

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

**File Ref: F1491999  
Decision Ref: D0222000**

Participants: **Robert Burke Whooley**  
Complainant

- and -

**City of Stirling**  
First Respondent

- and -

**Sandtech Pty Ltd**  
Second Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – invoices for work carried out under contract – application by unsuccessful tenderer – clause 4(2) – whether information re work inside scope of contract has a commercial value that could be destroyed or diminished by disclosure – whether information relating to description of variations and work outside scope of contract has a commercial value – whether disclosure could destroy or diminish commercial value – clause 4(3) – information relating to business, commercial and financial affairs of third party – whether those affairs could reasonably be expected to be adversely affected by disclosure – information re work inside scope of contract already made public – potential effect of disclosure of information re work inside scope of contract – potential effect of disclosure of information re variations and work outside scope of contract – whether disclosure could prejudice supply to government of information re work carried out under contract – editing of documents.

*Freedom of Information Act 1992 (WA)* Schedule 1 clause 4(2), 4(3).

*Re Precious Metals Australia Limited and Department of Minerals and Energy* [1997]  
WAICmr 12

## DECISION

The decision of the agency is set aside. Subject to the deletion of the matter described in paragraph 31 of my reasons for decision, which matter is not in dispute between the parties, the documents are not exempt.

B.KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

11 April 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 City of Stirling ('the agency') to refuse Mr Whooley ('the complainant') access to documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').
2. In October 1997, the Council of the agency awarded a contract for the construction of concrete footpaths and associated works to Sandtech Pty Ltd ('the third party'). The complainant was an unsuccessful tenderer for the contract. On 22 March 1999, the complainant applied to the agency under the FOI Act for access to documents relating to the tender. In particular, the complainant sought access to copies of progress claims submitted to the agency and progress claims approved for payment by the agency for the construction during the period May 1996 to December 1998.
3. On 16 June 1999, the agency decided to give the complainant access to some documents. However, access to the progress claims was refused on the ground that those documents are exempt under clause 4 of Schedule 1 to the FOI Act. The complainant expressed his dissatisfaction with the agency's decision, but did not formally seek an internal review of that decision. I understand that an internal review was conducted by the agency as a result of discussions with the complainant.
4. On 20 August 1999, after the statutory period had expired for the making of an internal review decision, and after the complainant had approached my office for assistance, the agency notified the complainant in writing of its decision. The internal reviewer confirmed the initial decision to refuse access on the ground that the requested documents are exempt under clause 4. On 30 August 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

### REVIEW BY THE INFORMATION COMMISSIONER

5. After receiving this complaint, I required the agency to produce to me, for my inspection, its file maintained for the purpose of dealing with the complainant's access application, together with the documents in dispute. Various discussions were held with the complainant and the agency to determine whether this complaint could be resolved by conciliation between the parties. However, those discussions were not successful.
6. On 16 December 1999, the third party applied to be joined as a party to this complaint and was joined. On 20 December 1999, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the documents may not be exempt under any of the

subclauses of clause 4. Subsequently, I received a written submission from the third party's solicitor in which the third party claimed exemption for the disputed documents under clause 4(2) or, in the alternative, 4(3) of Schedule 1 to the FOI Act. A copy of that submission was provided to the complainant. I received a written response from the complainant disputing the claims of the third party

## THE DISPUTED DOCUMENTS

7. Initially, the agency identified 1845 invoices as falling within the scope of the complainant's access application. Following discussions with my office, the complainant narrowed the scope of his application so that he only sought access to invoices raised between 1 December 1998 and 30 April 1999. Several of those invoices contain references to more than one job and that resulted in the number of disputed documents being incorrectly described in the letter informing the parties of my preliminary view as 174. There are in fact only 82 invoices, comprising 29 documents, in dispute in this matter.
8. The invoices contain a variety of information including the name of the contractor, the contractor's address, order number and invoice number, the location of the particular job, a description of the materials used, the unit price of each of those materials, the quantity of each of those materials used and the total cost to the agency. The complainant has confirmed that he does not seek access to information relating to work performed which is completely outside the scope of the contract, nor the rates charged for variations. That matter is, therefore, not in dispute between the parties. As each of the documents essentially contains similar information to the others, I do not intend to deal separately with each one of them but shall treat them as a group for the purposes of this decision.

