

YERILLA GEMS AND MINERALS/ENERGY

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

**File Ref: 96081
Decision Ref: D05896**

Participants:

**Yerilla Gems Pty Ltd
Gembank Limited
WA Gem Explorers Pty Ltd**
Complainants

- and -

Department of Minerals and Energy
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - reverse FOI complaint - complaint by a third party against a decision of an agency to give access to an access applicant - documents relating to the production and mining of chrysoprase - clause 4 - commercial or business information - clause 1 - documents which reveal the deliberations or decisions of an Executive body - clause 3 - personal information about third parties - clause 5 - whether documents contain matter which could if disclosed be reasonably expected to reveal the investigation of any contravention or possible contravention of the law - clause 7 - legal professional privilege - clause 8 - confidential communications - section 24 - access to edited copies of documents - section 102 - the onus of the third party to establish that access should not be given.

Freedom of Information Act 1992 (WA) ss. 33(2), 72(1)(b), 75(1), 102(2); Schedule 1 clauses 1(1)(d), 3, 4, 5(1)(b), 7, 8, 10(3).

Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310).

Re Slater and State Housing Commission of Western Australia (Information Commissioner, WA, 22 February 1996, unreported, D01396).

Grant v Downs (1976) 135 CLR 674.

DECISION

The decision of the agency is confirmed. The disputed documents are not exempt.

**B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER**

1st November 1996

REASONS FOR DECISION

BACKGROUND

1. This complaint arises out of a decision of the Department of Minerals and Energy ('the agency') to give an access applicant access to documents of the agency requested by the access applicant under the provisions of the *Freedom of Information Act 1992* ('the FOI Act'). In this instance, the complainants are third parties who object to the disclosure of the requested documents. The background to this matter is as follows.
2. On 20 February 1996, access was sought to documents held by the agency relating to the production and mining of chrysoprase by Yerilla Gems Pty Ltd, Gembank Limited and WA Gem Explorers Pty Ltd ('the complainants'). After receiving the FOI application and pursuant to s.33(2) of the FOI Act, the agency sought the views of the complainants before making its decision on whether to give access to the requested documents.
3. In order to assist the complainants in that regard, the agency provided copies of the relevant documents and invited the complainants to identify the particular matter in those documents that was considered commercially sensitive and to specify the clause or clauses under which that matter was considered to be exempt matter.
4. Without identifying the specific information considered to be exempt matter, one of the complainants, Gembank Limited ('Gembank'), informed the agency on behalf of all the complainants that it objected on principle to the disclosure of the documents forwarded to it by the agency, and claimed commercial confidentiality under clause 4 of Schedule 1 to the FOI Act as the basis for its objection.
5. Gembank also submitted that a number of the documents had been made available to the Minister for Mines in April 1995, following discovery by the complainants in the course of litigation then before the Federal Court of Australia. On that basis, Gembank contended that the documents are privileged and ought not be made available to any party without the consent of the Federal Court.
6. On 17 April 1996, the agency decided to give the access applicant access to some of the requested documents; to give access to edited copies of others with exempt matter deleted; and to refuse access to the remainder. However, the agency deferred the giving of access to allow the complainants to exercise their third party rights of review under the FOI Act. Accordingly, on 26 April 1996, solicitors for the complainants sought internal review of the agency's decision. On 10 May 1996, the agency's internal review officer confirmed the agency's initial decision and, on 20 May 1996, solicitors for the complainants lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. After receiving this complainant and pursuant to my powers under ss.75(1) and 72(1)(b) of the FOI Act, I obtained copies of the disputed documents from the agency, together with the agency's FOI file maintained in respect of this matter. My Investigations Officer met with the parties on 1 July 1996, to establish procedures for the external review and a time-frame for dealing with this complaint which involved a significant number of documents. At that meeting, the complainants were advised of the onus on them under s.102(2) to establish that access should not be given to the documents in question.
8. On 12 July 1996, I received a submission from the complainants which dealt with the complainants' objections in respect of the disputed documents which were listed and described on a schedule prepared by my office and provided to the parties. Initially, 124 documents were in dispute. However, following consultation, the access applicant withdrew from the request in relation to 8 documents; the complainants withdrew their objections to disclosure of 10 documents; and both the access applicant and the complainants withdrew their respective concerns in respect of parts of 5 other documents.
9. On 23 September 1996, I provided the parties with my preliminary view and reasons for that view. Based on the material before me, it was my preliminary view that, pursuant to the onus under s.102(2) of the FOI Act, the complainants had not satisfied me that the documents are exempt and that the access applicant should not be given access to them. Accordingly, 106 documents or parts of documents remain in dispute in this matter. Those documents are listed and described in a revised schedule which is attached to this decision. In these reasons for decision I refer to the disputed documents by number according to that schedule.

