

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

**File Ref: F1882000
Decision Ref: D0042001**

Participants:

Greg Rowe and Associates
Complainant

- and -

Minister for Planning
First Respondent

- and -

Alannah Joan Geraldine MacTiernan
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – decision to give access to edited documents – third party complaint – documents relating to a town planning appeal – clause 4(1) – trade secrets – whether disclosure would reveal trade secrets of a person – clause 4(3) – information relating to the business or commercial affairs of a person – whether disclosure could reasonably be expected to adversely affect those affairs by enabling a competitor to use the information to the commercial disadvantage of the complainant.

Freedom of Information Act 1992 (WA) ss. 32, 33, 102(2), Schedule 1 clause 4(1), 4(3).

Re Organon (Australia) Pty Ltd and Department of Community Services and Health (1987) 13 ALD 588

Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) FCR 111

Re Cannon and Australian Quality Egg Farms Limited (1994) 1 QAR 491

Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd [1967] VR 37

Re Kobelke and Minister for Planning [1994] WAICmr 5

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

DECISION

The decision of the Minister is confirmed. The disputed documents, edited in the manner proposed, are not exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

18 January 2001

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Minister for Planning ('the Minister') to give Ms Alannah MacTiernan, MLA ('the applicant') access to edited copies of certain documents requested by her under the *Freedom of Information Act 1992* ('the FOI Act'). In this instance, Greg Rowe and Associates ('the complainant') is a third party who objects to the disclosure of the documents on the ground that they contain commercial or business information about the complainant which is exempt matter under clause 4 of Schedule 1 to the FOI Act.
2. In August 2000, the applicant applied to the Minister under the FOI Act for access to documents relating to Town Planning Appeal No. AP36707. The appeal had been made by the complainant on behalf of clients to the Minister, against a refusal by the then Shire of Wanneroo to grant approval for the development of a jetty at Mindarie Keys.
3. Pursuant to ss.32 and 33 of the FOI Act, the Minister's office consulted with the complainant. The complainant advised the Minister that both it and its clients objected to the release on the grounds that the documents contain personal information and commercially confidential information. The Minister considered those objections, but decided, nonetheless, to grant access to edited copies of two documents. However, pursuant to s.34 of the FOI Act, the Minister deferred the giving of access to allow the complainant and its clients to exercise their rights of review under the FOI Act. Subsequently, on 9 November 2000, the complainant made a complaint to the Information Commissioner seeking external review of the Minister's decision to grant access to edited copies of two documents.

REVIEW BY THE INFORMATION COMMISSIONER

4. I obtained the disputed documents from the Minister, together with the FOI file maintained in relation to the applicant's access application. Having examined those documents and the FOI file, it appears to me that, following consultations between the Minister's office and the applicant, the Minister decided to delete some information from Document 1, on the basis that the applicant no longer sought access to the deleted parts. The applicant did not seek external review of that aspect of the Minister's decision. Therefore, those parts of Document 1 are not in dispute.
5. The Minister also decided to delete some other information from Documents 1 and 2, on the ground that that information is exempt under clause 3 of Schedule 1 to the FOI Act. The applicant did not seek external review of that part of the Minister's decision either. Consequently, I am only required to consider whether the documents, edited in the manner proposed by the Minister, are exempt under clause 4 as claimed by the complainant.

6. In the course of my dealing with this complaint, the applicant sought to be joined as a party to these proceedings and was so joined. Taking into account the onus on the complainant under s.102(2) of the FOI Act, I sought submissions from the complainant in support of its claim that access should not be given to the documents in the manner proposed by the Minister. Written submissions were received from the complainant in support of its claims for exemption under clause 4.
7. On 19 December 2000, after considering the material before me, I informed the parties of my preliminary view of this complaint, including my reasons. It was my preliminary view that the requested documents may not be exempt under clause 4 as claimed by the complainant and that the Minister's decision to grant the applicant access to edited copies of those documents appeared to be justified. The complainant was invited to reconsider its position in light of my preliminary view and to make further submissions to me in support of its claims for exemption.
8. The complainant sought an extension of time to respond. However, nothing further has been received from the complainant.

