

Participants:

**Mineralogy Pty Ltd**  
Complainant

- and -

**Department of Industry and  
Resources**  
Respondent

**Hunt and Humphry**  
Second Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - decision to give access - complaint by third party - documents relating to proposals made under a State Agreement - clause 4(2) - whether the documents have a commercial value - clause 4(3) - business, professional, commercial or financial affairs - clause 6(1) - deliberative processes - clause 8(1) - breach of confidence - clause 8(2) - information of a confidential nature.

*Freedom of Information Act 1992 (WA)*: section 102(2); Schedule 1, clauses 4(2), 4(3), 6(1), 8(1) and 8(2)

*Iron Ore Processing (Mineralogy Pty Ltd) Agreement 2002*

*Re Kimberley Diamond Company NL and Department of Resources Development and Another* [2000] WAICmr 63

*Re Rogers and Water Corporation and Others* [2004] WAICmr 8

*Re Precious Metals Australia Ltd and Department of Minerals and Energy* [1997] WAICmr 12

*Re Mineralogy Pty Ltd and Department of Environment and Anor* [2003] WAICmr 14

*Re Cannon and Australian Quality Egg Farms Limited* [1994] 1 QAR 491

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

*Re Waterford and Department of the Treasury (No. 2)* (1984) 5 ALD 588

*Ministry for Planning v Collins* (1996) 93 LGERA 69

*Re Speno Rail Maintenance Australia Pty Ltd and The Western Australia Government Railways Commission and Another* [1997] WAICmr 29

**DECISION**

The decision of the agency to give access to the disputed documents is confirmed.

I find that Documents 1 and 4 are not exempt under clauses 4(2), 4(3), 6(1), 8(1) or 8(2) of Schedule 1 to the *Freedom of Information Act 1992*.

JOHN LIGHTOWLERS  
A/INFORMATION COMMISSIONER

25 August 2008

## REASONS FOR DECISION

### BACKGROUND

1. This complaint arises from a decision made by the Department of Industry and Resources ('the agency') to give an access applicant, Hunt and Humphry, a law firm ('the Applicant'), access to certain documents under the *Freedom of Information Act 1992* ('the FOI Act').
2. Mineralogy Pty Ltd ('Mineralogy') is the principal proponent to the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement 2002* ('the State Agreement') and is the complainant in this matter. The six co-proponents to the State Agreement are wholly owned subsidiaries of Mineralogy. Mineralogy objects to the agency's decision to disclose certain documents to the Applicant. The Applicant is joined as a party to this complaint.
3. On 14 February 2008, the Applicant applied to the agency under the FOI Act for access to documents held by the agency relating to proposals lodged with the agency or the Minister for Resources ('the Minister') pursuant to clause 6(1) of Schedule 1 to the State Agreement. On 19 March 2008, following discussions with the agency about the scope of the application, the Applicant confined its request to the proposal for the Sino Iron Pellet Project, sited some 100 km south west of Karratha in the Pilbara region of Western Australia ('the Project') and a list of proposals previously submitted under clause 6(1) of Schedule 1 to the State Agreement.
4. The agency, as it was required to do under sections 32 and 33 of the FOI Act, consulted with relevant third parties, including Mineralogy. The third parties objected to the disclosure of the requested information to the Applicant.
5. On 15 April 2008, the agency gave the Applicant a notice of decision which identified four documents as coming within the scope of the access application. The agency decided to give the Applicant access to three documents, either in full or in edited form and to refuse access to one document on the basis that it was publicly available.
6. The third parties sought internal review of certain parts of that decision. In particular, Mineralogy sought internal review of the agency's decision to disclose, in full, Documents 1 and 4 on the agency's schedule of documents. On 22 May 2008, the agency varied its original decision but not in respect of Documents 1 and 4.
7. On 25 June 2008, Mineralogy applied to me for external review of the agency's decision to give the Applicant access to Documents 1 and 4, and made submissions in support of its objection to the release of the disputed documents.

