

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

**File Ref: F2013132  
Decision Ref: D0072015**

Participants:

**Latro Lawyers**  
Complainant

- and -

**Department of State Development**  
Agency

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – decision by the agency to refuse access to documents relating to the development of a State Agreement then known as the *Natural Gas (Canning Basin Joint Venture) Agreement Bill 2012* – clauses 1(1)(a), 1(1)(d), 1(1)(e) – deliberations of Cabinet and Executive Council – clause 3 – personal information – clause 4(2) – information that has a commercial value to a person – clause 4(3) – information about the business, professional, commercial or financial affairs of a person – clause 7 – legal professional privilege – section 24 – whether practicable to edit.

***Freedom of Information Act 1992***: sections 24, 26, 30(f), 42, 69(2), 74(1), 74(2) and 102(1); Schedule 1, clauses 1, 3(3), 4(2), 4(3), 7 and 8.

***Interpretation Act 1984***: section 5.

***Apache Northwest Pty Ltd v Department of Mines and Petroleum*** [2012] WASCA 167  
***Attorney-General's Department v Cockcroft*** (1986) 10 FCR 180  
***British American Tobacco Australia Limited v Secretary Department of Health and Ageing*** [2011] FCAFC 107  
***Department of Housing and Works v Bowden*** [2005] WASC 123  
***Environmental Defender's Office WA (Inc) and Minister for Planning*** [1999] WAICmr 35  
***Esso Australia Resources Ltd v The Commissioner of Taxation*** (1999) 168 ALR 123  
***Manly v Ministry of Premier and Cabinet*** (1995) 14 WAR 550  
***McKinnon and Department of Finance and Deregulation*** [2011] AATA 469  
***Police Force of Western Australia v Winterton*** (1997) WASC 504  
***Re Birrell and Department of the Premier and Cabinet (No 1)*** (1986) 1 VAR 230  
***Re Kimberley Diamond Company NL and Department for Resources Development and Anor*** [2000] WAICmr 51  
***Re Malik and Office of the Public Sector Standards Commissioner*** [2010] WAICmr 25

*Re McGowan and Minister for Regional Development; Lands and Mineralogy Pty Ltd* [2011] WAICmr 2

*Re Porter and Department of Community Services and Health* (1988) 14 ALD 403

*Re Ravlich and Minister for Regional Development; Lands* [2009] WAICmr 9

*Re Tallentire and Department of Agriculture and Food* [2015] WAICmr 2

*Re West Australian Newspapers Limited and Another and Salaries and Allowances Tribunal and Another* [2007] WAICmr 20

*Secretary, Department of Infrastructure v Asher* [2007] VSCA 272

*Waterford v Commonwealth of Australia* (1987) 163 CLR 54

## DECISION

The agency's decision is varied. I find that:

- Documents 38 and 41 are exempt under clause 1(1)(a) of Schedule 1 to the *Freedom of Information Act 1992*.
- Documents 24, 27, 29, 40 and 42 are exempt under clause 1(1)(e).
- Document 17 contains some information that is exempt under clause 7 and a small amount of information that is exempt under clause 3, but the remainder of Document 17 is not exempt and it is practicable to give the complainant access to an edited copy of the document under section 24.
- Documents 1 and 18 are not exempt under clause 4(3).
- Document 1 contains a small amount of information that is exempt under clause 3 but it is practicable to give the complainant access to an edited copy of the document under section 24.
- Document 1 is subject to copyright and access is to be given by way of inspection only.
- The agency has taken all reasonable steps to find additional documents and they either cannot be found or do not exist.

Sven Bluemmel  
INFORMATION COMMISSIONER

17 April 2015

## REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of State Development (**the agency**) to refuse Latro Lawyers (**the complainant**) access to documents under the *Freedom of Information Act 1992* (**the FOI Act**).

### BACKGROUND

2. On 7 December 2012 the complainant applied to the agency under the FOI Act for:
  - All documents including – but not limited to – files, notes, letters and any form of paper document and electronic record including emails, audio or visual tapes or microfiches in relation to and/or in connection with:
    - Buru Energy Ltd’s approvals, tenure, project schedules, project timelines or key dates in relation to any proposed pipelines within the Canning Basin;
    - Diamond Resources (Fitzroy) Pty Ltd’s approvals, tenure, project schedules, project timelines or key dates in relation to any proposed pipelines within the Canning Basin; and
    - Mitsubishi Australia Ltd or Mitsubishi Corporation’s approvals, tenure, project schedules, project timelines or key dates in relation [to] any proposed pipelines within the Canning Basin.
  - All documents including – but not limited to – files, notes, letters and any form of paper document and electronic record including emails, audio or visual tapes or microfiches in relation to and/or in connection with the *Natural Gas (Canning Basin Joint Venture) Agreement Bill 2012*.
  - All documents including – but not limited to – files, notes, letters and any form of paper document and electronic record including emails, audio or visual tapes or microfiches in relation to and/or in connection with:
    - consultation document(s), policy document(s) or ‘white paper(s)’ to facilitate:
      - (i) the continued exploration for natural gas in the remote Canning Basin; and
      - (ii) the development of a gas pipeline to the Pilbara;
    - proposed legislation to facilitate:
      - (i) the continued exploration for natural gas in the remote Canning Basin; and
      - (ii) proposed legislation to facilitate the development of a gas pipeline to the Pilbara.
3. By notice of decision dated 23 January 2013 the agency decided to refuse the complainant access to the requested documents pursuant to clause 1(1) and clause 4(3) of Schedule 1 to the FOI Act.

4. On 21 February 2013 the complainant applied for internal review of the agency's decision. By letter dated 11 March 2013 the agency confirmed its decision and further claimed that some of the requested documents were also exempt under clauses 7 and 12 of Schedule 1 to the FOI Act.
5. By letter dated 10 May 2013, the complainant applied to me for external review of the agency's decision.

### **REVIEW BY THE INFORMATION COMMISSIONER**

6. Following my receipt of this complaint, the agency produced to me the original of the disputed documents together with its FOI file maintained in respect of the complainant's access application.
7. The parties also attended a conciliation conference before my Principal Legal Officer on 11 February 2014, following which the agency undertook a review of its searches.

