[2010] WASC 210

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	WATER CORPORATION -v- McKAY [2010] WASC 210
CORAM	**:**	KENNETH MARTIN J
HEARD	**:**	17 JUNE 2010
DELIVERED	**:**	17 AUGUST 2010
FILE NO/S	**:**	GDA 2 of 2010
BETWEEN	**:**	WATER CORPORATION Appellant AND RODERICK DOUGLAS McKAY KATHLEEN GLENYS McKAY Respondents

ON APPEAL FROM:

Jurisdiction	**:**	INFORMATION COMMISSIONER OF WESTERN AUSTRALIA
Coram	**:**	MR S BLUEMMEL
Citation	**:**	RE McKAY and WATER CORPORATION [2009] WAICmr 35

Catchwords:

Freedom of information - Appeal against disclosure orders of Information Commissioner - Public interest provision considered for exempt documents

Legislation:

Freedom of Information Act 1992 (WA), s 85
Land Administration Act 1997 (WA)
Public Sector Management Act 1994 (WA)
Water Agencies (Powers) Act 1984 (WA)
Water Corporation Act 1995 (WA), s 30(1)

Result:

Appeal dismissed

Category: A

Representation:

Counsel:

Appellant	:	Mr L E James
Respondents	:	Mr T Houweling & Ms J P See

Solicitors:

Appellant	:	Kott Gunning
Respondents	:	Cornerstone Legal

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

Craig v South Australia (1995) 184 CLR 163
Manly v Ministry of the Premier and Cabinet (1995) 14 WAR 550
Ministry for Planning v Collins (1996) 93 LGERA 69
Re Edwards and Electricity Corporation [1999] WAICmr 13
Re McKay and Water Corporation [2009] WAICmr 35
Re Ryan and City of Belmont [2000] WAICmr 42
Re Waterford and Department of Treasury (No 2) (1984) 5 ALD 588

KENNETH MARTIN J:

Overview

1 This is an appeal against a decision of the Information Commissioner (IC) pursuant to s 85 of the *Freedom of Information Act 1992* (WA) (FOI Act). The IC allowed the respondents access to the full content of valuation reports by licensed valuers which were commissioned by the appellant in respect of portions of the respondents' rural land at Ravenswood. The valuation reports are of November 2007 and March 2008 respectively.

2 On 30 December 2009, the IC determined that the full content of the two reports (referred to at [13] of the IC's reasons for decision) was not exempt from access, as the appellant had asserted - by reference to cl 6(1) of sch 1 to the FOI Act.

3 By s 85(1) of the FOI Act, an appeal lies to the Supreme Court on a 'question of law' arising out of any decision of the IC on a complaint relating to an access application.

4 Under sch 1, cl 6 of the FOI Act (which concerns the deliberative processes of an agency), matter will be exempt from disclosure, broadly speaking, if its disclosure would reveal opinions, advice or recommendations to an agency in the course of the agency's deliberative processes and where the disclosure of the matter would, on balance, be contrary to the public interest.

5 No argument was put on the appeal that the components out of the two valuation reports which had been redacted by the appellant and which are the focus of this disclosure dispute, do not fall squarely within the description of being part of the appellant's 'deliberative processes'.

6 The core issue in contention then, by reference to cl 6(1)(b) of sch 1, is whether a disclosure to the respondents of the redacted component valuation material would, on balance, be contrary to the public interest.

Background

7 The context of the respondents' FOI request relates to the appellant's proposal to construct a pipeline which in part will be situate on rural land owned by the respondents at Ravenswood. The appellant has for some time been negotiating with the respondents to acquire portions of their land - upon which a Stirling trunk main pipeline is constructed.

8 The appellant has sought to negotiate with the respondents towards a consensual acquisition of the land it requires. But to date negotiations have not born fruit. The appellant holds power under the *Land Administration Act 1997* (WA) to acquire land for public works, ultimately by compulsory acquisition, where negotiation efforts fail.

9 The appellant made offers to purchase the required land from the respondents on 28 May 2008 and then again on 11 September 2008. Those offers were rejected. The offers would appear to have been advanced by the appellant having regard to advice in two valuation reports obtained.