## REVIEW BY A/INFORMATION COMMISSIONER

8. Following the receipt of this complaint, I required the agency to produce the originals of Documents 1 and 4 to me, together with the agency's FOI file maintained in respect of the Applicant's application.
9. I invited the Applicant and the other third parties to be joined as parties to this complaint. On 3 July 2008, the Applicant was joined as a party to this complaint but the other third parties did not seek to be joined.
10. On 7 July 2008, my Legal Officer wrote to Mineralogy asking for further information and submissions in support of its claims that Documents 1 and 4 are exempt. Mineralogy was asked to provide that information to me before 15 July 2008. On 15 July 2008, Mineralogy contacted my Legal Officer requesting a three-week extension of time in which to provide the requested information. I granted Mineralogy an extension of time until 6 August 2008 but advised Mineralogy and the other parties to this complaint that I intended to proceed directly to a decision thereafter.
11. Having heard nothing further from Mineralogy by 6 August 2008, my Legal Officer contacted Mineralogy to confirm that I would now provide a decision on this complaint. Mineralogy advised that it wished to make submissions and provide information but was told that no further extension of time would be given. However, Mineralogy was advised that if it provided submissions and/or information before my decision was finalised, they would be taken into account. I have not received any further information or submissions from Mineralogy despite reasonable opportunity to do so. Therefore, as per the advice given to the parties, and having regard to s.70 of the FOI Act, I have now determined this matter on the information available to me.

## THE DISPUTED DOCUMENTS

12. Document 1 is dated 1 April 2008 and is described on the agency's schedule of documents as: "*List of proposals submitted under the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002*". It is a list of three proposals created by an officer of the agency for the purpose of reducing the scope of the Applicant's original access application.
13. Document 4 is dated May 2004 and is described on the same schedule as: "*Iron Ore Mine, Downstream Processing (Direct – Reduced & Hot Briquetted Iron) and Port Construction Cape Preston, Pilbara*". It is a document prepared for one of the co-proponents of the State Agreement, Austeel Pty Ltd, following the release of a report and recommendations on the Project by the Environmental Protection Authority ('the EPA') in 2002. That latter report is Document 3 on the agency's schedule of documents and is a public document.

## BURDEN OF PROOF

14. Section 102(2) of the FOI Act provides as follows:

*“If a third party initiates or brings proceedings opposing the giving of access to a document, the onus is on the third party to establish that access should not be given or that a decision adverse to the access applicant should be made.”*

15. In this case, the onus is on Mineralogy - which has made this complaint - to establish that a decision adverse to the Applicant should be made.
16. In its request for external review made on 25 June 2008, Mineralogy claims that Documents 1 and 4 are exempt under clauses 4(2), 4(3), 6(1) and clause 8.

#### **CLAUSE 4 – COMMERCIAL OR BUSINESS INFORMATION**

17. Clause 4, so far as it is relevant, provides:

**“4. Commercial or business information**

**Exemptions**

- (1) ...
- (2) *Matter is exempt matter if its disclosure –*
  - (a) *would reveal information (other than trade secrets) that has a commercial value to a person; and*
  - (b) *could reasonably be expected to destroy or diminish that commercial value.*
- (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 to prejudice the future supply of information of that kind to the Government or to an agency.*

**Limits on exemptions**

- (4) ...
- (5) ...
- (6) ...
- (7) *Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest.”*

18. The exemptions in clauses 4(2) and 4(3) are intended to protect different kinds of information from disclosure. The terms of those provisions make it clear that information that is exempt under clause 4(2) cannot also be exempt under clause 4(3), although it is open to a person to make alternative submissions as to which of the exemption clauses applies.

