

Participants:

Michael Butcher
Complainant

- and -

Department of Parks and Wildlife
Agency

- and -

Steven Edwards
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – clause 4(1) – trade secrets – whether disclosure of disputed document would reveal a trade secret of any person – clause 4(2) – commercially valuable information – whether disclosure of disputed document would reveal commercially valuable information – clause 4(3) – information about the business, professional, commercial or financial affairs of a person – whether disclosure could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of a person – clause 8(2) – information of a confidential nature obtained in confidence – prejudice future supply – candour and frankness of future responses – public interest factors.

Freedom of Information Act 1992 (WA): Sections 32; 33; 74(2); 102(1); 102(2); 102(3);
Schedule 1 clauses 4(1); 4(2); 4(3); 4(7); 8(2)

Apache Northwest Pty Ltd v Department of Mines and Petroleum [2012] WASCA 167
Attorney General's Department v Cockcroft (1986) 10 FCR 180

Re Cannon and Australian Quality Egg Farms Limited [1994] QICmr 9

Re City of Subiaco and Subiaco Redevelopment Authority [2009] WAICmr 23

Re Greg Rowe and Associates and Minister for Planning [2011] WAICmr 4

Re Kimberley Diamond Company NL and Department for Resources Development
[2000] WAICmr 51

Re Pillsbury and Department of Mines and Petroleum [2013] WAICmr 1

Re QMS Certification Services Pty Ltd and Department of Land Administration and
Another [2000] WAICmr 48

Re Read and Public Service Commission [1994] WAICmr 1

Re Rogers and Water Corporation and Others [2004] WAICmr 8

Re West Australian Newspapers Pty Ltd and Civil Service Association of WA (Inc) and
Salaries and Allowances Tribunal and Mercer (Australia) Pty Ltd [2007] WAICmr 20

DECISION

The agency's decision is set aside. In substitution, I find the disputed document, edited to remove information as to pricing, is not exempt under clauses 4(1), 4(2), 4(3) or 8(2) of Schedule 1 to the *Freedom of Information Act 1992*.

Sven Bluemmel
INFORMATION COMMISSIONER

28 February 2014

REASONS FOR DECISION

1. This complaint arises from a decision of the Department of Parks and Wildlife (formerly the Department of Environment and Conservation) (**the agency**) to refuse Mr Michael Butcher (**the complainant**) access to a document under the *Freedom of Information Act 1992* (**the FOI Act**).

BACKGROUND

2. In an access application dated 29 August 2012, the complainant sought access under the FOI Act to the '[q]uotation received by [the agency] from Wild Things Animal Control Solutions...between 7th and 28th August 2012.' The complainant confirmed that he did not seek access to the actual price submitted, '...but the content of their quote.'
3. In a notice of decision dated 8 October 2012, the agency decided to refuse access under clause 4(2) of Schedule 1 to the FOI Act to the one document (**the disputed document**) identified by it as coming within the scope of the complainant's access application. On internal review, the agency confirmed its initial decision to refuse the complainant access to the disputed document under clause 4(2) of Schedule 1 to the FOI Act. On 29 December 2012, the complainant lodged a complaint with me seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

4. I obtained the original and a copy of the disputed document from the agency, together with the agency's file maintained in respect of the access application. I examined those documents and considered the submissions made by the complainant. My office made inquiries with all of the parties.
5. The requirement to consult with third parties under sections 32 and 33 of the FOI Act only arises when an agency decides to give access to a requested document. Despite the agency deciding to refuse access to the disputed document in this matter, it nevertheless consulted with Mr Steven Edwards (**the third party**) who, under the business name Wild Things Animal Control Solutions, was the author of the disputed document. The third party made submissions to the agency that the disputed document is exempt under clauses 4(1), 4(2), 4(3) and 8(2) of Schedule 1 to the FOI Act.
6. On 11 December 2013, I informed the parties, in writing, of my preliminary view of this complaint including my reasons. On the information then before me, it was my preliminary view that the disputed document is not exempt as claimed by the agency or the third party.
7. In light of my preliminary view, I invited the agency to reconsider its claim for exemption. In the event that it maintained its claim that the disputed document is exempt under clause 4(2) of Schedule 1 to the FOI Act, I invited it to provide me with any further relevant information or submissions to support that claim.

