

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

**File Refs: F1212000; F1222000
Decision Ref: D0512000**

Participants: **Kimberley Diamond Company NL**
Complainant

- and -

Department of Resources Development
First Respondent

- and -

Argyle Diamond Mines Pty Ltd
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to the Argyle Diamond Mines Joint Venture – confidential communications – clause 8(1) – scope of exemption – whether breach of a contractual obligation of confidence – clause 8(2) – whether information of a confidential nature obtained in confidence – whether reasonable expectation of prejudice to future supply of information to the Government or to an agency – limit on exemption in clause 8(4) – whether disclosure is contrary to the public interest – clause 4(2) – information having a commercial value – whether disclosure would destroy or diminish commercial value – clause 4(3) – information relating to the business or commercial affairs of a person – whether disclosure could reasonably be expected to have adverse effect.

Freedom of Information Act 1992 (WA) s. 102(3); Schedule 1 clauses 3(1), 4(2), 4(3), 4(7), 8(1), 8(2) and 8(4).

Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981

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

Ryder v Booth [1985] VR 869

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

Re Hassell and Health Department of Western Australia [1994] WAICmr 25

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

DECISION

The decision of the agency is varied. It is decided that:

1. the Attachment to Document 1A and the disputed matter in Documents 6A and 7A referred to in paragraph 36 of these reasons for decision, is exempt under clause 8(2) of Schedule 1 to the *Freedom of Information Act 1992*; and
2. the remaining disputed matter is not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

16 October 2000

REASONS FOR DECISION

1. These are applications for external review by the Information Commissioner arising out of two decisions made by the Department of Resources Development ('the agency') to refuse Kimberley Diamond Company NL ('the complainant') access to documents requested by it under the *Freedom of Information Act 1992* ('the FOI Act').
2. In November 1981, the State of Western Australia and several Joint Venturers entered into an agreement ('the Agreement') relating to the exploration, development and marketing of diamond bearing ore deposits within two defined mining areas, described in the Agreement as the Argyle mining area ('Argyle') and the Ellendale mining area ('Ellendale') in the Kimberley area of Western Australia. The Agreement was signed and sealed by the State and by each of the Joint Venturers.
3. The Agreement imposed certain obligations on the State and on the Joint Venturers. Among other things, the State agreed to ratify the Agreement in legislation. Subsequently, in December 1981, the Parliament of Western Australia enacted the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981*. Under the Agreement, the Joint Venturers were granted certain rights in respect of land and mineral claims, including the right to explore and develop Argyle and Ellendale. The right to develop Argyle and Ellendale was conditional and required the Joint Venturers, among other things, to pay royalties to the State at an agreed rate.
4. In 1982 the Joint Venturers entered into a Management Agreement with Argyle Diamond Mines Pty Ltd ('the third party'). Under that Management Agreement, the third party was appointed to manage, carry out and conduct all relevant operations on behalf of the Joint Venturers, including the obligations of the Joint Venturers under the Agreement. The third party was also authorised to institute, prosecute, compromise or settle any legal proceedings on behalf of the Joint Venturers.
5. None of the original Joint Venturers is a current Joint Venturer. The current Joint Venturers are Capricorn Diamonds Limited, Ashton Argyle Holdings Pty Ltd and Perpetual Trustees WA Limited. Ashton Argyle Holdings Pty Ltd is, I understand, a wholly owned subsidiary of Ashton Mining Limited, one of the original Joint Venturers.
6. Under the terms of the Agreement, the Joint Venturers agreed, among other things, to submit to the relevant Minister, detailed proposals for the development of Argyle and associated marketing arrangements and were required to keep the State fully informed in writing of the progress and results of their operations. The Agreement stipulated, in clause 7, the details that were to be included in the proposal that the Joint Venturers were to submit to the relevant Minister for the development of Argyle.

