

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

**File Ref: F2003138
Decision Ref: D0302003**

Participants:

Prosser Management Pty Ltd
Complainant

- and -

City of Bunbury
Respondent

- and -

Harvey Norman Holdings Limited
First Third Party

And

Calardu Bunbury (WA) Pty Ltd
Second Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to a deed of licence between the agency and a third party, licensing the third party to use land as a car park – clause 4(2) – information having a commercial value to a person – whether disputed matter has a commercial value to third parties– whether disclosure of disputed matter could reasonably be expected to diminish or destroy the commercial value of the relevant information – clause 4(3) – information about the business, professional, commercial or financial affairs to a person – whether the disputed documents contain information about business, professional, commercial or financial affairs of the third parties– whether disclosure of disputed documents could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the third parties.

Freedom of Information Act 1992 (WA) ss. 24, 65(1)(c), 102(2); Schedule 1 clauses 3(1) 4(2), 4(3) and 5(1)(g)

Land Administration Act 1997

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

Re: Jones and Jones and Town of Port Hedland [2000] WAICmr 23

DECISION

The agency's decision is set aside and substituted with this decision. It is decided that the disputed documents are not exempt under clauses 4(2) or 4(3) of Schedule 1 to the *Freedom of Information Act 1992*. Further, in giving effect to this decision, it is also decided that:

- Documents 1-11 should be edited in the manner described in paragraph 33 to delete the personal information about people other than the complainant; and
- Access to Document 12 should be given by way of inspection only.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

22 October 2003

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the City of Bunbury ('the agency') to refuse Prosser Management Pty Ltd ('the complainant') access to certain documents requested by it under the *Freedom of Information Act 1992* ('the FOI Act'). In this matter, Harvey Norman Holdings Limited ('Harvey Norman') and Calardu Bunbury (WA) Pty Ltd ('Calardu') are joined as third parties.

BACKGROUND

2. The agency is the management body for certain Crown Land located at Lot 864, Sandridge Road, Bunbury. The agency informed me that, in 1999, it started negotiating with the landowners of properties adjoining Lot 864, with the intention of developing Lot 864 as a public car park. However, the negotiations were discontinued in 2000, because consensus could not be reached over the amount of the financial contributions necessary for the development of the car park and drainage infrastructure. The agency informed me that, after the negotiations had been discontinued, Calardu pursued the development proposal with the agency, to alleviate its own car parking problems on its property, which adjoins Lot 864.
3. On 27 July 2000, the Minister for Lands vested the care, management and control of Lot 864 in the agency, under a Management Order issued under the *Land Administration Act 1997*, on condition that Lot 864 was used for the designated purpose of "Drainage and Parking". The Minister granted the agency power to licence the whole or a portion of Lot 864 for the designated purpose for any term not exceeding 21 years from the date of the licence, subject to the agency first obtaining the written approval of the Minister to each and every licence.
4. On 10 October 2000, the Council of the agency decided to enter into a Deed of Licence ('the Deed') with Calardu, for a period of ten years, with an option to re-new for a further eleven years, to licence Lot 864 to Calardu for the purpose of public car parking and drainage. In late 2000, following negotiations with the agency, Calardu constructed a car park on Lot 864. Subsequently, on 23 July 2001, the agency granted Calardu a non-exclusive licence to use Lot 864 as a public car park and, at the same time, executed a Development Agreement ('the Agreement') with Calardu, which obligated Calardu to bear the cost of constructing the car park located on Lot 864.
5. The complainant owns one of the lots abutting Lot 864. In May 2003, the complainant applied to the agency for access, under the FOI Act, to documents relating to the agreement between the agency and Calardu and/or Harvey Norman, by which the agency had licensed Calardu and/or Harvey Norman to use Lot 864 as a public car park. The agency consulted with Harvey Norman, but Harvey Norman did not consent to the disclosure of the Deed. The agency then gave the complainant access to various documents (Minutes of Council Meetings relating to the Deed and the Agreement), but refused it access to the

Deed on the ground that it was exempt under clause 4(3) of Schedule 1 to the FOI Act.

