

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

**File Ref: F2002204
Decision Ref: D0112003**

Participants:

E G Green and Sons Pty Ltd
Complainant

- and -

**Department of Environment, Water
and Catchment Protection**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – reverse FOI application – decision to give access to edited documents – third party complaint – documents relating to licence issued to the complainant under *Environmental Protection Act 1986* – clause 4(2) – whether documents contain information of commercial value – whether disclosure of documents could reasonably be expected to destroy or diminish the commercial value of the information – clause 4(3) – whether information about business, professional, commercial or financial affairs – whether disclosure of requested documents could reasonably be expected to have an adverse effect on business, professional, commercial or financial affairs or to prejudice for the future supply of information to the Government or to an agency – clause 5(1)(b) – law enforcement – whether disclosure of disputed documents could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case – clause 6(1) – deliberative processes of agency – whether documents contain information of the kind described in clause 6(1)(a) – whether disclosure would, on balance, be contrary to the public interest.

Freedom of Information Act 1992 (WA) s.102(2)); Schedule 1 clauses 4(2), 4(3), 5(1)(b) and 6(1).

Environmental Protection Act 1986 s.59

DECISION

The decision of the agency is confirmed. The disputed documents, edited in the manner proposed by the agency, are not exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

17 March 2003

REASONS FOR DECISION

1. This is a “reverse” FOI complaint against a decision made by the Department of Environment, Water and Catchment Protection (‘the agency’) under the *Freedom of Information Act 1992* (‘the FOI Act’) to give access to edited copies of documents under the FOI Act. The complainant, E G Green & Sons Pty Ltd is a third party. The complainant opposes the decision of the agency on the grounds that the requested documents are exempt under clauses 4(2), 4(3), 5(1)(b) and 6(1) of Schedule 1 to the FOI Act. Pursuant to s.102(2) of the FOI Act, the onus is on the complainant to establish that access should not be given or that a decision adverse to the access applicant should be made.

BACKGROUND

2. The agency is responsible for the administration of the *Environmental Protection Act 1986* (‘the EP Act’). For the purpose of controlling pollution, Part V of the EP Act empowers the Chief Executive Officer (‘the CEO’) of the agency to grant licences to the occupiers of prescribed premises and to impose conditions on such licences. The licence conditions generally relate to the discharge of waste or the emission of noise, odour or electromagnetic radiation. Particulars of approvals and licenses are recorded by the CEO and prescribed particulars in respect of those approvals or licences are published by the agency. The complainant operates an abattoir near Harvey, in Western Australia. The operation of abattoirs is a prescribed activity under the EP Act and, accordingly, the complainant holds a licence under the EP Act, in respect of that activity.
3. Under s.59 of the EP Act, the CEO may revoke or suspend a licence if the CEO is satisfied that there has been a breach of any of the licence conditions, but the CEO is required to give the licensee a reasonable opportunity to ‘show cause’, in writing, why such action should not be taken. I understand that, in early August 2001, the agency wrote to the complainant, seeking a response to some concerns relating to its irrigation practices. The complainant responded in writing. On 30 August 2001, the agency again wrote to the complainant citing instances of apparent non-compliance with several of its licence conditions, as reflected in the 2000/2001 Annual Monitoring Report. In that letter, the agency called upon the complainant to show cause why enforcement action should not be taken by the agency in respect of those matters. The complainant responded and, subsequently, after a further exchange of correspondence, the agency decided that enforcement action would not be taken.
4. In August 2002, an applicant made application to the agency for access, under the FOI Act, to the agency’s ‘show cause’ letter to the complainant and the correspondence between the agency and the complainant in relation to that matter. The agency decided to give access to edited copies of the requested documents, but deferred the giving of access so that the complainant could exercise its rights of review under the FOI Act. On 4 December 2002, solicitors for the complainant lodged a complaint with me, seeking external review of the agency’s decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. I obtained the disputed documents and the FOI file from the agency. I also obtained a copy of the licence issued to the complainant under the EP Act and a copy of its 2001/2002 Annual Monitoring Report, from the agency. My office also contacted the access applicant. He advised me that he does not seek access to any confidential business information about the complainant's business affairs or arrangements but, rather, he seeks access only to information about the apparent breaches of its licence conditions and its responses to the agency about those matters. The complainant made submissions to me in support of its claims for exemption for the disputed documents.
6. On 18 February 2002, after examining the disputed documents and considering the material before me, I made a preliminary assessment of this complaint. I informed the parties, in writing, that it was my view that the disputed documents, edited in the manner proposed by the agency, may not be exempt as claimed by the complainant. The complainant made no further submissions to me in support of its claims but did not withdraw its complaint.

