

RICHMOND AND MINERALS/ENERGY

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

**File Ref: 95180
Decision Ref: D00596**

Participants:

William Robert Richmond
Complainant

- and -

Department of Minerals and Energy
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - correspondence received by Minister about a decision of the Warden's Court - clause 3 - personal information - public interest factors for and against disclosure - public interest in maintaining privacy of third parties - public interest in applicant obtaining access to information held by government agencies - clause 8(1) - whether documents were received in circumstances importing an obligation of confidence - clause 8(2) - confidential communications - whether information is information of a confidential nature obtained in confidence - whether disclosure could reasonably be expected to prejudice future supply.

Freedom of Information Act 1992 (WA) ss.34, 68(1), 69(4); 72(1)(b), 75(1), 102(3). Schedule 1 clause 3(1), 3(6), 8(1), 8(2), Glossary in Schedule 2.

Mining Amendment Regulations 1993.

Corrs Pavey Whiting and Byrne v Collector of Customs (Vic) (1987) 74 ALR 428

DECISION

The decision of the agency is varied. In substitution it is decided that:

- Documents 1, 4, 5, 6, 8, 9, 10, 11, 12 and 13 are not exempt under clauses 8(1) or 8(2) of Schedule 1 to the *Freedom of Information Act 1992*;
- Documents 2, 3 and 7 are exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*; and
- the matter described in the schedule attached to this decision relating to Documents 1, 8 and 9 is exempt matter under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

12th January 1996

REASONS FOR DECISION

BACKGROUND

1. This complaint is a “reverse FOI” application. That is, it is an application for external review by the Information Commissioner arising out of a decision by the Department of Minerals and Energy (‘the agency’) to grant access to certain documents requested by an access applicant under the *Freedom of Information Act 1992* (‘the FOI Act’).
2. The background to this matter is that in 1993 Mr Richmond (‘the complainant’) applied for a mining lease, M38/374. An objection to that application was made by a third party (‘the access applicant’) and the matter was heard in the Warden’s Court in Leonora on 18 May 1994. On 22 May 1994, the Warden handed down his decision recommending the Minister for Mines (‘the Minister’) refuse the complainant’s application for the mining lease. In January 1995, the complainant made a written submission to the Minister and the access applicant lodged a counter-submission. On 11 January 1995, the Minister informed the complainant’s solicitors that the complainant’s application for mining lease M38/374 was refused.
3. The complainant then sought access under the FOI Act to the counter-submission lodged by the access applicant. The agency initially refused access to that document and the complainant sought external review of that decision by the Information Commissioner.
4. On 9 June 1995, the access applicant applied for access under the FOI Act to documents held by the agency including, *inter alia*, two letters and the attachments to those letters sent by the complainant and his solicitors, to the Minister. After consulting with relevant third parties, the agency granted access in full to one of those letters and the attachments thereto. In addition, the agency decided to grant access to the second letter, plus attachments, subject only to the deletion of matter claimed by the agency to be exempt under clause 3(1) of Schedule 1 to the FOI Act.
5. On 3 August 1995, the access applicant applied to the agency for internal review of its decision to provide access to edited copies of the requested documents. At the same time, the complainant disputed the agency’s decision to provide any form of access to those documents on the ground that those documents are exempt. Notwithstanding that claim, the agency decided to grant access, but deferred giving access, pursuant to s.34 of the FOI Act, to enable the complainant to exercise his right to apply to the Information Commissioner to have that decision reviewed. On 15 September 1995, the complainant sought external review by the Information Commissioner.

REVIEW BY THE INFORMATION COMMISSIONER

6. On 22 September 1995, in accordance with my obligations under s.68(1) of the FOI Act, I notified the agency that I had accepted this complaint. Pursuant to my authority under s.75 (1) and s.72(1)(b) of the FOI Act, I sought the production to me of the documents in dispute, together with the agency's FOI file maintained in respect of this matter.
7. After examining the disputed documents and considering the submissions of the parties, on 1 December 1995, I provided the parties with my preliminary view and reasons for that view. It was my preliminary view that the complainant had failed to establish that access to the disputed documents should not be provided to the access applicant. It was also my preliminary view that the decision of the agency to provide the access applicant with access to edited copies of the documents with exempt matter deleted is, in the main, correct.
8. Although the complainant was given three extensions of time within which to respond to my preliminary view and provide additional material for my consideration, no submissions were received by the agreed dates and, as at the date of this decision, no submissions have been received from the complainant.

