

Decision D0072024 – Published in note form only

Re Central Pilbara North Iron Ore Pty Ltd and Department of Jobs, Tourism, Science and Innovation [2024] WAICmr 7

Date of Decision: 5 June 2024

Freedom of Information Act 1992 (WA): Schedule 1, clause 4(3)

On 11 January 2023, an access applicant 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 correspondence, since 2022, ‘from Central Pilbara North Iron Ore Pty Ltd/Hancock Prospecting Pty Ltd in relation to Renewal of Rights and Occupancy and Extension of Time Requests in relation to the *Iron Ore (Wittenoom) Agreement Act 1972* (temporary reserve 5616H)’.

The agency identified three documents within the scope of the access application. Those documents were a letter to the Minister for Mines and Petroleum with attachments (Document 1); emails to the agency (Document 2); and a letter to the then Deputy Premier attached to Document 2 (Document 2a) (collectively **the disputed documents**).

Pursuant to section 33 of the FOI Act, the agency sought the views of Central Pilbara North Iron Ore Pty Ltd (**the complainant**), a wholly owned subsidiary of Hancock Prospecting Pty Ltd about disclosure of the disputed documents. The complainant submitted that the disputed documents were exempt in their entirety under clause 4(3) of Schedule 1 to the FOI Act (**clause 4(3)**). The agency also sought the views of another third party under section 33 about the disclosure of information about that third party in the disputed documents - that third party did not make submissions.

By notice of decision dated 27 February 2023, the agency decided to give the access applicant access to an edited copy of the disputed documents, claiming that some information was exempt under clause 3(1) of Schedule 1 to the FOI Act (personal information) and that some information was outside the scope of the access application. The access applicant did not seek review of the agency’s decision to delete information from the disputed documents.

The complainant applied for internal review of the agency’s decision claiming that the disputed documents were exempt in their entirety under clause 4(3). The complainant also indicated that it was content for the disputed documents to be disclosed provided certain specific information was deleted.

By internal review decision, given to the complainant on 13 April 2023, the agency confirmed its decision to give the access applicant access to an edited copy of the disputed documents.

On 12 May 2023, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency’s decision. The Commissioner obtained the disputed documents from the agency, together with the FOI file maintained in respect of the access application.

Section 102(2) of the FOI Act provides that if a third party initiates or brings proceedings opposing the giving of access to a document, 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. As a result, the onus was on the complainant to establish that access to the disputed documents should not be given.

One of the Commissioner's officers provided the complainant with their assessment of the matter, which was that, based on the material then before the Commissioner, the Commissioner was likely to consider that the disputed documents were not exempt under clause 4(3). The complainant did not accept the officer's assessment and made further submissions.

The Acting Information Commissioner (**A/Commissioner**) considered all of the material before her, including the disputed documents, the officer's assessment and the complainant's further submissions, and was of the view that the complainant had not discharged the onus it bears under section 102(2) of the FOI Act to establish that the disputed documents are exempt.

Clause 4 recognises that the business of government is frequently mixed with that of the private sector and that neither the business dealings of private bodies nor the business of government should be adversely affected by the operation of the FOI Act. However, 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: see *Re Post Newspapers Pty Ltd and Town of Cottesloe* [2013] WAICmr 27 at [46].

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 public interest limit on the exemption in clause 4(7) 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 A/Commissioner accepted that the disputed documents, if disclosed, would reveal information about the business or commercial affairs of the complainant. Therefore, the A/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 complainant claimed that the information in the disputed documents was provided on a 'commercial in confidence' basis and should not be disclosed. The A/Commissioner observed that the disputed documents, provided by the complainant to the agency, were of the type required by the *Iron Ore (Wittenoom) Agreement 1972* (WA).

Taking into account all of the information before her, including the information that was already in the public domain, the A/Commissioner was not persuaded that disclosure of the disputed documents could reasonably be expected to have an adverse effect on the affairs of the complainant or to prejudice the future supply of information of that kind to the

Government or to an agency. Therefore, the A/Commissioner found that the requirements of clause 4(3)(b) had not been met. As a result, the A/Commissioner was not required to consider the limit on the exemption in clause 4(7) and she did not do so.

Accordingly, the A/Commissioner found that the disputed documents were not exempt under clause 4(3) of Schedule 1 to the FOI Act and confirmed the agency's decision to give the access applicant access to the disputed documents.