In the Administrative Decisions Tribunal
General Division
Sydney Registry

No. 123306

Between:

Fire Brigade Employees' Union of New South Wales
applicant

-and-

Fire and Rescue NSW

Submissions of the Applicant, the Fire Brigade Employees' Union of New South Wales February 11, 2013.

1. Preliminary

[1.1] The applicant, the Fire Brigade Employees Union of New South Wales ['FBEU'] has made an application under the *Government Information (Public Access) Act 2009 (NSW)* (GIPA Act) to the respondent for access to a range of information. Following discussions and a reconsideration of that request, much of the material requested was provided. There remains, however, a refusal by the respondent to provide the following information, namely (described by the respondent for convenience):

2.2 The Respondent has further determined that it is in the public interest to release, in part with deletions pursuant to section 74 of the GIPA Act, the following documents to the Applicant (as per the numbering in the Schedule of Documents attached to the Determination):

(a)56; (b)65; and (c)71.

2.3 For the reasons set out in these submissions, the Respondent contends that, on balance, the public interest considerations against disclosure outweigh the public interest considerations in favour of disclosure with respect to the remaining information in the Schedule of Documents attached to the Determination (withheld documents).

[1.2] The respondent filed detailed submissions on January 29th, 2013 in support of its refusal. The FBEU contends that the 'witheld documents' must be supplied under the GIPA Act. These submissions respond to the submissions filed by the respondent.

[1.3] This is the third occasion upon which these parties have joined issue on the release of information under the *Government Information (Public Access) Act* (2009) since it was introduced. The first of these resulted in a decision of the agency to release the information in contention. The second and third are currently awaiting programming for a hearing in the ADT.

[1.4] A consistent theme in the submissions of the FBEU has been its criticism of the failure on the part of the respondent to come to grips with the changes wrought to the state's freedom of information regime under the *Government Information (Public Access) Act* (2009). Yet again, the respondent's submissions evidence no preparedness to undertake this critical and necessary, exercise.

[1.5] The structure of these submissions will be first to address by way of general observations the significance of the new Act and then deal with the specific claims against disclosure advanced in the respondent's submissions.

2. The GIPA Act - general observations

[2.1] When the *Government Information (Public Access) Act* (2009) was introduced, the then Premier, the Hon Nathan Rees, hailed the legislation as marking a 'revolution' in public access to government information:

*'It is my privilege to introduce the Government Information (Public Access) Bill, the Government Information (Information Commissioner) Bill and the Government Information (Public Access) (Consequential Amendments and Repeal) Bill, legislation that will vastly improve the transparency and integrity of Government in New South Wales. In October 2008, I addressed this House on the issue of the transparency and accountability of Government and made clear my view that the old culture of Government secrecy has to end and that the public's right to know should be respected. **Members of the public should be able to have access to the widest possible range of information to give them confidence in Government decision making. And that means a total revamp of the system.** I gave a commitment that I would introduce new legislation to reform freedom of information [FOI] in the first half of this year, once the outcomes of the Ombudsman's review of the Act were known. And today we are delivering on that commitment.*

*These bills together represent the first comprehensive overhaul of the freedom of information regime in 20 years. **These bills do just what we undertook to do. They turn the freedom of information regime on its head. The bills establish a framework to actively promote the release of Government information and they offer the opportunity for a fresh start. The new legislation shifts the focus toward proactive disclosure.** The legislation requires that certain "open access information" must be published. This includes details of an agency's structure and functions, its policy documents, and its register of significant private sector contracts. In addition, agencies are authorised to release other information unless it is sensitive personal information or there is some other overriding public interest reason why it cannot be disclosed. There is a significant amount of information that can and should be released without the need for a formal application."*

The Premier concluded:

*"These bills constitute a fundamental freedom of information revolution. With these bills New South Wales will gain the nation's best freedom of information laws. The public's right to know must come first. As well as comprehensively responding to the Ombudsman's report, they pick up reforms arising from the Solomon review in Queensland and recently proposed changes to Commonwealth legislation. **The bills mark a paradigm shift. Our public sector must embrace openness and transparency and governments must forever relinquish their habitual instinct to control information. This is generational change and reform that is long overdue.** I commend these bills to the House and to the people whose interests they will so effectively serve.* [NSW Hansard 13 July, 2009] [emphasis added]

[2.2] These sentiments are embodied in [s3] the Object of the Act:

"In order to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective, the object of this Act is to open government information to the public by:
(a) authorising and encouraging the proactive public release of government information by agencies, and
(b) giving members of the public an enforceable right to access government information, and
(c) providing that access to government information is restricted only when there is an overriding public interest against disclosure."