THE DISPUTED DOCUMENTS

7. There are four documents in dispute in this matter. They are as follows:
 - Document 1 – a letter dated 17 December 2001 from the complainant to the agency.
 - Document 2 – a letter dated 1 November 2001 from the agency to the complainant.
 - Document 3 – a letter dated 28 September 2001 from the complainant to the agency.
 - Document 4 – a letter dated 30 August 2001 from the agency to the complainant.

THE EXEMPTIONS

(a) **Clause 4(2)**

8. 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.”

9. Clause 4(2) is concerned with protecting from disclosure matter 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 *Interpretation Act 1984*, s.5). Information may have a commercial value if it is valuable for the purposes of carrying on the commercial activities of a person or organization but I do not consider that the commercial value of the information under consideration needs to be quantified or assessed in order to satisfy the requirements of clause 4(2)(a). However, the exemption in clause 4(2) consists of two parts and the complainant must satisfy the requirements of both parts (a) and (b) in order to establish a *prima facie* claim for exemption.
10. The complainant claims exemption under clause 4(2) for complete, unedited copies of the disputed documents, not merely the matter which the agency has already decided to delete from those documents. The complainant submits that the information in the disputed documents has a commercial value to it because it has either paid external consultants to provide it with information or it has developed the information itself, over a number of years. The complainant claims that it operates in a very competitive industry and that disclosure of information about its trading methods, its customer lists and the mechanisms it uses to achieve compliance with environmental conditions are closely guarded secrets. The complainant submits that it is not possible to delete the commercially valuable information from the disputed documents.

Consideration

11. I am informed by the agency that copies of licences of the kind issued to the complainant may be obtained from the agency by members of the public, upon request. I am also informed that copies of Annual Compliance Reports submitted by licence holders are also available to the public upon request. I have examined the 2001/2002 Annual Monitoring Report submitted by the complainant. Having compared that document with the disputed documents, it is apparent to me that a substantial amount of information about the complainant’s licence conditions is contained in Documents 2 and 4. Further, other information in the disputed documents is published in its 2001/2002 Annual Monitoring Report, which is a publicly available document.
12. I have been unable to identify any information in the disputed documents of the kind described in paragraph 10 above, which the complainant asserts is commercially valuable information. Information which the agency proposes to delete from the disputed documents (taking into account the complainant’s claims about its commercial value) is information that has not been published and, arguably, may be exempt. In any event, the access applicant does not seek access to that kind of information.

13. In those circumstances, I am not persuaded that the disputed documents, edited in the manner proposed by the agency, contain information which has a commercial value to the complainant, or to any other person. Accordingly, in my view, the complainant has not satisfied the requirements of clause 4(2)(a). Further, even if I accepted that the requirements of clause 4(2)(a) had been met (which I do not), I am not persuaded that disclosure could reasonably be expected to destroy or diminish any commercial value, which the information in the disputed documents might have. In my view, any connection between disclosure of the disputed documents and future commercial loss to the complainant is too remote to be a result that could reasonably be expected.
14. For example, I do not consider that disclosure of edited copies of the disputed documents would give competitors any commercial advantage over the complainant. It is not apparent to me, nor has it been explained to me how such disclosure might affect the complainant's commercial competitiveness. In my view, the complainant has failed to discharge its onus under s.102(2) of the FOI Act. Accordingly, I find the disputed documents are not exempt under clause 4(2) of Schedule 1 to the FOI Act.

