THE OPERATION OF COMMONWEALTH FREEDOM OF INFORMATION LAWS

SUPPLEMENTARY SUBMISSION - SECTION 45 FOI ACT

This is a supplementary submission in respect of the final term of reference – *any other related matter*. I make a submission around s45 of the FOI Act noting recent experience in the AAT in relation to this exemption and an observation that it is being employed more regularly by agencies.

SECTION 45

Section 45 states:

> (1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.

This exemption is a very complicated exemption that involves an in-depth understanding of contract and equity law.

The exemption involves the common law test as set out by Justice Gummow in the Full Federal Court Case of *Corrs Pavey Whiting & Bryne v Collector of Customs (Vic) (1987)*[1]. To found an action for breach of confidence (which means s 45 would apply), the following five criteria must be satisfied in relation to the information:

1. it must be specifically identified
2. it must have the necessary quality of confidentiality
3. it must have been communicated and received on the basis of a mutual understanding of confidence
4. it must have been disclosed or threatened to be disclosed, without authority
5. unauthorised disclosure of the information has or will cause detriment.

It's a burden for the official to meet, but in reality, it's a likely more substantive burden for the lay person to contest. I know, because in a recent case before the AAT, three days were

[1] http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1987/266.html

spent dealing with the question as to whether schedule variance and cost variance in a Defence project report from a contractor would or would not give rise to a breach of contract.

Of course, most people would say that there is a reasonable case to be argued that every citizen ought to be able to know if a publicly funded project is running ahead, on or behind schedule, or under, on or over budget. But 'public interest' does not come into the common law test of "breach of confidence" here in Australia. In the UK, public interest does come into the common law test.

Recommendation

It is recommended (13) that the FOI Act be amended to turn the Section 45 exemption into a conditional exemption so that the public interest comes in to play when seeking access to information about public projects or services being delivered by private enterprise.

WHY THIS IS IMPORTANT

Every few years the Auditor-General conducts a performance audit into major public projects – and may reveal that a project is behind schedule or over budget. But the reality is that every major project funded by the project has reporting requirements that would allow the public (and the Parliament) to see on a month-by-month basis how the project is tracking.

The industry standard reporting method used most often is Earned Value Management reporting. I attach a 1.01 description from a book on Earned Value Project Management describing how it is used, but provide a brief description below as well.

Earned Value Management Example

Earned Value Management is an industry standard method for assessing both the schedule and cost performance of a project.

For simplicity's sake, imagine a project that has nine work packages that will each cost $1 million to complete (planned value $9 million).

In year one, three of the nine work packages are to be completed (planned value $3 million).

If all is going well at the end of the first year the Project Manager will see:

- Planned Value Year One – $3 million (three work packages were planned to be complete)
- Earned Value Year One - $3 million (three work packages were complete)
- Actual Cost Year One - $3 million (it took $3 million to complete three packages)

If after the first year only two work packages were completed, and they required twice the budget to do so ($2 million each), the Project Manager will see:

- Planned Value Year One – $3 million (three work packages were planned to be complete)
- Earned Value Year One - $2 million (only two of the work packages were completed)
- Actual Cost Year One - $4 million (it took $4 million to complete two packages)
- Schedule Variance - $1 million
- Cost Variance - $2 million

Imagine if the public were able to get access to this information (note the explanation above makes no reference to whether the project is to make a paper clip machine or a submarine – there's no need to pry into company project methods or their secrets).

There would be no waiting around for an Auditor-General's report to find out the schedule and cost status of a project.

It has not yet been determined by the AAT (in my most recent case before it) but there is a real possibility this sort of information will be shielded by Section 45. Certainly, the Australian Government Commissioner argues this information should be shielded.

The young man got little sleep that night. Imagine, his chance to actually manage a project, to be a project manager. He was in the Chief Executive's office a full 30 minutes before she arrived. When they met, she started out by saying, *This is one of the most important potential new products we have in the pipeline, but it needs some innovative thinking, and that's why I think you would be the right person to take this on. I need fresh ideas incorporated into this product.*

She outlined her thoughts for the new product, and it was exactly the type of work he had prepared himself to do. She asked him to pull together a half dozen cross-functional people from within the company and to prepare a project management plan for her review and approval. *If you have any problem getting people released, use my name to break them loose,* she said. *I don't want stonewalling by anyone; this new product is important to our future growth.*

Then she closed the meeting by saying: *Time to market is most critical on this project; I know our competition is working on similar products, and I want to be first into the marketplace.* The young man got the message, and it was better than he had ever hoped. On his way out, she also mentioned another issue: *I would also like you to use a technique I have heard about but can't seem to get started here . . . earned value management. Have you ever heard of it? Yes of course. We studied earned value in college and I think it would work well on this project,* was his reply. *Good. I look forward to seeing your project plan,* was her closing remark.

