

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

CITATION : MINISTER FOR TRANSPORT -v- EDWARDS
[2000] WASCA 349

CORAM : HASLUCK J

HEARD : 2 NOVEMBER 2000

DELIVERED : 17 NOVEMBER 2000

FILE NO/S : SJA 1130 of 2000

BETWEEN : MINISTER FOR TRANSPORT
Appellant

AND

JUDITH MARY EDWARDS
Respondent

Catchwords:

Freedom of Information Act - Application for access to documents in the possession of a Minister - Whether the right of access extends to documents held by a Minister - Meaning of phrase "documents of an agency" - Information Commissioner's decision to allow access upheld

Legislation:

Freedom of Information Act 1992
Government Railways Act 1904
Interpretation Act 1984 (WA), s 12

Result:

Appeal dismissed

Representation:

Counsel:

Appellant : Ms C F Jenkins
Respondent : Mr M L Barker QC

Solicitors:

Appellant : State Crown Solicitor
Respondent : Gibson & Gibson

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

Commissioner of Police v District Court of New South Wales (1993) 31
NSWLR 606
Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39
IW v City of Perth (1996) 191 CLR 1
Minister for Planning v Taweel, unreported; SCt of WA; Library No 960654,
13 November 1996
News Corporation Ltd v National Companies and Securities Commission (1984)
1 FCR 64
Police Force of Western Australia v Kelly (1997) 17 WAR 9
Victorian Public Service Board v Wright (1986) 160 CLR 145

Case(s) also cited:

Beckwith v R (1976) 12 ALR 333
Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic
Affairs (1992) 110 ALR 97
Commissioner of Taxation v Salenger (1988) 19 FCR 378
Commonwealth v Baume (1905) 2 CLR 405
Craig v State of South Australia (1995) 184 CLR 163
Deakin v Webb (Commissioner of Taxes) (1904) 1 CLR 585
Re Tyler & Ors; Ex parte Foley (1992) 181 CLR 18
Searle Australia Pty Ltd v Public Interest Advocacy Centre & Anor (1992) 36
FCR 111

1 **HASLUCK J:** This is an appeal from a decision of the Information
Commissioner made on 20 July 2000 pursuant to the *Freedom of
Information Act 1992* ("the FOI Act"). The provisions of the FOI Act
create a right to access to the documents of governmental agencies. The
question raised by the appeal is whether access can be obtained to
documents in the possession of or under the control of a Minister. The
answer to this question depends upon an appraisal of the right of access
and upon the meaning of the phrase "documents of an agency" as defined
in the glossary or definition section of the FOI Act.

2 The respondent, Dr Judy Edwards, is the Member for Maylands in
the Legislative Assembly. By letter dated 21 March 2000, Dr Edwards
made an application to the Minister for Transport for access under the FOI
Act to a copy of a review by the Acting Commissioner of Railways of the
policy of Westrail concerning the use of timber sleepers.

3 The letter in question was directed to the "Freedom of Information
Coordinator, Office of the Minister for Transport" and was in these terms:

"This application is made pursuant to s 12 of the *Freedom of
Information Act 1992*.

I wish to gain access to a copy of the Acting Commissioner of
Railways' review of Westrail's use of timber sleepers, and all
supporting documentation.

Where you have reason to believe that documents fitting this
description are in the custody of another agency I assume you
will, as required by the *Freedom of Information Act 1992*, refer
my application to those agencies. The address for service of
notices is given above. A cheque for \$30 application fee is
attached."

4 By letter dated 8 May 2000, a member of the Minister's staff
informed Dr Edwards that three documents had been identified as falling
within the request, namely, a report prepared by Westrail on the use of
timber sleepers called "Procurement of Timber Sleepers"; Westrail's
"Sleeper Procurement Policy" effective from November 1999; and
"Westrail Sleeper Specification - Australian Standard for Visually Graded
Green Sawn Western Australian Hardwood Sleepers". I will call these
documents collectively "the disputed documents".

