

Participants:

**Yamatji Marlpa Barna Baba  
Maaja Aboriginal Corporation**  
Complainant

- and -

**Department of Indigenous Affairs**  
Respondent

**Mineralogy Pty Ltd**  
Second Respondent

### **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - documents relating to application under the *Aboriginal Heritage Act 1972* - 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 – section 27 - whether documents are subject to copyright.

*Freedom of Information Act 1992*: ss.6, 27(2), 32, 33, 102; Schedule 1, clauses 4(2), 4(3), 6(1), 8(1) and 8(2)

*Aboriginal Heritage Act 1972*: s.18

*Interpretation Act 1984*

*Native Title Act 1993 (Cth)*: s.31

*Environmental Protection Act 1986*

*Mineralogy Pty Ltd v Kuruma Marthudunera Native Title Claimants* [2008]  
WAMW 3

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

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

*Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Anor* [2006]  
WAICmr 12

*Re Mineralogy Pty Ltd and Department of Environment, Water and Catchment Protection and Anor* [2003] WAICmr 14

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

*Hicks and Ors on behalf of Wong-goo-tt-oo and Lockyer and Ors on behalf of Kuruma Marthudunera and the State of Western Australia and Mineralogy Pty Ltd* [2008] NNTTA 3

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

*Re Pastoralists' and Graziers' Association and Department for Land Administration* [1995] WAICmr 27

*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

*Re BCG (Australia) Pty Ltd and Fremantle Port Authority*, [2002] WAICmr 23

*Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others* [2006] WAICmr 12

## DECISION

The decision of the agency to refuse access to the disputed documents is set aside. In substitution, I find that:

- the disputed documents 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*; and
- giving access to the disputed documents by the provision of a copy would not involve an infringement of copyright belonging to a person other than the State and access may be given in that way.

JOHN LIGHTOWLERS  
A/INFORMATION COMMISSIONER

19 December 2008

## REASONS FOR DECISION

1. This complaint arises from a decision of the Department of Indigenous Affairs ('the agency') to refuse the Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation ('the complainant') access to documents under the *Freedom of Information Act 1992* ('the FOI Act'). Mineralogy Pty Ltd ('Mineralogy') is joined as the third party to this complaint. This decision follows on from a preliminary view I expressed to the parties on 13 October 2008, which did not result in a conciliated outcome.

## BACKGROUND

2. By letter dated 29 January 2007, Mineralogy submitted two applications under s.18 of the *Aboriginal Heritage Act 1972* ('the AH Act') to the agency in relation to land in Cape Preston in the Pilbara region of Western Australia (together 'the Application').
3. I understand that Mineralogy is the principal proponent to the *Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act 2002* ('the State Agreement'), which governs the development of a large magnetite iron ore mining and processing operation in the Cape Preston region ('the Project') and future projects in that region.
4. I also understand from the information before me that the Application was afterwards referred back to Mineralogy with a request to provide clarification and additional information and that, to date, it has not been resubmitted.
5. The preamble to the AH Act provides that it is an "... *Act to make provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants...*".
6. Under s.17 of the AH Act, a person who excavates, destroys, damages or conceals or in any way alters any Aboriginal site commits an offence. It is also an offence to alter, damage, remove, destroy, conceal or deal with - or assume possession of - any object on or under a site.
7. Section 18 of the AH Act provides that, if the owner of land - as that term is defined in the AH Act - proposes to use land for a purpose that otherwise would likely result in a breach of s.17, the owner must seek the consent of the Minister for Indigenous Affairs ('the Minister').
8. The process to seek the Minister's consent under s.18 ('the s.18 process') is initiated when the owner gives the Aboriginal Cultural Material Committee ('the ACM Committee'), a statutory committee established under Part V of the AH Act, notice in writing. Other than requiring that the notice must be in writing, the AH Act and related regulations do not require that the notice must be in a particular form. However, the agency's website contains guidelines which include a suggested template for a notice made under s.18.

9. The complainant in this matter is the native title representative body for the traditional owners of the Pilbara, Murchison and Gascoyne regions of Western Australia. The complainant represents 24 different groups and its service arm in the Pilbara operates as the Pilbara Native Title Service. In the present case, the complainant's clients are the Kuruma Marthudunera native title claimants ('the Claimants').
10. On 1 May 2007, the complainant, on behalf of the Claimants, applied to the agency under the FOI Act for access to the following documents:

"A. *all and any documents submitted as part of [the Application]: OR*

B. *in the alternative we seek all and any documents submitted as part of that application other than the section 18 application itself i.e. that have been submitted in support that [sic] application and that are of an expert nature including the documents that comprise reports of archaeologists and their notes or reports of the information given to them by traditional owners on behalf of indigenous communities.*

*We further seek the names of any lobbyist(s) who have made approaches to the DIA in connection with this application together with any documents provided to the DIA by such lobbyists on behalf of the company; we use 'lobbyist' as that term is defined by government."*

11. In its letter of 1 May 2007 to the agency, the complainant advised that its access application was made for the purpose of obtaining information relevant to heritage protection in the Cape Preston area that is the subject of the Claimants' interests, including their registered claim. On 6 July 2007, the complainant advised the agency that it also sought access to any Aboriginal Heritage Management Plan related to the Cape Preston area, together with certain related documents.
12. With regard to the complainant's access application, I note the decision of the Mining Warden in *Mineralogy Pty Ltd v Kuruma Marthudunera Native Title Claimants* [2008] WAMW 3, which concerns an objection by the complainant in this matter to the grant of a general purpose lease in relation to the Project. In that decision at [88] the Mining Warden said:
- "... I find that [the agency] has refused to voluntarily provide [the Pilbara Native Title Service] with a copy of the s 18 application and any reports lodged in support of that application and that PNTS had, shortly prior to the date of the affidavit of Ms Southalan, made a formal request to DIA for such information under the Freedom of Information Act (WA)."*
13. Following the receipt of the complainant's access application, the agency consulted with Mineralogy and other third parties as required under ss.32 and 33 of the FOI Act, about the disclosure of the requested documents. Mineralogy advised the agency that it objected to the disclosure of those documents.

