OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2013248 Decision Ref: D0022015

Participants:

Chris Tallentire
Complainant

- and -

Department of Agriculture and Food
Agency

- and -

Others

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – the biophysical viability rating assigned to individual pastoral leases in a report – clause 4(3) – adverse effect on business affairs – clause 4(7) – public interest – clause 3(1) – personal information – clause 3(6) – public interest – seeking the views of third parties – right of third parties to claim exemptions other than under clauses 3 and 4 of Schedule 1 to the FOI Act – clause 8(2) – confidential information.

Freedom of Information Act 1992: sections 10(2), 32, 33, 34, 65, 68, 69, 102(1); Schedule 1, clauses 3(1), 3(6), 4(3), 4(7), 8(2) and 8(4); Glossary, clause 1
Land Administration Act 1997: sections 95, 101, 108, 113 and 139
Soil and Land Conservation Act 1945: section 13
Administrative Appeals Tribunal Act 1975: section 30
Freedom of Information Act 1982 (Cth): sections 27 (repealed), 43 (repealed) and 59 (repealed)

Apache Northwest Pty Ltd v Department of Mines and Petroleum [2012] WASCA 167
Attorney-General's Department v Cockcroft (1986) 10 FCR 180
Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550
Mitsubishi Motors Australia Ltd v Department of Transport (1986) 12 FCR 156
Re Butcher and Department of Parks and Wildlife and Steven Edwards [2014] WAICmr 6
Re Kimberley Diamond Company NL and Department for Resources Development and Argyle Diamond Mines Pty Ltd [2000] WAICmr 51
Re Mineralogy Pty Ltd and Department of Mines and Petroleum [2015] WAICmr 1
Re Oset and Office of Racing and Gaming and Anor [2000] WAICmr 2

Re Pastoralists' and Graziers' Association and Department of Land Administration [1995] WAICmr 27
Re QMS Certification Services Pty Ltd and Department of Land Administration and Quality Assurance Services [2000] WAICmr 48**.**
Re Strelley & Others and Department of Land Administration [1995] WAICmr 9
Re West Australian Newspapers Limited and Western Power Corporation [2005] WAICmr 10
Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 36 FCR 111

DECISION

The agency's decision to refuse access to the disputed information is set aside. In substitution, I find that the disputed information, as described at [33] of these reasons for decision, is not exempt under clauses 3(1), 4(3) or 8(2) of Schedule 1 to the *Freedom of Information Act 1992*.

Sven Bluemmel
INFORMATION COMMISSIONER

4 March 2015

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Agriculture and Food (**the agency**) to give Mr Chris Tallentire MLA (**the complainant**) access to edited copies of documents under the *Freedom of Information Act 1992* (**the FOI Act**). A number of third parties are joined as parties to this complaint.

BACKGROUND

2. By letter dated 5 July 2013, the complainant applied to the agency under the FOI Act for access to a number of reports about the viability and sustainability of Western Australia's pastoral leases.

3. By notice of decision dated 5 August 2013, the agency decided to give the complainant access to edited copies of three named reports. It claimed that the information deleted from those reports was exempt under clause 4(2) of Schedule 1 to the FOI Act.

4. On 14 August 2013, the complainant applied for internal review of the agency's decision in relation to two of the named reports (**the agency reports**). By letter dated 28 August 2013, the agency varied its decision by giving the complainant access to additional information in the agency reports. However, it maintained that the remaining information deleted from the agency reports was exempt under clause 4(2).

5. The agency reports were entitled *A Report on the Viability of Pastoral Leases in the Northern Rangelands Pastoral Region Based on Biophysical Assessment* and *A Report on the Viability of Pastoral Leases in the Southern Rangelands Pastoral Region Based on Biophysical Assessment.* Each report considered the biophysical viability of pastoral leases in the Rangelands at a regional and district level and assigned a biophysical viability rating to individual pastoral leases in the Northern or Southern Rangelands respectively. The biophysical viability ratings were defined in each report as:

    - 'A' – 'Lease viable, with a capacity to remain so under appropriate management';
    - 'B' – 'Lease not viable in 2011, but able to become viable following five years of rehabilitative management (essentially destocking) and recovery of rangeland condition'; or
    - 'C' – 'Lease not viable as a stand-along pastoral enterprise in 2011, with insufficient biophysical land capability to become viable within five years'.

6. The agency reports each included a schedule listing the individual pastoral leases in the respective rangelands and assigning a biophysical viability rating to each pastoral lease. The agency claimed that the biophysical viability ratings assigned in the schedules together with other information that may identify the pastoral leases that received an unfavourable biophysical viability rating were exempt under clause 4(2).

7. By letter dated 16 September 2013, the complainant applied to me for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

8. Following my receipt of this complaint, the agency produced to me the original of the agency reports and its FOI file maintained in respect of the complainant's access application.

9. On 29 January 2014, the parties attended a conciliation conference before my Principal Legal Officer, Ms Su Lloyd. As a result of that conference, the agency disclosed further information to the complainant. However, the complainant remained dissatisfied with the agency's decision that certain information in the agency reports was exempt and the matter was not resolved by conciliation.

10. Following the conciliation conference, the agency maintained that the information in the agency reports that it claimed specifically identified, or could reasonably be expected to identify, individual pastoral leases that had received an unviable biophysical viability rating (**the deleted information**), was exempt under clause 4(2) of Schedule 1 to the FOI Act. Following discussions with my office, the agency amended its claim to state that the deleted information was exempt under clause 4(3) of Schedule 1 to the FOI Act. On 18 March 2014, at the request of my office, the agency provided additional information in support of its claim that disclosure of the deleted information would have an adverse effect on the pastoral lessees whose pastoral leases are referred to in the deleted information (**the pastoral lessees**).

11. On 15 May 2014, I provided the complainant and the agency with a letter setting out my preliminary view of the agency's decision to give access to edited copies of the agency reports on the basis that certain information was exempt under clause 4(3) of Schedule 1 to the FOI Act. On the information before me, my preliminary view was that the agency's decision was not justified. I invited the agency to make any further relevant submissions by 30 May 2014. At the agency's request, I granted it an extension of time to make submissions to 9 June 2014.

12. By letter dated 9 June 2014, the agency advised me that it did not accept my preliminary view and provided submissions in support of its claim that the deleted information was exempt under clause 4(3) of Schedule 1 to the FOI Act.

13. Before proceeding to a formal decision in this matter, I considered whether the pastoral lessees should be advised that I am dealing with a complaint in relation to disclosure of the deleted information. As the agency had not proposed to give access to information about any individual leases, it had not previously notified the pastoral lessees that the complaint was before me.

14. Section 68 of the FOI Act provides that:

> *(1) The Commissioner has to notify the agency, in writing, of any complaint made under this Division unless a decision not to deal with it has been made under section 67.*
>
> *(2) If the complaint relates to an access application, notification of the complaint has to be given, in writing, by the agency —*

> *(a) in the case of a complaint made by the access applicant where the agency has decided to refuse access to a document, or give access to an edited copy of a document, on the grounds that matter in the document is exempt matter under clause 3 or 4 of Schedule 1 — to any third party;*
>
> …

15. Section 33(1) of the FOI Act provides that:

> *This section applies to a document that contains —*
>
> *(a) information concerning the trade secrets of; or*
>
> *(b) information (other than trade secrets) that has a commercial value to; or*
>
> *(c) any other information concerning the business, professional, commercial or financial affairs of,*
>
> *a person (the third party) who is not the applicant.*

16. I considered that the deleted information is information concerning the business, professional, commercial or financial affairs of the pastoral lessees. Therefore, I considered that each pastoral lessee was a potential third party for the purposes of section 68(2).

17. On that basis, section 68(2) requires the agency to notify the pastoral lessees of the complaint before me. On its face, this would have required the notification of over 400 pastoral lessees.

18. My officer discussed the large number of potential third parties in the matter and the notification requirement with the complainant. As a result, on 25 September 2014, the complainant advised my officer that he limited the scope of his complaint to that part of the decision that the biophysical viability rating given to 41 named pastoral leases in the Pilbara is exempt under clause 4(3). Therefore, I consider that the pastoral lessees of those 41 pastoral leases identified by the complainant are the third parties in this matter.

19. On 7 October 2014, I required the agency to notify the leaseholders of those 41 pastoral leases (**the third parties**) of this complaint. I required that the notification include:

- a cover letter from the agency advising the third parties of the matter before me and the nature of the disputed document;
- a copy of a notice from me to the third parties providing information about their rights in relation to this complaint (**the notice**); and
- the biophysical viability rating assigned to the individual pastoral lease held by the particular third parties,

(**the required information**).

20. I advised the agency that if it had concerns about notifying the 41 pastoral lessees on the basis I required, it should advise me by 15 October 2014. The agency did not make further submissions on that matter.

21. By letter dated 17 October 2014, the agency notified the third parties of the complaint and provided each of them with the required information. The notifications were sent by email where the agency held an email contact address. The agency notified the remaining third parties by registered post. The agency has provided me with information to demonstrate that it has taken reasonable steps to advise the third parties of the complaint and of their rights in respect of this complaint.

22. The third parties were advised that if they did not consent to disclosure of the disputed information they could choose either to make submissions or be joined as a party to the complaint, or both. Submissions or requests to be joined were to be provided to my office by no later than 10 November 2014.

23. By email to the agency dated 21 October 2014, one third party, a holder of two pastoral leases, advised that it accepted my preliminary view and made no further submissions.

24. I understand that following requests from a number of third parties, the agency subsequently gave each of the third parties an edited copy of the disputed document.