[2.3] At the time of writing, relatively few decided cases have considered the impact of the new Act upon access to government information. Importantly there appears to have been no detailed analysis of the changes said to be wrought by the new Act. Notwithstanding this, the

approach required by the statute - and glossed over (yet again!) in the FRNSW submissions, emphatically favours disclosure:

"(a) Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance.

(b) Disclosure of the information could reasonably be expected to inform the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public.

(c) Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.

(d) The information is personal information of the person to whom it is to be disclosed.

(e) Disclosure of the information could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct." s12(2)

[See: *Hurst v Wagga Wagga City Council* [2011] NSWADT 307; *XZ v Commissioner of Police, NSW Police Force* [2009] NSWADTAP 2]

[2.4] Rather than embrace the spirit and plain intention of the new Act, FRNSW's approach is redolent of 'more of the same'. Its refusal only confirms the perturbation that the instinctive bureaucratic reflex - finding reasons justifying (or better rationalising) how it could *refuse* access rather than how it could facilitate it - is alive and well. Its position represents a significant disposition *not* to take the GIPA Act seriously.

[2.5] In keeping with the spirit and intention of GIPA Act, FRNSW *should* have concentrated upon those factors identified as in the public interest in favour of disclosure - against the statutory background of a presumption *in favour* of disclosure. It is glib to suggest - as the respondent has suggested - that an agency must 'simply' balance the competing public interest factors for and against disclosure in each specific case.

[2.6] The presumption in favour of disclosure is the bedrock of the legislation. This presumption is further fortified by the tenor of the general qualification set out in section 15:

15 Principles that apply to public interest determination

A determination as to whether there is an overriding public interest against disclosure of government information is to be made in accordance with the following principles:

(a) Agencies must exercise their functions so as to promote the object of this Act.

(b) Agencies must have regard to any relevant guidelines issued by the Information Commissioner.

(c) The fact that disclosure of information might cause embarrassment to, or a loss of confidence in, the Government is irrelevant and must not be taken into account.

(d) The fact that disclosure of information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account.

(e) In the case of disclosure in response to an access application, it is relevant to consider that disclosure cannot be made subject to any conditions on the use or disclosure of information.

[2.7] It follows that a decision *not* to disclose requires specific and compelling reasons. The characterisation adopted by the Canadian courts of equivalent exemptions is that the reasons against disclosure must be "detailed and convincing". In *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* the Court of Appeal for Ontario, in upholding former Assistant Commissioner Tom Mitchinson's Order P-373, stated the following:

"[T]he use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed." Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.). See also: *Infrastructure Ontario* 2011 Appeal PA10-218 November 22, 2011 Information & Privacy Commissioner Ontario Canada [2011]CanLii 76388 (ON IPC); *Minister of Community Safety and Correctional Services* 2012 Appeal PA09-290 February 24, 2012 Information & Privacy Commissioner Ontario Canada [2012]CanLii 10570 (ON IPC).

[2.8] The Canadian formulation is appropriate to be adopted here. What has been offered by the respondent cannot be described as 'detailed and convincing' evidence but rather, unsubstantiated assertions dressed up as evidence. Those assertions fall well short of cogent, good quality evidence.

