

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

**File Ref: F2231999  
Decision Ref: D0152000**

Participants:

**Steven Lionel Kean**  
Complainant  
  
- and -  
  
**Department of Minerals and Energy**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - draft proposed advice to Minister - clause 6(1) - deliberative processes of agency - identification of the particular deliberative process - whether disclosure would be contrary to the public interest - clause 3(1) - personal information about third parties - whether document contains personal information.

*Freedom of Information Act 1992 (WA)* s.102; Schedule 1 Clauses 3(1) and 6(1).

*Re Waterford and Department of the Treasury (No.2)* (1984) 5 ALD 588.

*Minister for Planning v Collins* (1996) 93 LGERA 69.

## DECISION

The decision of the agency is varied. The matter described in paragraph 28 of my reasons for this decision is exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*, but the documents are not otherwise exempt.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

14 March 2000

## REASONS FOR DECISION

### BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Department of Minerals and Energy ('the agency') to refuse Mr Kean ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. The complainant is a director of Optimum Resources Pty Ltd ('Optimum'). On 8 June 1993, Optimum applied to the agency for a prospecting licence over land some 1900 metres long and 20 metres wide situated on the northern section of land that is the subject of a Miscellaneous Licence held by another mining company.
3. Objections against Optimum's application were lodged by various parties and heard in the Kalgoorlie Warden's Court on 29 February 1996. On 7 June 1996, the Warden upheld the objections and refused the licence application of Optimum. On 21 June 1996, solicitors for Optimum lodged an appeal with the Minister for Mines ('the Minister'). On 5 December 1996, and before the appeal to the Minister could be decided, Optimum applied to the Supreme Court of Western Australia for an Order Nisi for a Writ of Certiorari to quash the decision of the Warden.
4. On 11 July 1997, the Supreme Court discharged the Order Nisi on the ground that, since Optimum had chosen to exercise its right of appeal to the Minister, it should pursue that avenue of appeal. However, the matter of the jurisdiction of the Warden was the subject of comment by White J. As a result, certain matters are presently before the Warden for reconsideration.
5. Subsequently, the agency provided advice to the Minister in respect of the appeal by Optimum. Three of the disputed documents, Document 138 (folios 235-241), Document 148 (folio 5) and Document 149 are undated drafts of the proposed advice to the Minister. Three other documents (Documents 151A, 151B and 151C) are undated draft letters addressed to various parties associated with Optimum's licence application. Those documents were prepared by the agency for the Minister's signature and were to accompany the advice tendered to him.
6. Initially, the agency granted the complainant access to a significant number of documents, either in full or in edited form. Following his request for internal review, the complainant was granted access to additional material, but refused access to the balance on the basis of exemption under clause 3(1) and clause 6(1). On 17 November 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision to refuse him access to the documents.

## REVIEW BY THE INFORMATION COMMISSIONER

7. I obtained the disputed documents from the agency. After examining those documents, my Senior Investigations Officer informed the complainant that some matter deleted from the documents consisted of the names and other personal details of various employees of other companies and that that information was clearly personal information about third parties and, therefore, *prima facie* exempt under clause 3(1). The complainant accepted that advice and withdrew the part of his complaint concerning access to that matter.
8. As a result of the complainant's withdrawal, 6 documents (17 folios) remain in dispute between the parties. Those disputed documents are Documents 138, 148, 149, 151A, 151B and 151C (described in paragraph 4 above). The agency claims that Documents 151A, 151B and 151C and the matter deleted from Documents 138, 148 and 149 is exempt under clause 6(1). On 10 February 2000 and 15 February 2000, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the disputed documents may not be exempt under clause 6(1). However, I was also of the preliminary view that some of the matter in those documents may be exempt under clause 3(1). I received a further written submission from the agency maintaining its claims for exemption for those documents.