### **Scope of the complaint**

8. The agency originally identified 42 documents as falling within the scope of the access application. As a result of the agreed review noted above, the agency decided to provide edited copies of Documents 2 and 9 to the complainant on 2 September 2014 together with a schedule of the disputed documents.
9. The agency stated in respect of those two documents that it:

*Originally made its claim for exemption when the Natural Gas (Canning Basin Joint Venture) Agreement 2012 had not been settled. The State Agreement has since been finalised and was assented to on 26 June 2013. On that basis the previous claim falls away due to the effluxion of time, even though, in the agency's view, those claims were properly made.*
10. It also reconsidered its decision in respect of some of the other disputed documents.
11. The agency withdrew its claim for exemption under clause 4(3) for Documents 2, 9, 14, 20 and 22 but maintained its claim for exemption under clause 7 for Documents 14, 20 and 22. It maintained its claim for exemption under clause 4(3) in relation to Documents 1 and 18.
12. My office advised the complainant on 27 August 2014 that 21 of the documents were likely to be found exempt under clause 7 and the complainant was invited to withdraw its claim in respect of those documents. No response was received and my Principal Legal Officer contacted the complainant again on 9 October 2014 to obtain its response. The complainant responded and withdrew its complaint in respect of Documents 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 16, 19, 21, 23, 33 and 36.

### **The agency's notices of decision**

13. Under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision to refuse access to the requested documents is justified. The applicant is not required to establish that it is entitled to access the requested documents; it is up to the

agency to establish a case for exempting a document from disclosure and to demonstrate that it has established the requirements of any exemption in its notice of decision.

14. Section 30 of the FOI Act sets out the details that must be included in an agency's notice of decision given to an access applicant. If an agency decides to refuse access to a document, section 30(f) of the FOI Act provides that the agency must include the following details in its notice of decision:
  - the reasons for the refusal;
  - the findings on any material questions of fact underlying those reasons; and
  - reference or references to the material on which those findings were based.
15. In this case, neither the agency's initial decision nor the internal review decision complied with the requirements of section 30(f). Apart from citing the exemption clause in respect of each document for which exemption was claimed, neither decision explained how the requirements of each particular exemption provision were satisfied. A case for exemption is not made out merely by citing an exemption clause or clauses.
16. No attempt appears to have been made by the agency to explain the factual basis underlying the agency's original decision to refuse the complainant access to the disputed documents which were also not initially identified by number or description. The decision merely said that certain general information was available publicly and the agency had decided to refuse the complainant access to the documents claiming they were exempt under clauses 1(1) and 4(3) of Schedule 1 to the FOI Act.
17. The notice of decision on internal review also does not comply with the requirements of sections 30 or 42 of the FOI Act. In particular, it does not demonstrate any consideration of any of the exemptions in the FOI Act or give reasons why the decision-maker considered the requested documents contained exempt information under the provisions of the FOI Act. The decision does not outline the findings on any material questions of fact underlying those reasons, or reference or references to the material on which those findings were based. Section 42 of the FOI Act requires an application for review to be dealt with as if it were an access application.
18. The agency's internal review decision confirmed its initial decision and further decided that Documents 25, 35, 37 and 40 were also exempt under clause 12 and Documents 3-8, 10-16, 19-34, 36, 41 and 42 were exempt under clause 7. No reasons for the inclusion of these additional exemption claims were provided to the complainant.
19. The agency subsequently withdrew its exemption claim under clause 12 for Documents 25, 37 and 40.
20. I acknowledge that the agency is restrained from identifying exempt information, and that this may limit how much detail the agency is able to include in its decision. However, as the former Acting Commissioner noted in *Re Ravlich and Minister for Regional Development; Lands* [2009] WAICmr 9 at [10]-[19], if an agency gives an applicant a notice of decision that does not contain sufficient findings of fact and a clear statement of the basis on which an exemption is claimed, it is unlikely that the applicant will have a clear understanding of the reasons why access is refused and why the

requirements of any exemption clause or clauses are satisfied. Only if applicants understand all of the elements involved in applying a particular exemption and why access is refused are they in a position to decide whether to accept the decision or to test it by way of external review on complaint to the Information Commissioner.

21. Section 74(1) of the FOI Act requires the Information Commissioner to ensure that exempt matter is not disclosed during the course of dealing with a complaint and section 74(2) places a further obligation on the Commissioner not to include exempt matter in a decision on a complaint or in reasons given for a decision. The Supreme Court in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 556-557 recognised the difficulties faced by complainants and the constraints placed on the Commissioner by such provisions in the FOI Act but took the view that those provisions should be construed strictly according to their tenor.
22. By letter dated 9 December 2014, I provided the agency and the complainant with my preliminary view of the issues in dispute.
23. My preliminary view was that:
  - Documents 14, 15, 20, 22, 25, 26, 28, 30, 31, 32, 34, 35, 37 and 39 are exempt under clause 7;
  - Document 17 contains some information that is exempt under clause 7 and it is practicable to edit Document 17 to delete the exempt information under clause 7;
  - Document 17 contains a small amount of exempt personal information under clause 3, but it is practicable to edit the document to delete the exempt personal information;
  - Documents 38 and 41 are exempt under clause 1(1);
  - Documents 24, 27, 29, 40 and 42 are exempt under clause 1(1)(e); and
  - Documents 1 and 18 are not exempt under clause 4(3).
24. The complainant advised in response that it was instructed to accept my preliminary view except in relation to documents 24, 27, 29, 38, 40, 41 and 42. It also asserted that there must be additional documents falling within the scope of the access application. However it provided no probative evidence for this assertion.
25. The agency maintained its claim for exemption in respect of Documents 1 and 18 and provided me with a further edited version of Document 17, which it proposed to release.
26. Following my preliminary view letter dated 9 December 2014 in which I considered that Documents 1 and 18 were not exempt under clause 4(3) of Schedule 1 to the FOI Act, I sought the views of a third party that was named in those documents and invited the third party, pursuant to section 69(2) of the FOI Act, to be joined as a party and make submissions to me. By letter dated 21 January 2015 I invited the third party to advise me whether it objected to the release of Documents 1 and 18 and, if it did, to make any submissions to me that it cared to make in respect of clauses 3 and 4 of Schedule 1 to the FOI Act by no later than 4 February 2015.
27. The third party did not wish to be joined as a party to the complaint but it did make submissions to me by letter dated 2 February 2015. Those submissions are summarised

at paragraphs [70]-[71] and [105] of this decision. I have carefully considered those submissions in reaching my decision concerning Documents 1 and 18.

