

Participants:

**Mark McGowan**  
Complainant

- and -

**Minister for Regional Development;  
Lands**  
First Respondent

- and -

**Mineralogy Pty Ltd**  
Second Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – documents relating to a mining company – clause 4(2) of the Glossary – whether document of an agency where agency is a Minister – clause 4(2) – commercial value – clause 4(3) – adverse effect on business affairs – clause 4(7) – public interest – clause 3(1) – personal information – clause 3(6) – public interest – other exemption claims not made out.

*Freedom of Information Act 1992*: sections 10(1), 13(1), 24, 26, 30(f), 74(1), 74(2), 76(5), 76(8), 102(2), 102(3); Schedule 1, clauses 2(1), 3(1), 3(6), 4(2), 4(3), 4(7), 8 and 9; Glossary, clause 4(2)

*Freedom of Information Regulations 1993*: regulation 9(1)

*Interpretation Act 1984*: section 5

*Re Kimberley Diamond Company NL and Department for Resources Development and Argyle Diamond Mines Pty Ltd* [2000] WAICmr 51

*Re West Australian Newspapers Limited and Civil Service Association of WA Inc and Salaries and Allowances Tribunal and Mercer (Australia) Pty Ltd* [2007] WAICmr 20

*Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491

*Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550

*Re West Australian Newspapers Limited and Western Power Corporation* [2005] WAICmr 10

*Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Lander and Rogers, Lawyers* [2010] WAICmr 35

*Re Schatz and Department of Treasury and Finance* [2005] WAICmr 8

*Re Mossenson and Ors and Kimberley Development Commission* [2006] WAICmr 3

*Re Fabbri and Police Force of Western Australia* [2005] WAICmr 14

*Police Force of Western Australia v Kelly and Smith* (1996) 17 WAR 9

*DPP v Smith* [1991] 1 VR 63

*Police Force of Western Australia v Winterton* (1997) WASC 504

## DECISION

The Minister's decision to give access in edited form to documents and to refuse access to other documents is varied. I find that:

- The first two sentences in paragraph 2 of the first email (dated 28 February 2009 5:44am) in Document B1 are not part of a document of the agency, pursuant to clause 4(2) of the Glossary.
- Documents 8, 9, 11, 23, 24 and 28 and the information that relates to Mineralogy in Documents 2, 3, 5-7, 10, 12, 14, 15, 18, 19, 20, 21, 25, 27 and B1-B6 are not exempt under clause 4(2).
- The following documents and information are exempt under clause 4(3):
  - Documents 6, 8-11, 24 and 28 in full.
  - Document 5: Emails 2 and 3 sent 2 July 2009 at 12:05pm and 12:24pm respectively.
  - Document 7: Emails 2-5 sent between 2 July 2009 at 12:05pm and 3 July 2009 at 4:25pm.
  - Document 15: Paragraph 4 in email 5 sent 18 September 2009 at 9:33am.
  - Document B6: Emails 2-4 (dated between 2 July 2009 at 12:05pm and 20 July 2009 at 11:28am) and the subject line and paragraph 1 in email 5 dated 20 July 2009 at 1:16pm.
- The personal information about Professor Palmer in Documents 12, 14, 23, 28, A2, A3, A4, A9, A13, A17, A18, A19, A32, B1, B5 and B6 is not exempt under clause 3(1).
- Documents 5, 7 and 10 and certain information in Document 15 are not exempt under clause 2(1).
- Documents 5, 7, 14, 15, 19, B1, B6 and certain information in Documents 15 and 18 are not exempt under clause 8.
- Document 19 and certain information in Documents 15 and 18 are not exempt under clause 9.

Sven Bluemmel  
INFORMATION COMMISSIONER

24 January 2011

## REASONS FOR DECISION

1. This complaint arises from a decision made under the *Freedom of Information Act 1992* ('the FOI Act') by the Minister for Regional Development; Lands ('the Minister') to refuse Hon Mark McGowan MLA ('the complainant') access to documents and to give access to other documents in edited form. Ministers and public bodies or offices are all 'agencies' for the purposes of the FOI Act. Mineralogy Pty Ltd ('Mineralogy') is a third party which opposes the giving of access and which has been joined as a party to these proceedings.

## BACKGROUND

2. On 31 March 2010, the complainant applied to the Minister under the FOI Act for access to: "*All documents to and from the Minister's Office*" concerning Mineralogy, a mining company, and its Chairman, Professor Clive Palmer. The timeframe for the request was 23 September 2008 to 31 March 2010.
3. Unlike listed public companies whose business affairs are disclosed through the Australian Stock Exchange, Mineralogy is a private company. Mineralogy is the principal proponent to the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* ('the State Agreement'), which governs the development of a large magnetite iron ore mining and processing operation at Cape Preston in the Pilbara region of Western Australia and other projects in that area.
4. The complainant granted the Minister a two-week extension of time beyond the permitted period of 45 days in which to provide him with a notice of decision, in order to consult third parties. In June 2010, the Minister's office sought further extensions of time to obtain detailed legal advice from the State Solicitor's Office. In the event, the Minister made his decision on 27 July 2010 and identified 28 documents as coming within the scope of the access application (Documents 1-28).
5. The Minister excluded from his decision a number of further documents that he considered to be outside the scope of the complainant's application because they were not 'documents of an agency' in circumstances where, as here, the agency is a Minister: see clause 4(2) of the Glossary to the FOI Act. The agency referred to those documents in its FOI file as Documents 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 25, 27, 28, 29, 30, 32, 33, 46 and 47. To avoid confusion with Documents 1-28, which the agency dealt with, I shall refer to the further documents as the 'A' documents, being Documents A2-A5, A8-A19, A25, A27-A30, A32-A33, and A46-A47.
6. The Minister gave the complainant access to 11 documents, edited to remove information claimed to be exempt under clauses 3 and 4 of Schedule 1 to the FOI Act, but refused access to the remaining 17 documents on the ground that each was exempt under clause 8(2).
7. On 17 September 2010, the complainant applied to me for external review of the Minister's decision in respect of the following three matters:

*“... the release of documents which were not released, yet are listed on the schedule of documents held;  
... the release of documents which were not listed on the schedule but which undoubtedly exist ...;  
... the release of any other documents that relate to this matter that should have been released.”*

## **REVIEW BY INFORMATION COMMISSIONER**

8. Following the receipt of this complaint, the Minister provided me with his FOI file maintained in respect of the complainant’s access application (‘the FOI file’) and copies of the disputed documents and other documents potentially relevant to this matter. Only copy documents were provided since, at that date, the Auditor General held the originals.
9. In his letter to me of 17 September 2010, the complainant raised concerns about a decision by the Department of Environment not to impose a \$45 million environmental bond on Mineralogy’s Balmoral South iron ore project in the Pilbara. The complainant sought external review of the Minister’s decision to refuse access to documents, as well as a review as to whether further documents within the scope of his application existed or should exist pursuant to s.26 of the FOI Act.
10. My office obtained information from the Minister concerning, among other things, the searches made for the requested documents. As a result of a search of the email account of a former staff member who had left the Minister’s office before the complainant lodged his access application, six additional documents within the scope of the application (Documents B1-B6) were found.
11. In my opinion, the Minister’s notice of decision to the complainant was deficient because it did not give the details required to be provided by s.30(f) of the FOI Act. Section 30(f) provides that – if the decision is to refuse access to a document – the notice that the agency gives the applicant under s.13(1)(b) has to give details of the reasons for the refusal and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based. The notice given to the complainant only asserted that the 17 documents, to which access was refused, were exempt under clause 8(2). However, the material facts – that is, the facts necessary to constitute the exemption claimed – and references to the material on which the Minister’s findings were based were not included in the notice.
12. If an agency fails to give an access applicant the information referred to in section 30(f), the agency has not discharged its obligations under the FOI Act. Simply citing the exemption provision – as the notice did here – does not satisfy the requirements of section 30(f). Unless agencies explain *why* the exemptions they have claimed apply, it is unlikely that applicants will have a clear understanding of the reasons why access is refused or be in a position to provide me with relevant submissions in relation to the agency’s decision.

