

**BELMONT FORUM AND PLANNING AND WESFIELD LTD
AND JEBB HOLLAND**

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

**File Ref: 97120
Decision Ref: D03297**

Participants:

Belmont Forum Shopping Centre Pty Ltd
Complainant

- and -

Ministry for Planning
First Respondent

- and -

Westfield Limited
Second Respondent

- and -

Jebb Holland Dimasi Pty Ltd
Third Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - complaint against a decision of an agency to refuse access to documents - documents relating to planning application to redevelop shopping centre - clause 4(2) - information having commercial value - whether disclosure would destroy or diminish commercial value - clause 4(3) - business, professional, commercial or financial affairs - access to edited copies of documents.

Freedom of Information Act 1992 (WA) ss. 74, 102(2); Schedule 1 clause 4.

Interpretation Act 1984 (WA) s.5

Re Hassell and Health Department of Western Australia (Information Commissioner, 13 December 1994, unreported, D02594)

Re E & L Metcalf Pty Ltd and Western Power Corporation (Information Commissioner, 7 May 1996, unreported, D02396)

Re Precious Metals Limited and Department of Minerals and Energy (Information Commissioner, 17 April 1997, unreported, D01297)

Re Cannon and Australian Quality Egg Farms Limited (1994) 1QAR 491

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

DECISION

The decision of the agency is varied. In substitution it is decided that the matter identified in the schedule to the reasons for this decision is exempt matter under clause 4(2) of Schedule 1 to the *Freedom of Information Act 1992*.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

25th November 1997

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Ministry for Planning ('the agency') to refuse Belmont Forum Shopping Centre Pty Ltd ('the complainant') access to documents requested by the complainant under the *Freedom of Information Act 1992* ('the FOI Act').
2. The Westfield Carousel Shopping Centre ('the Carousel') is situated in the Perth suburb of Cannington and is managed and operated by Westfield Shoppingtown Carousel Pty Ltd, a member of Westfield Limited ('the Westfield Group'). The Westfield Group also owns, manages and operates similar shopping centres in most of the mainland States and in the Australian Capital Territory. The complainant manages and operates the Belmont Forum Shopping Centre, which is situated in the neighbouring suburb of Belmont. The complainant is a member of the Perron Group of companies. The Westfield Group and the complainant are trade competitors.
3. In 1996, Westfield Developments Pty Ltd ('Westfield Developments'), which is also a member of the Westfield Group, applied to the Western Australia Planning Commission ('the WAPC') for planning approval to redevelop and expand the Carousel. The application for planning approval was considered by the Statutory Planning Committee ('the Committee') of the WAPC in late November 1996. However, consideration of that application was deferred until Westfield Developments provided the Committee with further information about the economic impact and the urban design aspects of the redevelopment proposal.
4. Thereafter, Westfield Developments commissioned Jebb Holland Dimasi, Economists and Property Advisers ('JHD'), to prepare a report containing a detailed economic analysis of the redevelopment proposal, to be provided to the Committee in support of the redevelopment application. That report was subsequently provided to the Committee in early December 1996 and, on 23 December 1996, the Committee considered Westfield Developments' redevelopment application and decided to refuse that application.
5. By letter dated 1 May 1997, the complainant's solicitors applied to the agency seeking access, under the FOI Act, to certain documents associated with the redevelopment application. The requested documents were described by the complainant as:

“(A) *The report titled ‘Summary of Economic and Retail Issues and Impacts’ by The Westfield Group Strategic Analysis (December 1996);*

