Office of the Information Commissioner
Western Australia

Decision D0042026 – published in note form only

Re Kabay and City of Armadale [2026] WAICmr 4

Date of Decision: 30 April 2026

***Freedom of Information Act 1992* (WA): Schedule 1, clauses 4(1), 4(2), 4(3)**

Decision

1. For the reasons given to the parties and summarised below, the Information Access Deputy Commissioner (**Deputy Commissioner**) set aside the decision of the City of Armadale (**agency**) to refuse Eduard Kabay (**complainant**) access to a copy of the '2020/21 Financial Year Dieback Program Treatment Cycle Report' (**Report**). In substitution, the Deputy Commissioner found the disputed information in the Report was not exempt under clauses 4(1), 4(2) or 4(3) of Schedule 1 to the *Freedom of Information Act 1992* (WA) **(FOI Act)** and should be released.

Background

2. On 14 November 2021, the complainant applied to the agency under the FOI Act for access to, among other things, 2020/21 reports (draft and finals) on dieback management (mapping and treatments) of selected Armadale bush reserves carried out during the summer of 2020 and 2021.
3. In its initial decision, which was confirmed by internal review, the agency identified the Report and refused access in full on the basis it was exempt under clause 4(2) of Schedule 1 to the FOI Act. A **third party**, Glevan Consulting, also claimed the Report was exempt in full under clause 4(2).
4. During the course of the external review, the agency and third party amended their position and the agency gave the complainant access to an edited copy of the Report with certain information deleted (**disputed information**). Generally, the disputed information consisted of information relating to the volume of chemicals used for dieback treatment, the number of stems injected, the number of syringes used and the total number of stems injected per plant species.
5. The agency and third party argued, in essence, the disputed information was exempt because it had commercial value and disclosure would diminish that value by allowing competitors to reverse engineer the third party's pricing and gain an advantage in future tenders.

Clause 4 – commercial or business information

6. The Deputy Commissioner noted clause 4(2) forms part of three mutually exclusive exemptions in clause 4 of Schedule 1. Information found to be exempt under one subclause cannot also be exempt under one of the other subclauses.[1]

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1 See, e.g. *Re Rogers and Water Corporation* [2004] WAICmr 8, [37].

7. Although the agency and third party focused only on clause 4(2), on external merits review the Information Commissioner or Deputy Commissioner may decide any matter in relation to an access application that could have been decided by the agency.[2] Accordingly, it was not determinative that submissions were framed by reference to one clause rather than another. The same factual material may support exemption under different provisions, even though only one exemption ultimately applies. In light of this, each of the clause 4 exemptions were considered.

Clause 4(1) does not apply to the disputed information

8. Clause 4(1) of Schedule 1 to the FOI Act provides matter is exempt if its disclosure would reveal trade secrets of a person. The factors that may be relevant in determining the existence of a trade secret for the purposes of clause 4(1) are well established.[3]

9. The Deputy Commissioner found the disputed information contained no trade secrets. Although the agency once referred to the third party's trade secrets, neither it nor the third party identified any secret formula, pattern or device or compilation used in the third party's business.

Clause 4(2) does not apply to the disputed information

10. Clause 4(2) of Schedule 1 to the FOI Act provides matter is exempt if its disclosure:
    - would reveal information (other than trade secrets) that has a commercial value to a person; and
    - could reasonably be expected to destroy or diminish that commercial value.

11. The agency and third party claimed the disputed information had commercial value because:
    - the information included details about concentrations, techniques and brands used which would allow competitors to replicate the work;
    - the information was based on a dataset purchased from a previous business;
    - the information was 'essential' to the ongoing profitability of the third party's business as it demonstrated value for money and allowed the customer to verify fair pricing; and
    - the effort invested in collecting and providing detailed proof of work could reveal sensitive aspects of the third party's pricing structure, particularly given the total contract price is publicly available.

12. The principles for determining whether information has commercial value are well established.[4] The Deputy Commissioner was not satisfied the disputed information had commercial value for the following reasons:
    - the application concentrations, techniques and chemicals described in the Report aligned with publicly available guidelines and standards, industry practice at the time, and the third party's advice that its methodology followed published best-practice standards;
    - the investment of time and money alone does not indicate commercial value. If it were, most business documents would have commercial value merely because resources were expended in their creation or acquisition;[5]

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2 FOI Act, s 76(1)(b). See also *Pearlman v WA A/Information Commissioner* [2019] WASC 257, [74]-[76].

3 *Re Greg Rowe & Associates and Minister for Planning* [2001] WAICmr 4, [14]-[16]; *Re West Australian Newspapers Ltd and Salaries and Allowances Tribunal* [2007] WAICmr 20, [97].

4 *Re West Australian Newspapers Limited and Salaries and Allowances Tribunal* [2007] WAICmr 20, [115]-[125]; *Re McGowan and Minister for Regional Development; Lands and Mineralogy Pty Ltd* [2011] WAICmr 2, [33].

5 *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, [52].