## THE EXEMPTION

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

***“4. Commercial or business information***

***Exemptions***

*(1)...*

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

*(a) would reveal information (other than trade secrets) that has a commercial value to a person; and*

*(b) could reasonably be expected to destroy or diminish that commercial value.*

- (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***

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

10. In my opinion, each of the exemptions in clause 4 protects a different kind of information from disclosure. Further, the specific terms of the exemption make it clear that the same information cannot be exempt under more than one subclause, although it is open to an agency or to a third party to make claims in the alternative for exemption under subclause (2) or (3) of clause 4. However, different information in different parts of a document may be exempt under a different subclause.
11. In this instance, the agency did not specify which subclause of clause 4 it seeks to rely on as justification for its decision to refuse the complainant access to the disputed documents. The agency has merely cited clause 4, but has not considered the requirements of that clause or made any findings of fact, or given any reasons to justify its decision to refuse access to the disputed documents. The third party claims exemption for the whole of the invoices under clause 4(2) and clause 4(3).
- (a) **Clause 4(2)**
12. Clause 4(2) is concerned with the protection of information which is not a trade secret but which has a "commercial value" to a person. In order to establish an exemption under clause 4(2), the matter for which a claim for exemption is made must be shown to have a commercial value, although, in my view, it is not necessary in order to satisfy the requirements of clause 4(2)(a) that the commercial value be quantified or assessed. However, that alone is not sufficient to establish the exemption. It must also be shown that disclosure could reasonably be expected to destroy or diminish the commercial value of the information in question. Only when the requirements of clause 4(2)(a) are satisfied am I required to consider the effects of disclosing that kind of matter, to determine whether the potential effect of disclosure claimed is one that could reasonably be expected, in accordance with the requirements of clause 4(2)(b).

13. I have previously expressed the view that matter may have a commercial value if it is valuable for the purpose of carrying on the commercial activities of a person or organisation: see *Re Precious Metals Australia Limited and Department of Minerals and Energy* [1997] WAICmr 12. As I have previously stated, I consider that it is by reference to the context in which the information is used, or exists, that the question of whether it has a “commercial value” to a person may be determined.

### **The third party’s submission**

14. The third party submits that, pursuant to the contract between it and the agency, the third party may claim payment for work completed by it on a square metre rate, cubic metre rate or a lineal metre rate. For work outside the scope of the contract the third party may claim payment on an hourly basis. The invoices seek payment based on a square metre rate, lineal metre rate and hourly rate multiplied by the number of square metres, lineal metres or hours of work completed by the third party.
15. The third party concedes that, given the fact that the square metre rate, lineal metre rate and the hourly rate in the contract have been publicly disclosed, it may appear that the information contained in the invoices may not constitute matter which is exempt under clause 4(2). However, the third party claims that that material is exempt because the information has a commercial value to the third party and, if its competitors have access to that information, its commercial value will be destroyed or diminished. The third party submits that tenders for the work the subject of the contract are extremely competitive and that profit margins are low. The third party submits that the profit margins on work chargeable on a square metre rate or lineal metre rate or hourly rate differ. The third party contends that the work outside the scope of the contract is substantial and is chargeable on an hourly rate. If a competitor of the third party were to gain access to the invoices, it is submitted, it may calculate the amount of work carried out by the third party outside the scope of the contract. That would enable a competitor to estimate the likely profits from extra-contractual work and take those likely profits into consideration when tendering for the next three year contract when the present contract expires later this year.
16. Finally, the third party informs me that some of the variations relate to work that is carried out so frequently that it is likely to be included in any future tender. The third party submits that information relating to work outside the scope of the contract and the rates charged for that work, agreed on from time to time by the agency and the third party, is commercially sensitive because its disclosure will enable a competitor to estimate the rates that are acceptable to the agency, and at which the third party is prepared to undertake the work, and enable a competitor to outbid the third party in respect of work not previously included in any tender.

### **The complainant’s submission**

17. The complainant informs me that he does not intend to tender for future contracts with the agency, and does not seek to use the documents to gain any

commercial advantage. The complainant submits that his interest is in the agency's administration of the present contract because it has been let over a period of nine years. He contends that if substantial variations in the contract price have been allowed for a period of nine years, it may indicate negligence in the agency's administration of the contract. The complainant submits that the disclosure of that kind of information may very well be in the public interest.

18. The complainant disputes the third party's claims concerning the commercial value of information about the extra work performed. He informs me that it is usual for a contractor to claim the maximum amount for variations and for the principal - in this case, the agency - to try to reduce the amount payable. I am informed that, in the event that agreement is not reached, the "day-work" rates are used and that those rates are a matter of public knowledge. The complainant submits that agreed rates for variations have no commercial value because those rates have not been tested in the marketplace and, when variations are incorporated into a tender, the rate is substantially reduced to its true competitive component. The complainant submits that any contractor who relies on an agreed variation rate in a tendering situation would suffer a commercial disadvantage, presumably, by tendering at an inflated price for the contract.

### **Consideration**

19. Having regard to the fact that the invoices contain information relating to the quantity of material used in the construction of a particular section of footpath, it seems to me that that information merely relates to a part of the completion of the particular construction process. It is a progress payment for the part of the job completed by the third party. Insofar as that information relates to work within the scope of the contract, I am not persuaded that that information has a commercial value to anyone nor, if it does, that the value could be diminished or destroyed by disclosure as it is already publicly known.
20. The claims made by the third party relate only to the commercial value of information relating to charges for work performed outside the contract and variations to the contract. However, the complainant does not now seek access to information concerning work wholly outside the scope of the contract, nor the rates charged for variations. I consider that that information is, therefore, not in dispute and is outside the scope of this complaint. The only information in the invoices that remains in dispute between the parties is information relating to the progress payments for the work performed within the scope of the contract and the description and quantities of variations. The third party has not explained what commercial value information concerning work within the contract and the charges for it might have. I do not consider that that information has a commercial value other than reflecting the amount earned by the third party. In my view, it is not information that falls within the terms of clause 4(2).

