OFFICE OF THE INFORMATION COMMISSIONER (W.A.)

File Ref: F2011318
Decision Ref: D0012013

Participants:

James Buchanan Pillsbury
Complainant

- and -

Department of Mines and Petroleum
First Respondent

- and -

Cimeco Pty Ltd
Second Respondent

- and -

Rey Resources Limited
Third Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – environmental management plan and occupational hygiene management plan – clause 4(2) – commercial value – clause 4(3) – adverse effect on business affairs – clause 8(2) – confidential communications – section 27(2)(c) – whether documents subject to copyright

Freedom of Information Act 1992: sections 27(1), 27(2), 33, 68(2), 74(2), 80 and 102(3); Schedule 1, clauses 4(2), 4(3), 4(7), 8(2) and 8(4)
Interpretation Act 1984
Mines Safety and Inspection Regulations 1995

Re Kimberley Diamond Company NL and Department for Resources Development and Anor [2000] WAICmr 51
Re Rogers and Water Corporation and Others [2004] WAICmr 8
Manly v Ministry of Premier and Cabinet (1996) 14 WAR 550
Apache Northwest Pty Ltd v Department of Mines and Petroleum [2012] WASCA 167
Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Anor [2010] WAICmr 35
Attorney-General's Department v Cockcroft (1986) 10 FCR 180

Searle Australia Pty Ltd v Public Interest Advocacy Centre [1992] FCA 241; (1992) 36 FCR 111
Re West Australian Newspapers Limited and Another and Salaries and Allowances Tribunal and Another [2007] WAICmr 20
Re Cannon and Australian Quality Egg Farms Ltd (1994) QAR 491
Re QMS Certification Services Pty Ltd and Department of Land Administration and Another [2000] WAICmr 48
Re City of Subiaco and Subiaco Redevelopment Authority [2009] WAICmr 23
Re Read and Public Service Commission [1994] WAICmr 1
Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others [2006] WAICmr 12
Re City of Subiaco and Subiaco Redevelopment Authority [2009] WAICmr 23

DECISION

The agency's decision is set aside. In substitution, I find that the disputed documents are not exempt under clause 4(2), clause 4(3) or clause 8(2) of Schedule 1 to the FOI Act. Further, I find that the disputed documents are subject to copyright and that access should be given by way of inspection only.

Sven Bluemmel
INFORMATION COMMISSIONER

22 January 2013

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Mines and Petroleum ('the agency') to refuse Mr James Pillsbury, ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act'). Two third parties, Rey Resources Ltd ('Rey Resources') and Cimeco Pty Ltd ('Cimeco') have each been joined as a party to this complaint.

BACKGROUND

2. I understand that Rey Resources has identified a thermal coal deposit, known as Duchess Paradise, in the Canning Basin, West Kimberley, Western Australia. Rey Resources proposes to develop and implement the Duchess Paradise Project ('the Project') with the aim of mining, processing and exporting thermal coal. I understand that the coal product will be transported to the Derby Export Facility ('DEF') at the Port of Derby.

3. The DEF was used by the previous operator for lead and zinc sulphide concentrate exports. In 2009, that previous operator submitted a closure plan to the Department of Environment and Conservation ('DEC') which outlined a remediation plan for the shed and associated facilities at the DEF to remove any potential risk of lead and zinc contamination at the site. Rey Resources subsequently took over the sublease of the DEF and agreed with the Shire of Derby/West Kimberley to clean up the site consistent with the closure plan. I understand Rey Resources has contracted Cimeco, a construction contractor, to dismantle the DEF and remediate the land area within the fence line of lot 325 at the Derby Port ('the Land'). A fact sheet entitled *'Derby Export Facility Remediation'* dated June 2011 – which is publicly available on Rey Resources' website – states as follows:

   > *"Rey Resources and its contractors have sourced appropriate expertise, equipment and clean-up techniques to closely manage and monitor the dismantling and remediation in accordance with DEC guidelines and the closure plan.*
   >
   > *The following plans have also been prepared and submitted to the Shire of Derby/ West Kimberley and Department of Mines and Petroleum:*
   >
   > - *Environmental Management Plan*
   > - *Occupational Hygiene Management Plan*
   > - *Safety Management Plan*
   >
   > *These plans will be followed to ensure environmental, occupational hygiene and safety standards are maintained during and after remediation.*
   >
   > *Works will be conducted under the jurisdiction of the Department of Mines and Petroleum and in accordance with the Mines Safety and Inspection Act 1994 and the Mines Safety and Inspection Regulations 1995".*

4. On 7 July 2011, the complainant applied to the agency under the FOI Act, for access to documents as follows:

"Rey Resources Ltd Derby Export Facility demolition project

Documents sought are:

- *Environmental Management Plan*
- *Occupational Hygiene Management Plan*
- *Safety Management Plan"*

5. The agency identified two documents within the scope of the complainant's request, which it described as 'Health, Safety & Environment Management Interface Plan' dated 9 June 2011 ('Document 1') and 'Occupational Hygiene Management Plan' ('Document 2'), collectively 'the disputed documents'.

