

SLATER AND HOMESWEST

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

**File Ref: 95248
Decision Ref: D01396**

Participants:

William Diamrid Slater
Complainant

- and -

**State Housing Commission of Western
Australia (Homeswest)**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - valuation report - clause 10(3) - commercial value - destroy or diminish - meaning of "could reasonably be expected" - clause 10(4) - commercial affairs of agency - adverse effect.

Freedom of Information Act 1992 (WA) ss. 72(1)(b), 75(1), 102(1), Schedule 1 clause 10(1), 10(3), 10(4).

Freedom of Information Act 1992 (Qld) s. 45.

Housing Act 1980 (WA) s. 12.

Re Hassell and Health Department of Western Australia (Information Commissioner, WA, 13 December 1994, unreported).

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

Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, 15 June 1995 unreported).

Grant v Downs (1976) 135 CLR 674.

DECISION

The decision of the agency is set aside. In substitution it is decided that the document is not exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

22 February 1996

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the State Housing Commission of Western Australia, trading as Homeswest ('the agency') to refuse Mr Slater ('the complainant') access to a valuation report obtained by the agency relating to his property.
2. On 27 April 1995, the complainant made an application to the agency seeking access under the *Freedom of Information Act 1992* ('the FOI Act') to documents relating to the complainant's property situated at Lot 15, Woolcott Avenue, Henley Brook, West Swan. In particular, the complainant sought access to a copy of the valuation report on that property prepared by Mr Philip Logan of Baillieu Knight Frank for the agency.
3. The complainant was advised that his initial application was not valid under the FOI Act until the application fee of \$30 had been paid. Although the complainant was requested to pay that fee on two occasions, it was not until 3 May 1995 that another access application accompanied by the appropriate fee, was lodged with the agency by the complainant.
4. The agency provided the complainant with a notice of decision dated 13 July 1995, informing him that one document consisting of 34 folios had been located and that access to that document was denied. The document was claimed to be exempt under clause 10(1) of Schedule 1 to the FOI Act. On 10 August 1995, the complainant sought internal review of the decision to refuse him access to those documents and, on 18 October 1995, the agency advised the complainant that it had reviewed and confirmed its initial decision to refuse access to those documents.
5. On 8 December 1995, the complainant sought external review by the Information Commissioner of the agency's decision to refuse him access to the valuation report only.

REVIEW BY THE INFORMATION COMMISSIONER

6. On 14 December 1995, I notified the agency that I had received this complaint. Pursuant to my powers under ss.75(1) and 72(1)(b) of the FOI Act, I obtained a copy of the valuation report from the agency, together with the agency's FOI file maintained in respect of this matter. A member of my staff met with officers of the agency to obtain some background information and to discuss the claims for exemption under clause 10(1) of Schedule 1 to the FOI Act. I also received a further submission from solicitors for the complainant.

7. After considering the material before me, including submissions from the parties and the document itself, I provided the parties with my preliminary view and reasons for that view. It was my preliminary view, on the material then before me, that the valuation report was not exempt under clause 10(1), nor was it exempt for any other reason. After receiving my preliminary view, the agency abandoned its claims for exemption under clause 10(1) and provided a written submission claiming that the disputed document is exempt under clauses 10(3) and 10(4) of Schedule 1 to the FOI Act.

THE EXEMPTIONS

8. There is only one document in dispute between the parties. The disputed document is a valuation report dated 31 January 1994, prepared by Baillieu Knight Frank for the agency to assist it in determining whether it should proceed to purchase the complainant's property. The agency claims that the disputed document is exempt under clause 10(3) and also under clause 10(4) of Schedule 1 to the FOI Act. Clause 10, so far as is relevant, provides:

"10. The State's financial or property affairs

Exemptions

- (1) *Matter is exempt matter if its disclosure could reasonably be expected to have a substantial adverse effect on the financial or property affairs of the State or an agency.*
- (2)...
- (3) *Matter is exempt matter if its disclosure -*
 - (a) *would reveal information (other than trade secrets) that has a commercial value to an agency; and*
 - (b) *could reasonably be expected to destroy or diminish that commercial value.*
- (4) *Matter is exempt matter if its disclosure -*
 - (a) *would reveal information (other than trade secrets or information referred to in subclause (3)) concerning the commercial affairs of an agency; and*
 - (b) *could reasonably be expected to have an adverse effect on those affairs.*
- (5)...