## THE DISPUTED DOCUMENTS

28. Documents 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 25, 26, 28, 30, 31, 32, 33, 34, 35, 36, 37 and 39 are no longer in dispute and I have not considered them further.
29. Ten documents remain in dispute. They are Documents 1, 17, 18, 24, 27, 29, 38, 40, 41 and 42. They consist of copies of draft State agreements, reports, email correspondence between the agency and its legal advisers regarding the drafting of the State agreement, correspondence between the agency and its Minister, correspondence with third parties and Cabinet documents.
30. The agency claims that the disputed documents are exempt under clauses 7, 4(3), 1(1)(a), 1(1)(e) and 8(2) as follows:

Document 1	clause 4(3)
Document 17	clause 7 and clause 8(2)
Document 18	clause 4(3)
Document 24	clause 1(1)(e)
Document 27	clause 1(1)(e)
Document 29	clause 1(1)(e)
Document 38	clause 1(1)(a)
Document 40	clause 7 and clause 1(1)(e)
Document 41	clause 1(1)(a)
Document 42	clause 7 and clause 1(1)(a)

## CLAUSE 1 – CABINET AND EXECUTIVE COUNCIL

31. The agency claims that Documents 24, 27, 29, 38, 40, 41 and 42 are exempt under clause 1.
32. Clause 1(1) provides that matter is exempt if its disclosure would reveal the deliberations or decisions of an Executive body. ‘Executive body’ is defined in clause 1(6) as including, amongst other things, Cabinet, committees of Cabinet and the Executive Council.

### Clause 1(1)(a)

33. The agency claims that Documents 38 and 41 are exempt under clause 1(1)(a), which provides that, without limiting the general rule in clause 1(1), matter is exempt matter if it is an agenda, minute or other record of the deliberations or decisions of an Executive body.
34. I have carefully reviewed Documents 38 and 41. It is plain on their face that they are documents prepared for and considered by Cabinet. They are Cabinet minutes, decision, summary and consultation sheets attached to draft copies of a bill.

35. Accordingly I consider that documents 38 and 41 are exempt under clause 1(1)(a) of Schedule 1 to the FOI Act.

### Clause 1(1)(e)

36. The agency also claims that Documents 24, 27, 29, 40 and 42 are exempt under clause 1(1)(e).
37. Matter is exempt under clause 1(1)(e) if it is a draft of a proposed enactment. The plain meaning of ‘draft’ insofar as it is relevant in this context is ‘a preliminary written version of a speech, document, etc’ and ‘a first or preliminary form of any writing, subject to revision and copying’ (The Australian Concise Oxford Dictionary (4<sup>th</sup> edition) and the Macquarie Dictionary (5<sup>th</sup> edition)). In my view, ‘a draft of a proposed enactment’ means the working or preliminary version of the proposed bill in its documentary form and does not extend to a mere reference to such a document.

### The complainant’s submissions – clause 1(1)(e)

38. The complainant’s submissions in summary were that:
- some or all of the documents do not disclose the deliberations of Cabinet;
  - some of the documents pertain to the mere receipt of information;
  - the decision-maker did not consider any of the exemptions in clauses 1(2) -1(5) of Schedule 1 to the FOI Act; and
  - the agency did not consider whether it was possible to edit the documents so as to delete exempt matter.
39. In response to my preliminary view dated 9 December 2014, the complainant asked me to reconsider my preliminary view and made the following further submissions in respect of clause 1:
- In *Environmental Defender’s Office WA (Inc) and Minister for Planning* [1999] WAICmr 35 (***Re EDO and Minister for Planning***) at [13] the then Commissioner referred with approval to Deputy President Todd’s comment in *Re Porter and Department of Community Services and Health* (1988) 14 ALD 403 at [407] that the words ‘deliberation or decision’ cover debate in Cabinet and formal decisions in Cabinet. ‘It is not to be concluded that there was a deliberation in respect of matter contained in a document merely because a document was before Cabinet at a meeting thereof’. At [19] of *Re EDO and Minister for Planning* the then Commissioner referred to *Re Birrell and Department of the Premier and Cabinet (No 1)* (1986) 1 VAR 230 at page 239 in which the Victorian Administrative Appeals Tribunal said:

*It is our opinion that ‘deliberation’ encompasses more than the mere receipt of information in the Cabinet room for digestion by Cabinet Ministers then or later. The word ‘deliberation’ connotes careful consideration with a view to the making of a decision. The mere acceptance of material which may or may not provide the basis for further action or decision-making (certainly if there is not discussion or consideration concerning its worth or merit) does not in our view amount to ‘deliberation’.*

- In *McKinnon and Department of Finance and Deregulation* [2011] AATA 469 the Administrative Appeals Tribunal (Cth) distinguished between the subject matter of Cabinet discussions and the discussions themselves, finding that the disclosure of summarised reports which were attached to Cabinet submissions would disclose part of the relevant cabinet consideration but would not disclose any ‘deliberations of Cabinet’ and would not involve any breach of Cabinet confidentiality.
- In *Secretary to the Department of Infrastructure and Asher* [2007] VCSA 27 Buchanan JA said at [7]:

*I can readily understand that it is necessary for the protection of an essential public interest to prevent the disclosure of documents revealing the views expressed by members of Cabinet as to a matter and the manner in which Cabinet treats and uses information placed before it. I am unable to see, however, that the disclosure of a document placed before Cabinet, without any indication that Cabinet even read the document, let alone how Cabinet dealt with the document, could jeopardise any public interest.*

#### **The agency’s submissions – clause 1(1)(e)**

40. The agency’s notice of decision dated 23 January 2014 did not contain any reasons or submissions on the application of clause 1 to the disputed documents. The agency’s revised schedule of documents dated 20 October 2014 contains the following annotation for each of Documents 24, 27, 29, 40 and 42: ‘this document comprises a draft of a proposed enactment’.

#### **Consideration – clause 1(1)(e)**

41. I have examined the disputed documents carefully. Documents 24, 27, 29, 40 and 42 are not simply documents referring to a proposed enactment but are draft annotated copies of a proposed enactment, being a Bill prepared for introduction into Parliament.
42. I have carefully considered the complainant’s submissions and the authorities it drew to my attention but I am not persuaded by them. I have also considered whether the documents meet the threshold test of revealing the deliberations or decisions of an Executive body and, without disclosing exempt material, I am satisfied that they do. I am satisfied that Cabinet received drafts of the proposed enactments, considered them and made decisions related to them.
43. I consider that Documents 24, 27, 29, 40 and 42 are therefore exempt under clause 1(1)(e) of Schedule 1 to the FOI Act.