(b) Clause 4(3)

15. Clause 4(3) provides:

“4. Commercial or business information

Exemptions

(3) 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.”

16. The purpose of the exemption in clause 4(3) is to ensure that the business, professional, commercial or financial affairs of any person (including a company or incorporated body) that provide information to State or local government agencies are not adversely affected by the disclosure of information about those affairs under the FOI Act. The exemption recognises that the business of government is frequently mixed with that of the private sector and that the business interests of third parties should not suffer as a result.
17. The complainant submits that disclosure of the disputed documents could reasonably be expected to have an adverse effect on its business, professional, commercial or financial affairs, because they contain information relating to its trade. The complainant asserts that its competitors will use the information to unfairly disadvantage it, by using information about its confidential trading

methods, its customer lists and the mechanisms it uses to achieve compliance with environmental conditions. The complainant also asserts that, had it known that information voluntarily provided to the agency would be available under the FOI Act, then it would in the future, only provide the information it is obliged to provide and nothing more. The complainant also asserts that it is likely that similar businesses would also restrict the amount of information provided to the agency to only that which is strictly required by law and nothing more.

Consideration

18. I am satisfied that the disputed documents contain information which, generally, falls within the terms of the exemption in clause 4(3)(a), because it is information about the business, commercial and financial affairs of the complainant. Accordingly, the requirements of clause 4(3)(a) are satisfied.
19. I accept that the complainant operates in a competitive industry and that any information about its current and future business proposals may be commercially useful to competitors. In my view, the disclosure of that kind of information could adversely affect the commercial competitiveness of the complainant. However, the disputed documents do not contain information about confidential trading methods, customer lists, or the mechanisms employed by the complainant to ensure compliance with environmental conditions.
20. I also reject the claim that disclosure of the disputed documents could reasonably be expected to prejudice the future supply of information of the relevant kind to the Government or to an agency. When a commercial organisation is required by law to provide information to a Government agency or risk the possible suspension or loss of its licence to operate as a commercial entity, I consider it highly unlikely that the required information would not be forthcoming. In my view, the claimed effect of disclosure made by the complainant is not one that could reasonably be expected.
21. It follows from that, that the complainant has not established that the exemption in clause 4(3) applies to the disputed documents. Accordingly, I find the disputed documents are not exempt under clause 4(3).

(c) Clause 5(1)(b)

22. Matter is exempt matter under clause 5(1)(b) if its disclosure could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted. If disclosure of the disputed documents could reasonably be expected to reveal that there has been an investigation, the identity of the person being investigated and the subject matter of the investigation then it will be exempt: *Police Force of Western Australia v Kelly and Anor* (1996) 17 WAR 9 at 13.

23. The complainant claims that the disputed documents are exempt under clause 5(1)(b) because their disclosure would reveal an investigation into a contravention or possible contravention of s.58 of the EP Act, specifically, the fact of the investigation, the matters being investigated and the identities of the people being investigated.
24. Under s.59 of the EP Act, the CEO may revoke or suspend a licence if the CEO is satisfied that there has been a breach of conditions, but must give the licensee a reasonable opportunity to 'show cause' why such action should not be taken. Although, a licensee who contravenes a condition of his licence may commit an offence (s.58), it appears to me that such a breach may not necessarily result in enforcement action. Rather, a breach of a condition of a licence may result in suspension or removal of the licence, or even a modification of its conditions by the CEO, depending on a licensee's response to a 'show cause' letter issued by the CEO. That is, there is an administrative step, which the EP Act requires the CEO to take, before he can alter the conditions of a licence, or revoke a licence.
25. I understand that inspectors are employed by the agency to inspect prescribed premises and prepare reports to determine whether a licensee is complying with the relevant licence conditions. I do not consider that the administrative action of sending a "show cause" letter to a licensee could reasonably be expected to reveal the investigation of any contravention or possible contravention of the law as required by clause 5(1)(b). The disclosure of such a letter, in my view, may reveal the conditions attached to the licence and the reasons why the CEO considers that conditions might have been breached. In my view, the sending of such a letter does not constitute an 'investigation' in the ordinary sense of the word, and certainly not an investigation into a contravention or possible contravention of the law as required by clause 5(1)(b). My views in this regard are supported by information on the agency's FOI file, which clearly states that there was no such investigation.
26. I consider that the sending of a 'show cause' letter is nothing more than an administrative step which the CEO is required to follow under the EP Act, in order to afford a licensee natural justice and the opportunity to remedy any defects in its work practices at the particular prescribed premises before further action is considered. It is my view that the disclosure of matter contained in the 'show cause' letter sent to the complainant by the agency could not reasonably be expected to reveal the investigation of any contravention or possible contravention of the law, within the meaning of clause 5(1)(b). Accordingly, I find the disputed documents are not be exempt under clause 5(1)(b).