Limit on exemptions

(6) *Matter is not exempt matter under subclause (1), (2), (3), (4) or (5) if its disclosure would, on balance, be in the public interest.*

9. In my view, it is clear from the specific words of the clause that the exemptions in sub-clauses (3) and (4) of clause 10 are directed at protecting different types of information from disclosure under the FOI Act. Hence, whilst it is open to an agency to claim exemption for documents or parts of documents under more than one clause or sub-clause, as a matter of construction, the same information, in my view, cannot be exempt under more than one of the sub-clauses of clause 10. An agency may argue on external review that information is exempt under one of these provisions, and put arguments in the alternative as to which is applicable. However, that was not the position taken by the agency in this instance.

(a) Does the disputed document contain matter that is exempt matter under clause 10(3)?

10. Clause 10(3) is concerned with protecting information that has a "*commercial value*" to the agency. There is, in the FOI Act, a recognition of the increasing commercial reality of government business in contemporary society. The exemptions in clause 10 reflect that commercial reality and ensure that the business and commercial affairs of government agencies, which are conducted by those agencies for, and on behalf of, the public of Western Australia, are not jeopardised by the disclosure of documents under the FOI Act containing that kind of information, unless there is some countervailing public interest that requires the disclosure of such documents.
11. The Concise Oxford Dictionary of Current English, 8th Edition, defines "commercial" as meaning "*of, engaged in, or concerned with, commerce*" and "commerce" as meaning "*financial transactions, esp. the buying and selling of merchandise, on a large scale*". Similarly, the Collins English Dictionary (Aust. Ed) defines "commercial" as meaning "*of, connected with or engaged in commerce; mercantile*", and "commerce" as meaning "*the activity embracing all forms of the purchase and sale of goods and services*". I discussed the scope and meaning of the exemptions in clauses 10(3) and 10(4) in my decision in *Re Hassell and Health Department of Western Australia* (13 December 1994, unreported).
12. In a decision by the Queensland Information Commissioner ('the Commissioner'), *Re Peter Gerard Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, the Commissioner considered the meaning of the phrase "*commercial value*" when dealing with a claim that certain information was exempt from disclosure under the provisions of section 45 of the *Freedom of Information Act 1992* (Queensland), the equivalent of clause 10 of Schedule 1 to the Western Australian FOI Act. The Commissioner said, at pages 16-17:

"[i]t seems to me that there are two possible interpretations of the phrase "commercial value" which are not only supportable on the plain meaning of those words but also apposite in the context of s.45(1)(b) of the FOI Act. The first (and what I think is the meaning that was primarily intended) is that information has commercial value to an agency or to another person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged. That information may be valuable because it is important or essential to the profitability or the viability of a continuing business operation...The second interpretation of 'commercial value' which is reasonably open is that information has commercial value to an agency or another person if a genuine, arms-length buyer is prepared to pay to obtain that information from that agency or person. It would follow that the market value of that information would be destroyed or diminished if it could be obtained from a government agency that has come into possession of it, through disclosure under the FOI Act. The fact that there is a genuine market for information used by an agency or another person in carrying on commercial activity could also be regarded as a strong indication that the information is valuable for the purpose of carrying on that commercial activity, i.e. that the primary meaning referred to above is satisfied. I do consider, however, that information can be capable of having commercial value to an agency even though it could not be demonstrated that an arms-length buyer would be prepared to obtain that information. The difficulties of proof of the material facts which would bring information within the ambit of the second meaning of "commercial value" to which I have referred will probably mean that it is not relied upon on many occasions."

13. I agree with that view and consider that it applies equally in respect of clause 10(3) in Western Australia. Further, as I stated in my decision in *Re Hassell*, at paragraph 37, I prefer the first view of the meaning of the phrase "commercial value" identified by the Information Commissioner in Queensland, namely, that it refers to information that is valuable for the purposes of carrying on the commercial activities of an agency. As I stated in that decision, I consider that it is only by reference to the context in which the information is used, or exists, that the question of whether it has a commercial value to an agency may be determined. It is only when that question is determined in the positive that consideration must be given to the requirements of paragraph (b) of the exemption.

The submission of the agency

14. The agency informs me that it is a statutory authority that derives its existence from the provisions of the *Housing Act 1980*. Under s.12 of that Act, the agency is empowered to acquire, hold, maintain, improve, exchange, lease and dispose of real and personal property; borrow and lend money; and give guarantees, indemnities and undertakings whether in respect of the payment or repayment of monies, the performance of obligations, or otherwise. It is the submission of the