THE DISPUTED DOCUMENTS

9. The two disputed documents are a letter dated 31 March 2000 from the complainant to the Minister enclosing an "appeal report" (which I refer to collectively as Document 1), and a letter dated 8 May 2000 from the complainant to the Minister relating to the appeal (Document 2). The complainant claims that Document 1 is exempt under clauses 4(1) and 4(3) of Schedule 1 to the FOI Act. No submissions were made to the Minister or to me in respect of Document 2.

THE EXEMPTIONS

10. Clause 4, so far as is relevant, provides:

"4. Commercial or business information

(1) *Matter is exempt matter if its disclosure would reveal trade secrets of a person.*

(2)...

(3) *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.*

Limits on exemptions

- (4)...
- (5)...
- (6)...
- (7) *Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest."*

The complainant's submission

11. The complainant submits that Document 1 contains the bulk of the intellectual information prepared by the complainant, which was used by the Minister in his consideration of the Planning Appeal. The complainant submits that the Minister's decision to delete material from Document 1 does not remove its concerns regarding the release of its commercial business information. The complainant submits that it has, over a period of ten years, developed a particular format and "content requirement" for town planning appeal documents and that disclosure would enable its competitors to view the information included and the manner in which the complainant compiles such documents and thereby give its competitors an unfair advantage over the complainant. The complainant contends that it would be inappropriate and unfair given the "*vast historical research and development*" the complainant has undertaken "*in the creation of the format of this work product.*" The complainant submits that the contents of Document 1 represent its intellectual property and the commercial property of its clients. The complainant claims that, as Document 1 was prepared and paid for by its clients, the information in it should not be disseminated to other parties without the benefit of some payment.

Clause 4(1)

12. Clause 4(1) of Schedule 1 to the FOI Act is concerned with protecting trade secrets of a person (including an incorporated body). In this matter, I accept that the complainant is a "person" for the purposes of clause 4(1): see s.5 of the *Interpretation Act 1984*. In order to establish an exemption under clause 4(1), the disputed documents must contain some information which would be considered to be a trade secret of a person.
13. The phrase "trade secrets" is not defined in the FOI Act. However, the meaning of the phrase "trade secrets" in the context of FOI legislation was considered by the Commonwealth Administrative Appeals Tribunal in *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD

588; by the Full Federal Court of Australia in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) FCR 111; and by the Queensland Information Commissioner in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491.

14. After considering the relevant authorities in *Re Cannon*, the Queensland Information Commissioner concluded that the phrase “trade secrets” should be given its usual meaning in Australian law, as defined by Gowans J in *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37. In the *Ansell Rubber* case, Gowans J noted that a “trade secret” may consist of “...any formula, pattern or device or compilation of information which is used in ones’ business and which gives him (sic) an opportunity to gain an advantage over competitors who do not know it or use it.”
15. In *Re Cannon*, the Queensland Information Commissioner summarised, at paragraph 49 of his decision, the matters that may be relevant in determining the existence or otherwise of a trade secret. Those matters include:
 - the necessity for secrecy, including the taking of appropriate steps to confine dissemination of the relevant information to those who need to know for the purposes of the business, or to persons pledged to observe confidentiality;
 - that information, originally secret, may lose its secret character with the passage of time;
 - that the relevant information be used in, or useable in, a trade or business;
 - that the relevant information would be to the advantage of trade rivals to obtain; and
 - that trade secrets can include not only secret formulae for the manufacture of products, but also information concerning customers and their needs.
16. I accept that the factors identified by the Queensland Information Commissioner in *Re Cannon* are relevant to my determination of whether the disclosure of a copy of Document 1, edited in the manner proposed by the Minister, would reveal trade secrets of the complainant.
17. The complainant submits that the information in Document 1 is a trade secret because the format and method adopted by the complainant in preparing town planning appeal reports is a method that has been developed by it over time. The complainant asserts that the disclosure of an edited copy of Document 1 to its commercial competitors would enable those competitors to obtain an unfair commercial advantage over the complainant.
18. I am not persuaded by those claims. I do not accept that Document 1 is exempt under clause 4(1) simply because of its format or that the format of the document itself constitutes a trade secret. The complainant asserts that the particular format adopted in its preparation of appeal reports is secret and that its continued secrecy gives the complainant a competitive advantage over its competitors who do not know or use that particular reporting method.

