

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

**File Ref: F0232000
Decision Ref: D0232000**

Participants: **Christopher Noel Jones and
Angela Saryn Jones**
Complainants

- and -

Town of Port Hedland
First Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – decision to give access – third party complaint – tip dockets relating to dumping of liquid waste – clause 4(2) – whether information having a commercial value to 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 misuse the information out of context.

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

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

Attorney General's Department v Cockcroft (1986) 10 FRC 180

DECISION

The decision of the agency is confirmed. The disputed matter is 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 Town of Port Hedland ('the agency') to grant access under the *Freedom of Information Act 1992* ('the FOI Act') to documents requested by an applicant. Mr and Mrs Jones ('the complainants') are third parties who object to the applicant being given access in the manner proposed by the agency.
2. On 22 October 1999, an application was made to the agency for access to documents described as "*Chris Jones Plumbing tip dockets from June 96 to June 99*". The access applicant also applied for access to another record that is not part of this complaint. Some discussions occurred between the agency and the applicant over the scope of the request. On 2 December 1999, pursuant to its obligations under s.33(2) of the FOI Act, the agency informed the complainants of the application and sought their views as to whether the requested documents contain matter that may be exempt under clause 4 of Schedule 1 to the FOI Act.
3. On 3 December 1999, after receiving the complainants' response, the agency refused the applicant access to the requested documents on the ground that they are exempt under clause 4 of Schedule 1 to the FOI Act. The access applicant applied for internal review of the agency's decision and limited his request to documents containing information about the 5 largest loads of liquid waste and the 5 smallest loads of liquid waste deposited by the complainants at the local tip between July 1997 and December 1998.
4. On 6 January 2000, the internal reviewer varied the initial decision and decided to give the applicant access to the requested documents. However, access was deferred to enable the complainants to exercise their rights of review under the FOI Act. On 27 January 2000, the complainants lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. In order to assist me in dealing with this matter, I required the agency to produce to me the originals of the disputed documents, and the agency's FOI file maintained in respect of the original access application.
6. Under s.102(2) of the FOI Act, if a third party initiates 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. Therefore, the complainants were invited to provide reasons in

writing to support their claims for exemption under clause 4(2) of Schedule 1 to the FOI Act. Subsequently, I received a submission dated 14 February 2000.

7. On 24 March 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 matter in dispute may not be exempt. The complainants did not withdraw their complaint.

THE DISPUTED MATTER

8. In this instance, the matter in dispute consists of 10 entries in the gate-keeping records of the local rubbish tip recording the date and the volume of liquid waste deposited by Chris Jones Plumbing, the business owned and operated by the complainants.

THE EXEMPTIONS

(a) Clause 4(2)

9. Clause 4(2) of Schedule 1 to the FOI Act provides:

“4. Commercial or business information

Exemptions

(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.”

10. In order to establish exemption under clause 4(2), the complainants must persuade me that the disputed matter has commercial value to a person, although, in my view, it is not necessary that the commercial value be quantified or assessed. It must also be shown that disclosure could reasonably be expected to destroy or diminish the commercial value of the information in question.
11. 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 Ltd and Department of Minerals and Energy* [1997] WAICmr 12. I also consider that it is by reference to the context in which the information is used, or exists, that the question of whether it has “commercial value” to any person may be determined.