THE MATTER IN DISPUTE

10. The agency did not provide the access applicant with the details of the matter which it proposed to delete from certain of the disputed documents on the ground that that matter is exempt matter under clauses 3 and 4 of Schedule 1 to the FOI Act. However, the access applicant does not dispute the agency's decision to refuse access to that matter and did not pursue its rights in respect of that matter. Of the 106 documents remaining in dispute, the agency decided to disclose all the matter contained in 19 of those documents and to give access to edited copies of the remaining 87 documents.
11. The complainants did not specifically identify the matter in the disputed documents of which they object to disclosure. I must, therefore, proceed to determine this complaint on the basis that the matter in dispute is all that matter in the disputed documents described in the schedule attached to these reasons for decision, which the agency proposes to disclose to the access applicant. Clearly, the matter which the agency proposes not to disclose is not in dispute. For convenience, where I refer in the reasons to the 19 disputed documents and the

disputed matter in the other 87 documents collectively, I refer to them as “the disputed documents”.

THE COMPLAINANTS’ ONUS UNDER S.102(2)

12. 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 not be made. Since the complainants oppose the agency’s decision to give access to the documents, the onus lies on the complainants to satisfy me on that point.
13. In order to displace the access applicant’s statutory right of access under the FOI Act, the complainants must establish a case for exemption according to the exemption clauses in the FOI Act. The minimum requirement is that there must be some probative material provided to me to support the claims for exemption, and merely expressing an objection in the terms of an exemption clause or clauses, is insufficient for that purpose. On that point, I refer to the comments of Owen J in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310), where His Honour said, at p.44:

"How can the [Information] 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 reasoned decision-maker."

THE EXEMPTIONS

14. The complainants, in their initial objection to the agency, claimed that the disputed documents are exempt under one or more of clauses 4(1), 4(2) and 4(3) of Schedule 1 to the FOI Act. In their submission to me, the complainants maintain that claim and make additional claims for exemption under clause 1(1)(d). Further, although not specifically cited, the complainants appear to me to have also alluded to exemption claims under clauses 3, 5(1)(b), 7 and 8 of Schedule 1 to the FOI Act. Despite being specifically invited by me to do so, the complainants have not identified with any particularity the matter claimed to be exempt on each ground suggested by them, nor addressed the requirements of each exemption clause claimed or suggested. Although I deal below with each of

the claims in turn, on the basis of the material before me I do not consider that the complainants have satisfied the onus which they bear under s.102(2) of the FOI Act to establish that access should not be given. My reasons follow.

Clause 4 - Commercial or business information

15. Clause 4, so far as is relevant, provides:

"4. Commercial or business information

(1) *Matter is exempt matter if its disclosure would reveal trade secrets of a person.*

(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."*

16. In my view, it is clear from the specific words of clause 4 that the exemptions in each of the sub-clauses (1), (2) and (3) are directed at protecting different types of information from disclosure under the FOI Act. As I have said before, whilst it is open to a complainant or an agency to make alternative claims for exemption for documents, or parts of documents, under more than one of those sub-clauses, the same information cannot be exempt under more than one of those sub-

clauses. However, different matter within a document may be exempt under different sub-clauses of clause 4.

