

Decision D0182023 – Published in note form only

Re Alcoa of Australia Limited and Department of Biodiversity, Conservation and Attractions [2023] WAICmr 18

Date of Decision: 22 December 2023

Freedom of Information Act 1992 (WA): Schedule 1, clauses 4(2) and 4(3)

In December 2021, Jeffrey Bremer (**the access applicant**) applied to the Department of Biodiversity, Conservation and Attractions (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to a copy of a document referred to in a proposal submitted to the Environmental Protection Authority (**EPA**) by Alcoa of Australia Limited (**the complainant**). The proposal related to the Pinjarra Alumina Refinery and the Huntly Bauxite Mine (EPA Assessment Number: 2253). The access applicant did not seek personal information relating to third parties or prescribed details relating to agency officers contained in the requested document (**the excluded information**).

The agency identified two documents within the scope of the access application, namely a document titled ‘Alcoa/DEC Working Arrangements - Bauxite Mining Operations - 2011-2015’ (**the Working Arrangements**) and the Appendices to that document (**the Appendices**) (together, **the disputed documents**).

Pursuant to section 33 of the FOI Act, the agency sought the views of the complainant about disclosure of the disputed documents. The complainant submitted that the disputed documents were exempt under clause 4(2) and clause 4(3) of Schedule 1 to the FOI Act (**clauses 4(2) and 4(3)**). Subsequently, by notice of decision dated 16 February 2022, the agency gave the access applicant access to an edited copy of the disputed documents – that is, parts of the Working Arrangements and the whole of Appendix 1 of the Appendices. The agency claimed that the deleted information was exempt under clause 4(3).

The access applicant applied for internal review of the agency’s decision. By internal review decision dated 13 May 2022, the agency reversed its decision and gave the access applicant access to the disputed documents in full (apart from the excluded information).

In June 2022, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency’s decision. As the external review request was limited to the information in the Appendices that had not already been released, on 16 June 2022, the agency gave the access applicant a full copy of the Working Arrangements (apart from the excluded information). Therefore, the information that remained in dispute was the whole of the Appendices apart from Appendix 1 (**the disputed information**).

The Commissioner obtained the disputed documents, together with the FOI file maintained in respect of the access application from the agency. The access applicant was joined as a party to the matter pursuant to section 69(3) of the FOI Act.

Section 102(2) of the FOI Act provides that if a third party initiates or brings proceedings opposing 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.

As a result, the onus was on the complainant to establish that access to the disputed information should not be given.

On 4 May 2023, the Commissioner's Principal Legal Officer (**officer**), provided the complainant with her initial assessment of this matter (**initial assessment**). It was her initial assessment that the complainant's claims that the disputed information is exempt under clauses 4(2) and 4(3) were not made out; and that, based on the material then before this office, it was likely that the Commissioner would find that the disputed information is not exempt.

The complainant confirmed that it did not wish to make further submissions but that it wished to proceed with the external review. The complainant was advised that, in those circumstances, the Commissioner was required to finalise this matter by formal decision.

During the course of this external review, the Commissioner noted that she had a potential conflict of interest based on an association with the access applicant which she considered may give rise to a reasonable apprehension of bias. As a result, the Commissioner formed the view that she should not determine this matter. As the Commissioner's power to make a decision on an external review matter cannot be delegated to any other position, it was necessary for an Acting Commissioner to be appointed to determine this matter. In September 2023, the Commissioner's officer – as the occupant of the next most senior position in the Commissioner's office – was appointed as Acting Information Commissioner (**A/Commissioner**) for the limited purpose of dealing with this matter.

In the absence of further submissions from the complainant and having considering all of the material before her, the A/Commissioner was not dissuaded from her initial assessment that the disputed information is not exempt under clause 4(2) or clause 4(3).

Clause 4 recognises that the business of government is frequently mixed with that of the private sector and that neither the business dealings of private bodies nor the business of government should be adversely affected by the operation of the FOI Act. However, private organisations or persons having business dealings with Government must necessarily expect greater scrutiny of, and accountability for, those dealings than in respect of their other dealings: see *Re Post Newspapers Pty Ltd and Town of Cottesloe* [2013] WAICmr 27 at [46].

Clause 4(2) provides that matter is exempt matter if its disclosure (a) would reveal information that has a commercial value to a person; and (b) could reasonably be expected to destroy or diminish that commercial value. Clause 4(2) is not subject to a public interest test.

Clause 4(3) provides that matter is exempt matter if its disclosure (a) would reveal information 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. If clause 4(3) is satisfied, the public interest limit on the exemption in clause 4(7) must also be considered.

The complainant claimed that the processes described in the disputed documents had been developed by it over time. The A/Commissioner observed that the investment of time and money is not, in itself, a sufficient indicator of the fact that the information has a commercial value: see *Re McGowan and Minister for Regional Development; Lands and Mineralogy Pty Ltd* [2011] WAICmr 2 at [33].

The A/Commissioner considered that the complainant had not provided sufficient information to establish that the disputed information is essential to the viability of the complainant's continuing business operations, nor was it evident that the information is valuable for the purposes of the complainant carrying on its commercial activities.

The A/Commissioner did not consider that the complainant's submission that, in effect, disclosure of the disputed information would give the complainant's competitors a commercial advantage (or would result in commercial disadvantage to the complainant) to be persuasive. Further, the A/Commissioner considered it was not clear how the disputed information is novel or unique such that its disclosure would be detrimental to the complainant's business operations, give its competitors a commercial advantage or that an arm's length buyer would be prepared to pay for the information.

The complainant refuted the agency's claim that the disputed information is out of date and claimed that, although the disputed documents are more than 12 years old, the procedures described remain unchanged and continue to be used by the complainant. In her initial assessment, the A/Commissioner informed the complainant that she was inclined to accept the agency's claim that the procedures and practices have evolved or been discontinued as a result of adaptive management practices. The complainant was invited to provide further material to support its assertion, together with further information that explains how those procedures and practices are novel or unique. However, the complainant did not do so.

The A/Commissioner considered that the complainant had not discharged the onus it bears under section 102(2) of the FOI Act to establish that the disputed information is exempt and that the access applicant should not be given access to it.

In relation to clause 4(2), the A/Commissioner considered that there was insufficient information before her to establish that the disputed information has a commercial value to the complainant. The A/Commissioner noted that, even if she was satisfied on this point, she was not persuaded on the information before her that the disclosure of the disputed information could reasonably be expected to destroy or diminish any commercial value in that information. Therefore, the A/Commissioner was not satisfied that the requirements of clause 4(2) were established.

In relation to clause 4(3), the A/Commissioner accepted that disclosure of the disputed information would reveal information about the business affairs of the complainant. However, on the material before her, the A/Commissioner was not persuaded that disclosure of the disputed information could reasonably be expected to have an adverse effect on the business affairs of the complainant or prejudice the future supply of information of that kind to the Government or to an agency. Consequently, the A/Commissioner was not satisfied that the requirements of clause 4(3) were met. As a result, the A/Commissioner was not required to consider the limit on the exemption in clause 4(7) and she did not do so.

After considering all of the material before her including her examination of the disputed information, the A/Commissioner found that the disputed information was not exempt under clauses 4(2) or 4(3) of Schedule 1 to the FOI Act. Accordingly, the A/Commissioner confirmed the agency's decision to give the access applicant access to the disputed information.