

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

**File Ref: F2015107
Decision Ref: D0232015**

Participants:

Robert Alexander
Complainant

- and -

Department of Fisheries
Agency

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – access to an edited copy of a document – document relating to a ‘Review of Access and Allocation Panel Advice for the Developing Octopus Fishery’ – clause 3(1) – personal information – clause 8(2) – confidential communications – whether disclosure of information would reveal information of a confidential nature obtained in confidence and could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency – whether complainant can expand the scope of the access application upon external review – section 74(1) – requirement not to disclose exempt matter when dealing with a complaint.

Freedom of Information Act 1992: sections 30, 74(1) and 102(1); Schedule 1, clauses 3(1) and 8(2)

Fish Resources Management Act 1994

DPP v Smith [1991] 1 VR 63

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550 at 556-557

Re Kimberley Diamond Company NL and Department for Resources Development [2000] WAICmr 51

Re Leighton and Shire of Kalamunda [2008] WAICmr 52 at [72]

Re West Australian Newspapers Ltd and Western Power Corporation [2005] WAICmr 10

Ryder v Booth [1985] VicRep 86; [1985] VR 869, at 872 per Young J

DECISION

The agency's decision is confirmed. I find that the disputed information is exempt under clause 8(2) of Schedule 1 to the *Freedom of Information Act 1992*.

Sven Bluemmel
INFORMATION COMMISSIONER

10 December 2015

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Fisheries (**the agency**) to give Mr Robert Alexander (**the complainant**) access to an edited copy of a document, under the *Freedom of Information Act 1992* (**the FOI Act**).

BACKGROUND

2. On 10 October 2014 the complainant applied to the agency under the FOI Act for access to documents concerning:

2014 Alistair Bryant report on the octopus allocation process to move forward to an interim managed fishery.

3. The complainant paid the \$30 fee payable under the FOI Act for applications for non-personal information.
4. By letter dated 7 November 2014 the agency asked the complainant to reduce the scope of the access application. The complainant agreed that the agency could:
 - delete all third party personal information;
 - exclude background documents that the agency had previously provided to the complainant; and
 - exclude documents submitted to the agency on the complainant's behalf.
5. On or about 12 November 2014 by email the complainant also agreed that the agency could delete all commercial information from the requested documents.
6. By notice of decision dated 28 November 2014 the agency decided to provide the complainant with edited access to Documents 1 and 5, on the basis that some information is exempt under clauses 3(1) and 8(2); and refuse access to Document 2 on the basis it is exempt in full under clause 8(2).
7. On 19 December 2014 the complainant applied for internal review of the agency's decision. By letter dated 28 January 2015 the agency confirmed its decision.
8. By letter dated 24 March 2015 the complainant applied to me for external review of the agency's decision to provide edited access to Document 1.

REVIEW BY THE INFORMATION COMMISSIONER

9. Following my receipt of this complaint, the agency produced to me a copy of Document 1 (**the disputed document**) together with its FOI file maintained in respect of the complainant's access application.
10. On 24 March 2015 the complainant confirmed to my office that his request for external review was only in relation to the agency's decision to provide edited access to the disputed document.

11. On 17 June 2015 the complainant and agency representatives attended a conciliation conference with my Principal Legal Officer. The matter could not be resolved by conciliation and has been referred to me for determination.
12. On 3 November 2015 my office sought further information from the agency, in particular to clarify which information was deleted from the disputed document on the basis that it is information about third parties and thus out of scope by agreement, and which information was deleted pursuant to being exempt under clause 8.
13. By email dated 10 November 2015 the agency responded and provided my office with a further copy of the disputed document clearly indicating which information has been deleted as outside the scope and which was deleted pursuant to clause 8.