13. On 6 October 2010, I provided the parties with a letter setting out my preliminary view of the Minister's claim that the 17 documents were exempt under clause 8(2). On the information then before me, my preliminary view was that none of those documents was exempt under that provision.
14. It was also my preliminary view that a number of the 'A' documents – Documents A2-A4, A8-A10, A12-A13, A15-A19, A32 and certain information in Documents A5, A11, A33, A46 and A47 – should be included within the scope of the complainant's access application but that the Minister was not required to deal with the remainder of the 'A' documents pursuant to clause 4(2) of the Glossary, which sets out what 'documents of an agency' consist of where, as here, the agency is a Minister. Further, it was my preliminary view that certain information in Documents A5, A11, A33, A46 and A47 was outside the scope of the access application because information of that kind was not sought by the complainant.
15. At that stage, I considered that the Minister had taken all reasonable steps to find the requested documents but that – with the exception of Documents B1-B6 – further documents could not be found or did not exist. I asked the Minister to contact relevant third parties to advise them of my preliminary view; to invite them to be joined as parties to this complaint and to make submissions to me; and to give them the opportunity to view any additional documents containing their personal or business information.
16. In response, the Minister accepted my preliminary view concerning Documents 5-14, 19-21, 23, 24, 27 and 28 but now claimed that those documents were exempt under clause 4(3). The Minister accepted my preliminary view in relation to Documents A5, A11, A33, A46 and A47 and claimed that certain personal information in Documents A2-A4, A8-A10, A12-A13, A15-A19 and A32 was exempt under clause 3(1) but that he was prepared to give access to the remaining information in those documents. The Minister also agreed to give access to Documents B1, B4 and B5 deleting only personal information under clause 3(1) but claimed that Documents B3 and B6 were exempt under clause 4(3) and that Document B2 was outside the scope of the complaint.
17. The complainant advised me that he had intended to seek external review of both the 17 documents for which access was refused and the 11 documents to which he had been given access in edited form (Documents 1-4, 15-18, 22, 25 and 26). Following further discussions, the complainant agreed to withdraw his complaint in respect of Documents 1, 4, 16, 17, 22, A14, A25, A27-A29 and the disputed information in Documents A5, A11, A33, A46 and A47.
18. On 27 October 2010 Mineralogy was joined as a party to this complaint and invited to make submissions to me by 15 November 2010. Mineralogy later clarified that it was acting on behalf of both the company and its Chairman, Professor Palmer. Although invited, the latter did not elect to be joined as a party to this complaint.
19. On 12 November 2010, Mineralogy provided me with a copy of its letter to the Minister dated 5 November 2010, which made submissions in respect of the

disputed documents and information. Mineralogy provided me with further submissions, in a letter dated 29 November 2010 and sent to me by facsimile on that date. That letter was subsequently found to be incomplete and Mineralogy provided me with a full copy of those submissions on 20 December 2010.

20. By letters of 15 November and 9 December 2010, I provided the parties with my preliminary views of the disputed information in Documents 2, 3, 15, 18 and 25 and the complainant's claim that there is a public interest in the disclosure of personal information about Professor Palmer. I advised the parties of my understanding that:
  - the complainant had withdrawn his complaint in relation to certain information and documents and had also advised that he was not seeking access to personal information about individuals, other than the Minister, the Minister's policy officers and Professor Palmer (and he was not seeking any contact information for those persons);
  - the Minister had agreed to give the complainant access to additional documents and information; and
  - Mineralogy had provided me with submissions to support its view that the disputed matter was exempt under clauses 2(1), 3(1), 4(2), 4(3), 8 and 9.
21. I also set out my understanding of what remained in dispute and the various exemption claims made for the disputed matter. I also noted that it appeared from the FOI file that the Minister's office had not fully consulted third parties in relation to personal or business information about them that appeared in the disputed documents. In light of that, I advised Mineralogy to contact the Minister for details of information about Mineralogy or its Chairman that appeared in those internal communications.
22. Following my letter of 9 December 2010, both the Minister and Mineralogy had further discussions with my office and Mineralogy clarified its claims for exemption by providing me with a full copy of its previous letter to me dated 29 November 2010.
23. Mineralogy's submissions are contained in its letters to the Minister of 19 May 2010 and 5 November 2010 and its letters to me of 29 November 2010 and 20 December 2010. The Minister's submissions are contained in his notice of decision dated 27 July 2010 and his letters to me of 18 October 2010 and 18 November 2010. The complainant's submissions are contained in his application for external review dated 17 September 2010.

#### **THE DISPUTED MATTER AND THE EXEMPTIONS CLAIMED**

24. The documents and information that remain in dispute are described in the appendix to this decision. The Minister now claims as follows:
  - Documents 5-14, 19-21, 23, 24, 27, 28, B3 and B6 are exempt under clause 4(3) of Schedule 1 to the FOI Act and the last paragraph in email 5 (dated 18 September 2009 9:33am) of Document 15 and the table in email 1 (dated 26 November 2009) of Document 25 are exempt under clause 4(3).

- Document B2 is outside the scope of the application.
  - Information that identifies private individuals in Documents A2-A4, A8-A10, A12, A13, A15-A19, A32, B1, B2, B4-B5, and in the disputed information in Documents 2, 3, 15, 18 and 25, is exempt under clause 3(1).
25. Mineralogy initially appeared to claim that all of the disputed matter was exempt under clauses 2, 3, 4, 8 and 9 of Schedule 1 to the FOI Act. However, from the complete copy of its submissions dated 29 November 2010, which was received by my office on 13 December 2010, I understand that Mineralogy now makes the following claims:
- Documents 5-7, 10, 11, 28 and certain information in Document 15 are exempt under clause 2(1).
  - Information that identifies individuals who are not officers of government agencies in Documents A2-A4, A8-A10, A12, A13, A15-A19, A32, B1, B2, B4-B5, and in the disputed information in Documents 2, 3, 15, 18 and 25, is exempt under clause 3(1).
  - Documents 8, 9, 11, 23, 24 and 28 and all information that relates to Mineralogy in Documents 2, 3, 5-7, 10, 12, 14, 15, 18, 19, 20, 21, 25, 27, B1-B6 are exempt under clauses 4(2) and 4(3).
  - Documents 5-11, 14, 19, 28, B1 and B6 and the disputed information in Documents 15 and 18 are exempt under clause 8.
  - Document 19 and the disputed information in Documents 15 and 18 are exempt under clause 9.