6. The agency consulted with Rey Resources and Cimeco ('the third parties') in accordance with section 33 of the FOI Act about the disclosure of the disputed documents.

7. By separate letters dated 8 August 2011, the third parties objected to disclosure of the disputed documents, claiming exemption under clause 4(2) of Schedule 1 to the FOI Act.

8. By notice of decision dated 15 August 2011, the agency refused access to the disputed documents on the ground they are exempt under clause 4(2) of Schedule 1 to the FOI Act.

9. On 12 September 2011, the Environmental Defenders Office WA (Inc) ('the EDO') applied to the agency, on behalf of the complainant, for internal review of that decision. On 21 September 2011, the agency varied the initial decision by refusing access to the disputed documents on the ground they are exempt under clause 4(2) and clause 4(3) of Schedule 1 to the FOI Act.

10. On 18 November 2011, the EDO applied to my office, on the complainant's behalf, for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

11. Following receipt of the complaint, I obtained the disputed documents from the agency, together with the agency's FOI file maintained in respect of the access application. The agency notified the third parties of this complaint, as required by s.68(2) of the FOI Act, and each of those parties applied to be joined as a party to this complaint and have been so joined.

12. On 4 October 2012, I provided the parties with a letter setting out my preliminary view of this complaint, which was that the disputed documents are not exempt as the agency claimed. In addition, it was my preliminary view that the disputed documents would be subject to copyright and that access should be given by way of inspection only.

13. By letter dated 12 October 2012, the agency advised me that it withdraws its claims for exemption.

14. By letter dated 19 October 2012, lawyers acting for Cimeco provided further submissions to my office claiming that the disputed documents are exempt under clauses 4(2), 4(3) and 8(2) of Schedule 1 to the FOI Act. On the same date, Rey Resources advised my office that it adopts Cimeco's further submissions.

15. By letter dated 23 October 2012, the EDO made further submissions in respect of my preliminary view that access to the disputed documents should be by way of inspection rather than a copy.

16. Although the agency has withdrawn its claim for exemption, I am required to determine this matter by formal published decision because the third parties joined to this complaint maintain their objection to disclosure of the disputed documents.

THE DISPUTED DOCUMENTS AND THE EXEMPTIONS CLAIMED

17. The disputed documents are a Health, Safety & Environment Management Interface Plan dated 9 June 2011 (Document 1) and an Occupational Hygiene Management Plan dated April 2011 (Document 2) as described at paragraph 5 of this decision.

18. The agency advised my office on 24 May 2012 that both documents are appendices to the *'Project Management Plan – Remediation of the Derby Export Facility'* ('the PMP'), which Rey Resources provided to the agency. I understand that Cimeco is the author of Document 1 and that Rey Resources is the author of Document 2.

19. The third parties claim that the disputed documents are exempt under clauses 4(2), 4(3) and 8(2) of Schedule 1 to the FOI Act.

Information outside the scope of this complaint

20. Document 1 contains a small amount of personal and business information about other third parties.

21. In his access application made to the agency in this matter, the complainant ticked the box which stated *"I do not require any "personal information" as part of my request and understand that such information will be deleted from any documents released."* On this basis, I consider that the agency is entitled to delete any personal information, as that term is defined in the FOI Act – for example, the name of the individual on the cover sheet of Document 1 and the names of the individuals on page 12 of Document 1 – before access is given to that document.

22. Document 1 also contains a small amount of commercial or business information about other third parties, namely the names of certain third party companies on pages 9, 21, and 31. As the complainant has advised my office that he would accept access to Document 1 with that information deleted, that information should also be deleted before access is given to Document 1.

CLAUSE 4 – COMMERCIAL OR BUSINESS INFORMATION

23. Clause 4 recognises that the business of government is frequently mixed with that of the private sector and that such business should not be adversely affected by the

operation of the FOI Act: *Re Kimberley Diamond Company NL and Department for Resources Development and Anor* [2000] WAICmr 51.

24. The exemptions in clauses 4(2) and 4(3) are intended to protect different kinds of information from disclosure. The terms of those provisions make it clear that information that may be found to be exempt under clause 4(2) cannot also be exempt under clause 4(3). However, it is open to an agency or a third party to make alternative submissions as to which of the exemption clauses applies. It is also possible that a single document may contain a mixture of information, some of which is exempt under clause 4(2) and the remainder under clause 4(3): see *Re Rogers and Water Corporation and Others* [2004] WAICmr 8 at [37].

Meaning of 'could reasonably be expected to'

25. A number of the exemptions in Schedule 1 to the FOI Act, including those under consideration in this matter, provide that matter is exempt if its disclosure 'could reasonably be expected to' have the effect described in the exemption.

