

**OFFICE OF THE INFORMATION  
COMMISSIONER (W.A.)**

**File Ref: F2009264  
Decision Ref: D0022010**

Participants:

**Alannah Joan Geraldine  
MacTiernan**  
Complainant

- and -

**Department of the Premier and  
Cabinet**  
Respondent

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – documents relating to Oakajee Port and Rail State Development Agreement – clause 8(1) – scope of exemption – whether disclosure would be breach of a contractual obligation of confidence – whether confidentiality clause must be disclosed – whether improper purpose or intent to frustrate FOI Act – scope of obligation of Information Commissioner on external review – limits on exemption – clause 8(3).

*Freedom of Information Act 1992 (WA)*: sections 10, 72, 74, 76; Schedule 1, clauses 1(1), 4(3), 8(1), 8(2), 8(3), 8(4).

*Re Speno Rail Maintenance Australia Pty Ltd and The Western Australia Government Railways Commission and Another* [1997] WAICmr 29

*Re BGC (Australia) Pty Ltd and Fremantle Port Authority* [2002] WAICmr 23

*BGC (Australia) Pty Ltd v Fremantle Port Authority and Anor* (2003) 28 WAR 187

## DECISION

The decision of the agency to refuse access to the disputed document is confirmed. The disputed document is exempt under clause 8(1) of Schedule 1 to the *Freedom of Information Act 1992*.

Sven Bluemmel  
INFORMATION COMMISSIONER

21 January 2010

## REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of the Premier and Cabinet ('the agency') to refuse Hon Alannah MacTiernan MLA ('the complainant') access to a document under the *Freedom of Information Act 1992* ('the FOI Act').

## BACKGROUND

2. The State Government proposes to develop a new deepwater port and open-access rail line at Oakajee, 25 kilometres north of Geraldton ('the Project'). Information publicly available on the Department of State Development's website (at <http://www.dsd.wa.gov.au/6616.aspx>) provides:

*"The port and rail project involves direct infrastructure expenditure of approximately \$3.5 billion. This involves private sector financed private use infrastructure at the port with the State and Commonwealth Governments funding common use infrastructure.*

*On 20 March 2009 the Western Australian Government signed the...Oakajee Port and Rail State Development Agreement...with Oakajee Port and Rail, Murchison Metals, Crosslands Resources and Mitsubishi Development. The State Development Agreement appoints OPR on an exclusive basis as the infrastructure provider for the port and provides for an open-access rail line servicing northern mid-west iron ore mines".*

3. On 9 April 2009, the complainant applied to the agency under the FOI Act for access to the following document:

*"...The Development Agreement with Oakajee Port and Rail Pty Ltd signed on the 20 March [2009].*

*This request includes all attachments and appendices to this agreement."*

4. On 15 May 2009, the agency advised the complainant that access to the requested document was refused on the ground that it is exempt under clauses 1(1), 4(3) and 8(1) of Schedule 1 to the FOI Act.
5. By letter dated 28 May 2009, the complainant sought internal review of the agency's decision. On 11 June 2009, the agency notified the complainant that the initial decision to refuse access was confirmed. Subsequently, on 6 July 2009, the complainant applied to me for external review of the agency's decision.

## REVIEW BY INFORMATION COMMISSIONER

6. Following the receipt of this complaint, I required the agency to produce to me the original of the disputed document, together with the agency's FOI file maintained in respect of the complainant's application.
7. From the information on the agency's FOI file, it appears that due to restricted internal access to the disputed document, the agency's decision-makers based their respective decisions that the disputed document is exempt under clause 8(1) not on the confidentiality clause contained in the disputed document but on a confidentiality provision contained in a related document. Having examined the original of the

disputed document - which I required the agency to produce to me pursuant to my power under s.75(1) of the FOI Act - I have considered the terms of the confidentiality provision in that document and whether that document is exempt under clause 8(1). In my view, this matter highlights the importance of agencies' decision-makers examining for themselves the originals of the documents upon which they are making a decision about access under the FOI Act.

8. On 22 September 2009, after considering the information then before me, including the disputed document, the agency's FOI file and information provided by the complainant, I wrote to the parties setting out my preliminary view of the complaint. It was my preliminary view that the disputed document is exempt under clause 8(1). In light of my preliminary view, I did not need to consider whether the disputed document is also exempt under clauses 1(1) or 4(3), as claimed by the agency.
9. I invited the complainant to provide me with further submissions by 7 October 2009. The complainant sought an extension of time in which to do so and subsequently provided me with submissions by letter dated 16 November 2009.

