

Decision D0122021 – Published in note form only

Re Onslow Resources Limited and DevelopmentWA [2021] WAICmr 12

Date of Decision: 24 September 2021

Freedom of Information Act 1992 (WA): clause 6(1)

On 13 October 2020 the complainant applied to DevelopmentWA (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents comprising correspondence between Landcorp and the former Department of State Development, relating to particular mining tenements held by the complainant, for the period 1 July 2010 to 30 June 2015. The agency is an amalgamation of the Western Australian Land Authority (formerly trading as LandCorp) and the Metropolitan Redevelopment Authority, which merged in 2019.

By notice of decision dated 10 December 2020, the agency decided to give the complainant access to edited copies of 27 documents. On 14 December 2020, the complainant sought internal review of the agency's decision to give it access to an edited copy of five documents (Documents 9, 14, 25, 26 and 27). The agency confirmed its decision on internal review.

On 21 December 2020 the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision in relation to the information deleted from Documents 9, 25 and 26.

The agency claimed that the information deleted from Document 9 was exempt under clause 7(1) of Schedule 1 to the FOI Act (**clause 7(1)**); that some information deleted from Document 25 was outside the scope of the complainant's access application; and that the remainder of the information deleted from Documents 25 and 26 was exempt under clause 6(1) of Schedule 1 to the FOI Act (**clause 6(1)**).

On 21 July 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 some of the information deleted from Document 25 was outside the scope of the application, as claimed by the agency, but that the remainder of the deleted information was not exempt under clause 7(1) or clause 6(1).

The parties were invited to accept the Commissioner's preliminary view or to provide further submissions. The complainant indicated that it accepted the Commissioner's preliminary view.

The agency indicated that it accepted the Commissioner's preliminary view in relation to certain of the information for which it had claimed an exemption under clause 7(1) and subsequently gave the complainant access to that information. However, the agency maintained its claims for the remaining deleted information and provided further submissions in support of its claims.

After considering the agency's further submissions, the Commissioner was persuaded that the remaining information deleted from Document 9 was exempt under clause 7(1) and the complainant was informed accordingly. The complainant indicated that it accepted the Commissioner's revised preliminary view in this regard and therefore, the deleted

information in Document 9 was no longer in dispute. As a result, the only issue remaining in dispute for the Commissioner to determine was whether the information deleted from Documents 25 and 26 (**the disputed information**) was exempt under clause 6(1).

After considering all of the material before her, including the agency's further submissions, the Commissioner was not dissuaded from her preliminary view that the disputed information was not exempt under clause 6(1).

Clause 6(1) provides that matter is exempt if its disclosure would reveal any opinion, advice or recommendation that has been obtained, 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 the Government, a Minister or an agency and, such disclosure would, on balance, be contrary to the public interest.

Unlike the other exemption clauses set out in Schedule 1 to the FOI Act that are limited by a public interest test, in the case of a claim for exemption under clause 6(1), an access applicant is not required to demonstrate that disclosure of the requested matter would be in the public interest. Instead, the onus of establishing that its disclosure would, on balance, be contrary to the public interest rests with the agency: see *Health Department of Western Australia v Australian Medical Association Ltd* [1999] WASCA 269 at [18].

The Commissioner has consistently expressed the view that it may be contrary to the public interest to prematurely disclose deliberative documents while deliberations in an agency are continuing, if there is material which establishes that such disclosure would adversely affect the decision-making processes or that disclosure would, for some other reason, be demonstrably contrary to the public interest: see for example, *Re West Australian Newspapers Pty Ltd and Western Power Corporation* [2005] WAICmr 10.

Documents 25 and 26 consisted of emails dated 2013 from the then Department of State Development to LandCorp. Having examined the disputed information in Documents 25 and 26, the Commissioner accepted that it contained opinion, advice or recommendations that had been obtained, prepared or recorded in the course of, or for the purpose of, the deliberative processes of an agency, the relevant deliberative processes being consideration of matters relating to the specified mining tenements.

However, the Commissioner was of the view that the agency had not established that the disclosure of the disputed information would, on balance, be contrary to the public interest.

The Commissioner observed that the decision-making process in this instance had been completed in June 2015 and that the deliberations were therefore complete. On the material before her, the Commissioner was not persuaded that disclosure of the disputed information would adversely affect the decision-making processes of an agency or that disclosure would, for some other reason, be demonstrably contrary to the public interest. Therefore, the Commissioner was not persuaded that disclosure of the disputed information was contrary to the public interest.

Accordingly, the Commissioner set aside the agency's decision and, in substitution, found that the disputed information is not exempt under clause 6(1) of Schedule 1 to the FOI Act.