26. In relation to their claim that the disputed documents are exempt under clause 4(3) of Schedule 1 to the FOI Act, the third parties submit that *"*[p]*ursuant to the decision of* Manly v Ministry of Premier and Cabinet *(1996) 14 WAR 550, the phrase "could reasonably be expected to prejudice the future supply of information of that kind to the government or to an agency" should not be seen as imposing on an agency the obligation to establish a case on the balance of probabilities. The test is whether there are real and substantial grounds".*

27. Although that claim relates to the application of clause 4(3), I take it to extend to the meaning of the phrase 'could reasonably be expected to' in clauses 4(2) and 8(2), being the two other exemptions claimed by the third parties.

28. I understand the third parties to be relying on the following statement of Owen J in *Manly* at p.44:

> *"...it is not sufficient for the original decision-maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision-maker."*

29. In *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167 the Court of Appeal (WA) determined an appeal which arose out of my decision in *Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Anor* [2010] WAICmr 35. The Court noted that, in that case, I had adopted the above statement of Owen J's in *Manly* as the applicable test. Newnes JA, with whom Martin CJ and Beech J agreed, said at [68] *"I did not understand* [the appellant] *to take issue with the approach in Manly and nor in my opinion could it".*

30. Notwithstanding that statement, the Court of Appeal held at [60] that the correct approach to the construction of the phrase 'could reasonably be expected to' was set out

in the decision of the Full Federal Court in *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 and said as follows:

> *"The court* [in Cockcroft] *said it was undesirable to consider the phrase 'could reasonably be expected to' in terms of probabilities or possibilities or the like; to do so was to put an unwarranted gloss on the plain meaning of the words. The effect of the provision was to* 'require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous'*; the enquiry is to be confined to* 'whether the expectation claimed was reasonably based'. *That approach was endorsed by a differently constituted Full Federal Court in* Searle Australia Pty Ltd v Public Interest Advocacy Centre *[1992] FCA 241; (1992) 36 FCR 111, 123. It is, in my respectful view, the correct approach".*

31. Consequently, I consider that the above approach to the meaning of the phrase 'could reasonably be expected to' in the FOI Act is the one I am bound to follow.

Clause 4(2) – information that has a commercial value

32. The third parties claim that the disputed documents are exempt under clause 4(2) of Schedule 1 to the FOI Act.

33. Clause 4(2) provides:

> *"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."*

34. The word 'person' in paragraph (a) of clause 4(2) includes a company or an incorporated body (see s.5 of the *Interpretation Act 1984*).

The third parties' submissions

35. Section 74(2) of the FOI Act provides that I must not include exempt matter in my decision or in my reasons for decision. As I consider that this obligation extends to matter that is claimed to be exempt, I have not described all of the third parties' submissions, or my consideration of those submissions set out below, in full detail.

36. In its letter to the agency dated 8 August 2011, Rey Resources, in brief, submits as follows:

    1. Rey Resources provided the information in the disputed documents to the agency on the basis that the information would be treated as 'commercial and in confidence'.

2. The disputed documents reveal in detail Rey Resources' internal processes and procedures which are highly specific and *"sensitive to external competitors"* and other interested organisations.

3. Rey Resources operates in the mining resources and exploration industry which is a commercially competitive environment.

4. Rey Resources has invested significant time and money in developing these documents. The information contained in the documents is not in the public domain and is confidential. As well as assisting Rey Resources (or its contractors) in the management of the remediation, the information has a commercial value. A third party would be prepared to pay to obtain that information from Rey Resources. If the documents are released into the public domain, their commercial value will be destroyed.

5. Certain detrimental consequences would potentially result from the disclosure of the disputed documents, for reasons outlined by Rey Resources in its letter.

37. By letter to the agency dated 8 August 2011, Cimeco claimed that the information in the disputed documents is exempt under clause 4(2) because it formed part of the tender documents which Rey Resources submitted to Cimeco. Cimeco advised that Rey Resources had requested it to object to disclosure of the disputed documents for substantially the same reasons as given by Rey Resources.

38. As noted at paragraph 14 above, in response to my preliminary view letter dated 4 October 2012, lawyers acting on behalf of Cimeco made further submissions to me by letter dated 19 October 2012, which Rey Resources has adopted. Those further submissions are as follows:

> *"... the disputed documents are exempt under clause 4(2) of Schedule 1 to the FOI Act as* [their] *disclosure would reveal information that has a commercial value to the parties, and could reasonably be expected to destroy or diminish that commercial value.*
>
> *The test for whether information has commercial value was considered in the decision of* Re McGowan and Minister for Regional Development; Lands and Mineralogy Pty Ltd *[2011]WAICmr 2 at [33]:*
>
> *(a) Information may have a commercial value if it is valuable for the purposes of carrying on the commercial activities of a person or organisation. That is, information may be valuable because it is important or essential to the profitability or viability of a continuing business operation or a pending 'one-off' commercial transaction.*
> *(b) Information may have a commercial value if a genuine 'arms-length' buyer is prepared to pay to obtain that information.*
> *(c) It is by reference to the context in which the matter is used or exists that the question of whether it has a commercial value can be determined.*
>
> *Document 1 clearly has a commercial value to the parties: Rey Resources obtained the documents after engaging Cimeco to dismantle the DEF and*

remediate [the Land]. *The creation of the document and the whole of its contents are the direct result of Cimeco and Rey Resources carrying on commercial activities: Cimeco does not provide the information contained in the document other than in the course of its commercial activities. The processes and methodologies contained in the document therefore have a significant commercial value to Cimeco, and to Rey Resources, which acquired the information in the course of its commercial activities.*