(a) Clause 4(1)

17. In my view, in order to establish an exemption under clause 4(1), the documents in question must contain some information which could clearly be considered to be a trade secret of a person (including an incorporated body). However, on the basis of my examination of the disputed documents, and in the absence of any assistance from the complainants in identifying the particular matter in the documents they consider their trade secrets, I have been unable to identify any matter which could constitute a trade secret. Accordingly, I find that the disputed documents are not exempt under clause 4(1).

(b) Clause 4(2)

18. Clause 4(2) is concerned with the protection of matter which is not a trade secret but which has a commercial value to a person which value could reasonably be expected to be destroyed or diminished if disclosed. However, I do not consider that the commercial value of matter needs to be quantified or assessed in order for it to be covered by this sub-clause. The exemption consists of two parts and both parts (a) and (b) must be satisfied in order to establish a *prima facie* claim for exemption under clause 4(2).
19. In my decision in *Re Slater and State Housing Commission of Western Australia* (22 February 1996, unreported, D01396), I considered the meaning of the words “commercial value” in the context of a claim for exemption under clause 10(3) of Schedule 1 to the FOI Act. As clause 10(3) is in similar terms to clause 4(2), except that it applies to the commercial activities of agencies, I consider the discussion in *Re Slater*, at paragraphs 10-13, to be equally applicable in this instance. Accordingly, I consider that matter has a commercial value if it is valuable for the purpose of carrying on the commercial or business activities of a person. Further, it is by reference to the context in which the matter is used, or exists, that the question of whether it has a commercial value can be determined.
20. The disputed documents have largely been created by the agency. They contain matter concerning the nature of the relationship between the agency and the complainants. Whilst I am prepared to accept that information describing aspects of a commercial or business relationship between parties may, in certain circumstances, have a commercial value, I am not satisfied that that is the case in respect of the disputed documents.
21. It was submitted on behalf of the complainants that some of the disputed documents contain information about Gembank’s customers, world wide markets and prices for chrysoprase which is information having a commercial value to the complainants and that disclosure could reasonably be expected to destroy or diminish that value. However, Gembank did not identify the

particular information or documents in question, but simply made a “class claim” for exemption for all the documents.

22. As the complainants have neither identified the sensitive matter in the disputed documents, nor provided material to persuade me that disclosure of that matter could reasonably be expected to destroy or diminish its commercial value, I consider the complainants have not discharged the onus they bear under s.102(2) of the FOI Act. I find the disputed documents are not exempt under clause 4(2).

(c) Clause 4(3)

23. The exemption in clause 4(3) is more general in its terms than those provided by clauses 4(1) and 4(2). In order to establish the exemption under clause 4(3), the matter must be information of the type described in sub-clause 4(3)(a) and it must be shown either that disclosure of that information could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of a person, or that disclosure could reasonably be expected to prejudice the future supply of that kind of information to the Government or to an agency.
24. Having examined the disputed documents, I consider that they contain some matter which is of the type described in sub-clause 4(3)(a). However, there is nothing in the documents themselves nor the submissions of the complainants which persuades me that the requirements of sub-clause 4(3)(b) have been established. Despite the complainants being specifically invited by me to provide it, there is simply nothing before me to indicate upon which alternative the complainants rely, nor is there material to establish real and substantial grounds for expecting any adverse effects from disclosure or any prejudice to the supply of that kind of information to the agency in the future. Accordingly, I find that the disputed documents are not exempt under clause 4(3).

Other grounds for exemption

(a) Clause 1

25. The complainants submit that Documents 59 and 65 are exempt under clause 1(1)(d)(i) because they were prepared by the agency for the purpose of briefing the Minister for Mines. However, clause 1(1)(d) is in the following terms:

“1. Cabinet and Executive Council

Exemptions

(1) Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body and, without limiting that general description, matter is exempt matter if it -

(a)...

(b)...

(c)...

(d) was prepared to brief a Minister in relation to matters -

- (i) prepared for possible submission to an Executive body, or
- (ii) the subject of consultation among Ministers relating to the making of a Government decision of a kind generally made by an Executive body or the formulation of a Government policy of a kind generally endorsed by an Executive body.”

