

Decision D0102023 – Published in note form only

Re Forrest & Forrest Pty Ltd and Department of Mines, Industry Regulation and Safety [2023] WAICmr 10

Date of Decision: 31 August 2023

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

On 23 December 2021, Forrest & Forrest Pty Ltd, Harvest Road Pastoral Pty Ltd and Wyloo Metals Pty Ltd (**the complainant**) applied to the Department of Mines, Industry Regulation and Safety (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to certain documents relating to the transfer of particular tenements from Yarri Mining Pty Ltd (**the third party**) to another named party (**the second third party**).

By notice of decision dated 15 February 2022, the agency decided to give access to some documents and to refuse access to others on the ground they are exempt under clauses 4(3) and 8(2) of Schedule 1 to the FOI Act. The complainant sought internal review of the agency's decision in relation to the two documents described by the agency as Document 3 and Document 14 (**the disputed documents**). Document 3 was an agreement between the third party and the second third party and Document 14 was a letter from the agency to the third party.

On 21 April 2022, the agency provided the complainant with an internal review decision, which incorporated reviews of its decisions in relation to nine access applications made by the complainant. That internal review decision summarised the exemptions claimed for each of the disputed documents in the nine different matters. The agency confirmed its decision that the disputed documents in this matter are exempt under clause 4(3) of Schedule 1 to the FOI Act (**clause 4(3)**). Among other things, the agency claimed that the third party had been consulted on a number of occasions pursuant to section 33 of the FOI Act and that 'receiving and attempting to respond to' numerous third party consultations had 'caused an adverse effect' on the business affairs of the third party, which was sufficient to fulfil the requirements of clause 4(3)(b).

On 20 June 2022, 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.

On 17 May 2023, after considering the information before her, the Commissioner provided the parties with her preliminary view of this matter. It was her preliminary view that the disputed documents were not exempt under clause 4(3). The Commissioner considered that the agency's claims regarding the effect of third party consultation for the purpose of clause 4(3)(b) was misconceived, as the adverse effect on the affairs of the third party must result from the disclosure of the disputed documents themselves, not the third party consultation process under the FOI Act.

The agency was invited to accept the Commissioner's preliminary view and to give the complainant access to the disputed documents, taking into account its obligations under

section 33 of the FOI Act. Alternatively, the agency was invited to make further submissions in support of its claims.

The agency informed the Commissioner that it accepted her preliminary view. The agency subsequently notified the third party and the second third party that it withdrew its exemption claims and proposed to give the complainant access to the disputed documents. The second third party did not elect to be joined as a party to the matter and did not make any submissions.

Pursuant to section 69(2) of the FOI Act, the third party was joined as a party to the matter and made submissions claiming that Document 3 is exempt. The third party informed the Commissioner that it did not object to the disclosure of Document 14. As the agency had withdrawn its exemption claims, Document 14 was no longer in dispute.

After considering all of the information before her, the Commissioner was not dissuaded from her preliminary view that Document 3 is not exempt under clause 4(3).

The exemption in clause 4(3) consists of two parts and the requirements of both parts (a) and (b) must be satisfied in order to establish a prima facie claim for exemption.

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 Document 3, 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 third party claimed that Document 3 is a commercially sensitive document and not one typically provided to a government agency. The Commissioner observed that the third party had provided Document 3 to the agency with particular information deleted and considered it was not clear what sensitive commercial information would be revealed by disclosure of the document in that form.

Taking into account all of the information before her, the Commissioner was not persuaded that disclosure of Document 3 could reasonably be expected to have an adverse effect on the affairs of the third party or to prejudice the future supply of information of that kind to the Government or an agency. Therefore, the Commissioner found that the requirements of clause 4(3)(b) had not been met.

Accordingly, the Commissioner set aside the agency's decision and, in substitution, found that Document 3 is not exempt under clause 4(3) of Schedule 1 to the FOI Act.