



# Western Australian Information Commissioner

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## Conservation Council of Western Australia Inc and Department of Conservation and Land Management, Re [2005] WAICmr 5 (8 April 2005)

Last Updated: 11 April 2005

<b>OFFICE OF THE INFORMATION COMMISSIONER (W.A.)</b>	<b>File Ref: F2003185 Decision Ref: D0052005</b>
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	Participants:	<p><b>Conservation Council of Western Australia Inc</b> Complainant</p> <p>- and -</p> <p><b>Department of Conservation and Land Management</b> Respondent</p>
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### DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal to deal with an access application – electronically stored information – database – data relating to calculation of sustainable yield – forest management plan – [section 20](#) – assistance offered by the agency – whether reasonable steps taken to help applicant change application – work involved to deal with access application – whether substantial and unreasonable diversion of resources.

[Freedom of Information Act 1992](#) (WA): [section 20](#); Schedule 1, clauses 4(2), 10(3);

### DECISION

The decision of the agency to refuse to deal with the access application under [section 20](#) of the [Freedom of Information Act 1992](#) is confirmed.

D A WOOKEY  
A/INFORMATION COMMISSIONER

8 April 2005

## REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Conservation and Land Management ('the agency') to refuse to deal with an access application made by the Conservation Council of Western Australia Inc ('the complainant') under the [Freedom of Information Act 1992](#) ('the FOI Act').

### Background

2. On 14 May 2003, the complainant made an access application to the agency seeking access to: "1. All data involved in the derivation of the parameters of, and input to, the model(s) used; and 2. The methodology – the mathematical and/or computational basis of the model(s) used: To determine (a) the annual increment and (b) the non-declining sustained (sustainable) yield for jarrah, karri and marri in the form used for the development of the new Forest Management Plan."

3. On 1 July 2003, the then A/Director, Sustainable Forest Management, of the agency advised the complainant that she was of the view that the scope of the complainant's access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations. The agency briefly described the difficulties it envisaged if it were to deal with the complainant's access application and provided the complainant with an example of the large size of one data set that is a small part of the requested data.

4. Pursuant to the requirements of [s.20](#) of the FOI Act, the A/Director invited the complainant to discuss with the agency whether the scope of its access application could be redefined, to reduce the call on the agency's resources necessary to deal with the complainant's access application and to still be of assistance to the complainant. The A/Director advised the complainant that the agency's response to its access application would not be finalised until the complainant advised the agency how it wished to proceed in light of the agency's comments.

5. Thereafter, between 16 July 2003 and 11 September 2003, representatives of the complainant attended a number of meetings with officers of the agency and exchanged a number of written communications in an attempt to negotiate a reduction in the scope of the access application and to have the agency provide it with sufficient information to satisfy its request. However, following those negotiations, the matter remained unresolved and, accordingly, on 11 September 2003, the complainant applied to the agency for an internal review of the agency's deemed refusal of access.

6. By letters dated 16 September 2003 and 1 October 2003, the agency confirmed its decision to refuse to deal with the complainant's access application, pursuant to [s.20\(2\)](#) of the FOI Act, on the ground that the scope of the complainant's access application remained

too broad and that the work required to deal with the complainant's access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations.

7. On 10 November 2003, the complainant made a complaint to the Information Commissioner, seeking external review of the agency's decision to refuse to deal with its access application.

### **Review by A/Information Commissioner**

8. After receiving this complaint, I required the agency to produce to me, for my examination, the FOI file maintained by the agency in respect of the complainant's access application. One of my officers then made further inquiries with the parties, to clarify the background to this complaint and to discuss with the parties whether this complaint might be able to be resolved by conciliation and negotiation between the parties.

9. On 21 November 2003, the agency provided my office with additional information in support of its decision. The complainant was provided with a copy of the agency's letter and invited to respond. My officer also advised the complainant that, based on the information then before him, it seemed to him that the agency's decision to refuse to deal with its access application under [s.20](#) of the FOI Act appeared to be justified.

10. On 3 December 2003, my officer met with two representatives of the complainant. In those discussions, the complainant's representatives advised my officer that they had already made a number of concessions to the agency in an attempt to have the agency deal with the complainant's access application and they disputed the accuracy of some of the information contained in the agency's letter of 21 November 2003. However, the complainant's representatives also advised my officer that they would again review the terms of the complainant's access application and propose a reduced scope which could be dealt with by the agency.