The young man circulated within the company and got the commitment of the right people to do the project planning job. This was a young startup company, so the impenetrable "stone walls" so pervasive in older more established companies had not yet set in. All he had to do was mention that the big-boss was behind this assignment and he got his people. He didn't even have to describe the details of the assignment; they all knew it had a high priority.

Planning for Earned Value Project Management

The newly formed team met at the project manager's apartment to prevent interruptions and phone calls. *It shouldn't take us very long to put a plan down on paper,* was his opening remark. They spent the next few hours conceptualizing and defining the project. The project manager, after he captured their ideas, would prepare the final plan for review and approval of the team, then submittal to the CEO. The project manager wanted everyone to buy into the project plan. They all knew exactly what was required in order to employ earned value performance measurement. It was simply classic project management, "Project Management 101."

First, they had to define what constituted the project, 100 percent of their assumed project scope. For this they created a Work Breakdown Structure (WBS). Next they decomposed the project scope into measurable tasks, each with an estimated value, and then assigned responsibility for the actual performance of each

task to a functional manager within the company. For this they developed a WBS Dictionary to record their thoughts. They decided that their project needed 10 units to develop and test, and that each unit would require about the same level of resources to accomplish.

Next, they would take the work conceptualized from the WBS diagram and dictionary, and then prepare a detailed plan and schedule for all of the major critical tasks. After a few iterations they had their Project Master Schedule (PMS), fully supported by critical path methodology. They did a forward and backward schedule pass to give them assurances that their schedule was in fact achievable. The project would take 18 months to perform from start to completion.

Lastly, they estimated the resources which were required to produce these 10 units and constituted the total project. Each article would cost them $150,000 to produce; thus, the total project would require $1.5 million to complete. They charted their requirements as illustrated in Figure 2.1, which they termed their Project Management Plan. This display would contain the three critical components of any earned value baseline plan: a WBS, a Project Master Schedule, and a Performance Display graph. Each element was supported by detailed breakouts. This process is sometimes called detailed "bottom-up planning." The team had done their job, and it was now time for the project manager to take their plan to the CEO for her approval.