### **Mineralogy's submissions**

19. In its letters to the agency of 14 April 2008, and to me of 25 June 2008, Mineralogy made the following submissions:
- (a) Documents 1 and 4 are exempt under clause 4(2) or, in the alternative, clause 4(3).
  - (b) Documents 1 and 4 are exempt under clause 4(2) because Mineralogy has spent tens of millions of dollars on the Project, "*in relation to plans, maps, plants, engineering works, studies, consultations, environmental and geological surveys, project development, financial information, etc*". Such information is of commercial value to Mineralogy, disclosure of which would diminish that commercial value by, for example, revealing details of Mineralogy's financial and commercial affairs, trade secrets and intellectual property to the public, including its competitors in the iron ore industry.
  - (c) Mineralogy is a private company so that its business affairs are confidential and are not open to the public. The documents are commercial in confidence. Their disclosure will reveal information about the financial and business affairs of Mineralogy to, for example, its competitors in the iron ore and mining industry in general.
  - (d) Mineralogy is currently involved in a dispute with the State Government in relation to proposals claimed by the State to have been refused or to have lapsed. This dispute relates directly to information referred to in Document 1. Disclosure of any part of Document 1 will reveal material forming part of a current legal dispute and will adversely prejudice Mineralogy's affairs by disclosing incorrect factual information to the public.
  - (e) Documents 1 and 4 were submitted pursuant to the State Agreement. The purpose of the State Agreement is to take out of the public realm proposals submitted under that statute. The intention of the State Agreement is to facilitate development of Mineralogy's Cape Preston Projects. Documents 1 and 4 are exempt under clause 4(3) because their disclosure will prejudice the future supply of information to the agency and/or Minister where confidentiality cannot be maintained. This is not what the State Agreement intended. (I note that - since Mineralogy did not 'submit' Document 1 to the agency - I have taken Mineralogy to mean that it submitted the information in Document 1 to the agency).

### **The agency's submissions**

20. In its notice of decision dated 15 April 2008, the agency submitted, with regard to clause 4(2), that Document 1: “*lacks any information of any commercial significance and certainly has insufficient details of the Cape Preston operations to result in any diminution of value*” and that Document 4 “*appears to detail a modification to an existing proposal and mostly seems to involve confirming commitments made under the original proposal, particularly relating to environmental requirements*”.
21. The agency submitted that neither Document 1 nor Document 4 contained information “*that could reasonably be expected to reduce the commercial value of the Cape Preston development.*”
22. With regard to clause 4(3), the agency only made submissions in relation to the application of the limit on the exemption in clause 4(7) and concluded that, in this case, the factors favouring the disclosure of Documents 1 and 4 significantly outweighed those that did not. The agency made no further submissions in respect of those documents in its notice of decision on internal review.

#### **Clause 4(2)**

23. Clause 4(2) is concerned with the protection from disclosure of information which is not a trade secret but which has a ‘commercial value’ to a person. 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 under clause 4(2).
24. The exemption in clause 4(3) is more general in its terms than the exemption in clause 4(2). Clause 4(3) deals with information (other than trade secrets or information of the kind referred to in clause 4(2)) about the business, professional, commercial or financial affairs of a person, in circumstances where disclosure could reasonably be expected to either have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency. This exemption recognises that the business of government (state or local) is frequently mixed with that of the private sector and that such business dealings should not be adversely affected by the operation of the FOI Act.
25. I have examined Documents 1 and 4 and I have carefully considered the submissions put forward by the parties to this complaint.
26. In order to establish an exemption under clause 4(2), the matter for which a claim for exemption is made must be shown to have a commercial value. I agree with the view that matter has a commercial value to a person if it is valuable for carrying on the commercial or business activities of that person and, further, it is by reference to the context in which the information is used or exists that the question of whether or not particular information has a commercial value to a person may be determined: see, for example, *Re Kimberley Diamond Company NL and Department of Resources Development and Another* [2000] WAICmr 63 and *Re Rogers and Water Corporation and*

*Others* [2004] WAICmr 8. I also accept that it is not necessary that the commercial value be quantified.