14. On 12 July 2007, the agency notified the complainant that it had decided to refuse access to 11 documents - on the grounds that those documents were exempt under either clause 4(2) or clause 6(1) of Schedule 1 to the FOI Act - and to give access to eight documents. The complainant sought internal review of that decision.
15. On 5 October 2007, the agency's A/Principal Legal Officer varied the initial decision by deciding that access could be given – either in full or in part - to an additional seven documents for which the agency had previously claimed exemption. The agency claimed that the remaining four documents were exempt under clauses 4(2) or 6(1).
16. On 18 October 2007, the complainant applied to the Information Commissioner for external review of the agency's decision in respect of two of the documents for which access had been refused.

### **REVIEW BY THE A/INFORMATION COMMISSIONER**

17. On receipt of this complaint, the former A/Information Commissioner required the agency to produce to her the original of its FOI file maintained for the purposes of the complainant's access application, together with the originals of the disputed documents.
18. On 8 November 2007, Mineralogy applied to be joined as a party to this complaint and was so joined. By letter dated 29 November 2007, Mineralogy made submissions to me claiming that the disputed documents are exempt under clauses 4(2), 4(3), 6 and 8 of Schedule 1 to the FOI Act.
19. In order to avoid disclosure to the complainant of information which Mineralogy claimed is exempt, Mineralogy provided my office with a summary of its submissions, set out in its letter dated 20 February 2008, for my office to provide to the complainant. Mineralogy also provided my office with further, more detailed submissions by letter dated 4 March 2008. On 7 March 2008, the complainant provided my office with its submissions in response to Mineralogy's letter dated 20 February 2008. My office also invited the agency to make further submissions to me in support of its claims for exemption. However, it declined to do so.
20. The two disputed documents in this matter comprise approximately 437 folios, not including the attachments which I consider are outside the scope of the complainant's access application (see paragraph 31). Given the number of folios involved, one of my officers held numerous discussions with representatives of the complainant and Mineralogy in an effort to reduce the number of folios and issues in dispute between the parties and to expedite a resolution of the matter.
21. Although those attempts were unsuccessful, the complainant agreed to exclude certain information from the scope of its application and to withdraw its application for the CDs attached to the back of items 1 and 2 of Document 1. However, on 20 February 2008, Mineralogy advised my office that "*due to the*

*commercial in confidence and culturally sensitive nature of the information contained in [the disputed documents] we cannot agree to the release of any of the information in either document”.*

22. On 13 October 2008, after considering the material before me, I informed the parties, in writing, of my preliminary view of this complaint, including my reasons. It was my preliminary view that the disputed documents are not exempt under clauses 4(2), 4(3), 6(1), 8(1) or 8(2) of Schedule 1 to the FOI Act; that the disputed documents are not subject to copyright; and that it would be practicable for the agency to give access to edited copies of the disputed documents.
23. The complainant advised me that it accepted my preliminary view. The agency did not respond to my preliminary view and made no further submissions to me. Mineralogy advised me that it does not accept my preliminary view and relies on its previous submissions.
24. I am conscious of the need to resolve FOI complaints as soon as reasonably practicable. However, this complaint has taken more time than I would have liked owing to the complexity of the issues involved; the large number of folios; the numerous claims for exemption; and the attempts made by my office to resolve this complaint by conciliation between the parties.

#### **THE SCOPE OF THE ACCESS APPLICATION**

25. During the course of my dealing with this complaint, the complainant advised that it does not seek access to the following information contained in the disputed documents:
  - Mineralogy’s confidential or commercial information.
  - Any culturally sensitive information provided by other traditional land owners or claimant groups to Mineralogy.
  - Personal information about individuals.

Accordingly, information of that description is outside the scope of this complaint.

#### **THE DISPUTED DOCUMENTS**

26. The agency described the documents in dispute in this matter, in a document schedule attached to its Notice of Decision given to the complainant, as follows:

Document 1     Mineralogy section 18 application and geographical coordinates; and

Document 6     Cape Preston Iron Ore Mine Downstream Processing Aboriginal Heritage Management Plan.

27. With regard to Document 6, I understand from the information before me that Aboriginal Heritage Management Plans are not a requirement under the AH

Act, although they may be a component of conditional approvals issued pursuant to statute. In brief, such plans are corporate statements issued by proponents and prepared in conjunction with stakeholder groups. Their aim is to set out the relevant policies and procedures governing heritage management over the life of a project.

28. In my view, the description of the disputed documents is too brief to constructively portray the nature of the documents and I have described them in detail as follows for that purpose (but without disclosing any contents that may be exempt).

**Document 1** consists of the following three items:

Item 1: A document entitled “*Aboriginal Heritage Act Section 18 Notice of Application for Minister’s Consent to Use Land - Archaeological Sites Rev A*” dated January 2007.