25. Following a number of requests from third parties or their representatives, which included cogent reasons for granting an extension of time, an extension of time to make submissions and/or be joined as a party was granted to the third parties until 24 November 2014.

26. Up to and including 24 November 2014, I received a number of submissions from third parties objecting to disclosure of the disputed information.

Submissions received

27. Submissions were received from Cornerstone Legal on behalf of the Pastoralists and Graziers Association of WA (Inc.) (**the PGA**), which represents the interests of 16 third parties (by letter dated 24 November 2014).

28. The PGA's submissions purported to be on behalf of pastoral lessees from 28 stations. The disputed information in this matter does not relate to nine of the stations referred to in those submissions. Sixteen third parties hold the remaining 19 pastoral leases. Those third parties, at their request, are joined as parties to this complaint.

29. In addition, I received submissions from a number of individuals and companies that hold interests in the pastoral leases the subject of the disputed information.

30. In total, there are twenty parties that have been joined to this matter. Given the nature of the issues involved in this matter, I have not identified the third parties because to do so would potentially disclose information which those third parties claim is exempt.

THE DISPUTED DOCUMENT AND THE DISPUTED INFORMATION

31. The disputed document in this matter is *A Report on the Viability of Pastoral Leases in the Northern Rangelands Pastoral Region Based on Biophysical Assessment* (**the disputed document**).

32. The disputed document assigns a biophysical viability rating to 154 named pastoral leases in the Pilbara and the Kimberley. The scope of this complaint is limited to the review of the agency's decision to refuse the complainant access to the biophysical viability rating of 41 named pastoral leases in the Pilbara.

33. The information in dispute consists of the biophysical viability rating assigned to each of the named 41 pastoral leases, deleted from pages 39 and 40 of the disputed document, as described at [18] (**the disputed information**).

34. The agency and the third parties submit that the disputed information is exempt under clause 4(3) of Schedule 1 to the FOI Act.

35. A number of third parties also submit that the disputed information is also exempt under clause 3(1) and 8(2) of Schedule 1 to the FOI Act.

Onus of proof

36. Under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision is justified or that a decision adverse to another party should be made. Accordingly, in this instance, the agency bears the onus of establishing that its decision to give the complainant access to an edited copy of the disputed document is justified.

CLAUSE 4 – COMMERCIAL AND BUSINESS INFORMATION

37. The agency and the third parties claim that the disputed information is exempt under clause 4(3) of Schedule 1 to the FOI Act. 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.*

38. I agree with the former A/Information 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].

39. 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 limits on exemption set out in clauses 4(4) to 4(7) must also be considered. In this case, I consider that only the limit on exemption in clause 4(7) may be relevant.

The complainant's submissions

40. The complainant's submissions are set out in his letter to me seeking external review dated 16 September 2013. The complainant's submissions are summarised below.

- While disclosures made in the Annual Return of Livestock Improvements (**the Annual Return**) required under section 113 of the *Land Administration Act 1997* (**the LA Act**) may have been traditionally regarded as confidential, there is nothing in that Act to state that those returns are confidential.

- Even if information in the Annual Returns is confidential, the range condition assessment does not necessarily rely on that information but 'focuses only on evidence of the long-term accumulated outcomes of past management'.

- Information about district level analysis of land systems and their carrying capacity is already available in the rangeland survey reports. However, the information in this report is 'up-to-date information on these key aspects of the status of land resources'.

- Pastoral lessees are managers, not owners of Crown land, and should be accountable for the management of Crown land.

- Scientific analysis of the impact of land degradation is a matter of critical public importance and should not be treated as 'commercial-in-confidence'.

- Disclosing the disputed information is important for objective present and future planning and management to achieve sustainable use of the Crown land resource.

- It is in the public interest to disclose the disputed information because the agency reports state that:

> *unless there is significant modification of the current leasehold structure or the true and substantial costs of resource deterioration are charged back to the lessee, then unrealistic expectations from the rangelands resource will continue, to the detriment of a large proportion of Western Australia's publicly owned land.*

The agency's submissions

41. The agency's submissions are set out in its internal review decision dated 28 August 2013, an email dated 18 March 2014 responding to queries from this office and a letter dated 9 June 2014 in response to my preliminary view. The agency's submissions are summarised below.

- The disputed document includes a biophysical viability rating of the pastoral leases which is:

  > *an assessment of the financial viability of pastoral leases (not pastoral businesses) using biophysical parameters (essentially the potential of the landscape to produce forage for livestock).*
  >
  > [The agency] *determined that numerous leases did not have the capacity to produce domestic stock at a level that would be defined as being financially viable (essentially that they were too small and/or the rangelands that they encompass were of too low productivity).*

- The biophysical viability ratings in the disputed document were calculated using information from both published and unpublished sources. The published sources included the rangeland surveys. However, the carrying capacity discounts due to range condition applied by the agency to the potential carrying capacity of each pastoral lease:

  > *were derived from the most recent assessment of rangeland condition of every pastoral lease in Western Australia. Range condition assessment of pastoral leases is performed by* [the agency] *under a service agreement with the Pastoral Lands Board. Range condition assessment of pastoral leases involves the collection and analysis of confidential lease level information relating to management of the land under lease and information provided in confidence by the pastoral leasehold to the Department of Lands through the* [Annual Return].

- Confidential information collected through the Annual Return 'is only ever published with the express permission of the pastoral leaseholder' and the disputed information is not otherwise publicly available.

- The information published in rangeland surveys is different to the disputed information because the rangeland surveys do not contain information about the outcome of a lease level assessment of biophysical viability. The rangeland surveys include assessment of land systems at a regional level.

- Disclosing the disputed information could reasonably be expected to adversely affect the capacity of a pastoral lessee to conduct their pastoral business and could potentially impair the commercial value of the lease.

- If a lending institution becomes aware that the agency:

  > *has assessed a pastoral lease as unviable, then this could generate doubt that had not existed previously, and could therefore affect the opinion of the*

> *lending institution in determining the financial worthiness of the lease. Financial institutions treat pastoral businesses in the same manner as any other business, and the inferred capacity to repay any loan is important in determining the financier's attitude.*

- Leaseholders of pastoral leases assessed as unviable in the disputed document may experience greater difficulty in obtaining commercial finance.

- Disclosure of the disputed information would:

> *carry significant 'gravity' in the eyes of a financier and/or prospective purchaser, and subsequently would encourage them to reconsider their valuation of a pastoral lease based business for finance or purchase. Any revaluation (downwards) of existing pastoral business would adversely impact their existing gearing ratios (rendering the business more risky to a financier). Some would find it more difficult to obtain operating capital. Downward revaluation would also diminish the commercial value of a pastoral business in the marketplace.*

- The agency asked a selection of rural financiers, consultants, stock firms and industry bodies whether the release of the disputed information would cause them to re-assess the value appraisal of a pastoral business or reconsider the provision of finance. The agency provided the following summary of the responses received.

> 1. *All parties agreed that they would consider the* [agency reports] *as 'significant' documents in the conduct of their dealings with the pastoral industry.*
>
> 2. *All parties offered that the adverse impact would extend more widely than upon the subject pastoral lease, i.e. it would impact across a district rather than on an individual lease.*
>
> 3. *The banks responded that they would consider the disputed information along with a range of other indicators in assessing a pastoral business applicant's capacity to service a debt. Other measures such as the business's demonstrated productivity, overall income profile and credit history would be no less considered.*
>
> 4. *Stock firms appeared to attribute a greater adverse impact on the release of the disputed information. In particular, they expressed concern of the likely impact on real estate values and regional sales.*
>
> 5. *The industry bodies expressed a range of views but each agreed that the disputed information could do nothing except harm the broader confidence in the pastoral industry, especially in regions where viability challenges were more prevalent.*

- The agency submits that the opinions expressed by the people it consulted are 'expert testimony' that supports its submissions about the likelihood and magnitude of the potential adverse impact on individual pastoral businesses and

the pastoral industry generally. On that basis, it submits that those considerations outweigh the public interests in favour of disclosure of the disputed information.

Third party submissions

42. The third parties' submissions include similar or the same material across the various submissions. Those submissions are summarised by topic rather than the identity of each third party.

Adverse effect on the business affairs of third parties

43. The third parties submit that disclosure of the disputed information could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the third parties because the disputed information is inaccurate, out of date and/or misleading. The submissions that the disputed information should be characterised as inaccurate, out of date and/or misleading are summarised below.

- The disputed document ignores the fact that some leases are run in combination with other leases in the one business and that many pastoral lessees have substantial non-pastoral income from alternative diversified activities.

- The information in the disputed document was 'collated from compulsory and confidential [Annual Return] and Rangeland Condition Reports, which are supplied by individual pastoral leaseholders' but it does not take into account several factors including appeals of decisions, reassessments of the Annual Returns, and incomplete Annual Returns.

- The disputed document is a desktop study that fails to consider the reality of each individual station. The biophysical viability rating is a generalisation that does not take into account knowledge of individual lease level information. The model used in the disputed document does not reflect the costs associated with different stations that will have very different overheads.

- The methodology and parameters of the disputed document are flawed. There is 'a deliberate disassociation from management and business operation skills' in the disputed document because the agency did not have access to the private and confidential information of the pastoral lessees. This means the authors of the disputed document (**the authors**) have devised a methodology that appears as though it has basis and then sent it off to an economist to apply viability. It does not describe parameters applied 'in terms of age, weight, gender or markets for sales, breed or productivity or overall management. The information can only be general not individually known data'.

