taken from ***Murtagh v Federal Commissioner of Taxation (1984)*** 54 ALR 313, 329. That case is quite different from the present, being concerned with an application made under the Commonwealth Freedom of Information Act 1982 by a taxpayer who sought from the Commissioner of Taxation access to a number of documents relating to her income tax returns. The Administrative Appeals Tribunal said (at 329):

> " We do not accept the contention put forward that it is in the interests of the public that negotiations between taxpayers and the Australian Taxation Office should proceed on inadequate knowledge. We abhor the contention that "mutual half-light" should be "the necessary pre-condition of negotiation and settlement". Objections to income tax assessments are not lodged only by tax evaders and tax avoiders. There is no suggestion of any such circumstance in the present case. We think it highly undesirable that, in a case such as the present, both the Australian Taxation Office and the taxpayer should not work together to ascertain the relevant facts and to arrive at a proper conclusion having regard to the whole of the relevant facts. As we have already said, we think that there are many relevant facts which are still in the sole possession of the applicant and Mr X and that it would be useful if those facts were to be disclosed to the Australian Taxation Office. The process of ascertaining all relevant facts is likely to be enhanced if the taxpayer knows what are the facts which the Australian Taxation Office has taken into

> account. In so far as those facts are not the full facts of the matter, the taxpayer may supplement them with further information."

It seems to me that the principle which that passage illustrates is that it is desirable for a government instrumentality and a private individual to work together "to ascertain the relevant facts and arrive at a proper conclusion having regard to the whole of the relevant facts". It is to be noted that in ***Murtagh's case***, the Tribunal was aware that there was a one-sided right to access under the relevant legislation. However, the Tribunal expressed the view that the process of ascertaining all relevant facts was likely to be enhanced by that process because the applicant might thereby be encouraged to disclose information in her possession.

In these circumstances, I do not think it right to say that the Commissioner in the present case gave undue weight to the consideration that if access were not granted, negotiations would be conducted in "mutual half-light".

Finally, the appellant contends that the Commissioner failed to give any, or sufficient, weight to its submissions in relation to the public interest on the basis that the Commissioner concluded that the appellant was required to provide evidence in support of its submissions and that it had failed to do so.

This ground arises out of the appellant's contention before the Commissioner that it was contrary to the public interest to disclose the disputed documents because of the appellant's experience that property negotiations become extremely protracted when individuals are provided with information about the appellant's reasoning and assumptions on property transactions and land values. The appellant claimed that its experience related to individual dealings and to successive dealings with different individuals who had interests in properties within a broadly defined region or area.

The Commissioner said (and I set out again part of para 27 of her reasons):

> "The final submissions of the [appellant] referred to "long established experience" of this nature, and asserted that its view is based on experience. However, the [appellant] provided no specific examples and, other than those general references to its experiences, the agency did not provide any material to support its claims about the adverse effects of disclosure of documents of the type in dispute. In the absence of supporting material, I have not attached much weight to the [appellant's] assertions."

I do not read the Commissioner's reference to the fact that the appellant had not provided material to support its claims as reflecting a conclusion that the appellant was required to provide evidence. I understand the Commissioner to be saying only that in the absence of supporting material, she did not attach much weight to the appellant's assertions. The appellant submitted that it would be difficult to envisage what other material it could have put before the Commissioner to support its submissions, when it was addressing a hypothetical situation. However, I do not think the appellant was referring to a hypothetical situation. Its submission was based on "long established experience" : matters which, in my view, ought to have been capable of elucidation if they were to be relied on.

The next ground of appeal deals with document 15. This is described as an extract from the minutes of the meeting of the Executive, Finance and Property Committee of the WAPC, held on 5 December 1995. Only part of that document, para 21.6.4, is relevant to this matter. The Commissioner said of it:

> "There is no evidence before me to suggest that the matter contained in Document 15 directly relates to the deliberations concerning the purchase price or the options available to the [appellant] in the continued negotiations with the [respondent] and

> I do not consider that the document itself is a true deliberative process document in the sense described in *Re Waterford*."

The Commissioner went on to say that the relevant part of document 15 was not exempt for any reason as it was merely a factual record of a resolution of a meeting of the WAPC.