5 The Minister refused access to the documents on the ground that the
documents had been used in a submission to cabinet and were therefore

exempt pursuant to provisions of the FOI Act. Dr Edwards applied to the Information Commissioner for external review of the decision of the Minister.

6 Exchanges of correspondence took place during the course of the review. It then emerged that the Minister did not intend to rely upon the claim for exemption. The stance adopted by the Minister was that the requested documents were not accessible because they were not "documents of an agency", as that term is defined in cl 4(2) of the glossary in the FOI Act.

7 Against that background, on 20 July 2000, the Information Commissioner published her reasons for decision. I will return to these reasons in due course. For the moment, it is sufficient to note that the Information Commissioner's decision was expressed in these terms:

"The decision of the agency is set aside. In substitution, it is decided that the disputed documents are documents of an agency and, further, they are not exempt."

8 The Minister for Transport has brought an appeal against the decision. Before turning to the grounds of appeal, it will be useful to look at the provisions of the *Government Railways Act 1904* with a view to understanding the structure of Westrail and the role of the Minister for Transport. I must also refer to the FOI Act in order to determine what documents can properly be regarded as documents of the agency in question.

9 Section 8(2) of the *Government Railways Act* provides that the Western Australian Government Railways Commission shall be the chief executive officer of the department, that is to say, "that branch of the public service employed in connection with government railways", and subject to the Minister shall be responsible for the administration of the Act. The Commission has the management, maintenance and control of every government railway.

10 By s 2 of the *Government Railways Act* the term "Minister" means the Minister for Railways, and includes any responsible Minister of the Crown administering the Act for the time being. Pursuant to s 8C, the Minister may give directions in writing to the Commission with respect to the performance of its functions, either generally or in relation to a particular matter. By s 4(1), all government railways shall be vested in the Minister.

11 I note in passing that by s 12 of the *Interpretation Act 1984* a reference in a written law to the Minister shall be construed as a reference to the Minister of the Crown to whom the administration of the particular Act is for the time being committed by the Governor. It was common ground before me that in the present case the relevant Minister was the Minister for Transport. Further, counsel for both parties accepted, as the Information Commissioner had accepted, that the Government Railways Commission, otherwise known as Westrail, was an "agency" within the meaning of s 4(2) of the FOI Act, being an agency for which the Minister of Transport was responsible. This view of the matter is consistent with the relevant statutory provisions.

12 It is apparent from the exchanges of correspondence between the parties that documents 1 and 2 of the disputed documents were essentially policy documents brought into existence by Westrail as a description of Westrail's current and previous policy on the procurement and use of hardwood railway sleepers. Document 3 is the Australian Standard Specification for hardwood sleepers. It was common ground at the hearing before me that the disputed documents were in the possession or under the control of the Minister for Transport.

13 Copies of the disputed documents may also have been in the possession or under the control of Westrail. I will return to this aspect of the matter in due course. For present purposes, however, in the absence of any evidence or information to the contrary, I must rely upon the written submissions of the parties which seem to establish as an agreed fact (see par 5 of the appellant's submissions) that the disputed documents "were in the possession or under the control of the appellant in his official capacity and that the documents related to the affairs of Westrail."

14 Section 3 sets out the objects and intent of the FOI Act. The objects of the Act are to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and Local Government more accountable to the public. The objects are to be achieved by creating a general right of access to State and Local Government documents. Nothing in the Act is intended to prevent or discourage the giving of access to documents (including documents containing exempt matter) otherwise than under the Act, if that can be properly done, or is permitted, or required by law to be done. Section 5 provides that the Act binds the Crown.

15 The right of access is defined more exactly in Pt 2 of the FOI Act concerning access to documents. Section 10(1) provides that a person

has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with the Act. A person's right to be given access is not affected by any reasons the person gives for wishing to obtain access or the agency's belief in that regard.