#### **CLAUSE 7 – LEGAL PROFESSIONAL PRIVILEGE**

44. The agency claims that Document 17 is exempt under clause 7.
45. Clause 7 provides that matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.

### **The agency's submissions – clause 7**

46. The agency's notice of decision dated 11 March 2013 gives no reasons for its decision that Document 17 is exempt but merely quotes the exemption clause and provides a brief description of the document.
47. The agency made further submissions dated 20 October 2014 concerning Document 17 in which it asserted that Document 17 formed the basis of legal discussion between the agency and Main Roads Western Australia regarding the issue of tenure for the gas pipeline within the Main Roads reserve. The agency also claimed that Document 17 is exempt under clause 8(2), the claim for which is dealt with separately below.

### **The complainant's submissions – clause 7**

48. The complainant's submissions are set out in its letter to me seeking external review dated 10 May 2013 and its further submissions dated 9 October 2014. In brief, the complainant submits as follows:
  - the information claimed as privileged has been reported in the media and the decision-maker did not consider whether privilege has been waived;
  - privilege has been waived over some or all of the documents; and
  - the decision maker did not consider whether disclosure was deployed for a forensic or other advantage (*British American Tobacco Australia Limited v Secretary Department of Health and Ageing* [2011] FCAFC 107).

### **Consideration – clause 7**

49. The grounds upon which a document is subject to legal professional privilege are fairly well settled in Australian common law. In brief, legal professional privilege protects from disclosure confidential communications between clients and their legal advisers, if those communications were made or brought into existence 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) 168 ALR 123 at 132.
50. The scope and meaning of the exemption in clause 7 has been considered by the Supreme Court of Western Australia in *Department of Housing and Works v Bowden* [2005] WASC 123 (*Re Bowden*). McKechnie J in *Re Bowden* concluded at [46]-[47]:

*For these ancillary reasons, I hold that once a document is determined, prima facie, to be the subject of legal professional privilege, questions of waiver do not arise under the FOI Act.*

*I conclude the question of waiver is one that is only able to be answered in legal proceedings when the fairness of maintaining the privilege to the detriment of a litigant is able to be judged and balanced. In the absence of legal proceedings, there is nothing to balance and fairness does not operate at large.*
51. Applying *Re Bowden*, once I decide that particular documents are on their face the subject of legal professional privilege, then that is all that is required to establish the exemption under clause 7(1). In my view, *Re Bowden* has the effect of constraining my

role to that of deciding whether documents are, on their face, privileged from production in legal proceedings. This means that the question of waiver does not arise for my consideration.

52. The solicitor/client relationship extends to agency legal officers as well as external legal advisers – see *Waterford and Commonwealth of Australia* (1987) 163 CLR 54 at page 63 per Mason and Wilson JJ:

*The common law... recognises that legal professional privilege attaches to confidential, professional communications between government agencies and their salaried legal officers undertaken for the sole purpose of seeking or giving legal advice or in connection with anticipated or pending litigation.*

53. It is my view that Document 17 contains some confidential communications between the agency and its legal advisers made for the dominant purpose of giving or seeking legal advice.
54. Specifically, I consider that only the following information in Document 17 would be privileged from production in legal proceedings on the ground of legal professional privilege and is exempt under clause 7(1):
- email dated Wednesday 3 October 2012 4.35pm – the third paragraph of the body of the email;
  - email dated Friday 5 October 2012 8:40am – the first and second paragraphs of the body of the email; and
  - email dated Friday 5 October 2012 9.00am – the third paragraph of the body of the email.
55. Document 17 also contains the following personal information which is exempt matter under clause 3, as its disclosure would reveal more than prescribed details about individual officers of an agency as outlined in *Re Malik and Office of the Public Sector Standards Commissioner* [2010] WAICmr 25:
- email dated 3 October 2012 at 4.35pm – mobile phone number and personal email address of sender and personal email address of receiver;
  - email dated 5 October 2012 at 8.40am – mobile phone number and personal email address of sender and personal email address of receiver; and
  - email dated 5 October 2012 at 9.00am – mobile phone number and personal email address of sender.
56. Section 24 of the FOI Act provides that if an access applicant requests access to a document containing exempt matter and it is practicable for the agency to give access to a copy of the document from which the exempt matter has been deleted, and the agency considers that the applicant would wish to be given a copy, the agency has to give access to an edited copy.
57. In my view it is practicable, in the sense discussed by Scott J in *Police Force of Western Australia v Winterton* (1997) WASC 504 (***Re Winterton***) at page 16 for the agency to delete the exempt material and give the complainant access to an edited copy of Document 17.

### **CLAUSE 4(3) – BUSINESS, PROFESSIONAL, COMMERCIAL OR FINANCIAL AFFAIRS**

58. The agency claims that Documents 1 and 18 are exempt under clause 4(3) of Schedule 1 to the FOI Act.
59. Clause 4(3) provides as follows:
- 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.*
60. Clause 4(3) is concerned with protecting from disclosure information about the business, professional, commercial or financial affairs of persons or organisations having business dealings with government agencies, where disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of that kind of information to the Government or its agencies.
61. The exemption consists of two parts and the requirements of both paragraphs (a) and (b) must be satisfied in order to establish a prima facie claim for exemption. Clause 4(7) then provides that certain information that is otherwise exempt under clause 4(3) is not exempt if disclosure would, on balance, be in the public interest.

#### **The complainant's submissions – clause 4(3)**

62. The complainant submits, in summary, that the agency:
- had not given reasons for its refusal of access;
  - had not applied the reasonableness test in clause 4(3)(b);
  - did not consider the exceptions in clauses 4(4) and 4(5); and
  - did not consider factors in favour of disclosure including the right of access to information under the FOI Act, the system of open and accountable government, being able to scrutinise the operations of government agencies and promoting robust and informed public debate and discussion.