... as the information relates to Cimeco's processes and methodologies to dismantle the DEF and remediate [the Land], [disclosure of Document 1] *would reveal detailed information to Cimeco's competitors as to those processes. Consequently the information contained in the document would, if disclosed enable a competitor of Cimeco's to ascertain Cimeco's costs and likely level of remuneration for its activities, and therefore provide a commercial advantage to those competitors. Accordingly, its disclosure will destroy or diminish that commercial value.*

... this is also the case for the competitors of Rey Resources, as Rey Resources has engaged Cimeco. Rey Resources' competitors are, self-evidently, interested in all of the components that comprise Rey Resources' costs of production, including the terms on which it engages contractors to facilitate the operation of its export facilities. Revealing that commercially valuable information - ultimately Rey Resources' costs of production - will destroy its value.

... the work the subject of the disputed documents is clearly the business of Rey Resources and Cimeco in that it is a necessary part of its operations regarding the transport of coal...Rey Resources has engaged Cimeco on commercial, "arms-length" terms...the work is, in any event, clearly a part of Cimeco's business.

... consideration must be given to the commercial value of Document 1 to Cimeco and its competitors. Cimeco has been contracted to remediate [the Land] *and has provided Document 1 to Rey Resources and the agency for this purpose. The document, and the information that it contains, is not otherwise available. The information is essential to the viability of Cimeco's business operation as a contractor that carries out demolition and remediation work.*

... the disputed documents have commercial value in that they reveal the third parties' processes and strategies in response to the regulatory framework [in relation to the DEF].

... [the disputed documents] *evince a specific set of processes and strategic responses to* [the governing national] *standards ... the* [commercial] *value* [of the information] *is* in the way in which *the processes and methodologies respond ... and ultimately that value is evident when an "arms-length" buyer such as Rey Resources pays for it.*

... it is no part of clause 4(2) that the disputed documents must contain a "novel approach" or unique process. The test for exemption is satisfied where, as here, the information contained in the disputed documents would, if disclosed, be

> *reasonably expected to provide a commercial advantage to the parties' competitors in understanding the parties' processes, strategies and costs and thereby destroy or diminish that commercial value if disclosed.*
>
> [Referring to some examples of specific processes in Document 1]*, it is not possible to understand the commercial value of the document without considering it in its entirety. The whole process of the remediation works is valuable as it represents the particular methodology of Cimeco in relation to the dismantling of the DEF and the remediation of* [the Land] *and, with respect to Document 2, Rey Resources' methodology as to the Occupational Health and Management Plan regarding the site demolition and decontamination at the* [DEF].
>
> *Accordingly ... the disputed documents clearly have commercial value to the parties in that they are valuable for the purposes of* [their] *commercial activities, Cimeco does not provide the information contained in Document 1 other than in the course of its commercial activities, the information would if disclosed enable a competitor of the parties to ascertain the parties' costs and remuneration for their activities, and therefore provide a consequent commercial advantage to those competitors and destroy that commercial value. Similarly, the information in Document 2 would, if disclosed, enable a competitor of Rey Resources to ascertain significant information as to Rey Resources' costs of production regarding its activities, and destroy that commercial value".*

The complainant's submissions

39. In its application for external review, the EDO submits, on behalf of the complainant, that:

    - It is difficult to see what commercially sensitive information the disputed documents could contain. The EDO regularly deals with these types of documents which usually contain a brief description of the facility in question; a description of the applicable legislation; and a description of how the proponent proposes to comply with the legislation in respect of that facility. As all proponents are required to comply with the same legislation and are likely to implement similar strategies for complying with this legislation, and since the information would be specific to that particular site in any event, the EDO questions what commercial value any of this information would have.

    - Accordingly, it is unlikely that the information contained in the disputed documents is either information of a commercial value whose disclosure could reasonably be expected to destroy or diminish that commercial value or information about the business or commercial affairs of Rey Resources which disclosure could reasonably be expected to have an adverse effect on those affairs.

Consideration

40. Clause 4(2) is concerned with the protection from disclosure of information that is not a trade secret but which has 'commercial value' to a person or organisation. The

requirements of both paragraphs (a) and (b) of that provision must be satisfied in order to establish a claim under clause 4(2).

41. I consider that the applicable legal principles in relation to clause 4(2) are as set out in *Re West Australian Newspapers Limited and Another and Salaries and Allowances Tribunal and Another* [2007] WAICmr 20 at [115]-[125] which are, in brief, as follows:

- Information may have a commercial value if it is valuable for the purposes of carrying on the commercial activities of a person or organisation. That is, information may be valuable because it is important or essential to the profitability or viability of a continuing business operation or a pending 'one-off' commercial transaction.

