

Decision D0022013 - Published in note form only

Re Farina and Department of Water and Others [2013] WAICmr 2

Date of Decision: 31 January 2013

Freedom of Information Act 1992: Schedule 1, clauses 4(2) and 4(3)

In March 2011, the Hon. Adele Farina MLC ('the complainant') applied to the Department of Water ('the agency') under the *Freedom of Information Act 1992* ('the FOI Act') for access to certain documents concerning the then proposed Osmington coalmine in Margaret River, Western Australia. In a media statement issued on 7 February 2012, the Minister for Environment confirmed that the State Government had rejected the project in respect of that proposed coalmine.

The agency initially refused the complainant access to all of the requested documents, under s.23(2) of the FOI Act, without identifying any of them. The agency claimed that it was apparent from the nature of the documents, as described in the complainant's access application, that those documents were exempt under clause 3 (personal information) and clause 4 (business or commercial information) of Schedule 1 to the FOI Act.

The complainant applied for internal review of the agency's decision. On 16 August 2011, the agency varied its original decision. It gave the complainant access to edited copies of some documents, after deleting some information under clause 3. It refused access to other documents on the ground they were exempt under clause 4(2) of Schedule 1 to the FOI Act, noting that one third party, on behalf of several third parties, had objected to the disclosure of those documents.

On 26 August 2011, the complainant applied to the Information Commissioner for external review of the agency's decision to refuse her access to documents claimed to be exempt under clause 4(2). Following receipt of the complaint, the Commissioner obtained the originals of those documents – which consisted of six documents – together with the agency's FOI file in relation to the complainant's access application.

In the course of the Commissioner's office dealing with the matter, two third parties, Vasse Coal Management Pty Ltd ('VCM') and LD Operations Pty Ltd ('LDO'), were each joined as a party to the complaint, with LDO further acting as the agent for VCM. LDO, on behalf of VCM, consented to the disclosure of three of the six documents in dispute. As a result, the agency withdrew its claims for exemption for those three documents and gave the complainant edited copies of them, which the complainant accepted. LDO objected to the disclosure of the other three documents remaining in dispute. It provided the Commissioner with submissions to the effect that those documents are exempt under clauses 4(2) and 4(3) of Schedule 1 to the FOI Act. Those three documents ('the disputed documents') comprise the '*Vasse Coal Project Exploration Report for 2005*' and its appendices.

After examining all the material before him including the disputed documents, in December 2012, the Commissioner wrote to the parties setting out his preliminary view of the complaint. It

was his preliminary view that the disputed documents were not exempt under clauses 4(2) or 4(3) of Schedule 1 to the FOI Act.

The parties were invited to accept the Commissioner's preliminary view or provide further submissions to him in support of their respective positions. The Commissioner also sought the complainant's advice as to whether or not she sought access to a small amount of commercial or business information about third parties other than VCM and LDO contained in the disputed documents.

The agency accepted the Commissioner's preliminary view and withdrew its exemption claims. LDO did not accept the Commissioner's preliminary view and made further submissions, including on behalf of VCM. As the complainant did not dispute the deletion of the small amount of commercial or business information about third parties other than VCM and LDO from the disputed documents, the Commissioner considered the agency was entitled to delete that information before giving the complainant any access to the disputed documents.

The Commissioner reviewed all of the information before him and was not dissuaded from his preliminary view. On the information before him, the Commissioner was not satisfied that the disputed documents have a commercial value to LDO, VCM or any other party, nor that the disclosure of the disputed documents could reasonably be expected to destroy or diminish the commercial value of that information, if any, as required by clause 4(2). The Commissioner was satisfied that, if disclosed, the disputed documents would reveal information about the business and commercial affairs of VCM and a number of other third parties. The requirements of clause 4(3)(a) were therefore satisfied. However, the Commissioner was not persuaded, on the information before him, that disclosure of the disputed documents could reasonably be expected to have an adverse effect on the business or commercial affairs of LDO, VCM or any other person, as required by clause 4(3)(b).

Accordingly, the Commissioner set aside the agency's decision and, in substitution, found that the disputed documents were not exempt under clause 4(2) or clause 4(3) of Schedule 1 to the FOI Act.