

Decision D0012012 – Published in note form only

***Re McGowan and Minister for Mines and Petroleum and Mineralogy Pty Ltd [2012]*
WAICmr 1**

Date of decision: 4 January 2012

Freedom of Information Act 1992: clauses 2(1), 4(2), 4(3), 7(1), 8, 9 and 12(c)

In September 2010, the complainant applied under the *Freedom of Information Act 1992* ('the FOI Act') to the Minister for Mines and Petroleum ('the Minister') for access to certain documents concerning the mining company Mineralogy Pty Ltd ('Mineralogy'). The Minister identified 52 documents as coming within the scope of the application and gave the complainant access in full or in edited form to 48 documents but refused access to four documents. There being no right of internal review for decisions made by the principal officer of an agency, the complainant applied to the Information Commissioner for external review in relation to some of the documents claimed to be exempt in part or in full.

In the course of the Commissioner's office dealing with the matter, the complainant withdrew his complaint in relation to the information claimed to be exempt under clause 3(1) of Schedule 1 to the FOI Act and also in relation to two documents. In addition, Mineralogy was joined as a party to the complaint and advised the Commissioner that it relied upon its submissions made by letter to the Minister on 21 October 2010 and by email to the Commissioner on 14 September 2011.

The Minister claimed that one document (Document 26) was exempt in full under clause 12(c) and that the disputed information in the remaining 13 documents was exempt under clauses 4(2), 4(3) or 7(1) (together, 'the disputed matter'). Mineralogy claimed that the disputed matter was exempt under clauses 2(1), 4(2), 4(3), 8 and 9 of Schedule 1 to the FOI Act.

On 5 December 2011, the Commissioner provided the parties with a letter setting out his preliminary view of the complaint. The Commissioner's preliminary view was that the disputed information was not exempt under clauses 4(2) or 4(3). In particular, neither the Minister nor Mineralogy had identified the nature of the commercial value that the disputed information was claimed to contain and nor did those parties explain how the disclosure of the disputed information could reasonably be expected to have an adverse effect on Mineralogy's commercial affairs or prejudice the future supply of information of that kind to the Government or to an agency. Moreover, although Mineralogy claimed that the disputed matter was exempt under clauses 2, 8 and 9, it had provided the Commissioner with no probative material in support of those claims and the Commissioner's preliminary view was that none of the disputed matter was exempt under those provisions.

It was also the Commissioner's preliminary view that the information claimed to be exempt under clause 7(1) was exempt under that provision because it consisted of legal advice provided to the Minister or to Mineralogy by their legal advisers, which would be privileged from production in legal proceedings on the ground of legal professional privilege. In addition, the Commissioner considered that Document 26 was exempt under clause 12(c) because its public

disclosure would infringe the privileges of Parliament as it had been created for the purpose of, or incidental to, transacting business in Parliament and its public disclosure would breach Parliament's right to control the publication of documents incidental to transacting the business of the Legislative Assembly.

Following the receipt of the Commissioner's letter of 5 December 2011, the parties were invited to accept the Commissioner's preliminary view or to provide further submissions to him in support of their respective positions.

Both the Minister and the complainant accepted the Commissioner's preliminary view. Mineralogy sought an extension of time in order to make further submissions but, following the grant of additional time, made no further submissions to the Commissioner.

The Commissioner reviewed all of the information before him and, in the absence of any further information or material from Mineralogy, was not dissuaded from his preliminary view.

The Commissioner found that Document 26 was exempt under clause 12(c) and that the information claimed to be exempt under clause 7(1) was exempt under that provision. However, the Commissioner found that the disputed information claimed to be exempt under clauses 2(1), 4(2), 4(3), 8 and 9 was not exempt under those provisions. Consequently, the Commissioner varied the Minister's decision in respect of the disputed matter.