27. Document 1 is simply a list of proposals - submitted by Mineralogy under the State Agreement – which has been compiled by the agency. Mineralogy has provided me with no persuasive information or material to support its claim that such a list has a commercial value to Mineralogy. Nor is it clear to me how information about the existence of the listed proposals could reasonably be expected to destroy or diminish any commercial value.
28. Document 4 concerns proposed changes to the Project following the release of Document 3 by the EPA. Much of the information in Document 3 – which is a public document – is contained in Document 4. Mineralogy has not identified the specific matter in Document 4 which it claims has a commercial value to it, nor has it explained the nature of that commercial value or how the disclosure of that information could reasonably be expected to destroy or diminish that commercial value.
29. With regard to Mineralogy’s claim - in (b) of its submissions - that it has spent a considerable sum of money on the Project, the former Information Commissioner dealt with similar claims in *Re Precious Metals Australia Ltd and Department of Minerals and Energy* [1997] WAICmr 12 and *Re Mineralogy Pty Ltd and Department of Environment and Anor* [2003] WAICmr 14. In *Re Mineralogy*, the former Information Commissioner accepted as correct the comments of the Queensland Information Commissioner (‘the Commissioner’) in *Re Cannon and Australian Quality Egg Farms Limited* [1994] 1 QAR 491 when the Commissioner said, at page 512:

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

The Commissioner went on to say:

*“This is surely too broad a proposition ... At best, the fact that resources have been expended in producing information, or money has been expended in acquiring it, are factors that may be relevant to take into account in determining whether information has a commercial value ... ”*

30. I agree with those comments. While I accept that Mineralogy has more probably than not spent a considerable sum on the Project, Mineralogy has put no material before me to support a claim that the investment of a sum of money in order to produce Document 4 is, of itself, a reason to establish that all of the information in that document has a commercial value to Mineralogy.

31. I have taken into account the fact that Mineralogy has spent millions of dollars on the Project in relation to “*plans, maps, plants, engineering works, studies, consultations, environmental and geological surveys, project development, financial information, etc*”. However, in this case, I have not given much weight to that factor because much of the information referred to is not contained in Documents 1 and 4 and other information contained in Document 4 appears to be in the public domain or to have been superseded – see, for example, the information on the Project contained on the following websites: [www.epa.wa.gov.au](http://www.epa.wa.gov.au) (which includes numerous documents relevant to the Project, including information contained in Document 4); [www.pdc.wa.gov.au](http://www.pdc.wa.gov.au); [www.citicpacificmining.com](http://www.citicpacificmining.com); and [www.bloomberg.com](http://www.bloomberg.com).
32. I do not accept Mineralogy’s submission in (e) that the purpose of the State Agreement is to take out of the public realm proposals submitted under that statute. Although I accept that the intention of the State Agreement is to facilitate the mining and processing of magnetite iron ore from mining leases held by Mineralogy at Cape Preston, there is nothing in the State Agreement which indicates that all documentation associated with the Project is ‘commercial in confidence’. Moreover, the fact that Mineralogy is a private, and not a public, company - as noted in (c) of Mineralogy’s submissions - does not exclude it from the operations of the FOI Act, where it has dealings with government and documents relating to its business activities are in the possession of a government agency.
33. Mineralogy has provided me with no particulars concerning its dispute with the State Government and I can identify no material in Document 1 which, if disclosed, would adversely affect Mineralogy’s commercial or business affairs.
34. I consider that the requirements of paragraph (a) of clause 4(2) are not satisfied in this case, with regard to Documents 1 and 4. In light of that, I consider that Documents 1 and 4 are not exempt under clause 4(2).

**Clause 4(3)**

35. Clause 4(3) comprises two parts and both paragraphs (a) and (b) of clause 4(3) must be satisfied before a *prima facie* claim for exemption is established. If the requirements of paragraphs (a) and (b) are satisfied, the application of the limit on exemption in clause 4(7) must also be considered.
36. Having examined Documents 1 and 4, I accept that, if disclosed, they would reveal information about the business or commercial affairs of Mineralogy. Accordingly, I consider that the requirements of paragraph (a) of clause 4(3) are satisfied.
37. However, Mineralogy bears the burden of establishing that the requirements of paragraph (b) are also satisfied by persuading me that the disclosure of Documents 1 and 4 could reasonably be expected to have an adverse effect on Mineralogy’s business, professional, commercial or financial affairs or prejudice the future supply of information of that kind to the Government or to an agency.