#### **DOCUMENT OF AN AGENCY**

26. Clause 4(2) of the Glossary provides, among other things, that where the agency is a Minister, a reference to a document of an agency is a reference to a document that is in the Minister's possession or control in his or her official capacity and relates to the affairs of another agency (not being another Minister) and includes a document to which the Minister is entitled to access.
27. The term 'document' is defined in the Glossary to include 'any part of a record' and 'record' to mean any record of information however recorded. In light of that, and having examined the disputed matter, I consider that, pursuant to clause 4(2) of the Glossary, the first two sentences in paragraph 2 of the first email (dated 28 February 2009 5:44am) in Document B1 are not part of a record or document of the agency, being the Minister, because that information relates only to the affairs of another Minister. Accordingly, in my view, that information is not accessible under the FOI Act and should not be disclosed.

#### **CLAUSE 4 (2) – COMMERCIAL VALUE**

28. Mineralogy claims that Documents 8, 9, 11, 23, 24 and 28 and all information that relates to Mineralogy and Professor Palmer in Documents 2, 3, 5-7, 10, 12, 14, 15, 18, 19, 20, 21, 25, 27 and B1-B6 are exempt under clause 4(2) of Schedule 1 to the FOI Act. Clause 4(2) provides:

*“(2) Matter is exempt matter if its disclosure –*

(a) would reveal information (other than trade secrets) that has a commercial value to a person; and

(b) could reasonably be expected to destroy or diminish that commercial value.”

29. Clause 4 recognises that the business of government is frequently mixed with that of the private sector and that neither the business dealings of private bodies nor the business of government should be adversely affected by the operation of the FOI Act: *Re Kimberley Diamond Company NL and Department for Resources Development and Another* [2000] WAICmr 51.
30. Clause 4(2) is concerned with the protection from disclosure of information that has commercial value to a person. The definition of the word ‘person’ in section 5 of the *Interpretation Act 1984* makes it clear that for the purposes of the FOI Act, ‘person’ includes incorporated and unincorporated bodies, as well as natural persons.
31. The exemption has two parts and the requirements of both parts (a) and (b) must be satisfied in order to establish a *prima facie* claim for exemption. Pursuant to section 102(2) of the FOI Act, the onus is on Mineralogy, in this case, to establish that a decision adverse to the complainant should be made.

### **Mineralogy’s submissions**

32. In brief, Mineralogy made the following submissions:
  - The disputed matter is ‘commercial in confidence’.
  - Some of the disputed information concerns dealings between the State and Mineralogy about the State Agreement. Submissions made by Mineralogy to relevant departments or officers must be characterised as commercial in nature as they relate to the conduct of the projects the subject of the State Agreement and related commercial activities.
  - Mineralogy’s investment in those projects amounts to tens of millions of dollars and, accordingly, project information disclosed to the Government has a significant commercial value to Mineralogy.
  - Whether the disputed information relates to the State Agreement or the general conduct of Mineralogy’s projects, the disclosure of that information may diminish its commercial value by:
    - revealing Mineralogy’s future plans and strategies in relation to its projects;
    - revealing Mineralogy’s strengths and weaknesses to its competitors; and
    - making Mineralogy’s competitors in the iron ore industry privy to how Mineralogy conducts its business and develops its mining projects.

### **CONSIDERATION**

33. The first question for my consideration is whether Documents 8, 9, 11, 23, 24 and 28 and all information that relates to Mineralogy and Professor Palmer in

Documents 2, 3, 5-7, 10, 12, 14, 15, 18, 19, 20, 21, 25, 27 and B1-B6 contain information that has a commercial value to Mineralogy under clause 4(2)(a). I consider that the applicable legal principles are set out in *Re West Australian Newspapers Limited and Another and Salaries and Allowances Tribunal and Another* [2007] WAICmr 20 at [115]-[125] which are, in brief, as follows:

- Information may have a commercial value if it is valuable for the purposes of carrying on the commercial activities of a person or organisation. That is, information may be valuable because it is important or essential to the profitability or viability of a continuing business operation or a pending ‘one-off’ commercial transaction.
  - Information may have a commercial value if a genuine ‘arms-length’ buyer is prepared to pay to obtain that information.
  - It is not necessary to quantify or assess the commercial value of the relevant matter.
  - It is by reference to the context in which the matter is used or exists that the question of whether it has a commercial value can be determined.
  - The investment of time and money is not, in itself, a sufficient indicator of the fact that the information has a commercial value.
  - Information that is aged or out-of-date has no remaining commercial value.
  - Information that is publicly available has no commercial value that can be destroyed or diminished by disclosure under freedom of information legislation.
34. I accept that some of the disputed matter relates to dealings between the State Government and Mineralogy in respect of the State Agreement and that particular information, as well as other information in Documents 2, 3, 5-12, 14, 15, 18-21, 23-25, 27, 28 and B1-B6, can be characterised as commercial in nature.
35. However, some of the disputed information appears to be in the public domain (see, for example, the information at the end of email 1 in Document 25 sent on 26 November 2009 at 2:08pm which my office downloaded from Mineralogy’s website at [mineralogy.com.au/reports](http://mineralogy.com.au/reports) on 19 October 2010). I agree with the Queensland Information Commissioner in *Re Cannon and Australian Quality Egg Farms Ltd* (1994) QAR 49, cited in *Re West Australian Newspapers Limited*, that information that is in the public domain has no commercial value that can be destroyed by disclosure under the FOI Act.
36. In the present case, Mineralogy has not explained the nature of the commercial value in relation to each of the documents for which it claims exemption nor has it identified the specific information in those documents which it claims has a commercial value to Mineralogy.
37. The fact that information may be described as ‘commercial in confidence’ or confidential does not necessarily mean that it is of commercial value, though it may be an indicator. However, it is not evident from the documents that any of the disputed matter is confidential as Mineralogy claims and Mineralogy has provided me with nothing other than its assertion that that is the case.

38. Mineralogy submits that the disputed matter has a commercial value because the company has spent a significant amount of money in developing its projects. In *Re Cannon* at 512, the Queensland Information Commissioner dealt with a similar claim and said:

*“I am not prepared to accept that the investment of time and money is a sufficient indicator in itself of the fact that information has a commercial value. It could be argued on that basis that most, if not all, of the documents produced by a business will have a commercial value because resources were invested in their production, or money expended in their acquisition.”*

39. I agree with those comments. In my view, Mineralogy has not provided me with any persuasive material to satisfy the onus placed on it of establishing that the disputed matter has a commercial value. In that regard, I refer to the comments of Owen J, in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at page 573, in relation to a claim for exemption under clause 4(3) of the FOI Act, when he expressed the nature of the onus (in that case, borne by a government agency) in the following way:

*“How can the Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had “real and substantial grounds for thinking that the production of the document could prejudice that supply” or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker.”*

40. In my view, Mineralogy has not established the requirements of clause 4(2)(a) and I find that Documents 8, 9, 11, 23, 24 and 28 and the information that relates to Mineralogy and Professor Palmer in Documents 2, 3, 5-7, 10, 12, 14, 15, 18, 19, 20, 21, 25, 27 and B1-B6 are not exempt under clause 4(2) as Mineralogy claims.