[2.9] A useful guide to the approach which *should* be taken to these exemptions is set out in the *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (revised January 2013). It must be recalled that the federal law has undergone significant changes which parallel those which have occurred in New South

Wales. The general observation concerning the approach to be taken to these exemptions are a useful guide to the approach which should be taken here:

"6.77 There is considerable case law on the former exemption provision (formerly s 36) as to whether disclosure of an internal working document would be contrary to the public interest, and whether reasonable grounds exist for a conclusive certificate claim to that effect. Agencies should be cautious in applying those precedents in light of the changes to the FOI Act in 2009 and 2010. Many earlier decisions applied or referred to the AAT's decision in Re Howard and the Treasurer, which listed five factors that could support a claim that disclosure would be contrary to the public interest. Three of those factors are now declared to be irrelevant considerations by s 11B(4) of the Act (the high seniority of the author of the document in the agency to which the request for access to the document was made, misinterpretation or misunderstanding of a document, and confusion or unnecessary debate following disclosure). The other two Howard factors (disclosure of policy development, and inhibition of frankness and candour) are not, in those terms, consistent with the new objects clause of the FOI Act (s 3) and the list of public interest factors favouring access in s 11B(3)). It is important that agencies now have regard to the more extensive range of public interest factors that may favour or be against disclosure (see paragraphs 6.23-6.29 above)." [page 16, footnotes omitted]

[See: *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* revised January 2013]

[2.10] The Australian Information Commissioner has endeavoured to come to grips with the new law. It has provided a considered analysis of the approach to the issues for and against disclosure:

6.25 The four factors favouring disclosure are broadly framed but they do not constitute an exhaustive list. Other factors favouring disclosure may also be relevant in the particular circumstances. A non-exhaustive list of factors is below.

Public interest factors favouring disclosure

(a) FOI Act promotes disclosure

(i) *inform the community of the Government's operations, including, in particular, the policies, rules, guidelines, practices and codes of conduct followed by the Government in its dealings with members of the community;*

(ii) *allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official 6*

(iii) *reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct*

(iv) *reveal the reason for a government decision and any background or contextual information that informed the decision*

(v) *enhance the scrutiny of government decision making*

(b) inform debate on a matter of public importance

(c) promote effective oversight of public expenditure

(d) allow a person to access his or her personal information, or

(i) the personal information of a child, where the applicant is the child's parent and disclosure of the information is reasonably considered to be in the child's best interests

(ii) the personal information of a deceased individual where the applicant is a close family member (a close family member is generally a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household)

(e) contribute to the maintenance of peace and order

(f) contribute to the administration of justice generally, including procedural fairness

(g) contribute to the enforcement of the criminal law

(h) contribute to the administration of justice for a person

(i) advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies

(j) reveal environmental or health risks of measures relating to public health and safety and contribute to the protection of the environment

(k) contribute to innovation and the facilitation of research.

6.29 A non-exhaustive list of factors against disclosure is provided below.

Public interest factors against disclosure

(a) could reasonably be expected to prejudice the protection of an individual's right to privacy, including where:

(i) the personal information is that of a child, where the applicant is the child's parent, and disclosure of the information is reasonably considered not to be in the child's best interests

(ii) the personal information is that of a deceased individual where the applicant is a close family member (a close family member is generally a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household) and the disclosure of the information could reasonably be expected to affect the deceased person's privacy if that person were alive.

(b) could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct

(c) could reasonably be expected to prejudice security, law enforcement, public health or public safety

(d) could reasonably be expected to impede the administration of justice generally, including procedural fairness

(e) could reasonably be expected to impede the administration of justice for an individual

(f) could reasonably be expected to impede the protection of the environment

(g) could reasonably be expected to impede the flow of information to the police or another law enforcement or regulatory agency

(h) could reasonably be expected to prejudice an agency's ability to obtain confidential information

(i) could reasonably be expected to prejudice an agency's ability to obtain similar information in the future

(j) could reasonably be expected to prejudice the competitive commercial activities of an agency

(k) could reasonably be expected to harm the interests of an individual or group of individuals

(l) could reasonably be expected to prejudice the conduct of investigations, audits or reviews by the Ombudsman or Auditor-General

(m) could reasonably be expected to prejudice the management function of an agency

(n) could reasonably be expected to prejudice the effectiveness of testing or auditing procedures

[2.11] To recap, nothing in the respondent's general submissions endeavours to attempt the kind of exercise undertaken by the Australian Information Commissioner by way of considering the manner in which exemptions should sensibly be approached under the new legislation.

