

Decision D0162021 – Published in note form only

Re Onslow Resources Limited and Department of Jobs, Tourism, Science and Innovation [2021] WAICmr 16

Date of Decision: 23 December 2021

Freedom of Information Act 1992 (WA): Schedule 1, clause 4(3)

On 28 May 2021 Onslow Resources Limited (**the complainant**) applied to the Department of Jobs, Tourism, Science and Innovation (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to a specific document that had been identified in a previous application for access to documents (**the disputed document**). The disputed document contains the notes of a meeting that took place, on 22 March 2011, between the former Department of State Development, and Onslow Salt Pty Ltd.

In a previous decision, the agency had refused access to some of the information in the disputed document on the ground it was out of scope of that particular access application. Accordingly, in this matter the complainant sought access to the document, rather than particular information that may be contained in the document.

By letters dated 3 June 2021, the agency sought the views of third parties, pursuant to section 33 of the FOI Act.

By notice of decision dated 12 July 2021, the agency decided to give the complainant access to an edited copy of the disputed document. On 13 July 2021 the complainant applied for internal review of the agency's decision. By letter dated 27 July 2021, the agency varied its decision and gave the complainant access to additional information in the disputed document.

By letter dated 10 August 2021 the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision. Following receipt of the matter, the agency produced to the Commissioner its FOI file maintained in respect of the complainant's access application, together with a copy of the disputed document.

The agency claimed that the information it had deleted in the disputed document (**the disputed information**) was exempt under clause 4(3) of Schedule 1 to the FOI Act.

On 27 October 2021, after considering the material then before her, the Commissioner provided the parties with her preliminary view of the matter. It was her preliminary view that the disputed information was not exempt under clause 4(3) of Schedule 1 to the FOI Act.

The agency was invited to accept the Commissioner's preliminary view or to provide further submissions. By letter dated 11 November 2021, the agency informed the Commissioner that it did not accept the Commissioner's preliminary view and made further submissions.

After considering the agency's further submissions, the Commissioner was not dissuaded from her preliminary view. Accordingly, she invited the third parties to be joined to the matter and to make submissions in relation to clause 4 of Schedule 1 to the FOI Act. Onslow Salt Pty Ltd (**the third party**) elected to be joined to the matter and made submissions to the

Commissioner. Another third party raised no objections to the disclosure of the disputed information.

The exemption in clause 4(3) is concerned with protecting from disclosure information about the business, professional, commercial or financial affairs of a person. 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. If the requirements of both parts (a) and (b) are satisfied, the application of the limit on the exemption in clause 4(7), the public interest, must also be considered.

Clause 4(3)(a) provides that matter is exempt matter if its disclosure would reveal information about the business, professional, commercial or financial affairs of a person. The Commissioner accepted that, as the disputed information related to the lease of the third party, the disputed information, if disclosed, would reveal information about the business affairs of the complainant. Therefore, the Commissioner considered that the requirements of clause 4(3)(a) had been met.

Clause 4(3)(b) provides that if disclosure of the matter described in clause 4(3)(a) could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of information of that kind to the Government or to an agency, then that matter will be exempt.

The Commissioner considered that, as the complainant is required by statute to provide the information in the disputed document to the agency, it was not open to the complainant to refuse to provide information of that kind to the agency. Accordingly, the Commissioner was not persuaded that disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or an agency.

The Commissioner considered that although the agency had made general statements about the clause 4(3) exemption, it had not provided submissions about how disclosure of the information in the disputed document could reasonably be expected to have an adverse effect on the affairs of the third party. Similarly, the third party made submissions about disclosure of information generally, but did not explain how disclosure of the particular information could have the effects claimed.

Taking into account all of the information before her, including the fact that the meeting took place more than ten years ago, the Commissioner was not persuaded that disclosure of the disputed information could reasonably be expected to have an adverse effect on the affairs of the third party.

As the Commissioner considered that the requirements of clause 4(3)(b) had not been met she was not required to consider the limit on the exemption in clause 4(7) and did not do so.

The Commissioner set aside the agency's decision and, in substitution, found that the disputed information is not exempt under clause 4(3) of Schedule 1 to the FOI Act.