#### **CLAUSE 4(3) – ADVERSE EFFECT ON BUSINESS AFFAIRS**

41. The Minister claims that Documents 5-14, 19-21, 23, 24, 27, 28, B3, B6, the last paragraph in email 5 (dated 18 September 2009 9:33am) of Document 15 and the information at the end of email 1 (dated 26 November 2009 2:08pm) of Document 25 are exempt under clause 4(3).
42. I understand that Mineralogy claims that Documents 8, 9, 11, 23, 24 and 28 and all information that relates to Mineralogy in Documents 2, 3, 5-7, 10, 12, 14, 15, 18, 19, 20, 21, 25, 27 and B1-B6 are exempt under clause 4(3) of Schedule 1 to the FOI Act.

43. Clause 4, insofar as it is relevant, provides:

“(3) *Matter is exempt matter if its disclosure –*

*(a) would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*

*(b) 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.*

...

*(7) Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest.”*

44. The exemption in clause 4(3) is more general in its terms than clause 4(2). It is concerned with protecting from disclosure sensitive information about the business, professional, commercial or financial affairs of persons, including companies. I agree with the former A/Commissioner’s view that private organisations or persons having business dealings with Government must necessarily expect greater scrutiny of, and accountability for, those dealings but should not suffer commercial disadvantage because of them: see *Re West Australian Newspapers Limited and Western Power Corporation* [2005] WAICmr 10 at [101].

45. 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 clause 4(7) must also be considered.

### **The Minister’s submissions**

46. In letters to me dated 18 October 2010 and 18 November 2010, the Minister makes the following submissions:

- The Minister’s portfolio responsibilities require strong working relationships with a vast array of regional development proponents and government dealings with Mineralogy and Professor Palmer are conducted without fear or favour.
- In dealing with this access application, all of the requested information was provided to the State Solicitor’s Office and the Minister acted upon the detailed legal advice obtained from that office.
- The complainant’s request for ‘all documents’ relating to Mineralogy and Professor Palmer covers a number of sensitive commercial and business matters and the Minister submits that the disclosure of Documents 5-13, 19-21, 23, 24, 27, 28, B3, B6 and the disputed matter in Documents 15 and 25 would potentially have adverse effects on both the Government and Mineralogy.

- The disclosure of Document 14 would adversely impact ongoing business relations and future negotiations between a third party and the State Government.

### **Mineralogy's submissions**

47. Mineralogy made, in brief, the following submissions:

- The disputed matter contains 'commercial in confidence' information, which was provided to the Government on a confidential basis and in such circumstances as to fix them with "*an equitable obligation of [confidence] not to use the confidential information in a way that is not authorized by Mineralogy. Mineralogy does not authorise the release of any of the Documents to third parties.*"
- Disclosure of the disputed matter will cause unwarranted commercial disadvantage to Mineralogy as it contains information about its commercial and business affairs which would give its competitors information about its strengths and weaknesses; its future plans and strategies in relation to various projects; and information about how Mineralogy conducts its business and develops its mining projects.
- The purpose of the State Agreement is to take out of the public realm proposals submitted under such an Act and is intended to facilitate the development of Mineralogy's Cape Preston Projects. The disputed matter was submitted pursuant to the State Agreement and its disclosure will prejudice the future supply of information to the Government where confidentiality cannot be maintained.
- It is in the public interest that the Government effect proper and fair public administration, which cannot be achieved if the disputed matter is released.

### **Consideration**

#### ***Clause 4(3)(a)***

48. Having examined the disputed matter and reviewed the parties' submissions, I consider that Documents 5-14, 19-21, 23, 24, 27, 28, B1-B4, B6 and the disputed information in Documents 2, 3, 15, 18 and 25 all contain some information about the business, commercial or financial affairs of Mineralogy and other third parties. However, in my opinion, Document B5 contains no information of that kind.
49. Accordingly, I consider that Documents 5-14, 19-21, 23, 24, 27, 28, B1-B4, B6 and the disputed information in Documents 2, 3, 15, 18 and 25 satisfy the requirements of clause 4(3)(a) but that Document B5 does not. In light of that finding, it is unnecessary for me to consider the application of clause 4(3)(b) in relation to Document B5.

#### ***Clause 4(3)(b)***

50. The next question for my determination is whether Documents 5-14, 19-21, 23, 24, 27, 28, B1-B4, B6 and the disputed information in Documents 2, 3, 15, 18

and 25, if disclosed, could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of any person or whether the disclosure of that matter could reasonably be expected to prejudice the future supply of like information to government.

51. In *Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Another* [2010] WAICmr 35 at [84]-[94], I examined the meaning of the phrase ‘could reasonably be expected’ in clauses 4(2)(b), 4(3)(b) and 5(1) of Schedule 1 to the FOI Act in relation to the burden of proof and concluded – for the reasons set out there and consistent with previous precedents – that it required a person to prove *on the balance of probabilities* that a certain outcome *could reasonably be expected*.
52. It is my view that the most instructively expressed precedent is that of Owen J of the Supreme Court in *Manly*, who held that the correct standard of proof to apply in relation to the term ‘could reasonably be expected’ in clause 4(3) “...does not have to amount to proof on the balance of probabilities” but “must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker”.
53. The Minister has identified to me the particular subject matter in the disputed matter that he considers could be adversely affected by disclosure and has explained why, in his view, disclosure would have adverse effects and the nature of those effects. Mineralogy has also identified the specific subject matter that it claims is exempt. Its submissions as to why the disclosure of that information would have the effects claimed in clause 4(3)(b) are set out in paragraph 45 of this decision.
54. Having examined the documents in contention, I accept that the disclosure of the following could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of Mineralogy:
  - Documents 6, 8-11, 24 and 28 in full.
  - Document 5: Emails 2 and 3 sent 2 July 2009 at 12:05pm and 12:24pm respectively.
  - Document 7: Emails 2-5 sent between 2 July 2009 at 12:05pm and 3 July 2009 at 4:25pm.
  - Document 15: Paragraph 4 in email 5 sent 18 September 2009 at 9:33am.
  - Document B6: Emails 2-4 (dated between 2 July 2009 at 12:05pm and 20 July 2009 at 11:28am) and the subject line and paragraph 1 in email 5 dated 20 July 2009 at 1:16pm.
55. I accept that the disclosure of that matter could reasonably be expected to disclose Mineralogy’s strengths and weaknesses, as Mineralogy claims, and impact adversely on that company’s business by affecting its competitiveness. Clause 4(3) provides only that some adverse effect could reasonably be expected, not that the effect be substantial or quantified in any way.
56. Section 76(5) of the FOI Act requires that, in dealing with a complaint, the Information Commissioner has to include in the decision the reasons for that

decision, the findings on any material questions of fact underlying those reasons and reference to the material on which those findings were based. In addition, s.76(8) of the FOI Act requires that the Information Commissioner publish his or her decisions “...in order that the public is adequately informed of the grounds on which such decisions are made.”