- Information may have a commercial value if a genuine 'arms-length' buyer is prepared to pay to obtain that information.

- It is not necessary to quantify or assess the commercial value of the relevant matter.

- It is by reference to the context in which the matter is used or exists that the question of whether it has a commercial value can be determined.

- The investment of time and money is not, in itself, a sufficient indicator of the fact that the information has a commercial value.

- Information that is aged or out-of-date has no remaining commercial value.

- Information that is publicly available has no commercial value that can be destroyed or diminished by disclosure under freedom of information legislation.

42. Rey Resources claims that the documents are 'commercial in confidence' but has neither provided me with information in support of that claim nor put forward any explanation about how the concept of "commercial in confidence" relates to an exemption under the FOI Act. In response to inquiries from my office, the agency advised that the PMP – which, as noted at paragraph 18, contains the disputed documents as appendices – was provided to the agency as required under regulation 3.13 of the *Mines Safety and Inspection Regulations 1995* ('the MSI Regulations'). The agency advises that the PMP was provided prior to any formal request from the agency. The agency also advises that there is no evidence that the disputed documents (or the PMP as a whole) were provided to the agency on the basis of commercial confidentiality; nor is there any documentary evidence on file to show that the documents were received by the agency on a confidential basis. Accordingly, on the information before me, I am not persuaded that the disputed documents were communicated or received in circumstances imposing an obligation of confidentiality, as Rey Resources claims.

43. The third parties submit that the disputed documents have a commercial value because Rey Resources has invested significant time and money in developing them. In *Re Cannon and Australian Quality Egg Farms Ltd* (1994) QAR 491 at 512, the Queensland Information Commissioner dealt with a similar claim and said:

> "*I am not prepared to accept that the investment of time and money is a sufficient indicator in itself of the fact that information has a commercial value. It could be argued on that basis that most, if not all, of the documents produced by a business will have a commercial value because resources were invested in their production, or money expended in their acquisition."*

I agree with those comments.

44. I accept that the disputed documents were created in the course of the third parties' commercial activities and that Cimeco provided Document 1 to Rey Resources in the course of those activities. While the remediation work undertaken by Cimeco at the DEF may have a commercial value to Cimeco and may be essential to Rey Resources being able to transport the coal for the Project, I am not persuaded by the third parties' assertions that the information in the disputed documents is important or essential to the profitability or viability of their business operations.

45. I accept that particular methodologies or proprietary techniques may have a commercial value: see *Re QMS Certification Services Pty Ltd and Department of Land Administration and Another* [2000] WAICmr 48 at [40]-[44] and *Re City of Subiaco and Subiaco Redevelopment Authority* [2009] WAICmr 23. Although I have invited the third parties to identify the information that they claim has a commercial value, citing document, page, line and word numbers, they have not done so.

46. The third parties assert that *"the test for exemption is satisfied where, as here, the information contained in the disputed documents would, if disclosed, be reasonably expected to provide a commercial advantage to the third parties' competitors in understanding the parties' processes, strategies and costs and thereby destroy or diminish that commercial value if disclosed"*. However, based on the information before me including my examination of the disputed documents, I am not persuaded that disclosure of the disputed documents could reasonably be expected to give the third parties' competitors a commercial advantage.

47. As I understand it, the third parties claim that the disputed documents have a commercial value because they reveal in detail Rey Resources' internal processes and procedures which are highly specific and sensitive and would undermine that company's competitiveness if disclosed to external competitors and other interested organisations.

48. The third parties also submit that disclosure of Document 1 would reveal detailed information to Cimeco's competitors as to its processes and methodologies to dismantle the DEF and remediate the Land. This would enable Cimeco's competitors to ascertain Cimeco's costs and likely level of remuneration for its activities; it would provide a commercial advantage to those competitors. Accordingly, disclosure of Document 1 will destroy or diminish the commercial value of the information in that document. However, it is not evident to me how disclosure of Document 1 would enable Cimeco's competitors to ascertain Cimeco's costs and likely level of remuneration for its activities or how the disclosure of Document 1 could reasonably be expected to destroy or diminish the commercial value, if any, of the information in Document 1.

49. The third parties also submit that disclosure of Document 1 will reveal to Rey Resources' competitors the terms on which Rey Resources engages contractors to facilitate the operation of its export facilities and as such will reveal Rey Resources' costs of production; disclosing that commercially valuable information will destroy its value. However, it is not evident to me how the disclosure of Document 1 could reasonably be expected to have the effect claimed, nor have the third parties provided me with any evidence which supports those assertions.

50. In respect of the third parties' submission that the disputed documents have a commercial value in that they reveal their processes and strategies in response to the regulatory framework in relation to the DEF, I consider that the disputed documents contain more generalised information rather than specific details of the processes and strategies. In my opinion, it is not evident that the information in Documents 1 and 2 is so specific or sensitive that disclosure could give either of the third parties' competitors a competitive advantage. In any event, from my examination of the disputed documents, I note that the third parties are relying on other policies and documents which do not form part of the disputed documents, and which would not be disclosed in this case.

