

**OFFICE OF THE INFORMATION  
COMMISSIONER (W.A.)**

**File Ref: F2013089  
Decision Ref: D0052015**

Participants:

**Rebecca Scriven**  
Complainant  
  
- and -  
  
**Rottnest Island Authority**  
Agency

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – questions and answers in a survey – clause 10(3) – whether disclosure would reveal information that has commercial value and could reasonably be expected to destroy or diminish that value – clause 10(6) – whether disclosure would, on balance, be in the public interest.

*Freedom of Information Act 1992*: sections 30; 74(2) and 102(1); Schedule 1, clauses 10(3) and 10(6)

*Rottnest Island Authority Act 1987*

*Re McGowan and Minister for Regional Development; Lands and Mineralogy Pty Ltd* [2011] WAICmr 2

*Re West Australian Newspapers Limited and Another and Salaries and Allowances Tribunal* [2007] WAICmr 20

## DECISION

The agency's decision to refuse access to the disputed information under clause 10(3) of Schedule 1 to the *Freedom of Information Act 1992* (**the FOI Act**) is set aside. In substitution, I find that the disputed information is not exempt under clause 10(3) of the FOI Act.

Sven Bluemmel  
INFORMATION COMMISSIONER

25 March 2015

## REASONS FOR DECISION

1. This complaint arises from a decision made by the Rottnest Island Authority (**the agency**) to refuse Ms Rebecca Scriven (**the complainant**) access to a document under the *Freedom of Information Act 1992* (**the FOI Act**).

## BACKGROUND

2. On 1 February 2013, the complainant applied to the agency under the FOI Act for ‘the raw data ie questions and answers received from the 2012 TNS Survey ...’
3. By notice of decision dated 11 February 2013, the agency decided to refuse access to the requested document under clause 4 of Schedule 1 to the FOI Act on the grounds it was statistical data that could be used by others in the tourism industry for gain and put the agency at a competitive disadvantage.
4. The agency advised that it commissioned the 2012 TNS Survey to research the needs of its visitors (both current and potential), to identify options for products and experiences to suit those needs and to identify strategies that would stimulate more visits to Rottnest Island.
5. On 19 March 2013, the complainant applied for internal review of the agency’s decision. By letter dated 27 March 2013, the agency confirmed its decision on access.
6. By letter dated 9 April 2013, the complainant applied to me for external review of the agency’s decision.

## REVIEW BY THE INFORMATION COMMISSIONER

7. Following my receipt of this complaint, the agency produced to me a disc containing the requested information together with its FOI file maintained in respect of the complainant’s access application.
8. More recently, the agency produced a printed copy of the survey questions and answers remaining in dispute (**the disputed information**), as described below.
9. I have examined the agency’s FOI file and the disputed information and considered the information before me, including the agency’s decisions and submissions.
10. If an agency’s decision is to refuse access to a document, section 30(f) of the FOI Act requires the agency’s decision to outline the reasons for the refusal and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based.
11. I considered the agency’s notices of decision did not comply with section 30(f). Therefore, I required further information from the agency to support its decision to refuse access to the disputed information.
12. In addition, I invited the agency to reconsider its claim for exemption under clause 4 of Schedule 1 to the FOI Act and referred it to the provisions of clause 10(3).

13. In response, the agency withdrew its claim for exemption under clause 4 but maintained a claim for exemption under clause 10(3). The agency made further submissions in support of its decision, which are summarised below.
14. In making preliminary inquiries into this matter, the agency advised that it had tabled a report in Parliament which was relevant to the complainant's application. The report is titled 'Rottnest Island Research for Marketing and Tourism Strategy – Details of Methodology and of the Consumer Focus Groups & Stakeholder IDI's' (**the Report**).
15. The agency agreed to provide a copy of the Report to the complainant, once it had been tabled in Parliament. The agency advised the complainant that although the Report was not the document to which she sought access, it may contain the information she seeks. The complainant confirmed that she was not satisfied with the access provided and wished to pursue her complaint. The complainant also confirmed that she did not seek access to personal information about third parties.
16. On 10 December 2013 a conciliation conference was held between the parties. Although this matter was not resolved at the conciliation conference, the scope of the information to which the complainant sought access was reduced.
17. The agency provided certain information to the complainant but maintained that the balance of the disputed information was exempt under clause 10(3).
18. On 26 August 2014, after further consideration of the material then before me, I provided the parties with a letter setting out my preliminary view of the complaint. My preliminary view was that the decision of the agency to refuse access to the disputed documents under clause 10(3) was not justified.
19. In response to my preliminary view, the agency confirmed that it maintained its claim for exemption and provided me with further submissions in support of its claims that the disputed information is exempt under clause 10(3).

