‘CB’ and Australian Pesticides and Veterinary Medicines Authority [2014] AICmr 63
(24 June 2014)

Decision and reasons for decision of
Freedom of Information Commissioner, Dr James Popple

Applicant: ‘CB’
Respondent: Australian Pesticides and Veterinary Medicine Authority
Decision date: 24 June 2014
Application number: MR12/00061

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Summary

1. I affirm the access grant decision of the Australian Pesticides and Veterinary Medicines Authority (the APVMA) of 16 January 2012.

Background

2. On 13 September 2011, Creepy Crawly Pest Control Pty Ltd (the FOI applicant) applied to the APVMA for access to a ‘[c]opy of submission from [a named company] to the Australian Agricultural and Veterinary Chemicals Committee [sic—Council] dated late 1992, early 1993 outlining the [named company’s] Product Development throughout Australia’. The Australian Agricultural and Veterinary Chemicals Council (AAVCC) was a predecessor of the APVMA.

3. The FOI applicant subsequently revised the scope of the request to all submissions made to the AAVCC in relation to the named company (the IC review applicant).

4. On 4 October 2011, the APVMA wrote to the IC review applicant. The APVMA said it had identified 10 documents falling within the scope of the FOI applicant’s request and invited the IC review applicant to make submissions that the documents were exempt under s 47 or s 47G of the Freedom of Information Act 1982 (the FOI Act).

5. On 24 October 2011, the IC review applicant advised the APVMA that it objected to the disclosure of parts of eight of the documents on the basis that they contained commercially valuable information.

6. On 18 November 2011, the APVMA decided to give the FOI applicant access to all ten documents. The APVMA decided that four of the documents were not exempt, and that the remaining six documents were exempt in part under the trade secrets exemption (s 47(1)(a)), the commercially valuable information exemption (s 47(1)(b)), or the business affairs exemption (s 47G).

7. On 16 December 2011, the IC review applicant applied to the APVMA for internal review of its decision. On 16 January 2012, the APVMA affirmed its original decision.

8. On 16 February 2012, the IC review applicant sought IC review of the APVMA’s internal review decision under s 54M.

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1 During the period referred to in the FOI applicant’s request, the IC review applicant was known by a different company name.
2 Documents 1–4 and 6–9.
3 Documents 3, 5, 7 and 10.
Decision under review

9. The decision under review is that part of the decision of the APVMA on 16 January 2012 granting the FOI applicant access to six documents.\(^4\) The IC review applicant argues that more information should be deleted from the edited copies of those documents given to the FOI applicant, because of ss 47(1)(b) and 47G.

Documents disclosing commercially valuable information exemption (s 47(1)(b))

10. Section 47(1) of the FOI Act provides:

\[
\text{Documents disclosing trade secrets or commercially valuable information} \\
(1) \text{ A document is an exempt document if its disclosure under this Act would disclose:} \\
\text{ (a) trade secrets; or} \\
\text{ (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.}
\]

11. The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. The Guidelines explain that, when applying s 47(1)(b):

It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. The commercial value may relate, for example, to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved.\(^5\)

12. The documents under review are submissions from the IC review applicant to predecessors of the APVMA. They refer to other documents produced by the IC review applicant, and contain information about products that the IC review applicant has sold and installed.

13. The Guidelines list the following as factors that may assist in deciding whether information has a commercial value:

\begin{itemize}
  \item whether the information is known only to the person in question, or the extent to which it is known to others
  \item whether the information confers a competitive advantage on the person against any competitors
\end{itemize}

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\(^4\) Documents 1, 3, 4, 6, 8 and 9.

\(^5\) Office of the Australian Information Commissioner, \textit{Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982} [5.189].
• whether a genuine ‘arm’s length’ buyer would be prepared to pay to obtain that information
• whether the information is still current or out of date
• whether disclosing the information would reduce the value of a business operation or commercial activity.6

14. The APVMA decided that the contested information in the documents did not have commercial value. The IC review applicant submits that the information has commercial value generally, but particularly in relation to a dispute between the IC review applicant and a competitor regarding a patent belonging to the IC review applicant. The IC review applicant argues that disclosure of the information may assist that competitor to challenge its patent.