#### **The agency's submissions – clause 4(3)**

63. On 25 August 2014 the agency provided me with detailed submissions in respect of its claims relating to Documents 1 and 18, which I have summarised as follows, removing reference to matter which the agency claims is exempt.
64. In relation to Document 1, the agency submits as follows:

- Document 1 was prepared by a consultant to the third party. It contains a Limitations Statement that reads:

*This proposal has been prepared by [third party] for the exclusive consideration of the client. The proposal is ‘Commercial in Confidence’ and must not be distributed or used by a third party without the express written permission of [third party].*

- It contains commercially confidential information clearly relating to the business or commercial affairs of the third party.
- *The [third party] was under no obligation to provide this document to the agency. The agency relies upon companies such as [third party] providing confidential commercial information, in order to fully appreciate the development which is, or may be, proposed by that company and (using information from other companies also known to the agency) to understand the “big picture” of state development in various industries. The agency is not able to obtain this information through other sources. Moreover, [the third party] does not necessarily obtain a direct benefit from disclosing this information to the agency (unlike, say seeking a contract or a grant), rather it is part of the ongoing relationship between parties to a State Agreement to ensure mutual understanding of the [third party’s] business.*
- The disclosure of this information publicly could have a substantial adverse impact on the third party.
- As such, given that the third party is under no obligation to provide the information and would be put at a commercial disadvantage if the information was released, to disclose this information would prejudice the flow of this type of information to the agency in the future.

65. Document 18 records an exchange between agency officers and a third party which addresses various aspects of the (then) draft State Agreement at a general level, and discloses commercial priorities in the development of the Joint Venture to which the State Agreement pertains. In relation to Document 18, the agency submits as follows:

- the document includes reference to preferences and targets in relation to gas export volumes, gas reserve targets and pipeline sizes;
- the document relates to the business or commercial affairs of the third party and paragraph (a) of clause 4(3) is satisfied;
- the document deals with commercial projections for and in relation to gas production and sale;
- if information of this type was disclosed, it could affect the position of vis a vis the market and allow competitors to the third party an understanding of its commercial strategy; and
- on that basis paragraph (b) of clause 4(3) is satisfied.

66. The agency considered public interest factors in favour of disclosure under clause 4(7) identifying:

- the public's interest in full and frank disclosure;
- the interest of people potentially affected by the commercial development in the exact route; and
- the interest of the public in the operations of a partner of the State in a State Agreement.

67. Weighing against disclosure it identified the following public interest factors:

- the interest of the public in the agency being able to obtain commercially sensitive information from companies such as the third party;
- the interest of the public in not having the normal commercial processes being interrupted by the conduct of the agency; and
- economic advantage, without the imposition of extra costs on the proponent.

68. It submitted that the public interest factors do not weigh in favour of disclosure and the agency maintains its claim that Documents 1 and 18 are exempt from disclosure pursuant to clause 4(3) of Schedule 1 to the FOI Act.

69. Notably the agency also, in its notice of decision dated 23 January 2013, stated that '[t]here is a significant amount of information available on company websites... this includes information that the operator, Buru Energy Ltd has placed on its website' and '[f]urthermore, material pertaining to the 'proposed legislation to facilitate' ...is available from the Parliamentary website.'

It went on to provide the complainant with hyperlinks to a copy of the then *Natural Gas (Canning Basin Joint Venture) Agreement Bill 2012* and the explanatory memorandum to the Bill.

### **The third party's submissions – clause 4(3)**

70. The third party made the following submissions to me in respect of clause 4(3):

- Disclosure of the disputed document (Document 1) could reasonably be expected to have an adverse effect on the third party's affairs because of one or more of the following reasons:
  - The disclosure could provide the third party's competitors with a competitive advantage.
  - The disclosure could be used by other third parties to provide misinformation or frustrate the third party's activities.
  - The third party's projects in the Canning Basin are subject to significant scrutiny by certain issue motivated groups due to the proposed commercialisation of unconventional gas using this controversial technique of hydraulic fracturing or 'fracking'. The disclosure of Document 1 could facilitate parties opposed to the third party's operations to provide misinformation to certain other third parties.
  - The third party spent a significant amount of money to produce Document 1 and if it was disclosed the value of it would be diminished and the third party's affairs may be adversely affected. Given that Document 1 was not required to be submitted to government but was submitted to facilitate the

negotiation of the State agreement, potential oil and gas producers would, in the future, be more likely to refuse to provide information of that kind to the Government.

71. The third party also made submissions to me concerning clause 6 of Schedule 1 to the FOI Act which I have not reproduced here, nor taken into consideration. For the reasons given in *Re Tallentire and Department of Agriculture and Food* [2015] WAICmr 2 at [144] to [161], I consider that the third party is only entitled to make submissions as to whether matter is exempt under clause 3 or 4 of Schedule 1, not whether it is exempt under any other exemption clause. The agency has not claimed that any of the disputed documents are exempt under clause 6.

### **Consideration – clause 4(3)**

72. Document 1 is a report prepared by a third party and submitted to the agency. It is dated 9 December 2011. Document 18 is an email chain between agency staff and a third party.
73. I have carefully considered both the submissions of the agency and those of the third party.
74. Having examined Documents 1 and 18, I agree with the agency's submission that, if disclosed, they would reveal information about the business, professional, commercial or financial affairs of a person. Accordingly, I consider that the requirements of clause 4(3)(a) are satisfied in this case.
75. However, in order to establish a claim for exemption under clause 4(3), the requirements of paragraph (b) of clause 4(3) must also be satisfied. That is, the agency must show that 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.
76. In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 the Full Federal Court of Australia said, at 190, that the words 'could reasonably be expected to' in the Commonwealth FOI Act were intended to receive their ordinary meaning. That is, they require a judgment to be made by the decision maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the relevant outcome. That approach was accepted as the correct approach in *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167.
77. The agency has not provided any evidence that disclosure could reasonably be expected to have an adverse effect on the third party's business, professional, commercial or financial affairs, nor that businesses could reasonably be expected to be reluctant to provide this type of information to government when negotiating substantial infrastructure and resource agreements of significant mutual benefit. While asserting that disclosure could have a substantial adverse effect on the third party, the agency has not provided evidence as to how and in what respect the anticipated adverse effects could come to pass.

