

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

**File Ref: F2002103  
Decision Ref: D0232002**

Participants:

**BGC (Australia) Pty Ltd**  
Complainant  
  
- and -  
  
**Fremantle Port Authority**  
Respondent

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – documents relating to sale of land – clause 8(1) – scope of exemption – whether breach of a contractual obligation of confidence – whether confidentiality clause must be disclosed – application of section 104 – clause 3 – personal information – access given to edited documents

*Freedom of Information Act 1992 (WA)* ss.3, 10(1), 23(1), 74(1), 74(2), 76(3), 76(8), 104; Schedule 1 clauses 3(1) and 8(1).

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

## DECISION

The agency's decision is varied. Document 10, draft copies of Document 10 and those parts of Documents 2, 8 and 9 consisting of email messages, are exempt under clause 8(1) of Schedule 1 to the *Freedom of Information Act 1992*.

Further, the complainant is entitled to be given access to copies of Documents 1, 3, 4, 5, 6 and 7, which have been edited in accordance with paragraphs 23-25 of my Reasons for Decision.

B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

11 July 2002

## REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Fremantle Port Authority, trading as Fremantle Ports ('the agency'), to refuse BGC (Australia) Pty Ltd ('the complainant') access to documents requested by it under the *Freedom of Information Act 1992* ('the FOI Act').
2. I understand that a private port operates at James Point in Cockburn Sound, south of Fremantle. The private port is near land that is owned by BHP. The BHP land has bulk loading facilities and the agency wished to purchase that land from BHP so that it could expand and provide common user facilities in that area.
3. On 25 March 2002, the complainant made an application to the agency for access under the FOI Act to any documents or correspondence between the agency and any other party, including the Minister for Planning and Infrastructure, relating to the sale of the BHP land to the State Government. On the same date, the complainant also made applications to the Minister for Planning and Infrastructure and to the Western Australian Land Authority ('LandCorp') in almost identical terms.
4. The agency identified ten documents, including the Sale of Land Contract ('the Contract'), in response to that request and refused access to those documents on the ground that they are exempt under clauses 7(1) and 8(1) of Schedule 1 to the FOI Act. On 14 May 2002, the complainant questioned the claims for exemption and the agency's General Manager, Commercial Operations, made inquiries into the initial decision. Subsequently, the General Manager informed the complainant that he was satisfied that the agency had complied with its obligations under the FOI Act and confirmed the decision to refuse access.
5. On 28 May 2002, the complainant lodged a complaint with me seeking external review of the agency's decision.

## REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained the disputed documents from the agency, together with the agency's FOI file in respect of this application. After my initial inspection of those documents, my Legal Officer informed the complainant that most of the documents, including the Contract, appeared to be covered by a confidentiality clause in the Contract. However, the complainant was not prepared to withdraw its complaint at that point.
7. Following that, on 25 June 2002, the parties were informed in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that parts of the requested documents, consisting primarily of email messages, may not be exempt, but that some of the attachments to those emails and Document 10 may be exempt under clause 8(1). I also expressed the view that some attachments appeared to me to fall outside the scope of the complainant's access application because they do not directly relate to the sale of the BHP land. Those attachments are a Co-ownership and Partitioning Agreement ('the Agreement') and the Kwinana Rail Terminal Lease

(‘the Lease’) attached to Document 8. It was also my preliminary view that some personal information in Documents 1, 3, 4, 5, 6 and 7 may be exempt under clause 3(1), but it was, in any event, practicable to delete that information from those documents.

8. Subsequently, the agency provided the complainant with access to edited copies of the covering emails in Documents 1, 3, 4, 5, 6 and 7. The complainant responded in writing to my preliminary view, but did not withdraw its complaint in respect of the matter deleted from the covering emails in Documents 1, 3, 4, 5, 6 and 7 or the remainder of the disputed documents (Documents 2, 8, 9 and 10).

