

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

**File Ref: F1801999
Decision Ref: D0381999**

Participants: **The Buddhist Society of WA (Inc)**
Complainant

- and -

Main Roads Department
First Respondent

- and -

BGC Contracting Pty Ltd
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – annual extra mass permits – clause 4(2) – whether information having a commercial value – whether disclosure could destroy or diminish commercial value of information.

Freedom of Information Act 1992 (WA) s.30, Schedule 1 clauses 4(2) and 4(3):

Interpretation Act 1984 s.5

Road Traffic Act 1974 s.111

Vehicle Standards Regulations 1977 r.1401, 1402

Re Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor (1992) 36 FCR 111

Re Public Interest Advocacy Centre and Department of Community Services and Health and Schering Pty Ltd (1991) 23 ALD 714

Re Attorney-General's Department v Cockcroft (1986) 10 FCR 180

Re O'Reilly and Queensland Police Service (1996) 3 QAR 402

DECISION

The decision of the agency is set aside. In substitution it is decided that the document is not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

16 November 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 Main Roads Department ('the agency') to refuse The Buddhist Society of WA (Inc) ('the complainant') access to a document requested by it under the *Freedom of Information Act 1992* ('the FOI Act').
2. On 25 June 1999, the Secretary of the Abbot of the Bodhinyana Buddhist Monastery situated in Kingsbury Drive, Serpentine, on behalf of the complainant, made an application to the agency seeking access under the FOI Act to various documents relating to the use by heavy haulage trucks of Kingsbury Drive as a freight route for the period 1 January 1990 to the present date.
3. The agency granted the complainant access to all but one of the requested documents and claimed that that document is exempt because it contains commercial information. Insufficient reasons were given by the agency to justify the withholding of that document.
4. On 24 August 1999, the Abbot of the Monastery, on behalf of complainant, sought internal review of the agency's decision to refuse access to that one document. The principal officer of the agency conducted the internal review and confirmed the initial decision to refuse access to the document on the basis that it is commercially sensitive to a third party and disclosure could reasonably be expected to have an adverse effect on the affairs of the third party. Clause 4(2) and (3) of Schedule 1 to the FOI Act were cited as grounds for the withholding of that document, but insufficient reasons were given for that decision. On 22 September 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. I obtained the disputed document from the agency. On 5 October 1999, my Investigations Officer and I met with representatives of the agency. I informed the representatives that neither of the agency's notices of decision complied with the requirements of s.30 of the FOI Act. I also informed them that it was not clear to me which parts of the document were claimed to be exempt under clause 4(2) and which were claimed to be exempt under clause 4(3).
6. Subsequently, the agency provided a written submission to me containing its reasons for the refusal of access to the document on the ground that the document is exempt under clause 4(2) of Schedule 1 to the FOI Act. I also received a submission in writing from a third party, BGC Contracting Pty Ltd, trading as BGC Transport ('the third party'), and my Investigations Officer met

with representatives of the third party to discuss its claims that the document is exempt under clause 4(2). The third party requested to be joined as a party to this matter and was so joined.

7. On 26 October 1999, after considering the material before me, I informed the parties of my preliminary view of this complaint, including my reasons. It was my preliminary view that the disputed document may not be exempt. The third party responded to my letter with a further submission. Nothing was received from the agency.

THE DISPUTED DOCUMENT

8. The disputed document is an Annual Extra Mass Permit issued to the third party on 30 November 1998 by the Commissioner of Main Roads. The permit consists of 5 pages in total and contains conditions attached to the grant and endorsements of routes approved for travel by the nominated vehicle type.

THE EXEMPTION

9. Clause 4(2) 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.”

10. Clause 4(2) is concerned with protecting from disclosure matter which is not a trade secret, but which has “commercial value” to a person. The word “person” includes a public body, company, or association or body of persons, corporate or unincorporate: see s.5, *Interpretation Act 1984*. I do not consider that the commercial value of the matter under consideration needs to be quantified or assessed in order to satisfy the requirements of clause 4(2)(a). However, 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 for exemption under clause 4(2).
11. As to the requirements of clause 4(2)(a), I am of the view that matter has a “commercial value” if it is valuable for the purpose of carrying on the commercial activities of any person. I also consider that it is by reference to the

context in which that information is used, or exists, that the question of whether it has a commercial value to a person may be determined.

12. Clause 4(2)(b) is concerned with the effects of disclosure, not with the reasonableness of a claimant's behaviour: see *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor* (1992) 36 FCR 111 at p.123. Further, if the information in dispute is already in the public domain, then any commercial value it may have could not be further diminished by its disclosure under the FOI Act: see *Re Public Interest Advocacy Centre and Department of Community Services and Health and Schering Pty Ltd* (1991) 23 ALD 714 at 724.