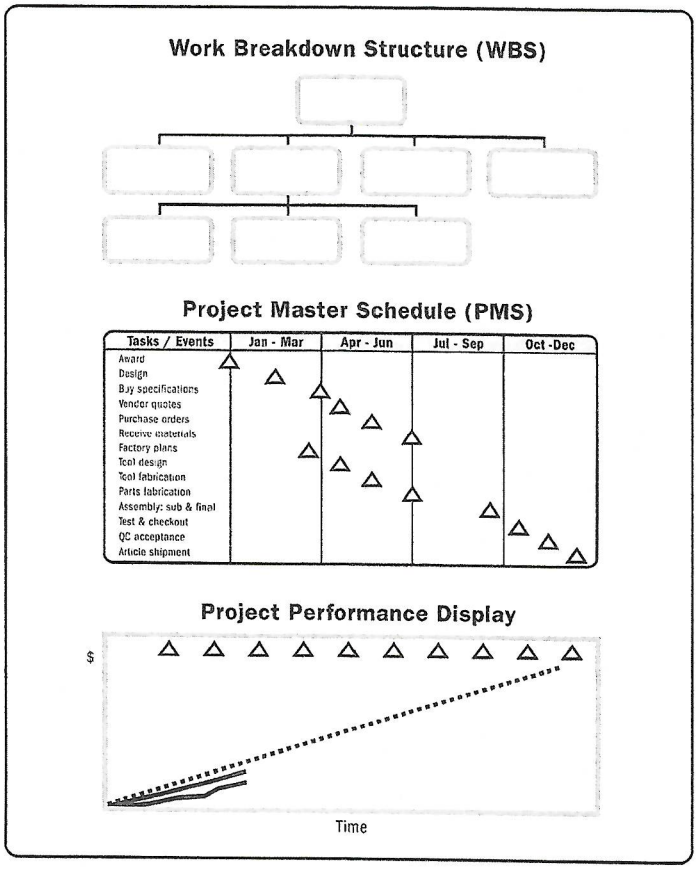

Figure 2.1 *Project Management Plan*

Management's Approval

The project manager made a copy of their Project Management Plan and gave it to the CEO's secretary so she could review it prior to their approval meeting. When he was at last able to meet with the CEO, it was obvious that she had thoroughly read the entire plan. Every page was marked up, tabbed, and color-coded. He hoped she liked what she had read.

The CEO opened the meeting on a positive note: *I want you to know, this is the finest project management plan I have seen as head of this company. I plan to use it as a model for approval of all our future projects.* The project manager was off to a good start. She liked it!

Then the CEO went on: *However, you must not have heard parts of my requirements. Time to market is most critical on this project, and you have developed a casual, business as usual schedule of 18 months . . . .That is completely unacceptable. I need this project completed in not more that 12 months. Can you handle that?* The young man took a deep breath and replied: *Of course we can.* Realistically, he had no clue as to how he would accomplish this, but the message from on high was becoming pretty clear.

Also, you have taken this simple job and gold-plated it at an estimated cost of $1.5 million . . . . That also is unacceptable! The boss was relentless: *The very most I could allocate for this project would be $1.0 million. We are not a big company; I have other commitments. Can you handle that?* The young project manager was beginning to understand why she had become a CEO at such an early age. She was one tough person to deal with. Without hesitation, the young man accepted the budget dictate.

The CEO realized that she had come down pretty hard on the young man, so she wanted to provide some consoling words before he left: *Again, I want to emphasize that this is the best project plan I have ever seen in this company, and it will be our role model for others to follow.* Her words were some comfort, although the project manager was now starting to worry about what he would say to the other members of his team. Their buy-in was important to him.

As he was about to leave the office, the chief executive said: *I am very pleased that you are going to employ earned value measurement on this project. I would like to review your performance each quarter, at say every three months into your 12-month, one million dollar project!* The thought racing through the young man's mind was,*She never lets up. What do I now tell the other team members?*

WELCOME TO THE WORLD OF PROJECT MANAGEMENT

Now, let us stand back from this discussion and try to understand what has taken place here. A project team got together and developed a thorough, comprehensive project plan, with considerable supporting data and schedule metrics so that they could measure their earned value performance from start to completion. In particular, they had scoped 100 percent of the total assumed project before they would begin to perform, and they created a detailed plan which allowed for the measurement of project performance.

Their supporting bottom-up detail indicated that they needed a full 18 months to complete the project, but the big boss directed them to do it in 12 months. They

estimated the costs to do the project at $1.5 million, and the big boss quickly cut it down to $1.0 million. What do we call this environment that the young project manager had just experienced for the first time in his professional career? We call it: *REAL LIFE PROJECT MANAGEMENT!*

Rarely do we ever get the total time we feel we need to reasonably do the job. Projects are always in competition with other projects to do something first. And the authorized budgets are rarely what we estimate we need to complete any job. We are frequently given what is commonly termed a "management challenge," and we go out and do our best. It matters not if these management challenges are arbitrary, unreasonable, unattainable, unrealistic, or just plain stupid. We as project managers must find a way to get it done. Welcome to the wonderful world of project management!

The First Quarterly Project Status Review

Three months went by quickly. It was time for the team to present its performance results to the chief executive and her management committee. This would be an awesome new experience for the young project team, but the thing that was working in their favor was the fact that they were performing against a detailed plan, and they knew exactly what they had to do from the go-ahead to completion.

A brief summary indicated the following results: Three of the ten units had been scheduled for completion at the three-month point, but only two were accomplished; thus, they were slightly behind their planned schedule. They had forecasted expenditures of $300,000 and had committed $300,000, so they were right on with their funding profile. Any optimistic person could easily paint a positive picture of this project: "We are right on our cost spending plan, a little behind schedule; we are doing well," would be the positive spin put on these results by most practitioners.

However, the chief executive had specifically asked that earned value project management be employed on this project. That requirement adds a slightly different orientation to project performance data. Earned value project management requires a detailed bottom-up performance plan, and a "three-dimensional" measurement against the baseline plan. Earned value also requires a periodic forecast of the final expected results, based on actual performance.