57. However, s.74(1) of the FOI Act enjoins the Information Commissioner to ensure that exempt matter is not disclosed during the course of dealing with a complaint. Further, s.74(2) places an obligation on the Information Commissioner “...not to include exempt matter ... in a decision on a complaint or in reasons given for the decision.”
58. Taking into account the provisions of sections 76(5) and 76(8), and bearing in mind the mandatory obligations imposed upon me by s.74(2), I consider that I am constrained from describing in more detail the submissions made by the Minister and Mineralogy in relation to the disputed matter and from discussing in detail the evidence on which my decision is based because to do so would breach my obligation under s.74(2).
59. The obligations imposed by the FOI Act on both the Information Commissioner and (on appeal) the Supreme Court to preserve the confidentiality of exempt matter seek to ensure that matter which is asserted to be exempt from disclosure may be scrutinised and examined by an officer quite independent of the agency claiming the exemption – namely, the Information Commissioner, or on appeal, the Supreme Court. As Heenan J said in *BGC (Australia) Pty Ltd v Fremantle Port Authority and Anor* [2003] WASCA 250; (2003) 28 WAR 187 in relation to a claim that material was exempt under clause 8 of Schedule 1 to the FOI Act.

*“That this scrutiny and examination, in order to protect the confidentiality of the material, if the claim is justified, must be conducted without disclosure to the applicant, its counsel or solicitors is one example of these rare instances in which a party to litigation is deprived of full access to all material documents. However, this is not an isolated exception, and policy considerations which have prompted its acceptance, have been recognised in other areas of the law such as the power of a court to inspect documents in respect of which a claim for legal professional privilege has been made, or to scrutinise material relied upon for the issue of a search warrant, or to inspect documents for which a claim of public interest immunity has been asserted, without disclosing them to the party seeking inspection – see Sankey v Whitlam (1978) 142 CLR 1 at 46 and 110. None of these examples constitutes any denial of natural justice because, if the claim for privilege, confidentiality or public interest immunity is justifiably made, the party seeking to inspect the documents has no right of any kind to do so. Justice is achieved and the law applied in these situations by an examination of the documents by an independent officer or court acting on settled principles.”*

60. I consider that these comments are also relevant to the present case, and illustrate that justice can be achieved in a situation where I am unable to provide greater details of why I consider that the documents listed in paragraph 54 above are exempt from disclosure.

61. Having considered the information before me, including the respondents' submissions, the FOI file and the documents themselves, I am not persuaded that, if disclosed, Documents 12, 13, 14, 19, 20, 21, 23, 27, B1-B4 and the remaining information in Documents 5, 7, 15, 18 and 25 could reasonably be expected to have an adverse effect on Mineralogy's, or any other third party's business, professional, commercial or financial affairs or prejudice the future supply of information of that kind to the Government or to an agency.
62. In my opinion, some of that information is in the public domain, for example, Document 13 and the information referred to in paragraph 33 of this decision. There is nothing before me to establish that, if disclosed, Documents 12, 13, 14, 19, 20, 21, 23, 27, B1-B4 and the remaining information in Documents 5, 7, 15, 18 and 25 could reasonably be expected to have the effects claimed and I am not persuaded that it could.
63. With regard to Document 14, I have considered the Minister's submission but do not accept that, once personal information about persons engaged or employed by Mineralogy has been deleted pursuant to clause 3(1) – as noted below – its disclosure could reasonably be expected to have the effect claimed.

***Clause 4(7)***

64. Clause 4(7) limits the exemption in clause 4(3) by providing that matter will not be exempt if its disclosure would, on balance, be in the public interest. Pursuant to s.102(3) of the FOI Act, the complainant bears the onus of establishing that disclosure would, on balance, be in the public interest. Accordingly, I have considered whether the documents and information listed in paragraph 54 would be subject to the application of clause 4(7).
65. In favour of disclosure, the complainant submits that there is a public interest in disclosing information relating to the activities of companies such as Mineralogy which have made representations to the Government in relation to their commercial or business interests.
66. I consider that there is a strong public interest in State and local government agencies being accountable for decisions made concerning the management and development of the State's mineral resources of services undertaken for the benefit of the public and I also consider that there should be as much transparency as possible in Ministers' dealings with companies and persons making direct representations to them. I consider that there is a public interest in the public having confidence that such contacts are dealt with properly by the Government and its agencies, including Ministers.
67. In the present case, I consider that those particular public interests are adequately served by the disclosures and proposed disclosures to the complainant and I do not consider that they require the disclosure of the disputed matter listed in paragraph 54 above. Moreover, in my view, the disclosure of that information would not further those public interests.

68. Although I consider that individuals and organisations undertaking business with government in relation to the management and development of the State's mineral resources must necessarily expect to be subject to a higher degree of scrutiny and accountability in respect of that work, I do not consider it to be in the public interest that such persons should suffer commercial disadvantage because of it. Clearly, that is what the exemptions in clause 4 are designed to avoid.
69. Weighing against disclosure, I recognise that there is a public interest in the Minister receiving and keeping confidential sensitive commercial information received from private individuals and companies to enable him to discharge his portfolio functions in an informed manner, including dealing with representatives of various interests.
70. In balancing the competing interests in this case, I consider that, in respect of the documents and information listed in paragraph 54, the public interest factors weighing against disclosure outweigh those for disclosure, for the reasons given above. Accordingly, I find that Documents 6, 8-11, 24 and 28 and the relevant information in Documents 5, 7, 15 and B6 are exempt under clause 4(3).

#### **CLAUSE 3(1) – PERSONAL INFORMATION**

71. The respondents claim that information that identifies private individuals in Documents A2-A4, A8-A10, A12, A13, A15-A19, A32, B1, B2, B4-B5 and in the disputed information in Documents 2, 3, 15, 18 and 25, is exempt under clause 3(1). I have also considered those claims in respect of personal information contained in Documents 5, 7, 12-14, 19-21, 23 and 27 which, in my view, is not exempt under any other provision.
72. The complainant has advised me that he seeks access only to personal information about the Minister, the Minister's policy officers and Professor Palmer, and he does not seek access to their contact details.
73. Clause 3, insofar as it is relevant, provides:

#### **“3. *Personal information***

- (1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*
- (2) ...
- (3) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to –*
  - (a) *the person;*
  - (b) *the person's position or functions as an officer; or*
  - (c) *things done by the person in the course of performing functions as an officer.*

(4) ...

(5) ...

(6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.*

74. The definition of ‘prescribed details’ referred to in clause 3(3) is set out in regulation 9(1) of the *Freedom of Information Regulations 1993* (‘the Regulations’). The term ‘personal information’ is defined in the Glossary to the FOI Act to mean:

*“... information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –*

- (a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
- (b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample”.*

75. In my view, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies. I consider that clause 3 is a recognition by Parliament that State and local government agencies collect and hold sensitive and private information about individuals and that the FOI Act is not intended to open the private and professional lives of its citizens to public scrutiny without the consent of the individuals concerned where there is no demonstrable benefit to the public interest in doing so.

