

Decision D0392011 - Published in note form only

Re BGC (Australia) Pty Ltd and Minister for Transport [2011] WAICmr 39

Date of Decision: 11 November 2011

Freedom of Information Act 1992: section 20; Schedule 1, clause 1(1)(d)(i)

In March 2010, BGC (Australia) Pty Ltd ('the complainant') applied under the *Freedom of Information Act 1992* ('the FOI Act') to the Minister for Transport ('the Minister') for access to certain documents relating to the James Point Private Port including development application forms and requests for their authorisation ('Part A') and a copy of the Fremantle Ports Optimum Planning Group Report ('the Report').

The Minister's decision was to refuse to deal with Part A of the access application under s.20 of the FOI Act. Section 20 provides that if – after taking reasonable steps to help the access applicant to change the application to reduce the amount of work required to deal with it – the agency considers that the work involved in dealing with it would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency can refuse to deal with the application.

The Minister refused the complainant access to the Report on the ground that it was exempt under clause 1(1)(d)(i) of Schedule 1 to the FOI Act. In order for the exemption in clause 1(1)(d)(i) to apply, it must be shown that the disputed matter was prepared to brief a Minister in relation to matters prepared for possible submission to an Executive body.

As there is no right of internal review from the decision of a Minister – who is the 'principal officer' of an agency for the purposes of the FOI Act (s.39(3)(a)) – the complainant applied to the Information Commissioner for external review of the Minister's decision.

Following the receipt of the complaint, the Minister produced to the Commissioner the Report and the FOI file maintained in respect of the access application, which included a sample of documents identified as coming within the scope of Part A of the access application.

In September 2011, the Commissioner provided the parties with a letter setting out his preliminary view of the complaint and invited the parties to reach a conciliated outcome by working together to reduce the work required to deal with Part A of the application. However, the Commissioner considered that the Report was exempt under clause 1(1)(d)(i) and invited further submissions from the complainant.

In October 2011, the parties accepted the Commissioner's preliminary view in relation to Part A of the access application and agreed to a revised scope. In light of that, the Minister agreed to deal with Part A of the application. Accordingly, that part of the access application was no longer in dispute. However, the complainant maintained its request for access to the Report and drew the Commissioner's attention to a provision of an operating agreement signed between the State Government of Western Australia and James Point Pty Ltd ('the Agreement'), which required the State to facilitate the obtaining of approvals.

The Commissioner reviewed all of the information before him, including the complainant's submissions and the Report. The Commissioner considered that the Report was commissioned by the Minister to brief him in relation to strategic planning for seaports in the Perth region and to provide that information to Government to help inform its decisions about future developments. In the present case, the Report was submitted to Cabinet.

The Commissioner was satisfied that the Report was prepared to brief the Minister in relation to matters prepared for possible submission to an Executive body, in this case Cabinet. The Commissioner did not consider the provision in the Agreement to be relevant to the matters for his determination and was not dissuaded from his preliminary view. Accordingly the Commissioner confirmed the Minister's decision to refuse the complainant access to the Report on the ground that it is exempt under clause 1(1)(d)(i) of Schedule 1 to the FOI Act.