3. Item 3(c) - Prejudice to court proceedings

[3.1] This ground of exemption can be readily dismissed. The respondent contends that pending and current matters before the Industrial Relations Commission of New South Wales raise a ground for exemption under s14 Item 3(c). It contends:

"6.1 There are a number of public interest considerations against disclosure of the remaining documents. These considerations are addressed in more detail below.

Item 3(c) - Prejudice court proceedings

6.2 Item 3(c) in the Table to section 14 of the GIPA Act refers to prejudicing court proceedings by revealing matter prepared for the purposes of or in relation to current or future proceedings."

[3.2] It is convenient to set out the (relevant) precise terms of the exemption in Item 3(c). It states:

Note: 3 Individual rights, judicial processes and natural justice There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

...

(c) prejudice any court proceedings by revealing matter prepared for the purposes of or in relation to current or future proceedings;

[3.3] It will be noticed immediately that the exemption relies solely on the existence of extant (or for the purposes of the argument but without concession, pending) *'court'* proceedings. It is instructive that the respondent has passed over this critical term in the section, sub silentio. This is an extraordinary omission coming from an agency of the crown which is nominally committed to open government, and which is obliged to assume the role of a model litigant.

[3.4] The respondent's submissions on this ground of exemption [Respondent's Submissions paras 6.2 - 6.21] fail entirely to discuss the character of the proceedings before the Industrial Relations Commission of New South Wales ['NSWIRC']. This is inexcusable because anyone with the slightest familiarity with the conciliation and arbitration of industrial disputes within the jurisdiction of the NSWIRC knows that when it is dealing with the matters described in the respondent's submissions it is doing so exercising its arbitral functions and not as a 'court. There is clear - and long recognised - legal and constitutional distinction between judicial and non judicial (e.g. tribunal) functions (with which the ADT will be well familiar) which cannot be so casually disregarded.

[3.5] Had there been the slightest doubt about this (and any such suggestion is completely without authority) it was surely put to rest by the recent decision of the High Court which considered the role and functions of the NSWIRC: *The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* [2012] HCA 58 (12 December 2012). Note that this decision was handed down well over a month before the date of the respondent's submissions (i.e. January 29th, 2013). The FBEU relies upon that decision and contends that at a minimum, the respondent should have explained why it was not conclusively fatal to any reliance upon s14 Item 3(c). This it has failed to do, and since the onus is upon it to make out each ground of exemption - it must be treated as having failed on this ground.

[3.6] There is no warrant for the suggestion (incidentally not made in the respondent's submissions) that the use of the term 'court' in the GIPA Act may be read to include 'tribunal'.

[3.7] Whilst it is strictly unnecessary to canvass the industrial and legislative character of the proceedings in the NSWIRC, the respondent has failed entirely to analyse these proceedings in the light of the legislative framework - particularly the requirements set out in the newly enacted s146C of the *Industrial Relations Act* (1996), the *Industrial Relations (Public Sector Conditions of Employment) Regulation* 2011, and the Government Wages Policy. The Government Wages Policy is engaged only when any employee related costs *exceed* 2.5% per annum:

> *"3.1.4.Increases in remuneration or other conditions of employment that increase employee related costs by more than 2.5 per cent per annum can be awarded, but only if sufficient employee related cost savings have been achieved to fully offset the increased employee related costs. For this purpose:*
> *3.1.4.1. whether relevant savings have been achieved is to be determined by agreement of the relevant parties or, in the absence of agreement, by the IRC, and*
> *3.1.4.2. increases may be awarded before the relevant savings have been achieved, but are not payable until they are achieved, and*
> *3.1.4.3. the full savings are not required to be awarded as increases in remuneration or other conditions of employment."*