- agency that it operates in a commercial environment in which it regularly enters into negotiations with other parties such as the complainant, for the purpose of carrying out commercial transactions.
15. I am informed by the agency that valuation reports are obtained for the purpose of assisting the agency to carry out its commercial activities and to maintain a competitive position vis-a-vis other vendors and purchasers in the market place. The agency informs me that the valuation report was commissioned by, paid for and relied upon by the agency. The agency submits, therefore, that the report has a commercial value to the agency in its dealings with the complainant because, among other things, such reports determine whether the agency purchases property at an appropriate price.
 16. It is my understanding that the powers of the agency under the *Housing Act 1980* ('the Act') to acquire property are only exercisable for the purposes of that Act. The long title of the Act states that it is "*An Act relating to housing, to make better provision for housing and improving housing standards and conditions in the State, to encourage the use, development and redevelopment of land for housing and related purposes, to enable the carrying out of agreements and arrangements with respect to housing, to preserve and continue The State Housing Commission and for other purposes.*"
 17. I am also satisfied that the agency operates in a commercial environment in relation to its activities of acquiring real property such as the complainant's property. However, I do not consider that that fact means that all documents held by the agency relating to those functions are necessarily documents containing information of a "commercial value" to the agency. The documents themselves must each be examined to determine whether any of them is of the type described in paragraph (a) of clause 10(3).
 18. In this instance, the disputed document consists of folios 33-53 and includes the title page and cover sheet, a description of the property, its dimensions, topography, improvements, general comments, the valuation figures, photographs of aspects of the property, recent sales evidence, statistical projections relating to estimates of profit and loss, a map of the area and a copy of the certificate of title.
 19. The agency did not identify, with any particularity, the information contained within any of those folios that it claims is information that has a commercial value. Some of the information in the valuation report is clearly, in my view, information that is in the public domain or otherwise available to the public. I consider the photographs, the certificate of title and recent sales evidence to fall into that category. If there is any information that may have a commercial value, then I consider it may be the valuation figure on folios 46 and 51 of the report and the statistical projections marked folios 36-39.
 20. However, the second element of the exemption contained in paragraph (b) of clause 10(3) must also be satisfied before a *prima facie* claim for exemption under clause 10(3) is established. The words "*could reasonably be expected*" in

paragraph (b) mean that I must be satisfied that there are real and substantial grounds for expecting that disclosure of folios 36-39, 46 and 51 would have the stated effect, namely, the destruction or a diminution of the commercial value of the information in those folios: see the observations of Owen J in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, delivered 15 June 1995, at pages 43 and 44).

21. To support its claims for exemption, the agency made the following claims (which I have summarised):
 - (i) once the contents of the valuation report are known, the negotiation position of the agency and the basis for its offer to the complainant are known and the complainant is in a position to use that knowledge for his own advantage and to the disadvantage of the agency;
 - (ii) the basis of buying and selling real property is that commercial transactions are conducted “at arms length” by the parties and if the agency is obliged to release the document it would change an existing practice for the agency in a way that does not apply to the complainant who is not obliged to disclose any valuation report that he might obtain;
 - (iii) if the commercial value of valuation reports is diminished in the manner described above, the agency might reassess its approach to purchasing property and forgo obtaining valuations in favour of making an unrealistically low offer in order to force the vendor to obtain a valuation leading to a cessation of the practice of ensuring fair and equitable prices are paid by the agency; and
 - (iv) it is unfair to the agency to have its valuation reports revealed to the parties with whom it is dealing.
22. The main thrust of the agency’s argument in support of its claim under clause 10(3) was that the information contained in the valuation report has a commercial value to the agency because it consists of expert opinion and advice in respect of a possible commercial transaction by Homeswest and will be relied upon by the agency. The agency argued that disclosure of valuation reports, contrary to established practice, would diminish the commercial value of such reports. However, the agency did not explain how the commercial value would be diminished. Its argument appears to be merely that it would be unfair that a vendor could have access to the agency’s valuation report, whereas the agency could not have access to a private sector vendor’s valuation report. The agency did not explain in what way its negotiating position may be damaged by disclosure of its valuation report or, more particularly, how the information in the report could be used by the complainant to disadvantage the agency.
23. In my view, disclosure of the valuation report would merely put the property owner in the position of knowing, had any offer to purchase his property been made by the agency, whether that offer was reasonably based upon a formal valuation properly prepared. I am informed by both parties, however, that in this

instance no offer to purchase the complainant's property was made by the agency in 1994 or subsequently.