- The disputed document implies knowledge of the source material, particularly by reference to the 1997 Rangeland Survey. The source material is also disputed which consequently reflects on the accuracy of the disputed information.

- The disputed information fails to take into account the diversity of a region. For example, the Pilbara area includes stations located on the coast, which have above average rainfall while stations located next to the Great Sandy Desert have below average rainfall.

- The disputed document does not take into account the management of each pastoral lease, which 'is critical to the sustainability of the resource and the long term viability of the rangeland and business'.

- The authors did not consult with individual pastoral lessees or cross-reference their methods 'with the positive rangeland condition reports or factual business performance, property or plans of general grass root perspective'. They do not have sufficient understanding of appropriate management of a pastoral business.

- One third party indicated that the agency had not visited his pastoral lease in 10 years. Another third party indicated that the agency had only visited his pastoral lease twice in 31 years. On this basis, I understand that the third parties submit that the disputed information is not an accurate reflection of the current and actual viability of individual pastoral leases.

- The disputed document is three years old and bases its analysis on data that goes back to 1995.

44. Several of the third parties provided information about their long association with their particular pastoral leases, the care that they had exercised over the land and the considerable time, effort and money expended to improve the leases. Those third parties expressed confidence that a current viewing of their property would demonstrate that their lease was viable.

45. Another third party provided examples of what he submits are inaccuracies and anomalies in a published report of the agency about the Pilbara Rangeland Survey 1997. The disputed document used that report as part of its analysis of the biophysical viability of individual pastoral leases. The third party submits that it 'must be recognised that there were limitations and inaccuracies resulting from those anomalies at individual lease level in the final report and therefore caution must be used in extrapolating data'.

46. Third parties submit that data from the Pilbara Rangeland Survey 1997, which was used for the analysis in the disputed document, is not relevant to current conditions because:

- it was a baseline survey that should not have been used for current comparisons nor as the starting point for current evaluations of viability;

- the rangeland surveys include assessment of land systems at a regional level rather than individual lease level;

- there is no definitive, detailed assessment of each lease area exposing anomalies and accurately interpreting the potential biophysical capacity; and

- data from the Pilbara Rangeland Survey is now 17 years old.

47. The third parties submit that disclosure of the disputed information could reasonably be expected to have an adverse effect on the 2015 pastoral lease renewal process that is currently in progress. The third parties submit that a biophysical viability rating of a Category 'B' or 'C' could reasonably be expected to adversely affect the third parties' ability to renew their leases.

48. The third parties submit that any negotiations with financiers will be adversely affected by disclosure of the disputed information because disclosure will:

    - significantly decrease the value of certain stations;
    - damage the reputation of the third parties, which could reasonably be expected have negative flow on effects to their other businesses and commercial affairs;
    - severely impact the ability of individual stations to obtain necessary ongoing finance; and
    - create obstacles to prospective purchasers seeking finance to buy certain leases.

49. The third parties made a number of submissions about the adverse effect of disclosure of the disputed information on the third parties' ability to obtain finance and the terms of financing.

    - Disclosure of the disputed information will 'severely impact the ability of individual stations to obtain necessary ongoing finance'.
    - Identifying a particular lease as 'unviable (especially in a document of the apparent status of [the disputed document]), self evidently, would be an obstacle to [third parties] getting finance for operations on the leases and to prospective purchases seeking finance to buy the leases from them'.
    - Disclosure of the disputed information will affect negotiations with financiers because finance is secured based on the number of stock and the level of improvements made on a pastoral lease, not on the individual title.
    - Disclosure of the disputed information will 'impact any dealings or negotiations regarding those stations'.
    - There is a 'strong likelihood' that a pastoral lessee whose pastoral lease received a biophysical viability rating of 'C' or 'B' 'will face increased interest rates due to a penalty risk, or will be required to pledge additional security before securing any loans'.
    - Disclosure of a non-viable biophysical viability rating will affect credit ratings with creditors and financial institutions as it will affect the creditors and financial institutions' perceptions on the viability of certain leases, which will destabilise the Pastoral lessees' current position.
    - Financial institutions are generally very risk averse and rarely give borrowers an opportunity to be heard. It is likely they would not give the pastoral lessees an opportunity to provide information that their pastoral lease is viable. It is relevant to consider that banks, in respect of residential home loans, do not lend at all to certain listed postcodes or only lend on terms much more onerous to the borrower.
    - It is likely that a financial institution will use the fact that the lease is categorised as non-viable as an automatic disqualifier and will decline finance and it is

unlikely that a financial institution would be able to overlook a report that expressly states that a lease is non-viable.

- The commercial reality is that typically borrowers have no power to influence a bank away from its predetermined 'policy'.

- There is anecdotal evidence that:

> *banks are aware of the 'A, B, C' viability classification used in the* [disputed document]. *It is reasonable to expect banks to, in respect of pastoral lease finance applications, have a 'check list' of factors, one of which would be its 'viability classification': if the classification is negative (say, B, but certainly C), the automatic result would be rejection of the application or, at least, it being dealt with more onerously (with higher interest rates or greater equity contribution from the borrower for example). It is hard to imagine a bank not taking such an approach. The commercial reality is that lenders may well be careless and prone to take into account irrelevant considerations and fail to take into account irrelevant considerations …*
>
> *For example, it may accept the disputed document's allegations and not accept, no matter how compelling, expert reports and evidence, to the contrary.*

50. The third parties submit that the destabilisation of the relationship with financial institutions will have an adverse effect on the pastoral businesses because all encumbrances registered against current leases will expire with the expiry of the pastoral leases on 30 June 2015. The 2015 pastoral lease renewal process includes the reissuing of all financial instruments and all encumbrances over individual stations and release of any information that categorises and names individual stations as non-viable has the potential to impact on these upcoming negotiations.

51. One third party submits that it is self evident that disclosure will affect the third parties' ability to get finance for operations on the leases.

52. Third parties submit that the adverse impact of the disclosure of the disputed information is demonstrated by the fact that financial institutions are:

> *already demanding* [pastoral lessees] *sign a* 'Release of Information Consent Form' *in relation to the 2015 lease renewals which includes the release of any information which relates to the Pastoral Lease, any outstanding directives, any compliance issues including payment of rent, and any information on the renewal or non-renewal of the Pastoral Lease by the Pastoral Lands Board.*

53. The third parties submit that disclosure of the disputed information will result in the pastoral lessees being required to provide the biophysical viability rating of their pastoral lease to the financial institutions, which 'would be detrimental to the leaseholder, especially considering that the disputed document does not adequately address the economic viability of their pastoral lease'.

54. The third parties submit that, even if a pastoral leaseholder could provide financial institutions with the relevant information to show why the overall business is viable, disclosure of the disputed information would place an extra burden on the leaseholder to persuade the particular financial institution that their lease is viable. In effect, disclosure of the disputed information would mean that a third party 'would have to present a case to his or her lender in answer to the prima facie problem that the classification obviously raises'.

55. One third party submits that the disclosure of the disputed information would have an adverse effect in relation to negotiations with the mining industry in relation to his pastoral lease. Those concerns are summarised below.

- Mining interests are expanding in the Pilbara region and the impact of the infrastructure associated with mining is a threat to the pastoralist business both environmentally and economically. Mining companies will negotiate with pastoral lessees over use of the land on pastoral leases. The relevant third party is currently negotiating with a company about a lengthy rail corridor through the bulk of the breed paddocks.

- Mining companies, whose core business is not pastoralism, tend to refer to the Rangeland Survey and approach negotiations on a cattle unit rating when negotiating about the impact of the use of the pastoral lease land. This is not appropriate because:

  > *This is not an adequate reflection of the level of biophysical capacity, individual management of the lease, or the operation and sound viability of my business built up over 40 years of hard work, planning and substantial investment in infrastructure and breeding.*

- The major consideration in negotiations is the breeder reductions due to grazing restrictions that will result from the placement of mining infrastructure. Disclosing a biophysical viability rating 'of contentious credibility' puts the third party in a position of 'extreme disadvantage in negotiating the real and serious economic impact from the company concerned'. When negotiating an access agreement, the third party needs to prevent the mining company compromising the rangeland resource and therefore the viability of the third party's business.

56. The third parties submit that disclosure will cause misinformation to spread within the community and damage the reputation of third parties and will in turn have negative flow on effects to other business and commercial affairs.

57. Some third parties submit that the motives of the complainant were political.

Prejudice to future supply of information

58. Several third parties submit that disclosure of the disputed information will prejudice the future supply of information of that kind to the Government or to an agency because the disputed information 'was obtained in confidence' from the Pastoral Lands Board (**the PLB**) by the agency from information collected through the Annual Return. That information was given to the PLB on the understanding that the Annual Return:

- is confidential;
- is only ever published with the express permission of the pastoral lessee;
- as a matter of policy and practice is obtained and maintained on a confidential basis based on mutual understandings and undertakings developed over many years;
- as a matter of policy is retained on a strictly confidential basis for seven (7) years; and
- is not otherwise publicly available.

59. The PGA submits that, while disclosure of the disputed information may not prejudice the future supply of information to the PLB – given the legislative requirements under the LA Act requiring disclosure by the pastoral lessees – it is likely to prejudice the future supply of information to the agency or another requesting agency.

60. Several third parties submit that if the disputed information is disclosed, pastoral lessees 'will be less willing to give the [PLB] permission to disclose information to [the agency] or another requesting agency'.

61. The third parties also submit that it 'could be reasonably expected that [pastoral lessees] may restrict information in future to that which it is legally required to provide, if they consider there is a risk of future disclosure under the FOI Act process'.