10 The appellant's position put both before the IC and to this court, is that the two valuation reports are now, in effect, stale. It is said they have been overtaken by events, particularly the global financial crisis, so that essentially a fresh valuation is called for. The appellant contends that a contemporary valuation outcome will likely be at a lower level than the levels of its valuations obtained in November 2007 and March 2008.

11 The appellant resists disclosure of the redacted components of the two valuations on the basis that its commercial position in negotiations with the respondents over acquisition of the required land would be undermined, if it were required to release the full content of those valuations. This argument was not accepted by the IC who concluded, essentially, that the sch 1 cl 6(1)(b) public interest threshold required to be demonstrated by an agency resisting disclosure, had not been met by the appellant.

12 The appellant seeks to challenge the decision of the IC in this appeal, contending that the IC erred, particularly as to the assessment of the public interest - by paying insufficient regard to the appellant's mandated duty to act on commercial principles under s 30(1)(a) of the *Water Corporation Act 1995* (WA).

13 The appellant has conditionally offered to bear the expense of a contemporary valuation to be carried out by a valuer chosen by the appellant (from one of three nominated valuers selected by the respondents). However, that offer to meet the cost of a fresh valuation is made conditional on the contemporary valuation also being made available to the appellant, as well as upon its findings being used (in the negotiations) as a basis of arriving at an agreed purchase value (see penultimate paragraph of the appellant's letter to Cornerstone Legal dated 11 September 2008 to the respondents' solicitor, and the appellant's

solicitor's email to my Associate of 17 June 2010 (sent after the appeal hearing on 17 June 2010)). In this regard, the position stated by the IC at [29] of his reasons is inaccurate.

14 The appellant maintains that its position in the presently incomplete negotiations with the respondents will be commercially undermined, if the redacted components of the two earlier valuations are made available to the respondents - especially before a more contemporary valuation emerges.

15 However, the appellant's solicitor's email of 17 June 2010 made it explicit that the appellant does not propose to make the redacted portions of the valuation reports available even after an arrival of a more contemporary valuation. It is not said when the redacted valuation information would be made available to the respondents, if ever.

16 It is also necessary to note that the IC recorded at [38] of his reasons that the appellant had informed him that there had been no negotiations with the respondents since September 2008 'although negotiations may be recommenced'. However, on 9 June 2010 (well after the IC's decision) the appellant wrote directly to the respondents' solicitor in these terms:

> Further to our discussion of the 27 April 2010, I wish to confirm that the Corporation forwarded instructions through to the two original valuation firms requesting they update their property reports relative to today's conditions.
>
> Their findings have established no upward movement in land values for the area and more specifically the comment that 'the value is fair and reasonable [too] perhaps generous' brings us to the [belief] that the most [recent] offer presented to your client on the 11 September 2008 still represents a fair and true market value for the land. As such we again present our offer of **$*38,000*** for your client's consideration.
>
> We confirm that it is the Corporations['] intention to carry out works to satisfy our earlier commitments with regards to erecting a suitable stock fence along the new boundary and establishing a legal access to the property.
>
> I again wish to reiterate that it is the Corporations aim to arrive at an amicable outcome to this matter, we are committed to working with you to negotiate the purchase of the required land, if it would assist in moving forward with this deal we welcome the opportunity to meet with your client to discuss his concerns.
>
> I look forward to your call to arrange a mutual time for us to meet.

17 This letter was forwarded to my Associate by an email of 30 June 2010, well after the hearing of the appeal on 17 June 2010. Negotiations therefore were attempted to be revived by the appellant as late as 9 June 2010.

Brief chronology of developments referable to response to FOI request

18 In response to the respondents' initial request (made through their solicitor) seeking all the appellant's valuation documentation, the appellant on 16 July 2008 informed the respondents of its decision to grant (unrestricted) access to 56 documents, but limited access to edited copies of another 18 documents. Documents 16 and 17 of the edited material had been redacted by the appellant to remove valuation figures, calculations and other information about the valuation of the land - on an asserted public interest basis, by reference to the appellant's deliberative processes (see [13] - [14] of the IC's reasons for decision).