Item 2: A document entitled “*Aboriginal Heritage Act Section 18 Notice of Application for Minister’s Consent to Use Land - Ethnographic Sites Rev A*” dated January 2007, together with ten attachments contained in two bound documents entitled “*Aboriginal Heritage Act Section 18 Notice of Application for Minister’s Consent to Use Land Ethnographic Sites Rev A Attachments 1 to 3*” and “*Aboriginal Heritage Act Section 18 Notice of Application for Minister’s Consent to Use Land Ethnographic Sites Rev A Attachments 4 to 11*”. The agency advises that **Attachment 11** – which contained gender-restricted material - was immediately returned to Mineralogy and that the agency did not retain a copy.

Attachments 1-10 of Item 2 are described, as follows:

**Attachment 1** is headed “*Report on an Archaeological Survey for Aboriginal Sites, Cape Preston, Western Australia*” dated May 2001.

**Attachment 2** is headed “*Report on an Ethnographic Survey of the Proposed Cape Preston Iron Ore Mine*” dated June 2001.

**Attachment 3** is headed “*Cape Preston Iron Ore Mine, Downstream Processing – Aboriginal Heritage Management Plan*” dated October 2005. It appears to be an earlier copy of Document 6, but lacks the attachments to Document 6.

**Attachment 4** is the Public Environmental Review prepared for Austeel Pty Ltd headed “*Iron Ore Mine, Downstream Processing, Cape Preston, WA*” (December 2000).

**Attachment 5** is a Supplementary Environmental Review prepared for Austeel Pty Ltd headed “*Iron Ore Mine, Downstream Processing, Cape Preston, WA*” (February 2002).



**Attachment 6** is Ministerial Statement No. 000635 published on 20 October 2003.

**Attachment 7** is an application by Mineralogy.

**Attachment 8** is a letter dated 8 September 2004 to Mineralogy from the Minister for the Environment.

**Attachment 9** is a letter dated 10 October 2006 to Mineralogy from the Department of Environment and Conservation.

**Attachment 10** is a copy of the State Agreement.

Both Items 1 and 2 of Document 1 are divided into three parts consisting of 14 numbered sections. With the exception of sections 9.1 - 9.4 and a very small amount of minor detail, the information in both documents is identical.

**Document 6** is entitled "*Cape Preston Iron Ore Mine, Downstream Processing – Aboriginal Heritage Management Plan – Rev 2 February 2007*".

29. Document 1 (comprising Items 1 and 2) and Document 6 are the disputed documents in this matter.

#### **INFORMATION IN THE PUBLIC DOMAIN**

30. In its notice of decision on internal review, the agency made it clear that parts of the disputed documents are in the public domain. In particular, I understand that Attachments 4, 5, 6 and 10 - which form part of Item 2 of Document 1 - are publicly available.
31. Section 6 of the FOI Act provides that the access procedures of the FOI Act do not apply to documents that are publicly available. Accordingly, I consider that Attachments 4-6 and 10 in Item 2 of Document 1 fall outside the scope of this access application. In light of the complainant's advice that it accepts my preliminary view in this regard (see paragraph 23), I do not propose to deal with those attachments further.
32. Mineralogy is the principal proponent to the State Agreement. State Agreements are essentially contracts between the Government of Western Australia and proponents of major resources projects that are ratified by an Act of the State Parliament. In this case, the State Agreement relates to the Project.
33. All of the information in the State Agreement - which contains information about the establishment and operation of the Project - is public information because it is published by the Parliament of Western Australia and by the State Law Publisher. Section 1 of the State Agreement defines "Project 1" to mean:

*"... a project or projects for the production of high grade iron ore pellets within Western Australia with ... an initial minimum production capacity of six*

*million tonnes per annum (or lesser amount approved by the Minister from a mine or mines within Area A and a pellet production facility located within Area A ...”.*

34. Area A is specifically identified in section 1 and relevant plans are attached as Schedule 1 to the State Agreement.
35. Clearly, the Project which is a large project of significance to the State, has been subject to a good deal of publicity during its development and approval stages. I also understand that a considerable amount of information concerning the Project is obtainable from a survey of various internet sites. Information of that nature is public information and, thus, unlikely to be exempt for any reason.
36. In addition, it seems to me that information in Attachment 9 in Item 2 of Document 1 may be publicly available and that much, if not all, of the information about tenements and leases contained in the disputed documents is publicly available from the Department of Industry and Resources, along with mining proposals lodged with that agency after 6 February 2006.
37. The question that arises for my determination is whether the disputed documents, edited to exclude information which is outside the scope of the complainant’s application, are exempt from access under the FOI Act in full or in part under any of the exemptions claimed.

#### **THE EXEMPTIONS CLAIMED**

38. In this case, the agency claims that Documents 1 and 6 are exempt under clause 4(2) and Mineralogy claims that those documents are exempt under clauses 4(2), 4(3), 6 and 8 of Schedule 1 to the FOI Act. Pursuant to s.102 the onus is on the agency and Mineralogy to establish that the decision on access was justified or that access should not be given. Each claimed exemption is dealt with below.

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

39. Clause 4 of Schedule 1 to the FOI Act, insofar 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) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*

(5) *Matter is not exempt under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant.*

(6)...