## **THE DISPUTED INFORMATION**

20. The disputed information consists of specific parts of the requested document. The disputed information is numerous questions and answers by the survey respondents, which are described by the agency as follows:
  - Section A – Extended Stay Visitors – Questions 1, 2, 3a, 3b, 4, 5a, 5b, 5c, 6 and 7;
  - Section B – Day Trip Visitors – Questions 1, 3a, 3b, 3c, 4, 5, 5b, 5c, 6 and 7;
  - Section D – Destinations – Question 10; and
  - Section E – New Product Ideas – Questions 13, 14 and 15.
21. The disputed information also includes data about the characteristics of the survey respondents.

## Onus of proof

22. Under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision is justified or that a decision adverse to another party should be made. Accordingly, the agency bears the onus of establishing that its decision to refuse the complainant access to the disputed documents is justified.

## CLAUSE 10 – THE STATE’S FINANCIAL OR PROPERTY AFFAIRS

23. To the extent it is relevant, clause 10 provides as follows:

- (1) ...
- (2) ...
- (3) *Matter is exempt matter if its disclosure -*
  - (a) *would reveal information (other than trade secrets) that has a commercial value to an agency; and*
  - (b) *could reasonably be expected to destroy or diminish that commercial value.*
- (4) *Matter is exempt matter if its disclosure –*
  - (a) *would reveal information (other than trade secrets or information referred to in subclause (3)) concerning the commercial affairs of an agency; and*
  - (b) *could reasonably be expected to have an adverse effect on those affairs.*
- (5) ...
- (6) *Matter is not exempt matter under subclause (1), (2), (3), (4) or (5) if its disclosure would, on balance, be in the public interest.*

## The agency’s submissions

24. Section 74(2) of the FOI Act provides that I am not to include exempt matter in a decision on a complaint or in reasons given for the decision. I also regard that limitation as extending to matter that is claimed to be exempt.
25. As a result, I have outlined the agency’s submissions bearing in mind that I am prevented from disclosing information that is claimed to be exempt.
26. In its internal review decision dated 11 February 2013, the agency advised the complainant that disclosure of the disputed information would ‘destroy the value of information.’ In particular, the agency contended as follows:

*[The agency] operates in the extremely competitive tourism marketplace. The TNS... was initiated by [the agency] to gather market intelligence to be used in the development of commercial and marketing strategies to gain a competitive advantage within the tourism market. The requested raw data in the TNS... report contains statistical data that could be used by others for gain and put [the agency] at a competitive disadvantage therefore adversely impacting on the financial and commercial viability of Rottnest Island and diminishing the value of the research. The release of the requested information is not in the interest of Rottnest Island or the public.*