19 The respondents' solicitor then requested an internal review of this response, by a letter dated 13 August 2008, seeking full details of the valuations on which the appellant's 'offer to take the land was based'.

20 There would appear to have been no response to the request for internal review by the appellant. A second offer to purchase then issued by the appellant to the respondents on 11 September 2008.

21 On 17 September 2008, the respondents' solicitor requested that the IC conduct an external review of the refusal of access to the redacted components of the two valuations.

22 The respondents' application for the external review was accepted by the IC on 22 September 2008. In due course, the (redacted) materials were produced to the IC by the appellant, accompanied by written submissions supporting its decision not to disclose the redacted valuation materials.

23 On 3 September 2009, the IC communicated to the parties a preliminary view that the deleted information was not exempt from disclosure under cl 6(1) of sch 1 to the FOI Act. Further written submissions were invited from the parties, and received on 17 September 2009 from the appellant.

24 On 30 December 2009 the IC published his reasons confirming the decision expressed under the preliminary view: see ***Re McKay and Water Corporation*** [2009] WAICmr 35.

25 This appeal was lodged on 20 January 2010.

The Information Commissioner's decision

26 The IC concluded that the first limb of cl 6(1)(a), as to the deliberative process of an agency, was established (at [31] - [32]). That aspect of the decision embodied an uncontroversial view that the deliberative processes of an agency concern its 'thinking processes' and the process of reflection: see [23], referring to ***Re Waterford and Department of Treasury (No 2)*** (1984) 5 ALD 588. There is no challenge to that aspect of the IC's decision.

27 Nor is there any challenge to the approach of the IC towards his assessment as to the applicable legal burden and the standard of proof carried by the appellant. At [25], the IC referred, appropriately, to observations made by Owen J (as he then was) in ***Manly v Ministry of the Premier and Cabinet*** (1995) 14 WAR 550, 573, to this effect:

> In my opinion it is not sufficient for the original decision-maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision-maker.

28 In the present context, then, the appellant carried an onus to make good by reference to sch 1, cl 6(1)(b) of the FOI Act, the basis of the exemption it relied upon and particularly to show that a disclosure of the matter forming part of the deliberative processes of the appellant, ie the redacted components of the two valuations, 'would, on balance, be contrary to the public interest'.

29 In assessing the public interest threshold under sch 1, cl 6(1)(b), the IC at [34] referred to Templeman J's decision in ***Ministry for Planning v Collins*** (1996) 93 LGERA 69 at 13. There his Honour had observed:

> 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 s 85(1) of the Act might have reached a different conclusion.

30 The IC then reasoned as to cl 6(1)(b) that:

> I recognise that there is a public interest in the agency carrying out negotiations to acquire land by agreed purchase without the risk of those negotiations being undermined by the disclosure of sensitive information. In general, I consider that it would be contrary to the public interest to

> prematurely disclose documents while deliberations in an agency are continuing, if there is evidence that the disclosure of such documents would adversely affect the decision-making process, or that disclosure would, for some other reason, be contrary to the public interest. In general, I consider that the public interest is best served by allowing deliberations to occur unhindered and with the benefit of access to all of the material available so that informed decisions can be made.
>
> At the time of the agency's initial decision in July 2008, there were ongoing negotiations between the agency and the complainants and the agency was concerned that disclosure of the valuation reports would reveal the parameters of its negotiating range. The agency contended that such disclosure would undermine its negotiating position, which would be contrary to the public interest. In my view, it might well be contrary to the public interest to disclose an actual negotiating range, however I am not persuaded that disclosure of valuation reports would necessarily disclose an agency's negotiation range. …
>
> The agency currently submits that Documents 16 and 17 were obtained as part of its ongoing deliberative processes. The agency has also informed me that there have been no negotiations with the complainants since September 2008, although negotiations may be recommenced. The complainants advise me that negotiations with the agency have stalled or broken down. In my opinion, the latter is the more realistic view.
>
> In light of that, and in view of the agency's submission that the valuations in Documents 16 and 17 are out of date, it appears to me that, although the agency's deliberations to determine the value of the Land and the price it is willing to pay for the Land may be ongoing, those current deliberations no longer relate to the particular valuation amounts in Documents 16 and 17. Consequently, I am not persuaded that disclosure of those amounts could damage negotiations between the parties because those negotiations are no longer on foot. Nor, in my view, could they damage future negotiations because the valuation amounts are now out of date [36] - [39].