16 The glossary at the end of the Act defines the meaning of words used in the Act. The term "agency" means (a) a Minister; or (b) a public body or office, and "the agency" means the agency to which an access application has been made or to which such an application has been transferred. The term "public body or office" applies to a list of bodies commonly regarded as arms of government such as a department of the Public Service, the Police Force, a local government, and is said to include any other body or office that is declared to be a public body or office. The term "document" means any record, any part of a record, any copy of a record, or any part of a copy of a record.

17 In cl 4 of the glossary one finds a definition of the term "documents of an agency", being the term used in s 10 of the Act concerning the right of access to documents. Clause 4 reads as follows:

"(1) Subject to subclause (2), a reference to a document of an agency is a reference to a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer.

(2) Where the agency is a Minister a reference to a document of an agency is a reference to a document that -

(a) is in the possession or under the control of the Minister in the Minister's official capacity; and

(b) relates to the affairs of another agency (not being another Minister),

and includes a document to which the Minister is entitled to access and a document in the possession or under the control of a member of the staff of the Minister as such a member, but does not include a document of an agency for which the Minister is responsible."

18 I note in passing that the definitions of the terms "agency" and "documents of an agency" appear to recognise that there will be

circumstances in which "the agency is a Minister", that is to say, the entity to which the application for access has been made is a Minister as contrasted with a situation in which the application is made to a department of the Public Service or a body or office that is established for a public purpose under a written law.

19 Counsel for the appellant emphasised that the right of access created by s 10 is "subject to and in accordance with this Act." One must therefore give proper weight to those provisions of the Act which might be thought to qualify the right of access.

20 By s 11, a person who wishes to obtain access to one or more documents of an agency (other than an exempt agency) may make an application to the agency. By s 15, if the agency does not hold the requested documents, but knows that the documents are held by another agency, the agency has to transfer the access application to the other agency. If the agency holds the requested documents, but the documents originated with or were received from another agency, and are more closely related to the functions of that other agency, the agency may transfer the access application to that other agency, together with copies of the documents.

21 These provisions indicate that the right of access is concerned with documents, not information, and not with ownership or with responsibility for creating of the document in question. Access depends upon identifying the party in possession of the documents.

22 There will obviously be some circumstances in which the party seeking to obtain access is more interested in a copy than in the original of the document in question, possibly because of annotations or amendments to the copy. In other words, the provisions concerning access seem to allow for the possibility that an application for access may be directed to an agency, even though the document did not necessarily originate with that agency. The critical question is whether the agency to whom the request is directed is in possession of either the original or a copy of the document the subject of the request, bearing in mind that the term "document" is defined to mean any record or any copy of a record.

23 The importance of possession is borne out by the provisions concerning transfer. An agency can transfer an application to a more appropriate agency, such as an agency where the subject documents originated, but in that case the documents have to be transferred too.

24 In the present case, however, I need not give consideration to circumstances of that kind. I must keep steadily in mind that the present application was directed to the office of the Minister for Transport. By cl 1 of the glossary "the agency" means the agency to which an application has been made. An agency can be a Minister. Clause 4(2) applies because it covers the case where the agency is a Minister.

25 I must keep in mind also that the facility for transfer to a more appropriate agency allowed for by s 15 was not activated in the present case. The decision to refuse access was made by the Minister as appears from his delegate's letter to Dr Edwards, dated 8 May 2000. The refusal of access in the present case was not based upon the notion that the application should be dealt with by Westrail as a more appropriate agency to which the application had been or could be transferred. The refusal was based initially upon the exemption provisions of the FOI Act, but eventually upon the basis that the disputed documents, albeit documents in the Minister's possession, did not fall within the description "documents of an agency".

26 Section 23 provides that the agency may refuse access to a document if the document is an exempt document or is not a document of the agency.