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

- 40. Clause 4 recognises that the business of government is frequently mixed with that of the private sector and that neither the business dealings of private bodies, nor the business of government, should be adversely affected by the operations of the FOI Act (see, for example, *Re Kimberley Diamond Company NL and Department for Resources Development and Argyle Diamond Mines Pty Ltd* [2000] WAICmr 51).
- 41. The exemptions in clauses 4(2) and 4(3) are intended to protect different kinds of information from disclosure and the terms of those provisions make it clear that information that may be exempt under clause 4(2) cannot also be exempt under clause 4(3). However, it is possible that a single document may contain some information that may be exempt under clause 4(2) and other information that may be exempt under clause 4(3).

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

- 42. Clause 4(2) is concerned with the protection from disclosure of information that has a ‘commercial value’ to a person. The definition of the word ‘person’ in s.5 of the *Interpretation Act 1984* makes it clear that the word ‘person’ includes bodies corporate or unincorporated as well as natural persons.
- 43. 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).

If the requirements of paragraphs (a) and (b) of clause 4(2) are satisfied, then the application of the limits on exemption in clauses 4(4) - 4(7) must be considered.

44. Previous decisions of the Information Commissioner have found that information has a 'commercial value' to a person if it is valuable for the purpose of carrying on the commercial activities of a person. 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. It is not necessary that the commercial value of the information be quantified or assessed in order to determine whether the information has a commercial value: see, for example, *Re Precious Metals Australia Ltd and Department of Minerals and Energy* [1997] WAICmr 12 and *Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Anor* [2006] WAICmr 12. I agree with those views.
45. In order to satisfy the requirements of clause 4(2), it must be established that it is more probable than not that the disputed documents would, if disclosed, reveal information that has a commercial value to a person and, also, that disclosure of that information could reasonably be expected to destroy or diminish that commercial value.

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

46. In its original decision of 12 July 2007, the agency simply cited clause 4(2) and said:

*"Permission for access to the documents was sought from [Mineralogy] but was refused."*

47. In its notice of decision on internal review, dated 5 October 2007, the agency's decision-maker said:

*"The [s.18] application was provided in confidence and the contents of the Application appear to consist of commercial information that would render the documents exempt under Schedule 1 clause 4(2) commercial or business information.*

*I have considered whether the exempt material could be edited from the documents, however, I believe that this is not practicable."*

#### ***Mineralogy's submissions***

48. Mineralogy made detailed submissions to me on 29 November 2007 and also on 4 March 2008. A summary of the former was given to the complainant on 20 February 2008 to enable it to respond. Section 74(2) of the FOI Act provides that I must not include matter that is claimed to be exempt in a decision on a complaint or in reasons given for the decision. Accordingly, to avoid the disclosure of information that may be exempt, I have briefly summarised Mineralogy's extensive and useful submissions, as follows:

- (1) Tens of millions of dollars have been spent by Mineralogy in developing the Project to which Documents 1 and 6 relate. This includes expenditure in relation to consultations and surveys with various Aboriginal claimant groups.
- (2) The disputed documents are of significant value to Mineralogy the disclosure of which will diminish the commercial value of this work by revealing Mineralogy's future plans and strategies.

***The complainant's submissions***

49. The complainant also provided detailed and helpful submissions contained in its letter of 3 August 2007 to the agency seeking internal review and in its letter to me of 7 March 2008. In brief, the complainant submits, as follows:
- (a) Mineralogy was required to produce the disputed documents to the agency as part of a statutory process for consent to destroy or damage Aboriginal heritage sites. Given this context, Document 1 does not contain information which has a commercial value. The s.18 consent (if given) may have commercial value, but that is not relevant for the purpose of clause 4(2) of the FOI Act.
  - (b) The information in Document 1 relates to archaeological and ethnographic sites, which is not commercially sensitive information: it does not relate to Mineralogy's commercial or developmental activities and projects. Even if the Application can be characterized as being of 'commercial value' the complainant submits that its disclosure could not reasonably be expected to destroy or diminish that commercial value. It is very unlikely that any other person would be able to make use of the information in the Application.
  - (c) Document 6 was required to be produced as a condition of the Environmental Protection Authority's approval of the Project. As such it has the character of a public rather than a private document. The complainant's clients are among the indigenous people who will be affected by the Project. A failure to provide a copy of Document 6 to its clients undermines the requirement to consult on the Aboriginal Heritage Management Plan - as set out in the Ministerial Statement published on 20 October 2003 - and the complainant's clients will be unable to monitor Mineralogy's compliance with that plan.
  - (d) Providing the complainant with a copy of Document 6 could not reasonably be expected to diminish any commercial value in that document, as it is unlikely to contain detailed information about Mineralogy's commercial activities. Instead, it should contain information on proposed surveys and consultation, rather than commercial information.

- (e) Mineralogy has not provided ‘reasons or material’ supporting the claim that the disputed documents contain information that has a commercial value. Mineralogy states that it has spent tens of millions of dollars in developing the Project. The complainant submits that the money spent in relation to the Project is not relevant for the purposes of considering whether or not the Application is of ‘commercial value’. Even if, as Mineralogy states in its submissions, this expenditure includes monies spent on ‘consultations and surveys with various Aboriginal claimant groups’, this fact of itself does not mean that the information in the Application is of commercial value.
- (f) Mineralogy submits that the Application was provided to the agency on a confidential basis. The confidentiality of information may be a factor to be considered in deciding whether the relevant information has a commercial value, but that fact alone does not, of itself, establish that the information has a commercial value or that it is exempt information.
- (g) The FOI Act provides exemption for information, rather than whole documents. If there is any exempt matter within the disputed documents, it may be deleted so that the complainant has access to edited copies of the disputed documents.

