

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

**File Ref: F2011083
Decision Ref: D0372011**

Participants:

**West Australian Newspapers
Limited**
Complainant

- and -

**Department of Mines and
Petroleum**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – incident investigation report – clause 12(a) – contempt of court – what comprises contempt of court – whether disclosure would be in contempt of court.

Freedom of Information Act 1992: schedule 1, clause 12(a)

Petroleum Pipelines Act 1969: section 38(b)

Apache Northwest Pty Ltd v Agostini [2009] WASC 225

AMIEU v Mudginberri Station Pty Ltd (1986) 161 CLR 46

Apache Northwest Pty Ltd v Agostini [No 2] [2009] WASCA 231

Re Kobelke and Minister for Planning [1994] WAICmr 5

DECISION

The respondent's decision is confirmed. I find that the disputed document is exempt under clause 12(a) of Schedule 1 to the *Freedom of Information Act 1992*.

Sven Bluemmel
INFORMATION COMMISSIONER

6 October 2011

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Mines and Petroleum ('the agency') to refuse West Australian Newspapers Limited ('the complainant') access to a document under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 9 February 2011, the complainant applied to the agency under the FOI Act for access to:

“... the 470-page report titled *Offshore Petroleum Safety Regulation Varanus Island Incident Investigation authored by Kym Bills and David Agostini*” ('the Report').

3. The Report arose from the agency's investigation into a pipeline explosion that occurred on Varanus Island off the north-west coast of Western Australia on 3 June 2008. Apache Northwest Pty Ltd ('ANPL') and Apache Energy Limited ('AEL') (together 'Apache') hold numerous interests in relation to the exploration and production of oil and gas in the north-west of Western Australia. ANPL is one of three licensees of the pipeline which exploded on Varanus Island on 3 June 2008. AEL is the operator of the gas processing facilities on Varanus Island.
4. The agency prepared a preliminary report into the explosion, which was made public in October 2008. On 8 May 2009, the Minister announced that Mr David Agostini and Mr Kym Bills had been appointed to conduct the final stage of the agency's investigation and prepare the Report. On 27 May 2009, the agency commenced a prosecution against ANPL and the other two licensees of the pipeline, for an offence under s.38(b) of the *Petroleum Pipelines Act 1969*. That action is yet to be heard.
5. On 23 June 2009, Apache brought proceedings in the Supreme Court seeking to restrain the State, Mr Agostini and Mr Bills from providing the Report to the Minister: *Apache Northwest Pty Ltd v Agostini* [2009] WASC 225. In *Agostini*, Apache claimed that, in the preparation and finalisation of the Report, the two officers and the State had breached a duty to afford procedural fairness to Apache. Apache sought declarations and injunctions, including an injunction restraining the Minister from publishing the Report or its contents. Apache's application was dismissed. In *Agostini*, Beech J found, amongst other things, that there was no duty of procedural fairness on the officers or State in the provision of the Report to the Minister but that any decision by the Minister to publish the Report would attract a duty of procedural fairness to Apache.
6. On 14 August 2009, Apache filed an appeal against the decision in *Agostini*, which was heard by the Court of Appeal in *Apache Northwest Pty Ltd v Agostini [No 2]* [2009] WASCA 231. That appeal was also dismissed.

7. With regard to the complainant's application under the FOI Act for access to the Report, the agency notified the complainant of its decision on 20 February 2011, which was to refuse access under 'clause 12(1)' [in fact, clause 12(a)] of Schedule 1 to the FOI Act, on the ground that the Report's release would be in contempt of court.
8. The complainant applied for internal review of the agency's decision and, on 2 March 2011, the agency confirmed its original decision. The complainant applied to me for external review of the agency's decision on 21 March 2011.

REVIEW BY INFORMATION COMMISSIONER

9. Following my receipt of this complaint, and after some discussion with the agency, the agency provided me with a copy of the Report and the original of its FOI file, together with the judgment of Beech J in *Agostini* and an undertaking given by the Minister for Mines and Petroleum ('the Minister') to the Supreme Court, dated 30 July 2009.
10. On 19 September 2011, I provided both parties with a letter setting out my preliminary view of this complaint, which was that the Report was exempt under clause 12(a), as the agency claimed. The complainant was invited to provide me with written submissions by 30 September 2011 or withdraw its complaint. However, the complainant made no further submissions and did not withdraw the complaint.