78. To the contrary, the agency's acknowledgement in its notice of decision that substantial information about the project was already in the public domain and readily accessible to the public at large seems inconsistent with its assertion that disclosure of the disputed documents could reasonably be expected to have an adverse effect on the business affairs of the third party or prejudice the future supply of such information.
79. In my view, business is well aware that engaging with government, particularly on major infrastructure projects, necessarily attracts a greater level of scrutiny and public interest than would be the case in a purely private commercial venture.
80. I consider that private organisations or persons having business dealings with government must necessarily expect greater scrutiny of, and accountability for, those dealings than in respect of their other dealings but should not suffer commercial disadvantage because of them: see *Re Kimberley Diamond Company NL and Department for Resources Development and Anor* [2000] WAICmr 51.
81. The agency deals with large infrastructure projects of significance to the State and private organisations frequently engage with the State government through the agency, in pursuance of such projects, presumably to mutual benefit. There is no evidence currently before me that, as a consequence of Documents 1 and 18 being made public (and accepting that release of documents under the FOI Act is potentially release to the world at large), business would be reluctant to deal with the State in future.
82. Further, in respect of Document 1, merely writing the words 'commercial in confidence' on a document is not sufficient to attract the exemption under clause 4(3).
83. At the time the access application was made (over two years ago), on 7 December 2012, the State agreement was, as I understand it, in the early stages of negotiation. It was assented to on 26 June 2013. Much time has passed, and I presume that the project is now well under way.
84. Document 1 is dated 9 December 2011 so it is over three years old. Much of the content merely recites the various approvals and licences that are required for a project of the type described in the access application.
85. As the third party is an Australian Stock Exchange (ASX) listed company, it is obliged from time to time to publish certain information about its business affairs or any changes to those affairs.
86. Two ASX Announcements dated 7 November 2012 and 19 June 2013 disclose information about the *Natural Gas (Canning Basin Joint Venture) Agreement (the State Agreement)* including information about the amount of gas resources in one of the formations.
87. The ASX Announcement dated 7 November 2012 contains the following:

*Buru Energy is pleased to announce that it has today entered into an agreement with the Western Australian state Government (State Agreement) to provide long term tenure over the Company's most prospective acreage and facilitate the development of a domestic gas project and pipeline and, in due course, an LNG development, once sufficient gas reserves are identified.*

Further,

*Commenting on the State Agreement, Buru's Executive Director, Mr Eric Streitberg, said:*

Buru and Mitsubishi have undertaken an extensive exploration and appraisal program in the Canning Superbasin over the past three years. This program has resulted in the identification of potentially world class gas resources, a significant new oil field and a trend of oil prospectivity. The State Agreement provides a mechanism for us to continue to explore and develop our acreage in the most efficient way.

88. The announcement contains a coloured map of the north western area of Western Australia identifying State Agreement Permit areas and also Buru Interest Permits.
89. Under the heading 'State Agreement' the announcement further states:

*The State Agreement provides for each of the permits to be exempted from the legal requirement to periodically relinquish 50% of the area of the Permits until 31 January 2024, subject to meeting the exploration, appraisal and development obligations under the State Agreement. This provides Buru and MC with a significant extension to the existing permit terms in which to explore, appraise and develop this highly prospective area.*

and

*The State Agreement is targeting the delivery of at least 1 500PJ of gas into the domestic market over 25 years.*

and further

*By exempting Buru and MC from the relinquishment requirements in respect of these Permits, the value created by the extensive exploration and appraisal program in the past three years is preserved. The facilitation role played by DSD will allow the permits to be developed in the most efficient and effective way.*

90. The ASX announcement dated 19 June 2013 contains the following:

*Buru Energy is pleased to announce that the Natural Gas (Canning Basin Joint Venture) Agreement (**State Agreement**) signed by the State Government with joint venture partners, Buru Energy Limited and Mitsubishi Corporation in November last year, has now been passed by both houses of WA Parliament and is awaiting Royal Assent.*

*Buru's permits in the Canning Superbasin have been assessed by independent consultants to contain in excess of 47 TCF of tight gas resources net to Buru in one formation alone. The State Agreement areas cover most of these identified resources.*

*The development of these resources would give WA consumers and businesses access to a reliable and cost competitive long term supply of natural gas. It would also give the Traditional Owners of the area access to a long term and sustainable business opportunity.*

91. The announcement also contains a coloured map of the northwest of Western Australia, disclosing both the State Agreement Permits and Buru Interest Permits. It also contains a summary of the terms of the State Agreement as follows:

*The agreement, which is for an initial term of 25 years, with a possible 25 year extension, will:*

- *encourage investment in a significant exploration and evaluation program to determine the technical and economic viability of the natural gas resources;*
- *enable the Government to set firm timetables for development of gas discoveries;*
- *ensure domestic gas production and delivery occurs before any gas is supplied for export;*
- *ensure an amount equivalent to 15% of any gas processed for export is reserved for domestic use;*
- *make available for sale related products such as ethane, propane, butane and condensate, for the possible manufacture of chemicals or use as transport fuel;*
- *defer relinquishment conditions of the Petroleum and Geothermal Energy Resources Act 1967 for five key permits; and*
- *facilitate the development of pipelines and other infrastructure to deliver gas to the State's domestic gas network.*

92. Further, the Premier of Western Australia issued a media statement on 7 November 2012 concerning the State Agreement which contained the following:

*Mr Barnett said there was enormous potential for natural gas in the arid 530 000 sq km Canning Basin, which stretched from the coast between Port Hedland and Broome, to the State's eastern border.*

*Last year, the US Energy Information Administration estimated the Canning Basin unconventional gas resources at about 229 trillion cubic feet, which is about one and a half times WA's currently identified offshore resources.*

The Premier further said in that statement that:

*the agreement provided additional security of tenure for 17 000 sq km (1.7 million hectares) covered by the five exploration permits held by the joint venture.*

93. The agency has also published an information sheet entitled 'The Natural Gas (Canning Basin Joint Venture) State Agreement 2013', which is available on its website. It contains information about the company's obligations under the State Agreement, a

coloured map of the respective State and Buru Permits and key milestones for the project.

94. In addition, at least two large commercial law firms published on their websites, on 7 November 2012 and 6 August 2013 respectively, detailed articles about the State Agreement<sup>1</sup>.
95. Furthermore, on the third party's own website is a copy of the slides of a PowerPoint presentation for its 2014 Annual General Meeting, presented by Dr Keiran Wulff, Managing Director. This document contains summaries of the third party's major projects under the headings of 'Achievements' and 'Challenges/Opportunities'. There are at least two references to the project in question contained in the PowerPoint slides.
96. The third party has not provided evidence as to the disadvantage that it says will accrue upon disclosure. It also has not provided any probative evidence of the 'misinformation' that it says will circulate, nor any evidence that the project to build the gas pipeline will be frustrated by disclosure. I consider these claims to be merely speculative and not supported by any probative evidence.
97. Given the amount of material concerning the project that is readily available in the public domain, I am not persuaded by the agency or the third party that disclosure of information contained in Documents 1 and 18 is such that it could reasonably be expected to have the effects they suggest.
98. Therefore, on the material currently before me, I am not persuaded that disclosure of Documents 1 and 18 could reasonably be expected to have an adverse effect on the business or commercial affairs of the third party, nor to prejudice the future supply of information of that kind to government.
99. Consequently, I am not satisfied that the requirements of paragraph (b) of clause 4(3) are met. As a result, I am of the view that Documents 1 and 18 are not exempt under clause 4(3).
100. Since only one of the two elements of clause 4(3) is met, it is not necessary for me to consider the public interest test in clause 4(7).

