

Participants:

**G & S Thompson Pty Ltd as  
trustee for the Thompson  
Family Trust, trading as  
Terrestrial Ecosystems**  
Complainant

- and -

**Department of Environment  
and Conservation**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – information submitted online to a database – whether agency’s decision that section 6 of the FOI Act applies is capable of internal review – definition of ‘document’ – section 6 – access rights do not apply to documents that are already available – whether documents available for free distribution to the public – meaning of free distribution – practical limitations on querying of database not relevant to question of whether document is available for free distribution to the public – clause 3(1) – personal information – whether licence numbers and return IDs are personal information as defined – whether individual can be identified by reference to an identification number – to whom identity must be apparent or reasonably ascertainable – whether disclosure of licence numbers is in the public interest – clause 5(1)(a) – whether disclosure could reasonably be expected to impair the effectiveness of a lawful method or procedure for preventing any contravention or possible contravention of the law

***Freedom of Information Act 1992***: sections 6, 10, 20, 27(1)(g), 39(1), 39(2)(a), 65(1)(c), 66(6) and 102(3); Schedule 1, clauses 3(1), 3(6), 4, 5(1)(a) and 5(5); Glossary

***Interpretation Act 1984***: sections 18 and 19

***Wildlife Conservation Act 1950***: sections 14(1), 14(4), 16, 16A, 17 and 26

***Wildlife Conservation Regulations 1970***: regulation 17

***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*** [2009] HCA 41

***Apache Northwest Pty Ltd v Department of Mines and Petroleum*** [2012] WASCA 167

***Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft***  
(1986) 10 FCR 180

***Collection Point Pty Ltd v Commissioner of Taxation*** [2012] FCA 720

***Dimitrijević and Department of Education*** [1998] QICmr 14

*DPP v Smith* [1991] 1 VR 63

*Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Another* [2010] WAICmr 35

*Re Australia First Party (NSW) Inc. and Department of Commerce* [2010] WAICmr 32

*Re Bartucciotto and Guardianship and Administration Board* [2004] WAICmr 16

*Re Blight and Police Force of Western Australia* [1996] WAICmr 46

*R v Mansfield* [2011] WASCA 132

*Re Sanfead and Medical Board of Western Australia* [1995] WAICmr 50

*Re West Australian Newspapers Limited and Department of the Premier and Cabinet* [2006] WAICmr 23

*Steadfast Group Pty Ltd v WorkCover NSW* [2010] NSWADT 23

*Travellex Ltd v Federal Commissioner of Taxation* [2010] HCA 33

*Macquarie Dictionary*, 5<sup>th</sup> edition, 2009

## DECISION

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

- (i) except for those parts of the requested document described in paragraphs (ii) and (iii) below, the requested document is available for free distribution to the public so that, pursuant to section 6 of the FOI Act, the access rights in the FOI Act do not apply to that document;
- (ii) the licensee details – as defined in paragraph 38(f) of this decision – in the requested document are not available for purchase by the public or free distribution to the public so that, pursuant to section 6 of the FOI Act, the access rights in the FOI Act do apply. However, the licensee details are exempt under clause 3(1) of Schedule 1 to the FOI Act; and
- (iii) the precise locations of threatened and priority species – as defined in paragraph 38(f) of this decision – in the requested document are not available for purchase by the public or free distribution to the public so that, pursuant to section 6 of the FOI Act, the access rights in the FOI Act do apply. However, the precise locations of threatened and priority species are exempt under clause 5(1)(a) of Schedule 1 to the FOI Act.

Sven Bluemmel  
INFORMATION COMMISSIONER

25 March 2013

## REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Environment and Conservation ('the agency') that certain records requested under the *Freedom of Information Act 1992* ('the FOI Act') by G & S Thompson Pty Ltd as trustee for the Thompson Family Trust, trading as Terrestrial Ecosystems ('the complainant'), are publicly available. Accordingly, the agency decided that the access rights in the FOI Act do not apply, pursuant to section 6 of the FOI Act.

## BACKGROUND

2. The agency manages a database known as the Fauna Survey Returns Database, also commonly referred to as the Fauna Survey Database ('the FSD'). The agency's webpage entitled 'Fauna Survey Returns System' provides the following information on the FSD:

### ***“Welcome to the DEC Fauna Survey Database.***

*DEC Fauna Survey Database contains records of Western Australian fauna from sources including historical reports, DEC staff, survey data from major projects, consultants (as part of the Scientific Licence Procedure), and the general public. It is an online system of data entry, maintenance and distribution that is accessible to licence holders and is managed by DEC.*

*This database was developed during 2004-2006 as a project co-ordinated by the Royal Society of Western Australia ('the RSWA') with funds provided by Lottery West, and was launched in 2008.*

*Members of the [g]eneral public can access data relating to the distribution of Western Australian Fauna by using the DEC NatureMap website ('NatureMap'). DEC NatureMap contains data from the DEC Fauna Survey Database and a range of other datasets, including the WA Museum FaunaBase database.*

### ***What type of information is available from Fauna Survey?***

*Fauna Survey contains records for terrestrial mammals, birds, reptiles and amphibians, collected under licences to take fauna. It is hoped the database will be expanded to receive records for fish, marine fauna and terrestrial invertebrates.*

### ***Who can use DEC Fauna Survey?***

*If you have applied for and received a Licence to Take Fauna (Regulation 17, Wildlife Conservation Regulations 1970), you will be issued with a licence number and personal identification number. You will be able to*

*submit your licence returns, query data from a range of sources and download query results in CSV format.*

*If you do not have a Licence to Take Fauna for Scientific Purposes, you can still access information available to the general public via DEC NatureMap.*

***How do I get started?***

*Registered Members can [Login here](#) to upload their Fauna Survey Returns, query the amalgamated data and download query results in CSV format.”*

