

**Decision D0242017 – Published in note form only**

***Re Cockburn Cement Limited and Department of Water and Environmental Regulation [2017] WAICmr 24***

**Date of Decision: 29 December 2017**

***Freedom of Information Act 1992 (WA): Section 27(2)(c) and Schedule 1, clauses 4(1), 4(2) and 4(3).***

On 5 January 2017 an access applicant (**the access applicant**) applied to the Department of Water and Environmental Regulation (**the agency**), formerly the Department of Environment Regulation, under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to: The Cockburn Cement Limited Community Odour Survey dated 14 August 2015 (Document 1); the Cockburn Cement Limited Odour Verification Program dated 28 August 2015 (Documents 2); the Department of Environment Regulation Technical Expert Report on the Review of the Community Odour Survey, dated 10 May 2016 (Document 3); the Department of Environment Regulation Technical Expert Report on the Investigation of Cockburn Cement Limited stack emissions and potential ground impacts of odours and air compounds (Document 4); and information that had been deleted from the Decision Report for Licence L4533/1967/16 (Document 5), published on the agency's website.

By letter dated 25 January 2017 the agency contacted Cockburn Cement Limited (**the complainant**) to seek its views under sections 32 and 33 of the FOI Act as to whether the documents, to which it proposed to give access (**the disputed documents**), contained matter that is exempt under clauses 3 or 4 of Schedule 1 to the FOI Act.

The complainant advised the agency that it considered the disputed documents to be exempt under clauses 4(1), 4(2) and 4(3) of Schedule 1 to the FOI Act. It claimed that disclosure would reveal trade secrets of the complainant; reveal information that has a commercial value to a person and could reasonably be expected to destroy that commercial value; and that disclosure would reveal information about the business, professional, commercial or financial affairs of a person and 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 an agency.

After taking the complainant's views into account the agency decided to give the access applicant access to the disputed documents with all personal information deleted, as agreed with the access applicant. The decision was made by the principal officer of the agency, therefore, no internal review of the decision was available to the complainant.

By letter dated 2 June 2017 the complainant applied to the Information Commissioner for external review of the agency's decision. Following receipt of the complaint, the former Information Commissioner (**the former Commissioner**) obtained the disputed documents from the agency, together with the FOI file maintained by the agency in respect of the access application.

On 25 August 2017 the complainant provided additional information to the former Commissioner in support of its claims for exemption. It withdrew its claims for exemption in relation to a small amount of information in Documents 1, 2, 3 and 5, such as 'contents', 'tables of figures' and general definitions.

On 2 November 2017, after considering all the information before her, the Acting Information Commissioner (**the A/Commissioner**) provided the parties with her preliminary view of the matter. It was her preliminary view that Documents 1 and 3 are not exempt under clause 4 of Schedule 1 to the FOI Act; that the remaining disputed information in Documents 2 and 4 is exempt under clause 4(2) of Schedule 1 to the FOI Act; that a small amount of disputed information in Document 5 is exempt under clause 4(2); and that access should be given to Document 1 by way of inspection so as not to breach copyright. Section 27(2)(c) provides that access should be given in the way requested by an access applicant, unless to do so would involve an infringement of copyright belonging to a person other than the State.

Document 1 was a report produced by a third party, on behalf of the complainant. It was adapted from a standard document, and contained information that was required of the complainant, by the agency, in order to obtain a licence to manufacture cement, in accordance with the *State Government Cement Works (Cockburn Cement Limited) Agreement Act 1971*. Document 3 was the agency's review of Document 1. Although the A/Commissioner accepted that disclosure of the information may reveal business information about the complainant, such disclosure could not reasonably be expected to have an adverse effect on the affairs of the complainant, or prejudice the supply of information of that kind to the agency.

Document 2 contained information about the content of emissions and operational specifications of the complainant's business. The A/Commissioner accepted that disclosure of the disputed information would reveal commercial information about the complainant, and that disclosure of the information could reasonably be expected to diminish or destroy that value. Document 4, as the agency's review of Document 2, contained similar information.

Document 5 contained information from Documents 1 and 2; accordingly, the A/Commissioner decided that information about the content and break down of emissions and production methods, similar to that in Document 2, was exempt under clause 4(2) of Schedule 1 to the FOI Act.

The complainant was invited to provide the A/Commissioner with further submissions or to withdraw its complaint. The agency was invited to accept the A/Commissioner's preliminary view or to provide additional submissions for her consideration. As the preliminary view of the A/Commissioner was that some of the information in the disputed documents was exempt, by letter dated 30 November 2017, the access applicant was provided with a version of the preliminary view, abridged to ensure that no exempt material was disclosed.

On 15 November 2017 the agency confirmed that it accepted the A/Commissioner's preliminary view. By letter dated 17 November 2017, the complainant made further submissions to the A/Commissioner. The access applicant chose not to be joined as a party to the matter, but made submissions to the A/Commissioner by email dated 6 December 2017, that the disputed information was not exempt and that copyright did not subsist in Document 1.

The A/Commissioner considered the complainant's further submissions, the access applicant's submissions and reviewed all of the information before her, but was not dissuaded from her preliminary view.

Accordingly, the A/Commissioner found the disputed information in Documents 2 and 4, and some of the disputed information in Document 5 is exempt under clause 4(2) of Schedule 1 to the FOI Act and varied the agency's decision to give the access applicant access to that information. The A/Commissioner confirmed the agency's decision to give access to Documents 1 and 3, but found that access should be given to Document 1 by way of inspection only.