### **THE DISPUTED DOCUMENT**

10. The disputed document is the State Development Agreement for the Project dated 20 March 2009 ('the Agreement').

### **CLAUSE 8 – CONFIDENTIAL COMMUNICATIONS**

11. Clause 8 of Schedule 1 to the FOI Act, so far as is relevant, provides:

*“(1) Matter is exempt matter if its disclosure (otherwise than under this Act or another written law) would be a breach of confidence for which a legal remedy could be obtained.*

*(2) ...*

#### ***Limits on exemption***

*(3) Matter referred to in clause 6(1)(a) is not exempt matter under subclause (1) unless its disclosure would enable a legal remedy to be obtained for a breach of confidence owed to a person other than –*

*(a) a person in the capacity of a Minister, a member of the staff of a Minister, or an officer of an agency; or*

*(b) an agency or the State.*

*(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest”.*

12. The scope and meaning of the exemption in clause 8(1) was considered by the former Information Commissioner ('the former Commissioner') in *Re Speno Rail Maintenance Australia Pty Ltd and Another and The Western Australia Government Railways Commission* [1997] WAICmr 29 and in *Re BGC (Australia) Pty Ltd and Fremantle*

*Port Authority* [2002] WAICmr 23. The former Commissioner considered that the exemption in clause 8(1) applies to documents if their disclosure would give rise to a cause of action for breach of a common law obligation of confidence, such as a breach of a contractual obligation of confidence, for which a legal remedy may be obtained. I agree with that view.

### **The agency's submissions**

13. The agency's submissions are set out in its initial decision dated 15 May 2009 and its internal review decision dated 11 June 2009. I have summarised those submissions insofar as they relate to clause 8(1), as follows:

- The parties to the Agreement must not disclose any unpublished information in connection with the Agreement.
- Disclosure of any part of the Agreement, including the State's obligations, would be a breach of contractual obligation and such a breach may be a breach of confidence for which a legal remedy could be obtained by Oakajee Port and Rail Pty Ltd against the State.
- All of the information contained within the Agreement is covered by the confidentiality provision contained in that document.
- The exemption in clause 8(1) is not limited by a public interest test and the limit on exemption in clause 8(3) does not apply.

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

14. The complainant's submissions are set out in her application for internal review dated 28 May 2009; in her application for external review dated 1 July 2009; and in her letter to me dated 16 November 2009. I have summarised those submissions, insofar as they relate to clause 8(1), as follows:

- While the justifications advanced in the agency's decision may apply to some clauses of the Agreement, they do not apply to the whole document. There is no case advanced to withhold the clauses in the Agreement that relate to the State's obligations.
- As the confidentiality clause has not been disclosed, it is not possible to judge whether disclosure of the Agreement would be a breach of confidence for which a legal remedy could be obtained.
- The fact that the confidentiality clause has been drawn so broadly to preclude even the revelation of government obligation is evidence of improper purpose and attempts to frustrate the statutory provision. In contrast to *BGC (Australia) Pty Ltd v Fremantle Port Authority and Anor* (2003) 28 WAR 187, this is not a standard commercial arrangement between two commercial entities. The use of an "extremely broad ranging" confidentiality clause relating to government obligations would have only been designed to protect government and not commercial interests. Although the Supreme Court in the *BGC* case said that the

person asserting that the scope of a confidentiality clause inserted in a contract was designed to frustrate or evade a statutory obligation must prove that assertion, the Supreme Court also made it clear that a decision-maker is obliged to review this if anything casts doubts on the usual presumptions of good faith and regularity.

- As a matter of policy, the Government should not be allowed to undermine the FOI Act by inserting such a provision in any contract it wishes to screen from the public.
- The Information Commissioner is obliged to call for other documents which may throw light on transactions, in particular the legal advice and Departmental notes that surrounded the preparation of the Agreement and the inclusion of the confidentiality clause.
- As \$700 million of taxpayers' funds are proposed to be expended pursuant to the Agreement, it is in the public interest for the Agreement to be disclosed to ascertain at least the extent of the State's obligations.

