

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: F2014059
Decision Ref: D0152014**

Participants:

Greg Rowe Pty Ltd
Complainant

- and -

City of Swan
Agency

- and -

Snowdale Holdings Pty Ltd
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access clause 4(3) – information about the business, professional, commercial or financial affairs of a person – whether disclosure could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of a person.

Freedom of Information Act 1992: Section 10(2); Schedule 1 clause 4(3)

Apache Northwest Pty Ltd v Department of Mines and Petroleum [2012] WASCA 167

Attorney General's Department v Cockcroft (1986) 10 FCR 180

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550

DECISION

The agency's amended decision is confirmed. I find that the disputed document is not exempt under clause 4(3) of Schedule 1 to the *Freedom of Information Act 1992*.

Sven Bluemmel
INFORMATION COMMISSIONER

29 July 2014

REASONS FOR DECISION

1. This complaint arises from a decision made by the City of Swan (**the agency**) to refuse Greg Rowe Pty Ltd (**the complainant**) access to a document under the *Freedom of Information Act 1992* (**the FOI Act**).

BACKGROUND

2. On 9 December 2013 the complainant applied to the agency under the FOI Act for 'a copy of the Operational Management Plan recently submitted by the operator of Swan Valley Egg Farm, situated at Lot 600 (No. 60) Cheltenham Street, Bennett Springs' (**the disputed document**).
3. By notice of decision dated 20 January 2014, the agency decided to refuse access to the disputed document under clause 4(1) of Schedule 1 to the FOI Act. On 22 January 2014, the complainant applied for internal review of the agency's decision. By letter dated 4 February 2014, the agency confirmed its initial decision.
4. By letter dated 17 March 2014, Lavan Legal, on behalf of the complainant, applied to the Information Commissioner for external review of the agency's decision to refuse access to the disputed document.

REVIEW BY THE INFORMATION COMMISSIONER

5. Following receipt of this complaint, the agency produced to me the original of the disputed document together with its FOI file maintained in respect of the complainant's access application.
6. My office contacted Snowdale Holdings Pty Ltd (**the third party**) which is joined to this matter as a party.
7. On 30 May 2014, having considered the information currently before her, the A/Information Commissioner advised the parties in writing of her preliminary view of this complaint and her reasons. It was the A/Commissioner's preliminary view that the disputed document is not exempt under clauses 4(1), 4(2) or 4(3) of Schedule 1 to the FOI Act.
8. The agency confirmed that it accepted the A/Commissioner's preliminary view and amended its decision by withdrawing its claim for exemption (**the agency's amended decision**). Notwithstanding that the A/Commissioner's preliminary view was that the disputed document is not exempt, the complainant made submissions in support of its position that the disputed document is not exempt.
9. The third party did not accept the A/Commissioner's preliminary view and made further submissions confirming that it maintains its claim for exemption under clause 4(3) of Schedule 1 to the FOI Act for the disputed document.

THE DISPUTED DOCUMENT

10. There is one document in dispute in this matter, which is a copy of the Operational Management Plan dated December 2013, prepared for Swan Valley Eggs Farm and submitted to the agency as a condition of a retrospective building approval granted by the agency to the third party.

The third party's submissions

11. The third party submits that the disputed document contains:
 - internal management procedures;
 - unique and commercially sensitive features of its facilities;
 - details of specific equipment used by it; and
 - confidential information relating to the operation of the egg farm.
12. The third party also submitted to the agency that it had developed the information contained in the disputed document in confidence with its external consultants. In addition, the third party submits that if the disputed document were disclosed, its competitors may 'gain advantage at [the third party's] expense.' Further, the third party submits that the disputed document contains 'commercially sensitive information of [its] operations' giving it a commercial advantage over its competitors.
13. The third party submits that disclosure of such information would result in that information losing 'its commercial value and would likely have an adverse effect on [the third party's] commercial and or financial affairs.'
14. In response to the A/Commissioner's preliminary view, the third party only made submissions in relation to a claim for exemption under clause 4(3) of Schedule 1 to the FOI Act. On that basis, I understand that the third party now only claims the disputed document is exempt under clause 4(3). In any event, as the third party did not make any further submissions in relation to clauses 4(1) and 4(2), there is nothing before me to dissuade me from the A/Commissioner's preliminary view that the disputed document is not exempt under clauses 4(1) or 4(2) of Schedule 1 to the FOI Act.
15. In its submissions to the A/Commissioner's preliminary view that the document is not exempt under clause 4(3), the third party submits that:
 - it is currently involved in proceedings before the State Administrative Tribunal (**the SAT**) relating to two notices issued by the agency against the third party under section 214 of the *Planning and Development Act 2005*;
 - the complainant is the other party, representing a number of individual parties, in the SAT proceedings;
 - the complainant has indicated that it needs the disputed document for the purposes of those proceedings;

- the disputed document details the ‘farming and management practices of Snowdale’;
- disclosure of the disputed document, prior to the determination of the SAT matter, would be ‘adverse to Snowdale’s commercial and business affairs because it provides confidential information to a group whose purpose is to oppose Snowdale’s ongoing business at the Property’; and
- disclosure of the disputed document will ‘have the effect of ensuring that Snowdale’s approach to the content of future management plans is more guarded.’