11. In a letter dated 10 December 2003, the complainant described its proposal for the agency to give it access to certain information which would satisfy its request. A copy of that proposal was provided to the agency, for its consideration and response as to whether or not it was prepared to deal with the complainant's access application, on those revised terms. In the complainant's revised application, it sought access to:

- "1. A list of all jarrah datasets used in the Forest Management Plan.*
- 2. All such datasets in (1) being identified as to the way in which they contributed to the JARSIM model.*
- 3. A list of the plots for each of the datasets used, showing for each plot the forest block, the location (non-specific), and the months and years that measurements were taken.*
- 4. The FORTRAN program which implements JARSIM, with referencing of sub-routine or function calls."*

12. On 15 December 2003, the agency responded to the complainant's proposal and advised my office, among other things, that in order to satisfy the complainant's revised request it would be necessary to create documents and that, in the agency's view, it was not reasonable for it to utilise key staff for that purpose when those staff were busy with other priority tasks. Details of the agency's advice of 15 December 2003 were given to the complainant and it was again requested to confirm whether it still wished to pursue the

matter. On 23 December 2003, the complainant confirmed that it wished to pursue the matter and, on 8 January 2004, provided further submissions for my consideration.

13. On 10 February 2004, my officer made further inquiries with the agency to clarify the agency's position on this matter. The agency subsequently confirmed, in writing, that it maintained its position which was to refuse to deal with the complainant's application. On 20 February 2004, the complainant was given a summary of the additional information provided to me by the agency in support of its decision to refuse to deal with the application. My officer advised the complainant that, in the circumstances, it was clear that there was little point in continuing to pursue a conciliated outcome and, therefore, he would refer the complaint to me to give the parties my written preliminary view and the reasons for that view.

14. Following my consideration of the matter, my officer made further inquiries with the agency and obtained more information about the estimated diversion of resources that would be required to deal with the access application. Following those further inquiries, on 25 September 2004 I informed the parties, in writing, of my preliminary view of this complaint. It was my preliminary view that the agency's decision to refuse to deal with the complainant's access application, pursuant to [s.20\(2\)](#) of the FOI Act, appeared to be justified.

15. However, it was also my preliminary view that the only document that fell within both the initial and revised applications that the complainant made to the agency and which, in my view, the agency may have been able to identify and retrieve with any ease was the FORTRAN program for JARSIM. It also appeared to me that the agency could deal with an application from the complainant for access to the FORTRAN program for JARSIM, without diverting an unreasonable or substantial portion of its resources away from its other operations.

16. Accordingly, I advised the complainant that, in my preliminary view, if the complainant limited the scope of its access application to an application for access to the FORTRAN program for JARSIM, I did not consider that the work involved in dealing with an application for access to that program only would be too great for the agency to deal with, without diverting an unreasonable or substantial portion of its resources away from its other operations. However, the agency also claimed that the document which comprised the FORTRAN program for JARSIM, being a copy of the program data, is exempt matter and, if that data were found to fall within the scope of the application, then the agency would refuse the complainant access to that document on the ground that it contains government intellectual property which has a commercial value that the agency wishes to protect. Although the agency claimed it to be exempt under clause 4(2), it appeared to me that the exemption that may apply to the FORTRAN program for JARSIM is the exemption provided by clause 10(3) (which concerns information having a commercial value to an agency) of Schedule 1 to the FOI Act.

17. In light of my preliminary view, I invited the complainant to reconsider whether it still wished to pursue its complaint. I also invited the complainant to consider whether it wished to reduce the scope of its request to a request for access to the FORTRAN program for JARSIM, in which case, I intended to invite the parties to make further submissions to me in relation to the agency's claim for exemption under clause 10(3).

18. However, by letter dated 25 October 2004, the complainant advised me that it was not prepared to limit its application in that way and wished to pursue its complaint, in full, and

it made further written submissions to me in support of its complaint. The question for my determination, therefore, is whether or not the agency was justified in deciding not to deal with the access application. The question of whether or not any of the “documents” are exempt does not arise for my consideration at this stage.

## **Ground for refusal**

19. The agency refused to deal with the access application in accordance with [s.20](#) of the FOI Act. [Section 20](#), so far as is relevant, provides:

### ***“20. Agency may refuse to deal with an application in certain cases***

*(1) If the agency considers that the work involved in dealing with*

*the access application would divert a substantial and unreasonable portion of the agency’s resources away from its other operations, the agency has to take reasonable steps to help the applicant to change the application to reduce the amount of work needed to deal with it.*

*(2) If after help has been given to change the access application the*

*agency still considers that the work involved in dealing with the application would divert a substantial and unreasonable portion of the agency’s resources away from its other operations, the agency may refuse to deal with the application.”*

20. A decision made by an agency under [s.20](#) of the FOI Act cannot be justified where the agency has not satisfied its obligation under subsection (1). That is, the agency has to take reasonable steps to help the applicant to change the application to reduce the amount of work needed to deal with it.

