

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

**File Ref: F2010319
Decision Ref: D0262011**

Participants:

Co-operative Bulk Handling Limited
Complainant

- and -

Public Transport Authority
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to grain rail lines – clause 8(1) – would disclosure be a breach of confidence for which a legal remedy could be obtained – section 24 – deletion of exempt matter.

Freedom of Information Act 1992: sections 24, 30, 74(1), 74(2), 76(5); Schedule 1, clause 8(1)

Rail Freight System Act 2000

*Re Portman Iron Ore Ltd and Western Australian Government Railways
Commission* [2002] WAICmr 27

Re Speno and BGC (Australia) Pty Ltd v Fremantle Port Authority and Anor [2003]
28 WAR 187

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

Police Force of Western Australia v Winterton (1997) WASC 504

DECISION

The respondent's decision is varied. I find that:

- Documents 1(i), 1(ii), 2, 3(ii) and 4(i) are exempt under clause 8(1) of Schedule 1 to the FOI Act.
- With regard to Document 4(ii): item 2 under 'Recommendation' and the second last paragraph on page 1; and lines 10-19 on page 2 of the briefing note; and all of the annexures are exempt under clause 8(1).
- It would be practicable to edit Document 4(ii) to delete the information that, in my view, is exempt under clause 8(1) and give access to Document 4(ii) in edited form.

Sven Bluemmel
INFORMATION COMMISSIONER

19 August 2011

REASONS FOR DECISION

1. This complaint arises from a decision by the Public Transport Authority ('the agency') to refuse Co-operative Bulk Handling Limited ('CBH') access to documents under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. I understand that CBH is a co-operative representing some 4,800 members throughout Western Australia ('WA') that stores, handles and markets grain. CBH advises me that:
 - there is currently 5,100 km of rail network in WA's south west region, just under half of which is almost exclusively used to transport grain from growers to port, and about 65% of WA's grain freight is transported along this rail network.
 - the WA Government has granted exclusive 49 year leases over all of the rail infrastructure in WA (with minor exceptions) to WestNet StandardGauge Pty Ltd and WestNet NarrowGauge Pty Ltd (together 'WestNet') and the agency is responsible for the management of those leases pursuant to the *Rail Freight System Act 2000*.
 - CBH has tendered for the provision of grain rail freight services in WA and seeks access to the requested documents to better understand the use of WA railway infrastructure in relation to its own rail operations.
3. On 1 July 2010, CBH applied to the agency for access to documents relating to the Rail Freight Corridor Land Use Agreement (StandardGauge) and Railway Infrastructure Lease dated 16 December 2000 and Rail Freight Corridor Land Use Agreement (NarrowGauge) and Railway Infrastructure Lease dated 16 December 2000 (each a 'Lease' and together, the 'Leases'). Specifically CBH sought access to:
 - Schedule 1 to the Leases.
 - Schedule 4 to the Leases, which concerned Initial Performance Standards, and any amendments to those Standards.
 - The Maintenance Plans required to be submitted to the relevant Minister under clause 15.7 of the Leases.
 - The approved terms of engagement of the expert engaged by WestNet to review WestNet's compliance with the Performance Standards.
 - The report/s produced by the expert engaged by WestNet, in particular those sections which deal with the rail lines that comprise the Grain Network.

4. I note that the Leases, other than their schedules and annexures, are public documents that can be downloaded from the internet. The two Leases are substantially similar; for example, Schedule 1 of each Lease is identical. The agency, as the successor agency to the WA Government Railways Commission, is a party to each Lease. CBH is not a party to the Leases but was referred to, among other things, in Schedule 1 of the Leases.
5. On 19 August 2010, the agency gave CBH access to a copy or copies of Schedule 1 to the Leases but refused access to the rest of the requested documents on the ground that they were exempt under clauses 4(2), 4(3) and 8(1) of Schedule 1 to the FOI Act. The agency confirmed its decision on internal review by notice dated 9 September 2010 and, on 20 October 2010, CBH applied to me for external review of that decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. After receiving this complaint, I required the agency to produce to me the FOI file maintained by the agency in relation to CBH's access application and the documents the subject of the agency's notices of decision. My office made preliminary inquiries with both the agency and CBH to determine whether this complaint could be resolved by conciliation between the parties.
7. On 7 June 2011, CBH provided me with detailed submissions as to why, in its view, the claim for exemption under clause 8(1) of Schedule 1 to the FOI Act was not justified. In accordance with the usual practice of this office, a copy of those submissions was provided to the agency for its information and any response it wished to make. However, the matter could not be conciliated. Consequently, on 8 July 2011, I provided the parties with a letter setting out my preliminary view of the complaint. In that letter I drew the agency's attention to its failure to comply with s.30(f) of the FOI Act, which provides that agencies must include the following details in their notices of decision:
 - the reasons for the refusal;
 - the findings on any material questions of fact underlying those reasons; and
 - reference or references to the material on which those findings were based.
8. In this case, neither the agency's initial decision nor the internal review decision complied with the requirements of s.30(f). Although the reasons for refusal were given – being that the documents were exempt under clauses 4(2), 4(3) and 8(1) – no attempt was made to explain the factual basis underlying those claims. Neither of the agency's notices explained why those particular exemption clauses applied or referred to the material on which the agency's findings were based.
9. My preliminary view was that most of the requested documents were exempt under clause 8(1), as the agency claimed. However, one of the requested reports (Document 3(i)) is a public document, due to its having been tabled in Parliament. I have since received confirmation from the Legislative Assembly