7. Clause 9 of the Agreement further required the Joint Venturers to submit to the relevant Minister, on or before 31 December 1990, detailed proposals for the development of Ellendale. Clause 40 of the Agreement gives the relevant Minister, at the request of the Joint Venturers, the power to extend, further extend or to vary any period or date referred to in the Agreement, including the due date for the submission of development proposals for Ellendale.
8. On 27 December 1990, pursuant to clause 40 of the Agreement, the third party, on behalf of the Joint Venturers, applied to the Minister for an extension of time for the submission of development proposals for Ellendale. It appears that that extension was granted. On 20 December 1993, the Joint Venturers sought another extension to 1998 and, on 11 December 1998, a further extension to December 2003 was sought.
9. The complainant was incorporated in 1993 for the purpose of exploring for diamonds in the West Kimberley region of Western Australia. The mining tenements held by the complainant are, I understand, adjacent to Ellendale. I further understand that the complainant has made several unsuccessful attempts to negotiate with the third party an agreement relating to the development of Ellendale.
10. In March 2000, the complainant made two applications to the agency for access under the FOI Act to various documents relating to Ellendale, including a feasibility study prepared by the Joint Venturers, the applications submitted to the Minister for the extensions of time and the approvals given by the Minister for Resources Development ('the Minister').
11. The agency granted the complainant access to some of the requested documents, but refused access to part of one document on the ground that it is outside the scope of the access application and parts of others on the ground that those parts are exempt under clauses 4(2), 4(3) and 8(2) of Schedule 1 to the FOI Act. Internal reviews of the agency's decisions were conducted, and the agency's initial decisions to refuse access were confirmed.
12. On 27 June 2000, the complainant applied to the Information Commissioner for external review of the agency's decisions. Taking into account the fact that the parties are the same in both complaints, the disputed documents all relate to the same subject matter, and the exemption claims are similar, both complaints have been dealt with together.

REVIEW BY THE INFORMATION COMMISSIONER

13. I obtained the disputed documents from the agency. Various discussions took place to determine whether these complaints could be resolved by conciliation between the parties. They could not. In the course of my dealing with these complaints, the third party applied to be joined as a party to both complaints on behalf of the current Joint Venturers, and was so joined.

14. I understand that the third party made written submissions to the agency in April 2000 and that the agency based its notices of decision to the complainant on those submissions. On 24 August 2000, after considering all of the material then before him, the Acting Information Commissioner informed the parties in writing of his preliminary view of both complaints, including his reasons. It was the Acting Information Commissioner's preliminary view that some of the disputed matter fell outside the scope of the access applications; one document, the Attachment to Document 1A may be exempt under clause 8(2) and some other matter may be exempt under clause 3(1); but that the remaining matter may not be exempt under clause 4(2), 4(3) and 8(2). The parties were given the opportunity to reconsider their positions and to provide submissions to me.
15. Thereafter, the third party made submissions to me claiming exemption for the disputed matter under clause 4(2) and clause 8(1). The agency made no further submissions to me but did not withdraw its claims for exemption. The complainant withdrew that part of its complaint with respect to matter that the Acting Information Commissioner considered might be exempt under clause 3(1) and the matter that fell outside the scope of its access applications. The result is that 10 documents remain in dispute. With the exception of the Attachment to Document 1A, edited copies of the disputed documents have been released to the complainant and exemptions are claimed for only the matter deleted from them.

THE DISPUTED DOCUMENTS

16. The disputed documents have been described, in detail, in two schedules previously provided to the complainant by the agency and the parties are aware of the parts that are in dispute. It is, therefore, unnecessary for me to describe those documents for the purposes of this decision. However, I refer to them as Documents 1A-9A and Document 5B in these reasons.

THE EXEMPTIONS

(a) Clause 8(1)

17. The third party claims that all of the disputed matter is exempt under clause 8(1) of Schedule 1 to the FOI Act. Clause 8(1) 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.”