In response, the agency informed me that it accepts my preliminary view and withdrew its claim for exemption. The agency also provided clarification of the background to the granting of the tender.

8. In light of my preliminary view, I invited the third party to be joined to this matter as a party and to either accept my preliminary view or to make further submissions to me. The third party exercised its right under section 69(2) of the FOI Act and sought to be joined as party and is so joined. The third party also did not accept my preliminary view and made further submissions to me.

THE DISPUTED DOCUMENT

9. The disputed document is broadly described as an email quotation submitted to the agency by the third party for carrying out specific works.

PRELIMINARY ISSUE

10. The scope of the access application is limited to seeking a copy of the disputed document, edited to remove all pricing information. Therefore, the pricing information is outside the scope and I will not consider the exempt status or otherwise of the pricing information further.

THE EXEMPTIONS

11. The third party claims the disputed document is exempt in full under clauses 4(1), 4(2), 4(3) and 8(2) of Schedule 1 to the FOI Act.
12. Clause 4 provides:
 4. ***Trade secrets, commercial and business information***
 - (1) *Matter is exempt matter if its disclosure would reveal trade secrets of a person.*
 - (2) *Matter is exempt matter if its disclosure –*
 - (a) *would reveal information (other than trade secrets) that has a commercial value to a person; and*
 - (b) *could reasonably be expected to destroy or diminish that commercial value.*
 - (3) *Matter is exempt matter if its disclosure –*
 - (a) *would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
 - (b) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of*

information of that kind to the Government or to an agency.

...

(7) *Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest.*

13. Clause 4 recognises that the business of government is frequently mixed with that of the private sector and that such business should not be adversely affected by the operation of the FOI Act: see *Re Kimberley Diamond Company NL and Department for Resources Development* [2000] WAICmr 51 which was followed in *Re Pillsbury and Department of Mines and Petroleum* [2013] WAICmr 1.

Clause 4(1) – trade secrets

14. I have previously taken the view that the correct approach to clause 4(1) is set out in paragraphs [12] – [16] of the decision by the former Information Commissioner in *Re Greg Rowe & Associates and Minister for Planning* [2001] WAICmr 4, as follows:

Clause 4(1) of Schedule 1 to the FOI Act is concerned with protecting trade secrets of a person (including an incorporated body). In this matter, I accept that the complainant is a "person" for the purposes of clause 4(1): see s.5 of the Interpretation Act 1984. In order to establish an exemption under clause 4(1), the disputed documents must contain some information which would be considered to be a trade secret of a person.

*The phrase "trade secrets" is not defined in the FOI Act. However, the meaning of the phrase "trade secrets" in the context of FOI legislation was considered by the Commonwealth Administrative Appeals Tribunal in *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588; by the Full Federal Court of Australia in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) FCR 111; and by the Queensland Information Commissioner in *Re Cannon and Australian Quality Egg Farms Limited* [1994] QICmr 9; (1994) 1 QAR 491.*

*After considering the relevant authorities in *Re Cannon*, the Queensland Information Commissioner concluded that the phrase 'trade secrets' should be given its usual meaning in Australian law, as defined by *Gowans J in Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VicRp 7; [1967] VR 37. In the *Ansell Rubber case*, *Gowans J* noted that a "trade secret" may consist of "... any formula, pattern or device or compilation of information which is used in ones' business and which gives him (sic) an opportunity to gain an advantage over competitors who do not know it or use it."*

15. In *Re Cannon*, the Queensland Information Commissioner summarised, at paragraph 49 of his decision, the matters that may be relevant in determining the existence or otherwise of a trade secret. Those matters 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.
16. I accept that the factors identified by the Queensland Information Commissioner in *Re Cannon* are relevant to my determination of whether the disclosure of the disputed document, edited to remove pricing information, would reveal trade secrets of the third party.

The third party's submissions

17. Section 74(2) of the FOI Act provides that I must not include exempt matter in my decision or in my reasons for decision. In accordance with my obligations under section 74(2) of the FOI Act, I have not described all of the third party's submissions, or my consideration of those submissions, in full.
18. The third party submits disclosure of the disputed document would reveal the way in which it '...conducts its business including pricing, processes, tools and strategies, we consider to be trade secrets...'