6. The complainant's legal advisers applied for an internal review and disputed the thoroughness and adequacy of the agency's searches for documents. Subsequently, eleven additional documents were found but access was refused to all additional documents. The agency confirmed the decision to refuse access to the Deed and also claimed that the eleven additional documents were exempt as being "commercial in confidence" during the preparation of the Deed. On 21 August 2003, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. I obtained the requested documents and the relevant FOI file from the agency. After examining that material, it was not apparent to me why the documents were exempt under clause 4(3) and I sought additional reasons from the agency. In response, the agency then claimed that the requested documents were exempt under clauses 4(2), 4(3) and 5(1)(g) of Schedule 1 to the FOI Act.
8. After examining the Deed, it seemed to me that that document was, on its face, subject to copyright. I also considered that the requested documents contained some personal information about individuals, which I considered was exempt matter under clause 3(1). The complainant informed me, through its solicitors, that it would accept access to the Deed, by way of inspection, and access to edited copies of the remaining documents.
9. The third parties were invited to make submissions to me but none were received. On 17 September 2003, after considering the material then before me, I made a preliminary assessment of this complaint and informed the agency, Harvey Norman and Calardu, in writing, that I was not persuaded that the documents were exempt as claimed and I gave my reasons.
10. Following that, on 26 September 2003, Harvey Norman as the holding company of Calardu, made a joint submission to me on behalf of both companies, through its legal advisers. In that submission, Harvey Norman and Calardu claim that the requested documents are exempt under clauses 4(2) or 4(3) of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENTS

11. There are 12 documents in dispute in this matter. Those documents are listed and described as follows:

Doc No.	Date	Description
1	27/10/00	Facsimile from the agency to Harvey Norman.
2	17/10/00	Facsimile from Harvey Norman to the agency.
3	13/10/00	Facsimile from Harvey Norman to the agency.
4	03/10/00	Letter from Valuer General to the agency.
5	22/09/00	Facsimile from Harvey Norman to the agency.

6	13/09/00	Letter from Marks & Sands, Lawyers to Slee Anderson & Pidgeon, Barristers and Solicitors.
7	28/07/00	Agency file note.
8	Undated	Email message from the agency to Harvey Norman with draft Development Agreement and draft Deed of Licence attached.
9	16/05/00	Letter from Slee Anderson & Pidgeon to agency with draft Development Agreement and draft Deed of Licence attached.
10	05/05/00	Facsimile from the agency to Harvey Norman.
11	03/05/00	Letter from the agency to Slee Anderson & Pidgeon.
12	23/07/01	Deed of Licence.

THE EXEMPTIONS

12. The agency withdrew its claim for exemption based on clause 5(1)(g). However, the third parties claim that the disputed documents are exempt under clauses 4(2) and 4(3). Clause 4, so far as is relevant, provides:

“4. Commercial or business information

(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

(4)...

(5)...

(6)...

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

13. The exemptions in clauses 4(2) and 4(3) protect different kinds of information from disclosure. The specific terms of the exemptions in clauses 4(2) and 4(3) make it clear that the same information cannot be exempt under clause 4(2) and also exempt under clause 4(3).

(a) *Clause 4(2)*

14. Clause 4(2) is concerned with the protection of information which has a “commercial value” to a person (including a company). The exemption consists of two parts and the requirements of both parts (a) and (b) must be satisfied in order to establish a *prima facie* claim under clause 4(2).
15. In my view, information may have a “commercial value” if it is valuable for the purpose of carrying on the commercial activities of a person or organization: see *Re Precious Metals Australia Ltd and Department of Minerals and Energy* [1997] WAICmr 12; *Re Jones and Jones and the Town of Port Hedland* [2000] WAICmr 23. I also consider that it is by reference to the context in which the information is used, or exists that the question of whether or not particular information has commercial value may be determined.