#### **CLAUSE 4(2) – INFORMATION THAT HAS A COMMERCIAL VALUE**

101. Even though the agency did not claim an exemption under clause 4(2), the third party has made submissions to me to the effect that Document 1 is exempt under that clause and I have considered those submissions below.
102. Clause 4(2) 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*

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<sup>1</sup> Minter Ellison: 'State Agreement secures DomGas reserves for WA', 6 August 2013 and Herbert Smith Freehills: 'Herbert Smith Freehills advises Buru and Mitsubishi on Canning Basin State Gas Agreement', 7 November 2012

(b) *could reasonably be expected to destroy or diminish that commercial value.*

103. The word ‘person’ in paragraph (a) of clause 4(2) includes a company or an incorporated body (see section 5 of the *Interpretation Act 1984*).
104. Clause 4(2) is concerned with the protection from disclosure of information that has commercial value to a person. The requirements of both paragraphs (a) and (b) of clause 4(2) must be satisfied to establish a claim under that provision. The agency, or in this case the third party, is required to identify the information that is alleged to be of commercial value and how disclosure could reasonably be expected to destroy or diminish that commercial value.

### **The third party’s submissions – clause 4(2)**

105. The third party submitted as follows:
- Document 1 was commissioned and paid for by the third party for the third party’s internal planning purposes. It has commercial value for the purposes of clause 4(2)(a) of Schedule 1 to the FOI Act as it is essential for the efficient and timely planning of the construction of a major infrastructure project.
  - Document 1 is the intellectual property of the third party, required significant time and monetary investment by the third party to develop and is not publicly available.
  - The third party operates in a competitive industry and has expended significant monies to produce the disputed document. A competitor could use the information in Document 1 to create, review and update their own documents and approvals processes which may give them a competitive advantage by enabling those competitors to use the third party’s information to gain a substantial head start both in terms of time and investment of funds in respect of this type of project in Western Australia.

### **Consideration – clause 4(2)**

106. In my decision in *Re McGowan and Minister for Regional Development; Lands and Mineralogy Pty Ltd* [2011] WAICmr 2 (**Re McGowan**), I considered the meaning of the words ‘commercial value’ in the context of a claim for exemption under clause 4(2) of Schedule 1 to the FOI Act.
107. In *Re McGowan* at [33], I considered that when dealing with a matter requiring the determination of whether information has ‘commercial value’, the applicable legal principles to be considered are set out in *Re West Australian Newspapers Limited and Another and Salaries and Allowances Tribunal and Another* [2007] WAICmr 20 (**Re West Australian Newspapers**) at [115]-[125] which are, in brief, as follows:
- Information may have a commercial value if it is valuable for the purposes of carrying on the commercial activities of a person or organisation. That is, information may be valuable because it is important or essential to the profitability or viability of a continuing business operation or a pending ‘one-off’ commercial transaction.

- Information may have a commercial value if a genuine ‘arms-length’ buyer is prepared to pay to obtain that information.
  - It is not necessary to quantify or assess the commercial value of the relevant matter.
  - It is by reference to the context in which the matter is used or exists that the question of whether it has a commercial value can be determined.
  - The investment of time and money is not, in itself, a sufficient indicator of the fact that the information has a commercial value.
  - Information that is aged or out-of-date has no remaining commercial value.
  - Information that is publicly available has no commercial value that can be destroyed or diminished by disclosure under freedom of information legislation.
108. I have examined Document 1. Dated 9 December 2011, it is over three years old. It has 32 pages and is titled ‘Pipeline Approvals proposal for [third party] Revision C’. Its purpose is described as ‘to outline the approvals strategies for the rights to construct the pipeline’. Much of the content merely recites the various approvals and licences that are required for a project of the type described in the access application.
109. Section 4 of Document 1 lists all the stakeholders who need to be consulted, including Ministers, key government agencies, traditional owners and landholders. This information is already in the public domain or readily accessible by the public from government and other websites. It also contains a list of State and Commonwealth legislation that must be complied with, a list of typical environmental risks for like projects, land approvals, pipeline approvals, consultation and reporting obligations. Much of the report appears to be somewhat generic in nature, although some of the material makes particular reference to the third party.
110. The third party claims it has expended considerable money on the preparation of Document 1 but this is not determinative of whether the document is exempt. See *Re West Australian Newspapers* at [115]-[125].
111. Given the structure and format of the document, it appears to be of the type that relies heavily on a template format, with customised paragraphs making reference to the specific project or client.
112. The third party has not provided any evidence, beyond mere assertions, that the document would be valuable to a competitor. While I accept that this document may have been produced by the third party in addition to material required by the agency for statutory compliance purposes, I am not persuaded that any commercial value in the document, given its age and the attendant publicity surrounding the project, could now reasonably be expected to be destroyed or diminished by disclosure to a competitor.
113. In any event, without specific evidence, I do not consider that disclosure of the information in Document 1 could reasonably be expected to diminish or destroy any commercial value in the document.
114. For the reasons given above, I am not persuaded that Document 1 is exempt under clause 4(2).

115. However, Document 1 contains a small amount of exempt personal information in the table on page 1 of the document, being personal information about private individuals, in the columns headed 'Prepared by', 'Checked by' and 'Approved by' of Lines A, B and C of the table, including three signatures at the foot of the table, but in my view it is practicable, in the sense considered in *Re Winterton*, for the agency to delete the exempt material and give the complainant access to an edited copy of Document 1.

#### **NEW CLAIMS FOR EXEMPTION – CLAUSE 8(2)**

116. The agency has further claimed in submissions dated 20 October 2014 that Document 17, as well as being exempt under clause 7, is also exempt under clause 8(2) of Schedule 1 to the FOI Act.

117. It has been more than 28 months since the complainant made its access application to the agency in this matter. During that time, the agency has had ample opportunity, both when it made its initial and internal review decisions and during the external review process, to consider its exemption claims. While I acknowledge that I have invited the agency to provide me with further submissions to support its view that the disputed information is exempt, I consider that making a new claim for exemption at this late stage is potentially unfair to the complainant and would unnecessarily prolong the external review process.