It was submitted by counsel for the appellant that document 15, being an extract from the minutes of a meeting, must necessarily reflect a decision, and that this must itself involve deliberations. I was referred to s36 of the Commonwealth freedom of information legislation which expressly excludes from the category of exempt documents:

> "the record of.....a final decision given in the exercise of a power or of an adjudicative function."

It was submitted that as there is no such provision in the Act, records of this kind (which document 15 is said to be) must be exempt.

I do not think it permissible to use one piece of legislation to construe another. In any event, as appears from the extract from ***Re Waterford*** which I have set out above, it is to be borne in mind that documents disclosing deliberative processes should be distinguished from documents dealing with purely procedural or administrative processes involved in the functions of the agency.

Having considered document 15, I respectfully agree with the Commissioner's view as set out above. I think it is described accurately as a factual record of a resolution, and I therefore consider the Commissioner was correct in finding that it was not an exempt document.

It should be noted that ground 2 of the appeal was substantially abandoned at the hearing. I allowed amendment which limited the ground to the application of cl 6(1)(a) to document 15.

Having determined the public interest question in favour of the respondent, the Commissioner went on to hold that "in any event" the disputed

documents contain a considerable amount of merely factual information to which the limitation in cl 6(3) applies. The Commissioner said that such information could be severed from other more sensitive information and could not be exempt under cl 6(1).

The appellant contends that having come to the view that much of the matter contained in the documents was merely factual, the Commissioner ought to have been more specific than she was in identifying the material.

It is submitted by the appellant that if the Commissioner's decision on the public interest point is set aside, the matter should be remitted to her so that she could, in effect, edit the documents so as to delete the matter which does not fall within para (6)(3).

The Commissioner said:

> "The factual information consists of information concerning the land in question, including title particulars, encumbrances, improvements, zoning details and a history of the property. Some of that information is on the public record and cannot, therefore, be exempt matter, in my view. Other factual information in the documents merely relates the history of the agency's dealings with the complainant."

Although this question does not now arise, it seems to me that the guidance afforded by that passage is sufficient to enable the appellant to carry out any editing which might be necessary.

The final ground of appeal asserts that the Commissioner failed to find that each of the documents was exempt pursuant to cl 10(3) or 10(4) of Schedule 1 to the Act. These clauses provide as follows:

"**10.** (3) Matter is exempt matter if its disclosure —

(a) would reveal information (other than trade secrets) that has a commercial value to an agency; and

(b) could reasonably be expected to destroy or diminish that commercial value.

(4) Matter is exempt matter if its disclosure —

(a) would reveal information (other than trade secrets or information referred to in subclause (3)) concerning the commercial affairs of an agency; and

(b) could reasonably be expected to have an adverse effect on those affairs."

The appellant submits that the Commissioner is under a duty pursuant to s74(1)(a) of the Act to avoid the disclosure of exempt matter and that she was accordingly under a duty to consider whether either of cls 10(3) or (4) was applicable. The appellant points out that the Commissioner made no reference in her reasons to those provisions.

In my opinion, s74 does not have the effect for which the appellant contends. I think the section is intended to ensure that the Commissioner does not disclose exempt matter, or the existence of exempt matter, when dealing with a complaint.

As I understand it, the Commissioner made no reference to cls 10(3) or (4) because no submissions were made to her which required her to do so. It was submitted to me that as a matter of inference the Commissioner should have concluded that the disclosure of the documents could reasonably be expected to destroy or diminish their commercial value. This, it is said, is because the appellant has no right of access to information which forms the basis for the respondent's negotiating position : and disclosure would therefore put the appellant at a disadvantage.

I disagree. While considerations of that kind may be appropriate in some cases, it seems to me that in the present case disclosure of the disputed documents is more likely to enable their commercial value to be realised. If the purpose of obtaining valuations is to enable the WAPC to determine a price at which it is reasonable for the land to be acquired, that purpose will be frustrated by their non-disclosure. The respondent has made it plain that he

will not proceed. In these circumstances, I think the disclosure of the documents would have a beneficial effect on the commercial affairs of the WAPC.

For these reasons, I do not think it appropriate to remit the matter to the Commissioner for further consideration.

In summary, I am not persuaded that the Commissioner made any error of law. In the exercise of the power vested in me by s87(1)(a) of the Act, I confirm the Commissioner's decision.