In order to employ earned value, there must be a plan in place that will allow for continuous measurement of actual performance results. This may sound complicated, but it is not. Earned value simply requires a focus on the completed physical or intellectual work, together with management's authorized budget for the completed work. This we call the "earned value."

In order to employ the earned value concept, a project must measure three dimensions of performance. The first dimension is called the Planned Value. (Note:

The United States Department of Defense [DoD] has been calling this the Budgeted Costs for Work Scheduled [BCWS] for some three decades, but we choose to call it by the term Planned Value).

To determine the Planned Value, the project must ascertain: (1) how much physical or intellectual work has been scheduled to be completed as of a point of measurement, and (2) management's authorized budget for this authorized work. The Planned Value is simply a direct fallout of those detailed tasks specified on the PMS. (Important point: Earned value requires a baseline PMS, or, stated another way, without a PMS one cannot employ earned value).

In this case, the PMS had specified three units to be completed as of the first quarter, and each unit had a budgeted value of $100,000. Thus, they can determine that the Planned Value for the first three months of the project was $300,000. (Note: The fact that the team's original estimate for each unit was $150,000 is only interesting. Management authorized $100,000 per unit, and management doesn't want to hear about other issues . . . period! Best the team forget about their original $150,000 estimate).

Next they will need to measure the second dimension, called their Earned Value for the same reporting period. To measure Earned Value, they will need to determine: (3) how much of the authorized work they actually accomplished and (4) the amount of management's original budget for the accomplished work. (Note: Do not bother with the actual costs at this point, since actual costs have nothing to do with creating earned value). Their actual performance results: They completed two units, each with a value of $100,000, for a total earned value of $200,000.

The third dimension they need to determine is, Actual Costs, or how much money was spent converting the planned value into earned value during the measurement period. They look at the cost ledger and find that they have incurred actual costs of $300,000.

The three dimensions of earned value project management are now set for the first quarter, expressed in monetary terms, and a performance pattern has emerged for this project:

- The Planned Value was $300,000;
- The Earned Value was $200,000; and
- The Actual Costs were $300,000.

They now need to analyze their performance results to determine if there have been any schedule or cost variances, which earned value project management looks at in a slightly different form from that of traditional project management.

With earned value, a "schedule variance" is defined as the difference between the completed Earned Value less the Planned Value. In this case they planned to accomplish $300,000 of work but only did $200,000, thus they are behind their planned baseline schedule by $100,000. Not so bad, until they realize that they only accomplished 67 cents for each dollar they had planned to accomplish!

Lastly, they need to know if there was a "cost variance." An earned value cost variance is determined by taking the earned value work accomplished, and subtracting the actual costs spent or incurred. They spent $300,000 in actual costs to accomplish only $200,000 in earned value! Not so good when they realize that for each dollar they spent they got only 67 cents of value earned. Thus, this project is behind their planned baseline schedule and overrunning the costs. The negative schedule variance is serious. But the negative cost variance may be non-recoverable!

The team summarizes the results of their earned value performance for presentation to the management committee. Not exactly a pretty sight, but one of extreme importance in the portrayal of the true status of project performance. This project at the end of the first quarter is performing only 67 percent of its planned schedule, and 67 percent of cost performance. Stated another way, it is overrunning its costs by 50 percent. At only the 20 percent completion point, by monitoring these three dimensions of earned value data, the project is forecasting a significant final overrun of costs!

The project has already spent $300,000 to complete only $200,000 of work, so they are experiencing a negative $100,000 overrun of costs. And if the project continues at its present "cost efficiency" rate of earning only 67 cents for each dollar spent, it will need a 50 percent increase in budget will be needed to complete the work ($1,000,000 divided by .67 equals nearly $1,500,000). Also, if the team tries to get back on the 12 month schedule it will likely have to add additional resources and overtime to do the same authorized work, so the projected costs could equate to about a 100 percent overrun. (Note: There are scientific studies which reinforce these three forecasting methods.)[6]

Most executives do not like to hear bad news. But this chief executive knows well that bad news does not get better with time; it only gets worse. At issue: Bad news known at the 20 percent point in a project's life cycle gives management an opportunity to take corrective actions and possibly change the final projected results. Conversely, bad news which is ignored until perhaps the 80 percent completion point severely limits management's opportunities to make the necessary changes to recover performance. Earned value gives management an important "early warning" signal.