- (B) *The report titled 'Summary of Urban Design Aspects' by The Westfield Group Developments (December 1996);*
 - (C) *Briefing notes dated 23 January 1997 prepared by The Westfield Group Developments for presentation to the Minister for Planning;*
 - (D) *The report titled 'The Westfield Group Carousel Shopping Centre - Economic Impact Overview' by Jebb Holland Dimasi (6 December 1996); and*
 - (E) *The report titled 'The Westfield Group Carousel Redevelopment - Traffic and Car Parking' by Connell Wagner (4 January 1995)."*
6. By letter dated 23 May 1997, the agency refused the complainant access to the requested documents on the ground that those documents are exempt from disclosure under clause 4 of Schedule 1 to the FOI Act. The complainant sought internal review of the agency's decision. The agency's internal reviewer confirmed the initial decision of the agency. By letter dated 2 July 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. I obtained copies of the disputed documents from the agency together with the file maintained by the agency in respect of the complainant's access application. Subsequently, both the Westfield Group and JDH ('the third parties') sought to be joined as parties to this complaint, and they were so joined. Meetings were held with the various parties in an effort to resolve this complaint through conciliation and negotiation. At the first of those meetings, the third parties advised my Legal Officer that they did not object to the disclosure of Documents B and E. Subsequently, the agency withdrew its claims for exemption for Document B and Document E and released copies of those documents to the complainant.
8. Initially, the third parties claimed that Documents A, C and D were exempt under clauses 4(2) and 4(3) of Schedule 1 to the FOI Act. After further negotiations, and an exchange of written submissions between the third parties and the complainant, the third parties withdrew their claims for exemption for Document A and Document C. Subsequently, the agency withdrew its claims for exemption for those documents and released copies of Document A and Document C to the complainant. The third parties maintained their claims that certain parts of Document D were exempt, but they did not object to the disclosure of the balance of that document to the complainant. Thereafter, the agency granted the complainant access to an edited copy of Document D.
9. After considering all of the material before me and the matter in Document D to which access has been refused, on 20 September 1997, I informed the parties in

writing of my preliminary view of this complaint and my reasons for that view. It was my preliminary view that some of the matter deleted from Document D may be exempt matter under clause 4(2) of Schedule 1 to the FOI Act. However, I was not satisfied that the remaining matter in that document was exempt under clause 4(2) or clause 4(3), as claimed by the third parties.

10. Subsequently, the third parties withdrew their claims for exemption for the matter in Document D which in my preliminary view was not exempt matter under clause 4(2) or clause 4(3). That decision resulted in further material being disclosed to the complainant. However, the solicitors representing the complainant advised me that the complainant wished to pursue access to the deleted matter and requested that I determine this complaint by formal decision. Accordingly, as only certain matter in Document D remains in dispute between the parties, this decision concerns only that matter.

THE DISPUTED MATTER

11. Document D is comprised of a Table of Contents, a List of Tables, a List of Maps, an Introduction and Executive Summary (pages (i)-(x)), and the substantive report (pages 1-51). The matter remaining in dispute consists of certain information in pages (vi), (vii), (viii), 9, 17, 19, 27, 29, 34, 37, 39, and all of the matter in pages 18, 20-22, 26, 28, 30-33, 35, 36, 38, and 40-51. The disputed matter is more fully described in the schedule to these reasons.

THE EXEMPTION

12. The agency and the third parties claim that the disputed matter is exempt under clause 4(2) of Schedule 1 to the FOI Act. Clause 4, so far as is relevant, 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.”

13. 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).

14. 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). However, taking into account the information already disclosed to the complainants, I am able to discuss in general terms the nature of the disputed matter.

The third parties' submissions

15. The third parties submit that the matter remaining in dispute is information having a commercial value to the Westfield Group because it directly relates to the Westfield Group's commercial activities at the Carousel, to the value of the shopping centre as an asset of the Westfield Group and to the forecast economic impact of the proposed expansion of the shopping centre. The third parties made specific submissions in respect of each of the sections of disputed matter. The third parties submit that, if the disputed matter is disclosed, the information could be used to adversely affect the Westfield Group's various commercial relationships and could be used by its trade competitors to their advantage and to the disadvantage of the Westfield Group, for example, by publicising the negative aspects and using those facts to attract potential or existing tenants away from the Carousel.
16. The third parties also submit that one indicator that the disputed matter has a commercial value is that the commissioning of the JHD report by the Westfield Group was at a significant cost to the Westfield Group, that cost reflecting the importance placed by the Westfield Group, from a commercial view, upon such information and due, in part, to the uniqueness of the methodology used. The third parties also submitted that the disputed matter has a commercial value to JHD, but that submission was not pursued.