38. Mineralogy claims that the disclosure of Documents 1 and 4 would mean that the future supply of information of that kind would be prejudiced, where confidentiality cannot be maintained. I do not accept that submission. I do not consider that it could reasonably be expected that, if those documents are disclosed, Mineralogy or some other proponent or co-proponent of a State Agreement would not submit proposals as set out in Documents 1 and 4, if it was in that organisation's interests to do so or if it was a requirement for compliance with the terms of the State Agreement.
39. In my view, the requirements of paragraph (b) of clause 4(3) are not satisfied in this case, with regard to Documents 1 and 4. In light of that, I consider that Documents 1 and 4 are not exempt under clause 4(3).
40. As previously noted, pursuant to section 102(2) of the FOI Act, the onus is on Mineralogy to establish that a decision adverse to another party should be made. I refer to the comments of Owen J, in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at page 573, in relation to a claim for exemption under clause 4(3) of the FOI Act, when he expressed the nature of that onus in the following way:

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

41. Since I find that clauses 4(2) and 4(3) are not applicable, it is unnecessary for me to consider the application of clause 4(7) and the question of public interest.

#### **CLAUSE 6(1) – DELIBERATIVE PROCESSES**

42. Mineralogy claims that Documents 1 and 4 are exempt under clause 6 of Schedule 1 to the FOI Act, which, insofar as it is relevant, provides:

*“(1) Matter is exempt matter if its disclosure -*

*(a) would reveal -*

*(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or*

- (ii) *any consultation or deliberation that has taken place, in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency; and*
- (b) *would, on balance, be contrary to the public interest.*

### **Limits on exemption**

- (2) ...
  - (3) *Matter that is merely factual or statistical is not exempt matter under subclause (1).*
  - (4) ...”
43. The deliberative processes of an agency are its ‘thinking processes’, the process of reflection for example on the wisdom and expediency of a proposal, a particular decision or a course of action: see *Re Waterford and Department of the Treasury (No. 2)* (1984) 5 ALD 588. In order to establish a *prima facie* claim for exemption under clause 6(1), the requirements of both paragraphs (a) and (b) of clause 6(1) must be satisfied. If both paragraphs (a) and (b) are satisfied, the disputed documents will be exempt, subject to the application of the limits on exemption set out in clauses 6(2) to 6(4).

### **Mineralogy’s submissions**

44. In its letter to me of 25 June 2008, Mineralogy made the following submissions, in brief:
- (a) Documents 1 and 4 are exempt under clause 6 because their disclosure will reveal material forming part of the decision-making of the agency and/or Minister in circumstances where confidentiality of those deliberations is required. Documents 1 and 4 were communicated in such circumstances as to fix the agency and/or Minister with “*an equitable obligation of conscience* [sic]” not to use the confidential information in a way that is not authorized by Mineralogy. Mineralogy has not authorized the disclosure of the documents to third parties.
  - (b) It is significant that a dispute is currently in process in relation to certain proposals. This dispute directly relates to information referred to in Document 1. Disclosure of any part of this document will reveal material forming part of a current legal dispute. “*As the material forms part of the decision making of the agency and/or Minister in circumstances where confidentiality of those deliberations is required and in view of the current legal dispute, this document must remain confidential.*”
  - (c) It is in the public interest that the agency and/or Minister be able to effect proper and fair public administration. This cannot be achieved if Documents 1 and 4 are released.

## The agency's submissions

45. In its notice of decision dated 15 April 2008, the agency made the following submission with regard to Mineralogy's claim for exemption under clause 6(1) for the four requested documents:

*“Clause 6 of schedule 1 to the Act is also subject to a public interest test. As outlined in sections 13 to 16 above [in relation to clause 4(3)] ... it is in the public interest for these documents to be released, on the condition that any commercial information is removed. As a result Clause 6(1)(b) cannot be true, and therefore these documents are not exempt as a matter of deliberative process.”*

The agency did not proceed to identify any 'commercial information' in those documents.