18. In my decision in *Re Speno Rail Maintenance Australia Pty Ltd and The Western Australia Government Railways Commission and Another* [1997] WAICmr 29, I discussed the meaning and application of the exemption provided in clause 8(1) of Schedule 1 to the FOI Act. In that case, I determined that,

because of its particular and unique terms, the exemption in clause 8(1) is limited in its application to a breach of confidence for which a remedy is available at common law. That is, I consider that clause 8(1) applies to a common law breach of confidence, such as breach of a contractual obligation, for which a legal remedy may be obtained, rather than to an equitable breach of confidence, for which only an equitable remedy could be obtained.

19. The third party submits that the Agreement is a contract between the State and the Joint Venturers and that clause 50 of the Agreement requires the parties to keep all of their communications confidential. The third party claims that, therefore, disclosure of the disputed matter would constitute a breach of clause 50 of the Agreement, which would enable a legal remedy to be obtained by an aggrieved party.
20. I have examined the Agreement. Clause 50 of the Agreement is in the following terms:

“Consultation

50. The Joint Venturers shall during the currency of this Agreement consult with and keep the State fully informed on a confidential basis concerning any action that the Joint Venturers propose to take with any third party (including the Commonwealth or any Commonwealth constituted agency authority instrumentality or other body) which might significantly affect the overall interest of the State under this Agreement.”

21. Having considered the plain words of clause 50, I do not understand that clause to be an overarching confidentiality requirement as the third party claims. Rather, clause 50 appears to me to require confidentiality in respect of certain communications only, being those between the Joint Venturers and the State relating to any action the Joint Venturers propose to take with any third party which might significantly affect the overall interest of the State under the Agreement.
22. In my view, the disputed documents are not communications of that kind. They are letters from the third party to the Minister or to the agency containing requests made pursuant to clause 40 of the Agreement seeking the Minister’s approval to extend, and to further extend, the date by which the Joint Venturers are required to submit development proposals relating to Ellendale, and giving information pursuant to the Joint Venturers’ obligation under clause 19(2) of the Agreement, which requires annual programs of work to be submitted to the Minister. In the main, the disputed documents do not describe or refer to any dealings or proposed dealings between the Joint Venturers and any third party. Documents 5B and 9A contain a small amount of information that may be covered by the confidentiality requirements of clause 50 of the Agreement. However, that particular information has already been released to the complainant by the agency. That matter is, therefore, not in dispute. I consider

that clause 50 does not apply to the disputed matter. Accordingly, I find that the disputed matter is not exempt under clause 8(1).

(b) Clause 8(2) – Confidential communications

23. The agency and the third party claim that the disputed matter in each document is exempt under clause 8(2). Clause 8(2) provides:

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

(a) *would reveal information of a confidential nature obtained in confidence; and*

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

Limits on exemption

(3)...

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

24. There are two limbs to the exemption in clause 8(2). To establish a *prima facie* claim for exemption under clause 8(2), the requirements of both paragraphs (a) and (b) must be met. That is, it must be shown that the documents would, if disclosed, reveal information of a confidential nature obtained in confidence and also that disclosure could reasonably be expected to prejudice the future supply, to the Government or to an agency, of information of the kind under consideration. Further, if the requirements of paragraphs (a) and (b) are satisfied, then the limit on exemption in clause 8(4) must be considered.

The agency’s claims

25. The agency claims that, under clause 50 of the Agreement, the Joint Venturers were obliged to consult with the State, on a confidential basis, concerning any action that the Joint Venturers proposed to take with any third party, on the understanding that those communications were confidential. Therefore, the agency claims that all of the disputed documents are confidential by virtue of the operation of clause 50. The agency also submits that, if the Joint Venturers had known that their intentions regarding the development of Ellendale could be released to third parties such as the complainant, then the information provided to the Minister and to the agency would have been more limited and its disclosure now would restrict the future supply of such information to the Minister and to the agency. The agency’s claims appear to me to be a précis of the submissions made to the agency in April 2000 by the third party.

