

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: F2003007
Decision Ref: D0142003**

Participants:

Mineralogy Pty Ltd
Complainant

- and -

**Department of Environment,
Water and Catchment Protection**
First Respondent

- and -

**Yamatji Barna Baba Maaja
Aboriginal Corporation**
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – decision to give access to edited document – reverse FOI application – third party complaint – document relating to application for licence to take groundwater – clause 4(2) – information having commercial value – whether disclosure could reasonably be expected to diminish or destroy commercial value – clause 4(3) – business, professional, commercial or financial affairs – whether disclosure could reasonably be expected to adversely affect those affairs – whether disclosure could reasonably be expected to prejudice future supply of information to the Government or to an agency.

Freedom of Information Act 1992 (WA) s.102(2), Schedule 1 clauses 3(1), 4(2) and 4(3).

Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002

Environmental Protection Act 1986 (WA)

Rights in Water and Irrigation Act 1914 (WA) s.5C

Rights in Water and Irrigation Regulations 2000

Mining Act 1978 (WA) s.115A

Mining Regulations 1981 (WA) Regulation 96

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

Re Public Interest Advocacy Centre and Department of Community Services and Health (1991) 23 ALD 714

DECISION

The decision of the agency is varied. With the exception of the matter described in the Schedule, the disputed document is not exempt under clause 4(2) or clause 4(3) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

16 April 2003

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner, which arises from a decision made by the Department of Environment, Water and Catchment Protection ('the agency') under the *Freedom of Information Act 1992* ('the FOI Act') to give access to a document. Mineralogy Pty Ltd ('the complainant') is a third party who opposes the giving of access. The access applicant is the Yamatji Barna Baba Maaja Aboriginal Corporation, which has been joined as a party to these proceedings. The complainant claims that the requested document is exempt under clauses 4(2) and 4(3) of Schedule 1 to the FOI Act. As this is a third party complaint, pursuant to s.102(2) of the FOI Act, the onus is on the complainant to establish that access should not be given to the requested document or that a decision adverse to the access applicant should be made.

Background

2. On 5 December 2001, the Premier of Western Australia signed the Iron Ore Processing (Mineralogy Pty Ltd) Agreement ('the Agreement') on behalf of the State of Western Australia. The other parties to the Agreement are the complainant and six co-proponent companies. In February 2002, the Minister for State Development introduced a Bill into the Parliament of Western Australia to ratify the Agreement. The Minister informed the Parliament that negotiations had been approved in 1994 and essentially, were complete in 1998. The Minister also informed the Parliament that the Agreement had been negotiated to facilitate the mining and processing of magnetite iron ore from mining leases held by the complainant at Fortescue, near Cape Preston, about 85 kilometres south-west of Karratha. Following that, the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* ('the Agreement Act') came into effect on 24 September 2002.
3. The Agreement (which is contained in Schedule 1 to the Agreement Act) provides for the complainant, by itself or in conjunction with one or more of the six co-proponent companies, to develop projects incorporating the mining and concentration of iron ore and the processing of ore into high grade pellets, direct reduced iron and/or hot briquetted iron or steel. The Agreement further provides for the transportation of that product within the Pilbara region; the establishment of new port facilities in the Pilbara region; and the shipping of the processed iron ore through those facilities.
4. When the Bill was first introduced, the Minister informed the Parliament that the complainant had brought together a consortium of internationally reputable companies, to participate in an integrated iron and steel project, known as the Austeel Project. The Minister also informed the Parliament that the Austeel Project was the first development project proposed under the Agreement. It is my understanding that Austeel Pty Ltd intends to develop an open-pit iron ore mine and downstream processing plant and to construct a new deep-water port at Cape Preston. I also understand that the complainant has granted Austeel Pty Ltd certain rights to use part of its mining tenements for the development and

operation of the Austeel Project, including the right to mine ore from the Fortescue magnetite ore resource over which the complainant holds mining rights.