The complainant's submission

17. The complainant submits that the disputed matter does not have a commercial value in terms of clause 4(2)(a) as it is not important or essential to the profitability or viability of the Westfield Group's continuing business operations and that a substantial portion of such assessments focuses on the impact of the proposed development on shopping centres operated by trade competitors and to that extent does not directly concern the Westfield Group's business operations or commercial activities. The complainant submits that the disputed matter does

not relate to the commercial activities of the Westfield Group because the context in which it is being used does not relate to the Westfield Group's day to day business operations. The complainant contends that the information contained in the JHD report comprises a form of assessment that the Westfield Group would only require on rare occasions, for example, supporting an application for planning approval.

18. The complainant also submits that, if it is argued that the disputed matter has a commercial value to JHD because it reveals the methodology used in undertaking the assessment, it could only have a commercial value if it could be shown that the methodology is unique to JHD. Otherwise, it is submitted, it could not be said to have commercial value to JHD in particular.
19. It is the complainant's submission that, even if the disputed matter has commercial value to the Westfield Group and to JHD, both must discharge their onus of establishing that its disclosure could reasonably be expected to destroy or diminish its commercial value, and that they have not done so. The complainant submits that the third parties have provided no evidence in that regard but mere speculation only.
20. The complainant also claims that the disputed matter has, to some extent, already been revealed to it by the disclosure of Documents A, B, C and E, as well as by the disclosure to it of a document entitled "Cannington Regional Centre - Retail Impact Assessment" dated October 1996, prepared for the agency by Shrapnel Urban Planning ('the Shrapnel Report').

Clause 4(2)(a)

21. In several of my previous decisions – including *Re Hassell and Health Department of Western Australia* (13 December 1994, unreported, D02594) and *Re E & L Metcalf Pty Ltd and Western Power Corporation* (7 May 1996, unreported, D02396) and, most recently, in *Re Precious Metals Limited and Department of Minerals and Energy* (17 April 1997, unreported, D01297) - I considered the meaning of the phrase "commercial value" in clause 10(3) and clause 4(2) of Schedule 1 to the FOI Act, which are in essentially similar terms. 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. Further, it is only 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.
22. Document D was specifically commissioned by Westfield Developments for the purpose of providing additional information to the Committee in response to its request for further information about the economic impact and urban design aspects of the proposed redevelopment of the Carousel. Clearly, it was prepared in the context of the proposed expansion of the future commercial activities of the Carousel and, thereby, the Westfield Group. Although it may be argued that it was not prepared for the purpose of the day to day commercial activities of the

Westfield Group, it is in my view information directly concerning the day to day commercial activities of the Westfield Group at the Carousel and was prepared for the purpose of progressing the future development of those commercial activities.

23. In my decision in *Re Hassell*, I dealt with a claim that information has commercial value to a person because time and money has been spent in acquiring the information in question. At paragraph 39 of that decision, I accepted and adopted the comments of the Queensland Information Commissioner in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, where he said, at p.512:

“...I am not prepared to accept that the investment of time and money is a sufficient indicator of the fact that information has a commercial value...At best, the fact that resources have been expended in acquiring it, are factors that may be relevant to take into account when determining whether information has a commercial value for the purposes of s.45(1)(b) of the Queensland FOI Act.”