27. Following a request for further information to justify the exemption claimed the agency provided additional submissions. In summary, the agency submits as follows:
- The disputed information is of commercial value to the agency regarding its options to develop marketing, tourism and business strategies in order to improve Rottnest Island's financial sustainability, economic viability, business development opportunities and visitor satisfaction. The disclosure of this information could reasonably be expected to diminish its value.
  - In particular, the disputed information concerns the agency's options to develop a competitive advantage over other tourist destinations.
  - Disclosure would result in the commercial value and revenue streams that the agency would expect to achieve through the use of the raw data to create a competitive advantage to be lost, as the information would be in the public domain and available to competing tourism providers and regions, therefore destroying and diminishing its commercial value to the agency.
  - Disclosure is not in the public interest as it would allow the raw data to be analysed and a competitor could 'develop an understanding of what the agency may be proposing in relation to the strategic direction for Rottnest Island.'
28. In response to my preliminary view of this matter, the agency provided further submissions. The agency submitted that the preliminary view did not reflect a full appreciation of the commercial nature of the agency's business model and provided details of its operating budget and monies received from Parliament.
29. I understand that the agency submits that I gave undue weight to its ability to receive monies appropriated by Parliament.
30. The agency cited numerous examples of how it operates as a competitive commercial operation and tourism destination. The agency stated that the functions outlined, with the exception of environmental and heritage management, are funded from revenue generated by the agency's continuing commercial operations.
31. In further support of its claim that the disputed information is commercially valuable, the agency explained that it competes with other tourism destinations – within the State and nationally – which are usually managed or promoted by private sector bodies. In summary, the agency submitted as follows:

- To effectively operate the agency has used the disputed information to develop the Rottnest Island Management Plan 2014 to 2019 (**RIMP**) in response to market pressures. The *Rottnest Island Authority Act 1987* (**the RIA Act**) requires the RIMP to be a public document. However, the disputed information has also been used to develop and implement the Strategic and Operational Plans that will achieve the RIMP's Strategic Direction. These plans are 'commercial in confidence.'
  - The disputed information is specific to the ongoing commercial operations conducted by the agency as a tourism destination and, therefore, is commercially valuable. Specifically, the commercial value lies in the fact that the disputed information has and will continue to be used to develop commercial and competitive strategies within the agency's Strategic and Operational Plans, including the agency's Marketing Strategy, which includes market segmentation and that is required to generate significantly more revenue during the 2014/15 financial year.
  - The disputed information is valuable for the purpose of the agency's commercial activities and is essential to the profitability and viability of the agency's and Rottnest Island Chamber of Commerce's (**RICC**) continuing business operations.
  - The agency competes with the Rottnest Lodge and Rottnest Hotel in the provision of tourist accommodation. The agency also competes with Rottnest Express Ferry Service and Rottnest Fast Ferries including the hiring of bikes by both ferry services.
  - The RICC relies on the agency to undertake destination marketing that drives visits to Rottnest Island. Without destination marketing, Rottnest Island will not have a 'viable tourism driven economy.'
  - The 'commercial in confidence' status of the disputed information is essential to the profitability or viability of the agency's and the RICC's continuing commercial business operations by creating and maintaining a competitive edge over other tourism destinations. The disputed information has and will continue to be used for developing marketing strategies and the development of products valued by visitors in the tourism market and to attract visitors to Rottnest Island.
32. The agency also cites 'evidence that disclosure of the disputed information will destroy or diminish any commercial value it may have' as follows:
- The disputed information was collected for the purpose of producing a range of strategic documents to give the agency a commercial competitive advantage over other tourist destinations.
  - The disputed information could easily be used by others – including the agency's direct competitors on Rottnest Island – for gain and put the agency, RICC and/or Rottnest Island as a tourism destination at a competitive disadvantage, therefore adversely impacting the financial and commercial viability of the agency and the Rottnest Island economy. The commercial value to the agency and RICC of the disputed information would be destroyed and diminished by disclosure.

33. In relation to the public interest consideration under clause 10(6) the agency submits that:
- The release of the disputed information is not in the public interest as it will have a significant adverse effect on Rottnest Island's financial sustainability and economic viability as a tourist destination.
  - If the agency is not able to fund the non-commercial operations from its commercial revenue streams, the cost of this will fall to the Western Australian Government and therefore the Western Australian community.
  - The disputed information has been used for the purpose of developing the RIMP and has been subject to a period of two months community consultation. The release of the RIMP once approved by Government will address the public interest by providing a factual understanding of what the agency is proposing in relation to the strategic direction for Rottnest Island.
  - It is not in the public interest to release the disputed information, which has and will continue to be used for developing marketing strategies and the development of products valued by visitors in the tourism market and to attract visitors to Rottnest Island.

