

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

**File Ref: F2003157  
Decision Ref: D0312003**

Participants:

**Mineralogy Pty Ltd**  
Complainant

- and -

**Department of Industry and  
Resources**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – decision to give access to edited document – reverse FOI application – third party complaint – documents relating to application for grant of general purpose leases – clause 4(2) – information having commercial value – whether documents contain information of commercial value – whether disclosure could reasonably be expected to diminish or destroy commercial value – clause 7 – legal professional privilege – whether disputed documents subject to legal professional privilege – clause 8(2) – confidential communications – whether documents contain confidential information given and received in confidence – whether disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

*Freedom of Information Act 1992 (WA)* s.102(2), Schedule 1 clauses 4(2), 7 and 8(2).

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

*Mining Act 1978 (WA)*

*Native Title Act 1993 (Cwth)*

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

*Re Jones and Jones and Town of Port Hedland* [2000] WAICmr 23

*Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 74 ALJR 339

*Trade Practices Commission v Sterling* (1979) 36 FLR 244

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

## DECISION

The decision of the agency is confirmed. The disputed documents, edited in the manner proposed by the agency are not exempt under clauses 4(2), 7 or 8(2) of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY  
INFORMATION COMMISSIONER

29 October 2003

## REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner, arising from a decision made by the Department of Industry and Resources ('the agency') under the *Freedom of Information Act 1992* ('the FOI Act') to give access to edited copies of documents. Mineralogy Pty Ltd ('the complainant') is a third party that opposes the agency's decision to give access. The complainant claims that the requested documents are exempt under clauses 4(2), 7 and 8(2) of Schedule 1 to the FOI Act.

## BACKGROUND

2. The complainant is a party to an agreement with the State of Western Australia, known as the Iron Ore Processing (Mineralogy Pty Ltd) Agreement ('the Agreement'). The Agreement was negotiated between the complainant and the State of Western Australia in order to facilitate the mining and processing of magnetite iron ore from mining leases held by the complainant at Fortescue, near Cape Preston. The Agreement was ratified by the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* ('the Agreement Act'), which came into effect on 24 September 2002.
3. In anticipation of the passage of the Agreement Act, in early 2001, the complainant applied to the agency for the grant of General Purpose Leases 08/52 to 08/55, to support its proposed iron ore operations. I understand that objections to the grant of those leases were lodged by the Pilbara Native Title Service ('the PNTS') under the *Mining Act 1978*. I also understand that the objections were heard before the Warden's Court in May 2001 and January 2002, in open court, and that the Warden subsequently recommended that the complainant's applications for General Purpose Leases 08/52 to 08/55 be refused.
4. Following the Warden's recommendation, written submissions were made to the agency by the complainant and by the PNTS, respectively opposing and supporting the Warden's recommendation. The agency also sought advice on the matter from the Crown Solicitor's Office ('the CSO'). In early June 2003, after considering submissions received from the PNTS and the complainant, and the legal advice received from the CSO, the Minister for State Development ('the Minister') informed the PNTS that he had decided not to follow the Warden's recommendations but, rather, that he intended to grant the complainant's applications for General Purpose Leases 08/52 to 08/55, upon the completion of the formalities required under s.24MD of the *Commonwealth Native Title Act 1993*.
5. Following receipt of the Minister's advice, on 11 June 2003, the PNTS applied to the agency for access under the FOI Act to various documents relating to the Minister's decision. The agency consulted with the complainant and, after considering its response, decided to give the PNTS access to edited copies of six documents ('the requested documents'). However, the agency deferred the

giving of access, to allow the complainant to exercise its rights of review under the FOI Act.

6. The agency's decision on access was confirmed following an internal review and, on 16 September 2003, the complainant lodged a complaint with me, seeking external review of the agency's decision. The complainant claims that the requested documents, edited in the manner proposed by the agency, are exempt under clauses 4(2), 7 and 8(2) of Schedule 1 to the FOI Act.