The agency's submission

13. The agency informed me that the trucking industry is highly competitive and that there exists in the industry a general understanding that permits are considered commercially sensitive. The agency decided that the disputed document should not be disclosed for the following reasons:
 - the document identifies unique combinations of routes and vehicles used by the third party;
 - it provides a corporate summary of the third party's operations for a particular vehicle combination;
 - the information in the disputed document could be used to identify work packages and the third party's customers for the work packages; and
 - that information could be used by a competitor in the trucking industry to identify the third party's costs and to reconfigure its own vehicles on similar routes and to offer discount rates to the third party's customers, and that disclosure could, therefore, reasonably be expected to destroy or diminish the commercial value of the information to the third party.

The third party's submission

14. The third party submits that a specific configuration may be the product of some years of testing and attempts at convincing the agency that the configuration suggested for a particular route ought to be adopted. The third party submits that such information is of commercial value because it is the product of some time and effort which it should not have to repeat, and which its competitors would have to incur in order to achieve the same result, unless access to the disputed document is obtained through the FOI Act.
15. The third party informs me that the trucking industry is highly competitive and routes for heavy haulage vehicles are highly regulated because of the need to monitor the load-carrying capacities of vehicles on roads, for a variety of reasons including safety (for example, to ensure that certain loads do not travel on bridges which cannot support such loads), and the effect on local amenity (such as tourist attractions or quiet neighbourhoods).

16. However, I am informed that trucks may be reconfigured to be acceptable to the agency for the type of load being carried and the manner in which it is carried. The third party submits that, therefore, the manner in which its trucks are configured is information that is of commercial value to it. It is submitted that the disclosure of that information would enable a competitor to reconfigure its fleet and, by calculating costs based on a new configuration, could approach the third party's clients and offer a better deal to the disadvantage of the third party.
17. The third party also submits that, even if a document does not contain that kind of commercially valuable information, its disclosure in conjunction with other documents that might be available or accessible could, nonetheless, have the effect of diminishing the commercial value of that information to the third party. The third party also informed me that, as far as it is aware, there are three other transport companies operating in the same market in Perth in which it operates.

The complainant's submission

18. The complainant submits that it is a religious order and is not in the heavy haulage business or in competition with the third party. However, disclosure of a document under the FOI Act is considered to be disclosure "to the world at large" and the use to which the document might be put by the complainant or its reasons for seeking access are not relevant to the question that I must decide concerning the exempt nature or otherwise of that document.

Permits under the *Vehicle Standards Regulations 1977*

19. The *Vehicle Standards Regulations 1977* ('the Regulations') are made pursuant to s.111 of the *Road Traffic Act 1974*. The Regulations prescribe, among other things, the mass limits of vehicles, tyre and axle mass limits, aggregate mass and gross combination mass of vehicles, recognised axles and modifications that may be made to certain vehicles. Notwithstanding anything in the Regulations, under regulation 1402, the Commissioner of Main Roads may issue a permit specifying excess mass limits and conditions upon payment of the prescribed fee.
20. My inquiries with the agency established that the Commissioner of Main Roads issues two types of permits. They are: single trip permits, of which approximately 30,000 are issued annually; and annual permits, of which between 3-5,000 are issued annually. The agency produced a selection of those permits for my inspection.

Clause 4(2)(a) – information that has a commercial value to a person

21. I am not persuaded that the expenditure of time and money and effort by the third party is a sufficient indicator that information has commercial value. It may be a factor to be taken into account, but that is all. In any case, other than the assertion that time and effort has been spent in reaching an acceptable configuration, there is nothing before me from the third party to support the claim that that factor alone justifies a finding that the document is exempt as claimed.

22. From my examination of the selection of permits produced to me, it appears to me that a number of trucking companies are in a similar position to that of the third party in that those companies have reconfigured vehicles to permit the carrying of extra loads, either equal to or greater than those of the third party. I have some difficulty, therefore, in accepting the third party's submission that information about the specific configuration of its vehicles that is contained in the disputed document thereby ensures a competitive advantage over other truck operators who do not operate vehicles having the same configuration.
23. Whilst I accept, however, that the particular configuration devised by the third party might have a commercial value to it in terms of it being valuable for the purpose of carrying on its commercial activities, it appears to me that that commercial value is not dependent upon the secrecy of the information. Were it information which gave the third party a competitive advantage by virtue of being unique to the third party, then its commercial value might be, at least in part, dependent on its continued secrecy. However, it seems to me, from my inspection of the sample permits produced to me, that there is nothing unique about the information such that its commercial value might lie, in part, in its secrecy.
24. In my view, the commercial value of information about the third party's vehicle configurations must be ascertained by reference to the context in which that information exists or is used by the third party. Clearly, the operation of heavy haulage vehicles is a business that occurs on public roads and in the public domain, as it were. It is not a business that operates behind closed doors or out of the public gaze. It seems to me that the public nature of the trucking industry means that the kinds of vehicles in operation on public roads and highways, including the tyre, axle and laden mass of such vehicles is information that is also in the public domain. For example, under regulation 1401(1) of the Regulations, goods vehicles are required to display the tare of the vehicle, aggregate mass and combination mass to be displayed. It seems to me that, once those vehicles were in operation in the public domain, as it were, then it would be readily open to any competitor or other trucking company to note the particular configuration of the third party's vehicles and to adjust its own vehicle configurations accordingly. That would seem to be borne out by the sample of permits produced for my inspection.