THE DISPUTED INFORMATION

14. The disputed document is titled Review of Access and Allocation Panel Advice for the Developing Octopus Fishery. The agency has deleted certain information that is out of scope and other information that it claims is exempt pursuant to clause 8 of Schedule 1 to the FOI Act.
15. The disputed information consists of some of the information deleted from Document 1 by the agency before providing an edited copy to the complainant.
16. Section 74(1) of the FOI Act requires the Information Commissioner to ensure that exempt matter is not disclosed during the course of dealing with a complaint and section 74(2) places a further obligation on the Commissioner not to include exempt matter in a decision on a complaint or in reasons given for a decision. The Supreme Court in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 556-557 recognised the difficulties faced by complainants and the constraints placed on the Commissioner by such provisions in the FOI Act but took the view that those provisions should be construed strictly according to their tenor.
17. For the avoidance of doubt, and bearing in mind that the complainant has a copy of the disputed document, edited in a way that does not distinguish between information that has been deleted because it is out of scope and information that has been deleted because the agency claims it is exempt, I have identified the information which the agency claims is exempt under clause 8 as follows:

Page 1	line 1 words 7-18 inclusive
Page 2	line 6 words 6-18 inclusive
	line 7
	line 8 words 1-6 and 9-15 inclusive
	lines 9-12
	line 13 word 1
	line 23 words 1-6 and 10-17 inclusive
	line 24
	line 25 word 1
Page 5	line 2 words 2-11 inclusive
Page 6	line 4 words 6-10 and 14-15
	line 5 words 1-13
	line 6 words 1-5 inclusive

Pages 7-13 inclusive

Page 14 paragraphs 1-5 inclusive

Page 15 line 8 words 3-13 inclusive

line 9

line 10 words 1-3 and 7-16 inclusive

line 12 words 5-17 inclusive

line 13 words 1-13 inclusive

line 15 word 11.

18. The rest of the deleted information in the document is outside scope and has not been considered further.

Onus of proof

19. Under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision to refuse access to the requested information is justified. The applicant is not required to establish that he is entitled to access the requested information; it is up to the agency to make its case for exempting information from disclosure and to demonstrate that it has established the requirements of any exemption in its notice of decision.

The agency's notices of decision

20. Section 30 of the FOI Act sets out the details that must be included in an agency's notice of decision given to an access applicant. If an agency decides to refuse access to a document, section 30(f) of the FOI Act provides that the agency must include the following details in its notice of decision:
- the reasons for the refusal;
 - the findings on any material questions of fact underlying those reasons; and
 - reference or references to the material on which those findings were based.
21. In this case, neither the agency's initial decision nor the internal review decision complied with the requirements of section 30(f). Apart from citing the exemption clause in respect of the document for which exemption was claimed and giving very brief reasons for its decision, neither decision explained how the requirements of the exemption provision were satisfied.
22. The obligation to provide applicants with notices of decision that contain all of the information prescribed by section 30 is intended to ensure that the true basis of a decision is clearly explained. In my view, an applicant who receives a decision that complies fully with section 30(f) of the FOI Act is less likely to seek external review of that decision.
23. Unless agencies explain *why* the exemptions they have claimed apply, it is unlikely that applicants will have a clear understanding of the reasons why access is refused or be in a position to provide me with relevant submissions in relation to the agency's decision.

THIRD PARTY INFORMATION

24. The agency submits that the complainant agreed to all third party information being deleted from the disputed document. I have reviewed the agency's FOI file. I note that on 8 November 2014 the complainant agreed to reduce the scope of his application to exclude all third party personal information. Subsequently, on or about 12 November 2014, the complainant also agreed to exclude all third party commercial information. It appears that the complainant is now seeking to reintroduce third party information to the scope of his application as he was not satisfied with the editing of the document that was provided to him.
25. I consider that, where a complainant has agreed to a reduction in scope with the agency during the application process, they are not able to withdraw from that agreement when the matter is before me on external review: see *Re Leighton and Shire of Kalamunda* [2008] WAICmr 52 at [72]. In my view, to allow a change in scope would undermine the effective operation of the FOI Act.
26. I further note that, in his submission dated 9 December 2015, the complainant requested information provided to the inquiry by a third party, prior to the completion of the disputed document. Plainly this submission seeks to expand the scope further. For the reasons set out above, I consider that I should not allow an expansion of the scope in these terms, and I have not done so.
27. In accordance with the complainant's negotiations and agreed position with the agency, I consider that third party personal and commercial information is not within the scope of the application.
28. In its notice of decision and the documents provided to the complainant, the agency did not identify which information was deleted as being third party information and which was deleted as being exempt under clause 8(2). The majority of the disputed information appears to have been deleted under clause 8(2). I now turn to consider the requirements for an exemption under clause 8 to be established.