## THE EXEMPTION

9. Clause 6 provides:

**"6. *Deliberative processes***

***Exemptions***

*(1) Matter is exempt matter if its disclosure -*

*(a) would reveal -*

*(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or*

*(ii) any consultation or deliberation that has taken place,*

*in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency;*

*and*

*(b) would, on balance, be contrary to the public interest."*

10. Clearly, the requirements of both paragraphs (a) and (b) must be satisfied in order to establish exemption under clause 6(1). I have discussed and considered the purpose of the exemption in clause 6 and the meaning of the phrase "deliberative processes" in a number of my formal decisions. I agree with the view of the Commonwealth Administrative Appeals Tribunal ('the Tribunal') in *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 that the deliberative processes of an agency are its "thinking processes", the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action: see also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69 at 72.

*Clause 6(1)(a) – nature of the information*

11. Having examined the disputed documents, and taking into account the circumstances in which they were created, I accept that those documents contain opinion, advice and recommendations prepared and recorded in the course of, and for the purposes of, the deliberative processes of the Minister in considering Optimum's appeal. Therefore, I am satisfied that the disputed documents contain matter of the kind described in paragraph (a) of clause 6(1). To establish the exemption, however, it must be shown not only that the information is of that kind but also that its disclosure would, on balance, be contrary to the public interest.
12. Further, in the case of this exemption, the complainant is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; he is entitled to access unless the agency can establish that disclosure of the particular deliberative process matter would be contrary to the public interest.

*Clause 6(1)(b) – contrary to the public interest*

13. As a general rule, I consider that it may be contrary to the public interest to prematurely disclose deliberative process documents while deliberations are continuing, if there is evidence before me to establish that disclosure of such documents would affect the integrity of the decision-making process, or that disclosure would, for some other reason, be demonstrably contrary to the public interest. I do not consider that it is in the public interest for a Minister to conduct the business of government with the public effectively "looking over his shoulder" at all stages of his deliberations and speculating about what might be done and why. I consider that generally the public interest is best served by allowing deliberations to occur unhindered and with the benefit of access to all of the material available so that informed decisions may be made: see also the comments of Templeman J in *Collins* at page 73.
14. The agency submits that the disputed documents were prepared for the Minister to assist him to make a decision in respect of the appeal made to him by Optimum. At the time that the agency made its decision on access, the Minister had not reached a decision on that appeal. Further, I am informed that the Minister is unlikely to make a decision on the appeal until the Warden publishes

his reasons for decision in the matters presently before him that relate to this issue.

15. The agency claims that it would be contrary to the public interest to release the documents at this time because the content of the documents would be misleading. The agency informs me that there are two basic issues involved in determining whether Optimum's application for a prospecting licence should be granted. The first is whether the grant would unduly interfere with activities on existing mining tenements. The second is the factual position concerning the extent of the ground actually available for the prospecting licence.
16. The agency informs me that the second issue may be affected by resolution of a survey dispute currently before the Warden. As yet, there has been no clear ruling on that issue by the Warden and that was the reason for the withdrawal of the advice to the Minister. The agency claims that disclosure of Documents 148 (and, presumably, Document 149) would be misleading because the advice was predicated on a particular outcome from the Warden's Court, and it would give the complainant an expectation as to the outcome of the appeal.
17. It appears that, since the creation of the disputed documents, the Warden has reached a decision in respect of some matters, but he has not clearly ruled on the second issue affecting the grant of the prospecting licence. The agency informs me that it may need clarification on that point. The agency submits that the matter is a complex case and, while it is not possible to say when it will be resolved, the recent decision of the Warden means that there are now current deliberations to ascertain whether it is now possible to finally determine Optimum's application or whether further clarification from the Warden will be required. As I understand it, the agency submits that, therefore, it would be contrary to the public interest to disclose the documents until those deliberations have concluded.
18. With respect to Document 138, the agency submits that that document is a "first draft" and that it expresses a view that was not endorsed by the relevant senior agency officers who dealt with such matters. The agency submits that, therefore, its disclosure would be misleading and only create confusion as to the likely outcome of the prospecting licence application.
19. With respect to Documents 151A-C, the agency claims that disclosure of those documents would be misleading because they were prepared on the basis that the Minister may determine the appeal in accordance with the advice tendered to him in Document 148. However, it is contended, as that document was withdrawn from the Minister, the disclosure of letters prepared in anticipation of his decision would be misleading.
20. It is my understanding that no date has been set for the Warden to hand down his written reasons with the result that the Minister has decided not to proceed with his consideration of Optimum's appeal until those reasons are published. If that is the case, then I do not consider that any current deliberations are likely to be affected by the disclosure of the disputed documents. That is because, clearly, there are no deliberations by the Minister on foot. In those

