

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

**File Ref: F2002026
Decision Ref: D0152002**

Participants:

George Weston Foods Limited
Complainant

- and -

Water Corporation
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – reverse FOI complaint – complaint by a third party against a decision of an agency to give access to documents – audit reports – clause 8(1) – whether breach of contractual obligation of confidence – application of confidentiality clause in Joint Venture Agreement.

Freedom of Information Act 1992 (WA) s.102(2); Schedule 1 clause 8(1).

Re Speno Rail Maintenance Australia Pty Ltd and The Western Australia Government Railways Commission and Another [1997] WAICmr 29.

DECISION

The decision of the agency is set aside. In substitution it is decided that the disputed documents are exempt under clause 8(1) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

17 April 2002

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Water Corporation ('the agency') to give an applicant access to documents. In this instance, a third party, George Weston Foods Limited ('the complainant') objects to disclosure and claims the requested documents are exempt under the *Freedom of Information Act 1992* ('the FOI Act').
2. In 1995, the complainant entered into a joint venture with the agency (then called the Water Authority of Western Australia) for the purpose of constructing, operating and maintaining an industrial wastewater treatment plant ('the Plant') on land owned by the complainant at Spearwood. The Plant was designed to dispose of treated wastewater from the complainant's operations, and other local meat and hide processing industries, into the agency's sewerage system. The joint venture is an unincorporated body called the Spearwood Wastewater Joint Venture ('the Joint Venture'). The Joint Venture owns and maintains a conveyancing system, which transports wastewater from the complainant's Spearwood operations into the sewer. The agreement to establish the Joint Venture ('the Agreement') originally referred to four parties. However, I understand that the Agreement was executed by the complainant and by the agency. Accordingly, the complainant and the agency are the only parties to the Agreement ('the Parties').
3. Under the Agreement, the agency is responsible for arranging and supervising the design, construction, commissioning and demonstration of the Plant. After the commissioning of the Plant on 31 March 1996, the agency ceased to have any ownership, property, title or interest in the Plant, or any ongoing liability, responsibility or duty for the operation, management or maintenance of the Plant (clause 18 of the Agreement).
4. Clause 20 of the Agreement provides that, after the commissioning of the Plant and the expiration of the initial demonstration period, the Users shall operate, repair and maintain the Plant at their own expense. At the present time, the complainant is the only User. I am informed by the agency that the initial demonstration period ran from 1 April 1996 until 31 August 1998 and that, from 1 September 1998, the complainant became the Manager of the Plant.
5. On 14 February 2000, following discussions, between the complainant and the agency, the complainant sent an email message to the agency asking it to present proposals to the complainant for the operation and management of both the Plant and the wastewater conveyancing system. Around August 2000, the agency sought tenders for two audits of the Plant to determine the level of occupational health and safety compliance and environmental compliance. Two private consultants, appointed by the agency, carried out the audits. Their reports were completed in October and November 2000. Those two reports are the disputed documents.
6. In September 2001, the agency notified the complainant that it had received an application for access under the FOI Act to documents, including the two audit reports. In response, solicitors for the complainant objected to disclosure and claimed the requested documents were exempt under clauses 6(1) and 4(3) of Schedule 1 to the

FOI Act. The agency considered the complainant's objections, but decided to grant access to the requested documents. The complainant applied for an internal review of the agency's decision in respect of the two audit reports and claimed that those two reports are exempt under clause 8(2). The agency considered but rejected that claim. However, it deferred giving the applicant access to the two audit reports to enable the complainant to exercise its rights of review as a third party. On 7 February 2002, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. The complainant's application for external review asserted that the disputed documents were exempt under clauses 4(3), 6(1), 8(1) and 8(2) of Schedule 1 to the FOI Act but did not contain adequate reasons or set out the material questions of fact underlying those reasons. Section 102(2) of the FOI Act provides that, if a third party initiates or brings proceedings opposing the giving of access to a document, the onus is on the third party to establish that access should not be given or that a decision adverse to the access applicant should be made. I required the complainant, therefore, to justify its claims for exemption.
8. I obtained the two reports from the agency, together with background information about the Agreement. The applicant was given an opportunity to make submissions and to be joined as a party to these proceedings, but has not been joined and did not make any submissions.
9. On 7 March 2002, after considering the material then 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 were covered by a confidentiality clause in the Agreement, Clause 32, and may be exempt under clause 8(1) of Schedule 1 to the FOI Act.
10. Following that, the agency responded in writing and gave further reasons as to why the confidentiality clause did not apply.