## Consideration

46. I agree with the view of the Commonwealth Appeals Tribunal ('the Tribunal') in *Re Waterford* that the 'deliberative processes' of the Government, a Minister or an agency are its 'thinking processes' the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action; see also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69 at 72.
47. In *Re Waterford* the Tribunal said at [58]:

*“As a matter of ordinary English, the expression “deliberative processes” appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. “Deliberation” means “the action of deliberating; careful consideration with a view to a decision”; see The Shorter Oxford English Dictionary. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action ...”.*

I agree with that statement.

48. I have considered whether, if disclosed, the information in Documents 1 and 4 would reveal any opinion, advice or recommendation that has been obtained, prepared or recorded, or any consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency.
49. I understand Mineralogy to submit that the relevant deliberative process is that of the agency and/or the Minister. It is not clear to me what the deliberative process of the agency might be. With regard to the Minister, I understand it to be the Minister's consideration of the matter contained in Documents 1 and 4.

50. I also understand Mineralogy to claim that the agency and/or the Minister has an equitable obligation to maintain the confidentiality of those documents. However, that claim does not appear to be directly relevant to a claim for exemption under clause 6(1), unless Mineralogy is contending that it is a factor that would support the non-disclosure of Documents 1 and 4 on the basis that such disclosure would, on balance, be contrary to the public interest.
51. In addition, it is not clear to me what relevance the fact of Mineralogy's legal dispute with the State has to this particular claim for exemption, unless Mineralogy is contending that Document 1 forms part of the agency or Minister's decision-making processes in relation to that dispute. If that is correct, then there is nothing before me to support the inference that that is the case. Instead, the material before me indicates that Document 1 was created by the agency solely for the purpose of dealing with the Applicant's access application.
52. Having inspected the agency's FOI file and Documents 1 and 4, I do not consider that the disclosure of the latter would reveal any opinion, advice, recommendation, consultation or deliberation that has taken place, in the course of, or for the purpose of, the deliberative process referred to. That is, Documents 1 and 4 do not contain any information of that character undertaken on the subject of the Project or any evaluation of competing arguments or considerations that have a bearing upon any course of action to be taken by an agency or the Minister. Instead, if Document 1 was to be disclosed, it would reveal a list of proposals and Document 4 would reveal information provided to the Minister and/or an agency. In light of that, I do not consider that their disclosure would reveal the "thinking processes" of an agency or the Minister.
53. For the reasons outlined above, I find that the requirements of paragraph (a) of clause 6(1) have not been satisfied in respect of Documents 1 and 4. Even if I had found that the requirements of clause 6(1)(a) had been satisfied in this instance, Mineralogy has provided me with no information to persuade me that the disclosure of Documents 1 and 4 would, on balance, be contrary to the public interest. In particular, Mineralogy has provided me with no information or material in support of its claim that the agency or the Minister has an equitable obligation of confidence to maintain the confidentiality of Documents 1 and 4, and I refer again to the comments of Owen J in *Manly*, cited in paragraph 40, above.

## CLAUSE 8 – CONFIDENTIAL COMMUNICATIONS

54. Mineralogy claims that Documents 1 and 4 are exempt under clause 8 of Schedule 1 to the FOI Act. Clause 8, insofar as it is relevant, provides:
- “(1) *Matter is exempt matter if its disclosure (otherwise than under this Act or another written law) would be a breach of confidence for which a legal remedy could be obtained.*
- (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.*