circumstances, I am not persuaded that the integrity of his decision-making processes is likely to be adversely affected such that it would be contrary to the public interest to disclose the disputed parts of the documents.

21. In my view, the agency's claim that premature release of the disputed documents would be misleading is not a sufficient reason to establish that disclosure would be contrary to the public interest. If, when the Minister comes to determine the appeal, the agency's advice remains the same but the Minister chooses, ultimately, to ignore that advice, he will no doubt give his reasons for doing so. It can hardly be misleading to give Optimum the benefit of that advice at this point. If the advice given to the Minister in the future by the agency is different, then I do not consider that the Minister's deliberative process would be adversely affected by the disclosure of earlier documents such that it would be contrary to the public interest to disclose them. Clearly, the agency is able to release additional information to clarify any misunderstandings that may arise so as to ensure that those documents are not misleading.
22. Further, in view of the fact that the Minister will decide the appeal at some future unknown date, when circumstances may well make the advice in the disputed documents obsolete or redundant, I do not consider that any public interest would be affected by its disclosure at this point, and none has been identified to me by the agency.
23. I am also not persuaded that the deliberations of the Warden are likely to be affected by the disclosure of the documents. The disputed documents do not reveal anything of that particular deliberative process. In my view, the disclosure of the disputed documents could not have any affect, adverse or otherwise, on the process of the Warden in determining the survey dispute.
24. Clearly, the disputed matter relates to the business interests of Optimum and I am of the view that there is a public interest in an applicant having access to information that may affect his, her or its future commercial viability. Taking into account the age of the documents, their current relevance, and their contents, I am not persuaded by the agency's claims that the disclosure of those documents would be contrary to any public interest.
25. I recognise that there is a public interest in an applicant, such as the complainant, being able to exercise his rights of access under the FOI Act. I also recognise that there is a public interest in the accountability of agencies for the manner in which those agencies discharge their obligations on behalf of the public in Western Australia. In my view, that accountability includes informing the public, wherever possible, of the basis for decision-making and of the material considered relevant to the decision-making process. I consider, in the circumstances of this complaint, that disclosure would serve those public interests.
26. I am not persuaded that the agency's claims that disclosure would be misleading or create confusion are sufficient to establish that it would be contrary to the public interest to disclose the documents. Even if those claims are true, I

consider that the public and the complainant are able to distinguish between advice based on one set of circumstances and different advice based on another set of circumstances and to appreciate the difference and therefore, the relevance, if any, of that advice. Similarly, I do not accept that disclosure will give the complainant or Optimum an expectation as to the eventual outcome of Optimum's appeal as it has been made clear that the advice and recommendations in the disputed documents were based on the then current circumstances and may not be the advice or recommendations that ultimately go to the Minister in respect of the appeal.

27. In my view, the agency has not discharged the onus on it under s.102(1) of the FOI Act to establish that its decision to refuse the complainant access was justified. Accordingly, I find that the disputed documents are not exempt under clause 6(1).
28. Documents 151A-C contain the names and addresses of third parties. That information is personal information as that term is defined in the FOI Act and is clearly exempt matter under clause 3(1). I have received no submissions from either party in relation to that particular information. However, in my view, it is practicable for the agency to delete the identifying personal information from those documents and to give access to edited copies of those documents.

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