

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

**File Ref: F2003072  
Decision Ref: D0232003**

Participants:

**Cockburn Cement Limited**  
Complainant

- and -

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

- and -

**Kwinana Progress Association Inc**  
Third Party

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION –reverse FOI complaint – third party request for external review of decision to give access to documents relating to emission testing results of complainant’s cement and lime manufacturing kilns – clause 4(1) – trade secrets – whether disclosure of disputed matter would reveal trade secrets of a complainant – clause 4(2) – information having a commercial value to a person – whether disputed matter has a commercial value – whether disclosure of disputed matter could reasonably be expected to diminish or destroy the commercial value of the relevant information.

*Freedom of Information Act 1992 (WA)* ss. 65(1)(a), 102(2); Schedule 1 clause 4(1), 4(2)  
*Environmental Protection Act 1986* ss.56 and 58

*Re: Precious Metals Australia Limited and Department of Minerals and Energy*  
[1997] WAICmr 12

*Re Pfizer Pty Ltd and Department of Health, Housing and Community Services*  
(1993) 30 ALD 647.

## DECISION

The decision of the agency is set aside. In substitution, I decide that the disputed matter is exempt under clause 4(2) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

21 August 2003

## REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Department of Environment, Water and Catchment Protection ('the agency') to give access to documents requested by Mr Hesse ('the applicant') under the *Freedom of Information Act 1992* ('the FOI Act'). Cockburn Cement Limited ('the complainant') objects to disclosure and claims that the requested documents are exempt either under clause 4(1) or 4(2) of Schedule 1 to the FOI Act.

### Background

2. The complainant operates a cement and lime manufacturing plant at Munster. I understand that the manufacturing process is relatively dusty and that the complainant's Munster plant is "prescribed premises" for the purpose of the *Environmental Protection Act 1986* ('the EP Act'). The complainant is the holder of a pollution control licence in respect of its Munster operations, issued under s.56 of the EP Act. Pollution control licences are issued by the agency and are subject to various conditions relating to levels of dust and other pollutants emitted from licensed premises. It is an offence under s.58 of the EP Act to contravene any conditions of a pollution control licence.
3. The complainant operates several kilns at Munster and undertakes "stack testing" of the kiln emissions at regular intervals. It is my understanding that stack testing is undertaken primarily to ensure that emission levels of dust and other pollutants are within licence requirements. The complainant has also commissioned independent stack testing of its kilns, in conjunction with its own testing programs to verify the quality and accuracy of the information and data.
4. In April 2002, the complainant commissioned Unilabs Environmental ('Unilabs') to conduct stack testing of three of its kilns at Munster. Unilabs carried out the stack testing program on 16, 17 and 18 April 2002, and reported the results to the complainant on 31 July 2002, in four reports numbered APR02062A, APR02062B, APR02062C and APR02062D. The first report, APR02062A, contains a detailed description of the testing methods and testing standards used by Unilabs. The three other reports contain the detailed test results. In mid-August 2002, the complainant was asked to provide the agency with copies of the Unilab test reports, which it did.
5. The applicant is the President of the Kwinana Progress Association Inc. In early January 2003, the applicant applied to the agency for access, under the FOI Act, to copies of the four Unilab reports. After consulting with the complainant, the agency decided to give the applicant access to edited copies of the requested documents, but deferred the giving of access to allow the applicant and the complainant to exercise their respective rights of review under the FOI Act.
6. Following that, the applicant applied for an internal review of the agency's decision to withhold certain information. Subsequently, the internal reviewer decided to give the applicant full access to the Unilab reports. The complainant

then lodged a complaint with me, seeking external review of the agency's decision.