Clause 8(2)(a) – confidential information obtained in confidence?

26. Information is obtained in confidence where there is evidence that establishes that the information was both given and received on the basis of either an express or implied understanding of confidence. I do not accept the agency's claim that clause 50 of the Agreement applies to the documents in question for reasons similar to those given in paragraphs 21 and 22 above. In my view, the disputed documents do not appear to have been created in the circumstances described in clause 50 and there is no material before me from either the agency or the third party to establish that they were. Save for the information in Documents 5B and 9A that has already been disclosed to the complainant, the disputed documents do not deal with actions taken or proposed to be taken by the Joint Venturers in relation to any third parties.
27. However, based on my examination of the disputed documents and taking into account other material before me, I accept that the disputed matter is information that is inherently confidential, because it is known only to a limited number of people and it is not otherwise in the public domain. Document 1A is marked "Confidential". Taking into account its contents, I accept that Document 1A, and the Attachment to that document, was provided to the Minister in confidence. None of the other disputed documents is marked confidential and there is nothing on the face of those documents to indicate that they were provided to, and received by, the Minister and the agency, on the basis of an express understanding of confidentiality.
28. However, the third party claims that the disputed documents were given to and received by the agency and the Minister in confidence, and that there was an implied understanding of confidentiality based on a common understanding between the Joint Venturers and the relevant Minister at the time the communications were made. The agency also submits that its usual practice is to receive such documents in confidence.
29. I have taken into account the fact that the disputed documents consist of a series of communications all dealing with the same subject matter, and that the first of those documents, Document 1A, is marked "Confidential". Based on those facts and the claims of the third party and the agency as to the implied understanding of confidentiality that existed at the time the documents were created and sent to the Minister and to the agency, I accept that the disputed documents contain information of a confidential nature that was given to and received by the Minister and the agency on an implied understanding of confidence. Accordingly, I consider that the requirements of paragraph (a) of clause 8(2) have been established in respect of the disputed matter.

Clause 8(2)(b) – prejudice to the future supply

30. However, except in relation to the Attachment to Document 1A and a small amount of matter in Documents 6A and 7A which are discussed in paragraph 36 below, neither the third party nor the agency's claims satisfy me with respect to the requirements of paragraph (b) of the exemption clause. Paragraph (b) of clause 8(2) is directed at the ability of agencies and the Government to obtain

the relevant kind of information in the future. The crux of the requirement is the ability of the Government or an agency to obtain similar information to that recorded in the disputed documents, in the future. It is not concerned with the question of whether the particular author or authors of a document would refuse to supply that kind of information in the future: see, in respect of a similar provision in the Victorian FOI legislation, *Ryder v Booth* [1985] VR 869 at p.872.

31. Each of the disputed documents contains information relating to an assessment of the economics of developing Ellendale. Clearly, the Joint Venturers were required by the terms of the Agreement to submit either a detailed development proposal to the Minister or a request for an extension of the due date. In the case of the former, the Agreement specifies the kind of information that must be provided to the Government. In the case of the latter, the Agreement is silent. However, it seems to me that, if a request for an extension of time were made to the Minister and insufficient reasons were given, the relevant Minister could ask for reasons and, if the Joint Venturers did not comply with the Minister's request, his approval might not be forthcoming. In this instance, the contents of some of the disputed documents indicate that additional information was requested on at least two occasions and that the third party provided the requested information on behalf of the Joint Venturers. The Joint Venturers also recognized an obligation under clause 19(2) to submit to the Minister information relating to proposed work on the site, and some of the information in the disputed documents was stated to have been provided pursuant to that obligation.
32. The Joint Venturers were, and still are, obliged by the terms of the Agreement, to provide enough information to enable the Minister to make a decision on whether or not to extend or vary their obligations under the Agreement. They also recognized an obligation under clause 19(2) of the Agreement to give information relating to proposed work. Given those facts, I do not accept that disclosure of the disputed matter in Documents 1A, 2A, 3A, 4A, 5A, 8A, 9A and 5B could reasonably be expected to prejudice the future supply of that kind of information to the Government or to an agency. The documents are, in the main, brief letters of no more than 1-1½ pages. They contain the briefest of information and, in my opinion, it is difficult to see how a letter of that kind could contain any less information and still be acceptable to the Minister and achieve the purpose for which it was provided. Further, this is not a case where information is provided to the Minister in a purely voluntary fashion. Rather, it is provided either pursuant to an obligation or in order to obtain agreement to defer the time for the performance of a contractual obligation. It follows that I am not persuaded that the agency has satisfied the requirements of clause 8(2)(b) with respect to all of the disputed matter.
33. However, it is clear to me that the Attachment to Document 1A is a comprehensive assessment of the commercial implications of developing Ellendale in 1990. Taking into account the projections and calculations contained in that document, I accept that it is not information of the kind that is required by the terms of the Agreement to be submitted to the Minister. Rather,