### **Consideration**

34. Clause 10 deals with the financial and property affairs, including commercial affairs, of State and local government agencies. The exemptions in clause 10 reflect the commercial reality that many State and local governments are increasingly engaged in commercial activities and are intended to ensure that the commercial and business affairs of government agencies – conducted by those agencies for and on behalf of the Western Australian public – are not jeopardised by the disclosure of documents under the FOI Act unless there is a public interest that requires such disclosure.
35. In order to establish a claim for exemption under clause 10(3), the agency must satisfy the requirements of both paragraphs (a) and (b). That is, the relevant information must have some commercial value. It must also be shown that disclosure could reasonably be expected to destroy or diminish the commercial value of the information in question. If the requirements of both of those paragraphs are satisfied, the disputed information will be exempt, subject to the application of the limit on exemption in clause 10(6).
36. In *Attorney-General's Department v Cockcroft* (1986) 64 ALR 97 at page 106, the Full Federal Court said that the words 'could reasonably be expected' were intended to receive their ordinary meaning and required a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the stated consequences to follow if the documents in question were disclosed. This approach was accepted as the correct approach in *Apache Northwest Pty Ltd and Department of Mines and Petroleum* [2012] WASCA 167.

### **Clause 10(3) – information that has a commercial value to an agency**

37. Information may have a commercial value if it is valuable for the purpose of carrying on the commercial activities of an agency and it is by reference to the context in which the information is used or exists that the question of whether it has a commercial value may be determined, see: *Re West Australian Newspapers Limited and Another and*



Salaries and Allowances Tribunal [2007] WAICmr 20 (*Re West Australian Newspapers Limited*).

38. Although the agency refers to the disputed information as ‘commercial in confidence’ that term does not appear in the FOI Act.
39. In my decision in *Re McGowan and Minister for Regional Development; Lands and Mineralogy Pty Ltd* [2011] WAICmr 2, (*Re Mc Gowan*) I considered the meaning of the words ‘commercial value’ in the context of a claim for exemption under clause 4(2) of Schedule 1 to the FOI Act. As clause 4(2) is similar in terms to clause 10(3), except that it applies to information of commercial value to persons other than an agency, I consider the discussion in *Re McGowan* about commercial value is equally applicable to the exemption in clause 10(3).
40. In *Re McGowan* at [33], I considered that when determining whether information has ‘commercial value’, the applicable principles to be considered are set out in *Re West Australian Newspapers Limited* at [115]-[125] which are, in summary, as follows:
  - Information may have a commercial value if it is valuable for the purposes of carrying on the commercial activities of a person or organisation [or an agency in the context of clause 10(3)]. That is, information may be valuable because it is important or essential to the profitability or viability of a continuing business operation or a pending ‘one-off’ commercial transaction.
  - Information may have a commercial value if a genuine ‘arms-length’ buyer is prepared to pay to obtain that information.
  - It is not necessary to quantify or assess the commercial value of the relevant matter.
  - It is by reference to the context in which the matter is used or exists that the question of whether it has a commercial value can be determined.
  - The investment of time and money is not, in itself, a sufficient indicator of the fact that the information has a commercial value.
  - Information that is aged or out-of-date has no remaining commercial value.
  - Information that is publicly available has no commercial value that can be destroyed or diminished by disclosure under freedom of information legislation.
41. I accept the agency’s submission that it is involved in activities of a commercial nature. However, the agency is also established for a public purpose.
42. The agency is a body corporate established under section 5(2) of the RIA Act. The functions and powers of the agency are set out in Part III of the RIA Act and include, among other things, the control and management of Rottnest Island for the purposes of providing a recreational and holiday facility.