Those were exactly the kind of performance results the chief executive wanted to see on this most critical project. She wanted the true status, good, bad, or ugly. She

6 All of the concepts and terms used herein are consistent with the earned value coverage in the Project Management Institute's *PMBOK® Guide* — Fourth Edition, section 7.3.2.1, released by PMI in December 2008.

also knew that she had to take immediate action in order to make additional funds available for this most important project. She made a note to herself to cancel two other projects of lesser importance, to free up funds for this project. This project was important to her company, and it had to be funded to completion.

The CEO now declared: *Thank you for this presentation; it has been most informative. I now know that I was perhaps a little too restrictive in my initial budget authorization to you. I will now authorize you a revised budget amount of $1,500,000 to complete this project.* The response from the young project manager was, *Thank you.* He knew that the team needed at least that amount to complete the project.

However, the chief executive continued, not letting anyone off the hook just yet, *I want you to catch up on the late schedule position and complete this project with all the technical features in another nine months. Can you do that?* The project manager's reply was, *Yes, we can, but that will require an accelerated schedule, and that will likely cost us the full $2,000,000 as we have presented to you. .*

Okay, I will authorize this project a total budget of $1,500,000, but ask that you complete it within the 12 month schedule, were the CEO's directions. *However, as we both well know, to recover this late schedule will likely cost us some additional money, so I will put another half a million dollars in my management reserve in case we need it. But it is not your money yet, and we want you back on schedule. Am I making myself clear?* said the CEO. *Absolutely clear,* said the young project manager, *and we promise to do the best we can for the authorized budget..*

But getting back on schedule is your main performance objective, and the budget goal is simply my challenge to you, understand? The schedule comes first, was the chief executive's final comment. *Understood,* said the young project manager, who was getting to fully appreciate the delicate role he was playing.

The Final Results

Standing back from this story, what was emerging was that this project was likely underbudgeted (at $1,000,000) from the beginning. But based on what was authorized and what the project team was experiencing, the likely final forecast of budget needs was in the statistical range of between a half million and one full million over the initial budget. Both the project manager and the CEO clearly understood that fact. But the CEO was not ready to relax her management challenge to this team. She released an additional half a million dollars to the project, but also asked that they get back on schedule. Getting back on schedule would cost additional resources, and likely require the full million to achieve. But she was not yet ready to authorize the full amount.

This chief executive knew the benefits of employing earned value. She believed in the accuracy of data that was being presented by the project team and the final projections of required costs. At the 20 percent completion point the team was

predicting an overrun of between 50 to 100 percent, and she was convinced that this would ultimately be the case. In order to fund the completion of this critical company project, she took immediate steps to cancel two other internal company projects of lesser importance. She knew what she had to do in order to free up funds for this high priority project. Other executives who do not employ earned value or do not rely on the performance data often find themselves overcommitted in their project portfolios, sometimes experiencing catastrophic results.

The final results were in: This project was completed with all the required technical features, on time and within the 12 month schedule. But the final actual costs reached $2,000,000. The new product worked exactly as required, and the additional funds to complete the project were made available by the CEO when she cancelled two other projects of lesser importance.

Life was good at this company. The young project manager's professional career was off to a great start. He performed exactly as desired by senior management. Earned value allowed this company to balance the technical requirements against cost and schedule considerations.

Project Postmortem: The Value of Earned Value Management

Issue: Will the use of earned value on projects prevent cost overruns? Answer: Never. Overruns are typically caused by three factors, or some combination of these three factors:

(1) Too little budget authorized by management to do the job;
(2) Poor technical performance from the project team; and
(3) Scope creep.

If management authorizes an inadequate budget, the project team performs poorly, or new work is constantly added because the project scope was never properly defined in the first place, earned value will not prevent cost growth. Earned value cannot perform a miracle.

What earned value will do is provide an "early warning signal" to the project manager, to senior management, and to the customer. It will indicate that the project will likely require so much money to complete, unless actions are taken to change future events. Sometimes project scope will need to be reduced. Sometimes risks will need to be taken. Sometimes additional funds will need to be made available to complete the project.

Earned value project management can help deliver better performance on any project.