### *Consideration*

- 50. I have examined Documents 1 and 6 and the agency’s FOI file and considered the submissions put forward by the parties. In my opinion, the agency’s submissions provide insufficient supporting information to establish to the relevant probative standard that the disputed documents contain information that has a commercial value to Mineralogy or to any other person or body, in order to meet the burden of proof that it bears under s.102(2) of the FOI Act.
- 51. I am not persuaded by Mineralogy’s claim that because tens of millions of dollars have been spent by Mineralogy in developing the Project it follows that the disclosure of Documents 1 and 6 will diminish the commercial value of the work undertaken by Mineralogy in that regard by revealing future plans and strategies. While I accept on face value that Mineralogy has spent tens of millions of dollars developing the Project, for the reasons set out below, I agree with the complainant’s submissions that the expenditure of money does not, of itself, mean that information has a commercial value.
- 52. In *Re Mineralogy Pty Ltd and Department of Environment, Water and Catchment Protection and Anor* [2003] WAICmr 14, the former Commissioner accepted and adopted the comments of the Queensland Information 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.*”

53. I agree with those comments. Mineralogy has put no persuasive material before me to support the claim that the investment of a large sum of money is a sufficient reason to establish that all of or any identified parts of the information in Documents 1 and 6 has a commercial value to it. Despite my invitation to Mineralogy to identify the plans and strategies to which it has referred, citing page and paragraph numbers for the relevant documents, it has not identified the specific information which it claims has a commercial value to Mineralogy.
54. On this point, I note the comments of Owen J of the Supreme Court of Western Australia in *Manly v Ministry of the Premier and Cabinet* (1995) 14 WAR 550, where his Honour discussed a claim for exemption made under clause 4(3) of the FOI Act. His Honour said, at p.573 of that decision:

*“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.”*

55. Based on the material presently before me, and for reasons given to the agency and to Mineralogy in my preliminary view letter (but which - to avoid breaching my obligations under s.74(2) of the FOI Act - I have not referred to here), I am not persuaded that the disclosure of the disputed documents would reveal information of a commercial value to Mineralogy.
56. Accordingly, I find that the disputed documents are not exempt under clause 4(2) of Schedule 1 to the FOI Act. In light of that I need not consider the limits on the exemption in clauses 4(4) - 4(6).

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

57. The exemption in clause 4(3) is concerned with protecting from disclosure sensitive information about the business, professional, commercial or financial affairs of a person, including a company or incorporated body.

### ***Mineralogy’s submissions***

58. Mineralogy made detailed submissions to me on 29 November 2007 and on 4 March 2008. I have summarised those submissions, in brief, as follows:
- (1) The disputed documents contain ‘commercial in confidence’ information. The disputed documents were communicated to the agency in such

circumstances as to fix the agency with “*an equitable obligation of conscience*” not to use the confidential information in a way that is not authorised by Mineralogy.

- (2) Mineralogy is a private company. Unlike public companies whose business affairs are disclosed on the Australian Stock Exchange, Mineralogy’s business and commercial affairs are confidential and are not open to the public. The disclosure of the disputed documents will reveal information about the business affairs of Mineralogy and which will adversely affect Mineralogy’s business and commercial affairs by revealing future plans and strategies of Mineralogy in relation to its various projects.
- (3) The disclosure of Documents 1 and 6 will cause unwarranted commercial disadvantage to Mineralogy. The disputed documents contain information about the business and commercial affairs of Mineralogy the disclosure of which will adversely affect such business affairs.
- (4) The disclosure of the disputed documents will prejudice the future supply of information of the kind provided to the agency. The disputed documents were provided on the strict proviso that the agency and the ACM Committee would not disclose any of the information without Mineralogy’s express written consent.
- (5) It would not be in the public interest to release confidential information provided to the agency, which has special responsibility for Aboriginal sites (see para [107] of Deputy President Sumner’s decision in *Hicks and Ors on behalf of Wong-goo-tt-oo and Lockyer and Ors on behalf of Kuruma Marthudunera and the State of Western Australia and Mineralogy Pty Ltd* [2008] NNTTA 30).
- (6) The disclosure of the disputed documents will prejudice all future supply of information to the agency as the agency may lose its ability to maintain the confidentiality of commercial in confidence information and culturally sensitive information.
- (7) The disclosure of the disputed documents will adversely affect Mineralogy’s ability to conduct further consultations with claimant groups in the future.

### ***The complainant’s submissions***

59. The complainant submits, in its letter to me of 7 March 2008, as follows:

- It is highly unlikely that information in an application to destroy or damage an Aboriginal heritage site would contain information about a proponent’s commercial activities or would be ‘commercial in confidence’ information. As such, its disclosure is unlikely to reveal Mineralogy’s future plans and thus adversely affect Mineralogy.



- Mineralogy has merely asserted that disclosure of the disputed documents would adversely affect its business, commercial or financial affairs but has provided nothing to support that assertion.
- Mineralogy claims that if the Documents are disclosed, this will “*prejudice all future supply of information to the agency*”. The complainant submits that this is unlikely to occur where the supply of information, as here, is a statutory requirement: see, for example, *Re Pastoralists’ and Graziers’ Association and Department for Land Administration* [1995] WAICmr 27. The complainant considers it unlikely that proponents and land holders will withhold information from the ACM Committee, as they will need to provide that information in order to be successful in applications made under s18 of the AH Act.

