

Decision D0042021 – Published in note form only

***Re Flatman and Main Roads Western Australia* [2021] WAICmr 4**

Date of Decision: 23 June 2021

Freedom of Information Act 1992 (WA): Schedule 1, clause 4(2)

On 3 October 2019, Lance Flatman (**the complainant**) applied to Main Roads Western Australia (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents which included Asphalt Test Reports (**ATRs**) and Core/Compaction Test Reports (**CTRs**) for a specific date range.

By notice of decision dated 13 February 2020 the agency identified three sets of documents within the scope of the complainant's access application. The agency decided to give the complainant access to an edited copy of the documents.

By letter dated 9 April 2020 the complainant sought internal review of the agency's decision to give access to edited copies of the ATRs and CTRs. On 28 April 2020 the agency confirmed its decision, claiming that the disputed information – being the information that the agency deleted from the ATRs and CTRs (**the disputed documents**) - is exempt under clause 4(2) of Schedule 1 to the FOI Act (**clause 4(2)**).

On 26 June 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 disputed documents.

Attempts were made to resolve the matter informally, with the parties, but these attempts were not successful.

On 20 May 2021, after considering the material then before her, the Commissioner provided the parties with her written preliminary view of the matter. It was her preliminary view that the disputed information, other than a very small amount of information identified in column 4 of the ATRs, is exempt under clause 4(2).

The complainant indicated that he did not accept the Commissioner's preliminary view and provided further submissions.

The agency advised that it accepted the Commissioner's preliminary view and gave the complainant access to the small amount of information that the Commissioner considered was not exempt. Accordingly, that information was no longer in dispute.

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

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

The exemption provides that matter is exempt matter if its disclosure would reveal information (other than trade secrets) that has a commercial value to a person and could reasonably be expected to destroy or diminish that commercial value.

The disputed documents contain information about testing carried out on a third party's asphalt mix, to assess whether it complied with the agency's Asphalt Mix Design (AMD). In order to undertake work for particular projects, the asphalt has to meet particular requirements.

The Commissioner accepted that the information about the results of the tests on particular components of the asphalt mix has a commercial value to the third party, as described in *Re McGowan and Minister for Regional Development; Lands and Mineralogy Pty Ltd* [2011] WAICmr 2. The asphalt mix is required to meet the AMD set down by the agency, and only mixes that meet the AMD can be used on particular agency projects. Accordingly, the Commissioner considered that the disputed information is valuable for the purposes of carrying on the commercial activities of the third party. The Commissioner did not accept the complainant's submissions that the disputed information is out of date, as the agency submitted that the mix may be used on future projects. Additionally, the Commissioner noted that the particular information is not publicly available.

Although the complainant submitted that it was not economically viable for a competitor to do so, the Commissioner accepted that disclosure of various components of the asphalt mix could enable the asphalt mix to be back-calculated. The Commissioner accepted that the third party operates in a competitive environment. Accordingly, she considered that competitors in the industry, with some knowledge of industry manufacturing processes, inputs and raw materials, could apply the data to their business activities to the detriment of the commercial activities of the third party, whether by competitive pricing strategies or products. Accordingly, the Commissioner considered that it is reasonable to expect that disclosure of the disputed information could destroy or diminish the commercial value of that information.

The complainant also made claims that the disclosure of the disputed information is in the public interest. However, as the exemption in clause 4(2) is not subject to a public interest limitation, it was not open to the Commissioner to consider that issue.

The Commissioner, therefore, found that the disputed information was exempt under clause 4(2) of Schedule 1 to the FOI Act and confirmed the agency's decision.