

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

**File Ref: F2003195
Decision Ref: D0012005**

Participants:

Hancock Prospecting Pty Ltd
Complainant

- and -

Department of Industry and Resources
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – decision to give access – “reverse FOI” – complaint by third party – documents relating to old temporary iron ore reserves – clause 4(3) commercial or business information – information about business, professional, commercial or financial affairs of a person – whether disclosure would reveal information about business, professional, commercial affairs of the complainant and third parties – whether disclosure of information could reasonably be expected to have an adverse effect on those affairs – onus on complainant under section 102(2).

FREEDOM OF INFORMATION – refusal of access – documents containing personal information about third parties – clause 3 - personal information – limits on exemption in clause 3(5).

Freedom of Information Act 1992 (WA) s.76(1); Schedule 1 clauses 3(1), 3(5), 4(3)-(7); Schedule 2, Glossary.

Manly v Ministry of Premier and Cabinet [1995] 14 WAR 550

Re Kimberley Diamond Company NL and Department for Resources Development and Argyle Diamond Mines Pty Ltd [2000] WAICmr 51.

DECISION

The decision of the agency is set aside and substituted with this decision. It is decided that the individual's name, being the 6th and 7th words which appear in the first line of paragraph 1 of the document, is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992* but that the document is not otherwise exempt.

D A WOOKEY
A/INFORMATION COMMISSIONER

25 January 2005

REASONS FOR DECISION

1. This complaint arises out of a decision made by the Department of Industry and Resources ('the agency') to give access to an edited copy of a document requested by an access applicant under the *Freedom of Information Act 1992* ('the FOI Act'). In this instance, Hancock Prospecting Pty Ltd ('the complainant') is a third party to the access application and objects to the disclosure of one document ('the disputed document') in the form proposed by the agency. The access applicant has not sought to be joined as a party to this complaint.

BACKGROUND

2. The access applicant sought access under the FOI Act to a number of documents relating to old temporary iron ore reserves. The agency decided to give the access applicant full access to some documents and access to edited copies of other documents but refused access to certain of the requested documents. During the course of dealing with the access application, in accordance with its obligations under ss.32 and 33 of the FOI Act, the agency consulted with the complainant and several other third parties mentioned in the document prior to making the decision on access.
3. The agency advised the complainant that it proposed to grant the access applicant access to an edited copy of the disputed document from which certain information would be deleted. The agency claimed that the information to be deleted was exempt under clause 4(3) of Schedule 1 to the FOI Act. The complainant objected to the disclosure of the disputed document in the manner proposed by the agency. However, two of the other third parties consented to the disclosure of information relating to them.
4. The agency confirmed its initial decision on internal review. Thereafter, the complainant made a complaint to the Information Commissioner seeking external review of that decision.

REVIEW BY THE A/INFORMATION COMMISSIONER

5. I obtained the disputed document and the agency's FOI file relevant to this matter from the agency. Following that, my office made further inquiries with the complainant and the agency. I also received and considered submissions from the complainant and the agency. Under section 76(1)(b) of the FOI Act, in dealing with a complaint, the Information Commissioner has the power to decide any matter with respect to an access application that could, under the FOI Act, have been decided by the agency. Therefore, as well as considering the claims of the complainant, I have considered whether any of the matter proposed to be deleted from the disputed document - and for which exemption has been claimed by the agency and the complainant - is exempt and whether the proposed editing is sufficient or necessary.

6. On 5 May 2004, after considering all of the material then before me, I informed the parties, in writing, of my preliminary view of this complaint and my reasons. It was my preliminary view that the disputed document may not be exempt under clause 4(3). In addition, it was my preliminary view that the only exempt matter contained in the disputed document is the name of one third party.
7. The agency accepted my preliminary view. The complainant did not accept my preliminary view and in a further submission to me confirmed its objection to the disclosure of the disputed document on the basis that it is an exempt document under clause 4(3) of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENT

8. There is one document in dispute in this matter, an edited copy of which the agency proposes to disclose to the access applicant. It is entitled “*TR 5072H – Sugar Fault Summary of Events Following Discovery.*”

THE EXEMPTION CLAIMED

Clause 4 – Commercial or business information

9. The complainant claims that the disputed document is exempt, in full, under clause 4(3) of Schedule 1 to the FOI Act. Clause 4(3) provides:

“ *Matter is exempt matter if its disclosure -*

(a) *would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*

(b) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*”
10. In order to establish a claim for exemption under clause 4(3), it must be established that the disputed document contains information about the business, professional, commercial or financial affairs of a person (including a company) and also that the disclosure of that information could reasonably be expected to have an adverse effect on those affairs or, in the alternative, to prejudice the future supply of information of that kind to the Government or to an agency. Finally, if the requirements of paragraphs (a) and (b) of clause 4(3) are satisfied, then the limits on exemption set out in clauses 4(4) to 4(7) must also be considered.