27 One finds in Sch 1 a list of exempt matters which will result in a document being characterised as an exempt document. The list of exemptions includes the deliberations of Cabinet, communications between Ministers on matters relating to the making of a government decision, or the formulation of a government policy where the decision or policy is of a kind generally endorsed by Cabinet or Executive Council, matter that could damage inter-governmental relations, personal information, commercial or business information, matter likely to interfere with security arrangements, matters of legal professional privilege and confidential communications. Many other areas of exemption are included in the list.

28 It follows from a consideration of the provisions concerning exemption that, notwithstanding the objects reflected in s 3, the right of access to governmental documents is subject to significant limitations. In the context of the present case, a question arises as to whether the provisions concerning exemption are intended to be the sole means of conferring an immunity upon certain documents or whether the definition of the term "documents of an agency" operates as another restriction upon the right of access.

- 29 The FOI Act includes provisions enabling a person aggrieved by an agency's decision to refuse access to have the decision reviewed, as happened in the present case. By s 76, if the Information Commissioner proceeds to review a decision made by an agency, the Commissioner is required to include in her decision the reasons for the decision and the findings on material questions of fact underlying those reasons.
- 30 Section 85 provides that an appeal lies to the Supreme Court on any question arising out of any decision of the Commissioner on a complaint relating to an access application. By s 87, the Supreme Court may confirm, vary or set aside the Commissioner's decision and, in the latter case, make a decision in substitution for that decision, or remit the matter to the Commissioner for reconsideration.
- 31 The scheme of the FOI Act has been considered by the Supreme Court of Western Australia on a number of occasions. In *Police Force of Western Australia v Kelly* (1997) 17 WAR 9 Anderson J held that the FOI Act should not be approached by leaning towards a wide interpretation of the access provisions and a narrow interpretation of the exemption provisions. The Act balances competing public interests in allowing and denying access to government records, and the ordinary meaning of the words and the subject matter of the FOI Act show where the line is to be drawn. *News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64 at 66 applied. *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 referred to.
- 32 In *Minister for Planning v Taweel*, unreported; SCt of WA; Library No 960654, 13 November 1996, Parker J was of the view that, despite some contrary appearances, when cl 4 of the glossary to the FOI Act is analysed, it is not the general scheme of the Act that documents in the possession or under the control of a Minister of the Crown are subject to the right of access given by s 10. The *Taweel* case is mentioned in the appellant's grounds of appeal in the present case and figured prominently in discussion before me. It follows that I must review the case carefully with a view to determining what constitutes the *ratio decidendi* of the case and what part of the reasoning should be characterised as *obiter dicta*.
- 33 In that case, the respondents, Mr and Mrs Taweel, instituted an appeal to the Minister for Planning against a refusal of planning approval by the City of Canning. When the appeal was dismissed by the Minister, the respondents applied under the FOI Act for access to reports and documentary materials on the Minister's file.

34 Parker J had little difficulty in concluding that the first limb of cl 4(2) applied in that the documents in question were in the possession of the Minister acting in his official capacity. The crucial question was whether, within the meaning of cl 4(2)(b) each document was a document that "relates to the affairs of another agency (not being another Minister)".

35 Parker J eventually concluded (as did the Information Commissioner) that the documents on the Minister's file related to the affairs of the City of Canning (viewed as "another agency"). Thus, the second limb of cl 4(2) having been satisfied also, the respondents had a right under the FOI Act to be given access to the subject document.

36 To this point, it seems, that the *Taweel* case is a precedent that favours the respondents in the present case. It suggests, in the context of the present case, that if the Minister for Transport has in his possession, in his official capacity, documents relating to the affairs of another agency - in this case Westrail - then an application for access made to the Minister should succeed. Unlike the present case, Parker J was not called upon to determine what effect should be given to the final words of cl 4(2), which arguably exclude documents of an agency for which the Minister is responsible, because the Minister for Planning in *Taweel* was not thought to be responsible for the City of Canning.