## CONSIDERATION

76. In view of the respondents’ claims in paragraph 71 above, I understand that there is no dispute over access to ‘prescribed details’. That is, the respondents accept that the limit on the exemption in clause 3(3) applies in this case to all references to the Minister and his policy advisers contained in the disputed matter, where that information consists of prescribed details.

77. Information that identifies any other third parties – whether government officers or private individuals – is outside the scope of the application and should be deleted from documents disclosed to the complainant (for example, the names and contact details of both the Minister’s officer – who is not a policy adviser – and Mineralogy’s adviser in Document 14 should be deleted). Contact details, such as email addresses, telephone and facsimile numbers for the Minister, the Minister’s policy advisers and Professor Palmer should also be deleted as they are outside the scope.

78. Having reviewed all references to the Minister and his policy advisers contained in Documents 5, 7, 12-14, 19-21, 23, 27, A2-A4, A8-A10, A12, A13, A15-19, A32, B1-B6 and the disputed information in Documents 2, 3, 15, 18 and 25, I am satisfied that all of that information is prescribed details as set out in

regulation 9(1) of the Regulations. Consequently, clause 3(3) applies to that information and none is exempt under clause 3(1).

79. The only personal information remaining in dispute is that relating to Professor Palmer. The respondents claim that all personal information about Professor Palmer is exempt under clause 3(1) and that clause 3(6) – the only limit on the exemption that might apply – has no application.
80. I have examined Documents 5, 7, 12-14, 19-21, 23, 27, A2-A4, A8-A10, A12, A13, A15-19, A32, B1-B6 and the disputed information in Documents 2, 3, 15, 18 and 25. In my view, Documents 12, 14, 23, 28, A2-A4, A9, A13, A17-A19, A32, B1, B5 and B6 all contain personal information, as that term is defined in the FOI Act, about Professor Palmer and all of that information is *prima facie* exempt under clause 3(1) of Schedule 1 to the FOI Act.

***Clause 3(6) – the public interest***

81. Section 102(3) of the FOI Act provides that the onus is on the complainant, as the access applicant, to establish that disclosure of personal information about a third party would, on balance, be in the public interest.
82. The complainant notes that the principal purpose of the FOI Act is to allow the public to participate more fully in governing the State. The complainant submits that Professor Palmer has lobbied the State Government in relation to Mineralogy's business interests and there is a public interest in the disclosure of the disputed matter because there is a question mark over the relationship between the Government and Professor Palmer.
83. The Minister submits that the disclosure of personal information about Professor Palmer would not be in the public interest because he is a private individual; there is a strong public interest in protecting the personal privacy of individuals; and there is no benefit to the public interest in disclosing such information.
84. In a letter to me dated 20 December 2010, Mineralogy makes, in brief, the following submissions:
  - The public interest is not primarily concerned with the personal interests of the particular access applicant or with public curiosity.
  - There is a very strong public interest in the maintenance of personal privacy and the FOI Act is not intended to call to account or unnecessarily intrude upon the privacy of private individuals: *Re Schatz and Department of Treasury and Finance* [2005] WAICmr 8 at [19] and [30]. That public interest may only be displaced by much stronger and more persuasive public interests that requires the disclosure of personal information about one person to another: *Re Mossenson and Others and Kimberley Development Commission* [2006] WAICmr 3 at [31].
  - The disputed matter contains information that would identify a significant number of other individuals and the "*complainant's advice that he is not*

*seeking access to personal information about individuals other than the Minister ..., the Minister's policy officers and Professor Palmer is not practicable or feasible at all": Re Fabbri and Police Force of Western Australia [2005] WAICmr 14 at [12].*

- The public interest in ensuring that government agencies are accountable does not require that details of third parties be made freely available to the complainant. There are other means by which the level of accountability can be carried into effect such as the scrutiny of material by law enforcement officers: *Manly, Re Fabbri and Re Schatz*.
  - In *Manly*, Owen J said, at p.570: “*Although the public has an interest in access to information, they also have an interest in the proper functioning of government and in protecting the privacy of individuals and the proper commercial interests of business organisations.*” In that case, the Supreme Court took the view that the former Information Commissioner had properly exercised her discretion to decide that the public interest in ensuring that Mr Smith, as the holder of elected public office, be accountable did not require the disclosure of the relevant documents.
  - It is not in the public interest to disclose documents that may cause unwarranted commercial disadvantage to Mineralogy, as Mineralogy has submitted in support of its clause 4 exemption claims.
  - In balancing the competing public interests, the very strong public interest in maintaining and protecting the personal privacy of individuals outweighs any countervailing interest in the disclosure of the disputed information.
85. I note that the background to this matter has been widely canvassed both in the media and in Parliament. In *Police Force of Western Australia v Kelly and Smith* (1996) 17 WAR 9, Anderson J of the Supreme Court of Western Australia said, at p.14:

*“In considering the question of whether exemption is lost once the matter has found its way into the hands of the applicant or into public hands, I think it must be remembered that what is under consideration is the right of access to the particular documents of an agency. One would not expect the character of the documents as exempt documents to depend on whether, by some means, the subject matter of the documents, or some of it, had already got out ... it would mean that an applicant could overcome a claim of exemption by showing or claiming that he already knew something of the matter from other sources. I do not think it could have been intended that exemption should depend on how much the applicant already knows or claims to know of the matter.”*

86. I agree with those comments. Nonetheless, the question of what is known by the applicant and the public may be relevant to the application of the limit on exemption in clause 3(6).

87. I accept Mineralogy's submission that the public interest is different from an applicant's personal interests or public curiosity. In *DPP v Smith* [1991] 1 VR 63 at p.65 the Supreme Court of Victoria said:

*“The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals ...”*

88. I agree with that view. The question is whether disclosure of the information would be of some benefit to the public generally.
89. I accept Mineralogy's submission that it is not in the public interest to disclose documents that may cause commercial disadvantage to Mineralogy. However, in view of my findings concerning Mineralogy's clause 4 claims, I do not consider that the disputed matter would reveal that kind of information if disclosed to the complainant.
90. I do not accept Mineralogy's submission that it is not practicable to provide the complainant with documents that delete all personal information other than that sought by the complainant. Section 24 of the FOI Act provides that an agency has to give access to an edited copy of a document if, among other things, it is practicable to do so. In *Police Force of Western Australia v Winterton* (1997) WASC 504, Scott J considered that the word 'practicable' in s.24 included the requirement that editing be done in such a way that the documents still made sense and could be read and understood in context. In the present case, I consider that it would be practicable in that sense to edit the disputed matter to delete the personal information that is outside the scope of the complainant's application. In *Re Fabbri*, the A/Commissioner considered that it would not be practicable to edit the document in dispute in the particular circumstances of that case.
91. Determining whether disclosure would, on balance, be in the public interest involves identifying the relevant competing public interests – those favouring disclosure and those favouring non-disclosure – weighing them against each other and making a judgment as to where the balance lies in the circumstances of the particular case.
92. In favour of disclosure, I recognise that there is a public interest in applicants being able to exercise their rights of access to documents under the FOI Act. However, those rights are not absolute rights. Section 10(1) of the FOI Act provides that a person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with the FOI Act. The right created by s.10(1) is subject to exemptions, which are designed to protect significant public interests, such as the protection and maintenance of personal privacy, that compete with the public interest in the openness and accountability of State and local government agencies.