(d) Clause 6(1)

27. Clause 6 provides:

"6. Deliberative processes

Exemptions

(1) Matter is exempt matter if its disclosure -

(a) *would reveal -*

(i) *any opinion, advice or recommendation that has been obtained, prepared or recorded; or*

(ii) *any consultation or deliberation that has taken place,*

in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency;

and

(b) *would, on balance, be contrary to the public interest."*

28. The deliberative processes of an agency are its "thinking processes", the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action: see *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588.
29. In order to establish a *prima facie* claim for exemption under clause 6(1), the requirements of both paragraphs (a) and (b) of clause 6(1) must be satisfied by the complainant. In the case of the exemption in clause 6(1), the access applicant is not required to demonstrate that disclosure of deliberative process material would be in the public interest; he is entitled to access, unless the complainant establishes that disclosure of the disputed documents would, on balance, be contrary to the public interest.
30. The complainant submits that the disputed documents would, if disclosed, reveal consultations that took place during the deliberative processes of the agency. The complainant submits that it would be contrary to the public interest to disclose such consultations because the agency should be able to investigate matters unfettered by the public looking over its shoulder. The complainant submits that there is a public interest in people being willing to provide information to assist such investigations, especially in sensitive matters concerning environmental protection.

Consideration

31. I accept that the disputed documents contain information about consultations that occurred between the agency and the complainant during the period when the agency was deliberating about the action it might take with respect to the complainant.
32. In my view, it may be contrary to the public interest to prematurely disclose deliberative documents whilst deliberations in an agency are continuing if there is material which establishes that such disclosure would adversely affect the decision-making processes, or that disclosure would, for some other reason, be demonstrably contrary to the public interest. In either of those circumstances, I consider that the public interest is served by non-disclosure. I do not consider that it is in the public interest for any agency to conduct its business with the

public effectively “looking over its shoulder” during its deliberations and speculating about what might be done and why. I consider that the public interest is best served by allowing deliberations to occur unhindered and with the benefit of access to all of the material available so that informed decisions may be made.

33. However, in this matter neither of those circumstances exists. It is my understanding that the agency’s deliberations are at an end and the agency has decided that enforcement action will not be taken against the complainant. Therefore, in my view, there is no recognizable public interest which could be harmed by disclosure of the disputed documents at this point in time.
34. In favour of access, I recognise that there is a strong public interest in agencies being accountable for their decision-making and in the members of the community having access to information about the processes of decision-making. I have not been able to identify any public interest factors, which weigh against the giving of access. I have not given much weight to those public interest factors identified by the complainant because I am not persuaded that it would be contrary to the public interest in ensuring the effective operation of agencies to disclose consultations, which took place between the agency and the complainant. Whilst I recognise a public interest in the agency obtaining information relating to environmental issues, I do not accept the claim that licence holders would be unwilling to provide such information to the agency.
35. Accordingly, I do not consider that there is any ground for exemption under clause 6(1). I find the disputed documents are not exempt under clause 6(1) and I confirm the agency’s decision to give access to edited copies of those documents.