### Consideration

15. I have examined the Agreement. It is an executed agreement between the State and six private companies. It contains a confidentiality clause that binds each of the parties to the Agreement to keep certain specified information confidential. The confidentiality clause contains a number of exceptions to its terms but, based on the information before me, none of those exceptions appears to apply in this case.
16. I am satisfied that the confidentiality clause imposes broad obligations of confidence on all of the parties to the Agreement. In my view, the obligation of confidentiality extends to all information in the Agreement including the confidentiality clause itself. I am also satisfied that disclosure of the Agreement by the agency would be a breach of a contractual obligation of confidence for which a legal remedy could be obtained by the other parties to the Agreement.
17. I do not accept the complainant's submission that some clauses, such as those that relate to the State's obligations, are not covered by the confidentiality clause. Having examined the confidentiality clause in the Agreement, I am satisfied that it applies to the whole of that document.
18. Section 76(5) of the FOI Act requires me to include in my decision on a complaint the reasons for that decision, the findings on any material questions of fact underlying those reasons and reference to the material on which those findings were based. In addition, s.76(8) of the FOI Act requires my decisions to be published "*...in order that the public is adequately informed of the grounds on which such decisions are made.*" However, section 74(1) of the FOI Act requires that I ensure that exempt matter is not disclosed during the course of dealing with a complaint. Further, section 74(2) places an obligation on me "*...not to include exempt matter... in a decision on a complaint or in reasons given for the decision.*"

19. In my view, the obligation not to disclose exempt matter extends to the disclosure of matter claimed to be exempt by an agency. As I have said, I consider that, in this case, the confidentiality clause applies to the whole of the Agreement, including the confidentiality clause itself. As the agency claims that the Agreement is exempt under clause 8(1), I consider that I would be in breach of my statutory obligations if I were to disclose the terms of the confidentiality clause in the Agreement.
20. In relation to the complainant's submission that it is not possible to judge whether disclosure of the document would be a breach of confidence for which a legal remedy could be obtained because the confidentiality clause has not been disclosed, the Supreme Court addressed a similar argument in the *BGC* case. In that case, one of the two grounds of appeal was that the former Commissioner had erred in law in failing to afford the appellant natural justice by setting out in her reasons the text of the confidentiality clause in the relevant agreement, in order that the appellant might assess whether disclosure of the disputed documents would constitute a breach of confidence. Heenan J held that this did not amount to a denial of natural justice and that the confidentiality clause itself was part of the information that could not be disclosed. His Honour noted at [16]:

*“One can readily appreciate that, as with any doubting Thomas, the appellant may not be convinced of the justification for this particular conclusion unless it sees and examines the evidence itself. However, on the basis that the confidentiality clause is itself part of the confidential information which may not be disclosed, that result is inescapable in the light of s 74(1) and (2) and s 90(1) and (3) of the [FOI] Act...”*

21. The obligations imposed by the FOI Act on both the Information Commissioner and (on appeal) the Supreme Court to preserve the confidentiality of exempt matter seek to ensure that matter which is asserted to be exempt from disclosure may be scrutinised and examined by an officer quite independent of the agency claiming the exemption - namely, the Information Commissioner, or on appeal, the Supreme Court. As Heenan J said in *BGC*, also at [16]:

*“That this scrutiny and examination, in order to protect the confidentiality of the material, if the claim is justified, must be conducted without disclosure to the applicant, its counsel or solicitors is one example of these rare instances in which a party to litigation is deprived of full access to all material documents. However, this is not an isolated exception, and policy considerations which have prompted its acceptance, have been recognised in other areas of the law such as the power of a court to inspect documents in respect of which a claim for legal professional privilege has been made, or to scrutinise material relied upon for the issue of a search warrant, or to inspect documents for which a claim of public interest immunity has been asserted, without disclosing them to the party seeking inspection – see *Sankey v Whitlam* (1978) 142 CLR 1 at 46 and 110. None of these examples constitutes any denial of natural justice because, if the claim for privilege, confidentiality or public interest immunity is justifiably made, the party seeking to inspect the documents has no right of any kind to do so. Justice is achieved and the law applied in these situations by an examination of the documents by an independent officer or court acting on settled principles.”*

22. Heenan J also noted at [19]:

*“ ... This same conclusion was reached by Owen J in Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550 at 556-557 where his Honour was faced with a similar situation in that the question of whether the document was exempt depended, to a significant degree, on the contents of the document itself and, therefore, the applicant and his counsel were severely handicapped in the conduct of the appeal by being unable to scrutinise the document. Nevertheless, Owen J concluded that this Court has no discretion to give access to the document and, whether during the hearing or in its reasons for decision, must not disclose exempt information to any person, including a qualified legal practitioner...”*

23. The appellant in *BGC* also submitted – along similar lines to the complainant in this case – that *“...where a confidentiality provision is drafted broadly so as to extend to clothe material which would not conventionally be regarded as confidential, with the character of confidential material as a result of the agreement, thereby attracting an exemption under the [FOI Act], it will defeat the very objects of the Act and should be regarded as void or unenforceable...”*: see [29].