5. In early 2000, Austeel Pty Ltd, in anticipation of the signing and ratification of the Agreement, engaged Halpern Glick Maunsell Pty Ltd ('HGM') to compile a Public Environmental Review report ('the PER document') for the Austeel Project, as part of the overall approval process under the *Environmental Protection Act 1986* and in accordance with environmental protection guidelines published by the Environmental Protection Authority ('the EPA').
6. HGM engaged Aquaterra Consulting Pty Ltd ('Aquaterra') to assist it in the preparation of the mine site surface water and groundwater components of the PER document. Aquaterra provided its report to HGM in June 2000 and HGM incorporated Aquaterra's report into the PER document. In late December 2000, Austeel Pty Ltd publicly released the PER document in accordance with EPA requirements as part of the public consultation process before the EPA made its own assessment and recommendations to the relevant Minister.
7. I understand that Austeel Pty Ltd distributed copies of the PER document to all relevant State and local government agencies; to several private conservation bodies and associations and to State and regional libraries, for public viewing. At page one of the PER document, interested members of the public, private organisations and government agencies are invited to make comments and submissions on the Austeel Project.
8. In May 2002, Aquaterra lodged an application with the Waters and Rivers Commission ('the WRC'), on behalf of the complainant, for a licence under s.5C of the *Rights in Water and Irrigation Act 1914* to take groundwater. In early August 2002, accordance with the public notification requirements of regulation 23 of the *Rights in Water and Irrigation Regulations 2000*, notices were published in the *Pilbara News* and in *The West Australian* newspapers informing the public of the licence application. Interested parties, who might be affected by the licence application, were invited to make written submissions to the WRC.
9. On 2 October 2002, the access applicant made an application to the agency, for access under the FOI Act, to various documents, including the complainant's licence application ('the disputed document'). The agency consulted with the complainant. Subsequently, the agency decided to give access to an edited copy of the disputed document, but deferred the giving of access, to allow the complainant to exercise its rights of review under the FOI Act.
10. On 17 January 2003, the complainant lodged a complaint with me seeking external review of the agency's decision. The complainant claims that the requested document is exempt under clauses 4(2) and 4(3) of Schedule 1 to the FOI Act.

REVIEW BY THE INFORMATION COMMISSIONER

11. I obtained the disputed document from the agency, together with the agency's FOI file maintained in relation to the access application, and made inquiries into this complaint. I obtained copies of two reports, identified as reference documents in the disputed document, from the public library of the Department of Industry and Resources. Those reports were prepared by the Geological Survey of Western Australia ('the GSWA') in 1989 and 1993 and are entitled "*Commander, D P: 1989 Fortescue River Coastal Plain Bore Completion Reports, unpublished GSWA Hydrology Report No. 1989/13*" and "*Commander, D P: 1993 Hydrology of the Fortescue River Alluvium, unpublished GSWA Hydrology Report No. 1993/14*". I also obtained a copy of the PER document and the Mine Site Surface Water and Groundwater Assessment Report prepared by Aquaterra, for HGM, from the agency's library.
12. The information in each of those documents was examined and compared with the information in the disputed document. Mr D P Commander, an officer of the agency and the author of both GSWA reports referred to in paragraph 11, informed me that virtually all of the hydro-geological information in the disputed document is available from published sources or is freely available to the public from the databases of the WRC. Following that, it seemed to me that a good deal of the information, which was claimed to be exempt by the complainant, might be information that was already in the public domain and was, therefore, not exempt. The complainant was informed of my preliminary assessment and invited to respond.
13. The complainant responded in writing. The complainant maintains its claim that most of the information in the disputed document is exempt under clauses 4(2) and 4(3) and it also disputes the fact that any of the information in the disputed document is publicly available information.

THE DISPUTED DOCUMENT

14. The disputed document consists of four separate documents, being:
 - (i) a letter from Aquaterra to the WRC, dated 23 May 2002 (folios 1 and 2);
 - (ii) a Groundwater Well Licence Application, dated 23 May 2002 (folios 3 - 11) with four maps attached;
 - (iii) a letter dated 24 May 2002, to the WRC from the complainant appointing Aquaterra as its authorized agent for the lodging of the licence application (folios 12 and 13); and
 - (iv) a hydro-geological report prepared by Aquaterra, dated 23 May 2002 (folios 14-33).
15. The complainant does not claim folios 3, 4, 6, 7, 12, 13 and 14 are exempt and, accordingly, those folios are not in dispute. The disputed document also contains a minor amount of personal information, which the agency claims is exempt under clause 3(1). The access applicant did not seek a review of that

claim. Therefore, the personal information in the disputed document is not in dispute either and I have not dealt with it in this decision.

THE EXEMPTIONS

16. The complainant claims exemption under clauses 4(2) and 4(3) for the information in folios 1, 2, 5, 8-11 and 15-33. Clause 4, so far as is relevant, provides:

"4. Commercial or business information

- (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."*

17. Clause 4(2) is concerned with the protection of matter that has a commercial value to a person (including a company), which could reasonably be expected to be destroyed or diminished if it was to be disclosed. Clearly, clause 4(2) consists of two parts and the requirements of both parts (a) and (b) must be satisfied in order to establish a *prima facie* claim for exemption.