43. Section 12(1)(a) of the RIA Act provides:
- (1) *In the provision and operation of recreational and holiday facilities on the Island, the Authority –*
- (a) *Shall have particular regard to the needs of persons usually resident in the State who wish to visit or stay on the Island as a family group; and ...*
44. Section 33(1)(a) provides that the funds and property available to the agency to enable it to perform its functions under the RIA includes monies from time to time appropriated by Parliament for that purpose.
45. Therefore, the agency is established for a public purpose, including the provision of facilities to residents in the State, particularly those who wish to stay on the Island as a family group.
46. I have examined the disputed information. I understand that the agency submits that the disputed information has a commercial value to the agency because it sets out its options for the development of Rottnest Island as a future tourist destination.
47. As observed above, the disputed information consists of responses from survey respondents to hundreds of questions. Most of the questions relate to Rottnest Island and its facilities. Some of the questions concern other tourist destinations. The onus is on the agency to explain how each of the questions and answers in the survey has the character attributed to it by the agency.
48. In my view, the agency makes an ambit claim for exemption without demonstrating how the claim relates to all of the disputed information.
49. Further, to the extent that the agency's submissions relate to third parties including the RICC, they are irrelevant because clause 10(3) is concerned only with the commercial affairs of an agency.
50. According to its website the RICC is a group of commercial enterprises that operate on or around the Rottnest Island and who work with the agency to improve the Rottnest Island 'experience and visitation.'
51. I accept that the agency is in competition with some commercial enterprises for the provision of some services on Rottnest Island. However, given the legislative powers available to the agency described at [60], including power to determine the proposed use of tourist services and facilities on Rottnest Island, I have attached little weight to that factor.
52. On the information presently before me, I do not consider that the agency has established that the disputed information is valuable for the purpose of the agency carrying on its commercial activities, in the sense that the information is important or essential to the profitability or viability of the agency's business operations or any pending commercial transactions.

53. As a result, I do not consider that the disputed information has commercial value as described in clause 10(3)(a).
54. Given my findings in relation to clause 10(3)(a), it is not necessary for me to consider whether the agency has made out the requirements of clause 10(3)(b).
55. However, if I were satisfied that clause 10(3)(a) has been made out, I am not persuaded on the information provided by the agency that the disclosure of the disputed information could reasonably be expected to destroy or diminish any commercial value it may have, as described in clause 10(3)(b).
56. While it may be possible that some of the disputed information could be used by other tourism operators in considering their marketing strategies, the agency has not explained how this proposition relates to each question and answer in the survey.
57. I also consider that the agency has not explained how the questions and answers could reasonably be expected to disclose the agency's 'business options' as submitted by the agency.
58. In addition, I consider that even if the agency could satisfy the requirements of clause 10(3), there are persuasive arguments in favour of disclosure in the public interest.

#### **Clause 10(6)**

59. Clause 10(6) limits the exemption in clause 10(3) by providing that matter is not exempt if its disclosure would, on balance, be in the public interest. Accordingly, I have considered whether the disputed information would be subject to the application of clause 10(6).
60. The agency submits that the public interest is satisfied by the disclosure of the *RIA Strategic Plan 2013 to 2018* that it is required to publish. I have reviewed that publication and note that it acknowledges that the control and management of Rottnest Island is vested in the agency for the purpose of enabling it to:
  - provide and operate recreational and holiday facilities on the Island;
  - protect the flora and fauna of the Island; and
  - maintain and protect the natural environment and the man-made resources of the Island and, to the extent that resources allow, repair its natural environment.
61. In favour of disclosure, the complainant submits that there is a public interest in disclosing information relating to the activities of the agency.
62. I consider that there is a strong public interest in State and local government agencies being accountable for decisions made concerning the management and development of the State's resources and services undertaken for the benefit of the public. I also consider that there should be as much transparency as possible in the agency's dealings with the State's resources and services undertaken for the benefit of the public.

63. Weighing against disclosure, I recognise that there is a public interest in the agency keeping confidential sensitive commercial information to enable it to discharge its functions in an informed manner.
64. However, I do not consider that the disputed information is sensitive commercial information for the reasons outlined.
65. In balancing the competing interests in this case, I consider that, in respect of the disputed information, the public interest factors for disclosure outweigh those against disclosure for the reasons given above. Accordingly, I find that the disputed information is not exempt.

## CONCLUSION

66. The agency's decision to refuse access to the disputed information under clause 10(3) of Schedule 1 to the FOI Act is set aside. In substitution, I find that the disputed information is not exempt under clause 10(3) of the FOI Act.

\*\*\*\*\*