24. In addressing this submission, among others, Heenan J said at [32]:

*“In my view, the starting point...is to identify the nature of the right of access to documents held by agencies which the [FOI Act] establishes. Section 10(1) provides that the right of access is subject to, and in accordance with, the Act. While the legislation and the obvious policy of access to government documents is undoubtedly a guide to the interpretation of the legislation, it is equally plain that the Parliament expressly provided that certain documents or classes of documents were to be exempt from public access...Where, as in the present case, there is an express provision for certain documents which impose obligations of confidentiality to be exempt, there is no possibility of accepting an unqualified proposition that any means of imposing a confidential obligation on an agency not to disclose a document, is necessarily inconsistent with the purposes of the legislation and is, for that reason, unenforceable”.*

I agree with Heenan J’s observations and consider that they apply in this case.

25. The complainant submits that the confidentiality clause has been included in the Agreement for an improper purpose and to frustrate the provisions of the FOI Act. In relation to the similar claim in *BGC*, Heenan J said at [33]:

*“... If it is the intention of the parties to the contract to engage in conduct, or to achieve a purpose which is illegal or which has as its object the frustration or evasion of a statutory obligation such a contract, or the offending provision, will be unenforceable. But it will need to be established that the parties made the contract with the intention of engaging in unlawful conduct, or of avoiding or frustrating a statutory provision. This will require the person asserting that proposition to establish it by requisite proof because the normal inference should be that the parties intended to act lawfully: Meehan v Jones (1982) 149 CLR 571”.*

26. His Honour went on to say at [35]:

*“...the appellant would no doubt contend that its inability to scrutinise the documents in respect of which exemption has been claimed hinders, or prevents, it from ascertaining the existence of any collateral purpose inconsistent with the claim for exemption. No doubt this lack of access may, in many cases, be a handicap but proof of the existence of a collateral or improper purpose, in inducing a document or transaction, otherwise regular on its face, will usually need to come from sources outside the document or documents under challenge. If the appellant seeks to prove that the obligation of confidentiality asserted by these contracts, was the product of some collateral or improper purpose then it would need to do so by adducing evidence to that effect...”*

27. I share Heenan J’s view and I consider that the complainant is required to adduce evidence to prove her assertion that the confidentiality clause has been included in the Agreement for an improper purpose or with intent to frustrate the provisions of the FOI Act.

28. I do not agree with the complainant’s submission that *“...the fact that the [confidentiality] clause has been drawn so broadly to preclude even the revelation of government obligation which can be matters of no commercial sensitivity is prima facie evidence of improper purpose and attempts to frustrate the statutory provision”*. In my view, the inclusion of a broad obligation of confidence in a government contract does not of itself establish either an improper purpose or an attempt to frustrate the provisions of the FOI Act. As the former Commissioner said in *Re BGC* at [19]:

*“The FOI Act does not prevent the inclusion of a confidentiality clause in a contract to protect confidential information from disclosure. There may be good reasons why such information should be withheld. However, if the use of confidentiality clauses in such contracts were to the effect of defeating the objects and intent of the FOI Act, as the complainant claims, then it is the responsibility of the Parliament of Western Australia to change the legislation, if more transparency is required in the dealings of public sector agencies. When dealing with complaints, my role is to determine the facts and to apply the law as I find it...”*

29. I agree with the former Commissioner’s view. In relation to the complainant’s submission that the Government should not be allowed to undermine the FOI Act by including confidentiality provisions in contracts of this type, I agree with the former Commissioner’s view in *Re BGC* that it is the responsibility of Parliament to amend the FOI Act if more transparency is required in the dealings of Government. As the former Commissioner said above, my role is to determine the facts and to apply the law as I find it, which I have done on this occasion.

30. Although I accept the complainant’s submission that the Agreement is not a standard commercial arrangement between two commercial entities because the State is a party to the Agreement, it is nonetheless a commercial agreement. Based on my experience, the confidentiality clause in the Agreement appears to be no broader than is the case in most standard commercial agreements.