THE DISPUTED DOCUMENTS

11. The two disputed documents are:
 - (i) A report dated 18 October 2000 by URS Australia Pty Ltd, entitled: "Environmental Audit - Watsons Centralised Wastewater Treatment Plant - Spearwood, Western Australia - for Water Corporation"; and
 - (ii) A report dated 3 November 2000 by SHE Pacific Pty Ltd, entitled: "Report of an Occupational Health & Safety Audit of the Watsonia Centralised Industrial Waste Treatment Plant".

THE EXEMPTION

12. Clause 8(1) provides:

“(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.”

13. In *Re Speno Rail Maintenance Australia Pty Ltd and The Western Australian Government Railways Commission and Another* [1997] WAICmr 29, I expressed the view that the exemption in clause 8(1) applies to documents, the disclosure of which would give rise to an action for breach of a common law obligation of confidence, such as a contractual obligation of confidence, for which a legal remedy would be available.

14. Clause 32(1) of the Agreement contains the following confidentiality clause:

“All information and data acquired by a Party hereto under or by virtue of this Agreement or the Project shall be treated as confidential by that Party and shall not be divulged by that Party in whole or in part to third persons without the prior written consent of all other Parties hereto, EXCEPT:

(a)...

...

(e)....”.

15. There is no dispute that the Agreement is a contract, to which the agency and the complainant are the only parties. The question for me is whether the disputed documents consist of information or data acquired by the agency under or by virtue of either the Agreement or the Project or both. The submissions of the agency and the complainant were each directed at that question.

The complainant’s submissions

16. The complainant claims that the information in the disputed documents is exempt under clause 8(1) because disclosure would be a breach of confidence for which a legal remedy could be obtained. The complainant submits that disclosure would amount to a breach of the confidentiality clause in the Agreement. As noted above, Clause 32 of the Agreement requires each Party to the Agreement to treat, as confidential, all information and data the Party acquired under or by virtue of the Agreement or the Project and such information or data cannot be divulged, in whole or in part, to third persons without the prior written consent of all of the other parties.

17. The complainant informs me that there is a close working relationship between it and the agency, as a result of the Agreement. I am informed that local management from both organisations regularly meet and discuss issues associated with the operation, maintenance and performance of the Plant and that the complainant holds the view that this relationship is of a contractual nature by virtue of the Agreement.

18. The complainant claims that it consults with the agency as to how the Plant should be operated, maintained, repaired and improved because the agency was responsible for

the design, construction, commissioning and demonstration of the Plant and because it has specialist knowledge in this area. The complainant submits that, by virtue of the Agreement and the Project, the agency is consulted and provides advice to the complainant on these matters.

19. The complainant submits that the agency is a party to the Agreement and that the information in the disputed documents was obtained by the agency from the complainant by virtue of their ongoing relationship relating to the Project. The complainant informed me that it had approached the agency with a proposal to take over the management and operation of the Plant, because of the agency's specialist knowledge of the Plant and the Project; its operation and maintenance of similar plants; and because of the complainant's joint venture relationship with the agency.
20. The complainant also submits that the disputed documents contain sensitive business information about the operation, management and performance of the Plant.

The agency's submission

21. The agency submits that the confidentiality clause in the Agreement does not apply to the disputed documents because it did not acquire the information or data in those documents as a Party to the Agreement and, accordingly, it made the decision to give the applicant access to the disputed documents on that basis.
22. The agency submits that the disputed documents were not acquired by virtue of the Agreement, but were commissioned by it in its independent capacity as the sole provider of sewer services in Western Australia, in the course of performing its due diligence obligations, before deciding whether or not to take over the management and operation of the Plant. In summary, the agency submits that:
 - (i) its obligations under the Agreement relate to the construction and initial operation of the Plant, but exclude the ongoing operation and management of the Plant, after commissioning. The agency provides some services under the Agreement, but also provides other services, which are outside the scope of the Agreement and submits that the information in the disputed documents was not acquired by it as a Party to the Agreement because the agency's responsibilities under that Agreement are limited, once the Plant was commissioned;
 - (ii) it was approached by the complainant, as the User of the Plant, to become the Manager of the Plant and the disputed documents were produced as part of the due diligence process. The agency submits that the disputed documents were acquired by it, not as a Party to the Agreement, but in its capacity as an expert in the management and operation of wastewater treatment plants. The agency claims that it is not required to carry out a due diligence process under the Agreement and, therefore, it did not acquire the information or data in the disputed documents by virtue of the Agreement or the Project;
 - (iii) the term "Project" is defined in clauses 1 and 38 of the Agreement. However, reading those clauses in context with the whole of the

