

Decision D0112021 – Published in note form only

Re Onslow Resources Limited and Department of the Premier and Cabinet [2021]
WAICmr 11

Date of Decision: 23 September 2021

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

On 3 September 2020 Onslow Resources Limited (**the complainant**) applied to the Department of the Premier and Cabinet (**the agency**) under the *Freedom of Information Act 1992 (the FOI Act)* for access to documents relating to a particular mining tenement lease held by Onslow Salt Pty Ltd (**the third party**). Particular documents were specified, including correspondence between the third party, the Premier and the Minister for State Development.

By notice of decision dated 14 December 2020 the agency decided to give the complainant access to edited copies of six documents and to refuse access in full to one document.

On 15 December 2020, the complainant sought internal review of the agency's decision to give it access to an edited copy of one document. The document was correspondence from the former Premier to the third party (**the disputed document**). The agency confirmed its decision on internal review.

By email dated 21 December 2020 the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision.

The agency claimed that the information deleted from the disputed document (**the disputed information**) was exempt under clause 4(3) of Schedule 1 to the FOI Act (**clause 4(3)**).

Pursuant to section 69(2) of the FOI Act, the third party was joined to the matter.

On 25 August 2021, after considering the material then before her, the Commissioner provided the parties with her preliminary view of the matter. It was her preliminary view that the disputed information was not exempt under clause 4(3).

The parties were invited to accept the Commissioner's preliminary view or to provide further submissions. The agency indicated that it accepted the Commissioner's preliminary view and withdrew its exemption claims.

The third party advised that it did not withdraw its claims that the disputed information is exempt, but did not wish to make any further submissions.

After considering the material before her, the Commissioner was not dissuaded from her preliminary view that the disputed information was not exempt under clause 4(3).

The exemption in clause 4(3) is concerned with protecting from disclosure information about the business, professional, commercial or financial affairs of a person. The exemption 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. 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 some, but not all, of 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 in relation to that information.

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.

Section 102(2) of the FOI Act provides that, if a third party opposes 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.

The third party made general claims about the effects of disclosure of the disputed information, but did not explain how its disclosure could reasonably be expected to have an adverse effect on the affairs of the third party. Additionally, as the disputed information was not information provided by the third party, the Commissioner was not persuaded that its disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or an agency.

The Commissioner did not consider that the third party had discharged the onus under section 102(2) of establishing that the disputed information is exempt under clause 4(3).

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 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. 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.

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