21. Further, even if I were satisfied that that matter falls within the terms of clause 4(2)(a), which I am not, there is no material before me to explain how the disclosure of that information could reasonably be expected to destroy or diminish the commercial value of that information as required by clause 4(2)(b). Neither the agency nor the third party has provided me with any material that goes to establishing that disclosure of the information in the invoices that concerns work within the scope of the contract could reasonably be expected to destroy or diminish any commercial value that information might have.
22. In respect of work outside the contract charged at an hourly rate and variations charged for the price agreed between the third party and the agency, the third party's submissions appear to me to concern disclosure of the rate charged only. The contention that a commercial disadvantage could reasonably be expected to follow from disclosure appears to be based on a competitor being able to estimate likely profits from extra-contractual work. Whilst I am prepared to accept that disclosure of those rates and charges may potentially enable a competitor to undercut the third party in future tenders, the complainant does not seek access to that information and, with that information deleted, I do not accept that disclosure of the kinds and quantities of variations would put a competitor in that position. Therefore, if information concerning the kinds and quantities or variations has any commercial value, I do not consider that that commercial value could be destroyed or diminished by disclosure of the documents.
23. Accordingly, I find that those parts of the documents remaining in dispute are not exempt under clause 4(2) of Schedule 1 to the FOI Act.

**(b) Clause 4(3)**

24. The exemption in clause 4(3) consists of two parts and both paragraphs (a) and (b) must be satisfied before a *prima facie* claim for exemption is established. The exemption in clause 4(3) is recognition of the fact that the business of government is frequently mixed with that of the private sector and that neither the business dealings of private bodies, nor the business of government, should be adversely affected by the operation of the FOI Act.

*Clause 4(3)(a)*

25. Having examined the disputed documents, I am satisfied that they contain information relating to the business, commercial and financial affairs of a person, the third party. Therefore, I accept that the requirements of clause 4(3)(a) are satisfied.

*Clause 4(3)(b)*

26. However, in my opinion, neither the agency nor the third party has established that disclosure of the information remaining in dispute could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the third party or prejudice the future supply of information of that kind to the Government or an agency. As to the latter, the documents are



invoices for payment. Clearly, in my view, the future supply to the agency of information as to the work done, the material and quantity of material used, the charges and amount to be paid could not reasonably be expected to be prejudiced by disclosure of the disputed matter. As long as contractors carrying out work for government agencies wish to be paid, they will continue to submit such information to agencies.

27. I understand that, at the opening of the tenders for the construction of footpaths, the contents of the successful tender were read aloud to those present, including the complainant. I also understand that information relating to the quantity and unit price was included in the information that was disclosed to the public. If the work was performed and payments made in accordance with the tender, then the disclosure of the invoices would reveal no more information about the performance of the contract than that which is already in the public domain, albeit disclosed in stages as the work progressed. In that case, I am not persuaded that disclosure of that information in the documents could have any adverse effect on the affairs of the third party.
28. In this case, the disputed matter, insofar as it relates to work within the original scope of the contract, does not appear to be anything more than a record of the amount of material used, presented as a claim to the agency for payment for the material used and work done. As the total price for the contract and the unit prices were made public at the opening of the tenders, I do not accept that the piecemeal disclosure of that information could reasonably be expected to have any adverse effects on the business, commercial or financial affairs of the third party.
29. As to information in the invoices concerning work outside the scope of the contract and work performed in variation of the contract, if the unit price and the total price for each such item is deleted from the documents, as it is not sought by the complainant and is therefore not in dispute, I am not persuaded that disclosure of any of the remaining information – that is the description and quantity of each such item – could reasonably be expected to have any adverse effect on the affairs of the third party. Accordingly, subject to the deletion of the unit price and total price for each such item, and the total charge of the invoice (which may enable the calculation of the charges for variations), I find that the matter remaining in dispute in the documents is not exempt under clause 4(3).
30. By way of comment, even if I were of the view that a *prima facie* exemption under clause 4(3) had been shown, the question of whether or not disclosure of that information would, on balance, be in the public interest would, in any event, arise. I would consider there to be a considerable public interest in the accountability of the agency for the expenditure of public monies in relation to a contract for a public work let by public tender, and in the accountability of the agency for the proper administration of such a contract over a period of some 9 years. As I am not persuaded that the matter is exempt as claimed, however, the question does not arise for my consideration.

31. Accordingly, I find that the disputed matter is not exempt under clause 4(3). Therefore, subject to the deletion of the unit price and total charge for each item in the invoices that is either wholly outside the scope of the works the subject of the contract or in variation to the contract, and the total charge on each invoice, I find that the documents are not exempt and edited copies should be given to the complainant.

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