THE DISPUTED DOCUMENTS

9. There are 13 documents in dispute between the parties. The agency claims that personal information about third parties in some of those documents is exempt matter under clause 3(1) of Schedule 1 to the FOI Act. The complainant claims that all 13 documents are exempt under clause 8(1) of Schedule 1 to the FOI Act. The disputed documents are described as follows:

Document	Description
1	Copy of a letter dated 8 March 1995 to Minister for Mines from the complainant.
2	Copy of a letter dated 8 March 1995 to Legal Practitioner's Disciplinary Tribunal from the complainant.
3	Copy of an affidavit dated 14 February 1995, sworn by a third party.
4	Copy of Reasons for Decision of Warden, dated 22 July 1994.
5	Copy of letter dated 27 February 1995, from Tenement Administration Services to complainant.
6	Copy of an unsigned letter dated 7 March 1995.
7	Statement of complainant's Visa Card Transactions dating from 29/9/93 to 28/10/93.

- 8 Copy of hand-written letter , undated , from complainant to third party.
- 9 Copy of facsimile message dated 30/8/94 from third party to complainant.
- 10 Copy of letter dated 9 November 1993, from complainant to access applicant.
- 11 Application for Mining Tenement, dated 13 September 1993, made by complainant.
- 12 Information pamphlet issued by the agency concerning *Mining Amendment Regulations 1993*.
- 13 Letter dated 21 September 1993, to Mining Warden from complainant, with attachments.

THE EXEMPTIONS

(a) Clause 3 - Personal Information

10. The agency decided to provide the access applicant with access to edited copies of Documents 1, 2, 3, 5, 6, 8, 9 and 13 and full access to the remaining documents. The matter which the agency deleted from Documents 1, 2, 3, 5, 6, 8, 9 and 13 is claimed by the agency to be personal information about third parties and exempt matter under clause 3(1) of Schedule 1 to the FOI Act. Clause 3, 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).”

11. In the Glossary in Schedule 2 to the FOI Act, "**personal information**" is defined as meaning "*...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."*

12. In my view, which I have previously expressed in a number of my formal decisions, the exemption in clause 3 is designed to protect the privacy of individuals because Parliament recognises the fact that all government agencies collect and hold a vast amount of important and sensitive private information about individual citizens and that information of that kind should not generally be accessible by other persons without good cause.
13. As I have said before, when an agency decides that a document contains personal information about a person, and that document is the subject of an access application under the FOI Act by some other person, the relevant agency may provide access to that document with personal information deleted. An agency may delete all of the personal information, including the relevant name of the person to whom the information relates, from which that person could be identified. In some instances, this may be achieved by deleting the name only and providing access to the remaining information, if the identity of the person to whom the information relates is not able to be ascertained from that information itself. I consider the practice of deleting names and providing access to edited copies of documents to be in accordance with the spirit and intent of the FOI Act.
14. I am satisfied that some of the matter which the agency deleted from the disputed documents is personal information about third parties. That information consists of names, addresses, telephone numbers and other information which, in the context in which it appears in the documents, would enable the third parties to be identified. In my view, that information is, *prima facie*, exempt matter under clause 3(1) of Schedule 1 to the FOI Act. Some of the disputed documents also contain personal information about the complainant. In particular, Document 7 is a record of certain financial transactions of the complainant. The exemption provided by clause 3(1) is, however, limited by a “public interest test” provided by clause 3(6). That is, matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. The onus of persuading me that disclosure of personal information about third parties would, on balance, be in the public interest lies on the access applicant under s.102(3) of the FOI Act.
15. Although the access applicant is not a party to this complaint, I am satisfied that he is a person who might be affected by a decision made on the complaint by me. Pursuant to my powers under s.69(4) of the FOI Act, I sought his views on this matter. The access applicant did not provide a submission for my consideration. He informed my office that he was not seeking access to personal information about third parties but, rather, that he was seeking access to the facts contained within the disputed documents.
16. From my examination of Documents 1, 2, 3, 8 and 9, I am satisfied that the information which the agency deleted from those documents is matter that consists of personal information about third parties, other than the access applicant. However, I consider the agency has, in some instances, deleted more information than is necessary to protect the personal privacy of the third parties and, in other instances, has not deleted information which, in my view, is, *prima*

facie, personal information about the third parties which should be deleted as exempt matter under clause 3(1).