Agreement, the agency ceased to have any ownership, property, title or interest in the Plant, or any ongoing liability, responsibility or duty for the operation, management or maintenance of the Plant after commissioning and, therefore, the information in the reports was not acquired by it under or by virtue of the Agreement;

- (iv) the Manager of the Plant, or a potential Manager, does not acquire the information in the disputed documents as a Party to the Agreement because the Manager is not a Party to that Agreement. The Manager is appointed by the User and is a distinct and separate entity, taking directions from the Management Committee, as set out in the Agreement;
- (v) the last Joint Venture Operating Committee attended by the agency was in July 1997. Since then staff of the agency and the complainant have met to discuss various matters and the complainant has sought advice from the agency on matters relating to the operation of the Plant. However, in discussing the latter and services provided by the agency in its normal course of business, the relationship is not of a contractual nature by virtue of the Agreement; and
- (vi) the disputed documents are not covered by the confidentiality clause in the Agreement and it would be iniquitous to apply the confidentiality clause because the complainant could not rely on that clause if it had made the same request to another body or organization to take over the control and operation of the Plant.

Consideration

- 23. I have examined the Agreement. There are only two Parties to the Agreement, the agency and the complainant. That being the case, in my view, each reference in the Agreement to “a Party” or “the Parties” can only be interpreted and understood as referring to either the agency or the complainant or both. The complainant is the Manager of the Plant and its only User. The clauses in the Agreement that refer to the “Manager” or to the “User” can only be interpreted and understood as referring to the complainant. As Manager, the complainant has possession and control of the Plant and the Joint Venture assets and is responsible for the conduct of the Project for and on behalf of the Parties, that is, for and on behalf of itself and the agency.
- 24. The agency’s submissions in support of its claim that Clause 32 of the Agreement does not apply to the disputed documents appear to me to be based upon three points. Firstly, that a distinction must be made between the “Manager” of the Plant and the Parties to the Agreement, because the Manager is not a Party to the Agreement. Secondly, that a distinction must also be made between the “User” and the Parties to the Agreement, because the User is not a Party to the Agreement. Thirdly, that regard must be had to the agency’s role and functions under the Agreement, once the Plant was commissioned.
- 25. In respect of the first point, I do not accept, for the purposes of determining the scope of Clause 32, that there is a distinction between the complainant as a Party to the Agreement and the complainant as the Manager, User and operator of the Plant.

Clearly, in the particular circumstances of this matter, the complainant is not only a Party to the Agreement, but it is also the Manager and the only User and operator of the Plant. In my opinion, the distinction drawn by the agency is artificial and I reject it.

26. In respect of the second and third points, I do not accept the claim by the agency that it commissioned the two audits reports of the Plant, not as a Party to the Agreement but, rather, as an independent contractor contemplating a business decision to assume the operation and management of the Plant. If that were the case, then the complainant was neither authorised nor required, under the terms of the Agreement, to provide assistance or information to the consultants and it could only have done so after obtaining written consent from the other Party to the Agreement, the agency.
27. Nothing has been put before me by the agency which establishes, as a fact, that it commissioned the audit reports in its capacity as a manager of wastewater treatment plants standing, as it were, outside the terms of the Agreement or that it notified the complainant to that effect, at the relevant time. In my opinion, the documents provided to me by the agency and some of the information in the disputed documents themselves, contradict that assertion. The complainant submits that it provided the information in the disputed documents to the agency by virtue of their ongoing relationship relating to the Project. The information before me clearly supports a finding that the complainant provided information, data and assistance to the consultants, as agents of the agency, in confidence and in accordance with its obligations as a Party to the Agreement.
28. In my view, the confidentiality requirements of clause 32(1) of the Agreement are clear and bind the Parties. In this case, both the agency and the complainant are bound by it. Clause 32(1) includes various exceptions, but I am satisfied that none of those exceptions apply in the circumstances of this complaint. The obligation of confidence applies to all information and data, which is acquired by the Parties, under or by virtue of either the Agreement or the Project and that information and data may not be divulged to third persons without the consent of the other Party. Since I am satisfied that the agency acquired the disputed documents as a Party to the Agreement, the next question is whether it acquired the information in those documents under the Agreement or the Project, or by virtue of the Agreement or the Project.
29. The term “Project” is defined in clause 38 of the Agreement and means “*all activities implementing or related to the affairs of the Joint Venture as set out in clause 1 of the Agreement.*” As I understand it, the “affairs” of the Joint Venture were to design and construct the Plant and, after commissioning the Plant, to operate and maintain that facility. The activities referred to in clause 1 are those of “*constructing, operating and maintaining*” the Plant. The question, therefore, becomes whether the agency acquired the information in the disputed documents under or by virtue of the Agreement, or under or by virtue of the construction, operation or maintenance of the Plant.
30. I do not accept the agency’s claim that Clause 32 does not apply to the disputed documents on the ground that, under the Agreement, it has no ongoing liability, responsibility or duty for the operation, management and maintenance of the Plant. I consider that Clause 32 applies to all information and data acquired by the agency under or by virtue of either the Agreement or the Project and not just to the information