### **The assistance offered by the agency**

21. Having examined the agency’s administrative file maintained in respect of the complainant’s access application, I am satisfied that the agency has taken reasonable steps to assist the complainant to change its access application. On a number of occasions after receipt of the complainant’s access application the agency described to it the large volume of the data it holds which falls within the scope of the access application and the amount of work that it believes would be required to deal with such a large access application. The agency invited the complainant to participate in a series of negotiations in an attempt to satisfy the complainant’s request by providing other information relating to the request. However, although the complainant reduced the scope of its access application and participated in the negotiations with the agency, it continues to seek more detailed information from the agency and the agency remains of the view that to deal with the reduced application would still involve a substantial and unreasonable diversion of its resources from its core work.

### **The work involved in dealing with the access application**

22. Initially, the agency briefly described the difficulties it envisaged if it were to deal with the complainant's access application and it provided an example of the large size of one data set that comprises a small part of the requested data. In its notices of decision, the agency did not provide a detailed estimate of the number or kinds of documents or the amount of time that it considered it would take to deal with the application. Rather, the agency described the task in more general terms and referred to the difficulties in retrieving the information because of the form in which the information is held and the necessity to use senior experienced staff to retrieve that information.

23. My office sought more detailed information from the agency in support of its decision. In a letter dated 21 November 2003, the agency provided an estimate of the relative size and complexity of some of each of the:

- jarrah and karri inventory data sets;
- forest stratification and management history data sets;
- silvicultural modelling systems;
- yield projection models; and
- yield scheduling models.

24. The agency also advised me that: *"...assuming a very limited interpretation of the breadth of the application, the extraction and collation across the range of components (excluding spatial data) would involve at least five weeks uninterrupted work for several senior staff at a cost exceeding \$15,000. Data extraction is not straightforward because in most instances portions of datasets would need filtering or sorting. If background hardcopy material was also required to be collated, these time and cost estimates would increase considerably. The presentation of databases would be of little value without an understanding of the data structures and attributes. Additional work and costs would be required to provide basic documentation and labelling of the data, which could involve several weeks to months depending on the detail adopted."*

25. On 8 January 2004, the complainant responded to the information contained in the agency's letter of 21 November 2003. A summary of the complainant's response, as far as it is relevant to the issue for determination, is as follows:

- the agency should be required to provide the complainant with a list of the growth plot data sets;
- the complainant does not accept that in order to deal with its application the agency needs to utilise the services of key senior staff or that those staff are otherwise busy on other matters; and
- the complainant specifically requested a list of data sets and until it has seen that list it cannot know what further information it may require regarding the data.

26. Further inquiries were then made with the agency in respect of the provision of a list of growth plot data sets and the complainant's submission on the issue of the claimed disadvantage to agency officers if disclosure occurred before publication of certain information. On 4 February 2004, the agency clarified the agency's position and confirmed that:

*"...a composite list of all the datasets used for jarrah increment and sustained yield, including an indication of the way in which they may have contributed to the JARSIM model, does not exist as a paper or electronic record. As a subset of such a list, the Council has further requested a list showing the location and measurement details for each plot. To generate such a document would involve considerable time for a series of officers."*

27. The agency pointed out that, in July 2003, it had provided the complainant with a “comprehensive list” of growth plots maintained by the Forest Management Branch of the agency, even though those details did not exist in a summary form and, therefore, in the agency’s view, it was not required by the FOI Act to provide them.

28. The agency also explained again that “...*data from a variety of sources and plot types (including the growth plots) have been drawn together to prepare the sustained yield calculations. ...[and] [m]uch data has been used indirectly at various stages in the calculation of sustained yield, by contributing to the various relationships developed for stand dynamics and modelling, or as comparisons to standing inventory data*”.

29. In addition to the above, the agency also confirmed its concern that, in repeatedly reserving the right to explore other aspects of the complainant’s original application, it makes it very difficult for the agency to assess the total amount of work that may be involved in dealing with the complainant’s request in the future.