CLAUSE 8 – CONFIDENTIAL COMMUNICATION

29. Clause 8(2) of Schedule 1 to the FOI Act, so far as is relevant, provides that
 - (2) *Matter is exempt matter if its disclosure –*
 - (a) *would reveal information of a confidential nature obtained in confidence; and*
 - (b) *could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*

Limits on exemption

- (3) ...
- (4) *Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest.*

30. There are two parts to the exemption in clause 8(2). To establish a prima facie claim for the exemption under clause 8(2) the requirements of both paragraphs (a) and (b) must be met.

The complainant's submissions

31. The complainant's submissions are set out in his letter to me seeking external review dated 24 March 2015 and his response to my preliminary view dated 8 December 2015. In summary the complainant submits as follows:
- the complainant was told that only personal information would be deleted from the disputed document;
 - the edited copy of the report as provided contained eight blank pages;
 - as a party involved in the report the complainant considers that he will be impacted by the decisions in the report; and
 - the complainant believes that he should be given access to the report to which he contributed.

The agency's submissions

32. The agency's submissions are set out in its notices of decision dated 28 November 2014 and 28 January 2015. In summary, the agency submits as follows:
- the disputed document was commissioned by the then Director General as part of due diligence following allegations against the agency, the Panel and other industry members that were brought to his attention;
 - the disputed document contains several interviews with third parties as part of the investigation to develop the conclusions and recommendations of the disputed document;
 - the investigator confirmed that he considered the information provided to him was confidential and that he advised interviewees accordingly;
 - *the nature of the comments outlined in the interviews is consistent with people speaking freely in a confidential manner;*
 - *the public release of this confidential information could have legal ramifications for particular industry members. Should this occur, it is reasonable to expect a detrimental impact on the future supply of information of this nature to the agency;*
 - *it is in the public interest of the fishery to ensure that the flow of information of this kind continues; and*
 - *Should any further investigation into this matter take place, it will be highly important for industry members to be able to provide such information to the [agency] or an independent contractor without fear of litigation.*

Consideration

33. The first question is whether disclosure would 'reveal information of a confidential nature'. If information is not in the public domain and is known by a small number or a limited class of persons, it may be concluded that it is inherently confidential.
34. To be considered to have been obtained in confidence, the information must have been both given and received on the basis of either an express or implied understanding of confidence: *Re Kimberley Diamond Company NL and Department for Resources Development* [2000] WAICmr 51. I have reviewed the agency's FOI file and can confirm the agency's submission that the investigator has advised that the interviews conducted for the purpose of creating the disputed document were confidential. The investigator provided written confirmation to the agency that the information given to him during the interviews was confidential and that he advised the interviewees accordingly.
35. The deleted information, particularly pages 7-13 inclusive, consists of notes of interviews conducted on a confidential basis. It is reasonable to assume, in light of the content of those pages, which I have reviewed carefully, that interviewees took part in the investigation on the basis that their contributions would be confidential and not disclosed to others.
36. Deleted information on the other pages, for example on pages 2 and 6, is also information that is, in my view, of a confidential nature obtained in confidence.
37. As I understand it, the inquiry was an independent investigation into certain allegations, with the outcome of the inquiry to be a written report to be provided to the agency's Director General. As stated above, I am satisfied that the persons providing information to the inquiry did so in the clear expectation that their submissions would be treated in confidence.
38. As such, I am satisfied that the deleted information was obtained in confidence and that the agency has satisfied the requirements of clause 8(2)(a) in respect of the disputed information.
39. However, in order to establish the exemption in clause 8, the requirements of paragraph 8(2)(b) must also be met. In my view, paragraph (b) of the exemption in clause 8(2), which provides that matter is exempt matter if its disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency, is directed at the ability of the Government or an agency to obtain similar information in the future. It is not concerned with whether the specific third party will give information of that kind to the Government or to the agency in the future: see *Ryder v Booth* [1985] VicRep 86; [1985] VR 869, at 872 per Young J.
40. I note that the investigation was characterised by the agency as an administrative review and was not undertaken under any provision of the *Fish Resources Management Act 1994* or by any other statutory authority. The investigator had no capacity to compel witnesses to give evidence, but rather, invited people to be interviewed and gave an undertaking that what was said to him would be kept in confidence. I also note that the subject matter of the investigation was contentious and highly contested by