CLAUSE 12 – CONTEMPT OF PARLIAMENT OR COURT

11. The agency claims that the Report is exempt under clause 12(a) of Schedule 1 to the FOI Act. Clause 12(a) provides:

"Matter is exempt matter if its public disclosure would, apart from this Act and any immunity of the Crown –

(a) be in contempt of court".

12. The expression "*contempt of court*" covers different types of legal wrong that relate to interference with the administration of justice in the courts. The Macquarie Dictionary (fifth edition, 2009) at p.369 provides the following definition of the term: "Law **a.** *disobedience to or open disrespect of, the rules or order of a court or legislature, or conduct likely to prejudice the fair trial of a litigant or an accused person.* **b.** *An act showing this disrespect".*
13. In *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 46, the High Court of Australia made the following observations on contempt of court at [14]-[15]:

"Punishment for contempt serves two functions: (a) enforcement of the process and orders of the court, disobedience to which has been described as 'civil contempt', and (b) punishment of other acts which impede the administration of justice, such as obstructing proceedings in court while it is sitting or publishing comments on a pending case ...

... The principal theoretical basis of the distinction is that disobedience to the process and orders of the court in civil proceedings is said to be a civil wrong, a matter between party and party, enforcement being for the private benefit or interest of the party seeking enforcement, whereas impeding the administration of justice is a public wrong. A secondary basis for the distinction is that the main purpose of sanctions for disobedience in civil proceedings is coercive rather than punitive ...”

14. In *Re Kobelke and Minister for Planning* [1994] WAICmr 5, the former Information Commissioner considered a claim made under clause 12(a) and noted, at [28]-[29], as follows:

“The Australian Law Reform Commission Report No 35 on "Contempt" (the ALRC Report), at p.18, identified four broad categories of conduct amounting to contempt of court. These were:

- (i) interference with proceedings;*
- (ii) contempt by publication;*
- (iii) non-compliance with orders and undertakings; and*
- (iv) contempt relating to tribunals and commissions.*

The ALRC Report also noted, at p.3, that the underlying theme of the law of contempt of court is that the administration of justice by the courts must be protected from unacceptable interference. Parliament and the courts both have powers to regulate their own proceedings. These powers have traditionally been regarded as a necessary incident to their functions. The law of contempt of court and the law protecting parliamentary privilege ensure that these bodies are able to regulate their own proceedings and to operate without interference or obstruction ... Clause 12 indicates that the FOI Act is not intended to override the public interest served by this exemption.”

I agree with those comments.

The agency’s submissions

15. The agency’s submissions are set out in its notices of decision and in letters to my office dated 27 June 2011 and 26 July 2011.
16. The agency submits that the Report was the subject of court action in 2009 by which AEL sought to restrain the authors of the Report from providing it to the Minister. Following the decision of the Court of Appeal in *Agostini [No 2]*, the Minister was given a copy of the Report.
17. In the course of the initial proceedings in *Agostini*, the Minister gave an undertaking to the Court “*not to release the Report to any member of the public*

without first affording Apache a reasonable opportunity to be heard in relation to the contents of the Report.”

18. The agency advises that the decision to give Apache a copy of the Report is at the Minister’s discretion and, to date, Apache has not been provided with a copy and, therefore, has not been given a reasonable opportunity to be heard in relation to its contents. The agency further advises that only a small number of agency officers have had access to the Report, which is held securely, and it has been treated as confidential at all times.
19. The agency submits that the Minister remains bound by the undertaking because the Supreme Court has not subsequently released the Minister from the undertaking or varied it and that the disclosure of the Report to the complainant under the FOI Act would be a serious contempt of court.

The complainant’s submission

20. In its letter to me seeking external review, the complainant submits that the disclosure of an edited copy of the Report to the complainant under the FOI Act would not be in contempt of court insofar as it would not prejudice the prosecution of Apache or of any other party. The complainant notes that there was no mention of the Minister’s undertaking in *Agostini [No 2]*.
21. The complainant also submits that there is an overriding public interest in the disclosure of, at least, those parts of the Report that relate to the State and Federal regulatory oversight of Varanus Island, particularly in light of other recent industry accidents, such as the Montara spill, the Deepwater Horizon disaster in the Gulf of Mexico and the blowout of the Sedco 711 rig in the North Sea on 23 December 2009.