51. In my preliminary view provided to the parties, I advised that my view might be different if the third parties could persuade me that the disputed documents contain some novel approach or particular process that is so unique that competitors could use it to gain a competitive edge, such as winning a tender for a site remediation contract. However, the third parties have not identified any such process, strategy or information and instead asserted that "*it is no part of clause 4(2) that the disputed documents must contain a 'novel approach' or unique process*".

52. I have also advised the third parties that if there is something unique or valuable about the processes and procedures which apply to the remediation of the DEF, they should describe how that is the case; what specific information they would pay for; and who would pay for it. However, apart from the third parties' assertions, there is nothing before me to show that an independent buyer would pay to obtain that information. Although the third parties claim that the commercial value of the information in Document 1 is evident by the fact that an 'arms-length buyer' such as Rey Resources has paid for it, it appears more to me that Rey Resources has paid Cimeco to carry out the remediation work rather than paying for the information in Document 1 itself.

53. There is insufficient information before me to establish that the disputed documents or any parts of them have a commercial value to either of the third parties. Consequently, I am not satisfied that the requirements of paragraph (a) of clause 4(2) have been established.

54. Even if I were satisfied on this point, I am not persuaded on the information before me that the disclosure of the disputed documents could reasonably be expected to destroy or diminish any commercial value in that information.

CLAUSE 4(3) – BUSINESS, PROFESSIONAL, COMMERCIAL OR FINANCIAL AFFAIRS

55. The third parties claim that the disputed documents are exempt under clause 4(3). Clause 4(3) and the relevant limit on that exemption in clause 4(7) provide:

> *"(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.*
>
> ...
>
> *(7) Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest."*

The third parties' submissions

56. Initially, the third parties did not expressly claim that the disputed documents are exempt under clause 4(3). However, I consider that their submissions at point 5 of paragraph 36 amount to a claim that disclosure of the disputed documents could reasonably be expected to have an adverse effect on Rey Resources' commercial or business affairs. Accordingly, I have also considered those submissions in relation to clause 4(3).

57. In response to my preliminary view, lawyers acting on behalf of Cimeco made further submissions to me by letter dated 19 October 2012, which Rey Resources has adopted, as follows:

- As it was my preliminary view that the requirements of clause 4(3)(a) were satisfied in this case, no submissions are made in this regard. In respect of clause 4(3)(b), the third parties refer me to their further submissions made in relation to clause 4(2).

- *"As the disputed documents are of commercial value to the* [parties]*, and in circumstances where (for example) Document 1 was prepared by Cimeco specifically and exclusively for the purpose of Rey Resources (through Cimeco) dismantling the DEF and remediating* [the Land]*, the disclosure of the information could reasonably be expected to have an adverse effect on the parties' affairs in that it can be expected that disclosure will give the parties' competitors a competitive advantage".*

- *"In those circumstances the future supply of information of that kind to the Government or to an agency will plainly be prejudiced - the disclosure of commercially sensitive information provided on commercial terms is a matter of primary importance to the parties and could jeopardise their commercial*

> *viability. This is particularly so where, as here... the disputed documents were required to be provided as required under regulation 3.13 of the* [the MSI Regulations]*".*

The complainant's submissions

58. The complainant submits, for the same reasons as relates to the agency's clause 4(2) claim, that it is unlikely that disclosure of the disputed documents could reasonably be expected to have an adverse effect on the business or commercial affairs of Rey Resources.

Consideration

59. The exemption in clause 4(3) is more general in its terms than the exemption in clause 4(2). Clause 4(3) is concerned with protecting from disclosure information about the business, professional, commercial or financial affairs of persons or organisations having business dealings with government agencies, where disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of that kind of information to the Government or its agencies.

60. The exemption consists of two parts and the requirements of both paragraphs (a) and (b) must be satisfied in order to establish a *prima facie* claim for exemption. Clause 4(7) then provides that certain information that is otherwise exempt under clause 4(3) may be disclosed if disclosure would, on balance, be in the public interest.

61. I agree with the former Information Commissioner's view that private organisations or persons having business dealings with government must necessarily expect greater scrutiny of, and accountability for, those dealings than in respect of their other dealings but should not suffer commercial disadvantage because of them: see *Re Kimberley Diamond Company NL.*

62. Having examined the disputed documents, I am satisfied that, if disclosed, they would reveal information about the business and commercial affairs of Rey Resources and Cimeco. Accordingly, I consider that the requirements of clause 4(3)(a) are satisfied in this case.

63. The third parties initially asserted that certain detrimental consequences could potentially result from disclosure of the disputed documents. However, the third parties have not explained to me exactly how the disclosure of any particular information identified in the documents could reasonably be expected to have the adverse effects claimed, other than by putting forward those assertions. In addition, I consider that a claim that certain adverse effects 'could potentially result' from disclosure may fall short of the test of whether disclosure 'could reasonably be expected to' have the relevant effect, as required by clause 4(3)(b).