37 The difficulty is that, although Parker J upheld the Information Commissioner's decision to allow access to the subject documents in the *Taweel* case, in the course of his reasoning he made this suggestion:

" ... the policy revealed by the provisions of the FOI Act with respect to documents in the possession or control of a Minister is clearly one which excludes such documents from the right of access provided in the FOI Act, save for the one exceptional case (itself subject to exclusions) of a document held in the Minister's official capacity which relates to the affairs of another agency, not being another minister or an agency for which the minister is responsible."

38 Parker J went on to say that the policy and context of the FOI Act in its application to documents in the possession or under the control of a Minister does not provide any support for the view that the legislation intended an expansive or generous provision for access.

39 The views expressed by Parker J underlie grounds 1 and 2 of the present appeal. The appellant contends that the Information

Commissioner erred in law in failing properly to apply the decision in *Taweel* to the circumstances of the present case.

40 Counsel for the appellant submitted, consistently with the reasoning in *Taweel*, that where the agency is a Minister, a discrete definition of the term "documents of an agency" is provided in cl 4(2) of the glossary. The appellant accepted that the disputed documents in the present case (like the documents on the Minister for Planning's file in *Taweel*) were in the possession or under the control of the Minister for Transport in his official capacity and that the documents related to the affairs of another agency, namely Westrail, with a result that the requirements of cl 4(2)(a) and (b) were satisfied. The crucial question was, however, having regard to the final words of cl 4(2), whether the disputed documents were the documents "of an agency for which the Minister is responsible". The final words of the clause suggest that in such a case, the term "a document of an agency" does not include such documents.

41 Counsel for the appellant submitted that the meaning of these final words of cl 4(2) was authoritatively determined by Parker J in *Taweel*, and the Information Commissioner was in error in failing to apply his determination.

42 According to the appellant, having held that the policy of the Act inclined against allowing access to documents in the possession or under the control of a Minister, Parker J must be taken to have decided that a document of an agency "will be beyond the reach of the access provisions of the FOI Act while it remains in the possession of the Minister responsible for the agency." In the present case, the appellant submitted, bearing in mind that the disputed documents were in the possession of the Minister, it must follow from the reasoning in *Taweel* that the Information Commissioner erred in law in holding that while the documents remained in the possession of the Minister, they were not the documents of Westrail and that access should be provided.

43 I am not persuaded that the *ratio decidendi* of *Taweel* operates in the manner contended for by the appellant in the present case. I noted earlier that when *Taweel* is examined closely, it is limited to a ruling upon cl 4(2)(a) and (b). In circumstances where the Minister for Planning was clearly not responsible for the City of Canning, it cannot be regarded as a decisive ruling on the final words of cl 4(2) or circumstances in which the documents are arguably the documents of an agency for which the Minister is responsible.

44 Further, and in any event, a single Judge of a state Supreme Court is not bound by the decision of another Judge of the same Court, although he will generally be reluctant to depart from an earlier decision. In my view, much of what was said in *Taweel* was *obiter dicta*. Accordingly, I remain at liberty to deal with the present case on its merits, and without necessarily being bound by the views expressed in the earlier decision. It follows that the Information Commissioner in the present case was in a similar position.

45 I accept, as Parker J did in *Taweel*, that cl 4(2) deals expressly with the situation where the agency to which the application for access is made is a Minister. I also accept, as does the appellant in the present case, that the disputed documents are in the possession or under the control of the Minister in his official capacity and relate to the affairs of another agency, namely Westrail. The crucial question is whether in the circumstances of the present case any right of access to the disputed documents is barred by the final words of the clause which arguably confer an immunity from access in respect of any document which is the document of an agency for which the Minister is responsible.

46 The question I have just posed brings me back to the structure of the FOI Act. Notwithstanding the reservations expressed by Anderson J in *Police Force of Western Australia v Kelly* (*supra*) and by Parker J in *Taweel* (*supra*) I consider that where the objects of the FOI Act can be met, there is no reason to adopt a restrictive interpretation of the relevant provisions.