that Document 3(i) is obtainable from Parliament by the public. As a result, that particular document is not accessible under the FOI Act, pursuant to s.6 of the FOI Act. In addition, my preliminary view was that it would be practicable to give CBH access to Document 4(ii) in edited form.

10. In response to my letter of 8 July 2011, CBH withdrew its complaint in respect of Document 3(i) but did not accept that the majority of the documents were exempt. The agency agreed to give CBH access in edited form to Document 4(ii), although it did not agree to all of the proposed deletions. Both parties made further submissions to me.

THE DISPUTED DOCUMENTS AND THE EXEMPTION CLAIMS

11. The following documents remain in dispute in their entirety (together ‘the disputed documents’):

Document 1: (i) Schedule 4 to the Leases – Initial Performance Standards; and
(ii) Deed of Variation for Rail Freight Corridor Land Use Agreement (Narrow Gauge); and Railway Infrastructure Lease dated 10 May 2004.

Document 2: WestNet Five Year Maintenance Plan 2006-2010.

Document 3: (ii) WestNet Rail – Audit of Compliance with the Initial Performance Standards as set out in the Track Infrastructure Leases dated May 2010.

Document 4: (i) Briefing Note for the Minister for Planning and Infrastructure dated 21 April 2005.

12. Further, the agency claims that the following information in Document 4(ii), which is a two page briefing note to the Minister for Transport dated 25 February 2010 with six pages of annexures, is exempt under clause 8(1) (together, ‘the disputed information’):

- item 2 under ‘Recommendation’ and the second last paragraph on page 1;
- lines 1-6 and 10-19 on page 2; and
- all of the annexures.

13. I understand that the agency claims each of the disputed documents and the disputed information is exempt under clauses 8(1), 4(2) and 4(3) of Schedule 1 to the FOI Act and that the disputed information in Document 4(ii) is exempt under clause 8(1).

CLAUSE 8 - CONFIDENTIAL COMMUNICATIONS

14. The agency claims that all of the disputed documents and the disputed information are exempt under clause 8(1) of Schedule 1 to the FOI Act. Clause 8, insofar as it is relevant, provides:

“8. Confidential communications

- (1) *Matter is exempt matter if its disclosure (otherwise than under this Act or another written law) would be a breach of confidence for which a legal remedy could be obtained.”*

The agency’s submissions

15. The agency’s notices of decision do no more than assert that the disputed documents are exempt under clause 8(1). However, a file note dated 9 September 2010, made by the agency’s internal review decision-maker and placed on the agency’s FOI file, states that the Leases impose express and stringent obligations of confidentiality on all parties, including the agency, over all of the information the subject of this complaint and that disclosure of that information to CBH would amount to a breach of confidentiality for which WestNet could obtain a legal remedy.
16. In response to an invitation by my office to provide additional submissions, the agency referred me to *Re Portman Iron Ore Ltd and Western Australian Government Railways Commission* [2002] WAICmr 27. In that case, the applicant sought access to a sale agreement relating to the sale of the Government’s rail freight business, which contained several confidentiality clauses. The former Information Commissioner found those clauses to be binding on the agency and held that disclosure of the requested documents in that case would amount to a breach of confidence for which a legal remedy could be obtained.