## THE DISPUTED DOCUMENTS

9. The ten documents initially identified by the agency in response to the complainant’s access application comprise nine email messages (eight with attachments) and the Contract. In my view, the Agreement, the related agreements attached to Documents 1, 3, and 8, and the Lease fall outside the scope of the complainant’s access application and, accordingly, I have not dealt with any of those documents.

| <b>Date</b> | <b>Description</b>  | <b>Exemption</b> |
|-------------|---|------------------|
| 6/12/01     | <b>Document 1</b> - Email message from solicitors to agency and others, to which is attached a draft copy of Document 10. [Other attachments are not covered by the terms of the access application].     | 3(1) and 8(1)    |
| 10/12/01    | <b>Document 2</b> – Email message from agency to solicitors, to which is attached a draft copy of Document 10.  | 7(1) and 8(1)    |
| 12/12/01    | <b>Document 3</b> – Email message from BHP Billiton to agency and others, to which is attached a draft copy of Document 10. [Other attachments are not covered by the terms of the access application].   | 3(1) and 8(1)    |
| 13/12/01    | <b>Document 4</b> – Email message from solicitors to agency. [The Agreement attached to this document is not covered by the terms of the access application].   | 3(1)             |
| 18/12/01    | <b>Document 5</b> – Email message from solicitors to agency. [The Agreement attached to this document is not covered by the terms of the access application].   | 3(1)             |
| 18/12/01    | <b>Document 6</b> – Email message from solicitors to agency and others, to which is attached a draft copy of Document 10.   | 3(1) and 8(1)    |
| 19/12/01    | <b>Document 7</b> – Email message from solicitors to agency. [The Agreement attached to this document is not covered by the terms of the access application].   | 3(1)             |
| 19/12/01    | <b>Document 8</b> – Email message from solicitors to agency and others, to which is attached a draft copy of Document 10. [The other attachments are not covered by the terms of the access application]. | 7(1) and 8(1)    |
| 19/12/01    | <b>Document 9</b> – Email message from LandCorp to agency.  | 8(1)             |
| 20/12/01    | <b>Document 10</b> – Sale of Land Contract.   | 8(1)             |

## THE EXEMPTIONS

### (a) Clause 8(1)

10. Clause 8, so far as is relevant, provides:

**“8. Confidential communications**

***Exemptions***

*(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.”*

11. In my view, the exemption in clause 8(1) applies to documents if their disclosure would give rise to a cause of action for breach of a common law obligation of confidence, such as a breach of a contractual obligation of confidence, for which a legal remedy may be obtained. Because of the precise wording of the exemption clause, I do not consider that clause 8(1) applies to documents if their disclosure would give rise only to a cause of action for breach of an equitable duty of confidence: see my decision and reasons in *Re Speno Rail Maintenance Australia Pty Ltd and Another and The Western Australian Government Railways Commission* [1997] WAICmr 29, at paragraphs 15-28.

### **The complainant’s submissions**

12. The complainant claims that the confidentiality clause itself cannot be confidential and it must be disclosed in order to establish the basis of a legal remedy. The complainant submits that the terms of the confidentiality clause ought to be disclosed in the interests of natural justice so that the validity of my reasons, which are based on the terms of that clause, can be properly assessed.

13. The complainant’s legal advisers also submit that:

- (i) If the confidentiality clause provides that a contracting party is obliged by law to disclose information, then it is not a breach of confidence if that information is disclosed, and they cited ss.3 and 10 of the FOI Act in support of that proposition;
- (ii) If I accept the agency’s argument, then the objects and intent of the FOI Act would be defeated by the device of including a confidentiality clause, which effectively enables the agency to contract out of a public duty; and
- (iii) Section 104 of the FOI Act provides protection against any claim for breach of confidence to any agency or officer of an agency in making a decision regarding the giving of access.