### *Consideration*

60. Having examined the disputed documents and reviewed the submissions, I consider that in context and in part they contain some information about the commercial, business or financial affairs of Mineralogy. Consequently, the requirements of paragraph (a) of clause 4(3) have been satisfied in this case.
61. I agree with the complainant’s submission that the disclosure of the disputed documents could not reasonably be expected to prejudice the future supply to the Government or to an agency of information of the kind contained in those documents. Owners of land are required by s.18 of the AH Act to give notice in writing to the Minister if they propose to use land for a purpose which would otherwise breach s.17 of the Act. However, I do not agree with the complainant that it is a statutory requirement to provide such information. As I understand it, it is not a statutory requirement to provide the agency with all of the information suggested in the template on the agency’s website – which template I note appears to form the basis of the Application – but I am not persuaded that Mineralogy or any other potential s.18 applicant would, if access were given to the disputed documents, be deterred from providing information of the kind contained in the disputed documents in future, if they were seeking to obtain the Minister’s consent under s.18 to use land for a purpose which would otherwise amount to a breach of the AH Act.
62. I have given no weight to Mineralogy’s submissions in (1) of paragraph 58 that the information in the disputed documents is commercial in confidence since Mineralogy has provided me with no persuasive material to support that view.
63. With regard to Mineralogy’s submission in (2) of paragraph 58, I accept that Mineralogy is a private, and not a public, company and that, in general, its business and commercial affairs are not open to public scrutiny. However, by engaging with the State Government under the State Agreement, its documents have come into the possession of various government agencies with the result that the provisions of the FOI Act operate in respect of those documents, notwithstanding its status as a private company. The ‘shield’ from public scrutiny of its financial and commercial operations by being an unlisted company is reduced by virtue of its participation in a State Agreement and

because it has provided information to government agencies in the course of its business activities. Mineralogy has also not identified with sufficient particularity the future plans and strategies which it claims would be disclosed if Documents 1 and 6 were released nor has it persuasively explained to me how such disclosure could reasonably be expected to have an adverse effect on its business or commercial affairs, as submitted in (5) of paragraph 58.

64. Mineralogy referred me to some information which a particular individual does not want publicised on the ground it is culturally sensitive which, I understand Mineralogy to claim that the disclosure of this matter could reasonably be expected to have an adverse effect on its commercial affairs. However, based on my examination of the disputed documents, I understand information of that kind was placed in Appendix 4 to Attachment 2 denoted “restricted information” - which was ‘sealed’ or ‘closed’ and not provided to the agency - and is therefore not contained in the disputed documents. I also understand that Attachment 11 - which, as noted (at paragraph 28), is not held by the agency - is a copy of Appendix 4 to Attachment 2.
65. The onus lies with Mineralogy to specify the particular material in the disputed documents which it claims is of cultural or heritage significance and to provide me with persuasive information to support its claim that the disclosure of that specific matter would adversely affect Mineralogy’s ability to conduct further consultations in the future with the claimant groups, including identifying those groups to me. Despite my invitation to Mineralogy to provide such information to me, it has not done so. Instead, it advised me that it is “...unable to identify with the necessary particularity culturally sensitive information contained within the disputed documents”.
66. In light of Mineralogy’s advice, my office asked the agency to identify any culturally sensitive information contained in the disputed documents. The agency provided the disputed documents to one of its Senior Heritage Officers and ultimately advised me that, in the agency’s opinion, those documents contain no culturally sensitive information.
67. I have considered the decision in *Lockyer* to which Mineralogy refers me in its submissions in (5) of paragraph 58. *Lockyer*’s case dealt with the proposed grant of exploration licences to Mineralogy over land overlapped by, amongst others, the Claimants’ registered claim. The licences are to form part of the Project. In *Lockyer*, the Claimants objected to that grant attracting the expedited procedure - in other words, being made without the normal negotiations required by s.31 of the *Native Title Act 1993* (Cth) – and the issues included an alleged lack of consultation between Mineralogy and the Claimants (see [87] of that decision).
68. In my view, that adds weight to Mineralogy’s concerns over any adverse effect on the trust, confidence and cooperation it has established with Aboriginal native title claimant groups and its ability to consult them in future. However, neither Mineralogy nor the agency has identified with any particularity any culturally sensitive information contained in the documents and, in any event, the complainant is not seeking access to culturally sensitive matter.

69. In the absence of any culturally sensitive material shown to exist in the disputed documents, and for the foregoing reasons, I am not persuaded that Mineralogy has satisfied the requirements of paragraph (b) of clause 4(3).
70. Accordingly, I find that Documents 1 and 6 are not exempt under clause 4(3) of Schedule 1 to the FOI Act.
71. In light of that, it is not necessary for me to consider the limits on the exemption in clauses 4(4) - 4(7).