on the basis of the material before me, it appears to have been provided voluntarily by the Joint Venturers and on their own initiative, to assist the Minister in his consideration of the Joint Venturers initial request for an extension of time.

34. The complainant submits that, if the required development proposals were not submitted within time, then the Joint Venturers stood to lose their exclusive right to develop Ellendale and the area would then be available for mining by other interested parties. The complainant claims that the Joint Venturers had no choice in the decision to submit the Attachment to Document 1A to the Minister if the Minister were to be persuaded to exercise his discretion and grant an extension of time. Accordingly, the complainant submits that the Attachment to Document 1A is not exempt under clause 8(2).
35. I have had the advantage of examining Document 1A in total and considering the contents of that document in light of other documents and material placed before me by the parties. In my view, detailed commercial information of the kind contained in the Attachment to Document 1A was not required under the Agreement, nor does it appear to me to have been specifically required by the Minister on this occasion. It appears to me that the amount of information that is considered necessary to persuade the Minister that an extension should be granted could vary and it is not subject to some precise formula specified in the Agreement. I accept that such detailed commercial and business information could not reasonably be expected to be provided to the Minister in the future if it were to be disclosed. Accordingly, I accept that the requirements of clause 8(2)(b) are satisfied with respect to the Attachment to Document 1A.
36. In Document 6A, the paragraph commencing at the last dot point and, in Document 7A, the paragraph commencing with the words "In late 1995..." is information that describes some preliminary activities carried out at Ellendale in 1995 and 1996. In my view, those parts of Documents 6A and 7A, consist of confidential information that goes beyond what was required to be provided to the Minister. For similar reasons to those given in paragraph 35 above, I find that the requirements of clause 8(2)(b) are satisfied with respect to those parts of Document 6A and Document 7A.

Public interest

37. As I have found that the Attachment to Document 1A and part of the matter deleted from Documents 6A and 7A, as described in paragraph 36, is *prima facie* exempt under clause 8(2), I must consider whether clause 8(4) operates to limit the exemption in respect of that material. Clause 8(4) provides that matter is not exempt under clause 8(2) if its disclosure would, on balance, be in the public interest. Pursuant to s.102(3) of the FOI Act, the complainant bears the onus of establishing that disclosure of that material would, on balance, be in the public interest.

The complainant's submission

38. The complainant submits that that the Joint Venturers have not complied with the terms of the Agreement with respect to Ellendale and that the various extensions granted by the Minister are invalid. The complainant submits that the Joint Venturers have no intention of developing and mining Ellendale because it is uneconomic to do so and that they intend to sell, not develop, the interest that they have in that area under the Agreement. The complainant submits that the Parliament of Western Australia did not intend to allow the Joint Venturers to hold back development of Ellendale for 20 years and then to sell their development rights.
39. The complainant submits that there is a public interest in a small Western Australian company being accorded natural justice and not having its rights usurped by the State in favour of the interests of large foreign companies. The complainant claims that it is in the public interest for the veil of secrecy to be lifted surrounding the apparent failure of the Joint Venturers to comply with their obligations under the Agreement and the reasons for the extensions granted by the Minister.