24. There are, therefore, no ongoing negotiations between the agency and the complainant in respect of the complainant's land, in which case different considerations may apply. Nor does it appear from the documentation produced to me that the agency ever proposed to buy the property. The agency has no "negotiation position" and, accordingly, there is no negotiating position to damage by disclosure. Further, the agency confirmed, in a meeting with a member of my staff, that if an offer were to be made in the future the valuation report would not be relied upon and a new one would be obtained. It is difficult, in those circumstances, to argue that the commercial value, if any, of the information contained in the report could be diminished or destroyed by its disclosure.
25. The agency also drew an analogy between the agency's obtaining of a confidential opinion and advice from a valuer to that of a client/solicitor relationship. The agency submitted that *"...as it would be demonstrably unfair for a client to have its legal advice from its solicitor revealed to the other party with whom it was negotiation, so it is unfair for Homeswest to have its valuation reports revealed to the parties with whom it is dealing. As the value of the legal advice would be diminished by having the other party know its contents, so does the value of a valuation report"*.
26. The analogy is not, in my opinion, valid. The rationale behind the protection of the confidentiality of certain communications between a client and solicitor is, essentially, to encourage clients to confide fully and candidly in their legal advisers in order that the clients may be properly advised. It has also been suggested that the broad rationale of the rule is the maintenance of the administration of justice and an effective adversary system of litigation: see *Grant v Downs* (1976) 135 CLR 674 at 685. None of those considerations applies to the situation of a client/valuer relationship.
27. Taking into account my examination of the disputed document, the submissions of the agency which, in my view, in the main are not supported by any probative material before me, I am not satisfied that disclosure of the disputed document could reasonably be expected to destroy or diminish the commercial value of any information in that document. The valuation report is now two years old. Whilst I accept that the agency may be interested in purchasing the complainant's property and neighbouring properties at some future date, common sense suggests that any commercial value of the information in the disputed document would, in all probability, be diminished by the passage of time and changing circumstances rather than by its disclosure.
28. Accordingly, I find that the disputed document is not exempt under clause 10(3) of Schedule 1 to the FOI Act.

(b) Does the disputed document contain information that is exempt matter under clause 10(4)?

29. The first requirement necessary to establish an exemption under clause 10(4) is that the disputed document contains information “*concerning the commercial affairs of the agency*”. The word “concerning” means “*about; regarding*”: the Concise Oxford Dictionary, Eighth Edition. From my examination of the disputed document, I do not consider that the information in that document concerns the commercial affairs of the agency. It may concern the commercial affairs of Casula Nominees Pty Ltd, the registered proprietor of the land. Further, as the complainant is either a director or the majority shareholder of Casula Nominees Pty Ltd (one of two family trusts of the complainant) it may also concern his personal affairs.
30. I accept that the disputed document was created to assist the agency in its functions of acquiring and developing property. I also accept that in performing those functions the agency operates in a commercial environment. However, the mere fact that there are commercial aspects to the agency’s operations is not sufficient, in my view, to conclude that a document acquired to assist the agency in making commercial decisions necessarily contains information “concerning the commercial affairs of the agency”. Whether a particular document is one that concerns the commercial affairs of the agency depends on a proper characterisation of the contents of the document. A business plan, for example, may be a document that contains information falling within the description of clause 10(4)(a).
31. In my view, the disputed document is not properly characterised as one “concerning the commercial affairs of the agency”. In any event, even if I was to accept that the disputed document was of a kind that described in clause 10(4)(a), the agency has not established that its disclosure could reasonably be expected to have an adverse effect on the commercial affairs of the agency. The agency submitted that disclosure of valuations could result in all property owners in a particular area being made aware of valuations given to other property owners in the area and that, in turn, “*...could lead to unrealistic expectations by property owners whose land was not worth as much as neighbouring land, but who refused to recognise that fact, leading to negotiations becoming endlessly protracted as land owners went about comparing Homewest’s various valuation reports with one another and challenging the validity of the valuations with Homewest*”.
32. I do not accept that that consequence could necessarily reasonably be expected to follow from disclosure of the disputed document and nothing was provided by the agency in support of that claim. Again I refer to the comments of Owen J in *Manly v Ministry of Premier and Cabinet (op. cit. at 44)*, who said of the requirements:

“...it is not sufficient for the original decision-maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, 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”.

33. The agency has not identified what adverse effect disclosure of the disputed document could have on its commercial affairs, other than that cited in paragraph 30 above, which I do not accept as reasonable to expect. The agency claims only that a commercial disadvantage will occur merely by disclosure to the complainant of the disputed document. It has not been explained to me what that commercial disadvantage might be, nor how it might be expected to follow from disclosure of the document, nor has the agency provided any material in support of any such claim. The agency has not, therefore, discharged the onus imposed on it by s.102(1) of the FOI Act to establish that its decision was justified. There is nothing in the material presently before me that establishes that an adverse effect upon the commercial affairs of the agency could reasonably be expected to follow from disclosure of the disputed document.

34. Therefore, on the material before me, I am not satisfied that the information in the disputed document is information of a type described in clause 10(4) of Schedule 1 to the FOI Act. Accordingly, as a *prima facie* claim for exemption has not been established, I need not consider whether disclosure would, on balance, be in the public interest. I find the disputed document is not exempt under clause 10(4) of Schedule 1 to the FOI Act.