15. I have examined unedited copies of the documents. The contested information comprises references to other documents (though it gives no detail about the contents of those documents); some imprecise information about the number of times a specified product has been installed; and the date of one of the documents.

16. I agree with the APVMA that the contested information is not commercially valuable, noting that the documents in question are all at least 19 years old. I do not think that disclosure of this information would reduce the value of a business operation or commercial activity.

17. The IC review applicant argues that the date in the signature block of one of the documents (a letter) is incorrect and should not be disclosed. It would appear (from the ‘date received’ stamp) that the letter was incorrectly dated. But the date being incorrect does not make it commercially valuable.

Findings

18. The information in the documents the subject of this IC review is not commercially valuable. The documents are not exempt under s 47 of the FOI Act.

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6 Guidelines [5.189].
Business affairs exemption (s 47G)

19. Section 47G(1) of the FOI Act relevantly provides:

Public interest conditional exemptions—business

(1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect or his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

(a) would or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; ...

20. The Guidelines explain that:

The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself. Nevertheless, the information in question must have some relevance to a person in respect of his or her business or professional affairs or to the business, commercial or financial affairs of an organisation or undertaking ...

21. The IC review applicant contends that the disclosure of the contested information in the documents would have an unreasonable adverse effect on its business by enabling its competitors to challenge its patent.

22. The information in the documents concerns the business, commercial or financial affairs of the IC review applicant. There is information about the number of products sold and installed, and publications produced by the IC review applicant. Without making any judgment about the validity or otherwise of the IC review applicant’s patent, I am satisfied that a possible result of the disclosure of this information would be to enable a third party to challenge the validity of that patent. I consider that the effect of disclosure of the information in question would, or could reasonably be expected to unreasonably affect the IC review applicant in respect of its lawful business, commercial or financial affairs.

Findings

23. The documents the subject of this IC review are conditionally exempt under s 47G.

The public interest test (s 11A(5))

24. I have found that the documents the subject of this IC review are conditionally exempt s 47G of the FOI Act. Section 11A(5) provides that, if a document is

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7 Guidelines [6.162].
conditionally exempt, it must be disclosed ‘unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest’.

25. As the Guidelines explain:

   The pro-disclosure principle declared in the objects of the FOI Act is given specific effect in the public interest test, as the test is weighted towards disclosure.\(^8\)

26. Section 11B(3) of the FOI Act lists factors that favour access when applying the public interest test. The factor applicable to this IC review is promoting the objects of the Act.

27. Against these factors must be balanced the factors against disclosure. The FOI Act does not specify any factors against disclosure, but the Guidelines include a non-exhaustive list of such factors.\(^9\) Of those factors, none is relevant to this IC review.

28. I note the IC review applicant’s concern that disclosure of the information may assist one of its competitors to challenge its patent. However, I do not think that the possibility that a third party might challenge a patent is a factor against disclosure when considering the public interest.

29. In balancing these factors—for and against disclosure—I give the greatest weight in this IC review to the factors in favour of disclosure, noting that I have not identified any factors against disclosure.

**Findings**

30. Giving the FOI applicant access to the information that I have found to be conditionally exempt under s 47G would not, on balance, be contrary to the public interest.

**Decision**

31. Under s 55K of the FOI Act, I affirm the decision of the APVMA of 16 January 2012 in relation to documents 1, 3, 4, 6, 8 and 9. The IC review applicant did not seek IC review of the remainder of the APVMA’s decision.

James Popple
Freedom of Information Commissioner

24 June 2014

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\(^8\) *Guidelines* [6.12].

\(^9\) *Guidelines* [6.29].
Review rights

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the Administrative Appeals Tribunal Act 1975). An application fee may be payable when lodging an application for review to the AAT. The current application fee is $816, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT’s website (www.aat.gov.au) or by telephoning 1300 366 700.