Consideration

40. The public interest test in Freedom of Information legislation is used to balance competing public interests. I consider there is a public interest in Ministers and government agencies, charged with the responsibility of considering and approving development projects, such as the Ellendale project, being open to scrutiny, so far as is possible. I also consider that there is a public interest in the Minister and the agency being seen to have discharged their responsibilities under the Agreement so that the public can be confident that the management and development of projects involving the resources of the State ensure a financial benefit is returned to the people of Western Australia.
41. I also consider that there is a public interest in the scrutiny of information provided to the Minister and the agency, such as the information provided by the Joint Venturers in accordance with their obligations under the Agreement, which potentially gives a private company or organization, such as the Joint Venturers, substantial economic benefits and an exclusive right to develop and sell the natural resources of the State. In that regard, I note that, despite being granted the exclusive right to develop Ellendale, the Joint Venturers have, on several occasions since 1990, sought the Minister's approval for an extension of time to perform their obligations under the Agreement to develop Ellendale.
42. On the other hand, I recognize that there is a public interest in ensuring that private sector organizations, such as the Joint Venturers, continue to provide the Minister and the agency with full and detailed information about development projects. I consider that there is a public interest in the Minister and the agency being able to obtain full and detailed information from companies such as the Joint Venturers that is necessary for the public discharge of their respective duties. I also consider that there is a public interest in ensuring that private sector bodies, such as the Joint Venturers, are not exposed to any commercial disadvantage by the premature disclosure of detailed business information relating

to proposed development projects before development has commenced, and a public interest in ensuring that private sector bodies are not adversely affected in their business dealings by the operation of the FOI Act.

43. In the circumstances of these complaints, I have given more weight to the public interest in the Minister and the agency being able to obtain all of the information necessary for the public discharge of their respective duties. In my view, the public interest in ensuring that private sector organizations, such as the Joint Venturers, continue to provide the Minister and the agency with full and detailed information about development projects, so that the obligations of the State under the Agreement are properly discharged, outweighs those public interests that favour disclosure.
44. In my view, the public interests favouring disclosure have been satisfied, to some extent, by the disclosure to the complainant of the documents in edited form. Reading the series of documents as a whole, it is apparent that the Joint Venturers made a series of commercial decisions to delay development of Ellendale. The factors that influenced those decisions are disclosed in the documents. I do not consider that the public interest would be served by the disclosure of the Attachment to Document 1A and the matter in Documents 6A and 7A described in paragraph 36 above. Disclosure of that matter might give the complainant valuable information that it could use in its future business operations, but I do not consider that the public interest would be served by such disclosure.
45. Accordingly, I find that the Attachment to Document 1A, the paragraph commencing at the last dot point in Document 6A, and the paragraph commencing with the words “In late 1995...” in Document 7A exempt under clause 8(2).

(c) Clause 4 – Commercial or business information

46. The agency and the third party claim that the disputed matter is exempt under clause 4(2) and clause 4(3). However, as I have found that the Attachment to Document 1A, the paragraph commencing at the last dot point in Document 6A, and the paragraph commencing with the words “In late 1995...” in Document 7A is exempt under clause 8(2), I need not consider whether that particular matter is also exempt under clause 4(2) or clause 4(3), and I consider those claims only in respect of the balance of the disputed matter.
47. Clause 4, so far as is relevant, provides:

“4. Commercial or business information

Exemptions

(1) ...