The onus under s.102

11. Section 102(2) of the FOI Act provides that, if a third party initiates or brings proceedings opposing the giving of access to a document, the onus is on the third party to establish that access should not be given or that a decision

adverse to the access applicant should be made. In this case, therefore, the complainant bears that onus.

12. Whilst the complainant is not required to establish a case for exemption on the balance of probabilities, there must be some probative material provided to me by the complainant which supports its claims for exemption. On this point, I refer to the comments of Owen J in *Manly v Ministry of Premier and Cabinet* [1995] 14 WAR 550 in respect of a claim for exemption under clause 4. Although referring to the exemption claims made by an agency in that case, nonetheless I consider the comments appropriate to any party claiming an exemption. His Honour said, at p.573 of that decision:

“How can the Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had “real and substantial grounds for thinking that the production of the document could prejudice that supply” or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker.”

The complainant’s submissions

13. The complainant provided me with a copy of a letter which evidences that the access applicant asserts that it has a right to royalties from the complainant in relation to the mining tenement to which the document relates. The complainant submits that disclosing the disputed document in the edited form proposed by the agency would be misleading, and that misleading information would encourage the access applicant to commence litigation in pursuit of royalties the access applicant asserts it is owed.
14. The complainant’s submission of 9 December 2003 contains detailed factual information relating to the history of its relationship with the access applicant and the history of the mining tenement, the subject of the disputed document. The complainant claims that disclosure of the disputed document would have an adverse effect on its business, professional, commercial or financial affairs because the access applicant may misinterpret the information contained in the disputed document and be encouraged to continue asserting that it has a right to the payment of royalties by the complainant and commence litigation against it. The complainant submits that:

“To the extent there is any likelihood that the release of that information to [the access applicant] will encourage the continued assertion of a royalty right, whilst finance is endeavouring to be approved, which is clearly a possibility demonstrated by the fact that the FOI application has been made by [the access applicant] such a possibility is potentially materially adverse to the Hancock Group’s interests, its business, commercial and financial affairs and

disclosure can reasonably be expected to have such an adverse impact on the Hancock Group.”

15. In a submission dated 23 December 2003, the complainant repeated its submissions that, if the disputed document were to be disclosed in the edited form proposed by the agency, then it would be misleading and may result in the access applicant using that information to pursue legal action against the complainant. The complainant claims that the potential legal action would be costly to it and, therefore, disclosure of the disputed document, even in edited form, will have an adverse effect on its business, commercial or financial affairs because of the potential costs of the anticipated litigation.
16. The complainant also submits that “... *should* [the access applicant] *be encouraged to continue to assert a right to a royalty on iron ore mined from the deposit ..., the amount of funding available to the Hancock Group would be diminished because of a perceived potential for a further liability to be borne by the ...Project.*” The complainant also argues that the information that would be disclosed is far from sufficient to found such a claim. The complainant further submits that the access applicant’s assertion of an interest in the site has been made “... *at a time when it has become public knowledge that the participants in [the project] are seeking further equity participation by third parties and looking to fund the project.*”
17. The complainant stressed that the particular project is at a very sensitive stage in development and that “... *it follows that any litigation or threat of it...could clearly and reasonably be expected to have an adverse effect on [the complainant’s] affairs and its ability to raise finance for the ... project...plus a consequence of delay in raising finance.*” The complainant clarified its previous submissions by advising me that it “... *is not...stating that any such claim by the Applicant, would necessarily be a deterrent to investor interest in the project, but the potential of a claim being successful, if pursued by the Applicant, necessarily has an impact in the minds [sic] of a third party, whether an investor or a financier, and would delay the project’s ability to raise finance. The commercial outcome in any such scenario, would inevitably be adverse to [the complainant].*”
18. In a final submission to me, dated 19 May 2004, the complainant responded to my preliminary view. In that submission, the complainant maintained its claim that the disputed document is exempt in full under clause 4(3) for the reasons cited above and provided information as to the relationship between it and the various parties named in the disputed document.
19. The complainant also submitted that, if I were to find that “... *edited release of this summary should nevertheless occur...*” then “... *the only deletions should be the confidential references to [a named person] and the bracketed material which follows it*”. The complainant submits that the remaining information would be less of a concern to it, some of it being on the public record in any event.