Clause 4(2)(b) – destruction or diminution of commercial value by disclosure

25. In those circumstances, in my view, the continuing commercial value of the information, if any, could not reasonably be expected to be destroyed or diminished by the disclosure of the disputed document. The value, if any, of the information dependent on its confidentiality would seem to me to have been destroyed or diminished once the vehicles were in operation on public roads. Any diminution of the value of that information would not, therefore, result from the disclosure of the disputed document. Further, in my view, the information in the disputed documents concerning the approved vehicle routes is hardly information that is secret. It is information that could readily be ascertained by anyone, including a competitor, by merely noting the routes

taken by the third party's vehicles and, if necessary, following those vehicles to and from their destinations.

26. The third party disputes that such information is in the public domain and submits that, if disclosure of documents under the FOI Act would enable a party to find out things about a competitor without spending time and effort to do so, then the commercial value of the information would be destroyed or diminished because a substantial hurdle would be removed that otherwise provides protection for the third party.
27. I accept that the exact information in the disputed document is not in the public domain. There is not, for example, another document of which I am aware that contains that same information. However, I consider that the very information that the third party is seeking to protect from disclosure has already been effectively disclosed by the very existence of the third party's trucks on the roads travelling to and from various destinations in the course of its business. In my view, disclosure of the disputed documents would not reveal that information. It has already been revealed by the operation of the trucks in accordance with the permit.
28. If the trucking industry is as competitive as the agency and the third party claim, then I do not consider that it would be difficult for a truck operator to readily deduce the contents of a particular permit merely by noting the particular axle and tyre configuration of another vehicle. Even if that information were not otherwise ascertainable, on the basis of my inspection of the sample range of permits produced to me, I am not persuaded that it is particularly novel or unique to the third party such that it gives the third party any commercial advantage that might be destroyed or diminished by its disclosure and therefore requiring its ongoing confidentiality.
29. The third party also submits that, if the information has a commercial value, then its disclosure would reasonably be expected to diminish that commercial value, irrespective of whether there would be other means of ascertaining the information. However, I do not consider that to be the appropriate test under clause 4(2). The phrase "*could reasonably be expected*" appears in a number of the exemption clauses in the FOI Act. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, at 190, the Full Federal Court said that the words "*could reasonably be expected to prejudice the future supply of information*" in s.43(1)(c)(ii) of the Commonwealth FOI Act were intended to receive their ordinary meaning and required a judgement 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 that those who would otherwise supply information of the relevant kind to the Commonwealth would decline to do so if the documents in question were disclosed.
30. In the context of the exemption in clause 4(2), I consider that the phrase "*could reasonably be expected*" requires a judgement to be made as to whether it is reasonable, as distinct from something irrational, absurd or ridiculous, to expect the commercial value of the information in the disputed document to be

destroyed or diminished by disclosure. For the reasons given, I do not consider that there is a reasonable basis for that expectation.

31. The third party also claims that, as a matter of commonsense, it is easy to understand that two or three separate applications for the release of information, each of which does not request information which of itself has commercial value, but which collectively do have significant commercial value means that none of that information should be released.
32. I have considered the third party's claims concerning the cumulative effects of disclosure of the disputed document together with other information that might be accessible. That claim is also known as the "mosaic theory". It was discussed by the Queensland Information Commissioner in *Re O'Reilly and Queensland Police Service* (1996) 3 QAR 402, at paragraphs 18-22. In *Re O'Reilly*, the Commissioner made the point that the mosaic theory does not give rise to any separate exemption and that it can only be used to establish a factual basis for satisfaction of one of the exemption provisions in the FOI Act. I agree with those comments. Based on the material before me, I am satisfied that there is no factual basis for its application in the circumstances of this complaint.

Finding

33. In my view, neither the agency nor the third party has established a valid claim for exemption under clause 4(2). Accordingly, I find that the disputed document is not exempt.