31 In his conclusion, the IC rejected the appellant's submissions that disclosure of the withheld valuation information (was):

- likely to lead to the complainants overstating the value of the Land;
- likely to result in the agency having to pay more than the market value of the Land;
- not likely to bring the parties closer together in terms of bargaining position; and
- not likely to assist in a sale or acquisition on just terms [44].

32 The IC assessed a number of prior FOI decisions regarding valuation reports (see [67]), including ***Re Ryan and City of Belmont*** [2000]

WAICmr 42. That decision related to a proposed land exchange concerning part of a recreation reserve in the City of Belmont which was Crown land. The complainant was not the owner of the private land which was being exchanged for part of the recreation reserve. A third party to the acquisition transaction was seeking information about the negotiations between the City of Belmont and a private landholder in a proposed land swap. On the particular facts, it was found that the public interest favoured maintaining confidentiality in the City of Belmont's negotiating stance with the private landowner. That decision, the IC concluded, was distinguishable on its facts from the present unresolved negotiations taking place directly as between the appellant and the respondents (at [72]).

Ground 1 of the appellant's appeal

33 Three grounds of appeal were pursued. The first was in these terms:

> (1) The Information Commissioner erred in law in that the Information Commissioner failed to give sufficient or any weight to the submission by the Respondent (Appellant) that the disclosure of the documents would compromise the Respondent's (Appellant's) ability to act on commercial principal [sic principle] in contravention of its duty to act in accordance with proven commercial principals [sic principles] in performing its functions under Section 30(1)(a) of the *Water Corporation Act 1995*, it being essential for the Respondent (Appellant) to maintain a defensible negotiating position so that the government funds involved are appropriated reasonably and justly.

34 In advancing this ground, the appellant put strong reliance upon the significance of s 30(1) of the *Water Corporation Act*, within Pt 3 Div 1 of that Act. It is necessary to assess that provision in its surrounding statutory context.

35 Viewing that Act as a whole, it is apparent that Div 1 commences with s 27, which deals with the functions of the appellant. In addressing statutory functions, it is relevant to know that by Pt 2 Div 1, the Water Corporation is established as a body corporate with perpetual succession (s 4(2)) and is expressly declared not to be an agent of the Crown. Accordingly, it does not enjoy the status, immunities or privileges of the Crown (s 5).

36 Next, section 6 in Pt 2 Div 1 makes it clear that the appellant is not, and is not to become, part of the Public Service of the State of Western Australia. The appellant's Chief Executive Officer and staff are not to be

included within the Senior Executive Service as is provided for under the *Public Sector Management Act 1994* (WA). The quasi-public nature of the appellant is, however, manifest in that its Board is to comprise not less than five persons who are appointed as non-executive directors by the Governor, on the nomination of the Minister (s 7).

37 The parties accept that the appellant, notwithstanding that the appellant is explicitly characterised by the *Water Corporation Act* as not being a Crown agent, nevertheless falls squarely under the regime of the FOI Act - as a public body which is an 'agency', and so, is subject to the access obligations imposed under Pt 2 of the FOI Act.

38 The objects and intent of the FOI Act are explicitly identified within s 3 and s 4 within Pt 1 of the FOI Act. These objects as expressed form the essential bedrock of open, democratic government. Their policy importance therefore cannot be overstated.

39 Returning to Pt 3 Div 1 of the *Water Corporation Act*, the functions of the appellant are identified in s 27, at the commencement of Div 1. The obligation is stipulated by s 28 for the appellant to perform its functions in accordance with policy instruments, which are identified. Section 29 identifies the extensive powers of the appellant, with certain restrictions under provisions of the *Water Agencies (Powers) Act 1984* (WA) (see s 30(4)).

40 Before considering s 30, I would note that s 32 in pt 3, div 1 (which identifies transactions requiring ministerial approval, read in conjunction with the exemptions under s 33 and s 34) requires the appellant to consult the Minister before entering upon courses of action that amount to major initiatives or likely to be of significant public interest.

