



## Decision and Reasons for Decision

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**Application Number:** 210716

**Applicant:** AIOI Insurance Co Limited

**Respondent:** Department of Environment and Resource Management

**Third Party:** Ensham Resources Pty Ltd

**Decision Date:** 16 December 2009

**Catchwords:** **FREEDOM OF INFORMATION – section 45(1)(c) of the *Freedom of Information Act 1992* – matter relating to trade secrets, business affairs and research – whether the matter in issue concerns the business affairs of another person – whether disclosure could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government**

**FREEDOM OF INFORMATION – section 46 of the *Freedom of Information Act 1992* – matter communicated in confidence – whether disclosure of the matter in issue would found an action for breach of confidence – whether the matter in issue consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest**

## Contents

REASONS FOR DECISION.....	3
Summary .....	3
Background.....	3
Decision under review .....	4
Matter in issue .....	4
Relevant law .....	4
Section 45(1)(c) of the FOI Act .....	4
Section 46 of the FOI Act.....	5
Findings .....	5
Collection 5 Folio 10 and Collection 13 Folio 30.....	5
Collection 6 Folio 107.....	6
DECISION.....	6

## REASONS FOR DECISION

### Summary

1. For the reasons set out below, I find that the matter remaining in issue in this external review does not qualify for exemption from disclosure under the *Freedom of Information Act 1992* (Qld) (**FOI Act**).

### Background

2. AIOI Insurance Co Limited (**AIOI**) applied to the Department of Natural Resources and Water (now known as the Department of Environment and Resource Management) (**Department**) for access to various documents under the FOI Act.
3. By letter dated 9 January 2009, Ensham Resources Pty Ltd (**Ensham**) applied for external review of the Department's decision in relation to the FOI application (external review 210706). That external review dealt with a number of documents concerning Ensham and was finalised by the issuing of a formal decision on 19 October 2009 (**Decision 210706**).
4. AIOI also applied for external review of the Department's decision (external review 210716). This external review deals with the remaining documents in issue.
5. By letter dated 25 November 2009, I wrote to AIOI to provide a preliminary view in respect of the bulk of the folios in issue in the review. By email dated 14 December 2009, AIOI advised that it accepted the preliminary view.
6. Also by letter dated 25 November 2009, I wrote to Ensham to:
  - provide a preliminary view in relation to three folios in issue
  - invite Ensham to provide any final submissions if it continued to object to disclosure of those three folios.
7. By letter dated 9 December 2009, Ensham responded to the preliminary view letter in the following manner:

*We note your preliminary view that the three folios specified in your letter of 25 November 2009 do not qualify for exemption from disclosure under the Freedom of Information Act 1992 as they are publicly available. Please identify the matters relied on to support this view. In particular, please give details of where the documents can be found in the public domain.*

*We will consider our clients position further upon receipt of the requested information.*

*In the meantime, we repeat and rely on our previous submissions contained in our letter of 9 January 2009 ...*
8. Accordingly, this decision concerns only the three folios which were the subject of the preliminary view provided to Ensham. As Ensham has not made new substantive submissions in this external review and instead repeats and relies upon its submissions made in external review 210706, I will also refer to Decision 210706 which considered the relevant issues in detail.

9. In making this decision, I have taken the following into account:

- the FOI application dated 17 July 2008
- the Department's considered decisions dated 8 October 2008
- the Department's submissions dated 12 December 2008
- information provided by Clayton Utz on behalf of Ensham including Ensham's submissions dated 9 January 2009
- information provided by the Department dated 30 January 2009 and 21 September 2009
- file notes of conversations with staff members of the Department on 15 April 2009 and 2 June 2009
- the matter in issue
- information available on Ensham's website (particularly Ensham's Customer Brochure)
- Decision 210706
- relevant provisions of the FOI Act.

### **Decision under review**

10. The decision under review is the deemed affirmation of the Department's considered decision.

### **Matter in issue**

11. The matter in issue subject of this decision (**Matter in Issue**) comprises 3 documents:

- Collection 5 Folio 10
- Collection 6 Folio 107
- Collection 13 Folio 30.