3. Through the RSWA, Dr Graham Thompson, a principal partner of the complainant, was involved in the original development of the FSD and in securing the grant from Lotterywest. The FSD was developed for the purpose of capturing fauna survey data electronically. At the request of the RSWA, the agency agreed to house the completed database. The agency established an external portal linked to the agency’s licensing system, to enable licensees to upload and access data in the FSD. The external portal is known as the Fauna Survey Returns System (‘the FSRs’).
4. I understand that the FSRs is only accessible to those who have a ‘Licence to Take Fauna for Scientific Purposes’ pursuant to regulation 17 of the *Wildlife Conservation Regulations 1970* (‘Regulation 17 licence’). One of the conditions attached to a Regulation 17 licence makes it compulsory for licensees to provide information to the agency on the species observed and the locations at which they were recorded, in the approved ‘csv’ (that is, comma-separated values) file format. To assist the return of such information, the agency requires Regulation 17 licensees to submit survey data online to the FSD, using a fauna survey return template available from its website (‘Survey Returns’). There are no hard-copy Survey Returns since those returns are submitted online to the FSD.
5. On 24 March 2011, the complainant applied to the agency under the FOI Act for access to:

*“a copy of ALL the fauna records and associated information that is submitted on the Regulation 17 returns [the Survey Returns] that have been collected by [the agency] in its online Fauna Survey Database (<https://secure.dec.wa.gov.au/apex/pls/fauna/f?p=faunasurveypublic>).*”

(‘the requested document’).
6. In the access application the complainant also stated that “...*these records can be downloaded as a .csv file. Would you copy these data on to the enclosed rewritable CD as a .csv file*” which it had enclosed with the access application.

7. By letter dated 12 April 2011, the agency advised the complainant that “[t]he record of information which you have requested is accessible to the public, without charge, from DEC’s Fauna Survey Database” and therefore the provision in s.6 of the FOI Act applied. Section 6, in essence, provides that access by way of the FOI Act does not apply to documents that are already available through other specified means. The agency refunded the \$30.00 application fee paid by the complainant and returned the CD which the complainant had enclosed with its access application.
8. On 15 April 2011, the complainant applied for internal review of the agency’s decision. In response, the Special Projects Officer of the agency advised the complainant that the agency had not made a decision capable of review. The officer suggested that the complainant apply to my office for external review, if it did not accept his advice.
9. Thereafter, on 16 May 2011 the complainant applied to me for external review, stating that it had requested an internal review of the agency’s ‘decision’ but had not received a response within the prescribed time.

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

10. After receiving the complainant’s application for external review, I required the agency to produce to me its complete FOI file maintained in relation to the access application.
11. Having reviewed the material before me, I accepted the complainant’s letter to me of 16 May 2011 as a complaint. I did not accept the agency’s view that it had not made a decision capable of review. Section 39(1) of the FOI Act provides that a person who is aggrieved “*by a decision made by an agency*” under Part 2 of the FOI Act has a right to have the decision reviewed by the agency (that is, to seek an internal review).
12. What comprises an agency’s ‘decision’ is not defined in the FOI Act. It is a well-established principle of statutory interpretation that words will be given their ordinary meaning, unless the contrary is shown or they are limited by their context: see *Re Bartucciotto and Guardianship and Administration Board* [2004] WAICmr 16 at [21]; see also s.18 of the *Interpretation Act 1984*. The Macquarie Dictionary (5<sup>th</sup> edition, 2009) relevantly defines ‘decision’ to mean “*the act of deciding; determination (of a question or doubt)... making up of one’s mind... that which is decided; a resolution...*”.
13. Section 39(2)(a) of the FOI Act provides that a person is aggrieved by a decision if the person is the access applicant and the *effect* of the decision is to (among other things) refuse to deal with the access application or refuse access to a document.
14. In my view, the agency, by returning the complainant’s application fee and in advising it as it did, made, in effect, a decision to refuse to deal with the access application. Consequently, pursuant to s.39(2)(a)(ii) of the FOI Act, the

complainant had a right to have that decision reviewed by the agency; that is, it had the right to seek internal review of the agency's decision that s.6 of the FOI Act applied in this case.

15. Section 65(1)(c) of the FOI Act provides that a complaint may be made to the Information Commissioner against an agency's decision to refuse to deal with an access application.
16. As there seemed to me to be no benefit to either of the parties to delay this matter further by referring the matter back to the agency for internal review, I exercised my discretion under s.66(6) of the FOI Act to deal with this complaint without internal review having been completed. Subsequently, I instituted further inquiries into this matter which included a demonstration at the agency's office of the search capabilities of the NatureMap website and the FSRS. NatureMap is an online mapping tool which provides information on the distribution of Western Australia's fauna and flora and can be accessed by the general public through a web-browser. At that stage, the agency advised that all of the requested data from the FSD was available on NatureMap.
17. On 24 February 2012, my Legal Officer advised the agency that, from her review of the information provided by the agency, it appeared that not all of the information sought by the complainant was publicly accessible through NatureMap. Accordingly, the agency was asked to reconsider its decision and to advise me of its position by 12 March 2012. My Legal Officer also attended at the agency's offices to obtain further clarification on the information in the FSD that is available on NatureMap.
18. In its responses on 23 March 2012 and 2 April 2012 to my office, the agency revised its decision and claimed that:
  - clauses 3 and 4 of Schedule 1 to the FOI Act applied to details about individual licensees in the requested document;
  - clause 5(1)(a) of Schedule 1 to the FOI Act applied to the geographic coordinates and specific location details of threatened and priority species in the requested document; and
  - the remainder of the requested document was available for free distribution to the public through NatureMap and therefore s.6 of the FOI Act applied to that document.
19. On 18 May 2012, after considering the material then before me, I informed the parties, in writing, of my preliminary view of the complaint and my reasons. It was my preliminary view that the details about individual licensees in the requested document were exempt under clause 3(1) of Schedule 1 to the FOI Act; the geographic coordinates and specific location details of threatened and priority species in the requested document were exempt under clause 5(1)(a); and the remainder of the requested document was available for purchase or free distribution to the public and, therefore, the access provisions in the FOI Act did not apply to the remainder of that document, pursuant to s.6 of the FOI Act.