The public interest

62. The third parties' submissions that disclosure of the disputed information is not in the public interest are summarised below.

- Disclosure is not in the public interest because it will have an adverse effect on a third parties' business affairs in the way described in the submissions relating to clause 4(3)(b). The third parties submit that my preliminary view did not 'fully appreciate the nature of the pastoral industry or understand the significant impact that the release of the information is likely to have on the pastoral lease'.
- The disputed information has been collected from the compulsory and confidential Annual Returns and Rangeland Condition Reports. Pastoral lessees are expected to fully comply with and truthfully submit the Annual Returns to the PLB on the basis that such information will not be released to the public and:

> *If this information no longer remains confidential between the pastoral lessee and* [the PLB], *the willingness with which* [pastoral lessees] *are expected to complete the* [Annual] *Returns will be significantly compromised. It is likely that the* [pastoral lessees] *will lose confidence in the confidentiality of the* [Annual] *Returns which may jeopardise the future accuracy of the future Returns. This will cause tension between the* [pastoral lessees] *and* [the PLB], *which will ultimately be contrary to the public interest.*

- Disclosure of information that was collected from compulsory and confidential Annual Returns and rangeland monitoring reports to the PLB will adversely affect the relationship between the PLB and pastoral lessees because:

  > *the providers of the information will reasonably resent the publication of this information. They will, naturally and reasonably, in the future do their utmost to withhold any information from the PLB for fear of that information being used against them. That certainly will be my professional advice (subject to the law, of course). Fomenting ill will between* [pastoral lessees] *and the PLB can only be contrary to the public interest.*

- Disclosure will prejudice the future supply of information to other government agencies because pastoral lessees may not give the PLB permission to disclose the information to the agency or another requesting agency, which is not in the public interest.

- Portraying an inaccurate view of the viability of pastoral leases will spread misinformation in the community about the viability of pastoral leases within the Pilbara region. This will damage the reputation of the pastoral lessees. It is not in the public interest for an individual's reputation to be impaired, especially when the pastoral lessees have not been given an opportunity to be heard on the matter.

- The public interest in the public knowing the state of the lands subject to the pastoral leases is not served by disclosure of the disputed information, given that the disputed document:

  > *fails to take into account income derived from any alternative diversified activity, discrepancies in the* [Annual] *Returns and the Rangeland Condition Reports, and the diversity within a region, the disputed document portrays an inaccurate view of the viability of pastoral leases. Therefore, disclosure of the Disputed Information would rather misinform the public about the viability of the pastoral leases.*

- Disclosure of the disputed information will not contribute to management of the land by the pastoral lessees and the State Government agencies, especially considering that the disputed document portrays an inaccurate analysis of the viability of individual pastoral leases.

- It is not in the public interest to disclose the disputed information because the interests of the individual pastoral lessees need to be taken into account when determining the public interest and:

  > *on balance the detriment suffered by individual pastoral lessees far outweighs the public benefit in releasing information specific to those leases, particularly in circumstances where leases are given a broad classification such as 'viable' or 'unviable'.*

- The public interest in the public knowing the state of pastoral lands is not materially served by the disclosure of the disputed information. Much has already been published in the public domain about this subject. On that basis

disclosure of the disputed information, which is fundamentally private, would not further serve the legitimate interests of the public in respect of this matter.

- Some third parties submit that the issue of the viability of their pastoral lease has not been raised with them by the agency and they have not been given the opportunity to object to the classification. Consequently:

  > *it is not in the public interest that the FOI Act be a means by which damage is caused to the interests of innocent persons who have been denied procedural fairness by a government agency.*

- It is not in the public interest to publish information that is false and misleading. As the credibility and methodology of the disputed document is in question, it is not in the public interest to disclose such information that could disadvantage the pastoral lessee.

- The public does not understand the administration process of pastoral leases, the limitations of the disputed document and the process and application of the source documents. Disclosure of the disputed information without that basic understanding would be out of context and would misrepresent reality and the level of management of the rangeland resource and operation of pastoral based businesses.

- One third party submits that the 'family business has broken no laws and we feel victimised in our endeavours to run our business on our lease'. That third party submits further that it is not in the public interest to disclose this information about the family business, which 'contributes to the State's economy and creates employment'.

- It is not in the public interest to decrease the value of individual pastoral stations.

- Disclosure of information that individual leases are unviable is bad for the pastoral industry as a whole and for regions where those leases are situated.

- Disclosure of the disputed information to the complainant 'as only an opposition Minister' would have no benefit to the Pastoral industry.

Consideration

Clause 4(3)(a) – would disclosure of the disputed information reveal information about the business, professional, commercial or financial affairs of the third parties?

63. The disputed information – the biophysical viability rating assigned to 41 individual pastoral leases – is an assessment of the 41 parcels of Crown land. It is not an assessment of the viability of any business operated on the pastoral leases. However, I am satisfied that disclosure of the biophysical viability rating of those pastoral leases would reveal information about the business or commercial affairs of the third parties. Accordingly, I am satisfied that the requirements of paragraph (a) of clause 4(3) are satisfied in respect of the disputed information.

Clause 4(3)(b) – could disclosure of the disputed information reasonably be expected to have an adverse effect on the third parties' business or commercial affairs?

64. The third parties submit that disclosure of the disputed information could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the third parties.

65. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 the Full Federal Court of Australia said, at page 190, that the words 'could reasonably be expected to' in the Commonwealth FOI Act were intended to receive their ordinary meaning. That is, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the relevant outcome. That approach was accepted as the correct approach in *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167. This concurs with third parties' submissions that the issue does not have to be proved on the balance of probabilities.

66. I agree with the view of the former Information Commissioner who said in *Re Oset and Office of Racing and Gaming and Anor* [2000] WAICmr 2 that the meaning of the term 'adverse effect' will depend on the context in which it is used and that the adverse effect will most likely be pecuniary in nature but not necessarily so.

Misleading, inaccurate or out of date information

67. Essentially, the third parties disagree with the biophysical viability rating given to particular pastoral leases, the basis on which the rating is calculated and the accuracy of the calculation itself. Some third parties provided very specific information to argue that the disputed information is an inaccurate assessment of their pastoral leases. Some submissions dispute the methodology and assumptions made in the disputed document and therefore, question the accuracy of the biophysical viability ratings assigned to any of the pastoral leases. However, it is not my role to determine the accuracy of the disputed information or the disputed document.

68. The disputed document assigns what it describes as a biophysical viability rating to individual pastoral leases based on analysis described in the body of the disputed document. It describes the data used in the analysis and the reasons for the conclusions drawn. It is not my role to determine the validity of the analysis.

69. I acknowledge that the analysis in the disputed document may not consider all the information that the third parties believe is relevant. I acknowledge that the disputed document was written in 2011 and the data and information used to inform the analysis was collected as early as 1995. I acknowledge that the third parties dispute some of the data relied on in the analysis.

70. I do not accept that the disputed document fails to acknowledge that some pastoral leases operate jointly or that some pastoral businesses may have more than one source of income. The disputed document expressly states at page 4 that joint management of leases and income received from alternative diversified activities such as tourism, and its effect on business viability is ignored in its analysis 'despite the income generated by these activities often being a substantial, if not the major, source of income for the business.'

71. The disputed document goes on to say at page 12 that:

> *the analysis does not account for several variables that would impact on the viability of enterprises based on pastoral leases and viability thresholds. These include:*
>
> - *Consideration of the variation in the viability threshold for different pastoral enterprises. There is no doubt that possible enterprises, or mix of enterprises (live export, live export plus some sale to the agricultural areas, bullocks etc.), are likely to have differing cost structures, and therefore different viability thresholds.*
>
> - *Differences in fixed and variable costs, e.g. through proximity to towns and major roads, or the impact on distances to market or service centres.*
>
> - *How heterogeneity and distribution of land systems within leases and land units within land systems would affect the financial return to infrastructure development.*
>
> - *Variation in management innovation and managerial expertise among businesses and lessees/managers.*
>
> *It is appreciated that these factors will be important in a regional context (the viability threshold will vary between* [Land Conservation Districts]), *and in identifying individual leases.*

72. I consider that the disputed information is the authors' opinion of what they describe as the biophysical viability rating of each pastoral *lease*. It does not purport to give an opinion of the viability of any individual pastoral *business*. The biophysical viability rating is not a term of art. It is not a term defined in legislation where there are specific consequences flowing from assignment of a particular rating. It is a term created, used and explained by the authors in the context of the disputed document. It is the authors' opinion based on their research and research of others.

73. I consider that the disputed document identifies the information that it is assessing and the basis on which it makes that assessment. It outlines the sources used for its analysis; the assumptions made in the analysis; and the reasons for those assumptions. I consider that it forms part of the information available to those involved in the pastoral industry. Other information exists, some of which has been provided by the third parties, which will allow individuals to query or test the conclusions drawn in the disputed document. It is not my role to determine whether the conclusions are valid.

74. In any event, age, inaccuracy and incompleteness are not, of themselves, exemptions under the FOI Act. Even if I accepted that the disputed information is misleading, inaccurate or out of date, the issue for my determination is whether its disclosure could reasonably be expected to have an adverse effect on the third parties' business affairs.

Effect on renewal of pastoral leases

75. In a statement to the ABC on 24 November 2014, the Minister for Lands, Mr Terry Redman stated:

> *The Department of Agriculture and Food report 'A Report on the Viability of the Northern Rangelands' is not part of the 2015 pastoral lease renewal process and has no impact on the State Government's 2015 pastoral lease renewal offer.*

Consequently, I do not accept the submissions that disclosure of the disputed information could reasonably be expected to affect the reissuing of leases in June 2015.

