

## HOYTS MULTIPLEX AND GOSNELLS

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

**File Ref: 97151  
Decision Ref: D0051998**

Participants:

**Hoyts Multiplex Cinemas Pty Limited**  
Complainant

and

**City of Gosnells**  
First Respondent

and

**MOSSFERN PTY LTD**  
Second Respondent

### DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – rezoning application re proposed cinema and entertainment complex – clause 4(2) – information having commercial value – whether disclosure would destroy or diminish commercial value – access to edited copies of documents.

*Freedom of Information Act 1992 (WA)* ss.24, 69; 74; Schedule 1 clauses 3, 4(2);

*Re Belmont Forum Shopping Centre Pty Ltd and Ministry for Planning and Anor* (Information Commissioner WA, 25 November 1997, unreported, D03297);

*Interpretation Act 1984* s.5;

*Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor* (1992) 36 FCR 111;

*Re Public Interest Advocacy Centre and Department of Community Services and Health and*

*Schering Pty Ltd* (1991) 23 ALD 714;

*Police Force of Western Australia v Winterton* (unreported; Supreme Court of Western Australia; Library No. 960227; 27 November 1997).

## DECISION

The decision of the agency is varied. Part 4.1 of the disputed document is exempt under clause 4(2) of Schedule 1 to the *Freedom of Information Act 1992*. Part 4.2 of the disputed document is not exempt.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

2 February 1998

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision by the City of Gosnells ('the agency') to refuse Hoyts Multiplex Cinemas Pty Limited ('the complainant') access to documents requested by it under the *Freedom of Information Act 1992* ('the FOI Act').
2. In March 1997, Mossfern Pty Ltd ('the third party'), on behalf of a number of other parties, submitted to the agency an application for the rezoning of certain property situated in Nicholson Road, Canning Vale. The rezoning application was considered by the Planning and Services Committee ('the Committee') of the agency at its meeting in April 1997. The Committee approved the rezoning of the property from "Rural" to "Special Purpose" for the establishment of a cinema and entertainment complex, subject to conditions.
3. By letter dated 13 May 1997, K A Adam and Associates, on behalf of the complainant, lodged an access application with the agency seeking access under the FOI Act to documents associated with the rezoning application made by the third party.
4. In June 1997, the agency granted the complainant access to some documents, but refused access to the rezoning application itself on the ground that that document is exempt under clause 4 of Schedule 1 to the FOI Act. The agency provided no reasons for its decision, nor did it specify under which sub-clause of clause 4 it claimed exemption for the document.
5. On 25 June 1997, the complainant sought internal review of the agency's initial decision. However, in its notice of decision dated 27 June 1997, the agency confirmed its decision on the basis that the requested document is exempt under clause 4(2) of Schedule 1 to the FOI Act. Again, no reasons were given by the agency to substantiate its decision. Thereafter, on 22 August 1997, solicitors for the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

### REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained the rezoning application from the agency, together with the agency's file maintained in respect of the complainant's access application. I directed a member of my staff to make further inquiries to clarify aspects of this complaint. As a result of those inquiries and discussions, the third party agreed to provide the complainant with access to an edited copy of the rezoning application.

7. I received submissions from the parties in support of their respective claims concerning the matter to which access had been refused. After considering the material before me, on 9 December 1997, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that some of the disputed matter may be exempt under clause 3(1), but not under clause 4(2) of Schedule 1 to the FOI Act. Pursuant to s.69 of the FOI Act, I also provided the third party with my preliminary view and invited it to be joined as a party to this complaint. Subsequently, the third party was joined to this complaint.
8. Following receipt of my preliminary view, the agency withdrew its claims for exemption for those parts of the documents that I considered not to be exempt. The complainant withdrew its claim for access to the matter that I considered may be exempt under clause 3(1), and, therefore, that matter is no longer in dispute. However, the complainant maintains its complaint in respect of the refusal of access to the balance. The third party maintains its claim that the balance of the disputed matter is exempt under clause 4(2), and made an additional submission in respect of that matter.

#### **THE DISPUTED MATTER**

9. The matter remaining in dispute between the parties consists of parts 4.1 and 4.2 of the rezoning application, including a map designated as figure 3 in part 4.1.