## **REVIEW BY THE INFORMATION COMMISSIONER**

7. I obtained the Unilab reports from the agency and examined them. My office made inquiries into this complaint and obtained further information and submissions from the complainant and from the applicant, who has been joined as a party to these proceedings. The complainant's legal advisers informed me that the complainant did not object to disclosure of the Unilab report numbered APR02062A, and only claims exemption for certain information in the three remaining reports.
8. Subsequently, the agency gave the applicant access to the report APR02062A, and access to edited copies of the other three reports. After considering all of the material then before me, on 23 July 2003, I informed the parties, in writing, of my view of the disputed matter including my reasons. It was my opinion that the disputed matter may be exempt under clause 4(2), but not under clause 4(1). Following that, I received further submissions in writing from the complainant and the applicant. I also received a submission from another body, the Alliance for a Clean Environment (Inc), which is not a party to this complaint.
9. The applicant then withdrew his request for access to certain parts of the disputed matter, being the information recorded on page 4 of each the three reports numbered APR02062B, C and D, under the headings "Test Conditions" and "Operating Conditions". Following that concession, the only matter remaining in dispute is the mass emission data, which is recorded in the 3<sup>rd</sup> column of Tables 1, 2, 6, 7 and 8 under the heading "Rate of Emission (mg/min)" ("the disputed matter") in those three reports. The complainant claims that the disputed matter is exempt either under clause 4(1) or clause 4(2).
10. As this is a complaint under s.65(1)(a) of the FOI Act, brought by a third party, the complainant, against the agency's decision to give access to documents, under s.102(2) of the FOI Act, the complainant bears the onus of establishing that access should not be given to the disputed matter or that a decision adverse to the applicant should be made. I am satisfied that the disputed matter is exempt under clause 4(2), for the following reasons.

## **THE EXEMPTION**

11. Clause 4(2) provides:

*"(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.”*

12. The exemption in clause 4(2) applies to a particular kind of commercial or business information. It protects information that has a commercial value to a person (including a company or an incorporated body) if its disclosure could reasonably be expected to destroy or diminish the commercial value of that information.
13. In my view, information may have a commercial value, if it is valuable for the purpose of carrying on the commercial activities of a person or organization: see *Re Precious Metals Australia Limited and Department of Minerals and Energy* [1997] WAICmr 12. I consider that it is by reference to the context in which the information concerned is used, or exists, that the question of whether it has a commercial value may be determined. In that regard, commercial value may attach to information which concerns the nature of techniques used in, and the actual results of, tests carried out: see *Pfizer Pty Ltd and Department of Health, Housing and Community Services* (1993) 30 ALD 647.

#### **The complainant's submissions**

14. The complainant informs me that, when Unilabs carried out the stack testing on its Munster kilns, those kilns were operating on standard, pre-set operating conditions, which it has developed and refined over time and which are not varied on any particular day. It submits that it has expended significant resources and engaged technical expertise, to develop and refine its kiln operating processes to optimal levels and that the information about those processes, which is contained in the Unilab reports, was not and cannot be purchased “off the shelf”. The complainant states that the data and information obtained from the stack testing program accurately reflects its day to day kiln operations at Munster.
15. The complainant submits that the disputed matter could be used by trade competitors to obtain information about the quantities of raw materials used in the production of lime and cement products. In support of that claim, the complainant gave me information about how that could be done, and explained how the disputed matter could be used to back-calculate information to determine the quantities and kinds of raw materials used in its production processes. The complainant submits that, by comparing the information obtained from the back calculation process with other information that is publicly available, such as the complainant's pricing forecasts, it is possible for commercial competitors to calculate the cost of raw materials, which it uses in the production of cement and lime products.
16. The complainant submits that if the disputed matter is disclosed, commercial competitors would have a clear insight into its business costs and that such information could be used by competitors to its commercial detriment, especially in negotiations over prices for cement and lime products. The complainant submits that it would never voluntarily disclose that kind of information and submits that the confidentiality of the disputed matter, which is

not known by any of its commercial competitors, gives it a significant commercial advantage over those competitors in its business dealings.

17. The complainant informs me that it owns and operates three of only four lime pre-heater tower kilns (one of which is kiln 5) that exists world wide and those kilns are the only ones operating at or near capacity. The complainant states that reports containing such detailed information about its kiln operations at Munster have never previously been compiled or published and that the data is so unique that it would be of considerable commercial interest to its competitors.