[3.8] Clearly industrial parties have a joint obligation to identify savings and such identification is in any event subject the close scrutiny of the NSWIRC. The implication of the respondent's submissions is that this exercise undertaken by the respondent is to remain secret at all costs. The FBEU may ask whether this represents government policy, and if so, whether this represents a failure to implement the Government Wages Policy honestly and transparently. But for the obstacle to the respondent's reliance on this head of exemption canvassed above this would represent a powerful argument in *favour* of disclosure.[See Para 2.10 above]

4. **The second ground of exemption claimed: Item 1(e) - Prejudice to deliberative process**

[4.1] The respondent claims that disclosure of the information would prejudice the deliberative process - in this case the information concerned is the "TOLing' information. The relevant exclusion states:

Note: 1 Responsible and effective government: There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally):

...

(e) reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency ...

[4.2] If it is assumed that the information described may be accurately described as (relevantly) 'deliberative' the disclosure must occur in 'such a way as to prejudice a deliberative process' of the agency.

[4.3] The nub of the respondent's argument in opposition to disclosure is to be found at the following paragraphs of its submissions:

"6.26 As such, the effective delivery of the revised TOL policy, with its attendant and overarching aims with respect to the Labour Expense Cap, will be reasonably likely to be undermined.

6.27 Furthermore, the disclosure of the information in the withheld documents, and in particular documents 38, 40 and 60, would prejudice the deliberative processes of the Respondent with respect to the development and discussion of all potential options for meeting the requirements of the Labour Expense Cap. This includes deliberations and discussions regarding budget strategies and operational reforms.

6.28 The Respondent submits the disclosure of such information could reasonably be expected undermine the full and frank consideration of all operational issues facing the Respondent, particularly where difficult decisions are required to be made in an environment of economic austerity and cutbacks."

[4.4] The passages extracted immediately above do no more than advance assertions. They do not meet the onus placed upon the respondent to avail itself of this ground of exemption. They are reminiscent of all the cliches of public service resistance to disclosure which had led to the pressure for freedom of information reform and to the new laws - federal and state.

[4.5] An equally disturbing feature of the approach adopted by the respondent in respect of the submissions on this ground - and this permeates the entire submissions - is the failure to address and come to grips with, the changes in the law. References to old cases decided under former freedom of information legislation are of limited helpfulness.

[4.6] Applying the factors suggested by the Australian Information Commissioner to the exclusion claimed here, it could not remotely be suggested that the factors identified in paras (a) (b) (c) (d) (e) (f) (g) (k) or (l) are relevant. There is no credible suggestion that disclosure in this case involves any issue of confidential information (h), or its capacity to obtain any 'similar' information (i) or could prejudice its 'commercial competitive activities" - [see above para 2.10]. Disclosure could not prejudice the 'effectiveness of testing or auditing procedures' (n).

[4.7] Doing the respondent's job for it, it remains to consider whether disclosure could reasonably be expected to prejudice the 'management function' of the respondent (m).

[4.8] As observed above, the respondent puts forward precious little, apart from assertions, to substantiate its claim that the relevant prejudice will be suffered. It asserts that the delivery of the TOL policy will be undermined - but exactly how? We are not told. Next it asserts that disclosure will prejudice the deliberative processes of the respondent with respect to the development and discussion of all potential options for meeting the requirements of the Labour Expense Cap - including deliberations and discussions regarding budget strategies and operational reforms. But once again precisely how this prejudice would occur is not explained. Finally, it asserts that disclosure would 'undermine the full and frank consideration of all operational issues facing the respondent, particularly where difficult decisions are required to be made in an environment of economic austerity and cutbacks.' Yet again we wait with bated breath for the necessary explanation.

[4.9] The OIC's publication provides a useful guide in this context to the meaning of the expression 'reasonably expected':

*6.42 The term 'could be reasonably expected' is explained in greater detail in Part 5. **There must be real and substantial grounds for expecting the damage to occur which can be supported by evidence or reasoning. There cannot be merely an assumption or allegation that damage may occur if the document were released.** For example, when consulting a State agency or authority as required under s 26A, the agency should ask the agency or authority for its reasons for expecting damage, as an unsubstantiated concern would not satisfy the s 47B(a) threshold.* [foot notes omitted] [emphasis added]

[4.10] Nothing put in the respondent's submissions from paragraph 6.26 to paragraph 6.28 seriously raises this head of exemption. Once again there is little except for more 'assumptions and allegations'. This ground for exemption should be rejected by the tribunal.