#### **THE EXEMPTION**

10. The third party claims that parts 4.1 and 4.2 of the rezoning application are exempt under clause 4(2) of Schedule 1 to the FOI Act. Clause 4(2) provides:

**“4. Commercial or business information**

***Exemptions***

- (1) ....
- (2) *Matter is exempt matter if its disclosure -*

*(a) would reveal information (other than trade secrets) that has a commercial value to a person; and*

*(b) could reasonably be expected to destroy or diminish that commercial value.”*

11. I have discussed the application of clause 4(2) most recently in my decision in *Re Belmont Forum Shopping Centre Pty Ltd and Ministry for Planning and Westfield Limited and Jebb Holland Dimasi Pty Ltd* (25 November 1997, unreported, D03297). As I said, at paragraph 13 of that decision, clause 4(2) is concerned with protecting from disclosure matter which is not a trade secret, but

which has “commercial value” to a person. The word “person” includes a public body, company, or association or body of persons, corporate or unincorporate: see s.5, *Interpretation Act 1984*. I do not consider that the commercial value of the matter under consideration needs to be quantified or assessed in order to satisfy the requirements of clause 4(2)(a). However, the exemption consists of two parts and the requirements of both parts (a) and (b) must be satisfied in order to establish a *prima facie* claim for exemption under clause 4(2).

12. As to the requirements of clause 4(2)(a), I am of the view that matter has a “commercial value” if it is valuable for the purpose of carrying on the commercial activities of any person. I also consider that it is by reference to the context in which that information is used, or exists, that the question of whether it has a commercial value to a person may be determined: see *Re Belmont Forum Shopping Centre*, at paragraph 21.
13. Clause 4(2)(b) is concerned with the effects of disclosure, not with the reasonableness of a claimant’s behaviour: see *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor* (1992) 36 FCR 111 at p.123. Further, in *Re Public Interest Advocacy Centre and Department of Community Services and Health and Schering Pty Ltd* (1991) 23 ALD 714 at 724, paragraph 44, the Commonwealth Administrative Appeals Tribunal took the view that, if information of an identical kind to the documents there in dispute were already in the public domain, then its commercial value would not be further diminished by its disclosure under the Commonwealth FOI Act. I take a similar view in respect of the disputed document on this occasion. If the matter in dispute in this instance is already in the public domain, then any commercial value it may have could not be further diminished by its disclosure under the FOI Act.

### **THE THIRD PARTY’S SUBMISSION**

14. The third party submits that, if details of the specifics of the proposal were released to its competitors, it would provide competitors with a revenue opportunity that would then be lost to the third party and those it represents in the matter. The third party contends that disclosure would enable its competitors, particularly nearby competitors, to include such facilities in their complexes and thereby reduce any competitive advantage of the third party’s complex. The third party claims that the material clearly has a commercial value to it that would be destroyed if it were disclosed to the complainant.

### **THE COMPLAINANT’S SUBMISSION**

15. The complainant submits that the index to the rezoning application shows that the disputed matter relates to proposed land uses and proposed re-zoning and does not consider that information contained under those headings could have any commercial value. Further, the complainant submits that it operates cinemas and is not in the business of developing property or seeking tenants. The complainant submits that, therefore, details of a tenancy mix would have no effect on the level of competition between the complainant and the third party because they are not competitors.

## CONSIDERATION

16. Section 74 of the FOI Act requires me to avoid the disclosure of exempt matter in dealing with a complaint and I must not include exempt matter in a decision on a complaint or in the reasons given for a decision. As a result, I am constrained from disclosing, or describing in any specific detail, the disputed matter in order to avoid breaching my duty under s.74 of the FOI Act and defeating the very purpose of the exemption in clause 4(2).
17. I am aware that the complainant has inspected an edited copy of the rezoning application. That document describes, in general terms, a proposal for rezoning to enable the development of a fully integrated cinema and entertainment complex. I am also aware that the minutes of the meeting of the Committee held on 8 April 1997 ('the minutes') record details of the proposed uses of the land in question, including entertainment and leisure, retail, fast food, restaurant and tavern. It is my understanding that the minutes of that meeting are available as a public document. In respect of this, the third party submits that the information contained in the document is considerably more – and in more detail – than that contained in the minutes.