17. I acknowledge that, in ordinary circumstances, an access applicant is at a disadvantage in that he or she does not have access to copies of the disputed documents. Accordingly, it is difficult for an access applicant to make meaningful submissions on the extent of matter deleted by an agency on the ground that it is exempt matter under clause 3(1) of Schedule 1 to the FOI Act. Nevertheless, I have examined the disputed documents in detail, together with other material before me. I have identified the matter contained in Documents 1, 2, 3, 8 and 9 that is, in my view, exempt under clause 3(1) in the schedule that is attached to this decision. Accordingly, as the complainant is not seeking access to personal information about third parties, I find that matter to be outside the ambit of the access application. In any event, I also find that matter to be exempt matter under clause 3(1) of Schedule 1 to the FOI Act.
18. From my examination of Document 7, I am also satisfied that that document contains personal information about the complainant, namely his financial affairs. I find that Document 7 is also exempt under clause 3(1).
19. In my view, the matter deleted from Document 5 is not exempt matter under clause 3(1) of Schedule 1 to the FOI Act. Document 5 is a letter to the complainant containing opinions about the Warden's decision in respect of mining lease M38/374. There is no material before me to justify the deletion of the complainant's name and address from Document 5 which, from my examination of other documents before me, and, in particular, Document 10, is known to the access applicant. The other name in Document 5 is that of the complainant's solicitor. As the access applicant was present at the hearing in the Warden's Court, the name of the solicitor is also known to the access applicant. Therefore, I find the matter deleted from Document 5 is not exempt under clause 3(1) of Schedule 1 to the FOI Act.
20. Matter identical to the matter deleted from Document 5 has also been deleted by the agency from Document 6. Accordingly, for the same reasons as those given in paragraph 19 above, I find that the matter deleted from Document 6 is not exempt under clause 3(1) of Schedule 1 to the FOI Act. Finally, in respect of Document 13, the matter deleted by the agency is matter which the complainant included in Document 10, being his letter to the access applicant dated 9 November 1993. Accordingly I find the matter deleted from Document 13 is not exempt matter under clause 3(1) of Schedule 1 to the FOI Act.

(b) Clause 8 - Confidential communications

21. The complainant submits that each of the disputed documents is exempt under clause 8(1). However, as I have already found that Documents 2, 3 and 7 are exempt under clause 3(1), I do not need to consider the complainant's claim that they are exempt under clause 8. Clause 8 of Schedule 1 to the FOI Act provides:

“8. Confidential communications

- “(1) Matter is exempt matter if its disclosure (otherwise than under this Act or another written law) would be a breach of confidence for which a legal remedy could be obtained.
- (2) Matter is exempt matter if its disclosure -
- (a) would reveal information of a confidential nature obtained in confidence; and
 - (b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

Limits on exemption

- (3) Matter referred to in clause 6 (1) (a) is not exempt matter under subclause (1) unless its disclosure would enable a legal remedy to be obtained for a breach of confidence owed to a person other than -
- (a) a person in the capacity of a Minister, a member of the staff of a Minister, or an officer of an agency; or
 - (b) an agency or the State.
- (4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest.”

22. Although clause 8 contains two separate exemptions, the complainant did not identify the matter in the documents remaining in dispute (Documents 1, 4, 5, 6, 8, 9, 10, 11, 12 and 13) which he claimed was exempt matter under clause 8(1). Clause 8(1) exempts matter in circumstances where disclosure, other than under the FOI Act or another written law, would be actionable at common law. The requirements to found an action for breach of confidence were explained in the dissenting judgment of Gummow J. in *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic)* (1987) 74 ALR 428. Other than in cases involving contractual obligations of confidence, Gummow J said (at 437):

"It is now settled that in order to make out a case for protection in equity of allegedly confidential information, a plaintiff must satisfy certain criteria. The plaintiff (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question, and must also be able to show that (ii) the information has the necessary quality of confidentiality (and is not, eg, common or public knowledge), (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence, and (iv) there is actual or threatened misuse of that information: Saltman Engineering Co Ltd v Campbell Engineering Co (1948) 65 RPC 203 at 205; Commonwealth v John Fairfax and Sons Ltd (1980) 150 CLR 39 at 50-51; 32 ALR 485 at 491-492; and O'Brien v Komesaroff (1982) 150 CLR 310

at 326-328; 41 ALR 255 at 266-268. *It may also be necessary, as Megarry J thought probably was the case (Coco v Clark (AN) (Engineers) Ltd [1969] RPC 41 at 48), and as Mason J (as he then was) accepted in the Fairfax decision was the case (at least for confidences reposed within government), that unauthorised use would be to the detriment of the plaintiff".*