26. Documents 59 and 65 are internal memoranda from officers of the agency to the Acting Director General of the agency. In my view, there is nothing on the face of either of those documents to suggest that they were prepared by the agency for the purposes suggested by the complainants. In any event, there is nothing before me to establish that those documents were prepared for possible submission to an Executive body, or that the matter in those documents relates to any issue that requires a decision or consideration by an Executive body, or to the making of any Government decision or to the formulation of Government policy of any kind. In the absence of such material, I reject the complainants' submission for exemption under that clause. Accordingly, I find that Documents 59 and 65 are not exempt under clause 1(1)(d).

(b) Clause 3

27. The complainants also submit that 60 of the disputed documents contain personal information about unnamed third parties and, accordingly, allude to a claim for exemption under clause 3(1). The agency proposes to delete matter which comprises personal information about third parties and which is, *prima facie*, exempt matter under clause 3(1). On the basis of my examination of the disputed documents, edited in the manner proposed by the agency, I am unable to identify any remaining information that may be considered to be “personal information” as defined in the Glossary in Schedule 2 to the FOI Act, about third parties (other than information concerning officers of the agency which I consider comprises prescribed details in accordance with the limitation in clause 3(3) and which is, therefore, not exempt).

28. In the absence of any material from the complainants to support their claims under clause 3(1), and for the reasons previously given, I find that the disputed documents are not exempt under clause 3(1).

(c) Clause 5

29. The complainants also submit that Documents 59 and 65 deal with an investigation into a possible contravention of the Mining Act. Documents which could reasonably be expected to reveal the investigation of a contravention or possible contravention of the law in a particular case, if disclosed, are exempt

under clause 5(1)(b). However, it appears to me from my inspection of those documents that they were created by the agency following an inspection of the particular mining lease because officers of the agency were of the view that the lessee had not complied with certain conditions of the mining lease. If the inquiries of the agency in respect of that possible contravention can be characterised as an investigation, I consider, nonetheless, that the investigation concerned a possible breach of an agreement, the lease, rather than a possible contravention of any law. In the absence of any material from the complainants to persuade me otherwise, I find that Documents 59 and 65 are not exempt under clause 5(1)(b).

(d) Clause 7

30. The complainants claim that Documents 59, 65, 223, 224, 229, 241, 248, 342, 343, 389A and 428 are subject to legal professional privilege because the complainants are involved in pending proceedings in the Federal Court in New South Wales. Clause 7(1) of Schedule 1 to the FOI Act exempts from disclosure documents which would be privileged from production in legal proceedings on the ground of legal professional privilege.
31. The requirements to establish that a document would be privileged from production in legal proceedings on the ground of legal professional privilege are well established and the question turns essentially on the purpose for which the document was created: *Grant v Downs* (1976) 135 CLR 674. On the basis of my examination of those documents and the limited submissions of the complainants, I do not consider that a claim for legal professional privilege has been established. It is not apparent from the documents themselves that they are of a kind that would be privileged according to the test in *Grant and Downs*, and to merely claim that they are privileged because of pending court proceedings is, in my view, insufficient. Accordingly, on the information before me, I find that Documents 59, 65, 223, 224, 229, 241, 248, 342, 343, 389A and 428 are not exempt under clause 7.

(e) Clause 8

32. The complainants claim that Documents 59, 65 and 414A contain information of a confidential nature which was obtained in confidence. If that were the case, and it could also be shown that disclosure could reasonably be expected to prejudice the future supply of that kind of information to the agency, then an exemption under clause 8(2) of Schedule 1 to the FOI Act may apply.
33. However, there is no material before me that establishes the confidential nature of the information in Documents 59, 65 and 414A, nor is there any material that would constitute real and substantial grounds for expecting any prejudice to the future supply of such information to the agency if those documents were to be disclosed to the access applicant. In the absence of any such material, and for

the reasons already given, I find that Documents 59, 65 and 414A are not exempt under clause 8.