16. Finally, the third party submits that:

If it is understood, that a management plan containing confidential information about its business is likely to be released to persons whose interests are adverse to its ongoing commercial operations at the Property and who have no duty of confidentiality, then that is likely to affect the detail of the future disclosure made by Snowdale in its management plans.

THE EXEMPTION

Clause 4(3) – business, professional, commercial or financial affairs

17. Clause 4(3) provides as follows:

Matter is exempt matter if its disclosure —

- (a) *would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
- (b) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*

18. Clause 4(3) is concerned with protecting from disclosure information about the business, professional, commercial or financial affairs of persons or organisations having business dealings with government agencies, where disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of that kind of information to the Government or its agencies.

19. The exemption consists of two parts and the requirements of both paragraphs (a) and (b) must be satisfied in order to establish a prima facie claim for exemption. Clause 4(7) then provides that certain information that is otherwise exempt under clause 4(3) may be disclosed if disclosure would, on balance, be in the public interest.

20. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 the Full Federal Court of Australia said, at 190, that the words 'could reasonably be expected to' in the Commonwealth FOI Act were intended to receive their ordinary meaning. That is, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the relevant outcome. That approach was accepted as the correct approach by the Court of Appeal (WA) in *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167.
21. Having examined the disputed document, I am satisfied that, if disclosed, it would reveal information about the business affairs of the third party. Accordingly, I consider that the requirements of clause 4(3)(a) are satisfied in this case.
22. However, the requirements of paragraph (b) must also be satisfied by the third party in order to establish a prima facie claim for exemption under clause 4(3). In regard to the first limb of clause 4(3)(b), the third party submits that disclosure of the disputed document would adversely affect its business affairs as its competitors would gain a commercial advantage.
23. There is nothing in the submissions of the third party to substantiate its claim that disclosure of the disputed document would have the effect as provided in clause 4(3). It merely makes the claim without providing any substantive evidence. In the circumstances, I refer to the comments of Owen J, in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at page 573, in relation to a claim for exemption under clause 4(3) of the FOI Act, when he expressed the nature of the onus an agency bears in the following way:

How can the Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had "real and substantial grounds for thinking that the production of the document could prejudice that supply" or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision-maker to proffer the view. ...it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker.
24. In regard to the second limb of clause 4(3)(b), the third party argues that disclosure of the disputed document is likely to have the effect of the third party's approach to the content of future management plans being more guarded.
25. I understand that the third party was required to prepare a management plan for submission to the agency as a result of a building dispute between the third party and the agency. The agency decided to grant retrospective approval for the buildings constructed by the third party without building approval. One of the conditions of that retrospective approval was the submission of a management plan to the agency – being the disputed document.

26. Further, I understand based on advice from the agency that whilst

[I]t is not a statutory requirement to provide documentation as part of the development approval conditions...if documentation was not provided as required by the conditions of an approval [the agency] would be able to prosecute the landowner/applicant for non-compliance with the development approval until such time as the documentation was submitted or a court ruled in the landowners/applicants favour.

27. In light of the advice provided by the agency above, I am not persuaded that disclosure of the disputed document could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

28. The third party also submits that the complainant does not have a right of access to the disputed document in the SAT proceedings. However, they do have a right of access to it under the provisions of the FOI Act. Section 10 of the FOI Act provides that a person has a right to access documents of an agency (other than an exempt agency) subject to and in accordance with the FOI Act. Specifically, section 10(2) of the FOI Act provides that a person's right of access to documents is not affected by any reasons the person gives for wishing to obtain access, or the agency's belief as to what are the person's reasons for wishing to obtain access.

29. For the reasons given above, I am not satisfied that the requirements of paragraph (b) of clause 4(3) are met. Accordingly, it is not necessary for me to consider whether the limit on the exemption in clause 4(7) applies and whether disclosure of the disputed document would, on balance, be in the public interest.

CONCLUSION

30. I find that the disputed document is not exempt under clause 4(3) of Schedule 1 to the FOI Act.