#### **Limits on exemption**

- (3) ...
- (4) *Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest.”*

#### **Mineralogy’s submissions**

55. In its letter to me of 25 June 2008, Mineralogy makes the following submissions:
- (a) Documents 1 and 4 are highly confidential in nature and were provided in strict confidence and only for the purposes for which they were given.
  - (b) Documents 1 and 4 were communicated to the State Government in such circumstances as to fix the Department and/or the Minister with an “*equitable obligation of conscience [sic]*” not to use the confidential information in a way that is not authorized by Mineralogy. I understand from that submission that Mineralogy submits that an equitable obligation of confidence exists in relation to Documents 1 and 4.
  - (c) Effective administration of the State Agreement cannot be achieved if highly confidential and sensitive information submitted to the agency and/or Minister is disclosed to the public. Disclosure of any part of Documents 1 and 4 would constitute a breach of confidence which may result in a legal remedy being sought against Mineralogy.

#### **The agency’s submissions**

56. In its notice of decision dated 15 April 2008, the agency’s decision-maker made the following submission with regard to Mineralogy’s claim for exemption under clause 8 for all the requested documents:

*“Third party claims for exemption under Clause 8 of schedule 1 of the Act, have been received. These claims include a statement that “Effective administration ... cannot be achieved if highly confidential and sensitive information submitted to the Department and/or Minister is disclosed to the public.” ... it is my intention to remove all “confidential and sensitive information” from the documents before release. In this case ... commercial information is the only form of confidential and sensitive information regarding the business interests involved.*

...

*Considering that one of the documents is currently publicly available via the internet for a reasonable length of time, and that the third parties have not informed me of any legal remedy being sought much less obtained, I am sceptical of their claims for exemption under this clause. I believe that by deleting the relevant commercial information I will remove any information for which a breach of confidence could be obtained due to its release.”*

However, the agency did not identify any relevant confidential and sensitive commercial information.

### **Consideration**

57. Mineralogy has not identified which of the two separate subclauses of clause 8 it refers to. However, I understand from Mineralogy’s submissions that its claims are made under both clauses 8(1) and 8(2).
58. In *Re Speno Rail Maintenance Australia Pty Ltd and The Western Australia Government Railways Commission and Another* [1997] WAICmr 29, the former Information Commissioner discussed the meaning and application of the exemption in clause 8(1) and determined, for the reasons stated in that decision, that it is limited in its application to a breach of confidence for which a remedy is available at common law. That is, clause 8(1) applies to a common law breach of confidence, such as a breach of a contractual obligation, for which a legal remedy may be obtainable, rather than to an equitable breach of confidence, for which only an equitable remedy could be obtained.
59. Mineralogy has not made any submission as to whether or why that approach to the interpretation of clause 8(1) is wrong. I accept the correctness of the approach of the former Information Commissioner.
60. Having examined Documents 1 and 4, I can identify no information which would suggest that the disclosure of either of those documents – or the information contained in those documents - would be a common law breach of confidence.
61. In my view, Mineralogy’s submissions, in (c) above, merely restate the exemption claim in clause 8(1) without providing any persuasive evidence or information in support of that claim. In my view, neither of those documents is exempt under clause 8(1).
62. With regard to Mineralogy’s submissions in (a) and (b) above, which I understand to relate to clause 8(2), Mineralogy is required to show that Document 2 would, if disclosed, reveal information of a confidential nature and also that that information was obtained in confidence.
63. Information is inherently confidential if it is not in the public domain. In this case, on the information provided to me, it is not clear to me what specific information in Documents 1 and 4 is in the public domain. For the reasons set

out in relation to the claim for exemption under clause 4, I consider that much of the information in Document 4 is, in fact, in publicly available.

64. Even if none of the information in Documents 1 and 4 was in the public domain, I do not accept that their disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. I do not consider that it is reasonable that the disclosure of that matter would prevent Mineralogy or any other proponent to a State Agreement from making proposals under that or a similar statute or taking such action as set out in Document 4.
65. Accordingly, on the information provided to me, I find that Documents 1 and 4 are not exempt under either clause 8(1) or clause 8(2).
66. I consider that, in this case, Mineralogy has not discharged the onus it bears to establish that a decision adverse to the Applicant should be made.

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