20. In light of my preliminary view, I invited the complainant to withdraw its complaint or provide me with further submissions relevant to the matters for my determination. The complainant did not withdraw its complaint but provided me with additional submissions in support of its position. The complainant maintained that the FSD was not accessible to the public and that certain details about individual licensees were not exempt under clause 3(1).
21. This office then undertook a series of further inquiries with the agency in relation to the FSD. Having considered the agency's and the complainant's additional submissions, on 5 October 2012, I informed the parties in writing of my supplementary view of this matter.
22. In summary, it was my supplementary view that:
  - the requested document was not available for purchase or free distribution to the public. Accordingly, s.6 of the FOI Act did not apply, as the agency claimed and, therefore, the access provisions of the FOI Act were applicable to the requested document;
  - the details about individual licensees in the requested document were exempt under clause 3(1) of Schedule 1 to the FOI Act;
  - the geographic coordinates and specific location details of threatened and priority species in the requested document were exempt under clause 5(1)(a); and
  - to give access to the remainder of the requested document that is not exempt ('the Remaining Matter'), in the form requested by the complainant, would either:
    - divert a substantial and unreasonable portion of the agency's resources away from its other operations so that the agency would be justified in refusing to deal with the application under s.20 of the FOI Act; or
    - require the agency to create a new document which the agency is not required to do under the FOI Act; and
    - as there was no written expression of the Remaining Matter in a form which is commonly available in the agency, the agency could give access in a form no less comprehensible than could be made available to persons in the agency (s.27(1)(g) of the FOI Act), that is, in the form as it exists in NatureMap. NatureMap is available for free distribution to the public so that, pursuant to s.6(a), the access provisions of the FOI Act do not apply to the Remaining Matter by way of NatureMap.
23. My supplementary view that the requested document was not available for free distribution to the public was, at that stage, based on my understanding that NatureMap was a different database, and thus a different document, to the FSD. I understood that the complainant had not requested information contained in NatureMap but rather, the FSD. There was also some confusion arising during this external review with the parties referring to both the FSD and the FSRS interchangeably as the same document or matter, which is not the case. It is

now apparent to me that NatureMap is not a 'database' but rather a viewing tool, which I have further explained at paragraphs 43 to 52 of this decision. This point of clarification is relevant to the reasons for my decision. Based on the information before me at that time, it appeared to me that the requested document was not available to the public. Hence I considered that s.6 of the FOI Act did not apply, as the agency claimed, and therefore, that the access provisions of the FOI Act were applicable to the requested document.

24. In response to my supplementary view, on 20 October 2012, the complainant did not withdraw its complaint but made further submissions. The complainant maintained that it was a simple process to extract *all* of the requested document from the FSD. By email dated 29 October 2012, the complainant also clarified that it sought access to the requested document from the relevant parts of the FSD, and not from all of the submitted individual Survey Returns collectively.
25. From October 2012 to November 2012, attempts were made by my Legal Officer to assist the complainant to change its application so that it would not require the agency to create a new document, or divert a substantial and unreasonable portion of the agency's resources away from its other operations in dealing with it. With the agreement of the complainant, my Legal Officer put a modified proposal to the agency for extracting the Remaining Matter from the FSD.
26. From further inquiries with the agency, it became apparent that giving effect to the modified proposal would still divert a substantial and unreasonable portion of the agency's resources away from its other operations. My Legal Officer, together with my Information Systems Manager, attended at the agency's Perth office on 16 January 2013 to analyse the various possible methods of extracting the Remaining Matter. The agency's FSD Administrator and the Manager of the agency's Species and Communities Branch (the branch responsible for the FSD) demonstrated a number of different data extractions possible through NatureMap and the FSRS, using both general public access and the agency's internal Administrator access.
27. The agency also provided me with further information on NatureMap, the FSRS and the FSD. On 18 and 21 January 2013, in response to a request by my office, the agency's Principal Research Scientist (Information) and Science Applications Unit Manager, who has management of NatureMap, provided me with further information on NatureMap's link to the FSD, including the schematics for NatureMap.

## **THE REQUESTED DOCUMENT**

28. The right of access under s.10 of the FOI Act is to *documents* not information. Therefore, I consider an appropriate approach to the interpretation of an access application, which is framed in part as a request for items of information, is to read it as a request for access to documents containing the information requested.

29. The requested document is the document described in the complainant's access application dated 24 March 2011 as set out in paragraph 5 of this decision.
30. As noted in paragraph 24 of this decision, the complainant seeks access to the requested document through the relevant parts of the FSD. The complainant has not requested the entire FSD, which is also comprised of other background tables, not merely the submitted Survey Returns.

### **DEFINITION OF 'DOCUMENT'**

31. Although the complainant sought access to 'records' and 'information', the definition of 'document' in clause 1 in the Glossary to the FOI Act means:

- “(a) any record;*
- (b) any part of a record;*
- (c) any copy, reproduction or duplicate of a record; or*
- (d) any part of a copy, reproduction or duplicate of a record.”*

32. 'Record' is defined in the Glossary to the FOI Act to mean any record of information however recorded including:

- “(e) any article or material from which sounds, images or writing can be reproduced whether or not with the aid of some other article or device;*
- (f) any article on which information has been stored or recorded, either mechanically, magnetically or electronically”.*

33. The requested document is all of those parts of the FSD comprised of the Survey Returns. While this does not exist as a tangible 'stand-alone' document outside of the FSD, it still meets the definition of 'document' in the Glossary.

### **SECTION 6 OF THE FOI ACT**

34. The agency claims that part of the requested document is available to members of the public pursuant to s.6(a) of the FOI Act.

35. Section 6(a) provides:

***“6. Access rights etc. in Parts 2 and 4 do not apply to documents that are already available***

*Parts 2 [access to documents] and 4 [external review; appeals] do not apply to access to documents that are –*

- (a) available for purchase by the public or free distribution to the public”.*

36. The question for my determination is whether the requested document is available for purchase or free distribution to the public pursuant to s.6(a) of the FOI Act. Importantly, section 6 is concerned with *documents* not information.