CONSIDERATION

22. I have examined all of the information before me, including the Report, the parties’ submissions, the agency’s FOI file, the judgments in *Agostini* and *Agostini [No 2]*, and the Minister’s undertaking. The latter was made on 30 July 2009 – the second day of the proceedings in *Agostini* – by the Minister, as the Third Defendant in that case, and was in the following terms:

“The Third Defendant undertakes that he will not give a copy of the Investigation Report to any member of the public without first affording to the Plaintiffs a reasonable opportunity to be heard in relation to the Adverse Contents of the Investigation Report (if they have not already been afforded that opportunity).”

23. In *Agostini*, Beech J discusses the Minister’s undertaking and makes the following points at [60]-[61]:

“the reference to members of the public indicates that the undertaking does not extend to public officers such as officers of the Department or

Cabinet colleagues; ... and the undertaking is not intended to affect the capacity of the Minister to table the Investigation Report in Parliament.

...

In other words, the Minister undertook not to publish to members of the public, as distinct from public officers and Cabinet colleagues, the Adverse Contents of the Investigation Report until the Apache companies had been afforded a reasonable opportunity to be heard in relation to those Adverse Contents.”

24. As previously noted, in that case Beech J held that any decision by the Minister to publish the Report would attract a duty of procedural fairness to Apache.
25. I understand from the agency that, in late 2009, following speculation in the media that the Minister was intending to table the Report in Parliament, the solicitors for Apache wrote to the State Solicitor’s Office contending that there was a real and substantial danger of prejudice to the prosecution of the licensees if the Adverse Contents of the Report relevant to the prosecution were made public. Although the tabling of the Report would not contravene the Minister’s undertaking, the Minister decided not to table the Report.
26. In my opinion, the undertaking given by the Minister cannot be read down to allow for the disclosure of an edited copy of the Report as the complainant proposes.
27. The exemption in clause 12(a) makes no provision for the application of public interest arguments, as put forward by the complainant. In addition, I do not consider the fact that there was no mention of the Minister’s undertaking in *Agostini [No 2]* to be relevant to my consideration. In my view, the undertaking was not referred to in that case because it was not germane to the matters the subject of that appeal.
28. In the present case, I understand that the Report was provided to the Minister, in the course of the exercise of his functions under the *Petroleum Pipelines Act 1969*, and that the agency, which reports to the Minister, has obtained a copy of the Report from the Minister.
29. The State has responsibility through the agency for both the administration and control of petroleum exploration and production in accordance with various Acts, including the *Petroleum Pipelines Act 1969*, and for the safety and health regulation of mining, dangerous goods, onshore petroleum and major hazard facilities.
30. I accept that the Report is the subject of the Minister’s undertaking and that its provision to the agency by the Minister does not breach the undertaking. I also accept that the undertaking remains in force.
31. I note that the complainant sought access to the Report from the agency rather than from the Minister (who is also an ‘agency’ for the purposes of the FOI Act). Although neither party to this matter has made submissions to me in that

regard, I consider that, in the circumstances, any disclosure of the Report by the agency – rather than the Minister – would also be in contempt of court because the Minister made the undertaking on behalf of the State, including the agency. In my opinion, to take the view that the agency is not bound by the undertaking given by the Minister would work to fundamentally undermine the intent of the undertaking.

32. On the information before me, I am satisfied that the disclosure of the Report to the complainant would be in contempt of court in that its disclosure would not comply with the undertaking given by the Minister and could, in addition, prejudice the current prosecution of Apache. Under the FOI Act, disclosure of documents is generally viewed as public disclosure or ‘disclosure to the world at large’ since no conditions can be imposed upon their release. Consequently, I find that the agency’s claim for exemption under clause 12(a) is justified.

CONCLUSION

33. I find that the Report is exempt under clause 12(a) of Schedule 1 to the FOI Act.