41 Accordingly, the residual public character of the appellant remains demonstrable from the Act, notwithstanding the appellant's status outside the public service and its express non-designation as an agency of the Crown.

42 I turn then to s 30 of the *Water Corporation Act* which provides:

> 1. The Corporation in performing its functions must -
>
> (a) act in accordance with prudent commercial principles; and
>
> (b) endeavour to make a profit, consistently with maximizing its long term value.

43 Subsection 2 then provides:

> 2. If there is any conflict or inconsistency between the duty imposed by subsection (1) and a direction given by the Minister under this Act the direction prevails.

44 The appellant emphasises s 30(1), particularly its duty to endeavour to make a profit, as a strong policy consideration bearing upon any evaluation of the public interest, for the purposes of cl 6(1). By ground 1, the appellant argues that the commerciality of the appellant's functions, was either overlooked, or inadequately weighted as a relevant consideration by the IC.

45 The respondents refute ground 1, but say, in any event, that if the challenge simply raises an issue of the IC affording inadequate weight to a 'profit' making consideration, that this would not raise a sufficient error of law, for the purposes of s 85(1). On the other hand, if commerciality and profit were overlooked completely, then the IC may have failed to advert to a relevant consideration. Such a failure may constitute an arguable error of law: see ***Craig v South Australia*** (1995) 184 CLR 163 at 179, applied by Templeman J in ***Ministry for Planning*** at 76.

Evaluation of ground 1

46 In my assessment, the IC's reasons were alive to the position of the appellant as a party with broad commercial interests, which was engaged in a commercial negotiation with the respondents over a potential acquisition of some required portions of their rural land. This is readily apparent from observations by the IC, at his [36] and [37], which I have already set out in the extract of his reasons at [30] above. Beyond those materials already mentioned, the IC also observed at [57]:

> With respect to the agency's submission that it is essential for it to maintain 'a defensible negotiating position', to ensure that government funds are appropriated reasonably, I recognise a public interest in the agency's efficient management of public monies when negotiating a transaction such as the one in question here. However, I consider that particular interest must be balanced against the public interest in ensuring that government agencies deal fairly and transparently with private citizens when seeking to acquire land in the course of acquisition processes, whether those processes are voluntary or compulsory, see ***Re Little and Others and Department of Natural Resources*** (1996) 3 QAR 170. (my emphasis underlined)

47 Accordingly, there was no failure by the IC to identify as a relevant consideration in his assessment, the commerciality of the appellant's

position, as regards it maintaining a viable negotiating position with the respondents. To the extent that further criticism under ground 1 moves towards an alleged failure by the IC to afford more weight to that factor, then, in my view, that is not a challenge that properly falls within the parameters of raising a question of law, for the purposes of satisfying s 85(1) of the FOI Act.

48 However, I would observe, in any event, that my review of the IC's reasons does not disclose any concern over the IC devaluing the significance of the appellant's need to maintain commerciality in its negotiations with the respondents and generally.

Grounds 2 and 3

49 The remaining grounds can be considered together. They are in the following terms.

> 2. The Information Commissioner failed to follow the decision in ***Re Ryan and City of Belmont*** (2000) WAICmr 42, in which decision the then Commissioner accepted the argument of the City of Belmont that the disclosure of the information concerned in that case would adversely affect sensitive ongoing negotiations with private landowners and was against the public interest in maintaining the City's ability to negotiate effectively in respect of the outstanding matters still to be settled with the private landowners.
>
> 3. The Commissioner should have found as a matter of law that the disclosure of the disputed matter would, on balance, be contrary to the public interest and followed rather than distinguished ***Re Ryan***.

50 I have already mentioned by reference to the IC's reasons that ***Re Ryan*** was referred to, considered, then factually distinguished by the IC. In my assessment, that analysis was correct, bearing in mind that each FOI objection must be assessed by reference to its own unique facts.