76. The Department of Lands has produced a considerable amount of information about the 2015 Pastoral Lease renewal process. The conditions applied to renewal leases are described as:

> *1. Compliance with lease conditions, including stocking requirements and maintenance of infrastructure, at the time of expiry on 30 June 2015;*
>
> *2. There being no Soil Conservation Notices or other orders by the Soil and Land Conservation Commissioner in force;*
>
> *3. There being no unfulfilled requirements of the Soil and Land Conservation Commissioner and/or the Pastoral Lands Board in relation to observance of lease conditions under the* Soil and Land Conservation Act *and the* [LA Act]; *and*
>
> *4. Exclusion of areas from the existing lease that may be required for public works, conservation, national park, nature reserve or other Government purposes.*

77. I understand from the Department of Lands website that, in January 2014, all pastoral lessees were advised in writing of outstanding compliance issues and that, if there were no outstanding compliance issues, pastoral leaseholds will have already received a letter confirming this and confirming that their lease will be renewed subject to ongoing compliance.

Financial disadvantage

78. The agency and third parties submit that the disclosure of the disputed information could reasonably be expected to have an adverse effect of the third parties' business affairs by affecting the ability to get finance, the terms of any financing agreements and the value of the pastoral lease.

79. I accept that it is currently a sensitive time for all existing pastoral lessees in Western Australia because their pastoral leases will expire on 30 June 2015 and those leases cannot be extended. Instead, new leases must be issued. I accept that this means all interests in respect of pastoral leases, including mortgages, caveats and other encumbrances, will expire with the existing pastoral leases and new encumbrances. I accept that third parties with pastoral leases subject to financial encumbrances will be required to renegotiate those encumbrances with their financiers due to the 2015 pastoral lease renewal process.

80. I do not consider that the mere fact that a third party may be required to give their financier additional information to establish why the disputed information should not affect financial negotiations means that disclosure of the disputed information could reasonably be expected to have an adverse effect on the third parties' business affairs. The third parties have given me considerable information to demonstrate that the

disputed information is not relevant to the viability of a particular pastoral business. The third parties are in a position to provide this to the financier. The third parties have advised that finance is not secured on the individual title but on the number of stock and the level of improvements, which is information that the third parties can provide to the financier. Several third parties submit that viewing the relevant land will demonstrate that the rating assigned to their lease was not accurate.

81. I consider that a financial institution employing due diligence when considering financing a pastoral business could reasonably be expected to be already aware of potential issues related to the viability of any pastoral lease. Financial institutions could reasonably be expected to require a leaseholder to provide sufficient information to demonstrate the viability of its business. A biophysical viability rating assigned by the agency would only be part of information that a financial institution may consider relevant when considering the viability of the pastoral business. The pastoral lessee would be in a position to provide relevant information demonstrating that the overall business is viable even where the disputed information gives an unfavourable biophysical viability rating. This is particularly the case where a leaseholder's income is derived from multiple sources, including sources other than livestock.

82. The agency submits that there is no evidence available to establish the adverse effect of disclosing the disputed information because this information has not previously been released. In effect, the agency and some third parties submit that it appears self-evident that disclosure of information about the biophysical viability of a lease could have an adverse effect on a lending institution's attitude towards a pastoral lessee. I consider that a claim that disclosure of the disputed information 'could generate doubt' falls short of the test of whether disclosure 'could reasonably be expected to' have the relevant effect, as required by clause 4(3)(b).

83. I consider that a considerable amount of information about individual pastoral leases has previously been made publicly available. In 2004 the agency published a report entitled *Pastoral Resources and their Management in the Pilbara Region of Western Australia*, written by A.M.E. Vreeswyk, A.L. Payne and K.A. Leighton dated 2004, Miscellaneous Publication 21/2004 (**the 2004 Report**). The 2004 Report outlines information gathered from the rangeland survey of the Pilbara area of Western Australia, which was conducted by the agency and the then Department of Land Administration in 1995-1999. The disputed document uses information in the 2004 Report to inform its analysis. The 2004 Report outlines very specific information about each of the 41 pastoral leases the subject of this complaint. It provides the following detailed information about each of the 41 pastoral leases including:

- land types on the property giving 'a general impression of the types of country and their extent on each station' at [55];
- more detailed information at a land system scale, outlining for each land system (sorted into groups according to pastoral potential), the areas; how much, if any, had been mapped as severely degraded and eroded; how many traverse assessments were made on it; and what its condition was, based on those traverse assessments at [55];
- the pastoral potential for each land system, including a suggested carrying capacity of cattle units – 'according to the system's current range condition' –

and a potential carrying capacity – 'assuming all of the system is in good condition';

- a summary of the percentage of the pastoral lease with each of a very high, high, moderate, low, very low, nil pastoral potential;
- the suggested carrying capacity for the pastoral lease; and
- the potential carrying capacity for the pastoral lease.

84. The 2004 Report is publicly available. Two copies of the 2004 Report are held by the State Library of Western Australia. According to the 2004 Report, it was 'primarily intended to be used to assist pastoral lessees in station management and to assist others involved in the pastoral industry.'

85. I do not accept the agency's submission that the disputed information is 'new information that could give rise to doubt in the minds of financiers' such that it could reasonably be expected to have an adverse effect on the third parties' business affairs. In addition to the 2004 Report, issues relating to the viability or sustainability of pastoral leases generally are matters already in the public domain. There are many examples of information about these issues in the public domain including a report by the Standing Committee on Public Administration, *Inquiry into Pastoral Leases in Western Australia*, tabled in April 2014. That report includes discussion of the viability of pastoral leases and issues relating to the appropriate stocking of those leases. Evidence to the Standing Committee includes a range of views about the carrying capacity of pastoral leases and correctness of the agency's calculations in relation to carrying capacity.

86. In June 2011, a study commissioned by the agency entitled *2010/11 Rangelands Financial Health Assessment Western Australia* was produced. The aims of the study included determining the level of viability of pastoral business in the Pilbara, Gascoyne, Murchison and Goldfields-Nullabor areas. The study did not deal with biophysical viability of leases but instead sought information from financial institutions including ANZ Bank, Rural Bank, Elders Rural Finance, Primaries, the Commonwealth Bank and Rabobank to ascertain the level of equity that those institutions consider clients were likely to be viable, marginally viable and unviable. The report states that the financiers believed that two unnamed businesses in the Pilbara were financially unviable and seven were marginally viable. That report identifies a number of factors that the financial institutions consider affect the viability of a pastoral business. The report identified the equity level in the business as the prime concern for financial viability of a pastoral business. I consider that financial institutions are already aware of viability issues in relation to pastoral leases.

87. The PGA in its submission dated 25 September 2013 to the Inquiry of the Standing Committee on Public Administration into Pastoral Leases in Western Australia (**the Pastoral Lease Inquiry**) states at page 5:

> [T]*here has been constant changes in rangeland management practices over the years as a consequence of the widespread use of computers, improved feral control, and where possible – diversification through new industries (eg tourism, stock fodder production and horticulture).*

88. It further states that reports produced by the agency:

> *do not accurately reflect current land use and the extent of landcare practices undertaken by* [pastoral lessees] … [Agency] *reports indicating stock problems are unsubstantiated and neither provided to the pastoral industry for comment, nor peer reviewed.*

89. I do not consider that diligent lenders could reasonably be expected to rely solely on the conclusions drawn in the disputed document in relation to financial negotiations associated with a pastoral business.

90. I consider that the express caveats in the disputed document itself gives a basis on which individual third parties can provide potential financiers with information to demonstrate why they should not be disadvantaged by a particular biophysical viability rating.

91. Further, I consider that, in order to determine that the disputed information is exempt under clause 4(3), I must be satisfied of a causal connection between disclosure and the adverse effect: see *Re Strelley & Others and Department of Land Administration* [1995] WAICmr 9 at [39]. As I have noted earlier at [65], this does not require proof on the balance of probabilities. It does require that the claimed adverse effect could reasonably be expected from the disclosure of the disputed information. It is public knowledge that the viability of pastoral leases is a contentious issue and that various studies have been conducted on this topic. I do not consider that there is a causal connection between disclosure of the disputed information under the FOI Act and any adverse effects that the third parties submit could reasonably be expected to occur from that disclosure. I consider that, if it is reasonable to expect that those adverse effects on relationships with financial institutions could occur, then any such occurrence would be independent of the disclosure of the disputed information to the complainant.

92. A number of submissions were about the effect that disclosure of the disputed information will have on the value of the land. No evidence has been provided to establish this. I acknowledge that a buyer considering the purchase of a pastoral lease could reasonably be expected to want to be informed of issues of viability, which includes more than the biophysical viability rating assigned in the disputed document. However, I understand that a lessee requires permission from the Minister to sell a pastoral lease. The lessee is obliged to provide the purchaser with a copy of the latest Rangeland Conditions Assessment (**the RCA**) prepared by the agency and the incoming lessee must advise the PLB in writing that they have read the RCA. The requirement of that written advice must be satisfied before the PLB will recommend to the Minister of Lands that the lease transfer proceed. Further, I understand that upon the sale of a pastoral lease, the selling lessee is required to provide a potential purchaser with copies of previous Annual Returns submitted to the PLB. In my view, a buyer is already able to access the information that produced the analysis in the disputed document.