18. The exemption in clause 4(3) is more general in its terms. In order to establish a claim for exemption, the complainant must establish that the document contains information about its business, professional, commercial or financial affairs and that disclosure of that kind of information could reasonably be expected to either have an adverse effect on those business, professional, commercial or financial affairs or to prejudice the future supply of information of that kind to the Government or to an agency.

The complainant's submission

19. The complainant's submission is, essentially, as I have summarised below:
- (i) Austeel Pty Ltd is a separate company and is not the complainant. The disputed document relates to the complainant's groundwater licence application and its business and commercial affairs, not those of Austeel Pty Ltd. The complainant says that any information published by Austeel Pty Ltd (including the PER document), which relates to the commercial and business activities of Austeel Pty Ltd, is not information about the complainant's business activities and, accordingly, the contents of the PER document should be disregarded for the purposes of determining whether the information in the disputed document is in the public domain;
 - (ii) certain information in folios 1 and 2 (which the complainant identified to me) is information about aspects of its commercial activities which has not been made public. The complainant claims that that information is highly confidential and commercially valuable, because it would "*...be commercially valuable to Mineralogy's competitors i.e. – BHP and Rio Tinto or aboriginals who are seeking to extort money from the complainant*";
 - (iii) information in folio 5 relating to the complainant's mining tenements and number of wells is commercially valuable information, which is not in the public domain;
 - (iv) information in folios 8-11 about the complainant's mining tenements is commercially valuable information, which is not in the public domain;
 - (v) the hydro-geological report (folios 15-33) prepared by Aquaterra has a commercial value to the complainant because:
 - it collates all of the known relevant hydro-geological information in an integrated and accessible format;
 - it was prepared as a result of the WRC policy and in accordance with WRC guidelines and by professionally qualified individuals;
 - considerable expenditure was incurred in its production and, if any other person obtained access to that document without incurring the costs of production, the commercial advantage the complainant gained by commissioning the report would be destroyed or diminished; and
 - the value of the report derives from the fact that it has been certified by qualified professionals.
20. The complainant also alleged that the two GSWA reports, which I have referred to in paragraph 11 above, are unpublished documents which are not freely or publicly available. The complainant submits that the GSWA reports are restricted documents that should only be available to the holders of the relevant mining tenements and the complainant informs me that it has held the relevant

mining tenements continuously since 1986. The complainant submits that any public disclosure of those documents or the information contained therein is improper and would be a breach of s.115A of the *Mining Act 1978* and regulation 96 of the *Mining Regulations 1981*. The complainant submits that in those circumstances, I am not entitled to rely on that alleged breach, as a reason for further disclosure.

Consideration

21. I have examined s.115A of the *Mining Act 1978* and regulation 96 of the *Mining Regulations 1981*. Section 115A requires the holder of a mining tenement to file mineral exploration reports containing information about prescribed activities carried out in the search for minerals, with the former Department of Mines in Perth. Regulation 96 provides that the relevant Minister may only release information contained in a mineral exploration report with the written consent of the holder of the relevant mining tenement.
22. In my view, there is nothing on the face of either GSWA report, which indicates that it was filed by the complainant in accordance with the requirements of s.115A of the *Mining Act 1978*. To the contrary, both reports were written by an officer of the agency. They contain information about the results of exploratory drilling and test pumping programs of the Fortescue River alluvium, carried out by the GSWA between 1983 and 1985 to locate groundwater supplies for towns along the Pilbara coast. Accordingly, I reject the complainant's assertion.
23. The complainant's claims for exemption are based, essentially, on the claim that the information in the disputed document derives its commercial sensitivity and value from the fact that it is secret and should not be disclosed under the FOI Act. Apart from the matter which is not in dispute, the complainant claims exemption for the balance of the disputed document. However, the FOI Act provides exemption for matter or information, rather than whole documents. The scheme of the access procedures is based on the fact that, where practicable, an applicant should be given access to a document with exempt matter deleted. The FOI Act does not intend that the mere inclusion of some exempt matter in a document is sufficient to make the document as a whole exempt under the Act. Rather, if exempt matter or information can practically be deleted, then that ought to occur and access be given to the balance of a document. With that in mind, and taking into account that it appeared to me that most of the information in dispute is actually in the public domain or freely available upon request, I tested the complainant's claims by making my own inquiries and by comparing the information obtained through those general inquiries with the information in dispute.
24. Through inquiries, I established that the 1993 GSWA Report was published by the then Department of Minerals and Energy in 1994, in another document entitled "*Report 37-Professional Papers*", which is available for purchase by the public, at a cost of \$33.00. My inquiries also established that the 1989 GSWA Report is an unpublished document, but both the Department of