The submissions made by Harvey Norman and Calardu

16. Harvey Norman and Calardu submit that Documents 3, 6, 8, 9, 11 and 12 contain information that has a commercial value to each of them because:
 - the Agreement and the Deed are current documents, which are still in use by Harvey Norman and Calardu, and which also contain clauses common to many agreements struck between Harvey Norman and other parties;
 - the documents contain information about the terms and conditions under which Harvey Norman and Calardu would agree to lease premises and it is possible that, in the future, those same terms and conditions may apply in relation to other projects;
 - the documents contain information about the current commercial relationship between Calardu and the agency, including the obligation to pay rent; and,
 - none of the information in Documents 3, 6, 8, 9, 11 and 12 is in the public domain and the fact that the information is not known by their commercial competitors gives the information a “commercial value” to Harvey Norman and to Calardu.
17. Harvey Norman and Calardu also submit that the disclosure of Documents 3, 6, 8, 9, 11 and 12 would diminish or destroy the commercial value of the information because it would reveal to their commercial competitors information about the commercial agreements with the agency, including the terms and conditions under which Calardu was prepared to do business with the agency, as well as information about the terms and conditions under which Harvey Norman and Calardu would agree to lease premises in the future.
18. In respect of the claim based on clause 4(3), it is submitted that disclosure would prejudice the respective negotiating positions of Harvey Norman and Calardu in the market place and thereby adversely affect their respective businesses, professional, commercial or financial affairs.

19. Harvey Norman and Calardu claim that the disclosure of information about the commercial relationship between Calardu and the agency and details of the commercial arrangements agreed to between Harvey Norman, Calardu and the agency would prejudice their future negotiating positions in the marketplace, both with the agency and with other parties. They also submit that disclosure would adversely affect their respective business and commercial affairs, by reducing their ability to negotiate favourably in the future with other Government and private organisations.

The complainant's submission

20. The complainant submits that neither Harvey Norman nor Calardu have given reasons why disclosure would reveal any information of commercial value or explained why disclosure could reasonably be expected to destroy or diminish the commercial value of the information in question.

Consideration

21. I do not accept the claim that because information is not in the public domain, it therefore has a commercial value to Harvey Norman and Calardu. The confidentiality of information may be a factor to be considered in deciding whether the relevant information has a commercial value, but that fact alone does not, of itself, establish that the information has a commercial value or that it is exempt information.
22. I accept that disclosure of the Deed and the Agreement would reveal the terms and conditions relating to the construction of the car park. I also accept that the disclosure of Documents 3, 6, 8, 9 and 11 would reveal information about the commercial negotiations between Harvey Norman and the agency. However, I do not consider the fact that the documents contain a certain kind of information necessarily means that the information concerned has a commercial value to either Harvey Norman or to Calardu.
23. Documents 1-10 were created during the course of negotiations that took place between representatives of Harvey Norman and representatives of the agency, between May and October 2000, some 8 months before the execution of the Deed and the Agreement. Documents 1-10 are now more than three years old and they relate only to the particular commercial agreement which was executed between the agency and Calardu in July 2001. In addition, neither the Deed nor the Agreement was created by Harvey Norman, by Calardu or by their respective legal advisers. Those two documents prepared by the agency's legal advisers, in early May 2000, at the request of and on instructions of the agency.
24. I do not accept the claim that the disputed documents are commercially valuable simply because they contain terms and conditions purportedly commonly used by Harvey Norman in its commercial agreements. No material has been put before me by Harvey Norman to support that claim. As I understand it, the commercial activities of Harvey Norman and Calardu involve the retailing of furniture and electrical goods, not the construction of public car parks.

However, I accept that providing the public with adequate parking is important to attract customers. In my view, there is nothing in the disputed documents which appears to be unique to the commercial activities of Harvey Norman or Calardu.