### **The complainant's submissions**

37. The complainant made the following submissions in correspondence to my office dated 30 May 2012 and 12 June 2012:
- (a) The FSD is not available to the public. It is only available to those who have an appropriate licence number and person ID. Therefore, the agency's decision that the requested document was "*accessible to the public, without charge, from DEC's Fauna Survey Database*" is incorrect.
  - (b) Although the agency might argue that the requested document is available through NatureMap or by accessing the FSD (which I understand the complainant to mean the FSRS), this is not correct. For example, records are not available for numerous species such as "*Dasycercus blythi, Dasycercus cristicauda, Ramphotyphlops ganie, Pseudomys chapmani etc.*"
  - (c) In addition, the FSD's download screen presentation (and .csv file that can be downloaded from the FSD) does not include all the information uploaded from the Survey Returns, for example the licensee's name, licence number and whether the specimen was vouchered. The complainant notes that the agency has since conceded that licence numbers of licensees, included in the Survey Returns, are not available from NatureMap. The licence numbers were requested in the access application. "*As the ...[licence] number that is attached to fauna survey data is ONLY available by accessing FSD and not NatureMap, the data requested under the [FOI] application CANNOT be met by accessing NatureMap.*"
  - (d) The requested document is not freely available to the public because "*...it is extremely difficult and time consuming to access the data given the 500 record download limit that [the agency] has deliberately put in place to restrict access and the inability for the public to search the database on survey, habitat types, SF licence number, etc.*" For example, a search of "*Mus musculus*" in the FSD (which I understand the complainant to mean the FSRS) provides 500 records and because there is a 500-records download limit imposed by the agency it is clearly not reasonable or sensible to ask members of the public to then divide the State up into 100m by 100m squares to get around the current limit in order to get all *Mus musculus* records.
  - (e) The download restrictions in the FSD (which I understand the complainant to mean the FSRS) and NatureMap were put in place by the agency to restrict public access to the data. When the software for the FSD was handed over to the agency, there were no restrictions on

download access. *“It is a total nonsense to suggest that the restrictions placed on the download capacity were to prevent system overload and denial of service attacks”* as the complainant currently operates a far larger fauna survey database on a relatively small computer and is aware of the potential download limitation issues.

- (f) The complainant does not understand why the agency does not wish to download the requested document onto a CD and provide it as requested, as such a task would take very little time. Access in this form would avoid issues to do with overloading the computer or service attacks.
- (g) The complainant acknowledges that it is technically possible to download most of the FSD (which gives access to the requested document) in its entirety in thousands of small stages. *“However, if this is deemed to be acceptable under the FOI legislation, then it provides an important loophole in the legislation that enables all government agencies to subdivide databases and other documents [into] thousands of small pieces and to then drip feed them to the public, and to then claim that they should be released from providing this same information under [FOI] requests because the data are ‘technically’ publicly available.”* Parliament could not have intended that government agencies are able to circumvent the provision of information under the FOI Act to the public using such a technicality, by making it extremely difficult to access that data.
- (h) It is in the public interest for the agency to provide access to the FSD as requested. For example, the FSD data would be used by the complainant in assessing the potential impacts of a development on local fauna. The complainant submits that such an assessment would clearly be *“for the good order of society and the well being of its members”* as distinct from *“the interests of an individual or individuals”*. Similarly, the complainant submits that public access to the FSD data would make the public better informed about potential impacts of a development and thus *“enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and local government more accountable to the public... when members of the public are commenting on reports released by the EPA for public comment”*.
- (i) It is in the public interest that data in the FSD is made freely available to the public, given that Lotterywest spent nearly \$100,000 to have the system developed to collect, collate and dispense the fauna survey information. The data could also significantly improve the capacity of environmental consultants, researchers, environmental agencies and members of the public to protect the State’s biodiversity.
- (j) The complainant does not agree with the agency that the intention of the FSD is for researchers to access data specific to their projects. The public has a right to access and use information as they see fit and it is not for any government agency to decide how that data is used.

## The agency's submissions

38. The agency's submissions made in support of its claim that s.6 of the FOI Act applies in this case are summarised as follows:
- (a) The FSD is a database that is available to the public for free. Access to the FSD is available to the public through the agency's alternative web-viewer known as NatureMap. Former and current Regulation 17 licensees also have another form of access to the FSD through the FSRS.
  - (b) NatureMap and the FSRS are *not* separate databases. They are both portals or viewing mechanisms used to view the data directly from the FSD. There is only one database, the FSD, which stores the requested document. Both portals have access to the same underlying FSD.
  - (c) NatureMap and the FSRS both use an 'Oracle view' to access the data in the FSD. (It is my understanding that Oracle database software creates the Oracle view). When Survey Returns are submitted through the agency's licensing system in the FSRS, and therefore into the underlying FSD, the data is contemporaneously reflected in both the FSD and in the Oracle view. Hence when viewing the FSD data through NatureMap or the FSRS, the data returned is the same.
  - (d) It is the FSRS, not the FSD, which is only accessible to Regulation 17 licensees. Dr Thompson of the complainant has previously held a Regulation 17 licence and access to the FSD through the FSRS is still available to him.
  - (e) As noted, the FSD is made freely available to any member of the public through NatureMap. The FSD is an electronic database not held in documentary form. The FSD comprises data submitted by Regulation 17 licensees. The FSD data that is available through NatureMap includes the names of the species; the source of the information uploaded; the date the information was collected; the collector; the status of the species; details of vouchering; the voucher number; and any comments provided by the licensee. The Oracle view allows the essential data submitted in the FSD to be viewed through NatureMap, so that persons who do not have a Regulation 17 licence (and, hence, have no access to the FSRS) can still access that same data through NatureMap. Therefore, the agency submits that the FOI Act does not apply to those particular records pursuant to s.6(a) of the FOI Act.
  - (f) The only information in the Survey Returns collected in the FSD that is not available to the general public through NatureMap are details about individual licensees and the geographic coordinates and specific location details of threatened and priority species. That matter is automatically screened from view when a search inquiry is done through NatureMap. However, that data is not removed from the FSD but is stored in a

background table within the FSD. Specifically, the information in the FSD that is screened from NatureMap comprises:

Details about individual licensees

- Licensees' first and last names;
  - Licence numbers; and
  - Return ID, which is the combination of the licence number, a separating hyphen, and the year and month of the submission (i.e. "SF123456-200508")
- (together 'the licensee details'); and

Geographic coordinates and specific location details of threatened and priority species (note the following is, however, available for common species)

- Locality;
- Site;
- Latitude;
- Longitude;
- Easting;
- Northing; and
- Geocode Accuracy, which is the level of precision or accuracy for the data coordinates (i.e. latitude and longitude) of where the threatened and priority specimen was observed.

(together 'the precise locations of threatened and priority species').

- (g) Apart from the licensee details and the precise locations of threatened and priority species (together 'the screened matter'), the remainder of the requested document is available to the public pursuant to s.6 of the FOI Act. That is, anyone who wishes to access the fauna records and other associated information submitted in the Survey Returns collected in the FSD, can do so through NatureMap.
- (h) The agency does not claim that s.6 of the FOI Act applies to the screened matter and acknowledges that those details are not publicly accessible. Rather, the agency submits that licensee details are exempt under clause 3(1) (personal information) of Schedule 1 to the FOI Act because they consist of personal information.
- (i) The agency also claims that the precise locations of threatened and priority species are exempt under clause 5(1)(a) of Schedule 1 to the FOI Act and are therefore screened from view. With respect to the complainant's submission that records are not available for numerous species such as "*Dasyercus blythi*, *Dasyercus cristicauda*, *Ramphotyphlops ganie*, *Pseudomys chapmani*" the agency submits that those species have conservation rankings as 'Threatened' or 'Priority' and, where they exist, the relevant records are exempt under clause 5(1)(a).

- (j) The locality of threatened and priority species can still be viewed by the public through NatureMap as general locations within a defined area, so that their precise locations are not disclosed. That information is displayed in – among other places – the search results and the ‘identify records’ tool in NatureMap, but cannot be downloaded as a .csv file (spreadsheet) or a shapefile (GIS) format that provides the on-ground location.
- (k) There are three levels of access to NatureMap which are all available at no cost – Guest, Basic and Advanced. A member of the public can access records from the entire NatureMap datasets, including the FSD, as a Guest user without special arrangements or registration. In order to download data from NatureMap, Basic level registration is required but this is also free and granted automatically to any member of the public. Apart from the download capability available to a Basic registered user, access to records by a Guest user and a Basic registered user is exactly the same. Advanced registered access allows certain people (for example, researchers such as the complainant) to access information, on request, on known threatened and priority fauna at, or near, a particular area of interest. That information is usually given for bona fide research or conservation purposes (that information is exempt under clause 5(1)(a) in any event). Advanced access to NatureMap is vetted by the agency but the registration process is open to all members of the public. (I understand that further details about the different levels of access to NatureMap is set out at <http://naturemap.dec.wa.gov.au/> under ‘Registration’).
- (l) The agency further offers a fee-for-service facility to commercial users who are not deemed approved Advanced users of NatureMap, to access the precise locations of threatened and priority species data for a particular project or area.
- (m) The essential element of the provision in s.6(a) is the phrase “*available for... free distribution to the public*”. The agency submits that whether information is available for ‘free distribution to the public’ is not “*governed by some form of organisation to distribute [that information] or that different categories of the public cannot be recognised for public access*”.
- (n) The definition of ‘public’ in s.6(a) is to be broadly interpreted. In this case, the complainant is a member of the public with access to NatureMap and has free access to all of the data (with the exception of only licensee details) requested under the access application.
- (o) The intention of s.6(a) of the FOI Act is not to place government departments in a position to provide information under an access application where that same information is provided for purchase or free distribution to the public, regardless of how that information is distributed

or whether that information is available to different categories of the public.

- (p) With respect to the complainant's submission that the public is unable to "search the database on survey, habitat types, SF licence number, etc." the agency advises the limitations of the FSD are all limitations from the original system developed by RSWA. NatureMap has largely addressed those issues. The FSD can still be searched through NatureMap and the FSRS by species or by area (location). By conducting these searches and doing a grid extraction, it is technically possible to download the complete FSD, except for the screened matter which the agency submits is exempt.
- (q) Apart from the screened matter, it is possible to download the FSD in its entirety, either through NatureMap or the FSRS, albeit in stages. A member of the public can download the entire FSD through NatureMap. Current and former Regulation 17 licensees, such as the complainant, can also download the entire FSD through the FSRS.
- (r) The agency acknowledges that there are size limitations on the quantity of FSD data that can be downloaded at one time from the FSRS and NatureMap. Although NatureMap is not subject to the 500 record-download limit that applies to the FSRS, it does have certain area search limitations incorporated into its design. However, the limitations in NatureMap do not mean that the data is not publicly available.
- (s) Should a person wish to download the entire FSD from NatureMap (as a member of the public) or the FSRS (which the complainant still has access to as a former Regulation 17 licensee), he or she can do so by performing a grid data extraction over the State. This involves subdividing the State into smaller portions such that the data for each portion is within the data extraction limits and hence the required data can be downloaded in portions. Thus, all of the fauna survey data available through NatureMap can be downloaded by the public through a grid extraction, with the exception of threatened and priority species data which is exempt under clause 5(1)(a) of Schedule 1 to the FOI Act and licensee details which are exempt under clause 3(1).
- (t) A person can also download the entire FSD from NatureMap (as a member of the public) or the FSRS (as a current or former Regulation 17 licensee), by performing a search by species. A search by species involves searching for each species which has been entered into the FSD. However, this method is not deemed practical as there is the risk of some data being missed and excessive time taken to identify all species. The use of the grid data extraction is deemed to be the most practical to ensure the whole state-wide data is extracted in a logical sequence.