The complainants' submission

12. The complainants claim, among other things, that the tip records are not a true record and do not reflect the true picture. I am informed that this is because, on occasions, the clients of the complainants would supply their own tip dockets so that the clients would not be charged a mark-up for the particular dumped waste. The complainants submit that, at the time when a private company managed the tip site, the waste dumped by the complainants was not always recorded on the tip dockets and, therefore, the records are inaccurate.
13. The complainants submit that the disputed matter in the tip dockets has a commercial value to them because, taken out of context and because the records are incomplete, it might enable a competitor to approach their clients and to suggest that overcharging has occurred for the dumping of waste products and thereby attract the business of those clients away from the complainants. It is claimed that the disputed matter has a commercial value because it is information about work carried out by the complainants and charged to the clients. The complainants submit that if the information were used out of context, its commercial value would be destroyed or diminished because clients would be lost to Chris Jones Plumbing
14. In my view, the complainants have not provided sufficient information to establish the nature, if any, of the commercial value of the information in the disputed documents. Having regard to the fact that the gate-keeping records only contain information relating to the quantity of material deposited, it seems to me that that information is unlikely to have a commercial value in the sense in which that term is used in clause 4(2). There is nothing in the submission that explains to me how the particular information is valuable for the purpose of carrying on the business of Chris Jones Plumbing.
15. Further, even if I were satisfied that the requirements of clause 4(2)(a) had been established, which I am not, there is nothing in the complainants' submission that persuades me that the disclosure of the dates, and amounts of waste deposited on those dates, could reasonably be expected to destroy or diminish the commercial value of that information. In my view, the claim about the likely effects of disclosure is speculation and unsupported.
16. Accordingly, I find that the disputed matter is not exempt under clause 4(2).

(b) Clause 4(3)

17. I have also considered whether the disputed matter might be exempt under clause 4(3). Clause 4(3) provides:

“4. Commercial or business information

Exemptions

- (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.”*
18. The exemption in clause 4(3) deals with information about the business, professional, commercial or financial affairs of any person, including a company or incorporated body. It provides exemption for matter of that kind if its disclosure would reveal information (other trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person, and disclosure 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.
19. The exemption in clause 4(3) recognises 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. The exemption in clause 4(3) consists of 2 parts and both paragraphs (a) and (b) must be satisfied before a claim for exemption is established.
20. In my opinion, information about the amount of waste dumped by Chris Jones Plumbing may be information relating to the business or commercial affairs of Chris Jones Plumbing and, therefore, the complainants. That is, it may satisfy the requirements of clause 4(3)(a). However, the requirements of clause 4(3)(b) must also be satisfied to establish the exemption.

Clause 4(3)(b)

21. The phrase “*could reasonably be expected to*” in clause 4(3)(b), appears in a number of the exemption clauses in the FOI Act. In *Attorney-General’s Department v Cockcroft* (1986) 10 FRC 180 at page 190, the Full Federal Court said that the words “*could reasonably be expected*” were intended to receive their ordinary meaning and required a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the stated consequences to follow if the documents in question were disclosed.
22. Clearly, disclosure of the disputed matter could not reasonably be expected to prejudice the future supply to the agency of information of the kind in dispute. Nor has that been argued. In order to dump liquid waste at the tip, a person must provide the gate-keeper at the tip with a docket and the gate-keeper records all the required information in the gate record before the waste may be dumped.

23. I am not persuaded that the adverse effect on their business that the complainants claim may follow from disclosure of the tip records is one that could reasonably be expected. Although the documents could possibly be used in the manner suggested by the complainants, I do not consider that the subsequent loss of clients is a result that could reasonably be expected to follow from the disclosure of those documents. Clearly, it would be open to the complainants to explain any anomaly, if there were one, to any of their clients, especially as the disputed documents are a sample only and do not represent a complete record of all dumps for the relevant period. Further, there is nothing in the documents that would suggest that a particular amount of waste dumped on a certain date could be attributed to any of the existing clients of the complainants.
24. Therefore, I am not persuaded that the disclosure of the disputed matter could reasonably be expected to have the adverse effect on the complainants' business that they claim it would have.
25. Further, although it is submitted that the records are inaccurate, the agency disputes that claim and informs me that it considers them to be a true record of movements to and from the tip during the relevant period. I am also informed by the agency that, although a private company managed the South Hedland Tip for certain periods, at the relevant time – July 1997 to December 1998 – the agency controlled the tip, not a private company.
26. The agency also informs me that the gate records contain records for domestic, commercial and industrial use and a separate record is maintained for the use of the tip by the agency's trucks. I am informed that the agency levies charges against its own vehicles for the use of the dump facilities.
27. For the reasons given, I find that the matter in dispute is not exempt under clause 4(2) or clause 4(3) of Schedule 1 to the FOI Act.