Consideration

19. Section 102(1) of the FOI Act provides that the onus is on the agency to establish that its decision is justified or that a decision adverse to another party should be made. Similarly under section 102(2) when a third party intervenes the onus is on the third party to establish that access should not be given or that a decision adverse to the access applicant should be made see: *Re West Australian Newspapers Pty Ltd and Civil Service Association of WA (Inc) and Salaries and Allowances Tribunal and Mercer (Australia) Pty Ltd* [2007] WAICmr 20 at [100].
20. Clause 4(1) does not contain the phrase 'could reasonably be expected to'. I agree with the views of A/Commissioner Shanahan SC in *Re West Australian*

Newspapers at [103] that ‘in the absence of such expressions the standard of proof to be applied must be the balance of probabilities.’

21. On the information before me, I am not satisfied that the disputed document contains information that is a ‘trade secret’ within the meaning of the FOI Act, as claimed by the third party because it has not established the existence or otherwise of a trade secret as outlined in *Re Cannon*. Therefore, I find the disputed document is not exempt under clause 4(1) of Schedule 1 to the FOI Act.

Clause 4(2) – commercial value

22. Clause 4 recognises that the business of government is frequently mixed with that of the private sector and that such business should not be adversely affected by the operation of the FOI Act: *Re Kimberley Diamond Company NL*.
23. The exemptions in clauses 4(2) and 4(3) are intended to protect different kinds of information from disclosure. The terms of those provisions make it clear that information that may be found to be exempt under clause 4(2) cannot also be exempt under clause 4(3). However, it is open to an agency or a third party to make alternative submissions as to which of the exemption clauses applies. It is also possible that a single document may contain a mixture of information, some of which is exempt under clause 4(2) and the remainder under clause 4(3): see *Re Rogers and Water Corporation and Others* [2004] WAICmr 8 at [37].

Meaning of ‘could reasonably be expected to’

24. A number of the exemptions in Schedule 1 to the FOI Act, including those under consideration in this matter, provide that matter is exempt if its disclosure ‘could reasonably be expected to’ have the effect described in the exemption.
25. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 the Full Federal Court of Australia said, at 190, that the words “*could reasonably be expected to*” in the Commonwealth FOI Act were intended to receive their ordinary meaning. That is, they require 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 relevant outcome. That approach was accepted as the correct approach in *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167.

The third party’s submissions

26. In response to my preliminary view, and in accordance with my obligations under section 74 of the FOI Act, the third party submits that:

The release of the information would give the complainant access to a means of securing contracts and an unfair advantage. If the complainant were to use that strategy to secure jobs whilst in competition with WildThings, the commercial value of that strategy would be diminished.

Consideration

27. Clause 4(2) is concerned with the protection from disclosure of information that is not a trade secret but which has 'commercial value' to a person or organisation. The requirements of both paragraphs (a) and (b) of that provision must be satisfied in order to establish a claim under clause 4(2).
28. I consider that the applicable legal principles in relation to clause 4(2) are as set out in *Re West Australian Newspapers Limited* at [115] - [125] which are, in brief, 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. 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.
29. I accept that the disputed document was created in the course of the third party's commercial activities. While the work undertaken by the third party for the agency may have a commercial value to the third party, I am not persuaded by the third party's assertions that the information in the disputed document is important or *essential to the profitability or viability of its business operations*.
30. I accept that particular methodologies or proprietary techniques may have a commercial value: see *Re QMS Certification Services Pty Ltd and Department of Land Administration and Another* [2000] WAICmr 48 at [40] - [44] and *Re City of Subiaco and Subiaco Redevelopment Authority* [2009] WAICmr 23.
31. The third party asserts that disclosure of the disputed document would provide competitors with a commercial advantage by disclosing its marketing strategy.

However, based on the information before me including my examination of the disputed document, I am not persuaded that disclosure of the disputed document could reasonably be expected to give the third party's competitors a commercial advantage.