64. In response to my preliminary view, the third parties submit that as the disputed documents are of commercial value to the third parties, and in circumstances where Document 1 was prepared by Cimeco for Rey Resources, disclosure of the disputed documents could reasonably be expected to have an adverse effect on the affairs of the third parties*"...in that it can be expected that disclosure will give* [their] *competitors a*

competitive advantage". For the same reasons as given in relation to the application of clause 4(2) above, I am not persuaded by that argument.

65. On the material before me, I do not consider that disclosure of the disputed documents could reasonably be expected to have an adverse effect on the business or commercial affairs of either of the third parties. Despite invitations to provide me with evidence that establishes their claims, neither of the third parties have done so. In the absence of such material, I consider the claims of the third parties to be merely speculative.

66. The third parties also submit that "*the future supply of information of* [the kind in the disputed documents] *to the Government or to an agency will plainly be prejudiced"* if the disputed documents are disclosed, *"... particularly ... where, as here ... the disputed documents were required to be provided as required under regulation 3.13 of the* [MSI Regulations]". However, in light of the apparent statutory requirement to provide the information in the disputed documents to the agency, I am not persuaded that disclosure of the disputed documents could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

67. Consequently, I am not satisfied that the requirements of paragraph (b) of clause 4(3) are met. Accordingly, it is not necessary for me to consider whether the limit on the exemption in clause 4(7) applies and whether disclosure of the disputed documents would, on balance, be in the public interest. As a result, I have not set out or considered in my decision the public interest submissions made by either the complainant or the third parties in this regard.

CLAUSE 8(2) – CONFIDENTIAL COMMUNICATIONS

68. In response to my preliminary view letter of 4 October 2012, the third parties submit that the disputed documents are exempt under clause 8(2). Clause 8, insofar as it is relevant, provides:

> ***"8. Confidential communications***
>
> *(1) ...*
>
> *(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.*
>
> *(3) ...*
>
> *(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."*

69. For the exemption in clause 8(2) to apply, I must be satisfied that the requirements of both paragraphs (a) and (b) are met. If both paragraphs are established then, pursuant

to s.102(3) of the FOI Act, the onus would shift to the complainant to persuade me that disclosure of the disputed documents would, on balance, be in the public interest.

The third parties' submissions

70. The third parties submit that the disputed documents are exempt under clause 8(2) for the following reasons:

> *"... pursuant to the decision of* Re Whitely and Curtin University of Technology *[2008] WAICmr 24, for the purposes of the FOI Act, matter is considered to be confidential if it is given and received in confidence, it is confidential in nature, and it is known to a limited number of people. For information to have been 'given and received in confidence', the information must have been both given and received on the basis of either an express or implied understanding of confidence. The exemption in clause 8(2) protects information of a confidential nature obtained in confidence.*
>
> *... the creation of Document 1 and the whole of its contents are the direct result of Cimeco and Rey Resources carrying on commercial activities: Cimeco does not provide the information contained in the document other than in the course of its commercial activities. The processes and methodologies contained in the document therefore have a significant commercial value to Cimeco, and to Rey Resources, which acquired the information in the course of its commercial activities. Document 1 was prepared by Cimeco specifically and exclusively, and therefore in circumstances of confidentiality, for the purpose of Rey Resources (through Cimeco) dismantling the DEF and remediating* [the Land]. *Plainly that was the basis on which Document 1 was prepared and provided to Rey Resources and on which Rey Resources provided the disputed documents to the agency.*
>
> *In those circumstances the future supply of information of that kind to the Government or to an agency will plainly be prejudiced, in that the disclosure of confidential and commercially sensitive information provided on commercial terms is a matter of primary importance to the parties. Its disclosure could jeopardise the parties' commercial viability. This is particularly so where, as here ... the disputed documents were required to be provided as required under regulation 3.13 of the* [MSI Regulations] *..."*

Consideration

71. Information is inherently confidential if it is not in the public domain: *Re Read and Public Service Commission* [1994] WAICmr 1 at [28]. That is, the information must be known by a small number or limited class of persons only.

72. In the present case, the disputed documents are not in the public domain and I accept that the information in them may be of a confidential nature in that it appears to be only known to a small number of people.

73. For the information in the disputed documents to have been 'obtained in confidence', the information under consideration must have been both given and received on the

basis of either an express or implied understanding of confidence: *Re Kimberley Diamond Company NL.*

74. The third parties submit that Cimeco prepared and provided Document 1 to Rey Resources in circumstances of confidentiality and that was also the basis upon which Rey Resources provided the disputed documents to the agency.

75. However, apart from making the above assertions, the third parties have provided me with no supporting material or evidence to establish that the disputed documents were obtained in confidence as required by clause 8(2)(a). Moreover, as noted at paragraph 42, the agency has advised my office that there is no evidence that the disputed documents were provided to or received by the agency on a confidential basis. Consequently, on the information before me, I am not persuaded that the requirements of clause 8(2)(a) have been met. Accordingly, I find that the disputed documents are not exempt under clause 8(2).

