

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

**File Ref: F1031999
Decision Ref: D0321999**

Participants:

Panda Holdings Pty Ltd
Complainant

- and -

Department of Minerals and Energy
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – decision to give access – reverse FOI complaint – submission to the Minister for Mines – clause 4(3) – business, professional, commercial or financial affairs – whether disclosure could reasonably be expected to have adverse effect – whether disclosure could reasonably be expected to prejudice future supply of information to the Government or to an agency – section 102 – onus on third party to establish that access should not be given.

Freedom of Information Act 1992 (WA) ss. 74, 102(2); Schedule 1 clauses 3(1), 4(3).

Interpretation Act 1984 (WA) s. 5.

Manly v Ministry of the Premier and Cabinet (1995) 14 WAR 550.

DECISION

The decision of the agency to grant the applicant access to an edited copy of the document is confirmed.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

12 October 1999

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Department of Minerals and Energy ('the agency') to grant access to an edited copy of a document sought by an applicant under the *Freedom of Information Act 1992* ('the FOI Act'). It is a "reverse" FOI application brought by a third party, Panda Holdings Pty Ltd ('the complainant'), who disputes the agency's decision to grant access to an edited copy because it claims that the document in question is exempt under clause 4(3) of Schedule 1 to the FOI Act.
2. In 1997 the complainant was one of three competing applicants for prospecting licences over the same ground. The resulting dispute was heard in the Warden's Court and the complainant withdrew its objection that it had not been granted a prospecting licence. The complainant subsequently wrote to the Minister for Mines concerning several matters. I understand that the Minister did not take any action with respect to the matters raised by the complainant in its submission to him.
3. On 22 January 1999, an applicant made an application to the agency seeking access under the FOI Act to various documents, including the submission made to the Minister for Mines by the complainant ('the disputed document'). After making inquiries to find the documents requested, including the disputed document, the agency informed the complainant of the access application and sought comments from the complainant in respect of the exempt status or otherwise of the disputed document.
4. The complainant's Director, Mr D J Roberts, advised the agency that both he and the complainant objected to the disclosure of the disputed document on the ground that it is exempt under clause 4(3). The agency considered the complainant's response but decided, nonetheless, to grant the applicant access to a copy of the disputed document with a small amount of exempt matter deleted.
5. On 27 May 1999, the complainant sought internal review of the agency's decision. Internal review was performed by Mr Burton, Acting Director, Mineral Titles in the agency, who decided to confirm the agency's initial decision to grant access to an edited copy of the disputed document. On 1 July 1999, the Director of the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

6. I obtained a copy of the disputed document from the agency, together with its FOI file maintained in respect of the original access application. My

Investigations Officer met with the complainant's Director to determine whether this matter could be resolved by conciliation. However, conciliation was not an option. Thereafter, I required the complainant to provide me with reasons in writing to support its claim for exemption based on clause 4(3) of Schedule 1 to the FOI Act. The complainant's submission was received on 5 August 1999.

THE DISPUTED DOCUMENT

7. The disputed document is a 10-page submission dated 17 June 1997 from the complainant to the Minister for Mines. Attached to the submission are 4 chronological tables.

THE EXEMPTION – clause 4(3)

8. Clause 4(3), so far as is relevant, provides:

"4. Commercial or business information

(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."*

9. The first requirement to establish an exemption based on clause 4(3) is that the disputed document must contain information about the business, professional, commercial or financial affairs of a person. Section 5 of the *Interpretation Act 1984* defines the word "person" to include a public body, company, or association or body of persons, corporate or unincorporate.
10. If it is established that the disputed document contains information of the kind referred to in clause 4(3)(a), then the requirements of paragraph (b) of the exemption must also be met. Paragraph (b) contains two alternatives. It must be shown that either disclosure could reasonably be expected to have an adverse

effect on the person's business, professional, commercial or financial affairs, or could reasonably be expected to prejudice the future supply of the relevant kind of information to the Government or to an agency.

The onus

11. 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. In *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550, at page 573, in respect of claim for exemption by an agency under clause 4(3), Owen J expressed the nature of the onus in s.102 in the following way:

“How can the Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision-maker that he or she had “real and substantial grounds for thinking that the production of the document could prejudice that supply” or that disclosure could have an adverse effect on business or financial affairs? In my opinion, it is not sufficient for the original decision-maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision-maker.”

