

Decision D0022021 – Published in note form only

Re Onslow Salt Pty Ltd and Department of Mines, Industry Regulation and Safety [2021] WAICmr 2

Date of Decision: 18 February 2021

Freedom of Information Act 1992 (WA): Schedule 1, clauses 4(2) and 4(3)

On 27 February 2020, Onslow Resources Ltd (**the access applicant**) applied to the Department of Mines, Industry Regulation and Safety (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to the environmental reports submitted by Onslow Salt Pty Ltd (**the complainant**) to the agency, for a number of specified years.

The scope of the access application was reduced by agreement between the agency and the access applicant to the Annual Environmental Report (**AER**) submitted by the complainant for the year 2013-2014 and the Triennial Environmental Report (**TER**) submitted by the complainant to the agency for the period 2012-2015.

After seeking the views of the complainant, pursuant to section 33 of the FOI Act, the agency decided, on 11 May 2020, to give the access applicant access to the AER and TER. On 10 June 2020, the complainant sought internal review of the agency's decision. The agency confirmed its decision on 24 June 2020.

On 24 July 2020, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision. The agency provided the Commissioner with its FOI file maintained in respect of the access application, together with a copy of the AER and TER.

The complainant claimed that particular, identified information (**the disputed information**) in the AER and TER was exempt under clause 4(2) or clause 4(3) of Schedule 1 to the FOI Act.

The access applicant was joined as a party to the matter pursuant to section 69(3) of the FOI Act.

On 25 November 2020, after considering the material then before her, the Commissioner provided the parties with her preliminary view of the matter. It was her preliminary view that the disputed information was not exempt under either clause 4(2) or clause 4(3) of Schedule 1 to the FOI Act.

The complainant was invited to accept the Commissioner's preliminary view or to provide further submissions. By letter dated 10 December 2020, the complainant indicated that it did not accept the Commissioner's preliminary view and provided further submissions.

After considering all of the information before her, including the complainant's further submissions, the Commissioner was not dissuaded from her preliminary view.

Clause 4(2) is concerned with the protection from disclosure of information that has commercial value to a person. The requirements of both paragraphs (a) and (b) of clause 4(2)

must be satisfied to establish a claim under that provision. Under section 102(2) of the FOI Act, the complainant was required to establish that the disputed information has a commercial value and that its disclosure could reasonably be expected to destroy or diminish that commercial value.

The complainant did not provide sufficient information to persuade the Commissioner that the disputed information has a commercial value. Further, the Commissioner considered that, even if the complainant were able to persuade her that the information did have a commercial value, the complainant had not provided sufficient information to show that disclosure of that information could reasonably be expected to destroy or diminish its value.

The exemption in clause 4(3) is concerned with protecting from disclosure information about the business, professional, commercial or financial affairs of a person. 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. If the requirements of both parts (a) and (b) are satisfied, the application of the limit on the exemption in clause 4(7), the public interest, must also be considered.

Clause 4(3)(a) provides that matter is exempt matter if its disclosure would reveal information about the business, professional, commercial or financial affairs of a person. The Commissioner accepted that, given the nature of the requested documents, the disputed information, if disclosed, would reveal information about the business affairs of the complainant. Therefore, the Commissioner considered that the requirements of clause 4(3)(a) had been met.

Clause 4(3)(b) provides that if disclosure of the matter described in clause 4(3)(a) could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of information of that kind to the Government or to an agency, then that matter will be exempt.

The Commissioner considered that as the complainant is required by statute to provide the information in the AER and TER to the agency, it was not open to the complainant to refuse to provide information of that kind to the agency. Accordingly, the Commissioner was not persuaded that disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or an agency.

Taking into account all of the information before her, including the information on the complainant's website about its activities; the fact that the complainant was the only operator with a licence to undertake the particular activities at the particular site; and the information already publicly available about the operations of the complainant, the Commissioner was not persuaded that disclosure of the disputed information could reasonably be expected to have an adverse effect on the affairs of the complainant. Therefore, the Commissioner found that the requirements of clause 4(3)(b) had not been met. As a result, the Commissioner was not required to consider the limit on the exemption in clause 4(7) and she did not do so.

Accordingly, the Commissioner found that the disputed information was not exempt under clause 4(2) or clause 4(3) of Schedule 1 to the FOI Act and confirmed the agency's decision.