5. Item 1(f) - Prejudice to agency functions [para 6.35]

[5.1] The next ground of exemption relied upon is Item 1(f) which provides:

Note: 1 Responsible and effective government There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

...

(f) prejudice the effective exercise by an agency of the agency's functions,

[5.2] Once again, however, the respondent's submissions follow the familiar pattern of advancing assertions rather than 'evidence or reasoning' which directs attention to demonstrating the real and tangible alleged prejudice. The respondent states:

6.41 Disclosure of the information in the withheld documents could reasonably be expected to prejudice the effective exercise of the Respondent's prevention and protection functions as they relate to life and property.

6.42 The withheld documents, if disclosed, would undermine the Respondent's capacity to implement any strategies developed to meet the requirements of the Labour Expense Cap, including its revised TOL policy, to reduce labour costs. This would be likely to have, in turn, a negative impact on staffing levels within the agency and a flow-on effect for its ability to fulfil its functions under the FB Act.

6.43 Furthermore, as the current IRC proceedings show, there are a number of issues in dispute between the Applicant and the Respondent as to how the Respondent should operationally achieve the Labour Expense Cap.

6.44 The Respondent submits that it is in the public interest, and in fulfilment of its obligations and core functions to protect life and property from fire and hazardous material emergencies, to limit industrial action as far as possible. This will ensure adequate protection for the public and the overall exercise of the Respondent's functions. The Respondent therefore also submits that disclosure of the withheld documents would also be reasonably likely to prejudice the effective exercise of its functions.

[5.5] Again, the respondent relies upon assertion rather than advancing any "detailed and convincing" reasons. It is appropriate and necessary to parse the above paragraphs and ask relevant questions - questions which the respondent has conspicuously failed to address.

[5.6] That disclosure of the information could reasonably be expected to prejudice the effective exercise of the respondent's prevention and protection functions [para 6.41] as they relate to life and property is nothing more than an assertion and may be disregarded as providing nothing in support of this ground. How disclosure would undermine the respondent's capacity to implement strategies developed to meet the requirements of the Labour Expense Cap, including its revised TOL policy, to reduce labour costs is left unexplained and the further conclusions offered add nothing except hyperbole. The additional reference to the IRC proceedings [6.42, 6.43] cannot add anything to this ground of exemption and is dealt with above. Para 6.44 similarly does little but add to the stock of tendentious assertions.

[5.7] Nothing put in the respondent's submissions from paragraph 6.41 to paragraph 6.45 makes out even a prima facie basis that raises this head of exemption. It should be roundly rejected by the tribunal.

6. Items 1(h) &4(e) - Investigations, research & the like

[6.1] The next grounds of exemption relied upon are Item 1(h) and 4(e) which state:

Note: 1 Responsible and effective government: There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally):

...

(h) prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).

Note: 4 Business interests of agencies and other persons: There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

...

(e) prejudice the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).

[6.2] The respondent puts forward the following justification for these exemptions:

6.48 If the information in the withheld documents was to be disclosed, the disclosure would tend to undermine the further development of the proposed revised TOL policy, and is likely to undermine the conduct and effectiveness of any future audits, tests or investigations into the implementation of the revised TOL policy.

6.49 The personnel and experts who conduct such tests or investigations would be reluctant to conduct such future studies if their opinions or investigation results were disclosed to the Applicant, because they would not have the right of reply or the opportunity to reply. They would therefore be loath to document their opinions and research.