Industry and Resources and the WRC have informed me that the 1989 GSWA Report is not a secret document nor is access to it restricted in any way. I obtained copies of both the GSWA reports from the public reading rooms of the WRC and the Department of Industry and Resources. Both agencies also informed me that those GSWA reports are available to any member of the public. I accept that advice, which accords with the experience of my officer who obtained those reports for me.

25. My office also made inquiries with the WRC to ascertain whether hydro-geological data of the kind recorded in folios 15-33 is available from the Information Services Section of the WRC. As noted in paragraph 12, the author of the GSWA Reports advised me that that kind of data is freely available from the Water Information System (WIN) database maintained and managed by the WRC. Using the site and bore information set out in the 1993 GSWA report, my officer conducted a spot check of the WIN database and obtained, from the WRC, some hydro-geological data that is identical to the disputed information recorded at various places in folios 15-33. For example, the data in the table in folio 16, and the data recorded in the tables in folios 18 and 20, was obtained in this manner.
26. Using the internet site of the WRC, my officer also accessed and searched the WIN database, and obtained other hydro-geological data identical to some of the data recorded at various places in folios 15-33 of the disputed document. The WRC internet site contains explanatory notes which state, among other things, that under the FOI Act, almost all of the hydrologic and hydro-geologic information contained in the WRC's WIN database is available, in most cases, free of charge to the public. Taking all of that into consideration, I reject the complainant's assertion that the two GSWA reports and the hydro-geological information in the WRC's WIN database are not freely available to the public.
27. The hydro-geological report submitted to the WRC (folios 15-33) in support of the complainant's licence application was prepared by Aquaterra in accordance with the policy of the WRC. It contains a substantial amount of information, which is identical in every respect, to information contained in the PER document or in the 1993 GSWA report. It consists of publicly available hydro-geological information about the area which is the subject of the complainant's licence application, and it also includes Aquaterra's assessment and analysis of the available groundwater resources based upon that hydro-geological information. In my opinion, except for a small amount of information in folios 1, 2, 15, 23 and 33, I can discern no other information about the complainant's commercial activities or development plans in that document.
28. However, I accept that a small amount of information in folios 1, 2, 15, 22 and 23 of the disputed document is information about the commercial affairs of the complainant, which is not otherwise in the public domain. I have been unable to find that particular information recorded or duplicated in the material in my possession. It is information relating to the development plans of the complainant and the value of that information to the complainant is derived from its continued confidentiality. I am satisfied that disclosure of that

information could reasonably be expected to destroy or diminish the commercial value of that information because the complainant is still in the process of considering the options available to it for the development of its resources. Accordingly, I find that particular matter exempt under clause 4(2) and I have described it in the schedule attached to my reasons for decision.

29. However, I do not consider that the balance of the disputed document is exempt. I reject the complainant's claim that that information has a commercial value merely because time and money has been spent on its acquisition and compilation by professional persons. I accept and adopt 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.*"
30. Information may be costly to produce without necessarily being worth anything. The fact that the complainant paid Aquaterra to prepare, certify and submit a hydro-geological report does not, of itself, establish that the information has a commercial value. Rather, it is a factor to be taken into account for the purposes of deciding whether the exemptions in clauses 4(2) and 4(3) apply. In this instance, I have not given much weight to that factor because, for the reasons given in paragraphs 24-27, I am satisfied that virtually all of the information in dispute is publicly available.
31. The complainant claims that folios 15-33 contain all of the known hydro-geological information about the area the subject of its licence application. I accept that is the case. However, it appears to me that the complainant is either unwilling or unable to accept the fact that virtually all of the hydro-geological information in the report prepared by Aquaterra has previously been published either in the PER document, in the GSWA Reports, or is otherwise publicly available, free of charge, from the WIN database.
32. In my view, if information having a commercial value is identical to information already disclosed to the public or is information that is publicly available for the asking, the commercial value of the information under consideration could not be further diminished by disclosure under the FOI Act: see *Re Public Interest Advocacy Centre and Department of Community Services and Health* (1991) 23 ALD 714. The contention by the complainant that it would be is not in accordance with the objects of the FOI Act or the intention of the Parliament.
33. Folios 8-11 are maps of mining tenements. Maps of those mining tenements are included in the Schedule to the Agreement Act, which is a statute of the Parliament of Western Australia. In my view, they contain no information about the complainant's business or commercial development plans. Identical copies of those maps can be obtained, free of charge, from the Department of