### Clause 4(2)(a)

18. It is clear that the disputed document was created for the purpose of obtaining rezoning of the relevant site in the context of the proposed expansion of the future commercial activities of the third party, by developing an entertainment and leisure centre. Having examined the disputed matter, and considered the parties' submissions and, in particular, the third party's most recent submission, I am now of the view that some of the information contained in the disputed matter is information having a commercial value to a person, the third party. The disputed matter in part 4.1 under the heading "Proposed Land Uses" contains the detail of the proposed development, including the specific leisure and entertainment facilities proposed and certain detail in respect of each of those and how it is proposed they will operate and inter-relate. "Figure 3", included in that part, is a plan showing the layout of the proposed complex. In my opinion, that information – particularly in the context in which it was created – is valuable for the purpose of the third party, or whoever owns and/or operates the proposed complex in the future, carrying on its future commercial activities. Therefore, I accept that the disputed matter in part 4.1 has a commercial value to a person and meets the requirements of clause 4(2)(a).
19. However, I do not have that view in respect of the matter contained in part 4.2 under the heading "Proposed Zoning". There is nothing before me that persuades me that the information contained in that part – except, perhaps, the fourth line of the first paragraph – has a commercial value to the third party or any other person. To enable the proposed development to proceed, the third party, in seeking the rezoning, has specified the particular land-use zoning within the agency's local town planning scheme it considers to be most appropriate.

The matter in part 4.2 contains that suggestion. Apart from the line I have specified, that part of the document does not appear to me to contain information having commercial value to the third party or any person and does not, therefore, meet the requirements of clause 4(2)(a) and is not exempt.

**Clause 4(2)(b)**

20. In respect of the line in part 4.2 that I do consider to have commercial value to the third party, I do not consider that its disclosure could diminish or destroy that value, because it is already in the public domain. That particular information and most of the information in the first paragraph of part 4.2 is contained in the minutes of the Committee meeting concerning the matter and is, therefore, already in the public domain. Any diminution of the commercial value in that information would, in my view, have already occurred (if at all) by its disclosure in that public document. I do not consider, therefore, that disclosure under the FOI Act would further diminish any commercial value in that information. Accordingly, I find that part 4.2 of the document is not exempt.
21. However, taking into account the nature of the matter contained in it and in particular the most recent submission of the third party, I am of the view that the disclosure of the matter contained in part 4.1 could reasonably be expected to enable a competitor, particularly one already operating a cinema complex in the neighbourhood, to alter the structure of an existing business enterprise to include, better, or otherwise counter, the kinds of activities proposed by the third party. In that way, I consider that a competitor could use the information to maximise its own commercial advantage and diminish the value of the third party's proposal from a commercial viewpoint.
22. Although the complainant denies that the complainant and the third party are competitors, it appears to me that, if only in respect of the third party's proposed development, in the context of this matter the complainant and the third party are involved in similar businesses, the provision of recreational activities for profit. However, whether or not the complainant and the third party are competitors is not directly relevant to my consideration of the exemption claimed. As no conditions or control can be imposed upon the use to which a document is put after disclosure under the FOI Act, disclosure under the FOI Act is generally considered to be disclosure to the whole world, including all competitors, whether or not the particular access applicant is a competitor of the relevant party.
23. Some of the matter contained in part 4.1 is information contained in the minutes and, therefore, is in the public domain. Therefore, I have considered whether further editing of the disputed matter – so that the information already in the public domain is not deleted – is practicable. *In Police Force of Western Australia v Winterton* (unreported; Supreme Court of Western Australia; Library No. 960227; 27 November 1997), although his Honour was there dealing specifically with documents relating to police work, Scott J said, at page 16:

*“It seems to me that the reference in s24(b) to the word “practicable” is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context. In that respect, where documents only require editing to the extent that the deletions are of a minor and inconsequential nature and the substance of the document still makes sense and can be read and comprehended in context, the documents should be disclosed. Where that is not possible, however, in my opinion, s24 should not be used to provide access to documents which have been so substantially edited as to make them either misleading or unintelligible.”*

With those comments in mind, I do not consider that it would be practicable to edit part 4.1.

24. For those reasons, I am of the view that disclosure of part 4.1 of the disputed document could reasonably be expected to diminish the commercial value of the information contained in it. Therefore, I find that part 4.1 of the disputed document is exempt under clause 4(2) of Schedule 1 to the FOI Act.

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