93. I also recognise that there is a public interest in Ministers and other government agencies being seen to be transparent and accountable in their contacts with those persons and companies they have dealings with in the course of their work, including observing appropriate protocols. In my view, the disclosure of the personal information in Documents 12, 14, 23, 28, A2, A3, A4, A9, A13, A17, A18, A19, A32, B1, B5 and B6 would serve the end of preserving public confidence in government by allowing the public to judge for itself whether proper and impartial processes are followed at the highest levels of government.
94. In *Manly*, a journalist applied under the FOI Act to a government agency for access to documents concerning the financial affairs of Mr Smith, a Member of Parliament. At the relevant time, Mr Smith's financial affairs were the subject of much media interest and a police investigation. On external review, the former Commissioner found that the disputed documents – which included a review of a report by Mr Smith's accountants – were exempt under clause 5(1). Although not technically required to do so, the former Commissioner went on to state her view of the other exemption claims made by the agency, including clause 3(1). In light of that, the Supreme Court, on appeal from the Commissioner's decision, proceeded to review the Commissioner's reasons for finding that the documents would also have been exempt under clause 3(1) and Owen J said, at p.571:

*“The Commissioner has taken into account the need for accountability among public officials ... It would be going too far to suggest that once a person puts forward his or her name for public office that the person forfeits the right to privacy ... An individual application for access to information will fall to be decided within the context of its own particular fact situation. In this situation, the Commissioner has decided that the public interest in ensuring that Mr Smith, as the holder of elected public office, is accountable does not require that details of the Mann Report be freely available. There are, the Commissioner has determined, other means by which that level of accountability can be carried into effect, namely the scrutiny of the material by the law enforcement authorities. In these circumstances, the right to privacy and the public interest meld to dictate a result in favour of exemption. It is not for me to comment on the merits of that conclusion. I am satisfied that in reaching it the Commissioner has not erred in her appreciation of the public interest test.”*

95. In the present case, the facts of the matter, which are in the public domain, are that the complainant, an opposition Member of Parliament, has raised concerns in Parliament, which have been reported in the media, about the contacts between the Minister – who has responsibility for the Regional Development portfolio – and Mineralogy, a mining company with significant mining projects in regional Western Australia and its Chairman, Professor Palmer.
96. I consider that there are points of difference between the facts in *Manly* and the present case. In *Manly*, Mr Smith's financial information was information of an essentially private nature, albeit he held public office. The information in the disputed documents about Professor Palmer is not of the same private character.

Instead, all the information about Professor Palmer relates solely to his role in Mineralogy. In that regard, I note Mineralogy's letter to the Minister's office dated 19 May 2010, which noted "*that all of the Documents relate to Mineralogy and that none of the Documents relate to Professor Palmer as an individual. References to Professor Palmer are to him in his capacity as a representative of Mineralogy only.*"

97. Moreover, on 29 November 2010, Mineralogy advised me as follows:

*"The Documents relate to the business/commercial dealings of Mineralogy with government agencies and do not reflect the actions of individuals acting in their own right. Where a representative of Mineralogy (including Professor Palmer) acts within their authority and only undertakes acts in the usual course as officers and employees of Mineralogy, all such acts of representatives are acts of Mineralogy. Mineralogy argues that there is no basis to assert that any of the officers or employees of Mineralogy referred to in the Documents acted outside of their capacity as officers and employees of Mineralogy."*

98. In my view that is correct. I do not consider that disclosure of the 'personal information' as defined in the FOI Act about Professor Palmer contained in the disputed documents would involve any real encroachment on Professor Palmer's privacy. From the face of the relevant documents, and in Mineralogy's own view, Professor Palmer was acting at all times as a representative of or a substitute for Mineralogy.
99. In other words, although Professor Palmer's identity can be ascertained from the relevant information in Documents 12, 14, 23, 28, A2-A4, A9, A13, A17- A19, A32, B1, B5 and B6, the disclosure of that information would not, in my view, intrude significantly upon his personal privacy. Therefore, the public interest in maintaining personal privacy in relation to these matters is not as strong as I would usually consider it to be. I have also taken into account the fact that, on the information before me, at least some of that personal information is in the public domain.
100. In favour of non-disclosure, I agree with the respondents that there is a very strong public interest in the maintenance of personal privacy and that interest may only be displaced by some other stronger and more persuasive public interest that requires the disclosure of personal information about one person to another person. The protection of an individual's privacy is a public interest that is recognised in the FOI Act by clause 3. The FOI Act is not intended to open the private lives of its citizens to public scrutiny in circumstances where there is no demonstrable public benefit in doing so. However, for the reasons set out in paragraphs 92-94 above, I have not given as much weight to this particular public interest as would normally be the case.
101. I have considered Mineralogy's submission that there are other avenues by which the complainant can have his concerns investigated so that, consequently, the public interest does not require the disclosure of third party information to the world at large. Unlike *Manly*, the complainant has raised his concerns in the

public forum of Parliament and there is nothing before me to establish that he has raised those matters with any relevant law enforcement body. That, of course, is a method of bringing agencies publicly to account and is a factor that, in part, satisfies the public interest in accountability.

102. Nonetheless, in balancing the competing public interests, I consider that the public interest in protecting personal privacy is outweighed by the public interests in government transparency and accountability in this case. Consequently, I consider that the disclosure of the personal information about Professor Palmer contained in Documents 12, 14, 23, 28, A2, A3, A4, A9, A13, A17, A18, A19, A32, B1, B5 and B6 would, on balance, be in the public interest. Accordingly, I consider that the limit on the exemption in clause 3(6) applies to that information.

### MINERALOGY'S OTHER CLAIMS FOR EXEMPTION

103. Mineralogy also claims that Documents 5, 7, 10 and certain information in Document 15 are exempt under clause 2(1); Documents 5, 7, 14, 15, 19, B1, B6 and certain information in Documents 15 and 18 are exempt under clause 8; and that Document 19 and certain information in Documents 15 and 18 are exempt under clause 9. Since Mineralogy provided me with no probative material in support of those claims, I have not considered them in detail, other than to outline the assertions made.
104. In relation to clause 2 (inter-governmental relations), Mineralogy submits that the disputed matter relates to China's first major iron ore project in Australia and that disclosure could potentially affect relations between the State Government and China, since the complainant has used documents previously disclosed to him under the FOI Act to make allegations in Parliament and the media about the Government. Mineralogy also submits that such allegations could adversely impact on Western Australia/China relations and "*could result in China investing in other countries.*" Mineralogy submits that there is a real question whether the public interest would be served by disclosure in this case.
105. With regard to clause 8 (confidential communications), Mineralogy submits that the relevant matter is highly confidential in nature and was provided in strict confidence and only for the purposes for which they were given. In its letter to the Minister dated 19 May 2010, Mineralogy said:

*"The Documents were communicated to the State in such circumstances as to fix the Department/and or Minister with an equitable obligation of [confidence] not to use the confidential information in a way that is not authorized by Mineralogy. Mineralogy has not authorized the release of the Documents. Disclosure of any part of the Documents would constitute a breach of confidence."*

106. In respect of clause 9 (the State's economy), Mineralogy, in its letter to the Minister of 5 November 2010, submits that disclosure of the disputed matter should not occur where doing so would have a substantial adverse effect on the ability of the State to manage the economy. In particular, in its letter to me of

29 November 2010, Mineralogy notes that the project undertaken in respect of the State Agreement is the biggest undertaken by the Chinese government and that the disclosure of commercially sensitive documents will undermine Chinese confidence in the State government and will make West African countries a better option. Mineralogy submits that effective administration and management of the State's economy cannot be achieved if confidential and sensitive information submitted to government agencies for consideration or decision-making is disclosed to the public prematurely.

