

Decision D0062022 – Published in note form only

Re Onslow Resources Ltd and Department of Jobs, Tourism, Science and Innovation [2022] WAICmr 6

Date of Decision: 10 June 2022

Freedom of Information Act 1992 (WA): Schedule 1, clauses 4(3), 6(1) and 8(2)

On 4 December 2020, Onslow Resources Ltd (**the complainant**) applied to the Department of Jobs, Tourism, Science and Innovation (**the agency**) under the Freedom of Information Act 1992 (WA) (**the FOI Act**) for access to a list of documents identified by subject and date, that contained information about a third party, Onslow Salt Pty Ltd (**the third party**).

By notice of decision dated 2 November 2020, the agency decided to refuse access to three documents, give access to two documents and to give access to an edited copy of the remaining 36 documents. The complainant sought internal review of the agency's decision and on 7 December 2020, the agency confirmed its decision.

By email dated 12 January 2021 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 the disputed documents.

The agency claimed that all of the documents contained information that is exempt under clause 4(3) of Schedule 1 to the FOI Act and that three of the documents also contained information that is exempt under clauses 6(1) and 8(2) of Schedule 1 to the FOI Act, respectively clause 4(3), clause 6(1) and clause 8(2) (**the disputed information**).

On 21 April 2022, after considering the information before her, the Commissioner provided the parties with her preliminary view. It was her preliminary view that the disputed information was not exempt under clause 4(3), clause 6(1) or clause 8(2).

The agency was invited to accept the Commissioner's preliminary view and give access to the disputed information, taking into account its obligations under section 33, or to make further submissions in support of its claims.

On 16 May 2022 the agency indicated that it did not accept the Commissioner's preliminary view but made no further submissions in support of its claims. However, the agency noted that the Commissioner had not considered whether a particular document was exempt under clauses 6(1) and 8(2) and made further submissions in relation to that document.

The Commissioner was not dissuaded from her preliminary view and invited the third party to be joined to the matter and/or make submissions as to whether the disputed information is exempt under clause 4 of Schedule 1 to the FOI Act. The third party elected to be joined to the matter, but made no submissions, other than to state that it did not consent to the disclosure of the disputed information.

The exemption in clause 4(3) is concerned with protecting from disclosure information about the business, professional, commercial or financial affairs of a person.

If the requirements of both parts (a) and (b) are satisfied, the application of the limit on the exemption in clause 4(7), the public interest, must also be considered.

Clause 4(3)(a) provides that matter is exempt matter if its disclosure would reveal information about the business, professional, commercial or financial affairs of a person. The Commissioner accepted that, the disputed information, if disclosed, would reveal information about the business affairs of the third party. Therefore, the Commissioner considered that the requirements of clause 4(3)(a) had been met.

Clause 4(3)(b) provides that if disclosure of the matter described in clause 4(3)(a) could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of information of that kind to the Government or to an agency, then that matter will be exempt. The Commissioner considered that, as the disputed information was required for the purpose of obtaining approvals to carry out works, then it was not open to the third party, or other individuals to refuse to provide the information. Accordingly, the Commissioner was not persuaded that disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or an agency.

Given the age and the nature of the disputed information, and the fact that the site to which it related was leased by the third party, the Commissioner was not persuaded that disclosure of the information would advantage a competitor.

Taking into account all of the information before her, the Commissioner was not persuaded that disclosure of the disputed information could reasonably be expected to have an adverse effect on the affairs of the third party. Therefore, the Commissioner found that the requirements of clause 4(3)(b) had not been met. As a result, the Commissioner was not required to consider the limit on the exemption in clause 4(7) and she did not do so.

Clause 6(1) provides that matter is exempt if its disclosure would reveal any opinion, advice or recommendation that has been prepared or recorded; or any consultation or deliberation that has taken place, in the course of, or for the purpose of, the deliberative processes of Government, a Minister or an agency; and would, on balance, be contrary to the public interest. The exemption at clause 6(1) is limited by clause 6(4) which provides that matter is not exempt if at least 10 years have passed since it came into existence. The limit at clause 6(4) applied to the disputed information in two of the documents. The Commissioner considered that the disputed information in the remaining document was of an instructive or administrative nature and that it was not contrary to the public interest to disclose such information.

Clause 8(2) provides that matter is exempt if its disclosure would reveal information of a confidential nature obtained in confidence and could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. The Commissioner accepted that the disputed information may be of a confidential nature as it was not in the public domain, however, for the same reasons considered in relation to clause 4(3), the Commissioner was not persuaded that disclosure of the disputed information could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

Accordingly, the Commissioner found that the disputed information was not exempt under clauses 4(3), 6(1) or 8(2) of Schedule 1 to the FOI Act and set aside the agency's decision.