CBH’s submissions

17. By email of 7 June 2011, CBH advised me that it has obtained copies of the Leases (excluding the schedules) from the website of the US Securities and Exchange Commission. CBH noted that those documents are publicly available, having been filed as exhibits to documents filed with the SEC in December 2000 by a member of a joint venture company that acquired the WA Government’s rail freight business. I was also able to access the Leases (minus their schedules and attachments) from that site.
18. CBH submits that it has a right to be given access to the disputed documents pursuant to s.10(1) of the FOI Act and that the agency may only refuse access if the documents are exempt.
19. In relation to the clause 8(1) exemption claim, CBH makes, in brief, the following submissions:

- Clause 8(1) only applies if disclosure of the relevant information ‘would’ (rather than ‘may’) be a breach of confidence for which a legal remedy could be obtained: *Re Speno* and *BGC (Australia) Pty Ltd v Fremantle Port Authority and Anor* [2003] 28 WAR 187. To fall within clause 8(1), disclosure must be a breach of the express terms of the Leases.
- Without knowing what information is contained in the disputed documents, CBH is at a disadvantage and must rely on the Commissioner to consider whether the information falls within the definition of ‘Confidential Information’ in the Leases.
- The confidentiality clauses of the Leases provide, in essence, that no confidential information may be disclosed by a party to the lease to any person, subject to specified exemptions which are not relevant here. However, certain information is excluded from the term ‘Confidential Information’ as defined in the Leases and that particular information will not be covered by clause 8(1).
- If clause 8(1) does not apply to all of the disputed matter, then CBH will accept access in edited form, if it is practicable to do so.
- CBH has recently purchased \$175 million worth of locomotives and wagons to transport grain and CBH was asking the agency to take a common-sense approach to providing CBH with information that would allow it to understand the performance standards of the grain rail lines, especially when it is the only party that uses those rail lines.

Consideration

20. Section 76(5) of the FOI Act provides that, in dealing with a complaint, I have to include in my decision the reasons for that decision; the findings on the material questions of fact underlying those reasons; and the material on which my findings are based.
21. Section 74(1) of the FOI Act requires me to ensure that exempt matter is not disclosed during the course of dealing with a complaint and section 74(2) places a further obligation upon me not to include, among other things, exempt matter in a decision on a complaint or in reasons given for a decision.
22. I acknowledge CBH’s submission that it is at a disadvantage in endeavouring to make meaningful submissions to me on the application of the confidentiality clauses when it does not know what information is contained in the disputed documents or the disputed information.
23. The difficulties faced by complainants and the constraints placed upon me by s.74 (and on the Supreme Court of WA by s.90 of the FOI Act - which is in similar terms to s.74) were recognised by Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550, at pp. 556-557, as follows:

“One provision with which I had some difficulty during the hearing is s 90, which is in these terms:

- (1) In hearing and determining review proceedings the Court has to avoid disclosure of –*
 - (a) exempt matter*
- ...*
- (3) The Supreme Court is not to include exempt matter ... in its decision in review proceedings or in reasons given for the decision ...’*

This places counsel in a position of considerable disadvantage in making submissions o a contested issue.”

- 24. However, Owen J concluded that s.90 should be construed strictly according to its tenor and stated that “[t]he Court has no discretion and, whether during the hearing or in its reasons for decision, the Court must not disclose exempt information to any person including a qualified legal practitioner.” Given the observations of Owen J in that case, I consider that I am constrained from describing, other than in general terms, the contents of any of the disputed documents and must adhere strictly to the obligation to avoid the disclosure of exempt matter imposed on me by s.74.
- 25. Clause 8(1) provides that matter is exempt if its disclosure (otherwise than under the FOI Act or another written law) would be a breach of confidence for which a legal remedy could be obtained. Clause 8(1) is not subject to a public interest test. The express terms of a contract may impose a contractual obligation of confidence and any breach of that obligation would have a legal remedy, which would include damages and injunctions, in an action for breach of contract.
- 26. I have examined the Leases and accept that both contain contractual obligations of confidence. For the relevant confidentiality clauses see clauses 1.2 and 38 in both documents. In my view, those clauses have a broad application.
- 27. Clause 1.2 in both Leases - which, as noted, in public information - provides:

“Confidential Information in respect of a party means:

- (a) all Information relating to the policies, business, technology or other affairs of:*
 - (i) the party; or*
 - (ii) any Related Entity of the party including:*
 - (iii) information which is designated or indicated as being the property or confidential information of the party, any of its Related Entities; and*
 - (iv) trade secrets or Information which is capable of protection at law or equity as confidential information’ whether that information was disclosed:*

- (v) orally, in writing or in electronic or machine readable form;
 - (vi) before, on or after the date of this agreement; or
 - (vii) by the party, any of its representatives, any of its Related Entities, any Representatives of its Related Entities or by any third person;
- and

(b) the terms of this agreement,

but excludes the Excluded Information”.

28. The term ‘Excluded Information’ is defined in the Leases to mean:

“...information:

- (a) which is in or becomes part of the public domain other than through breach of this agreement or the Sale Agreement or an obligation of confidence owed to a party;
- (b) which a party can prove by contemporaneous written documentation was already known to it at the time of disclosure by another Party or its Representatives (other than if such knowledge arose from disclosure of information in breach of an obligation of confidentiality); or
- (c) which a party acquires from a third party entitled to disclose it.”

