

**Decision D0032023 – Published in note form only**

***Re Woodside Energy Ltd and Department of Water and Environmental Regulation [2023] WAICmr 3***

**Date of Decision: 20 April 2023**

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

On 23 September 2021, the access applicant applied to the Department of Water and Environmental Regulation (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to ‘Correspondence relating to Works Approval W6332/2019/1’.

The agency identified various documents within the scope of the access application that contained information about a third party, Woodside Energy Ltd (**the complainant**). One of those documents was a report, described by the agency in its schedule of documents provided to the access applicant as ‘Best Practice Report Rev 3’ (**the disputed document**). The agency sought the views of the complainant, pursuant to section 33 of the FOI Act.

By notice of decision dated 8 February 2022, the agency decided to give the access applicant access to the disputed document. The complainant sought internal review of the agency’s decision and, by internal review decision dated 22 April 2022, the agency confirmed its decision.

On 26 May 2022 the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency’s decision. Following receipt of the matter in this office, the agency was required to produce to the Commissioner its FOI file maintained in respect of the access application, together with a copy of the disputed document.

The complainant claimed that the disputed document was exempt under both clause 4(1) and clause 4(2) of Schedule 1 to the FOI Act.

Under section 102(2) of the FOI Act, the onus is on the complainant to establish that access should not be given or that a decision adverse to the access applicant should be made.

On 19 January 2023, 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 document was not exempt under either clause 4(1) or clause 4(2).

The complainant was invited to accept the Commissioner’s preliminary view or to provide further submissions. By letter dated 3 February 2023, the complainant made further submissions to the Commissioner.

After considering the complainant’s further submissions and all of the material before her, the Acting Information Commissioner (**the A/Commissioner**) was not dissuaded from the Commissioner’s preliminary view.

In order to establish a claim for exemption under clause 4(1), it is necessary to show that disclosure of the relevant matter would reveal trade secrets of a person. The

A/Commissioner considered that the factors identified in *Re Cannon and Australian Quality Egg Farms Limited* [1994] QICmr 9 (***Re Cannon***) were relevant to determining the existence or otherwise of a trade secret.

Those factors include the necessity for secrecy, including the taking of appropriate steps to confine dissemination of the relevant information to those who need to know for the purposes of the business, or to persons pledged to observe confidentiality; that information, originally secret, may lose its secret character with the passage of time; that the relevant information be used in, or useable in, a trade or business; that the relevant information would be to the advantage of trade rivals to obtain; and that trade secrets can include not only secret formulae for the manufacture of products, but also information concerning customers and their needs.

The A/Commissioner observed that the complainant had been required to provide the disputed document to the agency, to comply with the requirements of Ministerial Statement 757, and that much of the information in the disputed document is publicly available. On the material before her, the A/Commissioner was not satisfied that the complainant had established that the disputed document contained information that is a trade secret, as described in *Re Cannon*, and therefore did not consider that the requirements of clause 4(1) were made out.

The exemption in clause 4(2) is concerned with the protection from disclosure of information that has a 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.

In considering whether the disputed document contained information that has a ‘commercial value’ to a person, the A/Commissioner had regard to the applicable legal principles outlined in *Re McGowan and Minister for Regional Development; Lands and Mineralogy Pty Ltd* [2011] WAICmr 2 at [33]. The A/Commissioner did not accept the complainant’s claim that the information in the disputed document is valuable to the complainant for the purposes of carrying out its commercial activities. Rather, as noted above, the complainant was required to provide the disputed document to the agency, for the purposes of statutory compliance. The complainant claimed that it had either paid for or developed the information in the disputed document. However, the A/Commissioner was not persuaded that the expenditure of money or resources alone was sufficient to establish that the information had a commercial value.

The A/Commissioner noted that, even if she were persuaded that information in the disputed document did have a commercial value, she did not accept that its disclosure could reasonably be expected to destroy or diminish the commercial value of the information, as required by clause 4(2)(b).

Accordingly, the Commissioner found that the disputed document is not exempt under either clause 4(1) or 4(2) of Schedule 1 to the FOI Act and confirmed the agency’s decision to give the access applicant access to the disputed document.