[6.3] Once again, the grounds advanced in support of an exemption under this heading put forward fall well short of demonstrating a convincing reason to support the exemption. The relevant paragraphs [paragraph 6.48 to paragraph 6.49] again, fail to identify with any particularity, any specific audit, test, investigation or review, or the effectiveness or integrity of any research of the respondent which might be prejudiced by the release of the information. How are we supposed to know whether the disclosure would further undermine the proposed TOL policy? We are not told. How are we to know whether (and which) persons and 'experts' would be deterred from conducting such future studies? Would their reasons - if any - be convincing? Have they even ben asked - or is this just overheated speculation? The respondent 'reasons' are in truth, merely a bald assertions. As already stated, under the GIPA Act, this is not good enough.

[6.4] Once again, the submissions on this ground fail the test by substituting 'assumptions or allegations' for actual, cogent, evidence - or in the words of the Ontario Court of Appeal, the respondent has failed to provide "detailed and convincing" reasons. None of the alleged grounds is addressed with sufficient particularity to allow the respondent to discharge its onus. None amounts to 'detailed and convincing' evidence. This ground of objection must fail.

7. Item 4(d) - legitimate business or financial interests

[7.1] This ground invokes exclusion contained in Item 4(d) which states:

Note: 4 Business interests of agencies and other persons: There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

...

(d) prejudice any person's legitimate business, commercial, professional or financial interests

[7.2] The respondent sets out its justification for its reliance on this exemption in the following paragraphs:

6.52 The Respondent has outlined its concerns above about the impact on the current IRC proceedings of the disclosure of the information to which the Applicant seeks access. Disclosure of information in the withheld documents could reasonably be expected to prejudice the Respondent's ability to manage its financial interests and budget constraints as directed by NSW Treasury.

6.53 As outlined in Annexure D, the Respondent has experienced a significant challenge in managing overtime costs, with $7 million in budgeted overtime costs for the entire financial year 2012- 2013 having already been exhausted by the end of October 2012.

6.54 Given the potential prejudice to the IRC proceedings, the weakening of the Respondent's bargaining position in those proceedings, and the significance of the successful implementation of the revised TOL policy to the Respondent' legitimate financial interests (as one of many strategies intended to contribute towards the meeting of the requirements of the Labour Expense Cap), the Respondent submits that disclosure of the withheld documents would prejudice its legitimate financial interests by:

(a) affecting its ability to implement operational strategies to meet significant budgetary restraints without compromising the fulfilment of its core statutory functions;

and

(b) enabling full and frank consideration and discussion by the Respondent as to the development and refinement of budget strategies and other measures put forward to meet the Labour Expense Cap.

[7.3] This is another example of the respondent's failure to address the precise scope of this exemption. The exemption is limited to a disclosure which would prejudice any ***person's*** legitimate business (etc.) interests. The respondent identifies no person whose legitimate business interests are relevantly prejudiced. The assumption which underlies this part of the respondent's submissions is that the reference in sub-clause (d) may be read as if it said 'agency'. This is erroneous.

[7.4] There is a clear distinction made within the entire act - but particularly, within Note 4 as between 'agencies' and 'persons'. There is no warrant to construe the section as requiring that they be treated as synonyms. A simple examination of the words used in the note shows that the draftsman made a clear distinction between an agency [sub clause (a)] and a person [sub clause (d)]. The section should (and must) be construed according to its plain meaning. It is incumbent upon the respondent (which carries the onus) to address this issue and it has not done so. Quite apart from the clear english of the note, the context also requires such a distinction to be made. The respondent has failed to address this fundamental issue concerning the scope of the exemption. Its reliance upon this ground of exemption must fail.

[7.5] Even if one were to concede that the insuperable statutory impediment to reliance on this exemption could - somewhow- be overcome, the grounds advanced in support of an exemption under this heading put forward on the erroneous assumption that it was relevant, fall well short, in any event, of demonstrating a convincing reason to support the exemption. The relevant paragraphs [paragraph 6.52 to paragraph 6.54] again, fail to identify with any particularity, any real or tangible legitimate business etc interests of the respondent which might be prejudiced by the release of the information. There is no precise identification of any legitimate business or commercial interest which FRNSW has, or might have, which would be threatened (it assumed that it is not suggested that any professional or financial interest is threatened).