30. After considering the agency’s advice of 4 February 2004, my office obtained further information to clarify the agency’s position in this matter. In particular, the agency was asked to describe in more detail the work involved in dealing with the specific documents requested by the complainant in its amended application. On 17 February 2004, the agency provided further written reasons for its decision not to deal with the amended application. The agency confirmed the following:

- “...*a single list of all datasets and how they were used to determine jarrah increment and the calculation of sustained yield for the Forest Management Plan does not exist as a paper or electronic record. The need to create a document to satisfy the application may mean that it falls outside the FOI requirement, however, more importantly from the Department’s perspective is that it would require a substantial amount of work to generate as detailed in Ms Bailey’s correspondence of 21 November 2003. Given the priority the Department has for the officers this work would have to be done by (sic) to undertake projects to implement the Forest Management Plan, to divert them to produce the data requested by the applicant would, I believe, be a serious imposition on the Department’s efficiency.*”

- “...*although some plot data is available electronically and could be provided in raw form it would be largely unintelligible without secondary explanation, which I understand the FOI legislation does not require. In that regard I believe the second dot point of the applicant’s reduced Point 1 “all such datasets being identified as to the way in which they contribute to the JARSIM model” is not existing information and similarly falls outside the FOI process.*”

31. As a consequence of the above, the agency advised that it was of the view that the revised application would still divert a substantial and unreasonable portion of its resources away from its core operations.

32. On 4 August 2004, my officers met with the relevant agency officers for the purpose of obtaining more detailed information about the kinds of documents that exist in the agency which fall within the scope of the revised application and to establish an estimate of the

amount of work required in order to deal with the revised application. On 10 September 2004, the agency advised the following:

*“Unfortunately, the apparent reduction in the scope of the request to consider only jarrah data is not a significant contraction, as the jarrah component constitutes the majority of the data used in calculation of the sustained yield for the Forest Management Plan.*

*As I explained in my earlier correspondence (dated 4 February 2004) on the revised application, a composite list of all the datasets used for jarrah increment and sustained yield, including an indication of the way in which they may have contributed to the JARSIM model (i.e. items 1 and 2), does not exist as a paper or electronic record. This is because a wide array of survey, plot, digital and other GIS data is combined or derived indirectly through the computer processing to generate sustained yield calculations, and this level of summarisation has not been necessary (and has therefore not been created).*

*Similarly, the list requested in item 3, showing the forest block, location and measurement details for any plots used for the Plan also does not exist as a paper or electronic record.*

*I understand that to create a series of new documents to satisfy the specific request would be outside the requirements of the FOI process. However, if it were within the scope of the FOI, significant work would be involved to generate the information to service the applicant's request. This is partly because many of the datasets are contained within database applications that manage them, but they do not contain the specific details or identifiers to separately prepare listings without manual collation and preparation. The following table provides an indication of the tasks and work involved should the Department seek to provide this information outside the FOI process.”*

33. The agency estimates that it will require 78 hours for officers at Levels 6, 7 and 8, at an estimated cost of \$4,370, to perform the following tasks in respect of Items 1 and 2 of the Revised Application:

1. Define a generalised format for summarisation of the disparate data sets:
  - Survey data (regeneration status, dieback status, other)
  - Mapping data
  - Plot data (various types)
  - Other contributing biometric data
  - Geographic information system data
2. For each data set, and for each stage of yield calculation process, generate a separate list by relevant units:
  - Land stratification
  - Stand definition
  - Inventory and yield
  - Growth projection
  - Scheduling
  - Other (e.g. dieback spread, fire risk)
3. Merge electronic and paper listings to create a unified document
4. Define contribution categories for JARSIM

5. Examine and manually annotate each component for contribution to JARSIM model

34. The agency estimates that it will require 126 hours for officers at Levels 4, 5, 6, 7 and 8, at an estimated cost of \$5,590, to perform the following tasks in respect of Item 3 of the Revised Application:

1. Identify all data sets that contribute plot-level data:

- Systematic examination of all data within each stage of calculation process (would include regeneration status, stocking, inventory, growth and experimental plots)

2. Identify current plot location, measurement and storage details:

- Source data to include paper-based and electronic formats

3. Prepare lists of individual plots for each relevant data set:

- Paper-based records
- Locate plot information on paper copies in field offices (Dwellingup, Bunbury, Manjimup, ← Perth →)
- Manually transcribe and extract relevant details for every plot to prepare lists
- Data sets held in a variety of electronic formats
- Intersect or source the location details with Forest Block coverage
- Intersect or source the geographic location details within the Block (AMG, FD grid)
- Program code to extract relevant data from internal database structures
- Manually enter remeasurement history data for those plots with incomplete electronic records

35. In total, the agency estimates that it would take 204 hours at an estimated cost of \$9,960, to complete the above tasks. In its letter of 10 September 2004, the agency also advised that:

*“These estimates have been prepared by specialist officers involved in generating an 85-page listing of one part of the plot data for this applicant outside an earlier FOI application. They have drawn on detailed records of the time and expense involved in related FOI requests, data analysis and map production outside the FOI process, and the transfer of other digital datasets to the Conservation Council. The costs are considered a minimum as they include only salary components.*







*The generation of such data and information imposes a considerable impost on Departmental operations and resources. This is because this work is performed by a small section of specialist staff that deliver essential planning and continuous operational support for land management operations in both CALM and the Forest Products Commission,*

*including Fire Management Services. There are only three specialist senior officers with the necessary systems privileges, expertise and experience to extract and describe the various inventory datasets, and their work remains a high priority associated with implementing the Government's Protecting our old-growth forests Policy. Consequently, the impact on Departmental productivity is far greater than it would be if junior staff could be set the task for the required period.*

*In regard to item 4, at face value the request in the revised application is straightforward. The FORTRAN program for JARSIM is stored on a Departmental computer and a specialist officer would require approximately one hour to create a text document of the program and two supporting library routines. This estimate does not include the creation of any new explanatory or referencing documents specific to this request. However, a key issue for the Department is the need to protect those components of the JARSIM and similar computer programs that contain government intellectual property and have commercial value. Over two person-years of work by specialist officers contributed directly to the program, building on the experience of a decade of work on stand growth and yield. Specific algorithms and aspects of the general code of the program have commercial value, and have previously been sought by timber industry consultants and companies. I note, for example, that the contracts signed by the six members of the Independent Panel (chaired by Professor Ferguson) appointed to review the data, models and methodology (including JARSIM) required the individuals to maintain confidentiality of all information and to observe and enforce security of the systems, data, projects, files and information from unauthorised access or use.*





*Accordingly, while the Department does have a specific project in place to publish further technical and general details about the sustained yield systems (including JARSIM), an exemption for critical components would be sought under clause 4 (2) of Schedule 1."*

### **The complainant's submissions**

36. The complainant submits that the agency treats it differently from other organisations. The complainant provided me with a copy of a letter dated March 2000, from the agency to the  **Noongar**  Land Council, in response to an access application which it appears the  **Noongar**  Land Council made to the agency in February 2000. The complainant submits that that letter was evidence of the fact the agency treats it differently from other organisations, because the agency supplied the requested information to the  **Noongar**  Land Council seven weeks after the application was made. The complainant submits that this is in contrast to the inordinate length of time the agency takes to respond, if at all, to its FOI access applications.

37. The complainant submits that, on every occasion, it has responded reasonably and readily to the agency's requests that it reduce the scope of its request. The complainant says that it has reduced the first part of its access application to a mere list of the data sets the agency has used to determine annual increment and sustained yields and that it has limited this list to one species only, namely jarrah. The complainant submits that no matter how far it attempts to satisfy the requirements of the agency, it is never enough and the agency comes up with another excuse to withhold the information sought.

38. The complainant submits that the agency's assertions that, in order to satisfy its request, the agency would have to generate documents that do not exist and which are, therefore,

outside the scope of the complainant's access application is not true. The complainant submits that the letter to the  **Noongar**  Land Council, described in [paragraph 36](#) above, gives details of the information then being supplied to the  **Noongar**  Land Council by the agency in response to an access application.

39. The complainant says that that information consisted of a list of jarrah growth plots and that the list was supplied without any suggestion that the agency had to create it especially to satisfy that application or that it was outside the scope of the FOI application. The complainant submits that this contradicts the agency's claim that the list did not exist. The complainant says that it has a copy of the list of Jarrah growth plots and that all the agency did in July 2003, was to update the existing list and add the list for karri and wandoo.

40. The complainant submits that the agency's claim that disclosure of the listing of the JARSIM program document might reveal information of a commercial value has no basis, because the complainant has already offered to agree to: any reasonable (a) non-disclosure of detail agreement; (b) non-commercial use agreement; (c) non-scientific publication agreement; and (d) non-distribution agreement. The complainant says that, if such an undertaking satisfied the agency in relation to the Ferguson Committee, it should also be sufficient for the agency in relation to the complainant.

41. The complainant submits that the JARSIM model is based on a program code that is: 30 years old; written in an out-dated language; run on an obsolete operating system using obsolete computer hardware; and completely dedicated to jarrah, which is not a commercial species anywhere else in the world and for the commercial management and sale of which the agency, together with the Forest Products Commission, has a virtual monopoly in Western Australia. The complainant submits that, therefore, it cannot comprehend what commercial value such a program could possibly have and, given its offer of a non-disclosure and non-commercial use agreement, the complainant fails to see how granting it access to the FORTRAN program for JARSIM could in any way diminish its alleged commercial value.