51 To the extent that ground 2 carries the further implication that an administrative official, such as the IC, is strictly bound by considerations of stare decisis - analogous to the principles of precedent which govern a judicial officer's decision-making - then in my assessment, ground 2 is conceptually misconceived. Whilst consistency in decision-making is a desirable policy objective in all environments, in the context of administrative decision-making, the strictures of precedent that pertain in a judicial context are less rigid. In any event, I agree with the IC's assessment that the decision in ***Re Ryan*** was largely fact specific in producing its outcome.

52 In the present case, the IC identified a stalled state in the negotiations between the parties, as a matter of fact, at [38]. There can be no challenge in this court to that factual assessment. A scenario where negotiations have stalled or broken down is obviously a different situation to one where negotiations are active. That distinction was recognised by the IC at [36] and [37] of his reasons, to which I have referred. The IC's decision of 30 December 2009 naturally preceded the appellant's letter to the respondents of 9 June 2010 that was copied to me, under the consent of the parties, after the appeal hearing had concluded.

53 As regards ground 3 and its reference to the public interest, the IC's formulation of the applicable public interest test under cl 6(1) of sch 1 and approach to assessing that aspect of the appellant's claim for exemption against disclosure, is not tainted by error that could constitute an error of law for the purposes of s 85(1) of the FOI Act.

54 It was for the appellant to show a public interest against disclosure of the redacted components of the valuation reports. The IC, in my assessment, cannot be shown to have erred in his public interest evaluation, recognising the following features in the context of the exemption sought concerning the appellant's deliberative processes.

(a) The imbalance of power in the land acquisition process (through negotiation or otherwise) as between a governmental agency and a private citizen, in circumstances where the agency may ultimately resort to use of a compulsory acquisition power if negotiations are not successful. The need for transparent and accountable decision-making through proper process is more than usually important where a private citizen deals with a governmental agency in such a context.

(b) Even if the withheld valuation information was wholly stale (which is now factually at issue, in light of what is most recently said in the appellant's letter of 9 June 2010), that would still be an insufficient basis for the information to be withheld. The appellant is well equipped in a commercial negotiation (particularly where the parties are each represented by solicitors) to forcefully make the point that time or events have overtaken its prior valuations, in terms of their current efficacy or utility (if that be so). But if for whatever reason the respondents are not prepared to accept that assertion at face value (and the appellant's letter of 9 June 2010, asserting that its 11 September 2008 offer, 'still represents a fair and true market value for the land', would

> support the respondents viewing the appellant's assertion of staleness with some scepticism), then there is still potential for an intelligent discourse between the parties over that difference of views. That, of course, does not mean that either side is obliged to meekly 'roll over' or accept the other party's asserted position. In that scenario, I see minimal, if any, potential for the respondents to be 'misled' by what was characterised by the appellant's counsel at the appeal hearing, as 'outdated valuation information'. It also lies fully within the capacity of the appellant to unilaterally commission a more contemporary valuation should it desire to do so and to then table that valuation in due course to the respondents, in any further negotiations. The fact that the appellant's heavily conditional offers to the respondents to meet the cost of a further valuation have not found favour to date, is not at all to the point.

55 Bearing in mind the appellant's ultimate compulsory acquisition powers, its public interest contention that its commercial position may be undermined in negotiations, if it is required to fully reveal the withheld component of the prior valuations, cannot be accepted. The IC referred to the decision in ***Re Edwards and Electricity Corporation*** [1999] WAICmr 13 where a similar argument about disclosure of what was asserted to be potentially misleading aspects in outdated land valuations was persuasively rejected (see reasons of IC [52]). I also agree with that analysis.

56 The appellant's desire to facilitate the obtaining of a more contemporary valuation may be viewed as an understandable step towards resolving an impasse in negotiations. But, in my view, it is a step of foreshadowed conduct that does not bear upon the assessment as to its satisfaction of the public interest exemption threshold criteria, set under cl 6(1) of sch 1, as regards the redacted components of these valuations.

57 In the context of a longer term potential use by the appellant of its compulsory land acquisition powers, the need for wholesale transparency in respect of the appellant's workings as a public agency is overwhelmingly the greater public interest, in the present case.

58 The appellant has not established any of its grounds of appeal. The appeal should therefore be dismissed.