[7.6] This is yet another example of the tendency which the Australian Information Commissioner warned against of substituting 'assumptions or allegations' for actual, cogent, evidence - or in the words of the Ontario Court of Appeal, a failure to provide "detailed and convincing" reasons. None of the concerns is addressed with sufficient particularity to allow the respondent to discharge its onus. None amounts to 'detailed and convincing' evidence. This ground of objection must also fail.

8. Items 2(c), 2(d) and 2(e) - public emergency, protection of life and property

[8.1] In *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305, (2001) 52 NSWLR 705 at [35], Heydon JA (as he then was) stated:

"It is common enough in litigation for witnesses with a truthful story to succumb to the temptation of gilding the lily or over-egging the pudding . The test for the trier of fact is to separate the truthful parts from the rest."

[8.2] The respondent's submission under this ground of exemption amply demonstrates that temptation is not confined to litigants in personal injury cases. It states somewhat breathlessly:

"6.61The Respondent submits that disclosing information about when and where fire stations or appliances will be 'offline' gives rise to a real security risk. It is reasonable to expect that such information about when and where, and on what basis, fire stations were temporarily offline could be used by criminal or terrorist elements to reduce the Respondent's ability to respond to a public emergency. As noted above, disclosure under the GIPA Act is effectively disclosure to the world and cannot be made the subject of any conditions upon disclosure."

[8.3] This extraordinary piece of hyperbole brings to mind the well known 'Godwin's law' which has been now been accepted as the short hand answer to this type of hyperbole. David Weigel explains:

'Rules against the N-bomb in Internet debates were formalized after 1990, when the propensity for long arguments to end in Nazi analogies led Mike Godwin (now a Reason contributing editor) to post his famous law: "As a Usenet discussion grows longer, the probability of a comparison involving Nazis or Hitler approaches one." Although "Godwin's Law" was initially conceived as a physical constant rather than a guide to good behavior, it was quickly adopted as a social rule, with general agreement that the guy who fell back on a Hitler analogy had lost the argument.'

"Hands off Hitler" It's time to repeal Godwin's Law' David Weigel reason.com July 14, 2005 reason.com/archives/2005/07/14/hands-off-hitler

[8.4] In the age of terrorism it is not at all surprising that in the popular press and the blogosphere resort to what the author hopes will be argument stopping invocations of terrorism and terrorists have been commonplace. There is no place for them in legal submissions.

[8.5] It is notable that - despite these overheated claims - FRNSW claims that TOLing can be utilised and is not a danger to public safety and uses the example of station closure during industrial disputes to illustrate its point (see annexures D & E to respondents' submissions). It is interesting that the terrorism angle has not occurred to it before these submissions.

9. 'Personal factors of the applicant'

[9.1] For the reasons advanced in respect of claimed ground Item 4(d) - see section 7 above, there is no basis for the respondent's submissions on this ground. Nor is it relevant that documents have already been released by the respondent. This not an exercise is bartering disclosure by numbers.

10. Conclusion

[10.1] By way of a general comment upon the respondents' approach it is submitted - once again - that it has failed to discharge the onus placed upon it to justify its refusal to disclose the documents in contention. The law requires it to do more than simply offer conjecture in support of its claimed exemptions. It must provide "detailed and convincing" reasons which, it is submitted, address the particulars of the specific refusal. As the Australian information Commissioner has stated *'(t)here must be real and substantial grounds for expecting the damage to occur which can be supported by evidence or reasoning. There cannot be merely an assumption or allegation that damage may occur if the document were released'*. Generic objections and assertions are no longer good enough.

[10.2] The FBEU has stated previously that the respondent carries the onus to demonstrate that it has taken seriously the significant differences between the GIPA Act and the former freedom of information legislation. That exercise is the starting point for any consideration of the scope of the present exemptions. That exercise has (still) not been attempted. The respondent has provided no adequate or convincing reason why the public interest in refusing disclosure outweighs the public interest in disclosure. The Tribunal should direct disclosure of the 'withheld documents' identified in the respondent's submissions.

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