- although the third party claimed to have acquired datasets through a business acquisition, it was unclear how the disputed information derived from them. It instead reflected work performed under the services contract; and
- demonstrating value for money and fair pricing were addressed through the tender process. A post-completion report is not necessary to achieve this.

13. In light of the above, there was no need to consider whether disclosure could reasonably be expected to destroy or diminish commercial value.

Clause 4(3) does not apply to the disputed information

14. Clause 4(3) of Schedule 1 to the FOI Act provides matter is exempt if its disclosure:
    - would reveal information about the business, professional, commercial or financial affairs of a person;[6] and
    - 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.
15. Even where both of those criteria are satisfied, matter is not exempt if its disclosure is, on balance, in the public interest (clause 4(7)).

Disputed information relates to business affairs of the third party

16. 'Business affairs' includes the affairs of an undertaking carried on in an organised manner for the purpose of obtaining profit or gain (whether or not they actually be obtained)[7] or matters impinging on the conduct or operations of that undertaking.[8] The Deputy Commissioner found the disputed information concerned the third party's business affairs as it related to services the third party delivered in the course of its business.

Disclosure will not have an adverse effect on business or commercial affairs

17. A key issue in the matter was whether disclosure of the disputed information could reasonably be expected to have an adverse effect on the third party's business affairs. An 'adverse effect' will most likely be pecuniary in nature, although not necessarily so.[9]
18. The phrase 'could reasonably be expected to' is given its ordinary meaning by the courts. It requires a decision-maker to assess whether it is reasonable, rather than irrational, absurd or ridiculous, to expect the relevant outcome.[10]
19. The complainant argued the phosphite treatment industry is a non-competitive 'closed shop' made up of a handful of Perth contractors, so disclosure could not have a substantial adverse effect on the third party.
20. The Deputy Commissioner did not accept that argument. Clause 4(3) makes clear that no substantial or significant level of adverse effect is required. Further, the Deputy Commissioner noted the following:[11]
    - whether disclosure could reasonably be expected to have an adverse effect will usually depend on whether the information is capable of causing competitive harm;

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6 The term 'person' includes bodies corporate: *Interpretation Act 1984* (WA), s 5.

7 *Re Oset and Office of Racing and Gaming* [2000] WAICmr 2, [27]. See also *Re Stewart and Department of Transport* (1993) 1 QAR 227; *Re Cannon and Australian Quality Egg Farms Limited* (1994) QAR 491, [73].

8 *Accident Compensation Commission v Croom* [1991] 2 VR 322, 330; *Re Cannon and Australian Quality Egg Farms Limited* (1994) QAR 491, [75].

9 *Re Oset and Office of Racing and Gaming* [2000] WAICmr 2, [31]; *Re Cannon and Australian Quality Egg Farms Limited* (1994) QAR 491, [82].

10 *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167, [60]; *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, 190.

11 *Re Cannon and Australian Quality Egg Farms Limited* (1994) QAR 491, [90], [97].

- a relevant factor is whether the third party operates in a competitive market or holds a monopoly;
- where an entity has a monopoly, it may be difficult to show a reasonable expectation of adverse effect on its business, commercial or financial affairs; and
- however, even entities with a strong market position (short of monopoly) may still be exposed to competition and capable of suffering adverse effects from disclosure.

21. In this case, multiple qualified businesses operated in the State's phosphite treatment industry. As such, the Deputy Commissioner accepted that, even if those businesses (including the third party) held strong market positions, individually or collectively, they still face competition.
22. The third party and agency argued disclosure of the disputed information, when combined with publicly available information (contract award price, industry standards and techniques etc), would advantage competitors by giving 'unacceptable insight' into the third party's pricing structure and enable reverse engineering of its pricing formula.
23. The Deputy Commissioner rejected that argument, finding the Report merely set out what work was undertaken under the contract. Such work was bespoke and site-specific, and the Report did not contain price sensitive information such as:
    - labour or staffing arrangements;
    - hours spent on treatment or intensity of work;
    - overheads or profit margins; or
    - other financially or commercially sensitive details.
24. The disputed information also did not reveal any pricing formula. Any attempt to reverse engineer pricing would be speculative and unreliable given the unknown variables. Accordingly, even with the contract price already public, disclosure could not reasonably be expected to have an adverse effect on the third party's business affairs.[12]

Disclosure will not prejudice the future supply of information of that kind

25. Alternatively, matter may be exempt under clause 4(3) if disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.
26. The third party and agency noted the Report was more detailed than in previous years and the disputed information was provided voluntarily as 'proof of effort' rather than as a tender requirement.
27. The Deputy Commissioner observed that, although a contract may not specify granular reporting requirements, this does not mean disclosure of the disputed information would prejudice future supply of similar information.
28. The disputed information was a factual record of work, and there was no basis to conclude contractors would withhold or minimise reporting of 'proof of work' information in future. This is particularly so as agencies could require it specifically if needed.

Public interest need not be considered in this case

29. In light of the above, it was not necessary to consider the public interest test in clause 4(7).

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12 *Re QMS Certification Services Pty Ltd and Department of Land Administration and Quality Assurance Services* [2000] WAICmr 48, [64].