42. The complainant submits that the agency's claim of commercial value as a reason to withhold information about its modelling is an example of how the agency keeps inventing new excuses not to disclose information. The complainant submits that the agency's claim is in direct contradiction of the agency's willingness, confirmed in its letter dated 17<sup>th</sup> July 2003, to have Dr Martin Rayner, the Director of the agency's Forest Management Branch (FMB), to assist Dr Paul Davis of the complainant to fully understand the methodology used to arrive at the figure of 131,000 m<sup>3</sup>/yr for 1<sup>st</sup> and 2<sup>nd</sup> grade jarrah sawlogs, an agreement on which the complainant alleges the agency subsequently reneged without offering any justification.

43. The complainant submits that the agency's claim that it has expended time and resources in dealing with the complainant's previous requests for information and that it has already gone to considerable lengths in an attempt to give the complainant as much information as possible over a long period of time is an irrelevant consideration and, as such, it is not a valid ground for refusing the complainant's request. The complainant submits that I should not entertain that claim. The complainant says that it has made an FOI application and it should be considered on its merits, without taking into consideration or account its other interactions with the agency. The complainant says that, if it were so minded, it could ask any one of a score of groups or individuals associated with the

complainant to make the same or a similar application and in that way circumvent this ground for refusal.

44. The complainant submits that the agency's objection that the complainant repeatedly reserves the right to explore other aspects of the original application is another irrelevant consideration. The complainant says what the agency thinks it would do with a list of the data sets is mere conjecture on the agency's part and that it should not be used as justification for withholding information from the complainant.



45. The complainant says that the agency's claims that there is a mechanism in place for reviewing the data and methodology and that the Ferguson Panel's reports are made public are incorrect. The complainant says that the data and modelling it has requested is not available elsewhere. The complainant says that, if they were, the complainant would not need to make this FOI application. The complainant also says that if, as it believes, the data it has requested was made available to the Ferguson Panel then the data already exists in document form and that there should, therefore, be no problem for the agency to now supply the data to the complainant.



46. The complainant says that the information provided to me by the agency, as to the estimated hours that the agency's employees of various levels would take to comply with its request, and estimates of the costs involved are unsupported by any evidence as to the accuracy of those figures, which have been arrived at by an agency determined to go to any lengths to avoid complying with its access application and which should, therefore, be discounted. The complainant submits that the figures are grossly exaggerated and, in support of its submissions on this issue, again refers to the agency's letter to the  **Noongar**  Land Council. The complainant says that, for the preparation and supply of the 34-page jarrah growth plot summary, the cost was only \$365 and the complainant understands this was mainly for the map depicting the location of the plots that was provided with the list.



47. The complainant submits that its members, as members of the public, have a right to receive information and documents from a public agency managing a public resource (forests) on behalf of the public. The complainant says that it has also expended considerable amount of time and effort in making a valid and reasonable access application to the agency under the FOI Act and that the agency should not be allowed to use delay, obfuscation, exaggeration and prevarication in order to frustrate the purposes of the FOI Act and prevent the complainant from participating in an important aspect of government, namely the agency's calculations for log extraction from public forests, or making the agency accountable to the complainant's members, as members of the public.

### **The agency's response**

48. In response to a number of allegations made by the complainant in its final submission of 25 October 2004, the agency responded as follows:

- The points made by the complainant go over old ground that has been covered in previous responses by the agency.
- There is no comparison in the level of effort required to supply a list of plots, such as was given to the  **Noongar**  Land Council and previously to the complainant, and the information sought in this application. The delay is

because the agency considers the level of effort required to provide the data requested is unreasonable, unlike the  **Noongar**  request which was easily met.