47 In *Victorian Public Service Board v Wright* (1986) 160 CLR 145, in the course of reviewing similar legislation, the High Court observed at 153 that it was proper to give to the provisions of the Victorian statute a construction which would further, rather than hinder, free access to information.

48 I note also that s 18 of the *Interpretation Act 1984* (WA) requires preference to be given to the construction of a written law that would promote the purpose or object underlying the law to a construction that would not promote that object. See *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606 at 627; *IW v City of Perth* (1996) 191 CLR 1.

49 It is apparent from s 3 that the objects of the FOI Act are to be achieved by creating a general right of access to State and local government documents. The right of access is constituted by s 10 in

respect of the documents of an agency and later provisions of the Act, especially s 23, allow for an exemption in respect of various kinds of governmental documents.

50 It is true that many of the exemptions apply to documents of a kind likely to come into the possession of Ministers of the Crown, such as policy documents and briefing materials bearing upon the deliberations of cabinet. Nonetheless, there does not appear to be any provision in the Act which explicitly underpins the view expressed by Parker J that no documents in the possession or under the control of a Minister are subject to the right of access. On the contrary, the presence of the various exemptions in respect of ministerial documents strongly suggests that, *prima facie*, the right of access is generally available in respect of such documents, with the result that there is a need to allow for exemptions in respect of certain categories of sensitive documents.

51 To my mind, the structure of the Act, as I have just described it, is complemented when one turns to the glossary in order to ascertain the meaning of the phrase "documents of an agency".

52 It is quite clear from the definition of "agency" in cl 1 and from the definition of "documents of an agency" in cl 4 that an agency can mean a Minister. Thus, *prima facie*, a Minister is subject to the right of access and is a proper recipient of an application for access.

53 Clause 4(1) makes it clear that when there is a reference to a document "of" an agency, this is not a reference to ownership or authorship of a document, or to any entitlement to exclusive possession. It is simply a reference to a document "in the possession or under the control" of the agency. Other provisions of the Act also indicate that access depends upon identifying the party in possession, as I have already noted.

54 It follows that when one proceeds to cl 4(2), one must also assume that the emphasis is upon the fact of possession or control. If this part of the clause is looked at in that light, the final words of cl 4(2), which were thought by Parker J to be somewhat at odds with the scheme of the FOI Act, now fall into place. The notion embodied in the final words whereby the documents of an agency "does not include the documents of an agency for which the Minister is responsible" can be regarded as simply a restatement of the basic rule that an application for access should be directed to the party that is actually in possession of the subject documents.

55 On this reading of cl 4(2) the reason for the final words becomes clear. Absent the final words, it might be thought by a student of constitutional law, or by a citizen familiar with the Westminster style of government, that it might be appropriate to direct an application for access to a document held by a government department to the Minister responsible for that department on the ground that he is responsible for the operations of the department and for documents in its possession or under its control.

56 In fact, in this new and special area of the law, the provisions of the FOI Act relieve the Minister of the burden that might otherwise attach to him as the responsible Minister. The emphasis is placed upon the fact of possession or control rather than upon the subtleties of constitutional law. If the document is in fact in the Minister's possession or under his control, then he must deal with an application for access directed to him in respect of the document in question. On the other hand, if the document is held not by the Minister, but by an agency for which he is responsible, then it will not be regarded as a document of the Minister. Likewise, as appears from the criteria reflected in cl 4(2)(a) and (b) if the document is not in the possession or under the control of the Minister in his official capacity and does not relate to the affairs of another agency, it will not be characterised as a document of the Minister.

57 Put shortly, on this interpretation, cl 4(2) is consistent with the general scheme of the FOI Act. There is a right of access to documents held by government agencies, be the agency a Minister or a department or a public body, save for certain exemptions. Clause 4(2) introduces a comparatively minor restriction upon the right of access by requiring that where an application is directed to a Minister, the documents must actually be in his possession or under his control, and be held in his official capacity.