19. However, merely making such an assertion does not, without some probative material, establish grounds for exemption. Submissions of a similar nature, dealing with a similar document, were previously made to me in the matter of *Re Kobelke and Minister for Planning* [1994] WAICmr 5, to which the complainant was a party. For the reasons set out at paragraph 89 of *Re Kobelke*, I stated then that I did not accept that the particular format and content of the complainant's appeal reports was a trade secret. Nothing has been submitted to me by the complainant in relation to this complaint that dissuades me from the views I expressed in *Re Kobelke*.
20. It appears to me that the complainant's appeal reports represent a logical method of presenting arguments in support of each ground of the appeal that is, in itself, unremarkable. Accordingly, for the reasons set out above, I am not persuaded that disclosure of a copy of Document 1, edited in the manner proposed by the Minister, would disclose the trade secrets of the complainant. I find that Document 1 is not exempt under clause 4(1) of Schedule 1 to the FOI Act.

Clause 4(3)

21. The exemption in clause 4(3) is more general in its terms than that provided by clauses 4(1) and 4(2). In order to establish a claim for exemption under clause 4(3), it must be shown that the matter under consideration is information about the business, professional, commercial or financial affairs of a person and also that disclosure of that information could reasonably be expected either to have an adverse affect on those business, professional, commercial or financial affairs or to prejudice the future supply of that kind of information to the Government or to an agency.

The complainant's submission

22. The complainant relies on the submissions set out in paragraph 11 above and, in addition, submits that, as a matter of principle, if it were to become common practice for the Minister to disclose information relating to town planning appeals, the intent of the Ministerial Appeal processes will change. However, the complainant has not explained to me how that process is likely to change or why it will change for the worse.
23. The complainant submits that it prepares many town planning appeal reports, which are structured on the basis that the contents of those reports are provided in a confidential and non-prejudicial basis for consideration by the Minister. The complainant submits that it would set an undesirable precedent for appeal reports to be made available to the broader community and that disclosure will change the very nature and intent of the appeal process.
24. The complainant claims that disclosure of Document 1 could reasonably be expected to have an adverse affect on its business, professional, commercial and financial affairs and to prejudice the future supply of information of that kind to the Government or to an agency. The complainant also asserts that, since the information in Document 1 was prepared and paid for by its clients, that

document should not be disseminated to other parties without the benefit of some payment being made, and that disclosure will give other parties an unfair commercial advantage.

Clause 4(3)(a) – the nature of the information

25. I have examined a copy of Document 1, edited in the manner proposed by the Minister. Although it may be said that the document was prepared and submitted in the course of the professional dealings of the complainant, I do not consider that the disclosure of an edited version of that document would reveal any information of the kind described in clause 4(3)(a) about either the complainant or its client. The document appears to me to contain submissions and factual information concerning the particular planning issues which is needed to persuade the Minister to decide the appeal in favour of the appellant. Without disclosing the contents of Document 1, I describe the information in that document as being the complainant's assessment of the relevant planning issues surrounding the project including, in my view, the kinds of typical planning issues that are likely to be considered by the Minister in any appeal of this nature.
26. I do not consider that that kind of information could be categorised as business, professional, commercial or financial information about the complainant. Rather, it appears to me to be planning information related to environmental concerns and the social impact that the proposed development might have on the surrounding areas. Accordingly, in the absence of any material from the complainant to dissuade me otherwise, I do not consider that the complainant has established the requirements of clause 4(3)(a) in relation to Document 1.
27. Notwithstanding the foregoing, it may, perhaps, be argued that the disclosure of Document 1 could be said to reveal information about the professional affairs of the complainant, in that it would reveal details of a particular professional task performed by the complainant and how the complainant performed that task. However, even if I were to accept that argument, that would not be the end of the matter. Information about the professional affairs of a person will not be exempt under clause 4(3) if the requirements of paragraph 4(3)(a) only are satisfied. The requirements of paragraph 4(3)(b) must also be satisfied; that is, the complainant must establish that disclosure 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 to an agency, including the Minister.