118. In any event, I do not consider that Document 17 is exempt under clause 8(2), because the document consists of emails passing between two agency officers, the content of which relates to liaison between the two agencies regarding a road reserve. I am not satisfied that even if the document revealed information of a confidential nature obtained in confidence that it could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

#### **SECTION 26 – DOCUMENTS THAT CANNOT BE FOUND OR DO NOT EXIST**

119. The complainant contends that the agency has not disclosed all documents that fall within the scope of the access application.

120. Section 26 of the FOI Act provides that:

(1) *The agency may advise the applicant, by written notice, that it is not possible to give access to a document if —*

(a) *all reasonable steps have been taken to find the document; and*  
(b) *the agency is satisfied that the document —*

(i) *is in the agency's possession but cannot be found; or*  
(ii) *does not exist.*

(2) *For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document.*

121. Following receipt of my preliminary view letter dated 9 December 2014 the complainant requested that I reconsider whether the agency has disclosed all documents within the scope of its access application.

122. In its submissions dated 9 October 2014 the complainant said

*I note that a review of the schedule of documents indicates that there are further documents which should be included in the schedule but which are not included in the schedule. For example, Item number 10 in the schedule refers to '[third party] – main issues from government meeting of previous week'. While that correspondence in item 10 is accepted as exempt on legal professional privilege grounds, one would expect to find references in the table to the meeting with government from that previous week, and to documents provided in advance of that meeting, and file notes from the meeting. There is no reference in the schedule to that earlier meeting nor to meeting notes or documents tabled at that meeting. On this basis we consider that DSD may not have a complete list of all documents within the scope of the request.*

123. On 24 December 2014 the complainant wrote to me in response to my preliminary view dated 9 December 2014 stating that it was instructed to accept my preliminary view but with the following exceptions:

- With respect to Document 8:
  - *[T]here must have presumably been internal communications, or notes of meetings with third parties where this issue was raised and discussed in order for the department to consider seeking legal advice on the issue.*
  - *Document 8 appears to be the conclusion of, or reached as a result of, other work or communications and the Department discussed the existence of other documents which are a precursor to the documents to which exemption is claimed...it appears the search may not be complete. In the alternative it may be that not all search results have been disclosed.*
  - *Document 4 appears to indicate that other work was being done within the Department. That is, if there were communications in relation to the 'due diligence' work with SSO, one would reasonably anticipate that there was due diligence work of a non-legal nature performed within or by the Department or a third party at the request of the Department, and we anticipate there would be documents that should have been disclosed in the FOI search that relates to such commercial or non-legal due diligence work. No such documents have been disclosed.*
  - *There is an absence of documents disclosed that relate to inter-department emails. On a matter such as this one would reasonably anticipate that there would be some volume of emails between officers in the Department. Many of these have not been disclosed by the Department. We consider a quick search of the Department's email system would reveal further documents within the scope of the application. As one example, the list of documents from our other applications with the Department of Indigenous Affairs and the Department of the Premier and Cabinet include at least one reference to correspondence with the Department of State Development, but the*

*Department of State Development has not disclosed that same document in their response to the FOI application.*

- *It appears that we have been provided a list of the documents which are exempt on the basis of being legal advice, or deliberations of Cabinet, but the Department is not disclosing other documents which must also be in existence in order for the legal advice to be sought in the first place, or as a precursor to the documents being prepared for Cabinet deliberations.*

124. I accept that in the first instance and upon internal review the agency did not provide the complainant with a compliant notice of decision and this meant that the complainant was not informed as to the searches that the agency had undertaken in responding to the access application. Although the FOI Act does not require an agency to produce a schedule of documents, nonetheless it is often desirable that it does so, particularly where there are many documents, as it can serve two purposes. First, it clearly identifies the documents that the agency has found that fall within the scope of the access application, and secondly it may help to demonstrate to the access applicant the searches that have been undertaken to locate relevant documents.
125. While the agency subsequently produced a schedule of documents and upon request provided a copy of it to the complainant, it may have led to a perception by the complainant that the searches have not thoroughly been carried out in the first instance.
126. The complainant infers that, because of the content and titles of certain documents, there must be other relevant, but as yet undisclosed, documents.
127. I consider that in dealing with section 26, the following questions must be answered. Firstly, whether there are reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency. Where those questions are answered in the affirmative, the next question, in my view, is whether the agency has taken all reasonable steps to find those documents.
128. The complainant has provided me with submissions as to the likelihood of further documents existing. On the basis of the complainant's submissions at paragraph [123] above, I consider that the complainant has established that there are reasonable grounds to believe that further documents may or should exist.
129. However I do not generally consider that it is my function to physically search for documents on behalf of a complainant. Provided I am satisfied that the requested documents exist, or should exist, I take the view that it is my responsibility to inquire into the adequacy of the searches conducted by an agency and to require further searches to be conducted if necessary.
130. Beyond the complainant asserting that the titles of certain documents identified by the agency as falling within the scope of the access application suggest that other relevant documents might exist, the complainant has not provided me with any further evidence.
131. During the period that the matter has been before me, and through communications with and requests to the agency at various stages during the review, the agency has from time to time been asked to review its files and to produce schedules of documents. In response to those requests, the agency has now provided further information and I

am satisfied that the agency has taken all reasonable steps to find documents, and that any further documents that the complainant claims may exist, either cannot be found or do not exist.

## **COPYRIGHT**

132. The third party claims that Document 1 is subject to copyright and that, in the event that I find the document not to be exempt, access to it should be given only by inspection, pursuant to section 27(2) of the FOI Act.

133. I am persuaded that copyright subsists in Document 1 and therefore access is to be given by inspection.

## **CONCLUSION**

134. I find that:

- Documents 38 and 41 are exempt under clause 1(1)(a) of Schedule 1 to the FOI Act.
- Documents 24, 27, 29, 40 and 42 are exempt under clause 1(1)(e).
- Document 17 contains some information that is exempt under clause 7 and a small amount of information that is exempt under clause 3, but the remainder of Document 17 is not exempt and it is practicable to give the complainant access to an edited copy of the document under section 24.
- Documents 1 and 18 are not exempt under clause 4(3).
- Document 1 contains a small amount of information that is exempt under clause 3 but it is practicable to give the complainant access to an edited copy of the document under section 24.
- Document 1 is subject to copyright and access is to be given by way of inspection only.
- The agency has taken all reasonable steps to find additional documents and they either cannot be found or do not exist.

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