- (u) All the FSD data viewed through NatureMap, excluding the screened matter, can be downloaded as a csv file or shapefile with associated dbf (DataBase File) file by any member of the public.
- (v) If the agency were to direct a staff member to download the FSD to a DVD or CD, the staff member of the agency would download the data through NatureMap, rather than the FSRS, in exactly the same way available to the general public. NatureMap has greater download capacity than the FSRS.
- (w) The complainant's issue is not that the requested document cannot be downloaded – only that it cannot all be downloaded at once. While the agency has greater download capabilities, it is also not able to download all of the requested document at once from either NatureMap or the FSRS. The agency is also subject to download limitations and would be required to download the requested document in stages. The agency notes that the complainant can download the requested document by itself through NatureMap or the FSRS.
- (x) If the agency is required to download the requested document – less the screened matter which is claimed as exempt under clauses 3(1) and 5(1)(a) – for the complainant, this would divert a substantial and unreasonable portion of the agency's resources away from its other operations. The agency has now attempted to help the complainant to change the application without success. (The agency demonstrated to my office various ways of downloading that matter and provided me with detailed information).
- (y) The agency refutes that the download limitations in the FSRS and NatureMap were deliberately intended to prevent access to data and says that the FSRS was designed to return 500 records at a time to prevent system overload and denial of service attacks. Similarly, the limitations in NatureMap are not to prevent data access, but to enable system continuity and stability and prevent performance issues. This is standard practice with online data-centric systems.
- (z) The agency submits that it is not within the spirit or purpose of such databases for them to be downloaded in their entirety. The intention of the FSD is for researchers to access the data specific to their projects. The data extracted will also be dated at the date when the data extraction occurs and over time will become unreliable as new fauna records are regularly added to the database. Accordingly, the agency does not recommend downloading the entire database because – with new data constantly being added – the older data becomes obsolete.

## CONSIDERATION

39. The question for my determination is whether the requested document is available – for purchase or free distribution – to the public, as claimed by the agency. Section 6 of the FOI Act provides that access rights in the FOI Act do not apply to documents that are already available.
40. There is no ‘public interest test’ in s.6. Therefore, I have not considered the complainant’s submissions on the public interest in my determination of whether s.6 applies to the requested document.
41. As noted, section 6 is explicitly concerned with documents not information. I do not accept the agency’s submissions at paragraphs 38(m) and (o) of this decision that s.6(a) applies to ‘information’. Therefore, for s.6(a) to apply in this case, the requested document – that is, the relevant parts of the FSD – must be available to the public for purchase or free distribution. As noted, the complainant did not request the entire FSD.
42. The FSD is a database which contains data submitted in Survey Returns by Regulation 17 licensees. Before I further consider the application of s.6 and the parties’ submissions, it is essential to understand what a database comprises since, unlike paper-based documents, it is not immediately tangible.
43. The Macquarie Dictionary (5<sup>th</sup> edition, 2009) defines ‘database’ to mean “*a large volume of information stored in a computer and organised in categories to facilitate retrieval*”. In simple terms, I understand a database is an organised collection of data. The data is arranged in a way so that its contents can be accessed and managed.
44. Access to information in a database requires a database management system. I understand a database management system is a program or a collection of programs that enables a person to enter, organise and retrieve data from a database. I understand that the terms ‘database’ and ‘database management system’ are often used interchangeably. Unlike paper-based documents, a database relies on a database management system to retrieve the data or information stored.
45. In the present case, the complainant claims that the FSD is not publicly available, but is only available to persons with, or who previously held, a Regulation 17 licence. However, I do not agree with that submission. As noted, there was some confusion arising during this external review with the parties referring to both the FSD and the FSRS interchangeably as the same document or matter. This is not the case. It is now clear to me from my inquiries with the agency, as noted in paragraphs 38(a)-(d) of this decision that the FSD is a database and the FSRS is an online portal to access the FSD. It is the FSRS that is only available to former and current Regulation 17 licensees.

46. The agency submits that the FSD is the underlying database containing the requested document and that the FSRS and NatureMap are both online portals to access the data stored in the FSD.
47. The agency submits that the requested document – comprised of the relevant parts of the FSD – is accessible to the public through the NatureMap online portal. The agency has provided me with detailed information on the FSD and NatureMap’s link to the FSD, including the schematics for NatureMap.
48. In my preliminary view and supplementary view, I misunderstood NatureMap to be a separate database that replicated the same data obtained from the FSD. Based on the information now before me, I am satisfied that that is not the case. I note that NatureMap is described on the agency’s website as an “*online mapping tool*”, “*a sophisticated scientific application providing online mapping, query and download of biodiversity data through a web browser*” and “*the most comprehensive warehouse available on the distribution of Western Australia’s flora and fauna*”. NatureMap can be accessed by any member of the public at the weblink: <http://naturemap.dec.wa.gov.au>
49. The agency’s NatureMap webpage states that NatureMap relies on data provided from a wide range of sources, both internal and external to the agency. A function of NatureMap allows users to select the relevant ‘Data Source’ to be accessed from a drop-down box that is available when a search inquiry is conducted. The data sources available include a range of databases and datasets, for example, Atlas of Australia Birds, the WA Herbarium Specimen Database, the Threatened and Priority Flora Database, and the Fauna Survey Returns Database, also known as the FSD, to name a few.
50. From the information before me, I am satisfied that NatureMap is not a separate database. I understand that NatureMap is a tool or system to access a range of data from various databases, one of which is the FSD. To do so, NatureMap uses Oracle database software to enable retrieval of data from the FSD, including the requested document. I understand that the FSD is a database stored on the computer servers under the agency’s control.
51. From my understanding of databases and database management systems – as set out in paragraphs 42 to 46 above – the FSD is simply a collection of data. To give access to the requested document, which is comprised of the relevant parts of the FSD, a program or mechanism is required. In this case, I am satisfied that NatureMap is the mechanism that enables a person to access the requested document.
52. The agency has explained to me that the screened matter is screened from view when accessed through NatureMap, because that matter is exempt matter under the FOI Act. Apart from the screened matter, the agency claims that s.6 of the FOI Act applies to the remainder of the requested document as it can be accessed by any member of the public through NatureMap.