Clause 4(3)(b)

28. The complainant submits that disclosure of an edited copy of Document 1 would enable its competitors to view the information in an appeal report and the manner in which such appeal reports are presented and prepared by the complainant, thereby giving its competitors an unfair advantage over the complainant. The complainant submits that such an outcome is inappropriate

and unfair, given the amount of research and development work undertaken by the complainant in the creation of the format of this work product.

29. However, no probative material has been put before me by the complainant to support its claims about the likely effects of disclosure. Further, having considered the contents of Document 1, I do not consider that any commercial sensitivity attaches to its contents, or should attach to those contents. As I have said, the format of the document appears to me to be unremarkable and of the kind that would be expected for a Planning Appeal document.
30. Based on the material currently before me, I can see no reasonable basis for expecting that disclosure would give the complainant's competitors an unfair advantage over the complainant. Further, I do not accept that disclosure could reasonably be expected to prejudice the future supply of information of the kind contained in Document 1 to the Minister. The material put before me by the complainant in support of its claims in this regard consists only of the assertion, and nothing more than an assertion, that disclosure will change the nature and the intent of the Town Planning Appeal process and, therefore, prejudice the ability of the Minister to obtain similar information in the future.
31. Clearly, Document 1 was created for the purpose of persuading the Minister to decide an appeal in favour of the complainant's client. By its own admission, the preparation of such appeals constitutes a significant and critical component of the complainant's business. It is apparent to me that the success or otherwise of a Town Planning Appeal is likely to depend on, among other things, the extent and quality of the information provided to the Minister. In those circumstances, I consider that it is highly unlikely that a person preparing an appeal on behalf of an appellant would do so with anything less than due diligence in the pursuit of its client's interests and I do not accept the assertion that disclosure would adversely affect the ability of the Minister to obtain similar information in the future.
32. I note that an edited copy of a document of a similar nature was disclosed several years ago as a result of my decision in *Re Kobelke* referred to above. Yet the complainant has put no material before me to indicate that any adverse effect on its affairs followed from that disclosure or that the effect of that disclosure had any effect on the quality or extent of information provided by the complainant or any other consultant in support of planning appeals since then. The complainant merely repeats the unsupported assertions. The standard of proof required does not have to amount to proof on the balance of probabilities. However, 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: see the comments of Owen J in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 573.
33. Finally, I refer to the complainant's submission that "[a]s a matter of principle, if it becomes common practice for the Minister for Planning to make information available in regard to Appeals, clearly the intent of these processes will change." Apart from the fact that the complainant has not explained how

“the intent” might change, I do not accept the submission because it is, and has been for some time, the common practice of the Minister to make information about planning appeals available. Information provided to me by the Minister’s office indicates that, in 2000, the Minister received 19 applications under the FOI Act for access to documents relating to planning appeals. The Minister refused access on one occasion only and in response to each other such application gave access to either full or edited copies of the documents. In 1999, the Minister received 15 applications for access to documents relating to planning appeals, and in 1998, 17. The Minister gave access to full or edited documents on each occasion and did not refuse access to any.

34. It seems to me that the current approach of the Minister to dealing with such requests for access accords with the spirit and intent of the FOI Act and advances the public interest in government accountability through transparency of decision-making processes. In my view, the operation of the present Ministerial appeal system is a vast improvement on the processes encountered when *Re Kobelke* was decided. Clearly, in my view, disclosures under the FOI Act have improved rather than detracted from the town planning appeal system.
35. I find that Document 1, edited in the manner proposed by the Minister, is not exempt under clause 4(3) of the FOI Act.

Document 2

36. Document 2 is a brief letter from the complainant to the Minister. Although I am not persuaded that it is the case, it may perhaps be argued that, in a very broad sense, its disclosure might reveal something of the professional affairs of the complainant. However, it appears to me that Document 2 is merely routine correspondence and that its disclosure could not reasonably be expected to have an adverse effect on the professional affairs of the complainant. It also does not appear to me to contain any information that could be considered to be a trade secret of any person, and there is no material before me to suggest otherwise. There is nothing either in the document itself or that has been put before me by the complainant to persuade me that there are any grounds for believing that Document 2 is exempt under clause 4. Accordingly, I also find that Document 2, edited in the manner proposed by the Minister, is not exempt under clauses 4(1) and 4(3).