(2) *Matter is exempt matter if its disclosure -*

- (a) *would reveal information (other than trade secrets) that has a commercial value to a person; and*
 - (b) *could reasonably be expected to destroy or diminish that commercial value.*
- (3) *Matter is exempt matter if its disclosure -*
- (a) *would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
 - (b) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*

Limits on exemptions

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

Clause 4(2) – information that has a commercial value

- 48. Clause 4(2) is concerned with the protection of information which is not a trade secret but which has a “commercial value” to person. The exemption consists of two parts and the requirements of both parts (a) and (b) must be satisfied in order to establish a *prima facie* claim under clause 4(2).
- 49. In my view, 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 a “commercial value” to a person may be determined.

The agency’s claims

- 50. The claims by the agency and the third party are, essentially, the same. The agency claims that the disputed matter is, by its nature, commercially sensitive and of particular commercial value to the third party because:

- it records the conclusion reached by the Joint Venturers about the commercial viability of Ellendale and that information potentially affects the future operation and development of Ellendale;
 - the information is the result of efforts and analysis by the Joint Venturers involving the expenditure of significant money;
 - release is likely to affect the value that a third party would be willing to pay for development rights to Ellendale; and
 - the information may be used by competitors of the Joint Venturers for their own commercial advantage and to the disadvantage of the Joint Venturers.
51. The third party informs me that, on behalf of the Joint Venturers, the third party has recently sought expressions of interest from a number of private companies who might be interested in developing Ellendale and it is essential for the third party to exercise control over the release of information if it is to attract commercially sound responses from interested parties. The third party claims that disclosure to the complainant (one of the parties invited to submit an expression of interest) could reasonably be expected to diminish the commercial value of the information because it would give the complainant an unfair competitive advantage.
52. The third party also submits that the conclusions reached by the Joint Venturers concerning the commercial viability of Ellendale are commercially valuable because of the tender process that is underway at the present time. It is submitted that disclosure could affect the price that others may be prepared to pay for the right to develop Ellendale.
53. As I understand it, the thrust of those submissions is that the commercial value of the disputed information arises, firstly, because the Joint Venturers have spent considerable amounts of money undertaking a feasibility study of Ellendale and, secondly, because confidentiality of the results of that study and the conclusions reached by the Joint Venturers is essential to enable some of those expenses to be off-set or compensated by the sale, disposal, assignment or transfer of the right to develop Ellendale.

Consideration

54. I have considered the kind of information already disclosed to the complainant in the documents released to the complainant in edited form. It seems to me that anyone reading that series of letters could readily infer the nature of the conclusions, if not the precise conclusions, reached by the Joint Venturers. For example, Document 5B has already been disclosed to the complainant in an edited form, including the following sentences:

“It is considered that other smaller companies who may have a strategic interest in the area could have a better chance of mounting a viable operation, particularly if it is combined with other nearby deposits. The Joint Venturers intend to invite other parties to submit proposals for the

development of the deposits, as outlined in the proposal submitted to you on 4 November 1999."

55. Taking that into account, I do not accept that any commercial value of the disputed matter lies in its continued secrecy. Having considered the disputed matter and the material already disclosed to the complainant, there appears to me to be little of the disputed matter, being the conclusions reached by the Joint Venturers, that is not apparent from the material already disclosed. I cannot give my reasons for that conclusion in more detail without possibly breaching my obligation under s.74(2) of the FOI Act not to include exempt matter in a decision on a complaint or in reasons given for the decision. Even if the disputed matter has a commercial value (which I do not accept has been established) to the third party, then I do not consider that the value of that information could reasonably be expected to be destroyed or diminished by its disclosure.
56. Both the agency and the third party also claim, among other things, that the disputed matter has a commercial value to the Joint Venturers because substantial sums of money have been spent to obtain the disputed matter.
57. I dealt with a similar claim in *Re Precious Metals*, at paragraphs 21-29, and in *Re Hassell and Health Department of Western Australia* [1994] WAICmr 25, at paragraphs 32-40. In *Re Hassell*, I accepted as correct the comments of the Queensland Information Commissioner (the Commissioner) in *Re Peter Gerard Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 on this point. In *Re Cannon* the Commissioner said, at page 16, that he was "*...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.*"
58. In this instance, there is no additional material put before me to support the claim that the investment of time and money alone is a reason to establish that information has a commercial value. On this point, therefore, and for reasons similar to those given in paragraph 40 in my decision in *Re Hassell*, I reject the claims of the agency and the third party. I am not satisfied that either the agency or the third party has established a valid claim for exemption under clause 4(2). Accordingly, I find that the disputed matter is not exempt under clause 4(2).