### **The applicant's submissions**

18. The applicant submits that the disputed matter is not exempt under clause 4(2). He claims that it cannot be used to determine any critical kiln operating conditions, nor can it be used to reveal the techniques used by the complainant in its kiln operations. In support of that claim, the applicant provided me with copies of two letters, written by two professionals with qualifications in the fields of science and chemistry. One of those letters questions the correctness of the complainant's claim about back calculations, because of the fact that there are too many other unknown parameters in the operating conditions of the kilns for the information to have any commercial value.
19. The other letter acknowledges the fact that the disputed matter (the mass emission data) could, provided certain other data was available, be used to estimate some operating conditions. However, the author of the second letter did not consider that critical kiln operating conditions could be determined or calculated with any degree of accuracy by a competitor.
20. The applicant also identified several public interest factors which he submits weigh in favour of disclosure of the disputed matter. Similar submissions were made to me by the Alliance for a Clean Environment (Inc).

### **Consideration**

21. In this matter, the only questions for my determination are whether the disputed matter is the kind of information that has a commercial value to the complainant and, if it does, whether its disclosure could reasonably be expected to destroy or diminish that commercial value. The exemption in clause 4(2) is not limited by a 'public interest' test and, accordingly, there is no scope for me to consider whether disclosure of the disputed matter would, on balance, be in the public interest. Therefore, I have not taken into account the submissions made to me by the complainant and the Alliance for a Clean Environment (Inc) on that point.
22. Clearly, the complainant is engaged in the commercial production of cement and lime products. The inquiries conducted by my office, which include information about lime manufacture in Western Australia obtained from the Internet, suggest that the cement and lime manufacturing industry is an industry characterised by strong competition, including strong import competition, which is a significant factor influencing local prices for cement and lime products. I understand, from

those inquiries, that the complainant is the dominant company in the industry in Western Australia.

23. I am satisfied that the disputed matter relates directly to the complainant's business activities. It consists of precise data about emission concentrations and mass emission rates of various compounds and chemicals which are used as raw materials in the production process. As I understand it, the commercial value of the mass emission data to the complainant lies in its uniqueness and its confidentiality, and in the fact that it is used by the complainant to ensure the kilns are operating at maximum efficiency and minimum cost, whilst meeting environmental requirements. The mass emission data is also used by the complainant as benchmark data during testing of possible alternative fuels for use in the kilns.
24. The complainant submits that disclosure would enable competitors to achieve similar production outcomes, but at a significantly reduced outlay, if the kiln operating processes developed by the complainant were duplicated. The complainant claims that competitors, whether in Australia or elsewhere, could use the mass emission data to tailor the design and operation of kilns to minimise business costs, negotiate lower prices for their own cement and lime products, and cause commercial detriment to the complainant's business.
25. Using the formula/methodology provided by the complainant, my office applied that to the disputed matter and obtained what I am satisfied is accurate information about the quantities of raw materials used by the complainant in its manufacturing processes. In my opinion, if my officers can obtain that kind of business information, any competitor with expertise in chemistry or chemical engineering or a reasonable knowledge of the basic raw materials and fuels used in the manufacturing processes of cement and lime industry, could also obtain the same kind of information. Accordingly, I accept the complainant's claim that the mass emission data could be used in the manner outlined and I do not accept the claims made by the two professionals to the contrary.
26. In my view, the disputed matter relates directly to the viability of the complainant's business operations, commercial activities, and compliance with licence conditions and I am satisfied that it is commercially valuable to the complainant for that purpose. In my opinion, disclosure of the disputed matter would reveal information that has a commercial value to the complainant, because it is valuable for the purpose of carrying out the business activity of manufacturing cement and lime products.
27. I am also satisfied that disclosure of the disputed matter would enable competitors in the industry, with some knowledge of industry manufacturing processes, inputs and raw materials, to apply the data to their business activities in such a way as to adversely affect the commercial activities of the complainant, whether by competitive pricing strategies or products. That is not to say that the possibility of increased commercial competition is a reason for non-disclosure. Rather, it only means that the expectation that the commercial value of the disputed information could be destroyed or diminished by disclosure is, in my opinion, reasonably based.

28. Accordingly, I find the disputed matter exempt under clause 4(2) of Schedule 1 to the FOI Act. The decision of the agency is set aside and my decision is substituted accordingly. In light of that finding, it is unnecessary for me to consider whether the disputed matter is also exempt under clause 4(1).

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