12. Although I am dealing with a claim for exemption made by a third party and not an agency, I do not consider that the nature of the onus on the complainant, the third party, is any different to that described by his Honour.
13. Section 74 of the FOI Act obliges me, when dealing with a complaint, to avoid the disclosure of exempt matter and prohibits me from including exempt matter in my decision or reasons for decision. Because an appeal lies to the Supreme Court on questions of law arising out of my decisions, I consider that I am constrained from including in my reasons not only matter which I find to be exempt, but also matter which is claimed to be exempt. Clearly, the contents of a disputed document should not be disclosed before all rights of review, or the timeframes for exercising them have been exhausted.
14. In the context of this matter, that constraint makes it difficult to discuss the complainant's submission in any detail as to do so would reveal something of the contents of the disputed document. Although I discussed it in more specific detail in my letter to each of the parties informing them of my preliminary view, in these reasons I discuss it in general terms only.

The complainant's submission

15. The complainant submits that the disputed document contains business and commercial information about it and also about a third party who, it is alleged, is not the access applicant. The complainant also submits that the document was prepared to draw the attention of the Minister for Mines to certain matters and request the minister's action.
16. The complainant also submitted, essentially, that, if disclosed, people seeking to misrepresent him might selectively republish the document. The complainant submitted that disclosure of the disputed document would deter it in the future from bringing serious matters of concern to the attention of the Minister for Mines.

Clause 4(3)(a)

17. Having examined the disputed document, I am satisfied that it contains some information about the business affairs of the complainant. In my view, it contains information relating to the business and commercial affairs of the complainant and others. On that basis, I accept that the requirements of clause 4(3)(a) have been satisfied.

Clause 4(3)(b)

18. The complainant has not explained the nature of any adverse effect on the business or commercial affairs that could be expected to result from, or be caused by, disclosure of the disputed document. Further, there is nothing apparent in the document itself that suggests such a result is possible. There is simply no probative material before me against which I might assess the likely outcome following disclosure.
19. Further, I am not persuaded by the complainant's claims with respect to the alternative ground in paragraph (b). The exemption in clause 4(3) is not concerned with the question of whether the complainant would be deterred from providing information about such matters to the relevant Minister. The question is whether disclosure of the disputed document could reasonably be expected to prejudice an agency's ability to obtain information of the relevant kind in the future from such persons who had information about such matters.
20. I do not consider that it is reasonable to expect that disclosure of information given to a Minister of the Crown in order to persuade him or her to take action that is within the Minister's power on matters within his or her portfolio responsibilities would dissuade other people in the future from making similar applications to a Minister for Mines. It seems to me that any person seeking to persuade a Minister of the Crown to act in a certain way or not to act in a certain way will do so by making relevant submissions and by writing to the Minister concerned. That being the case, I do not accept that it is reasonable to expect any prejudice to the future supply of that kind of information. Based on the material before me, I do not consider that the requirements of clause 4(3)(b) have been satisfied.

21. Accordingly, I find that the disputed document is not exempt under clause 4(3) of Schedule 1 to the FOI Act.

Clause 3(1) – Personal information

22. The agency decided to give the access applicant access to a copy of the disputed document edited so as to remove matter that it claims is exempt under clause 3(1) of Schedule 1 to the FOI Act. The matter to be deleted is the name, title and signature appearing on page 10 of the disputed document. That matter is not in dispute between the parties, as the complainant does not dispute that decision.
23. In any event, it is likely that that matter would be exempt under clause 3(1) of Schedule 1 to the FOI Act. Clause 3(1) provides that matter is exempt if its disclosure would reveal personal information, as defined in the FOI Act, about an individual. I am satisfied that the name, title and signature constitute personal information that is, on its face, exempt under clause 3(1). As the access applicant has not sought to be joined as a party to this complaint and has made no submissions in respect of it, there is nothing before me to establish that any of the limits on exemption applies. Clearly, it is practicable for the agency to delete that matter and to give access to an edited copy of the disputed document.