58 If this were not so, and the line of reasoning reflected in *Taweel* (*supra*) was preferred, then one would be left in the position that a provision in a glossary was being relied upon to cut down substantially a right of access created pursuant to the objects and substantive provisions of the Act.

59 The policy underlying the "exception" reflected in cl 4(2) of the glossary is that, where an agency for which a particular Minister is responsible holds relevant documentation, and the Minister does not, then the Minister should not be bothered with the administrative obligation of demanding its production from the agency for the purpose of providing a

citizen with access to it. However, where the Minister does in fact have the document, or a copy of the same, the document can be characterised as that of the Minister and is not to be regarded as a document of some other agency.

60 I digress briefly to say that I find support for the views I have just expressed in s 15 concerning the transfer of applications. In this provision also, as I noted earlier, one finds that the emphasis is upon possession. If the agency (which can be a Minister) does not hold the requested documents, it has to transfer the application to the appropriate agency. If it does hold the documents, then it may transfer the application to a more appropriate agency, but in that case it must transfer the documents also. This, again, suggests that for the most part the only legitimate way of access to documents being refused by a governmental agency is by reliance upon the exemption provisions.

61 What is the outcome when I apply this reasoning to the circumstances of the present case?

62 Clause 4(2) clearly applies to the circumstances of the present case because the agency to which the application for access was directed is a Minister, namely, the Minister for Transport. If the only copies of the disputed documents were held by Westrail, then the Minister would be entitled to say that the disputed documents are not the documents of the agency in question (in this case the Minister for Transport) because, applying the final words of cl 4(2), documents of that kind do not include the documents of an agency (Westrail) for which the Minister is responsible.

63 It is clear, however, contrary to the hypothetical case I have just posited, that in fact the Minister for Transport in the present case is indeed in possession of the disputed documents. That being so, it is immaterial that the documents may once have been in the possession of Westrail, or that copies are still held by Westrail as an agency for which the Minister is responsible. The definition of a "document" embraces any copy of subject documents. The disputed documents are in the possession of the Minister in his official capacity and it is acknowledged that they relate to the affairs of another agency (Westrail) not being another Minister. It follows that the requirement of cl 4(2) have been satisfied and access to the documents must be provided.

64 In essence, the Information Commissioner applied a view of cl 4(2) similar to the view I have expressed in holding that the Minister for

Transport was obliged to provide access to the disputed documents. The Information Commissioner had this to say at par 20 and par 21 of her reasons:

- "20. The disputed documents are in the possession of the Minister in his official capacity and they relate to the affairs of Westrail, an agency for which the Minister is responsible. That much is not disputed. While it may be that Westrail has in its possession copies or originals of the disputed documents, the access application was made to the Minister and it is the documents presently held by the Minister that are the subject of that application and this complaint. In my view, so long as those documents remain in the possession of the Minister they are not documents of Westrail, because they are not documents of that agency as that term is defined in the FOI Act. They are not in the possession of Westrail or under the control of Westrail, or any officer of Westrail and, while they are held by the Minister, Westrail is not entitled to access to them. They are not, therefore, documents of an agency for which the Minister is responsible.
21. Accordingly, I find that the disputed documents are in the possession of the Minister in his official capacity and relate to the affairs of another agency, Westrail, not being another Minister, and are not documents of an agency for which the Minister is responsible. Therefore, I find that the disputed documents are documents of the Minister to which the right of access in s.10 of the FOI Act applies."

65 It follows from earlier discussion that I concur with the views expressed by the Information Commissioner. Contrary to the contentions raised by grounds 1 and 2 of the notice of appeal, I do not consider that she is in error as to the application of *Taweel* (*supra*) to the circumstances of the present case. Contrary to the contentions raised by grounds 3 and 4 of the notice of appeal, I am not persuaded that the Information Commissioner erred in law as to the manner in which the FOI Act should be construed, either generally or in regard to cl 4(2), in particular. Accordingly, the appeal will be dismissed.