

**Decision D0302010 – Published in note form only**

***Re Commercial Properties Pty Ltd and City of Bunbury and Another* [2010] WAICmr 30**

**Date of decision: 17 November 2010**

***Freedom of Information Act 1992: sections 6, 33, 69; Schedule 1, clauses 4(2), 4(3)***

In January 2009, Bunbury Developments Pty Ltd applied, on behalf of Commercial Properties Pty Ltd ('the complainant'), to the City of Bunbury ('the agency') under the *Freedom of Information Act 1992* ('the FOI Act') for access to a copy of a particular caveat ('the Caveat') together with a specific agreement ('the Deed') between the agency and Cavera Nominees Pty Ltd ('the third party') in relation to certain land owned by the third party.

The agency identified two documents within the scope of the complainant's application. After obtaining the views of the third party as required by s.33 of the FOI Act, the agency refused the complainant access to the requested documents under clauses 4(2) and 4(3) of Schedule 1 to the FOI Act. The agency confirmed its decision on internal review.

The complainant applied to the Information Commissioner for external review of the agency's decision. The Commissioner obtained the requested documents from the agency together with the agency's file maintained in respect of the complainant's access application. Inquiries made by the Commissioner's office found that a copy of the Caveat is publicly available from the Western Australian Land Information Authority (Landgate) upon payment of a fee. As s.6 of the FOI Act provides that the access procedures under the FOI Act do not apply to documents that are publicly available for purchase, the Commissioner considered that s.6 applied to the Caveat. The complainant accepted the Commissioner's view in this regard and the Caveat was no longer in dispute.

The third party notified the Commissioner that it objected to disclosure of the Deed and was joined as a party to the complaint, under s.69(2) of the FOI Act. The third party made submissions to the Commissioner in support of its claim that the Deed was exempt under clause 4(3). During the external review process, the agency advised the Commissioner that it withdrew its claim that the Deed was exempt under clause 4(2) but maintained its exemption claim under 4(3). Clause 4(3) provides that information about the business, professional, commercial or financial affairs of a person is exempt if its disclosure could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of the kind in question to the Government or to an agency. The exemption is subject to the limits set out in clauses 4(4)-4(7). Clause 4(7) provides that matter is not exempt under clause 4(3) if disclosure would, on balance, be in the public interest.

After considering all of the information before him, the Commissioner provided the parties with a letter setting out his preliminary view of the matter, which was that the Deed was not exempt under clause 4(3). The parties were invited either to accept the Commissioner's preliminary view or to provide him with further submissions in support of their respective positions before the Commissioner finalised the matter by way of a decision.

The agency accepted the Commissioner's preliminary view and withdrew its exemption claim for the Deed. The third party made further submissions to the Commissioner and also consented

to the agency's disclosing an edited copy of the Deed provided certain information, which it claimed to be commercially sensitive and exempt under clause 4(3), was deleted ('the disputed information'). As a result, the agency gave the complainant an edited copy of the Deed, after removing the disputed information, in order to conciliate the matter. After receiving that document, the complainant confirmed that it wished to pursue access to the disputed information. Accordingly, the disputed information was the only information remaining in dispute which required the Commissioner's formal determination.

After considering the third party's further submissions, which included submissions on the public interest, the Commissioner was not dissuaded from his preliminary view. The Commissioner was satisfied that the disputed information - which consisted of information concerning the third party's obligations under the Deed - revealed information about the third party's business, professional, commercial or financial affairs pursuant to clause 4(3)(a). However, the Commissioner was not persuaded on the information before him that there were real and substantial grounds to expect that disclosure of the disputed information could have an adverse effect on the business or commercial affairs of the third party or prejudice the future supply of information of the kind in question to the Government or to an agency, as required by clause 4(3)(b). Accordingly, the Commissioner found that the disputed information was not exempt under clause 4(3) and set aside the agency's decision.

In light of that finding, the Commissioner was not required to consider whether the limits on exemption in clauses 4(4) – 4(7) applied. However, the Commissioner noted that if he were required to consider whether disclosure was in the public interest, in his view, the factors in favour of disclosure outweighed the public interest factors against disclosure in the circumstances of this case.