107. However, other than making those assertions, Mineralogy provided me with no material to support the requirements of each of clauses 2, 8 and 9. Having examined the relevant documents and information and considered Mineralogy's claims, I consider Mineralogy's claims under clauses 2, 8 and 9 to be merely speculative and I am not persuaded that Mineralogy has satisfied the onus placed on it of establishing any of the requirements of those provisions. I repeat the comments of Owen J in *Manly's* case, referred to in paragraph 39 above and I find that the relevant matter is not exempt as claimed under clauses 2, 8 or 9 of Schedule 1 to the FOI Act.

## CONCLUSION

108. The Minister's decision to give access in edited form to documents and to refuse access to other documents is varied. I find that:
- The first two sentences in paragraph 2 of the first email (dated 28 February 2009 5:44am) in Document B1 are not part of a document of the agency, pursuant to clause 4(2) of the Glossary.
  - Documents 8, 9, 11, 23, 24 and 28 and the information that relates to Mineralogy in Documents 2, 3, 5-7, 10, 12, 14, 15, 18, 19, 20, 21, 25, 27 and B1-B6 are not exempt under clause 4(2).
  - The following documents and information are exempt under clause 4(3):
    - Documents 6, 8-11, 24 and 28 in full.
    - Document 5: Emails 2 and 3 sent 2 July 2009 at 12:05pm and 12:24pm respectively.
    - Document 7: Emails 2-5 sent between 2 July 2009 at 12:05pm and 3 July 2009 at 4:25pm.
    - Document 15: Paragraph 4 in email 5 sent 18 September 2009 at 9:33am.
    - Document B6: Emails 2-4 (dated between 2 July 2009 at 12:05pm and 20 July 2009 at 11:28am) and the subject line and paragraph 1 in email 5 dated 20 July 2009 at 1:16pm.
  - The personal information about Professor Palmer in Documents 12, 14, 23, 28, A2, A3, A4, A9, A13, A17, A18, A19, A32, B1, B5 and B6 is not exempt under clause 3(1).

- Documents 5, 7 and 10 and certain information in Document 15 are not exempt under clause 2(1).
- Documents 5, 7, 14, 15, 19, B1, B6 and certain information in Documents 15 and 18 are not exempt under clause 8.
- Document 19 and certain information in Documents 15 and 18 are not exempt under clause 9.

\*\*\*\*\*

## APPENDIX

### 1. The disputed documents

- Document 5: A series of emails between the Minister's office and a third party dated between 27 February 2009 and 2 July 2009.
- Document 6: The attachment to Document 5.
- Document 7: A series of emails dated 27 February, 2 July and 3 July 2009 between the Minister's office and a third party.
- Document 8: A letter dated 7 July 2009 from the Minister's office to a third party.
- Document 9: A letter dated 7 July 2009 from the Minister's office to the Premier's office.
- Document 10: A series of emails dated 17 and 20 July 2009 between a third party and the Minister's office.
- Document 11: A letter dated 11 August 2009 from the Premier to a third party.
- Document 12: A series of emails between a third party and the Minister's office dated 18 August 2009.
- Document 13: The attachment to Document 12.
- Document 14: A series of emails dated 4 September 2009 between a third party and the Minister's office.
- Document 19: A series of emails dated 6 and 12 October 2009 to and from a third party and the Minister's office.
- Document 20: Emails between the Minister's office and the office of the Minister for Mines and Petroleum dated between 6 and 16 October 2009.
- Document 21: A copy of Document 20 minus the last email dated 16 October 2009 6:17pm.
- Document 23: A letter dated 9 November 2009 from a third party to the Minister.
- Document 24: The attachment to Document 23.
- Document 27: A series of emails dated 9 December 2009 between the Minister's office and the Department of Transport.
- Document 28: Letter dated 2 July 2008 to Minister from a third party. [This document is the attachment to Document 9]
- Document A2: An email dated 24 January 2009 between a third party and the Minister's office.
- Document A3: A series of emails dated between 30 January and 2 February 2009 between a third party and the Minister's office.
- Document A4: An internal email dated 3 February between officers in the Minister's office.
- Document A8: An email dated 27 February 2009 from the Minister's office to another government office.
- Document A9: A series of emails dated 22 April 2009 both internal within the Minister's office and external to another government office.
- Document A10: A series of emails dated 22 April 2009 both internal within the Minister's office and external to and from a third party.
- Document A12: A series of emails (including the first two from Document A10) dated between 22 April 2009 and 6 May 2009 both internal within the Minister's office and external to and from a third party.
- Document A13: A series of emails dated between 6 and 8 May 2009 between the Minister's office and another government office.

- Document A15: A series of emails dated between 19 and 21 May 2009 both internal within the Minister's office and external from a third party.
- Document A16: An email dated 26 May 2009 internal to the Minister's office.
- Document A17: An itinerary dated 29 May 2009.
- Document A18: An itinerary dated 29 May 2009.
- Document A19: An itinerary dated 29 May 2008.
- Document A32: A series of emails dated 17 August 2009 both internal within the Minister's office and external from a third party.
- Document B1: A series of emails dated 28 February 2009 to 27 May 2009 between the Minister's office, another government agency and third parties.
- Document B2: A series of emails dated 23 February 2009 to 9 March 2009 between officers of agencies and a third party.
- Document B3: A series of emails dated 19 to 21 November 2008 between officers of agencies, including the Minister's office.
- Document B4: A series of emails dated 29-30 July 2009 between the Minister's office and a third party.
- Document B5: A series of emails dated 5 June 2009 between the Minister's office and a third party.
- Document B6: A series of emails dated 27 February 2009-20 July 2009 between the Minister's office and a third party.

## **2. The disputed information**

Documents 2, 3, 15, 18 and 25 are all emails or series of emails that were disclosed to the complainant in edited form. The following information is the information deleted from those documents, which matter remains in dispute:

- Document 2: Paragraph 2 of email 1 sent 23 February 2009 at 10:30am.
- Document 3: Sentence 2 of paragraph 1.
- Document 15: Paragraph 2 of email 7 sent 18 September 2009 at 11:54pm and the whole of emails 1-5.
- Document 18: Paragraph 2 (including the two dot points) in email 3 sent 8 October 2009 at 7:19am.
- Document 25: Paragraph 2 and the Table in email 1 sent 26 November 2009.