29. Clause 38 of both Leases provides:

“38 Confidentiality

38.1 No Confidential Information may be disclosed by a party to any except:

- (a) employees, legal advisers, auditors and other consultants of the recipient or its Related Entities who genuinely require the information for the purposes of this agreement; or
- (b) with the consent of the party who supplied the information; or
- (c) if the party is required to do so by law or a stock exchange; or
- (d) if the party is required to do so in connection with legal proceedings relating to this agreement; or
- (e) to any prospective investors, purchasers, financiers, insurers or persons to whom disclosure is necessary so a party can perform its obligations under this agreement provided that the [sic] such other person agrees to be bound by similar confidentiality obligations to this clause.

38.2 A party disclosing information under clause 38.1(a) or (b) must use all reasonable endeavours to ensure that persons receiving

Confidential Information from it do not disclose the information except in the circumstances permitted in clause 38.1.

38.3 *This clause 38 will survive termination (for whatever reason) of this agreement.*

38.4 *Nothing in this clause 38 prevents the Minister from tabling a copy of this agreement in Parliament or providing a copy to any Member of Parliament.”*

30. I have also examined Documents 1(i), 1(ii), 2, 3(ii) and 4(i). I consider that all of the information in those documents relates to the “*policies, business, technology or other affairs of*” WestNet. There is nothing before me to indicate that the information in those documents is in the public domain and would thus be ‘Excluded Information’.
31. On the information before me, I am satisfied that the confidentiality clauses in the Leases impose an express obligation of confidentiality upon each of the parties to the Leases, including the agency. I am also satisfied that disclosure of Documents 1(i), 1(ii), 2, 3(ii) and 4(i) by the agency to CBH under the FOI Act would constitute a breach by the agency of those obligations. Consequently, I consider that Documents 1(i), 1(ii), 2, 3(ii) and 4(i) are exempt under clause 8(1). In light of that, it is not necessary for me to consider whether those documents are also exempt under clauses 4(2) or 4(3), as the agency claims.
32. In my letter to the parties of 8 July 2011, I took the view that part, but not all, of the disputed information in Document 4(ii) was exempt under clause 8(1), because it was covered by the confidentiality clauses in the Leases. My preliminary view was that the following information was exempt:
- item 2 under ‘Recommendation’ and the second last paragraph on page 1; and lines 10-19 on page 2 of the briefing note; and
 - all of the annexures to the briefing note.
33. However, following the receipt of my preliminary view, the agency claimed that lines 1-6 on page 2 of Document 4(ii) were also exempt under clause 8(1). I have examined lines 1-6. In my view that information is in the public domain since identical information is set out in Document 3(i), which is, as I have confirmed, a public document (see paragraph 9 above). In light of that, I am not persuaded that lines 1-6 on page 2 of Document 4(ii) are exempt under clause 8(1), as the agency claims because they come within the definition of ‘Excluded information’ as set out in the Leases
34. In my view, the information in Document 4(ii) that I have identified in paragraph 32 above is exempt under clause 8(1) but the remaining information in that document is not exempt under that provision.

Section 24

35. Section 24 of the FOI Act provides that if an agency considers that the applicant would want access to an edited copy of a document and it is practicable for an agency to give such access, then the agency has to give access to an edited copy of the document. In this case, CBH has agreed to accept access in edited form.
36. The application of section 24 was discussed by Scott J in *Police Force of Western Australia v Winterton* (1997) WASC 504 at page 16, as follows:
- “It seems to me that the reference to the word “practicable” is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context. In that respect, where documents only require editing to the extent that the deletions are of a minor and inconsequential nature and the substance of the document still makes sense and can be read and comprehended in context, the documents should be disclosed.”*
37. In my opinion, it would be practicable to edit Document 4(ii) to delete the exempt information because the disclosure of the remaining information on pages 1-2 of that document would not be misleading or unintelligible as it remains comprehensible in context.

CONCLUSION

38. I find that:
- Documents 1(i), 1(ii), 2, 3(ii) and 4(i) are exempt under clause 8(1) of Schedule 1 to the FOI Act.
 - With regard to Document 4(ii): item 2 under ‘Recommendation’ and the second last paragraph on page 1; and lines 10-19 on page 2 of the briefing note; and all of the annexures are exempt under clause 8(1).
 - It would be practicable to edit Document 4(ii) to delete the information that, in my view, is exempt under clause 8(1) and give access to Document 4(ii) in edited form.