Negotiations with mining companies

93. I accept that companies negotiating with the pastoral lessees for use of the pastoral land may use carrying capacity as a basis for negotiations. The disputed information does

not specifically identify the carrying capacity of the individual pastoral leases. Information that specifically identifies a potential carrying capacity and suggested carrying capacity of the pastoral leases is publically available in the 2004 Report. I accept the third parties dispute the data in the 2004 Report and that that report uses information collected well before 2011. No evidence has been provided to me to establish that publication of the 2004 Report had an adverse effect on negotiations with mining companies. I consider that the third parties are in a position to provide mining companies with the relevant information to establish the value of the use of their land. I do not accept that disclosure of the disputed information could reasonably be expected to have an adverse effect on negotiations with mining companies.

Disadvantage to potential purchasers of pastoral leases

94. I recognise that the ability of potential buyers to obtain finance may affect a current pastoral lessee's ability to sell a pastoral lease. However, for the reasons described above in relation to financial issues, I do not accept that disclosure of the disputed information could reasonably be expected to adversely affect the ability of the third parties to sell their pastoral lease.

Political motivation

95. Some third parties question the motives of the complainant for seeking the disputed information. However, the complainant's reasons for seeking the information are not relevant to whether the information is exempt and do not establish an adverse effect for the third parties' business affairs. Section 10(2) of the FOI Act states that a person's right of access is not affected by any reasons the person gives for wanting the information or the agency's belief as to what are the person's reasons for wanting the information.

96. Having examined the disputed document and considered the submissions of the agency and third parties and material available to the public, including media reports, agency and Department of Lands publications, I do not consider that disclosing the disputed information could reasonably be expected to have an adverse effect on the third parties' business, professional, commercial or financial affairs.

Clause 4(3)(b) – could disclosure of the disputed information reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency?

97. The third parties also submit that disclosure of the disputed information could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. If that is the case, the disputed information would be prima facie exempt under clause 4(3)(b).

98. I do not accept that submissions about the confidentiality of the disputed information establish that the disclosure of the disputed information could reasonably be expected to prejudice the future supply of information of that kind to the PLB or the agency. There is no probative material before me to show that disclosure of the disputed information could reasonably be expected to prejudice the future supply of information of this kind to the Government or an agency.

99. The disputed information was partly derived from an analysis of information provided by pastoral lessees in Annual Returns. Section 113 of the LA Act requires pastoral lessees to complete an annual return that includes information about stock numbers, improvements effected on the land and use of the land affected by a permit. Section 113(3) provides a penalty for providing false information or failing to provide the required information. Section 139 of the LA Act provides that the PLB can investigate at any time whether a pastoral lessee is complying with the conditions of the lease and other requirements of the LA Act. Under Division 5 of Part 7 of the LA Act, pastoral lessees can apply for permits to use the land the subject of the pastoral lease for particular purposes other than pastoral purposes. The PLB can only issue those permits if satisfied that the requirements specified in the LA Act and other relevant Acts are met.

100. I consider the comments of the former Information Commissioner in *Re Pastoralists' and Graziers' Association and Department of Land Administration* [1995] WAICmr 27 (**the *PGA* case**) continue to be relevant where, in response to similar submissions made in relation to a complaint about an agency's decision to refuse access to completed Annual Returns, the Commissioner states at [23]:

> *I reject the suggestion that the accuracy of future returns would be in doubt and the inference, if it can be called that, to be drawn that the ability of the agency in the future to obtain prescribed information relating to pastoral leases could reasonably be expected to be prejudiced. There is simply no material before me capable of supporting that conclusion. The complainant stated that the disclosure of information in the disputed document '...would be likely to cause* [pastoral lessees] *to lose confidence in the confidentiality of their annual Livestock and Improvement returns'. However, that is an altogether different matter to claiming that the ability of the agency to obtain that information in the future could reasonably be expected to be prejudiced. The supply of the information in the disputed document is a statutory requirement and a condition attached to the granting of a pastoral lease. Given those facts, I am not persuaded that the agency's ability in the future to obtain such information as is prescribed by statute could reasonably be expected to be affected in any way.*

101. In light of the apparent statutory requirement to provide the information to the PLB, the power of the PLB to investigate compliance with lease conditions and the LA Act and the penalties associated with providing false information to the PLB, I am not persuaded that disclosure of the disputed information could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

102. Further, I do not accept that disclosure of the disputed information could reasonably be expected to prejudice the future supply of information from the PLB to the agency or to other agencies. There are no provisions in the LA Act or in the Annual Return that the PLB shall not provide information to other State government agencies without permission of the pastoral lessees. The agency plays an important role in providing information to the PLB through conducting inspections and providing reports.

103. Having examined the disputed document and considered the submissions of the agency and third parties and material available to the public, including media reports, agency and Department of Lands publications, I do not consider that disclosing the disputed

information could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

104. Consequently, I am not persuaded that the requirements of clause 4(3)(b) have been met. On that basis, I find that the disputed information is not prima facie exempt under clause 4(3).

Clause 4(7) – would disclosure, on balance, be in the public interest?

105. Having determined that the disputed information is not exempt under clause 4(3), I am not required to consider whether disclosure is in the public interest. However, if I were satisfied that the disputed information is prima facie exempt under clause 4(3), I would be required to consider whether clause 4(7) limited that exemption and whether disclosure of the disputed information would, on balance, be in the public interest. For completeness, I have considered the public interest below.

106. Determining whether disclosure would, on balance, be in the public interest involves identifying those public interests that favour disclosure and those that weigh against it and making a determination as to where the balance lies.

107. The agency and the third parties submit that it is not in the public interest to disclose the disputed information. They submit that adversely affecting the third parties' business affairs is not in the public interest.

108. Weighing against disclosure, I recognise that there is a public interest in pastoral lessees being able to conduct successful businesses on Crown land. I do not consider that parties doing business with the Government should be disadvantaged by that business. However, in the absence of information that persuades me that it could reasonably be expected that disclosure of the disputed information would have an adverse effect on the pastoral lessees' businesses, I do not consider that disclosure of the disputed information would run counter to that public interest.

109. Even if I accepted that disclosure would have an adverse effect on the business affairs of the third parties, I would consider that this is a factor against disclosure of the disputed information. However, I would not give a great deal of weight to that factor. While the disputed information relates to the business affairs of third parties, it is information that specifically concerns Crown land, which is a public resource. The third parties can operate a pastoral business because they hold a pastoral lease. The disputed information is about the state of a public resource. While a third party should not be unreasonably disadvantaged by doing business with the Government, the pastoral business is founded on using a public resource, and I consider that the third party should be accountable for use of that resource.

110. I acknowledge that the third parties dispute the accuracy of the disputed information. The disputed information is an opinion about a specific aspect of Crown land. As noted at [73] the third parties are in a position to provide information to the relevant people in circumstances where they believe the disputed information may be used to their disadvantage.

111. Weighing against disclosure, I recognise a public interest in maintaining the confidentiality of information about the business, professional, commercial or financial

affairs of third parties recorded in documents held by State and local government agencies and in ensuring the viability of commercial bodies that do business with government agencies: see *Re QMS Certification Services Pty Ltd and Department of Land Administration and Quality Assurance Services*, [2000] WAICmr 48. I do not consider that this factor carries significant weight in this case, because the information is about a public resource, Crown land. The disputed information is not information about specific management or business practices of particular pastoral business.

112. I accept that a good relationship between the pastoral lessees and those agencies dealing with them is in the public interest. However, those agencies have an important supervisory role and they have powers to require that the pastoral lessees provide certain information. It is also in the pastoral lessees' interest to maintain good relationships with those agencies that can assist pastoral lessees. In the circumstances, I do not give much weight to public interests relating to the quality of the relationship between agencies and the pastoral lessees as factors against disclosure.

113. The third parties submit that it is not in the public interest to disclose the disputed information because they have not been afforded procedural fairness in the agency reaching a conclusion about their pastoral leases and assigning a biophysical viability rating. I recognise a public interest against disclosure of an adverse finding made by an agency against a party who has not received procedural fairness. Generally, when a decision-maker has before him or her material adverse to a person, the decision-maker should not make a decision without giving the person an opportunity to be heard in relation to that matter. However, in this case, the disputed information is not a decision. It merely consists of conclusions reached in the disputed document, which was prepared to inform considerations related to the rangelands reform process. If the PLB or the Minister were considering making decisions that would affect the pastoral lessees' rights, procedural fairness may require that those pastoral lessees be given an opportunity to address the conclusions of the disputed document. I do no accept that the disputed document and the disputed information are decisions subject to an expectation of procedural fairness that in turn creates a public interest against disclosure of the disputed information.

114. I do not accept that disclosure of the disputed information is against the public interest on the basis that it will simply spread misinformation. There is considerable information in the public domain already to demonstrate that the biophysical viability rating given to pastoral leases – the disputed information – is rejected by a number of parties. I consider that the disputed information is part of the information that can be used to inform the public debate about the biophysical viability of the rangelands.

115. In favour of disclosure, I consider there is a strong public interest in the public knowing the state of lands subject to pastoral leases, which are a public resource. I also consider there is a public interest in ensuring that lessees of Crown land manage that land in a manner that is for the long-term benefit of all the community.

116. I note the comments of the PGA in its submission to the Pastoral Inquiry that:

> *The role of pastoral* [lessees] *is not well understood by the general public. Perhaps their most important community function is to act collectively as stewards of a significant area of Western Australia.*

117. I consider that it is in the public interest for the community to be aware of information about how this stewardship is being exercised.