25. In my opinion, there is no current commercial information recorded in any of the disputed documents. The extracts of relevant Minutes of Council Meetings released to the complainant by the agency include information about such things as the terms of the Deed, the parties to the Deed, and the property the subject of the Deed. Those Minutes also contain information relating to the construction of the car park on Lot 864, at no cost to the agency, as well as information about the estimated cost of construction and the rent to be paid by Calardu, having regard to the infrastructure provided to the agency by Calardu. That information is recorded in Council Minutes and is, therefore, on the public record and in the public domain.
26. I reject the claim that the Deed and the Agreement have a commercial value to Harvey Norman and Calardu simply because of the form and content of those documents. Nothing has been put before me by Harvey Norman or by Calardu to establish that either the Deed or the Agreement contain terms or conditions that are representative of current or future commercial contracts used by Harvey Norman and Calardu, in their respective commercial activities. As noted in paragraph 23 above, the Deed and the Agreement were created by the agency's legal advisers.
27. The information before me clearly indicates that Calardu pursued the proposal to develop Lot 864 as a car park to alleviate parking difficulties at its commercial property at Lot 56 in Bunbury. In my view, the Agreement and the Deed appear to be a "one-off" commercial arrangement relating to the construction and subsequent licensing of a public car park, which was completed between the parties in July 2001. In those circumstances, I am not persuaded that the disputed documents contain any information that has a commercial value to Harvey Norman or to Calardu.
28. Even if the disputed documents contained information that has a commercial value, then I am not persuaded that disclosure of those documents could reasonably be expected to destroy or diminish the commercial value of that information. The terms and conditions of the Agreement and the Deed between Calardu and the agency appear to me to be standard terms and conditions, which any business entity is likely to use in furthering its commercial activities. There is, in any event, considerable information already in the public domain, relating to the terms and conditions upon which the agreement between the agency and Calardu was struck. In those circumstances, any destruction or diminution of the commercial value which the information might have is not, in my view, a result that could reasonably be expected. Accordingly, I find the disputed documents are not exempt under clause 4(2) of Schedule 1 to the FOI Act.

(b) Clause 4(3)

29. The exemption in clause 4(3) is more general in its terms. In order to establish a claim for exemption under clause 4(3), it must be established that the documents contain information about the business, professional, commercial or financial affairs of a person (including a company) and also that the disclosure of that information could reasonably be expected to have an adverse effect on those affairs or, in the alternative, to prejudice the future supply of information of that kind to the Government or to an agency.

Consideration

30. Based on my examination of the disputed documents, I accept that they each contain some information of the kind described in clause 4(3)(a) about Harvey Norman and Calardu.
31. However, I am not persuaded that the disclosure of the information about the business or commercial affairs of Harvey Norman and Calardu could reasonably be expected to have any adverse effect on those business or commercial affairs. The material put before me by Harvey Norman and Calardu consists merely of the assertion, and nothing more. Nothing before me persuades me that disclosure of the terms and conditions of a “one-off” business agreement with the agency would have any detrimental affect on their respective commercial or business activities. Although both claim disclosure will reduce their ability to negotiate favourable terms and conditions in the future, in relation to similar matters, it has not been explained to me how or why that will occur. Without a satisfactory explanation or reasons in support of that claim, I do not consider that the claimed adverse effect is one that could reasonably be expected. In my opinion, there are no reasonable grounds for such a claim.
32. In the absence of any persuasive material or reasons from which I can objectively determine that disclosure of the disputed documents could reasonably be expected to have an adverse effect on the business or commercial affairs of Harvey Norman or Calardu, I have concluded that there are no grounds for exemption under clause 4(3). Accordingly, I find the disputed documents are not exempt under clause 4(3) of Schedule 1 to the FOI Act.

Form of access

33. Access to requested documents may be given in a number of ways, including access by inspection. The complainant is prepared to accept access to the Deed, by inspection. In the circumstances, I consider that access to the Deed, by inspection, is appropriate as the copyright in the Deed belongs to a person other than the State. Further, as the complainant does not seek access to any personal information about other people, I consider that it is practicable for the agency to delete the personal information from Documents 1-11, in accordance with s.24 of the FOI Act, and to give the complainant access to edited copies of those documents.