32. As I understand it, the third party claims that the disputed document has a commercial value because it reveals in detail the third party's internal processes and procedures which are highly specific and sensitive and would undermine that company's competitiveness if disclosed to external competitors and other interested organisations.
33. The third party also submits that disclosure of the disputed document would reveal detailed information to its competitors as to its processes and methodologies to undertake the works the subject of the tender. This would enable the third party's competitors to ascertain its costs and likely level of remuneration for its activities; it would provide a commercial advantage to those competitors. Accordingly, disclosure of the disputed document will destroy or diminish the commercial value of the information in that document. However, on the evidence before me, I am not persuaded that disclosure of the disputed document would enable the third party's competitors to ascertain its costs and likely level of remuneration for its activities nor that the disclosure of the disputed document could reasonably be expected to destroy or diminish the commercial value, if any, of the information in the disputed document. This is particularly the case given that the complainant does not seek any pricing information.
34. Consequently, I am not satisfied that the requirements of paragraph (a) of clause 4(2) have been established.
35. Even if I were satisfied on this point, I am not persuaded on the information before me that the disclosure of the disputed document could reasonably be expected to destroy or diminish any commercial value in that information. Accordingly, I find that the disputed document is not exempt under clause 4(2) of Schedule 1 to the FOI Act.

Clause 4(3) – business, professional, commercial or financial affairs

36. To establish a claim for exemption under clause 4(3), it must be established that the disputed document contains information about the business, professional, commercial or financial affairs of a person and also that the disclosure of that information could reasonably be expected to have an adverse effect on those affairs or, in the alternative, to prejudice the future supply of information of that kind to the Government or to an agency.
37. Finally, if the requirements of both paragraphs (a) and (b) of clause 4(3) are satisfied, the limits on exemption set out in clauses 4(4) to 4(7) must also be considered. In this case, I consider that only the limit on exemption in clause 4(7) may be relevant.

The third party's submissions

38. The third party submits that if the disputed document is disclosed it is possible for a competitor to work out the third party's rates and therefore submit future tenders at lower prices.
39. In addition, the third party submits that disclosure of the disputed document would result in:
 - the disclosure of strategies that would give access to the techniques used by the third party; and
 - a precedent being set which would result in additional FOI access applications being lodged with the agency; this would in turn result in no information being made available in writing to the agency in the future tender submissions.
40. In addition, the third party submits that it could reasonably be expected that competitors would adopt the same type of equipment and methods as used by the third party.

Consideration

41. The exemption in clause 4(3) is more general in its terms than the exemption in clause 4(2). Clause 4(3) is concerned with protecting from disclosure information about the business, professional, commercial or financial affairs of persons or organisations having business dealings with government agencies, where disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of that kind of information to the Government or its agencies.
42. The exemption consists of two parts and the requirements of both paragraphs (a) and (b) must be satisfied in order to establish a prima facie claim for exemption. Clause 4(7) then provides that certain information that is otherwise exempt under clause 4(3) may be disclosed if disclosure would, on balance, be in the public interest.
43. I agree with the former Information Commissioner's view that private organisations or persons having business dealings with government must necessarily expect greater scrutiny of, and accountability for, those dealings than in respect of their other dealings but should not suffer commercial disadvantage because of them: see *Re Kimberley Diamond Company NL*.
44. Having examined the disputed document, I am satisfied that, if disclosed, it would reveal information about the business and commercial affairs of the third party. Accordingly, I consider that the requirements of clause 4(3)(a) are satisfied in this case.

45. The third party initially asserted that certain detrimental consequences could potentially result from disclosure of the disputed document. However, the third party has not explained to me how the disclosure of any particular information identified in the document could reasonably be expected to have the adverse effects claimed, other than by putting forward those assertions. In addition, I consider that a claim that certain adverse effects 'could potentially result' from disclosure may fall short of the test of whether disclosure 'could reasonably be expected to' have the relevant effect, as required by clause 4(3)(b).
46. In response to my preliminary view, the third party submits that as the disputed document is of commercial value to it, and in circumstances where it was prepared by the third party for the agency, disclosure of the disputed document could reasonably be expected to have an adverse effect on the affairs of the third party as its competitors will receive a competitive advantage. For the same reasons as given in relation to the application of clause 4(2) above, I am not persuaded by that argument.
47. On the material before me, I do not consider that disclosure of the disputed document, edited to remove all pricing information, could reasonably be expected to have an adverse effect on the business or commercial affairs of the third party. In the absence of evidence to support that claim, I consider it to be merely speculative.
48. The third party also submits that the future supply of information of the kind in the disputed document to the Government or to an agency will be prejudiced if the disputed document is disclosed. The third party also submitted that it could be presumed as a consequence of this practice that companies submitting tenders did so in the knowledge that their tender offers are treated confidentially and will not be released to an outside party. However, the third party offered no evidence which would show that its presumption had any basis in fact. The third party further claimed that release of the disputed document under the FOI Act would prejudice the ability of the agency to obtain the information it required from tenderers because the tenderer would be discouraged from providing confidential information or lodging tenders if there were a possibility that competitors could access those details using the FOI Act.
49. I do not accept the proposition that the disclosure in accordance with the provisions of the FOI Act of the disputed document could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the third party, or that it could reasonably be expected to prejudice the future supply of such information to the agency. Further, it is not reasonable, in my view, to claim that a business which, for its own financial benefit, submits tender offers for the supply of goods and services such as those required by a government agency as outlined in a tender specification would decline to provide detailed information in making a tender offer to the agency in the future.
50. In my view, where a company or business organisation which is involved in the provision of equipment and services for economic gain chooses to participate in the tender process and, as a result, provides the agency with information for