118. The functions of the PLB outlined in section 95 of the LA Act include:

> *(c) to ensure that pastoral leases are managed on an ecologically sustainable basis; and*
>
> *(d) to develop policies to prevent the degradation of rangelands; and*
>
> *(e) to develop policies to rehabilitate degraded or eroded rangelands and to restore their pastoral potential; and …*
>
> *(h) to monitor the numbers and the effect of stock and feral animals on pastoral land.*

119. Section 101(5)(a) of the LA Act provides that, generally, a pastoral lease must not be granted unless:

> [t]*he Board is satisfied that the land under the lease will be capable, when fully developed, of carrying sufficient authorised stock to enable it to be worked as an economically viable and ecologically sustainable pastoral business unit; …*

120. Section 108(2) of the LA Act provides that:

> [t]*he lessee must use methods of best pastoral and environmental management practice, appropriate to the area where the land is situated, for the management of stock and for the management, conservation and regeneration of pasture for grazing.*

121. I consider that those sections and others in the LA Act and other legislation, including the *Soil and Land Conservation Act 1945* (**the SLC Act**), recognise the importance of the sustainable use and management of pastoral leases.

122. Concern is expressed in the disputed document that, without appropriate reform, current pastoral lease management practices have the capacity to lead to further degradation of the State's rangeland resources. In my view, accountability for the sustainable management of State land resources is a strong public interest in favour of disclosure.

123. In my view, the accountability of State Government agencies or bodies responsible for ensuring appropriate management of pastoral land, such as the PLB and the Commissioner for Soil and Land Conservation (**the SLC Commissioner**), is also a factor in favour of disclosure of the disputed information.

124. Section 13 of the SLC Act provides that the general functions of the SLC Commissioner include:

> *(a) the prevention and mitigation of land degradation; and*
>
> *(b) the promotion of soil conservation; and*

> *(c) the encouragement of landholders and the public generally to utilise land in such a manner as will tend towards the prevention and mitigation of land degradation and the promotion of soil conservation; and*
>
> *(d) the education of landholders and the public generally in the objects and practice of soil conservation.*

125. I consider that disclosure of the disputed information is in the public interest because it will provide additional information to allow an understanding of how the relevant bodies are fulfilling their responsibilities and the challenges that they may face. I acknowledge that an edited copy of the disputed document has been disclosed and this goes some way to informing the public about the state of the rangelands. I consider that disclosure of the disputed information will provide additional relevant information, particularly in light of information already published about the 41 pastoral leases the subject of the disputed information.

126. Weighing the public interest factors for and against disclosure of the disputed information, I consider that the public interest factors weighing in favour of disclosure outweigh those against. Accordingly, I consider that disclosure of the disputed information would, on balance, be in the public interest and that the limit on exemption in clause 4(7) would apply, in the event the disputed document were prima facie exempt under clause 4(3) of Schedule 1 to the FOI Act.

CLAUSE 3 – PERSONAL INFORMATION

127. Clause 3(1) provides that matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead). The exemption in clause 3(1) is intended to protect the privacy of individuals about whom personal information may be contained in documents held by State and local government agencies.

128. 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.*

129. That definition makes it clear that 'personal information' is information about an identifiable individual. Information of that kind is exempt under clause 3(1), subject to the application of any of the limits on exemption in clauses 3(2)-3(6). In this case, only clause 3(6) is of any potential relevance.

Third party submissions

130. In summary, several third parties submit that disclosure of the disputed information would reveal personal information about those third parties because the identity of the third parties can reasonably be ascertained from the disputed information, given the location and size of the pastoral leases.

131. The third parties refer to [28]-[41] of the *PGA* case in support of their claim that the disputed information is exempt under clause 3(1).

132. The third parties submit that the protection of personal privacy is a very strong public interest that outweighs any public interest factors in favour of disclosure. They also submit that damage to the reputation of the individual pastoral lessee, particularly as they claim not to have been afforded procedural fairness, is a public interest factor against disclosure of the disputed information.

Consideration

133. On the information before me, I am not persuaded that the disputed information consists of personal information as that term is defined in the FOI Act. However, even if I accept that some or all of the disputed information consists of personal information, which is therefore prima facie exempt under clause 3(1), for the reasons set out below, I consider that disclosure would, on balance, be in the public interest and that the limit on the exemption in clause 3(6) applies in any event.

134. Clause 3(6) of Schedule 1 to the FOI Act provides that information is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest.

135. Determining whether or not disclosure would, on balance, be in the public interest involves identifying the public interests for and against disclosure, weighing them against each other and deciding where the balance lies.

136. The term 'public interest' is not defined in the FOI Act. In my view, it is best described in the decision by the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63, at page 75, where the Court 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...*

137. In favour of non-disclosure, I recognise there is a strong public interest in maintaining the personal privacy of individuals. The protection of an individual's privacy is a very strong public interest that is recognised and enshrined in the FOI Act by clause 3. The FOI Act is not intended to open the private or professional lives of citizens to public scrutiny in circumstances where there is no demonstrable benefit to the public interest in doing so.

138. As noted at [83 to 84], a considerable amount of information about the pastoral leases in this case is publicly available. Some of the third parties have also made public statements that indicate that their pastoral lease has received other than an 'A' rating. The disputed information itself is primarily information about the land the subject of the pastoral leases and not about the circumstances of individual leaseholders. In the circumstances of this matter, I do not consider that the disputed information is of a particularly private, personal nature. Accordingly, in this case I have given little weight to the public interest in the protection of personal privacy.

139. Also weighing against disclosure, I accept that there is a public interest in the protection of the reputations of professional people in circumstances where they have not had an opportunity to respond to opinions that may be considered critical of them: see *Re West Australian Newspapers Limited and Department of the Premier and Cabinet* [2006] WAICmr 23 at [92]. In the present case, the disputed document is an assessment of the land itself, not of the pastoral business or the pastoral lessee. The disputed document also recognises the difficulties faced by pastoral lessees. In all of those circumstances, I do not consider that the reputations of the third parties could reasonably be expected to be significantly affected by disclosure of the disputed information. Therefore, I do not consider that this public interest factor weighs strongly against disclosure in this instance.

140. In my view, the *PGA* case does not support the third parties' claim that the disputed information is exempt under clause 3(1). In that case, the former Commissioner considered whether Annual Returns completed in relation to certain pastoral leases were exempt. The only information in the Annual Returns that the Commissioner found to be exempt was the name and signature of the person who made the declaration contained in each Annual Return, who was not necessarily the lessee in each case.

141. The complainant in the *PGA* case - the PGA - maintained that the Annual Returns were exempt in full because the identity of the pastoral lessees could be ascertained 'due to the nature and size of the industry'. The Commissioner was not persuaded that this had been demonstrated to her and found that, even if she did accept that it was the case, disclosure of the documents was, on balance, in the public interest: see [41].

142. In this case, the public interest factors that I consider favour disclosure are described at [115 to 125] in relation to my consideration of clause 4(7). I agree with the view of the former Commissioner, as noted at [37] of the *PGA* case, that there is a public interest in a certain amount of public scrutiny of the operation of Crown leases. I consider that this public interest outweighs any public interest against disclosure of the disputed information in the circumstances of this case.

143. Accordingly, weighing the public interest factors for and against disclosure, I consider that disclosure of the disputed information would, on balance, be in the public interest.

RIGHTS OF THIRD PARTIES TO MAKE SUBMISSIONS ABOUT CLAUSE 8(2)

144. A number of third parties submit that the disputed information is exempt under clause 8(2) of Schedule 1 to the FOI Act. However, for the reasons set out below, I do not consider that I am obliged to consider the third parties' submissions other than in relation to whether the disputed information is exempt under clauses 3 and 4 of Schedule 1 to the FOI Act.

145. Historically, neither my predecessors nor I have limited our consideration of submissions made by a third party to only those that relate to whether the disputed matter is exempt under clauses 3 and 4 of Schedule 1 to the FOI Act. However, I have recently reconsidered this position. In *Re Butcher and Department of Parks and Wildlife* [2014] WAICmr 6, a third party was joined to the complaint under section 69(2) of the FOI Act and made submissions claiming that the disputed document in that case was exempt under clauses 4(1), 4(2), 4(3) and 8(2) of Schedule 1 to the FOI Act. At [54], I noted as follows:

> *The obligation on an agency to consult with a third party under Part 2 Division of the FOI Act is limited to obtaining the view of the third party as to whether a document contains matter that is exempt under clauses 3 or 4 of Schedule 1 to the FOI Act. It does not extend to other exemption clauses (see sections 32 and 33 of the FOI Act). It is therefore questionable whether the third parties in this matter have a right to be heard in relation to whether the disputed document is exempt under clause 8(2).*

146. In that case, I considered the third parties' clause 8(2) submissions but was not persuaded that the disputed document was exempt under clause 8(2) in any event.

147. In the present case, the third parties have also been joined as a party to this complaint under section 69(2) of the FOI Act and were invited to make submissions as to whether the disputed information is exempt under clauses 3 or 4 of Schedule 1 to the FOI Act.

148. The term 'third party', is defined in the Glossary to the FOI Act as 'a third party referred to in sections 32 and 33 of the FOI Act'. Sections 32 and 33 respectively refer to a third party as an individual or a person other than the applicant whose personal information or business, professional, commercial or financial information is contained in documents that are the subject of an access application.

149. Under sections 32 and 33, an agency is not to give access to a document containing personal or business information about a third party unless the agency has taken such steps as are reasonably practicable to obtain the views of the third party as to whether the document contains information that is exempt under clauses 3 or 4.

