

Decision D0032019 – Published in note form only

Re Gaffney and Department of Jobs, Tourism, Science and Innovation [2019] WAICmr 3

Date of Decision: 15 February 2019

Freedom of Information Act 1992 (WA): Schedule 1, clauses 4(3) and 8(1)

On 11 September 2017, Franklin Gaffney (**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 ‘the Community Development Plan and all annual reports submitted to the Minister on the implementation of the Community Development Plan as referred to in section 3(2) of Eight Schedule of the Iron Ore (Robe River) Agreement Act 1964 (WA)’.

The agency identified five documents (**the disputed documents**) and decided to refuse access to the disputed documents under clause 4(3) of Schedule 1 to the FOI Act. The agency claimed that disclosure of the disputed documents would reveal information about the business, professional, commercial or financial affairs of a person and that disclosure 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.

The complainant sought internal review of the agency’s decision. The agency varied its decision in that it decided that disclosure could not reasonably be expected to prejudice the future supply of information of that kind to the Government or an agency as the third party had a statutory obligation to provide the information to the agency.

However, the agency confirmed its decision that disclosure could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of Rio Tinto (**the third party**). By letter dated 14 November 2017 the complainant applied to the office of the Information Commissioner for external review of the agency’s decision.

The third party was joined as a party to the complaint in May 2018. The matter was suspended at the request of the complainant and the third party, while attempts were made to resolve the matter between themselves. These attempts were not successful.

On 13 July 2018, after considering all the information before her, the former A/Commissioner (**former A/Commissioner**) provided the parties with her preliminary view of the matter.

The former A/Commissioner accepted that as the documents contained information about the third party’s community involvement, disclosure would reveal information about the business or commercial affairs of the third party. However, the former A/Commissioner considered that as the third party is required to provide information of the kind contained in the disputed documents to the agency to comply with its statutory obligations, disclosure could not reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

Taking into account the submissions of the agency, including:

- that disclosure of the projects funded by the third party could lead other community groups to request funding from the third party and create a negative view of the third party if the requests were rejected; and
- unsupported claims that there may be contractual agreements between the third party and other community groups not to disclose the details of the funding provided by the third party;

the former A/Commissioner was not persuaded that disclosure of the disputed documents could reasonably be expected to have an adverse effect on the business, commercial, professional or financial affairs of the third party.

Therefore, the former A/Commissioner did not consider the disputed documents are exempt under clause 4(3).

The parties were invited to accept the former A/Commissioner's preliminary view or to provide additional submissions for her consideration. By letter dated 20 July 2018, the agency made further submissions. In its further submissions the agency changed its position and claimed that disclosure of the disputed information could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. The agency referred to the level of detail provided by the complainant to the agency. The third party also made further submissions by email dated 23 July 2018.

The Acting Information Commissioner (**A/Commissioner**) considered the parties further submissions, but was not dissuaded from the former A/Commissioner's preliminary view. The phrase '...could reasonably be expected to prejudice the future supply of information of that kind to the Government or an agency' in clause 4(3)(b) applies not to whether, in this case, the third party could reasonably be expected to refuse to supply such information in the future, but whether disclosure could reasonably be expected generally to prejudice the future supply of such information to the Government or an agency: *Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Anor* [2010] WAICmr 35 at [123].

In this instance, as the 'information of that kind' consists of information provided by a third party to an agency in accordance with its obligations under a State Agreement, the A/Commissioner did 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 an agency.

As the A/Commissioner considered the disputed documents were not exempt, the agency was required to seek the views of a significant number of other parties, pursuant to section 33 of the FOI Act, because some of the information in the disputed documents was information about those other parties. Of the third parties consulted, Tom Price Medical Centre (**the second third party**) and Scitech (**the third third party**) elected to be joined as parties to the complaint and make submissions as to why information about those parties should not be disclosed.

Two other third parties objected to disclosure of information about them but did not elect to be joined to the matter. While the submissions made by the third parties and joined parties in relation to clause 4(3) were in respect of their specific organisations, the submissions were broadly the same as those made by the agency and Rio Tinto. The second third party also claimed that the disputed information is exempt under clause 4(2), because it had commercial

value to that party, but did not adequately explain how disclosure of the information could reasonably be expected to destroy or diminish the commercial value of that information.

Further, the second third party submitted that the disputed information was exempt under clause 8(1) of Schedule 1 to the FOI Act, because disclosure would be a breach of confidence for which a legal remedy could be obtained. The second third party provided a copy of a confidentiality clause in an agreement between itself and the third party. Under section 33 of the FOI Act, the A/Commissioner is not required to consider submissions from third parties in relation to clause 8: *Re Tallentire and Department of Agriculture and Food* [2015] WAICmr 2. Therefore, it was not necessary for the A/Commissioner to consider the claim under clause 8(1).

However, as the agreement was between the third party and second third party, the A/Commissioner considered that disclosure of information by the agency would not constitute a breach by either of the parties to the agreement. Therefore, no legal remedy would be available to the parties. As a result, the A/Commissioner did not consider that the disputed information is exempt under clause 8(1).

As a result, the A/Commissioner set aside the agency's decision and found that the disputed documents are not exempt under clause 4(3) of Schedule 1 to the FOI Act.