## Consideration

14. I have examined each of the disputed documents, including the Document 10. Document 10 is an executed agreement for the sale of land made between several parties, including the agency. It contains a clear and unambiguous confidentiality clause, which is very broad in its terms and relates to a number of matters, including information exchanged between the parties, prior to and after the execution of the agreement for the sale of the land. I am satisfied that it imposes very broad contractual obligations of confidence upon all of the parties and that the contractual obligation of confidence extends to the information contained in Documents 2, 8 and 9 and to all of the information in Document 10 itself, including the confidentiality clause. The confidentiality clause contains some limited exceptions to its terms but, in my view, none of those exceptions is relevant to any of the disputed documents.
15. Section 76(5) of the FOI Act requires that, in dealing with a complaint, I must include, in the decision, the reasons for that decision, the findings on any material questions of fact underlying those reasons and reference to the material on which those findings were based. In addition, s.76(8) of the FOI Act requires my decisions to be published so that the public is adequately informed of the grounds on which such decisions are made. However, s.74(1) of the FOI Act enjoins me to ensure that exempt matter is not disclosed during the course of dealing with a complaint and, under s.74(2) I must not include exempt matter in my decision on a complaint or in reasons given for that decision.
16. Taking into account my statutory obligations, I consider that I would be in breach of those obligations if I were to disclose the terms of the confidentiality clause in Document 10. In my view, the obligation not to disclose exempt matter extends to the disclosure of matter claimed to be exempt by an agency. In this case, the agency claims that Document 10 is exempt under clause 8(1) and, given the breadth of the confidentiality clause in Document 10, I consider that the clause itself is covered by the contractual obligation of confidence.
17. Further, in my opinion, the FOI Act does not oblige government agencies to disclose information as asserted by the complainant's solicitors. The right of access in s.10(1) is to be exercised "...subject to and in accordance with the FOI Act" and s.23(1)(a) provides that an agency may refuse access to exempt documents. An exempt document is one that contains exempt matter. The word "matter" refers to a piece of information. In the context of the FOI Act, it can be a whole page or part of a page, or a single word or figure on a page and parts of a page can be exempt when other parts are not.
18. The exemption under clause 8(1) applies to matter if its disclosure "*otherwise than under [the FOI Act] or another written law would be a breach of confidence for which a legal remedy could be obtained.*" In other words, in the context of this complaint, information or matter will be exempt under clause 8(1) if its disclosure would be a breach of confidence for which a legal remedy could be obtained.
19. The FOI Act does not prevent the inclusion of a confidentiality clause in a contract to protect confidential information from disclosure. There may be good reasons why such information should be withheld. However, if the use of confidentiality clauses in

such contracts were to the effect of defeating the objects and intent of the FOI Act, as the complainant claims, then it is the responsibility of the Parliament of Western Australia to change the legislation, if more transparency is required in the dealings of public sector agencies. When dealing with complaints, my role is to determine the facts and to apply the law as I find it. I have done that on this occasion.

20. I have also considered the complainant's submissions relating to s.104 of the FOI Act, which protects officers of agencies from actions for defamation or breach of confidence, if decisions are made in good faith to give access to documents under the FOI Act and the FOI Act permits or requires such a decision to be made. In the present case, s.104 does not apply, because no decision has been made to grant access and, as I noted in paragraph 17 above, the FOI Act provides that an agency may refuse access to exempt documents.
21. Having examined Document 10 and satisfied myself that the confidentiality clause in that document is binding on the agency, I am also satisfied that the disclosure of Documents 2, 8, 9 and 10 would be a breach of a contractual obligation of confidence for which a legal remedy could be obtained by the other parties to that contract.
22. Accordingly, for the reasons given above, I find that Document 10, the draft copies of Document 10, and the email messages, designated Documents 2, 8 and 9, are exempt under clause 8(1). In light of that finding, I need not consider whether Documents 2 and 8 are also exempt under clause 7.

**(b) Clause 3 – Personal information**

23. After my preliminary view of this complaint was conveyed to the parties, the agency provided the complainant with edited copies of the email messages comprising parts of Documents 1, 3, 4, 5, 6 and 7. The agency deleted from those documents personal information about third parties, including the names of third parties, email addresses and other identifying information. In my opinion, that kind of information is personal information as defined in the FOI Act about those third parties and it is, *prima facie*, exempt matter under clause 3(1).
24. In the absence of any submissions from the complainant to the contrary, I am satisfied that the public interest in protecting the privacy of the third parties is not outweighed by any other public interest which requires the disclosure of such information to the complainant. Accordingly, I find the personal information about third parties in Documents 1, 3, 4, 5, 6 and 7 exempt under clause 3(1).
25. The agency provided my office with copies of Documents 1, 3, 4, 5, 6, and 7, which it released to the complainant, with certain matter deleted. In my opinion, the extent of the deletions made by the agency is more than is required to protect the public interest in the privacy of the third parties. Therefore, I have provided the agency with copies of Documents 1, 3, 4, 5, 6, and 7 with exempt matter highlighted on those copies. The complainant is entitled to be given access to Documents 1, 3, 4, 5, 6 and 7 with only the highlighted matter deleted and nothing else.

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