76. In light of that, I am not required to consider whether the requirements of clause 8(2)(b) have been met or whether the disclosure of the disputed documents would, on balance, be in the public interest, pursuant to clause 8(4). However, by way of comment, given that the third parties concede that the disputed documents were required to be provided to the agency by regulation 3.13 of the MSI Regulations, I do not consider that disclosure of the disputed documents could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

COPYRIGHT

77. Although copyright belonging to a person other than the State is not a ground of exemption under the FOI Act – nor is it a basis on which access to a document can be refused – it does have an effect in terms of the manner in which access to the document may be given: see *Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others* [2006] WAICmr 12 at [109]; *Re City of Subiaco and Subiaco Redevelopment Authority* [2009] WAICmr 23.

78. Section 27(2)(c) of the FOI Act provides that, if an applicant has requested that access to a document be given in a particular way, the agency has to comply with the request unless giving access in that way would involve an infringement of copyright belonging to a person other than the State, in which case access may be given in some other way, for example, by "*by giving a reasonable opportunity to inspect*" the documents, pursuant to s.27(1)(a) of the FOI Act.

79. As noted at paragraph 12, by letter dated 4 October 2012 I informed the parties that, from my examination of the disputed documents, I considered that they would be subject to copyright and that the creators of those documents are likely to be the copyright holders. Consequently, it was my preliminary view that access should be given to the disputed documents by way of inspection only.

The complainant's submissions

80. The EDO does not accept this aspect of my preliminary view and by letter dated 23 October 2012 submits as follows:

- The public interest in disclosure of the disputed documents will be better served by allowing access by way of a copy, rather than by inspection, as the latter would not allow the information in the documents to be used effectively for the complainant's purposes.

- The disputed documents should be *"... treated as being subject to an implied licence that permits them to be released if required under the* [FOI Act]*"*.

- *"... where a document is prepared for the purpose of obtaining a government approval, then the author of that document impliedly grants a licence to reproduce the work for the purpose. If such a licence were not assumed in the majority of cases, the processes of government would grind to a halt.*

  ... under the present statutory regime, where proponents and their consultants are well aware that documents submitted to government are liable to be released under the FOI Act, it should be assumed that documents submitted to government are also be subject to implied licence which allows copies to be made for the purpose of provision to information access applicants if required under [the FOI Act].

  This interpretation of the law would not render s.27(2) redundant, but rather it would merely narrow its scope to circumstances where a licence should not be implied, such as where a document was not prepared for the purpose of lodgement with an agency".

- *"In the alternative, even if release of the documents would result in a breach of copyright, then s.27(2) does not absolutely prohibit the Commissioner from providing a copy in those circumstances, but merely relieves him from the obligation to grant access in the manner requested by the* [access applicant] *which would otherwise apply under s.27(1). In this case, the Commissioner has discretion to either grant access in the way requested by the applicant, or in another way. Section 80 of the FOI Act would then protect the Commissioner from an action for breach of copyright if he decides to exercise his discretion in favour of granting access by means of a copy"*.

- *"... in this case, the Commissioner needs to weigh the considerations in favour of granting access by means of a copy ... against the harm which may be caused to the copyright holder ... the harm which may be caused to the copyright holder from breach of copyright* per se *is nil, because the document was produced for the specific purpose of obtaining a statutory approval, not for the purpose of making a profit from licensing the work. Therefore in this case the granting of access by means of providing a copy is the preferable decision."*

Consideration

81. On the information before me, I consider that the disputed documents are *prima facie* the subject of copyright and that access by providing the complainant with a copy of the disputed documents would involve an infringement of copyright belonging to a person

other than the State. Accordingly, I consider that pursuant to s.27(1)(a) of the FOI Act, any access to those documents should be by way of inspection.

82. Having considered the complainant's submissions, I am not persuaded by the argument presented to me that the disputed documents should be treated as being subject to an implied licence which permits a copy of them to be released under the FOI Act.

83. In respect of the complainant's submission that s.80 of the FOI Act would protect me against an action for breach of copyright if I decided to exercise my discretion to grant access to a copy of the disputed documents, I consider that submission is misconceived because it is the agency and not my office that will give the complainant access to the disputed documents in this matter.

84. Finally, in relation to the complainant's submission that I should weigh the considerations in favour of access to the disputed documents by means of a copy against the negligible harm that may be caused to the copyright holder, I consider that once I find that access to the disputed documents by way of a copy would involve an infringement of copyright belonging to a person other than the State, it is not open to me under the FOI Act to consider whether or not access to a copy would be in the public interest.

CONCLUSION

85. I find that the disputed documents are not exempt under clause 4(2), clause 4(3) or clause 8(2) of Schedule 1 to the FOI Act. However, as I am satisfied that s.27(2)(c) of the FOI Act applies in this instance, I find that access to the disputed documents should be given by way of inspection only.

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