

Decision D0342011 – Published in note form only

***Re Clayton Utz and Port Hedland Port Authority* [2011] WAICmr 34**

Date of decision: 23 September 2011

Freedom of Information Act 1992: clause 8(1)

In May 2011, Clayton Utz ('the complainant') applied under the *Freedom of Information Act 1992* ('the FOI Act') to the Port Hedland Port Authority ('the agency') for access to an agreement between the agency and a third party. The agency refused the complainant access to the agreement on the ground that it was exempt under clause 8(1) of Schedule 1 to the FOI Act. Clause 8(1) provides that matter is exempt if its disclosure would be a breach of confidence for which a legal remedy could be obtained. The agency confirmed its decision on internal review.

The complainant applied to the Information Commissioner for external review. Following the receipt of the complaint, the agency produced the agreement to the Commissioner together with the agency's FOI file maintained in respect of the access application.

In August 2011, the Commissioner provided the parties with a letter setting out his preliminary view of the complaint, which was that the agreement was exempt under clause 8(1) as the agency claimed. The Commissioner noted that the agreement contained a confidentiality clause that, in his view, applied to the agreement such that its disclosure would be a breach of confidence for which a legal remedy could be obtained.

In response, the complainant submitted that the Commissioner was obliged to investigate whether the confidentiality clause was included in the agreement for the purpose of avoiding the agency's obligations under the FOI Act. The complainant relied on *BGC (Australia) Pty Ltd v Fremantle Port Authority and Anor* [2003] 28 WAR 187 as authority for the principle that there is an obligation on agencies dealing with access applications to consider whether the grounds for an exemption claim are well-founded.

The Commissioner reviewed all of the information before him, including the complainant's submissions and the *BGC* decision. The Commissioner concluded that the principle as set out in *BGC* is that the obligation on agencies (and, on external review, the Commissioner) to investigate whether an exemption claim is well-founded only arises if there are reasons to doubt the legitimacy of that claim. In the present case, the Commissioner considered that there was nothing to cast doubt on the presumption of good faith and regularity in the inclusion of the confidentiality clause in the agreement.

As the Commissioner was satisfied that the disclosure of the agreement to the complainant would be a breach of confidence for which a legal remedy could be obtained, the Commissioner confirmed the agency's decision to refuse the complainant access on the ground that the agreement was exempt under clause 8(1).