Clause 4(3)

59. The exemption in clause 4(3) deals with information about the business, professional, commercial or financial affairs of any person, including a company or incorporated body. It provides exemption for matter of that kind if its disclosure would reveal information (other trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person, and disclosure 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.

60. The exemption in clause 4(3) 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 operation of the FOI Act. The exemption in clause 4(3) consists of 2 parts and both paragraphs (a) and (b) must be satisfied before a claim for exemption is established. If those requirements are satisfied, then the limits on exemption in clause 4(7) must also be considered.

The nature of the disputed information

61. Having examined the disputed matter, I accept that it consists of information about the business affairs of the Joint Venturers, and, to a lesser extent, about the business affairs of the third party. I consider, therefore, that the requirements of clause 4(3)(a) are satisfied in respect of the disputed matter. However, the requirements of paragraph (b) must be also satisfied before a *prima facie* claim for exemption is established.

The claims of the agency and the third party

62. The submissions of the agency and the third party in support of their respective claims for exemption under clause 4(3) are substantially the same as the arguments in support of their claims under clause 4(2). The agency claims that disclosure of the disputed matter could impact on the value of Ellendale to parties other than the Joint Venturers. The third party claims that disclosure is likely to affect the price a third party is willing to pay for the right to develop Ellendale and that disclosure has the potential to damage the commercial interests of the Joint Venturers who have invested many millions of dollars in developing a valuable State resource. It is the submission of both the agency and the third party that disclosure of the disputed matter may give a commercial advantage to bodies in commercial competition with the Joint Venturers and cause commercial disadvantage to the Joint Venturers.

Consideration

63. I have not attached much weight to the claim that disclosure could disadvantage the Joint Venturers. The Joint Venturers are the owners of Argyle and have been operating the diamond mine in that area for 20 years. I accept that significant development costs have been incurred and that significant royalties have been paid to the State as a result of the Argyle operations. However, during the last 20 years, the Joint Venturers have not developed Ellendale when, clearly, they had an exclusive right to do so. Taking into account the nature of the disputed matter, I do not consider that the disclosure of information giving reasons why Ellendale has not been developed could reasonably be expected to cause any commercial disadvantage to the Joint Venturers or otherwise have an adverse effect on their business, commercial or financial affairs. In my view, there is nothing in the material before me that supports that conclusion.

64. I accept the claim that the Joint Venturers have invested money assessing the viability of Ellendale. However, I am not persuaded that disclosure of the disputed matter could reasonably be expected to result in the adverse effects claimed by the agency and the third party. It seems to me that the main objection to disclosure is related to the current proposal by the Joint Venturers to dispose of the right to develop Ellendale, a right that they no longer wish to possess, and to thereby recoup some of their earlier exploration and assessment costs. However, I am not persuaded that those reasons are sufficient to establish that the disputed matter is exempt as claimed.

65. To a large extent, the nature of the disputed matter may be inferred from the decision to seek tenders for the right to develop Ellendale. Taking into account the kind of information that has been withheld in the disputed documents, I do not consider that either the agency or the third party has provided any additional material from which I could conclude that there are real and substantial grounds for expecting the claimed adverse effects to follow if the disputed matter were to be disclosed. Accordingly, save for the matter described in paragraph 46 above, which I have found is exempt under clause 8(2), I find that the balance of the disputed matter is not exempt under clause 4(3).