53. Based on the material before me, I am satisfied that – except for the screened matter – the requested document is available free of charge to the public through NatureMap.
54. The complainant acknowledges that part of the requested document available through NatureMap can all be downloaded, but submits that the process required to download that matter is unreasonable and time-consuming. In brief, the complainant claims that the requested document is not ‘freely available’ to the public, pursuant to s.6, if it is ‘drip-fed’ to the public in “*thousands of small pieces*” by downloading in stages.
55. I agree with the agency’s submission that the complainant is not disputing that the requested document that is available through NatureMap can be downloaded. Rather, the complainant submits that it is not easily (or ‘freely’) accessible, because it cannot all be downloaded at once. However, section 6 of the FOI Act is not concerned with difficulty or unreasonableness of access. Under s.6, a document is either available or it is not. Section 6(a) uses the term ‘*free distribution*’ to the public, rather than ‘freely available’ or ‘freely accessible’ to the public, which phrases have been used interchangeably by both the complainant and the agency. The term ‘free distribution’ is not defined in the FOI Act.
56. Section 18 of the *Interpretation Act 1984* provides:

***“18. Purpose or object of written law, use of in interpretation***

*In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.”*

57. Further, as noted by the High Court of Australia, the task of statutory interpretation is guided by the language which has actually been employed in the text of the legislation. In deciding the meaning of the text, it must begin by considering the context, in its widest sense, which includes the general purpose and policy of the provision: see *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 at [47]; *Travelex Ltd v Federal Commissioner of Taxation* [2010] HCA 33 at [82]; and also *R v Mansfield* [2011] WASCA 132. See also s.19 of the *Interpretation Act 1984*.
58. The phrase ‘free distribution’ in s.6(a) of the FOI Act is used in the context of the alternative availability of ‘purchase by the public’. The Macquarie Dictionary (5<sup>th</sup> edition, 2009) defines ‘free’ in context to mean “*provided without, or not subject to, a charge or payment...*” and ‘distribution’ and ‘distribute’ to mean “*the act of distributing; the state or manner of being distributed...*” and “*deal out; allot; to disperse through a space or over an area; spread; scatter*”. In my view, the requested document is available for ‘free distribution’ to the public if that document is given out at no cost to the

public. I consider this approach to the interpretation of ‘free distribution’ would promote the purpose of the provision, which is relevantly entitled “*Access rights etc. in Parts 2 and 4 do not apply to documents that are already available*”.

59. In light of that, I am satisfied that, with the exception of the screened matter, the requested document is available for ‘free distribution’ to the public pursuant to s.6(a) of the FOI Act.
60. I consider that the download or area search limits in NatureMap do not result in the document no longer being available for free distribution to the public. The FOI Act does not create an obligation on an agency to re-design a database system so that it is easier for the public to access or to include different search functions which complainants may, as here, complain that it lacks.
61. The complainant has asked for the requested document to be downloaded as a .csv file and copied onto a CD. In the present case, the ability to download data as a .csv file format is an option that is available through NatureMap. It is open to the complainant to download the requested document available from NatureMap as a .csv file and copy it onto a CD, as it has requested.
62. Further, in my opinion, the fact that the downloading capability is not available to users with Guest level access but requires registration for Basic level access to NatureMap, does not change the fact that the requested document – with the exception of the screened matter – is available for free distribution through NatureMap. In this case, a Guest level user of NatureMap is still capable of performing all the various search and report functions available to a Basic level user.
63. In summary, I am satisfied that, with the exception of the screened matter, the requested document is available for free distribution to the public pursuant to s.6(a) of the FOI Act. Therefore I consider that, with those exceptions, the access rights in Parts 2 and 4 of the FOI Act do not apply to the requested document.
64. However, even if my application of s.6 of the FOI Act to this case is incorrect and Parts 2 and 4 of the FOI Act do apply, I consider that, on the information before me, the agency would be justified in refusing to deal with the complainant’s application under section 20 of the FOI Act. In my view, reasonable steps have been taken to help the complainant to change the access application but the work involved in dealing with the access application would still divert a substantial and unreasonable portion of the agency’s resources away from its other operations. Further, by way of comment, I do not consider that s.27(1)(g) of the FOI Act requires an agency to write a specific program to enable a database to be interrogated if it cannot already be done or to obtain additional equipment or re-program existing equipment, in order to respond to an access application: see *Steadfast Group Pty Ltd v WorkCover NSW* [2010] NSWADT 23 at [25]-[28] and *Dimitrijevic and Department of Education* [1998] QICmr 14 which both considered similar provisions. See also *Collection Point Pty Ltd v Commissioner of Taxation* [2012] FCA 720.

65. With respect to the part of the requested document that I find is not available for free distribution to the public – that is, the screened matter – I have considered, below, whether that matter is exempt under the FOI Act, as claimed by the agency. As noted in paragraph 38(g) of this decision, the screened matter consists of the licensee details and the precise locations of threatened and priority species contained in the requested document.

### **CLAUSE 3(1) – PERSONAL INFORMATION**

66. The agency claims that licensee details – that is, licensees’ names, licence numbers and return IDs submitted in the Survey Returns collected in the FSD – are exempt under clause 3(1).

67. Clause 3, insofar as it is relevant, provides:

#### **“3. *Personal information***

(1) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*

...

(5) *Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.*

(6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.”*

68. The term ‘personal information’ is defined in the Glossary to the FOI Act to mean:

*“... information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –*

*(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or*

*(b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.”*

69. The definition of ‘personal information’ in the Glossary makes it clear that personal information is information about an identifiable person. Information of that kind is exempt under clause 3(1), subject to the application of any of the limits on the exemption in clauses 3(2)-3(6).