Clause 4(3)

20. The purpose of the exemption in clause 4(3) is primarily to protect from disclosure the business, professional, commercial or financial affairs of any person, including a company or incorporated body, who has business dealings with government agencies, in circumstances where such disclosure could reasonably be expected to have an adverse effect on those business, professional, commercial or financial affairs or disclosure could reasonably be expected to prejudice the future supply of that kind of information to the Government or to an agency.
21. I agree with the former Information Commissioner's stated view that the exemption in clause 4(3) recognises that the business of government is frequently mixed with that of the private sector and that such business dealings should not be adversely affected by the operation of the FOI Act: see *Re Kimberley Diamond Company NL and Department for Resources Development and Argyle Diamond Mines Pty Ltd* [2000] WAICmr 51. In my opinion, the exemption recognizes that private organizations having business dealings with government must necessarily expect greater scrutiny of and accountability for those dealings than in respect of their other dealings, but should not suffer significant commercial disadvantage because of them.
22. In order to establish a claim for exemption under clause 4(3), the complainant must establish that the disputed document would, if disclosed, reveal information of a kind described in clause 4(3)(a) and, also, that disclosure of that information could reasonably be expected to have an adverse effect on the complainant's business, professional, commercial or financial affairs, or to prejudice the future supply of information of that kind to the agency.

Clause 4(3)(a) – nature of the information

23. Having examined the disputed document and considered the complainant's submissions, I accept that the disputed document would reveal information about the business and commercial affairs of the complainant. Whilst the complainant is not referred to in the disputed document by the name of "Hancock Prospecting Pty Ltd", I accept that the relevant references are to a commercial business partnership between the complainant and a third party.
24. The complainant's submissions have focused on the alleged adverse effect it claims disclosure of the disputed document would have on its business, commercial and financial affairs. It appears to me, based on my examination of the disputed document and the complainant's submissions, that the disclosure of the disputed document would reveal some of the history of a site in which the complainant now has a significant commercial interest. To that extent, I accept that disclosure of that information would reveal information about the business or commercial affairs of the complainant.

Clause 4(3)(b) – effect of disclosure

25. However, although I accept that disclosure of the disputed document would reveal information about the business and commercial affairs of the complainant, I am not persuaded that its disclosure could reasonably be expected to have an adverse effect on those affairs, as claimed by the complainant.
26. The disputed document is 21 years old. It contains what appears to me to be a factual account of the early history of a particular site between 1968 and 1977, that is, 28 to 36½ years ago. That factual account is not disputed by the complainant. None of the other third parties referred to in the disputed document who were consulted by the agency objects to the disclosure of the disputed document. Three third parties could not be consulted. Two of those are companies that no longer exist and the third is a former employee of the complainant whom I understand from the complainant is now deceased.
27. The complainant has made a number of submissions as to the expected effect of disclosure, which appear to me to be contradictory. On the one hand the complainant argues that disclosure of the disputed document would be likely to cause a claim to be asserted against the complainant for royalties from the particular site; on the other hand the complainant has provided me with evidence that such a claim has already been asserted. On the one hand, the complainant argues that disclosure of particular information in the disputed document will encourage the pursuit of the claim for royalties and then, on the other hand, argues that the information that would be disclosed is far from sufficient to found such a claim. The complainant argues that the link between the access applicant and the site revealed by the disputed document is “tenuous” but, despite that assertion, claims that its disclosure could reasonably be expected to cause the access applicant to initiate litigation against the complainant.
28. If the connection revealed by the disputed document is as tenuous as the complainant asserts, then I do not accept that its disclosure could reasonably be expected to cause litigation to be commenced by the access applicant on the strength of it, nor for the access applicant to press its claim any further than it presently has. As the adverse effects claimed by the complainant – those being, as I understand it, the cost and inconvenience of litigation and “*an impact in the minds*” of potential investors and financiers which would “*delay the project’s ability to raise finance.*” – are contingent on disclosure causing the claim to be continued, I do not accept the complainant’s claim that disclosure of the information in question could reasonably be expected to have the adverse effect on the business, professional and commercial affairs of the complainant which it claims.
29. In particular, I have considered the complainant’s alternative suggestion that the document could be released with only information referred to in paragraph 19 above deleted – that is, the name of a third party and the bracketed material which follows it – and the complainant’s submissions in respect of

that information, which are set out in paragraphs 27 and 28 above. For the reasons I have given, I do not accept those arguments. The complainant has made a number of other assertions to me concerning that material but I consider those assertions to be merely speculative and without anything to support them. I do not accept the complainant's submissions in that regard