### **Relevant law**

#### ***Section 45(1)(c) of the FOI Act***

12. Section 45(1)(c) of the FOI Act provides:

**45** ***Matter relating to trade secrets, business affairs and research***

(1) *Matter is exempt matter if—*

...

(c) *its disclosure—*

- (i) *would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and*
- (ii) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;*

*unless its disclosure would, on balance, be in the public interest.*

## **Section 46 of the FOI Act**

13. Section 46(1) of the FOI Act provides:

### **46 Matter communicated in confidence**

(1) *Matter is exempt if—*

- (a) *its disclosure would found an action for breach of confidence;*
- (b) *it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

## **Findings**

14. Ensham submits that the Matter in Issue is exempt from disclosure under sections 45(1)(c) and 46(1) of the FOI Act.<sup>1</sup>
15. In support of its claim, Ensham repeats and relies upon its submissions dated 9 January 2009 made in external review 210706 and which I considered in detail<sup>2</sup> in Decision 210706.
16. As set out in Decision 210706 and in accordance with the relevant law set out above, it is difficult to sustain a claim that information is exempt from disclosure under the FOI Act where that information is publicly available. This is because, ordinarily, the release of information under the FOI Act that is already publicly available cannot reasonably be expected to have an adverse effect on business affairs or prejudice the future supply of information to government.<sup>3</sup> It is also difficult to satisfy the requirements for exemption on the basis of confidentiality where the relevant information is publicly available.<sup>4</sup>
17. I also note that it is not necessary to establish that the Matter in Issue is publicly available in the same form. Rather, for present purposes, it will be sufficient to establish that the information contained within the Matter in Issue is publicly available.

## **Collection 5 Folio 10 and Collection 13 Folio 30**

18. I am satisfied that Ensham has made publicly available a table setting out certain information concerning its international coal market (see page 18 of Ensham's Customer Brochure which is available on Ensham's website).
19. Collection 5 Folio 10 and Collection 13 Folio 30 are almost identical to the table at page 18 of the Customer Brochure. However, I note that the Matter in Issue contains slightly more information than that which is publicly available. Specifically, the publicly available information on the Ensham website ranges from 1994 – 2005 while the Matter in Issue covers the years 1994 – 2007.

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<sup>1</sup> As set out in Ensham's submissions dated 9 January 2009.

<sup>2</sup> Refer to paragraph 44 onwards in that decision.

<sup>3</sup> Thereby precluding satisfaction of the elements required to establish exemption from disclosure under section 45(1)(c) of the FOI Act.

<sup>4</sup> As the information must have 'the necessary quality of confidence' or degree of secrecy for it to be the subject of an obligation of confidence and qualify for exemption from disclosure under section 46(1) of the FOI Act.

20. I have carefully considered whether the additional information (that is, the information for the period 2006 – 2007) may qualify for exemption from disclosure and note that Ensham:
- has made similar information publicly available
  - has not provided any specific submissions in respect of this point.
21. On balance, I find that this information is neither commercially sensitive nor confidential to Ensham and its disclosure would not have an adverse effect.

***Collection 6 Folio 107***

22. I am satisfied that Ensham has made publicly available a diagram showing information about the thickness of relevant coal seams (at page 16 of Ensham's Customer Brochure).
23. Collection 6 Folio 107 is almost identical to the diagram at page 16 of the Customer Brochure although the Matter in Issue contains an additional sentence at the bottom of the page.
24. I have carefully considered the content of this additional sentence and whether it may qualify for exemption from disclosure. In this respect, I note that:
- the additional sentence comprises very general information which is not specific to Ensham or its operations
  - Ensham has not provided any specific submissions in respect of this point
25. On balance, I find that this information is neither commercially sensitive nor confidential to Ensham and its disclosure would not have an adverse effect.
26. On the basis of the matters set out above, I am satisfied that the Matter in Issue does not qualify for exemption from disclosure under sections 45(1)(c) or 46(1) of the FOI Act.

**DECISION**

27. For the reasons set out above, I set aside the Department's decision and find that the Matter in Issue is not exempt from disclosure under the FOI Act.
28. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

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**Assistant Commissioner Henry**

**Date: 16 December 2009**