## **REVIEW BY THE INFORMATION COMMISSIONER**

7. I obtained the disputed documents from the agency, together with the FOI file relating to the access application made by PNTS. I examined the disputed documents and considered the submissions previously made to the agency by the complainant, during the initial consultation period. After considering all of that material, I made a preliminary assessment of this complaint and of the claims for exemption made by the complainant.
8. Following that, on 7 October 2003, I informed the complainant, in writing, that, if the requested documents were edited in the manner proposed by the agency, to delete exempt matter, those documents did not appear to me to be exempt under clauses 4(2), 7 or 8(2). I gave the complainant detailed reasons for that view and invited its response.
9. The complainant responded, in writing, on 22 October 2003. The complainant withdrew its claims in relation to one of the disputed documents but made further submissions in support of its claims that the five remaining documents are exempt under clauses 4(2), 7 and 8(2) of Schedule 1 to the FOI Act.

## **THE DISPUTED DOCUMENTS**

10. The five documents remaining in dispute between the parties are listed and described as follows:

<b>Doc No.</b>	<b>Date</b>	<b>Description</b>
4	04/03/2002	Letter from complainant to agency.
9	09/08/2002	Letter from complainant to agency.
12	06/11/2002	File note of meeting held with complainant.
13	26/03/2003	File note of telephone discussion with complainant.
14	09/04/2003	Minute from Director General of the agency to the Minister for State Development.

### The complainant's submissions

11. In a submission to the agency, dated 28 July 2003, the complainant claimed that the disputed documents were privileged under legal professional privilege, because they contained information about the complainant's legal intentions and touched upon matters that were to be dealt with by the Warden's Court. The complainant also claimed that the disputed documents were exempt under clause 4, but did not give the agency any reasons in support of that claim.
12. In its submissions to me, the complainant claims that Documents 9 and 14 contain information concerning the basis upon which it may oppose a native title claim. The complainant submits that disclosure will jeopardize its position in any court proceedings and will adversely affect its business affairs, by allowing an opponent access to privileged information. On that basis, the complainant asserts that Documents 9 and 14 are exempt because their release will effectively diminish the commercial value of its project.
13. The complainant also submits that Documents 12 and 13 contain information that does not accurately reflect the real and true position on its applications for General Purpose Leases 08/52 to 08/55 and disclosure may, therefore, be misleading and would be adverse and damaging to its business and financial affairs.

### THE EXEMPTIONS

#### (a) Clause 4(2)

14. Clause 4(2) of Schedule 1 to the FOI Act provides that 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.”*

15. Clause 4(2) is concerned with the protection of information which has a commercial value. 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). I consider that information may have a “commercial value” if it is valuable for the purpose of carrying on the commercial activities of a person or organization: see *Re Precious Metals Australia Ltd and Department of Minerals and Energy* [1997] WAICmr 12; *Re Jones and Jones and the Town of Port Hedland* [2000] WAICmr 23. I also consider that 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 commercial value may be determined.

### *Consideration*

16. The agency informs me that much of the complainant's correspondence relating to its applications for General Purpose Leases 08/52 to 08/55 has already been provided to the PNTS and that the PNTS's position in relation to the disputed documents has been put to the complainant, in an effort by the agency to broker agreement between the two parties. The agency also informs me that the information in the disputed documents is not new but is known by both parties by virtue of previous discussions and exchanges of correspondence between them.
17. The agency informs me that Documents 12 and 13 are neither misleading nor inaccurate. Rather, the agency states that those two documents are accurate file notes of discussions that took place between officers of the agency and a representative of the complainant, in relation to the complainant's applications for General Purpose Leases 08/52 to 08/55.
18. I have examined the disputed documents and considered the edited form of those documents. The complainant has not put any information before me to establish the nature, if any, of the commercial value of the information in those documents, nor has it explained why any particular information has a commercial value to it. In my view, there is nothing in the complainant's submissions to explain how or why the disclosure of edited copies of the disputed documents will effectively diminish the commercial value of the project.
19. It seems to me that the complainant's objection to disclosure is based upon the assertion that the disputed documents contain information that is commercially sensitive, legally privileged, or inaccurate. However, the agency states that the information is not inaccurate and there are no reasons why I should not accept the agency's assurances on that point. In the absence of any reasons or material which supports the claim by the complainant that the disputed documents contain information that has a commercial value to it, I am not persuaded that they do contain that kind of information.
20. Further, even if I were satisfied that the requirements of clause 4(2)(a) have been established (which I am not), I am not persuaded that the disclosure of edited copies of the disputed documents, which contain information of a kind which the agency informs me has previously been exchanged between the parties, could reasonably be expected to destroy or diminish the commercial value of that information. In my opinion, the complainant's claims about the potential effects of disclosure are unsupported and speculative and could not reasonably be expected to follow from disclosure. Accordingly, I find the disputed documents are not exempt under clause 4(2) of Schedule 1 to the FOI Act.

