

Decision D0042022 – Published in note form only

Re Gilbert & Tobin and Department of Jobs, Tourism, Science and Innovation [2022] WAICmr 4

Date of Decision: 31 March 2022

Freedom of Information Act 1992 (WA): Schedule 1, clauses 4(2) and 8(1)

On 7 October 2020 the Department of Mines, Industry Regulation and Safety transferred an access application made by Gilbert & Tobin Lawyers (**the complainant**) to the Department of Jobs, Tourism, Science and Innovation (**the agency**). The access application sought access to ministerial consents in relation to the *Mining Act 1904*, the *Mining Act 1978* and the *Collie Coal (Griffin) Agreement Act 1979*, in 2013.

By notice of decision dated 13 November 2020, the agency identified one document and refused the complainant access to that document (**the disputed document**). The complainant sought internal review of the agency's decision. On 15 December 2020, the agency varied its decision and gave the complainant access to an edited copy of the disputed document, claiming that the deleted information (**the disputed information**) was exempt under clause 4(2) of Schedule 1 to the FOI Act (**clause 4(2)**) and clause 8(1) of Schedule 1 to the FOI Act (**clause 8(1)**).

The complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision. Following receipt of this complaint, the agency produced a copy of the disputed document, together with its FOI file maintained in respect of the complainant's access application to the Commissioner.

Section 30 of the FOI Act sets out the details that must be included in an agency's notice of decision given to an access applicant. If an agency refuses access to information in a document, the agency's notice of decision must include the reasons the information is exempt; the findings on any material questions of fact underlying those reasons; and reference or references to the material on which those findings were based.

In this case, neither the agency's initial decision nor the internal review decision complied with the above requirements of section 30. Apart from citing the exemption clauses claimed, the agency's initial decision did not explain how the requirements of each particular exemption provision were satisfied. A case for exemption is not made out merely by citing an exemption clause or clauses.

On 27 October 2021, 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 8(1).

The agency did not accept the Commissioner's preliminary view and provided further submissions. The agency's further submissions did not dissuade the Commissioner from her preliminary view.

The Commissioner sought the views of the third parties whose information was contained in the disputed document, in relation to clause 4 of Schedule 1 to the FOI Act. One of the third

parties, Griffin Coal Mining Company Pty Limited (**the third party**), elected to be joined as a party to the matter and made submissions. An additional third party considered that the information about it was not exempt under clause 4 of Schedule 1 to the FOI Act and did not elect to be joined to the matter.

Clause 4(2) provides that matter is exempt if its disclosure would reveal information that has a commercial value to a person and could reasonably be expected to destroy or diminish that commercial value.

The Commissioner noted that the applicable legal principles to be considered in relation to clause 4(2) were set out at [33] of *Re McGowan and Minister for Regional Development; Lands and Mineralogy Pty Ltd* [2011] WAICmr 2. Applying those principles, the Commissioner was of the view that the disputed information of itself was not valuable for the purposes of carrying out the commercial activities of a person. Additionally, the Commissioner considered that the information was out of date, and that it was not likely that another party would be prepared to pay for the information. As a result, the Commissioner was not persuaded that the disputed information had a commercial value to a person. Further, on the material before her, the Commissioner was not persuaded that disclosure of the disputed information could reasonably be expected to destroy any commercial value it may have to a person.

Accordingly, the Commissioner was not persuaded that the disputed information is exempt under clause 4(2).

Clause 8(1) provides that matter is exempt matter if its disclosure (otherwise than under this Act or another written law) would be a breach of confidence for which a legal remedy could be obtained.

The Commissioner noted that the exemption in clause 8(1) applies to documents if their disclosure would give rise to a cause of action for breach of a common law obligation of confidence, such as a breach of a contractual obligation of confidence, for which a legal remedy may be obtained: see *Re Speno Rail Maintenance Australia Pty Ltd and Another and The Western Australia Government Railways Commission* [1997] WAICmr 29.

The agency did not provide any information to support its claim that a contractual obligation of confidence exists in respect of the disputed document. Therefore, the Commissioner was not persuaded that the disputed information is exempt under clause 8(1).

Accordingly, the Commissioner set aside the agency's decision and, in substitution, found that the disputed information is not exempt under clauses 4(2) or 8(1) of Schedule 1 to the FOI Act.