certain parties involved. The subject matter is sensitive, both commercially and personally, to individuals and businesses.

41. Page 16 of the edited copy of the disputed document states:

Although it is clear that the Department and the Panel has acted scrupulously and any decision based upon the recommendation would be defensible in the courts, it is reasonable to predict that the adoption of the Panel's recommendations at this time would have a financially devastating impact on all but [deleted] of the octopus industry.

42. Since there was no statutory obligation on any party to assist the investigation, and the investigator relied upon full and frank disclosure by those people interviewed, in order to complete his task, I consider it more probable than not that the release of the disputed information would impact adversely on relevant individuals' inclination to take part in such investigations in the future. Accordingly, it is my view that disclosure of the disputed information would be likely to prejudice the future supply of such information to the Government or to an agency.
43. Since I consider the disputed information to be exempt under clause 8(2) I then need to consider whether the limit on exemption in clause 8(4) applies in this case.

Clause 8(4)

44. Clause 8(4) provides that matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest.
45. The term 'public interest' is not defined in the FOI Act. In my view, the term is best described in the decision by the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63 at page 65, where the Court said:

The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals.

46. I understand that the complainant has a personal interest in the disclosure to him of the disputed document. However, the public interest is not primarily concerned with the personal interests of the particular access applicant. Rather, the question is whether disclosure of the information would be of some benefit to the public generally, and whether that public benefit is sufficient to outweigh any public interest in the maintenance of a third party's personal privacy.
47. This requires consideration of the factors in favour of and against disclosure and a balancing of the respective factors.
48. This office has consistently expressed the view that it may be contrary to the public interest to disclose deliberative process documents if there is evidence that such disclosure would adversely affect the agency's decision-making process or that disclosure would, for some other reason, be demonstrably contrary to the public

interest: see for example, *Re West Australian Newspapers Ltd and Western Power Corporation* [2005] WAICmr 10.

49. I recognise that there is a public interest in agencies carrying out their deliberations such as this investigation on particular issues without those deliberations being undermined by the disclosure of relevant documents.
50. In favour of disclosure, I consider that there is a public interest in access to information held by government agencies under the FOI Act. That general right of access (subject to the exemptions in the FOI Act) to documents held by State and local government agencies means that the public is no longer required to accept only the information that agencies choose, for whatever reason, to provide: see *Re West Australian Newspapers Limited and Western Power Corporation* [2005] WAICmr 10.
51. I accept that, as a contributor to the report, albeit through an agent engaged by the complainant to represent his interests, the complainant has a strong private and personal interest in the subject matter of the report.
52. I also consider that there is a public interest in agencies being accountable for how they discharge their duties and obligations. However, the complainant has been provided by the agency with an edited copy of the disputed document, which I consider goes a considerable way to satisfying this public interest.
53. In this case I consider that those factors against disclosure outweigh those in favour of disclosure.
54. Accordingly I am not satisfied that disclosure of the disputed information would, on balance, be in the public interest.

CONCLUSION

55. I find that the disputed information is exempt under clause 8(2) of Schedule 1 to the FOI Act and the agency's decision to refuse the complainant access to the above disputed information is justified.