150. Section 34 provides that if, after obtaining the views of the third party in relation to a document under sections 32 or 33, the agency decides to give access to the document and the third party's views are that the document contains matter that is exempt under clauses 3 or 4, the agency has to give the third party written notice of the decision. Section 39(1) provides that a person who is aggrieved by a decision made by an agency has a right to have the decision reviewed by the agency. Under section 39(2)(b), a person is aggrieved by a decision if, among other things, a person is a third party whose views were or should have been obtained under sections 32 or 33, and the decision conflicts with that person's view.

151. Section 65(1) provides that a complaint may be made to the Information Commissioner against an agency's decision to, among other things, give access to a document, give access to an edited copy of a document, or refuse access to a document. Under section 65(2), a complaint may be made by an access applicant or a third party. Section 69(1) provides that, in the case of a complaint made by an access applicant, any third party is entitled to be joined as party on giving written notice to the Commissioner.

152. The Full Court of the Federal Court considered the rights of a third party to seek review of a decision made under the Commonwealth *Freedom of Information Act 1982* (**the Commonwealth FOI Act**) in *Mitsubishi Motors Australia Ltd v Department of Transport* (1986) 12 FCR 156 (***Mitsubishi Motors***). The Commonwealth FOI Act at that time contained similar provisions to clause 4 of Schedule 1 to the FOI Act, section 33 and section 65 of the FOI Act – sections 43, 27 and 59 respectively (now repealed).

153. In *Mitsubishi Motors*, the Federal Court considered whether, when reviewing an agency's decision made pursuant to section 59 of the Commonwealth FOI Act that a document is not exempt under section 43, the Administrative Appeals Tribunal (**the AAT**) was 'as a matter of law, obliged or alternatively, empowered, to decide whether the document is an exempt document under that, or any other, provision of [Part IV of the Commonwealth FOI Act]'. Bowen CJ and Beaumont and Wilcox JJ said at page 161:

> *In our opinion, s 59(1) should be construed to mean what it says, that is to say, to provide a right of review only in respect of a decision that a document is not exempt under s 43.*
>
> *... As a matter of both form and of substance, the language of s 59(1) makes it clear, we think, that the draftsman intended that there be given to the Tribunal jurisdiction to review only one kind of decision - a decision that a document is not exempt under s 43. The Act clearly distinguishes between a decision to grant access on the one hand and a decision that a document is not exempt under one or more of the several exempting provisions contained in Pt IV on the other. That distinction is clearly recognised and given effect to in the provisions of* [sections] *27(2) and 59(1).*

154. I consider that the deliberations in *Mitsubishi Motors* are applicable to the FOI Act. In my view, in light of the provisions of the FOI Act, the rights of a third party to seek review of an agency's decision to give access to a document, by way of a complaint made under section 65 of the FOI Act, is limited to whether the document is exempt under clauses 3 or 4 of Schedule 1 to the FOI Act.

155. Consequently, in *Re Mineralogy Pty Ltd and Department of Mines and Petroleum* [2015] WAICmr 1, I took the view that I was not obliged to consider the submissions made by the third party complainant, who applied to me under section 65 of the FOI Act for review of the relevant agency's decision to give access to documents, other than those in relation to the exemptions in clauses 3 and 4 of Schedule 1 to the FOI Act. Accordingly, in the circumstances of that case, I did not do so.

156. I recognise that this complaint does not involve a third party seeking review of an agency's decision to give access to a document. Rather, as noted, the third parties in this case have been joined as parties to the complaint pursuant to section 69 of the FOI Act.

157. I have considered the Federal Court decision in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 (***Searle***) at 113-114, which considered an appeal against a decision of the AAT where the third party was joined as a party when the matter was before the AAT. Davies, Wilcox and Einfeld JJ commented in *dicta* that, where a party opposing disclosure of a document is joined to a matter before the AAT under section 30 of the *Administrative Appeals Tribunal Act 1975* (**the AAT Act**), the third party is entitled to put forward any relevant ground of exemption and is not limited to whether the document is exempt under section 43 of the Commonwealth FOI Act.

158. Section 30(1A) of the AAT Act provides:

> *Where an application has been made by a person to the Tribunal for a review of a decision, any other person whose interests are affected by the decision may apply, in writing, to the Tribunal to be made a party to the proceeding, and the Tribunal may, in its discretion, by order, make that person a party to the proceeding.*

159. In my view, because the third party in *Searle* was joined to the matter under the AAT Act, the above comments in *Searle* do not apply to this complaint. Further, as *dicta*, I consider that I am not bound to follow those remarks in *Searle* in any event.

160. As noted at [154], I consider that a third party's right to seek review of an agency's decision to give access to a document under section 65 of the FOI Act is limited to whether the document is exempt under clauses 3 or 4 of Schedule 1 to the FOI Act. In my view, it would be inequitable for a third party joined to a complaint under section 69 to have more extensive rights to make submissions to me than a third party who initiates a complaint to me under section 65.

161. Having regard to the provisions of the FOI Act, I am similarly of the view that a joined third party's right to make submissions to me is limited to whether the disputed matter is exempt under clauses 3 and 4 of Schedule 1 to the FOI Act. On that basis, I do not consider that I am obliged to consider the third parties' submissions in this case in relation to clause 8(2) of Schedule 1 to the FOI Act.

162. Nonetheless, in this matter, I recognise the alleged sensitive nature of the disputed information and the significant number of third parties who claim that they will be adversely affected by disclosure of the disputed information. Accordingly, while I am of the view that I am not obliged to consider the third parties' submissions in relation to clause 8(2), I have done so on this occasion.

CLAUSE 8 – CONFIDENTIAL COMMUNICATIONS

163. Clause 8, insofar as it is relevant, provides:

> *(2) Matter is exempt matter if its disclosure –*
>
> *(a) would reveal information of a confidential nature obtained in confidence; and*
>
> *(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*
>
> *(3) ...*
>
> *(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest.*

164. There are two parts to the exemption in clause 8(2). The requirements of both paragraphs (a) and (b) must be satisfied to establish a prima facie claim for exemption under that provision. If a prima facie claim for exemption is established, then consideration must be given to whether clause 8(4) operates to limit the exemption.

Clause 8(4) provides that matter is not exempt under clause 8(2) if its disclosure would, on balance, be in the public interest.

Third party submissions

165. In summary, the third parties submit that the disputed information is exempt under clause 8(2) because it comes from information originally collected through the Annual Returns. The third parties submit that the Annual Return is confidential and only published with the permission of the pastoral leaseholder.

166. The third parties' submissions regarding the confidential nature of the disputed information are included at [58] of this decision. Further submissions relevant to the application of clause 8(2) are summarised below:

- *While disclosure of the disputed information may not prejudice the future supply of information to* [the PLB], *given the legislative requirements under the LA Act requiring disclosure by pastoral leaseholders, disclosure is likely to prejudice the future supply of information to the* [agency] *and another requesting agency.*

- The PLB only reveals the information with the express permission of the pastoral leaseholder and the pastoral leaseholder will be less willing to give the PLB permission to provide the information to the agency.

- Pastoral lessees may restrict the information that they provide to the PLB in the future to that which it is legally required to provide if they consider that there is risk of future disclosure.

- *Under the terms of the lease, the* [pastoral lessees] *are expected to fully comply with and truthfully submit the Returns to* [the PLB] *on the basis that such information will not be released to the public. If this information no longer remains confidential between the pastoral lessee and* [the PLB], *the* [pastoral lessees] *may lose confidence in the confidentiality of the Returns which may jeopardise the accuracy of the returns.*

Consideration

167. The first question for my consideration is whether disclosure of the disputed information would 'reveal information of a confidential nature'. If the information is not in the public domain and is known only by a small number or a limited class of persons, it may be concluded that it is inherently confidential. The second question to be answered in respect of clause 8(2)(a) is whether the disputed information was in fact 'obtained in confidence'. To have been 'obtained in confidence', the disputed information must have been both given and received on the basis of either an express or implied understanding of confidence: *Re Kimberley Diamond Company NL and Department for Resources Development* [2000] WAICmr 51.

168. I accept that pastoral lessees complete Annual Returns on the basis that they are not made generally available to the public. I also accept that an Annual Return is expressly marked 'Confidential' on the front page and is not otherwise publicly available.

169. However, the disputed information is not the information provided in the Annual Returns. Rather, the disputed information consists of opinion and conclusions reached based on information contained in completed Annual Returns together with other information. On the information before me, I am not persuaded that disclosure of the disputed information would reveal information of a confidential nature that was obtained in confidence. Consequently, I am not persuaded that the requirements of clause 8(2)(a) have been met. Accordingly, I find that the disputed information is not exempt under clause 8(2) of Schedule 1 to the FOI Act.

170. In light of that, it is not necessary for me consider whether the requirements of clause 8(2)(b) have been met or whether the disclosure of the disputed information would, on balance, be in the public interest, pursuant to clause 8(4). However, by way of comment, for the reasons set out at [97-104], I do not consider that disclosure of the disputed information could reasonably be expected to prejudice the future supply of that kind of information to the Government or to an agency. Further, for the reasons given at [105-126] of this decision, I consider that disclosure of the disputed information would, on balance, be in the public interest and that the limit on the exemption in clause 8(4) would apply in any event.

171. I consider that, even if I were required to make a finding whether the disputed information is exempt under clause 8(2), there in no information before me to establish that the disputed information is exempt under clause 8(2).

CONCLUSION

172. I find that the disputed information is not exempt under clauses 3(1), 4(3) or 8(2) of Schedule 1 to the FOI Act.

****