

**Decision D0022022 – Published in note form only**

***Re Onslow Resources Limited and Department of Jobs, Tourism, Science and Innovation [2022] WAICmr 2***

**Date of Decision: 9 February 2022**

***Freedom of Information Act 1992 (WA): Schedule 1, clause 4(3)***

On 15 October 2020, Onslow Resources Limited (**the complainant**) applied to the Department of Jobs, Tourism, Science and Innovation (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents relating to a particular mining tenement lease held by Onslow Salt Pty Ltd (**the third party**).

By notice of decision dated 24 December 2020, having sought the views of third parties, the agency identified seven documents and decided to refuse access to two documents and give access to an edited copy of five documents.

On 25 January 2021 the complainant sought internal review of the agency's decision.

On 16 February 2021 the agency varied its decision and decided to refuse the complainant access to two documents, give access to two documents and to give edited access to the remaining three documents, but with additional information disclosed in those documents.

By email dated 16 April 2021, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision to give edited access to three documents.

One of the documents was the subject of another external review. Therefore the complainant agreed to exclude that document from the scope of this external review. The remaining disputed documents comprised correspondence between the former Premier and the third party, and the Director General of the former Department of State Development and the third party.

The agency claimed that the information deleted from the disputed documents (**the disputed information**) was exempt under clause 4(3) of Schedule 1 to the FOI Act (**clause 4(3)**).

On 26 November 2021, 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 clause 4(3). The parties were invited to accept the Commissioner's preliminary view or to provide further submissions.

The agency did not accept the Commissioner's preliminary view and made further submissions.

After considering the material before her, the Commissioner was not dissuaded from her preliminary view that the disputed information was not exempt under clause 4(3). As the Commissioner did not consider the disputed information was exempt, she sought the views of the third party, and an additional third party, about the disclosure of the information about them.

Pursuant to section 69(2) of the FOI Act, the third party was joined to the matter. The third party consented to the disclosure of one of the documents, Document 4, but submitted that the disputed information in the remaining document, Document 6, was exempt under clause 4(3). The additional third party did not object to the disclosure of the disputed information.

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 the disputed information, if disclosed, would reveal information about the business affairs of the third party. Therefore, the Commissioner considered that the requirements of clause 4(3)(a) had been met in relation to that information.

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.

Section 102(1) of the FOI Act provides that the onus is on the agency to establish that access should not be given or that a decision adverse to the access applicant should be made.

Both the agency and the third party made general claims about the effects of disclosure of the disputed information, but did not explain how its disclosure could reasonably be expected to have an adverse effect on the affairs of the third party.

Additionally, as the disputed information was not information provided by the third party, but to the third party, the Commissioner was not persuaded that its disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or an agency.

The Commissioner did not consider that the agency had discharged the onus under section 102(1) of establishing that the disputed information is exempt under clause 4(3).

Taking into account all of the information before her, including the fact that the documents dated from 2011, 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 third party or to prejudice the future supply of information of that kind to the Government or an agency. 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 set aside the agency's decision and, in substitution, found that the disputed information is not exempt under clause 4(3) of Schedule 1 to the FOI Act.