### **Clause 6 – Deliberative processes**

72. Initially, the agency claimed that Document 1 was exempt under clause 6(1) of Schedule 1 to the FOI Act on the ground that the ACM Committee was still considering the s.18 Application. However, by the time the agency considered the issue on internal review, I understand that the s.18 Application had been withdrawn, which concluded the relevant deliberative process. Nonetheless, Mineralogy maintains its claim that the disputed documents are exempt under clause 6(1).
73. Clause 6, insofar as it is relevant, provides:

#### ***“6. Deliberative processes***

##### ***Exemptions***

- (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) *...”*

74. 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.
75. In order to establish a claim for exemption under clause 6(1), the requirements of both paragraphs (a) and (b) must be established. If both paragraphs 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***

76. I have summarised Mineralogy’s detailed submissions of 29 November 2007 and on 4 March 2008 in relation to this exemption claim, as follows:
- (1) Disclosure of Documents 1 and 6 will reveal material forming part of the decision making process of the agency in circumstances where confidentiality of those deliberations is required.
  - (2) The disputed documents were communicated to the agency “*in such circumstances as to fix the agency with an equitable obligation of conscience [sic] not to use the confidential information in a way that is not authorized by Mineralogy.*”
  - (3) It is in the public interest that the agency be able to effect proper and fair public administration. This cannot be achieved if the disputed documents are released. It would not be in the public interest to release confidential information provided to the agency, which has special responsibility for Aboriginal sites. One of the functions of the ACM Committee is to evaluate on behalf of the community the importance of places and objects alleged to be associated with Aboriginal persons. The ACM Committee includes certain select members of the public (including representatives from various Aboriginal claimant groups) and forms a crucial and determinative part of the s.18 application process. No other State Government Department has representative members of the community play such a crucial role. The ACM Committee operates in a highly confidential manner and this confidentiality must be maintained for the benefit of the Aboriginal community and effective operation of the AH Act.

### ***The complainant’s submissions***

77. In its letter to me of 7 March 2008, the complainant made the following submissions:
- The s.18 application was subsequently withdrawn by Mineralogy, so that the deliberative process was never concluded.
  - There is a public interest in the details of applications under s.18 of the AH Act being made available to an organisation such as the complainant,

as the complainant has a statutory responsibility under the *Native Title Act 1993* (Cth) to represent the interests of Aboriginal persons in the Pilbara who claim native title.

- The preamble to the AH Act notes that it was passed with the intention of making provision “*for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants*”. The AH Act clearly contemplates that the preservation of Aboriginal sites and objects is a matter of interest to the community, and, by extension, the public.
- The operation of the AH Act would not be undermined by the release of an application that was subsequently withdrawn. Further, the complainant’s members, as members of ‘the Aboriginal community’ have an interest in applications to destroy or damage sites within their claim area.

### **Consideration**

78. 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.

79. 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 ...”.*

80. I understand Mineralogy to submit that the relevant deliberative process is the consideration of the s.18 Application by the ACM Committee.

81. In my opinion, the disclosure of Documents 1 and 6 would not reveal the thinking processes of the ACM Committee because those documents do not disclose the weighing up and evaluation of competing arguments in the sense referred to in *Re Waterford*. Having examined the disputed documents, I do not consider that, if they were disclosed, it would be possible to discern from them any opinion, advice or recommendation that has been obtained, prepared and recorded - or any consultation or deliberation that has taken place - in the course of the deliberative process of the Government, a Minister or an agency.

82. For the reasons outlined above, I consider that the requirements of paragraph (a) of clause 6(1) have not been established and I find that the disputed documents are not exempt under clause 6(1). Consequently, it is unnecessary for me to consider whether disclosure of the disputed documents would, on balance, be contrary to the public interest.

### **Clause 8 – Confidential communications**

83. Mineralogy claims that Documents 1 and 6 are exempt in full 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 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.”*

### ***Mineralogy’s submissions***

84. I have summarised Mineralogy’s submissions of 29 November 2007 and 4 March 2008, in brief, as follows:
- (1) Disclosure of the disputed documents would constitute a breach of confidence which may result in a legal remedy being sought against Mineralogy.
- (2) The disputed documents were communicated to the agency in such circumstances as to fix the agency with “*an equitable obligation of conscience*” not to use the confidential information in a way that is not authorised by Mineralogy.
- (3) Each of the disputed documents is highly confidential in nature and was provided to the agency in strict confidence and only for the purposes for which each was given.
- (4) Effective administration of the AH Act, particularly in relation to s.18 applications, cannot be achieved if highly confidential and sensitive information submitted to the agency is disclosed to the public.

85. In addition, in response to my preliminary view, Mineralogy submitted that all information of aboriginal cultural or heritage significance and/or culturally sensitive information must be deleted from the documents, on the basis that such information was disclosed to Mineralogy by the various claimant groups on a strictly confidential basis.

### *The complainant's submissions*

86. The complainant submits that disclosure of the disputed documents would not constitute a breach of confidence for which a legal remedy could be obtained against Mineralogy. The complainant refers to the decision of the former Information Commissioner in *Re BCG (Australia) Pty Ltd and Fremantle Port Authority* [2002] WAICmr 23. Mineralogy has not specified what kind of legal remedy might be sought against it, and has referred merely to an “*equitable obligation of conscience*” (sic) on the part of the agency. An equitable obligation of confidence is not relevant to the disclosure of the disputed documents.
87. In the alternative, the complainant submits that if Mineralogy owes a legal obligation of confidentiality to Aboriginal persons or groups not represented by the complainant in respect of culturally sensitive information, then it is only that specific information (if any) within Documents 1 and 6 which is exempt from disclosure and that the balance of the disputed documents are not confidential.
88. The complainant submits that there is a public interest in the details of applications under s.18 of the AH Act being made available to an organisation such as the complainant, as the complainant has a statutory responsibility under the *Native Title Act 1993* (Cth) to represent the interests of Aboriginal persons in the Pilbara who claim native title.