**(b) Clause 7**

21. Clause 7 of Schedule 1 to the FOI Act provides that matter is exempt if it would be privileged from production in legal proceedings on the ground of legal professional privilege. Legal professional privilege applies to confidential communications between a client and his or her legal adviser which are made or brought into existence either for the dominant purpose of giving or seeking legal advice, or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 74 ALJR 339. Legal professional privilege also applies to various other classes of documents, as described by Lockhart J in *Trade Practices Commission v Sterling* (1979) 36 FLR 244.

**Consideration**

22. I have examined the disputed documents but none of them is a confidential communication between the complainant and its legal advisers. Further, in my view, none of them is a document which falls within the categories of documents described by Lockhart J in *Sterling's* case. In the absence of reasons from the complainant to explain to me why it is claimed that the disputed documents would be privileged from production in legal proceedings on the ground of legal professional privilege, I am not persuaded that they would be. Accordingly, I find the disputed documents are not exempt under clause 7 of Schedule 1 to the FOI Act.

**(c) Clause 8(2)**

23. Clause 8(2) of Schedule 1 to the FOI Act provides that 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.”*

24. To satisfy the requirements of clause 8(2), the complainant must persuade me that the disputed documents contain confidential information which was both given and received in confidence and also, that the disclosure of the information could reasonably be expected to prejudice the future supply of information of that kind to the Government or an agency. If a *prima facie* claim for exemption is established, then consideration must be given to whether clause 8(4) operates to limit the exemption.

**Consideration**

25. When this complaint came before me, the complainant submitted that Documents 4 and 9 contain confidential commercial information. I have examined Documents 4 and 9, but there is nothing on the face of either

document to indicate that it was given to, and received by, the agency, in confidence. The complainant is not unfamiliar with the operation of the FOI Act in Western Australia and one would expect it to require or seek some assurances of confidentiality from the agency, if the disputed documents are as sensitive as the complainant asserts they are. However, that does not appear to have occurred on this occasion and nothing has been put before me by the complainant to establish that the agency treated Documents 4 and 9 any differently from other normal inwards correspondence addressed to the agency.

26. In any event, the complainant has not proffered any arguments or material which would satisfy the requirements of clause 8(2)(b). Taking into account the fact that the complainant was seeking to persuade the agency that its applications for the relevant general purpose leases should be granted and was, therefore, providing information and arguments in support of its position, I consider it unlikely that the complainant, or any other commercial entity in a like position, would refuse to provide information of that kind to the agency or to the Government, in the future, in an endeavour to advance their commercial interests. In such circumstances, I do not consider that there would be any prejudice to the future capacity of the agency to obtain information of the kind contained in Documents 4 and 9 from the complainant, or from any other commercial entity seeking the grant of mining leases or licences, in similar circumstances.
27. As this is a “reverse FOI application” relating to a complaint made to me by a third party (‘the complainant’), pursuant to s.102(2) of the FOI Act, the complainant bears the onus of establishing that access should not be given to the edited documents, in the manner proposed by the agency, or that a decision adverse to the access applicant should be made. It is not enough for the complainant to simply object to disclosure and cite an exemption clause in support of its objections. The complainant bears the onus of providing me with some objective material to support its claims for exemption.
28. In *Manly v Ministry of the Premier and Cabinet* (1995) 14 WAR 550, Owen J of the Supreme Court of Western Australia, made it clear that the Information Commissioner requires some objective material or ‘proof’ be put before her, in order that an informed decision can be made as to whether documents are exempt as claimed. At p.573 of *Manly*’s case, Owen J said:

*“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.”*



29. The limited information contained in the submissions provided to me, and to the agency by the complainant, does not satisfy me that the complainant has discharged the onus it bears under s.102(2) of the FOI Act. There is no probative material in the complainant's submissions upon which I am able to objectively assess the correctness of its claims for exemption. Accordingly, I am satisfied that the complainant has not established any valid ground for exemption for Documents 4 and 9 based on clause 8(2) and I find that Documents 4 and 9 are not exempt under clause 8(2).

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