which it is prepared to provide its equipment and services, it cannot reasonably be expected that the agency will not be supplied with such information in the future if the disputed document is disclosed. It is also my view that the disclosure by the agency of the disputed document in this instance will not compromise the confidential nature of the tender process. There may well be scope for the agency to modify its practices to provide, as a matter of policy, more information of this nature to tenderers upon request. I am not persuaded that disclosure of the disputed document could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. Potential future tenderers will continue to submit tenders where they feel it is in their commercial interest to do so.

51. Consequently, I am not satisfied that the requirements of paragraph (b) of clause 4(3) are met. Accordingly, it is not necessary for me to consider whether the limit on the exemption in clause 4(7) applies and whether disclosure of the disputed document would, on balance, be in the public interest. As a result, I have not set out or considered in my decision the public interest submissions made by the third party in this regard.

Clause 8(2) – confidential communications

52. The third party also claims the disputed document is exempt under clause 8 which, insofar as it is relevant, provides:

8. Confidential communications

(1) ...

(2) *Matter is exempt matter if its disclosure –*

(a) *would reveal information of a confidential nature obtained in confidence; and*

(b) *could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*

(3) ...

(4) *Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."*

53. For the exemption in clause 8(2) to apply, I must be satisfied that the requirements of both paragraphs (a) and (b) are met. If both paragraphs are established then, pursuant to section 102(3) of the FOI Act, the onus would shift to the complainant to persuade me that disclosure of the disputed documents would, on balance, be in the public interest.
54. The obligation on an agency to consult with a third party under Part 2 Division of the FOI Act is limited to obtaining the view of the third party as to whether a document contains matter that is exempt under clauses 3 or 4 of Schedule 1 to

the FOI Act. It does not extend to other exemption clauses. It is therefore questionable whether the third party in this matter has a right to be heard in relation to whether the disputed document is exempt under clause 8(2). However, for the reasons which follow, I am not persuaded that the document is exempt under clause 8(2) in any event.

The third party's submissions

55. The third party asserts that, if it had known at the relevant time that documents could be disclosed to applicants under the FOI Act, then the information that it provided to the agency as a tender for works may have taken a very different form. It is the submission of the third party that the future supply of information of the kind in the disputed document could be severely restricted if that document were to be disclosed under the FOI Act.

Consideration

56. Information is inherently confidential if it is not in the public domain: *Re Read and Public Service Commission* [1994] WAICmr 1 at [28]. That is, the information must be known by a small number or limited class of persons only.
57. In the present case, the disputed document is not in the public domain and I accept that the information in it may be of a confidential nature in that it appears to be only known to a small number of people.
58. For the information in the disputed document to have been 'obtained in confidence', the information under consideration must have been both given and received on the basis of either an express or implied understanding of confidence: *Re Kimberley Diamond Company NL*.
59. The third party submits that it prepared and provided the disputed document to the agency in circumstances of confidentiality. However, apart from making this assertion, the third party has provided me with no supporting material or evidence to establish that the disputed document was obtained in confidence as required by clause 8(2)(a). Consequently, on the information before me, I am not persuaded that the requirements of clause 8(2)(a) have been met.
60. In light of that, I am not required to consider whether the requirements of clause 8(2)(b) have been met or whether the disclosure of the disputed document would, on balance, be in the public interest, pursuant to clause 8(4).

CONCLUSION

61. I find that the disputed document is not exempt under clauses 4(1), 4(2), 4(3) or 8(2) of Schedule 1 to the FOI Act.