Industry and Resources. Those maps are not exempt under clause 4(2) or clause 4(3) and I so find. Folio 5, the second page of the complainant's licence application form, includes brief details about wells. The complainant has not explained to me why it claims that that particular information has a commercial value to it. In the absence of any material to persuade me otherwise, I find that folio 5 is also not exempt under clause 4(2) or 4(3).

34. The complainant claims, in the alternative, that the balance of the information in the disputed document is exempt under clause 4(3). The complainant relies on the submissions summarised in paragraph 19 above, and also submits that the disclosure would seriously embarrass it, commercially, and in its relationships with other companies, including Austeel Pty Ltd. The complainant asserts, in the alternative, that disclosure would prejudice the future supply of information of that kind to the Government or to government agencies, because the complainant would not be prepared to provide that kind of information in the future.
35. In a general sense, I accept that the disputed document relates to the complainant's commercial or business affairs. However, in my view, there is no information about the complainant's commercial or business affairs in folios 8-11, 16-20 and 22-33. Those folios consist of the hydro-geological information compiled by Aquaterra. In my opinion, none of it is information of the kind described in clause 4(3)(a).
36. I consider that folio 22 contains Aquaterra's analysis and opinion about the potential groundwater resource. However, folio 22 does not, in my opinion, contain any information about the complainant or its business, professional, commercial or financial affairs. I accept that Aquaterra performed its analysis of mine site surface water and the groundwater components for inclusion in the PER document and that the PER document loosely relates to the business and commercial affairs of the complainant, in so far as Austeel Pty Ltd is a subsidiary of the complainant and because the complainant is also one of the consortium companies participating in the Austeel Project. However, the relevant information has been made public and it cannot, in my view, be exempt under clause 4(3).
37. The complainant claims that disclosure would cause it commercial embarrassment and give its competitors access to valuable information and thereby give those competitors an unfair commercial advantage over the complainant. However, the complainant has not explained how its commercial competitors would gain a commercial advantage from that information. Further, it seems to me that the Agreement Act provides certainty to the complainant's commercial activities and I am not persuaded that disclosure could reasonably be expected to have an adverse affect on the complainant's commercial activities or business affairs. The mere claim that it would do so is not sufficient to discharge the onus under s.102(2) of the FOI Act.
38. Further, as virtually all of the disputed information has already been published in the PER document or in the GSWA reports, or is otherwise publicly

available, I am not persuaded that disclosure could reasonably be expected to have an adverse effect on the complainant's business, professional, commercial or financial affairs. I do not accept the complainant's claim that information published about Austeel Pty Ltd is not information about the complainant and that I ought to disregard such publication for the purpose of deciding whether or not information is in the public domain. A search of the public records obtainable from the Australian Securities and Investment Commission indicates that the complainant holds 99.996% of the shares issued for Austeel Pty Ltd. In those circumstances, I consider that it is a fiction to suggest that the public information available about the business activities of Austeel Pty Ltd does not relate, directly or indirectly, to the business affairs of the complainant.

39. I also reject, as unreasonable, the assertion that disclosure could reasonably be expected to prejudice the future supply of information of the relevant kind to the Government or to an agency. Clearly, the success or otherwise of an application for a licence to take groundwater depends, among other things, on the extent and quality of the hydro-geological information provided in support of such an application. I consider it highly unlikely that any person or company would refuse or neglect to provide as much information as possible in support of its commercial interests. Therefore, the complainant has not persuaded me that the requirements of clause 4(3) have been established with respect to the balance of the information in the disputed document. Accordingly, I find that information is not exempt under clause 4(3) of Schedule 1 to the FOI Act.

SCHEDULE OF EXEMPT MATTER

Folio	Description of exempt matter
1	All of paragraph 1; the 3 rd and 4 th sentences of paragraph 2 and all of paragraph 3
2	Paragraph 2, last two sentences
15	Paragraph 1, first sentence; paragraph 4, under the heading “2.1 Location”, All.
23	All of folio 23
33	All of folio 33