- While the complainant points out that this application should be considered independently of other dealings, it should be noted that the Department (and FMB in particular) has, during the last two years, responded to a number of FOI applications from the complainant, many very promptly (example - the FOI application on plantation yields on the agency file 2003F002903V01) where they are straightforward requests for existing records. Moreover, during this period the Forest Management Branch and the Information Management Branch of the agency have also provided, on request and at no charge, substantial quantities of digital data for the complainant and another party.
- The references made by the complainant to the FOI application with the  **Noongar**  Land Council are quite selective and omit key points of context.
- The agency has never asserted that lists of growth plots do not exist. What the agency said was that a composite list of all data sets (of which growth plots are just one component) does not exist.
- The statements that JARSIM is based on program code some 30 years old, and written in an out-dated language running on obsolete computer systems are not correct: FORTRAN 95 is a widely used scientific language whilst the VMS operating system is not obsolete.
- The intellectual property in the JARSIM model is not related to the software it is written in or the hardware that software runs on but on the methodology and models. It is the modelling that can be copied and applied to other species.
- The reference to the willingness of the agency to assist Dr Davis being "*subsequently reneged without offering any justification for its breach of faith*" is difficult to justify. The agency's file records confirm the series of detailed briefings and documents that were provided by Dr Rayner of the agency to Dr Davis during August 2003.
- The data was not made available to the Ferguson Committee in the form the complainant is seeking. Instead, the workings of the model were explained to the Committee and they subsequently tested its output by providing scenarios for the agency to run.

### **Refusal to deal with an access application**

49. When considering a complaint about an agency's refusal to deal with an access application, my function is to decide, firstly, whether that agency took reasonable steps to help an access applicant to change the application to reduce the amount of work needed to deal with it and, secondly, whether, after taking those steps, the agency was justified in deciding that the work involved in dealing with the application would divert a substantial and unreasonable portion of the agency's resources away from its other operations.

50. The first question involves a consideration of the history of the matter between the parties from the date the application was received and includes the nature and degree of assistance offered to the applicant by the agency. The second involves a consideration of the number and kinds of documents involved in the access application, the usual work of the agency and an estimate of the resources that would need to be devoted to the task of dealing with the application in accordance with the statutory requirements of the FOI Act.

### **Consideration**





51. Having considered the history of this matter and, in particular, the advice obtained from individual agency officers, including the A/Director, Sustainable Forest Management, the Manager, Forest Management Branch, Manager Corporate Information; the agency's FOI file; and other information and documents provided by the agency and the complainant, I am satisfied that the agency has taken reasonable steps to assist the complainant to change its access application so that the agency could deal with it. In particular, as referred to in [paragraph 21](#) above, after receipt of the complainant's access application the agency made a number of attempts to assist the complainant to change the access application so that the work involved to deal with the application was reasonable.

52. From the outset, the agency described to the complainant why it was of the view that the scope of the application was too broad. In particular, the agency described the large volume of the data it holds which falls within the scope of the access application and the amount of work that it believes would be required to deal with such a large access application. The agency also attempted to satisfy the applicant's request by providing other information relating to the request in writing and by oral briefing sessions.

53. Although the complainant clarified and amended the scope of its access application and participated in the negotiations with the agency, the actual scope of the application was not sufficiently reduced and it continues to seek more detailed information from the agency. Each time the agency provided information in an attempt to satisfy the application, the complainant remained dissatisfied and sought further explanations and documents from the agency. Having exhausted all attempts to satisfy the application by negotiation, the agency remains of the view that to deal with the reduced application would still involve a substantial and unreasonable diversion of its resources from its core work.

54. Based on the information provided to me by the agency, it appears that most of the information that the complainant initially sought, and the information described in its amended application, is not currently contained within discrete documents held by the agency. The right of access created by the FOI Act is a right of access to existing documents, as defined, not access to information *per se*. In the case of electronically-stored information, access can be given by way of a written expression of the information in the form in which it is commonly available in the agency or, if there is no such common form, then in a form no less comprehensible that could be made available to the persons in the agency.

55. In this case, it appears that the main issue in dispute relates to the agency's refusal to undertake the work involved in providing information extracted from many documents including its electronic database in order to create documents containing the information sought by the complainant.

56. I have considered the complainant's submission that the agency dealt with a similar application by the  **Noongar**  Land Council and, consequently, should be able to deal with this application. However, I accept the agency's explanation that this is not a direct comparison because the  **Noongar**  Land Council matter was much smaller in scale, being limited to a listing and a map of a specific plot in the Jarrah dominant forest, and the data for that task was in an accessible form and readily available. In addition, that matter did not involve the provision of calculations and working notes but was limited in scope to the listing and map.

57. By contrast, the complainant seeks information that would draw on data held in different forms and in diverse areas of the agency, some of which is not readily available. Moreover, the complainant is also seeking access to all calculations, explanations of the models used by the agency and the program data for the various electronic tools used for those calculations.

58. The agency advises that, in any event, it successfully negotiated with the applicant in the **← Noongar →** Land Council matter to deal with its request outside the FOI Act. As a result the agency agreed to charge only a token sum based on 10 hours' work rather than the total costs calculated for the 45 hours that were actually taken to deal with that matter. In the present case, the agency advises that a conservative estimate of the time required to deal with this application would be 240 hours and estimates the costs to be about \$7200.