and data it acquired prior to the commissioning of the Plant. I accept that it had specific obligations relating to the initial period of construction and operation of the Plant. I also accept that under clause 18 of the Agreement, certain of its obligations ceased after the commissioning of the Plant. However, I do not consider that those are the only obligations of the agency under the Agreement.

31. For example, under clause 10 of the Agreement, there is a Joint Venture Operating Committee ('the Committee') composed of a member appointed by each Party. The Committee has authority to give approvals and make decisions required or permitted by the Parties under the Agreement with respect to the Plant, including the power to supervise the activities of the Manager.
32. Further, clauses 27 and 28 of the Agreement provide that the complainant must maintain the Plant to a standard acceptable to the agency and that the agency has the right to enter the Plant at any time to inspect its operation and condition, in order to verify that the Plant is being maintained properly and to an acceptable standard.
33. The agency claims that the last meeting of the Committee was on 1 July 1997. The agency agrees that various discussions have taken place between it and the complainant over the ensuing years, but claims that the discussions about the operation of the Plant and the services provided by the agency did not occur by virtue of the Agreement or under the Agreement. Rather, the agency claims that the discussions that it had with the complainant about the Plant occurred because the agency provides general business services and advice about waste water management issues to industry in general, which are not covered by the Agreement. However, it seems to me that the distinction drawn by the agency, between its obligations under the Agreement and its business practices as a utility service provider, is an artificial one and is not, in any event, conclusive.
34. Having examined the disputed documents and the information provided to me by the agency, it is clear to me that the agency was approached in February 2000, by the complainant, to present proposals to the complainant for the operation and management of the Plant and the wastewater conveyancing system. The documents indicate that there were some discussions between the agency and the complainant, before that request was made, rather informally, by email message. Following that, tenders to conduct two compliance audits were sought by the agency in August 2000. Between February and August 2000, I assume that some decisions about assuming management and control of the Plant were taken in the agency otherwise the tenders would not have been let. However, the agency has provided nothing to me with regard to that matter.
35. The environmental report dated 18 October 2000 contains a statement to the effect that the agency has submitted a proposal for the operation and management of the conveyancing system and that the purpose of that report is to identify potential liabilities, so that responsibility for costs could be apportioned. The occupational health and safety report dated 3 November 2000 indicates that it was prepared to assess the level of regulatory compliance, prior to the agency assuming management and control of the facility.

36. I am satisfied that the information in the disputed documents concerns the operation and maintenance of the Plant and the wastewater conveyancing system. I am also satisfied that that information came into the possession of the agency as a direct result of the agency's interests in the operation of the Plant, as a Party to the Agreement. I am also satisfied that the agency is bound by Clause 32(1) of the Agreement to keep that information confidential.
37. Clause 32(2) also requires each Party to the Agreement to obtain a written undertaking as to confidentiality from any person to whom the Party intends to disclose such data or information, whether that person is bound by a statutory, professional or contractual duty to keep it confidential. In my view, that requirement is further evidence of an intention to bind other persons, not merely the Parties to the Agreement, so that the confidentiality of information and data relating to the Plant and its operation is maintained.
38. Therefore, I consider that the disputed documents contain information, which was acquired by the agency, as a Party to the Agreement, under or by virtue of the Agreement or the Project. In my view, the agency is bound to keep the disputed documents confidential. Accordingly, I find the disputed documents exempt under clause 8(1) of Schedule 1 to the FOI Act.
39. In light of my finding, it is not necessary for me to consider whether the disputed documents are also exempt under clauses 4(3), 6(1) or 8(2) of Schedule 1 to the FOI Act.