30. In addition to those reasons, the evidentiary value of the document itself would appear to me to be questionable in any event. It is a typewritten, apparently internal, document of the agency – perhaps a file note, although its origin and purpose are not clear. It contains a series of unsourced statements. Its author is not identified in the document. On the complainant's own account of certain circumstances pertaining to this matter, that particular information would be easily ascertainable by the access applicant from another source, and the statement about which the complainant has expressed its primary concern is about a matter in respect of which the person named in it could give evidence whether or not this document were to be disclosed.
31. Therefore, on the material presently before me, I am not persuaded that disclosure of the disputed document, including those parts of it that the agency had proposed to delete before disclosing it, could reasonably be expected to have the effect described in clause 4(3)(b).

Clause 3 – personal information

32. At this stage, the only material in the disputed document which I consider to be *prima facie* exempt is the names of two individuals which appear in the document. Disclosure of those names would, in my view, reveal personal information about those individuals, which is *prima facie* exempt under clause 3(1) of Schedule 1 to the FOI Act. Clause 3(1), so far as is relevant, provides:

"3. Personal information

Exemption

- (1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*

Limits on exemption

- (2)....
- (3)....
- (4)....
- (5) *Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.*
- (6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

33. In the Glossary to the FOI Act the term "personal information" is defined to mean:

"... information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -

(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or

(b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample."

34. The definition of "personal information" in the Glossary makes it clear that any information or opinion about a person, from which that person can be identified, is, on the face of it, exempt under clause 3(1). I have examined the disputed document. There is matter contained in the disputed document which consists of names and other information that would clearly identify particular persons.

35. All of that matter will be exempt under clause 3(1) unless any of the limits on exemption applies. In this instance, the only limits on exemption which might apply are the limits in clause 3(5) and clause 3(6). Clause 3(5) provides that matter is not exempt under clause 3(1) if an individual consents to disclosure of personal information about him or her contained in the requested documents. Clause 3(6) provides that personal information is not exempt under clause 3 if its disclosure would, on balance, be in the public interest.

36. The personal information about the person named in paragraph 1 of the disputed document comprises his name, previous employment and something that he did in the course of that employment. The personal information about the person named in paragraph 3 of the disputed document also comprises his name, previous employment, his profession and something that he did.

37. I have been provided with evidence that the person named in paragraph 3 of the disputed document consents to the disclosure of the personal information about him which would be revealed by the disclosure of the disputed document. Where there is evidence that an individual consents to the disclosure of personal information about them, the limit in clause 3(5) applies and that information is not exempt. Therefore, in my view, the personal information about the person named in paragraph 3 is not exempt and need not be deleted before the disputed document is disclosed.

38. As far as I can ascertain, the person named in paragraph 1 of the disputed document is deceased and therefore it is not possible to consult him as to whether he consents to the disclosure of personal information about him. If an agency proposes to give access to personal information about a third party who is deceased, it is required to obtain the views of the third party's closest relative (s.32(2)). As the agency proposed to delete that name from the document before giving access, it was not required to – and did not – consult that person's closest relative. At this stage, therefore, I have no evidence

before me as to the views of the closest relative in respect of disclosure of that information. No evidence has been provided to me to establish that the closest relative consents to the disclosure and, that therefore the limit in clause 3(5) applies.

39. As the access applicant has chosen not to be joined as a party to this complaint and not to make submissions to me in respect of it, I have not had the benefit of any submissions as to whether the limit in clause 3(6) applies, that is, whether disclosure would, on balance, be in the public interest. As I do not consider that I have sufficient information available to me to determine that question – and under s.102(3) the access applicant bears the onus of establishing that disclosure would, on balance, be in the public interest – I cannot on the material presently before me find that the limit in clause 3(6) applies.
40. As it has not been established that any of the limits on the exemption applies to the personal information about the person named in paragraph 1, I find that information, which comprises the 6th and 7th words in paragraph 1, exempt under clause 3(1). However, I am of the view that, if the name were to be deleted, the identity of the person could not be ascertained from the information remaining in the document and, therefore, the document would not then contain personal information, as defined, about that person.

Conclusion

41. I find the disputed document is not exempt under clause 4(3) of Schedule 1 to the FOI Act. In addition, I find that the name appearing in paragraph 1 of the document is exempt under clause 3(1) of Schedule 1 to the FOI Act, but the document is not otherwise exempt. Only that name need be deleted before access is given.
