

Decision D0142020 – Published in note form only

Re Mineralogy Pty Ltd and Department of Mines, Industry Regulation and Safety [2020] WAICmr 14

Date of Decision: 21 December 2020

Freedom of Information Act 1992 (WA): Schedule 1, clauses 3(1), 4(3) and 4(7)

On 11 June 2018, Mineralogy 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 *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA)* (**the State Agreement**).

After identifying a number of documents, the agency consulted with a third party, in accordance with its obligations under section 33 of the FOI Act, about disclosure of information about the third party. By notice of decision dated 22 August 2018, the agency gave the complainant access to numerous edited copies of documents and refused access to documents on the ground they were exempt under clauses 3(1), 4(3) and 8(2) of Schedule 1 to the FOI Act.

On 20 September 2018, the complainant applied for internal review of the agency's decision to refuse access to Documents 26, 31, 33 and 60A (**the disputed documents**). On 1 October 2018, the agency confirmed its decision. On 29 November 2018, the complainant applied to the Information Commissioner (**Commissioner**) for external review of the agency's decision.

During the external review, Citic Pacific Mining Management Pty Ltd (**the third party**), was joined as a party to this complaint under section 69(2) of the FOI Act. The third party submitted that the disputed documents were exempt under clause 4(3) (**clause 4(3)**) and 8(2) (**clause 8(2)**) of Schedule 1 to the FOI Act.

Following receipt of the complaint, the Commissioner considered the disputed documents and the agency's FOI file maintained in respect of the complainant's access application. The Commissioner also considered the submissions provided by the parties.

On 5 August 2020, the Commissioner provided the parties with a letter setting out her preliminary view of the complaint. The Commissioner's preliminary view was that: parts of Document 26 are outside the scope of the access application; the remaining parts of Document 26 are not exempt under clause 4(3) or 8(2); Documents 31, 33 and 60A are exempt under clause 4(3) and Document 26 included 'personal information' of individuals other than the access applicant that is exempt under clause 3(1).

The agency and the third party accepted the Commissioner's preliminary view. The complainant did not accept the Commissioner's preliminary view that parts of Document 26 are outside the scope of the access application and that Documents 31, 33 and 60A are exempt under clause 4(3). The complainant and the third party provided further submissions to the Commissioner following the preliminary view.

The complainant submitted that, under subparagraph 1(d) of the access application, the requested documents extended to a broader range of documents than described by the Commissioner in the preliminary view. However, the Commissioner considered that subparagraph 1(d) clearly requested correspondence between the Minister and the parties set out in the Schedule in the access application. Parts of Document 26 were outside the scope of the access application because they did not include correspondence with the Minister.

The complaint's further submissions in relation to clause 4(3) and 4(7) were based on the proposition that there was an obligation on the State to provide Documents 31, 33 and 60A to the complainant under clause 11(2)(b) of the State Agreement. Further, the complainant submitted that for the purpose of considering if documents are exempt, there was no distinction between the State, as a party to the State Agreement, and the agency as the party dealing with the access application under the FOI Act.

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.

The Commissioner considered that disclosure of Documents 31, 33 and 60A would reveal information about the business, professional, commercial or financial affairs of the third party. The Commissioner also considered that disclosure of the documents could reasonably be expected to have an adverse effect on those affairs.

Where the third party was engaged in the highly competitive business of mining a specific kind of substance, the Commissioner considered that disclosure of the documents could reasonably be expected to reveal information about the specific sales processes of the third party and that competitors could use this information to compete with the third party.

In considering clause 4(7), the Commissioner considered that the objects of the FOI Act, as described at section 3(1), are to make the persons and bodies that are responsible for State and local government more accountable to the public. The Commissioner considered she was required to weigh the public interests for and against the agency disclosing documents under the FOI Act. The Commissioner was not persuaded by the complainant's submission that the State, as a party to the State Agreement, and the agency are to be regarded as equivalent entities for the purpose of assessing the public interest.

Weighing against disclosure, in *Re McGowan and Minister for Regional Development* [2011] WAICmr 2, the former Information Commissioner observed at [68] that:

Although I consider that individuals and organisations undertaking business with government in relation to the management and development of the State's mineral resources must necessarily expect to be subject to a higher degree of scrutiny and accountability in respect of that work, I do not consider it to be in the public interest that such persons should suffer commercial disadvantage because of it. Clearly, that is what the exemptions in clause 4 are designed to avoid.

The Commissioner agreed with those observations. The Commissioner considered that the complainant had not discharged the onus of showing that any public interest in the disclosure of Documents 31, 33 and 60A outweighed the public interest in avoiding commercial damage to the third party.

The Commissioner was not satisfied that the complainant had shown that the effect of clause 11(2)(b) of the State Agreement was to create a right of access by the complainant under the FOI Act to the disputed documents. In any event, the Commissioner remained of the view that her function in considering if the disputed documents are exempt under clause 4(3) and in weighing the considerations under clause 4(7) was to consider the effect of the disclosure of the disputed documents by the agency under the FOI Act.

The Commissioner varied the agency's decision. The Commissioner found that parts of Document 26 are outside the scope of the access application; the remaining parts of Document 26 are not exempt under clause 4(3) or 8(2); Documents 31, 33 and 60A are exempt under clause 4(3) and Document 26 included 'personal information' of individuals other than the access applicant that is exempt under clause 3(1).