31. In the *BGC* case, Heenan J discussed the obligations on a decision-maker, including the Information Commissioner, in cases where there are grounds to suspect the genuineness or authenticity of asserted grounds for exemption and said at [37] - [41]:

*“...if there were a document which contained a confidentiality clause purporting to prohibit disclosure of its contents or other related documents of a kind which would give rise to an exemption under cl 8(1) of Sch 1 but there were some reason to suspect that the document was a forgery or otherwise not genuine, then that issue would need to be considered by the agency and decided in order to justify a claim that the material was exempt on that ground.*

*For the same reasons, on any review of a decision made by an agency to refuse access on the grounds that the document or documents were exempt on specified grounds, the reviewing authority, whether on an internal review under s 43, an external review by the Information Commissioner under s 76, or, indeed, on an appeal to this Court under s 85, the reviewing body, or the appeal court, would need to consider and determine any issue which properly arose which questioned the genuineness of the grounds for the asserted exemption, even if that meant scrutinising facts or circumstances beyond the contents of the document or documents themselves. It is probable, that such an enquiry into the genuineness of the grounds for the asserted exemption will, in most cases, require little more than the decision-maker being satisfied that the records are authentic, have not been tampered with and have been produced and recorded in good faith by persons whose integrity is not doubted. However, if anything arises to cast doubts upon the usual presumptions of good faith and regularity relating to the preparation and content of such documents and, certainly, if there are any grounds to suspect the genuineness and authenticity of the records, then the decision-maker would be obliged to consider those matters and decide upon them as part of the role of determining the access or review application. This may, perhaps, entail the decision-maker calling for other documents which may throw light on the transaction which is the subject of the access application or interviewing personnel or making other necessary enquiries...*

...

*... While I have indicated that a responsibility for determining the genuineness of an asserted ground of exemption will arise on a decision-maker, whether an agency or review officer, there must be some reason to prompt this in the ordinary case in order to query the presumption of regularity which I have already mentioned. If there is anything in the particular application to raise doubts or concerns on these grounds then that will need to be addressed but, in the absence of such grounds, I consider that the responsibilities of the agency, any reviewing officer and the Information Commissioner are discharged by an examination of the materials which accepts them at face value”.*

32. The complainant submits that “...the drawing of the confidentiality clause so broadly that even the confidentiality clause cannot be revealed...found the obligation upon [me] to “call for other documents which may throw light on [the] transaction...”. I do not accept that submission. Following the *BGC* case, I consider that if there is anything in the material before me which casts doubt upon the usual presumptions of good faith and regularity relating to the preparation and content of the Agreement, or which gives

rise to any grounds to suspect the genuineness and authenticity of the grounds for exemption under clause 8(1), I am obliged to determine that issue.

33. In the present instance, apart from the complainant's assertions, there is nothing in the material before me which, in my view, casts doubt upon the usual presumptions of good faith and regularity relating to the preparation and content of the Agreement. Nor is there anything in the material before me which gives rise to any grounds to suspect the genuineness and authenticity of the grounds for exemption under clause 8(1). Accordingly, I consider that my responsibilities in this matter are discharged by my examination of the material before me, including the Agreement, which I accept on face value.
34. With regard to the complainant's submission that disclosure of the Agreement is in the public interest, the exemption in clause 8(1) is not subject to a public interest test. The public interest limit on exemption in clause 8(4) applies to the exemption in clause 8(2) but not to the exemption in clause 8(1). Accordingly, the question of whether disclosure of the Agreement is in the public interest is not a matter that I have discretion to decide. Further, as Heenan J noted in *BGC* at [8], I do not have the power on external review to make a decision to the effect that access is to be given to an exempt document (s.76(4)). That is, once I am satisfied on the information before me that a document is exempt, I have no discretion to decide that access should be given to it.

***Limit on exemption – clause 8(3)***

35. Clause 8(1) is subject to the limit on exemption in clause 8(3). However, in the present case, I agree with the agency's submission that clause 8(3) does not apply, as the Agreement does not consist of matter of the type referred to in clause 6(1)(a).

**CONCLUSION**

36. Having considered all of the information before me, I am satisfied that disclosure of the Agreement would be a breach of a confidence for which a legal remedy could be obtained. Accordingly, I find that the Agreement is exempt under clause 8(1) of Schedule 1 to the FOI Act and confirm the agency's decision to refuse access to it.
37. In light of that finding, it is unnecessary for me to consider whether the Agreement is also exempt under clause 1(1) or clause 4(3), as claimed by the agency.

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