### *Consideration*

89. 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).
90. With regard to Mineralogy's submissions, it is evident that not all of the information for which Mineralogy made its claim is 'commercial in confidence' or highly confidential in nature, since part of it is, in fact, in the public domain. For example, factual matter about the State Agreement and Mineralogy's mining tenement holdings are matters of public record.

### Clause 8(1)

91. 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 available, rather than to an equitable breach of confidence, for which only an equitable remedy could be obtained. I agree with the former Commissioner's views. For the reasons given in *Re Speno* at paragraph 95 of that decision, I agree with the complainant's submission that an equitable obligation of confidence is not sufficient to satisfy the requirements of clause 8(1).

92. Moreover, Mineralogy has provided me with no persuasive information or material to support its assertion that the disclosure of Documents 1 and 6 would be a breach of confidence for which a legal remedy (as distinct from a possible equitable remedy) could be obtained.
93. Mineralogy refers me to the last paragraph on page 3 of Attachment 2 to Item 1 of Document 1. That paragraph refers to a small amount of information which a particular individual does not want publicised on the ground that it is culturally sensitive information. However, that information does not establish Mineralogy's assertion that, if disclosed, Mineralogy would be in breach of confidence for which a legal remedy could be obtained - either for the disputed documents or for the specific information referred to. I also note that that particular information was contained in a 'sealed' appendix which is not amongst the disputed documents. Accordingly, that information will not be disclosed by the disclosure of the disputed documents.
94. For the foregoing reasons and for the further reasons given to the agency and to Mineralogy in my preliminary view letter (which s.74(2) of the FOI Act prevents me from disclosing), I find that Documents 1 and 6 are not exempt under clause 8(1).

#### Clause 8(2)

95. With regard to a claim for exemption under clause 8(2), information is inherently confidential if it is not in the public domain. That is, the information must be known by a small number or limited class of persons only. However, as previously noted, it seems to me that some of the information contained in the disputed documents is information that is available in the public domain. That information is not "*information of a confidential nature*" which would be exempt under clause 8(2).
96. To have been 'obtained in confidence', the information under consideration must have been both given and received on the basis of either an express or implied understanding of confidence. There is nothing on the face of the disputed documents which supports Mineralogy's claim in that regard. Nor has Mineralogy provided me with persuasive material in support of its claim.
97. As I have previously noted, the onus is on Mineralogy to identify the specific information that it considers was both given and received in confidence and for which it claims an exemption under clause 8(2). Again, despite my invitation to Mineralogy to provide me with that specific information citing paragraph and page numbers for individual documents, it has not done so.



98. Consequently, there is no information before me to establish that the disputed documents were both given and received on the basis of either an express or implied understanding of confidence, other than the assertion made by Mineralogy.
99. For the foregoing reasons - and for the reasons given to the agency and to Mineralogy in my preliminary view letter but which s.74(2) of the FOI Act prevents me from disclosing - I am not satisfied that Mineralogy has satisfied the requirements of paragraph (a) of clause 8(2). Accordingly, I find that Documents 1 and 6 are not exempt under clause 8(2).
100. In light of that, I am not required to consider whether the requirements of paragraph (b) are also satisfied. However, by way of comment, given that the supply of information in the disputed documents is a statutory requirement and a condition attached to the Minister granting consent to use land on which Aboriginal sites or objects are located, it does not seem to me to be reasonable to expect that the disclosure of the disputed documents would, in future, prevent the future supply of information of that kind to the Government or to an agency.

## COPYRIGHT

101. Mineralogy also claims that the disputed documents are subject to copyright.
102. Although copyright belonging to a person other than the State is not a ground of exemption under the FOI Act – nor is it a basis on which access to a document can be refused – it does have an effect in terms of the manner in which access to the document may be given: see *Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others* [2006] WAICmr 12 at [109].
103. Section 27(2)(c) of the FOI Act provides that, if an applicant has requested that access to a document be given in a particular way, the agency has to comply with the request unless giving access in that way would involve an infringement of copyright belonging to a person other than the State, in which case access may be given in some other way.
104. In the present case, for the detailed reasons given to the agency and to Mineralogy in my preliminary view letter (but in order to avoid the disclosure of matter which is claimed to be exempt I am unable to disclose in this decision, pursuant to my obligations under s.74(2) of the FOI Act), I do not consider that the disputed documents are subject to copyright. Therefore, I find that giving access by providing the complainant with edited copies of the disputed documents would not involve an infringement of copyright belonging to a person other than the State and access may be given in that way.

## CONCLUSION

105. I find that the disputed documents are not exempt under clauses 4(2), 4(3), 6(1), 8(1) or 8(2) of Schedule 1 to the FOI Act and are not subject to copyright.

**DELETION OF INFORMATION OUTSIDE SCOPE OF THE APPLICATION**

106. In light of the complainant's advice that it does not seek access to personal information about individuals or, any culturally sensitive information provided by other traditional land owners or claimant groups, information of that kind, if any, is outside the scope of the application and should be deleted from the disputed documents before the agency gives the complainant access to them.
107. In particular, I advised the parties in my preliminary view letter that I accepted that the information in Part 9.2 of Item 1 of Document 1 would enable sites or areas of significance to be identified and that some of those sites are designated as "gender restricted". I consider that specific information could be protected by the deletion of the site identification references in column one and the grid references in column 2 of that matter. In light of the complainant's advice that it accepts my preliminary view, the agency should delete any information of that kind in the disputed documents on the basis that it is outside the scope of the complaint.

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