23. The complainant did not provide any submissions to support a claim for exemption under clause 8(1) and merely quoted the words of the exemption to me. Document 1 is addressed to the Minister for Mines. Whilst I am satisfied that the document may have the necessary quality of confidentiality, in that its contents are not common or public knowledge, I am not satisfied that the third requirement identified by Gummow J. in paragraph 22 above, namely, that the information was received in such circumstances as to import an obligation of confidence, existed.
24. There is no evidence before me that the Minister received the document in such circumstances. However, there is evidence that the agency did not attach any confidentiality to the document. When the document was received by the agency it was placed on an open file which was available to any member of the agency. Therefore, I am not satisfied that the requirements exist to establish an equitable obligation of confidence with respect to Document 1. Accordingly, I find that Document 1 is not exempt under clause 8(1) of Schedule 1 to the FOI Act.
25. Document 4 is a copy of the Reasons for Decision, dated 22 July 1994 of the Warden. In my view, that document is not exempt under any clause of Schedule 1 to the FOI Act, because it is information that is already in the public domain. Document 10 is a letter from the complainant to the access applicant; Document 11 is a copy of the complainant's application for a mining tenement; and Document 12 is an information pamphlet published by the agency as a guide to *the Mining Amendment Regulations 1993*. From my own examination of the documents, Documents 10, 11 and 12 do not contain matter that is confidential and no submissions were received from the complainant to the contrary.
26. Similarly, in respect of Document 5, there is no material before me from the complainant to the effect that the document or any information in it, possesses the necessary degree of confidentiality to establish an action for breach of confidence. Similarly, in respect of Documents 6, 8, 9 and 13, no submissions were received on that point. Further, from my own examination of those disputed documents, I am satisfied that their disclosure would not be a breach of confidence for which a legal remedy could be obtained. Accordingly, I find that Documents 1, 4, 5, 6, 8, 9, 10, 11, 12 and 13 are not exempt under clause 8(1) of Schedule 1 to the Act.
27. Although the matter was not raised by the complainant, I have also considered the possibility that the disputed documents may be exempt under clause 8(2) of Schedule 1 to the FOI Act. To establish that claim, the requirements of both paragraphs (a) and (b) of clause 8(2) must be satisfied. On the material before me, including my own examination of each of those documents, I am not

convinced that any of the disputed documents contain information of a confidential nature obtained in confidence. There is some evidence before me that the agency did not attach any confidentiality to the documents at all, and further, it does not appear to be the case that the Minister treated them as confidential either.

28. It is clear that the complainant wanted to put before the Minister background details concerning the matter in which the Minister had refused his application for a mining lease. The documents contain the complainant's views on that matter that was decided in the access applicant's favour by the Warden's Court in Leonora on May 1994. I consider some of that information to be a matter of public record and lacking the degree of confidentiality which is necessary to justify a claim for exemption under the FOI Act.
29. However, even if I were satisfied that the requirements of paragraph (a) of clause 8(2) had been established, which I am not, there is no evidence or other probative material before me which would enable me to conclude that the disclosure of the documents could reasonably be expected to prejudice the ability of the agency or the Minister in the future to obtain that kind of information.
26. Therefore, I find that Documents 1, 4, 5, 6, 8, 9, 10, 11, 12 and 13 are not exempt under clause 8(2) of Schedule 1 to the FOI Act.

SCHEDULE OF EXEMPT MATTER UNDER CLAUSE 3(1)

Document	Exempt Matter
1	<p>Page 1 Paragraph 3 - all names except “Roberts” Paragraph 4 - the name of third party. Paragraph 5 - all text following “and” on line 2 Paragraph 6 - first word on line 1 Paragraph 7 - first word on line 1 Paragraph 9 - lines 1 and 2 Paragraph 10 - first word on line 2</p> <p>Page 2 : Paragraph 1 - the name after the word “advisor” Paragraph 3 - all text between the words “difficult” in line 1 and “attempted” in line 3 Paragraph 4 - first word on line 1 Paragraph 5 - all text Paragraph 7 - the name appearing twice in line 2 Paragraph 8 - name appearing on line 3 Next to the heading “PARAGRAPH 4” - the name in lines 3 and 7 Next to the heading “PARAGRAPH 5” - the name in line 3</p> <p>Page 3 : The names in line 16, 43 and 45</p> <p>Page 4 : The name in the last paragraph</p>
2	All of the document
3	All of the document
7	All of the document
8	Particulars of addressee
9	Facsimile details appearing at top of page Name, address, phone and fax number appearing at centre top of page Mail box number and signature appearing at bottom of page