24. In this instance, I accept that the level of the investment of time and money may be a relevant factor to take into account in determining whether the disputed matter has a commercial value to the third parties, but it is not of itself decisive of the matter. As the Queensland Information Commissioner said in that matter, information can be costly to produce without necessarily being worth anything.
25. However, I have examined Document D and I am satisfied that it contains, among other things, information about the current and projected future commercial performance of the Carousel and the underlying assumptions upon which projections about the future commercial performance of the Carousel are based. In my view, the disputed matter in Document D is information of the requisite kind, namely, information, other than trade secrets, that has a commercial value to the Westfield Group Group, because it includes information about the current and projected retail turnover at the Carousel and the commercial competitiveness of the Carousel as compared with other similar shopping centres. In my opinion, that kind of information is valuable to the ongoing and future economic performance of the Carousel.
26. Clearly, the Carousel is a business interest of the Westfield Group, which is operated on commercial lines. I accept that the disputed matter is valuable to the Westfield Group because it contains information concerning the current and projected future viability of the Carousel. I accept, therefore, that the disputed matter is of the kind referred to in clause 4(2)(a) of Schedule 1 to the FOI Act.

Clause 4(2)(b)

27. In *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor* (1992) 36 FCR 111, the Full Court of the Federal Court said, at p.123, that the question

to be considered under s.43(1)(b), the Commonwealth FOI equivalent of clause 4(2)(b), “...is not whether there is a reasonable basis for a claim for exemption but whether the commercial value of the information could reasonably be expected to be destroyed or diminished if it were disclosed...The decision-maker is concerned, not with the reasonableness of the claimant’s behaviour, but with the effect of disclosure.”

28. Information about the Carousel that has a commercial value to the Westfield Group is likely to have a commercial value to its competitors in the business of operating suburban shopping centres. The nature of the disputed matter is such that, in my view, its disclosure could reasonably be expected to provide a trade competitor, or any other interested business venture, with the means to structure its business activities in a way that would be likely to adversely affect the commercial viability and profitability of the Carousel. For example, a business competitor in the possession of information about how a shopping centre could operate to maximise the potential of its customer base would be able to use that information to its advantage to attract customers away from a rival shopping centre by providing a different kind of service.
29. Although I cannot describe the disputed matter in more specific terms, the complainant has been given access to the Table of Contents in Document D. The sub-headings in that table are a general indication of the type of information to which access has been refused. In my view, the disclosure of the disputed matter could reasonably be expected to destroy or diminish its commercial value to the Westfield Group, for the reasons given in paragraph 26 above.
30. 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 was of 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 share that view in respect of the disputed matter in this instance. If it has already been disclosed, further disclosure may not have any effect on its commercial value. Therefore, the complainant’s contention that the disputed matter has already been disclosed, if true, could materially affect the claim by the third parties that disclosure of the disputed matter could reasonably be expected to destroy or diminish its commercial value.
31. However, the complainant can only speculate about the nature of the matter in dispute. I have compared the disputed matter in Document D with the Shrapnel Report and with the information previously disclosed to the complainant in other documents. In my view, the disputed matter is not in the public domain, nor has it already been disclosed to the complainant in another form. Accordingly, I am satisfied that there is no basis for the claim made by the complainant in this regard. I am, therefore, satisfied that the requirements of clause 4(2)(b) have been met.

Conclusion

32. Taking into account the material received from the third parties and my examination of the disputed matter, I find that the disputed matter is information that has a commercial value to Westfield Shoppingtown Carousel Pty Ltd and the Westfield Group and that disclosure of the disputed matter could reasonably be expected to destroy or diminish the commercial value of that information. Therefore, I find the disputed matter, which is described in the schedule attached to these reasons for decision, to be exempt matter under clause 4(2) of Schedule 1 to the FOI Act.

SCHEDULE OF DISPUTED MATTER

Page	Description of disputed matter
(vi)	Paragraphs 19-24, inclusive
(vii)	Paragraph 26
(vii)	Paragraphs 30-32, inclusive
(viii)	Paragraph 34
(viii)	Paragraph 35
9	Table 2.1
17	Last paragraph
18	All
19	All, except the first paragraph under the heading 3.1.2
20	All
21	All
22	All
26	All
27	Paragraph 3 and paragraph 6
28	All
29	All, except first paragraph
30-33, inclusive	All
34	Last two paragraphs
35	All
36	All
37	The first and last paragraphs
38	All
39	The first and last paragraphs
40-51, inclusive	All