59. The agency submits that, in principle, it is willing to provide the complainant with the kind of information that it seeks outside the FOI process and it has done so in the past. However, the agency also submits that it is constrained by the time available to put into generating the data given the pressing need over the last three years to develop the Forest Management Plan ("the FMP") and now the significant workload involved in implementing the FMP.

60. The agency further submits that its willingness to put time and resources into generating the requested data for the complainant is tempered by the time and money that has been put into the Independent Panel of six scientists ("the Ferguson Panel") set up by the Conservation Commission to review the data and methodology for the calculation of sustained yield for the FMP. Although the complainant contends that the Ferguson Panel's reports have not been made public, I am satisfied that all relevant documents prepared by the Ferguson Panel - the draft Proposed Forest Management Plan (July 2003), an explanatory paper to accompany the Forest Management Plan (September 2003) and the final Forest Management Plan (December 2003) - have been published and are available from the agency's website.



61. In response to the complainant's claim that the data it has requested was made available to the Ferguson Panel, the agency advises that this was not the case and says:

*"data was not made available to the Ferguson Committee in the form the Conservation Council is seeking. Instead, the workings of the model were explained to the Committee and they subsequently tested its output by providing scenarios for CALM to run."*

62. I have examined the Ferguson Reports which describe the review methodology used by the Independent Panel. From my consideration of those documents, I understand that its review was a "system based" review, rather than a full 'reconstruction' review involving large amounts of base level data. The Executive Summary in the Stage 3 Review Report notes: *"The Panel examined the process used in modelling and simulating sustained yield and concluded that they were robust."*

63. From my examination of the Ferguson Reports, there is no indication that the Panel ever trawled through, or intended to trawl through, the vast amounts of base level data held by the agency in an effort to reconstruct the calculation made by the agency. In light of that, I accept that the data requested by the complainant was not provided to the Ferguson Panel.

64. With regard to the complainant's claim that the information about its modelling is not commercially sensitive because the agency has previously offered to assist the complainant to understand the methodology used to arrive at a figure for jarrah sawlogs, the agency advises that these two issues are quite different. For example, I understand that the agency's reference to 'modelling' is a reference to giving detailed written descriptions of the various models applied in the calculation process, which is not the same as providing a verbal briefing on how the agency used various models, without giving any formula or other tools used in the calculation process.

65. I have considered the agency's estimates of the time and resources that would be needed to deal with the complainant's application and the information which the agency has provided to me in support of those estimates. I am satisfied that the  **Noongar**  Land Council matter is not comparable to this application and that the scope of each application is quite different.

66. In view of the large amount of data and the accessibility of that data, I am satisfied that the estimates of time and resources set out in [paragraphs 33-35](#) are not far-fetched and that a total of 240 hours to deal with the complainant's application is not unreasonable.

67. The agency advises that the FMB has 65 staff of which only 6 have the specialist technical skills and knowledge to deal with this application. The agency has one officer whose duties include dealing with FOI applications. That officer dealt with 18 applications last year, in addition to many other requests for information which were dealt with outside the FOI Act.

68. The agency has provided me with an explanation of the duties and current work priorities of those staff, in the context of the implementation of the approved Forest Management Plan. On the information before me, I accept that those tasks are of a high priority to the agency, among others.

69. Based on the above, I am satisfied that most of the information requested by the complainant is not contained in existing documents and is not available in a common or accessible form in the agency. I also accept that the time and resources required to deal with the complainant's access application, whether or not documents exist, would be significant in the context of the agency's overall operations.

70. The agency does not have unlimited time, money and resources such that it can spend limitless time dealing with access applications and requests for information not contained in documents. It appears to me that for the agency to deal with the complainant's application in its present form would divert a substantial amount of its resources away from its other operations.

71. Further, given the time and resources already expended by the agency in dealing with the complainant's previous requests for information; that most of the information it seeks is not readily accessible for the reasons given above; that there is a mechanism in place for reviewing the data and methodology; and that the Panel's reports are made public, I consider that the portion of the agency's resources that would be required to be diverted from its other operations for it to deal with the complainant's application would be unreasonable.

72. It appears to me that the agency has gone to considerable lengths in an attempt to give

the complainant as much information as possible over a long period of time at little or no cost to the complainant.

**Conclusion**

73. In light of the above, I find the agency's decision to refuse to deal with the complainant's access application under [s.20](#) of the FOI Act is justified.

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