70. The purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies. I consider that clause 3 is a recognition by

Parliament that State and local government agencies collect and hold sensitive and private information about individuals and that the FOI Act is not intended to open the private and professional lives of its citizens to public scrutiny without the consent of the individuals concerned where there is no demonstrable benefit to the public interest in doing so.

### **The complainant's submissions**

71. The complainant accepts that the licensees' names are personal information but submits that licence numbers are not, because:
  - (a) the licence number by itself does not identify the licensee when provided without that person's name and would only be known to people in the agency;
  - (b) licence numbers "*are not confidential data, as the normal SF licence contains a condition that the licen[s]ee must be prepared to show their licence when question[ed], to any member of the public*"; and
  - (c) licence numbers are often contained in published reports. For example, the licence numbers of authors of fauna assessment reports that are submitted to the Environmental Protection Authority, the Department of Mines and Petroleum and the relevant Commonwealth department. The complainant provided me with examples of such reports and the website-links to those reports.
72. The complainant submits that it is in the public interest for licence numbers to be disclosed because it enables the FSD data to be linked with particular published reports (as noted in the previous paragraph) that contain useful, detailed environmental information about the habitat in which the fauna were caught. This link between the fauna and the habitat is important when assessing potential impacts a development might have on the fauna in an area as part of an environmental impact assessment.

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

73. In response to the complainant's submissions, the agency advises that licence numbers are not made public by the agency. The agency states that licence numbers may be published in reports prepared by the licensees or the companies that they work for as a demonstration of the legality of their collecting activities but disclosure is at those persons' discretion and is not a requirement of the agency.

## **CONSIDERATION**

### ***Licensees' names***

74. I consider that licensees' names are 'personal information', as defined in the FOI Act, because the identities of those individuals are apparent or can

reasonably be ascertained from that information. I understand the complainant accepts that is the case. In my view, licensee names in the requested document are *prima facie* exempt under clause 3(1).

***Licence numbers and return IDs***

75. The complainant submits that licence numbers are not ‘personal information’ because members of the public cannot identify the person by reference to the licence number alone and that only the agency’s staff would be able to do that, because of their knowledge or the ability to access that information within the agency. The complainant makes no submissions on the return IDs.
76. The main issue raised by the complainant is whether it is sufficient that only persons, already having some knowledge, could identify the individual concerned from the licence numbers and return IDs, in order for those numbers and IDs to constitute ‘personal information’.
77. In *Re West Australian Newspapers Limited and Department of the Premier and Cabinet* [2006] WAICmr 23, at paragraphs [22] and [45], the A/Commissioner agreed with the agency that the definition of ‘personal information’ in the Glossary to the FOI Act contemplated identification by people with special knowledge in some circumstances because information such as finger prints, retina prints or body samples can only identify a person if the reader or recipient of the information is in possession of other information, such as a finger print database.
78. The A/Commissioner said at [53]:
- “... As the purpose of the clause 3 exemption is to protect the personal privacy of individuals about whom government-held documents contain personal information, in my view the definition of ‘personal information’ should be construed in a way that achieves that purpose and accords with the objects of the FOI Act. I am inclined to the view, therefore, that if any person, even if only a person having some additional knowledge, could reasonably ascertain the identity of a particular individual from particular information about that individual, that information will be personal information for the purposes of the FOI Act.”*
79. I agree with that view. I consider that licence numbers and return IDs in the requested document are ‘personal information’ as defined in the FOI Act because it is information about private individuals who can be identified by reference to those identification numbers, albeit only by people who have certain knowledge in their possession, such as the agency’s staff.
80. I consider that licence numbers and return IDs of licensees in the requested document are *prima facie* exempt under clause 3(1). The exemption in clause 3(1) is, however, subject to a number of limits that are set out in clauses 3(2)-3(6). In the circumstances of this matter, I consider that only clause 3(6) is relevant.

*Clause 3(6) – the public interest*

81. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. Section 102(3) of the FOI Act provides that the onus is on the access applicant (in this case, the complainant) to persuade me that, on balance, it would be in the public interest to disclose personal information about other people in the requested document – that is, the licensee details – to the complainant.
82. In brief, the public interest is a matter in which the public at large has an interest as distinct from the interests of a particular individual or individuals: see *DPP v Smith* [1991] 1 VR 63 at 75. Determining whether or not disclosure would, on balance, be in the public interest involves identifying the public interests that favour disclosure of the particular matter and those that favour non-disclosure, weighing them against each other and making a judgment as to where the balance lies.
83. The complainant submits that it is in the public interest for licence numbers to be disclosed because it adds significant value to the fauna survey data contained in the FSD. In particular, the complainant submits that disclosure would establish a direct link between fauna survey data in the FSD with information contained in reports published by government agencies, about the habitat of certain fauna species, which would assist in assessing the impact of potential developments
84. The reports which the complainant has provided to me include, among other things, information about the fauna observed or collected during the surveys undertaken under the Regulation 17 licence (data which is required to be submitted in the FSD); information about the fauna habitat; and impact assessments on the fauna and the habitat. In my view, the ‘link’ between the fauna survey data in the FSD and information about the habitat contained in those reports can, to a large extent, already be made from the wealth of information that is included in those reports, without the disclosure of licence numbers.
85. Other than the complainant’s assertion, there is no persuasive evidence before me to show that disclosure of licensee details could significantly improve the capacity of environmental consultants, researchers, environmental agencies and members of the public to protect the State’s biodiversity. In my view, the publication of environmental assessment reports by the relevant government authorities for public comment substantially satisfies that public interest.
86. In favour of disclosure, I recognise that there are public interests in applicants being able to exercise their rights of access under the FOI Act and in the openness and accountability of government agencies in the performance of their functions. However, I do not consider that such accountability should unnecessarily intrude upon the privacy of individuals, where there is no demonstrable benefit to the public interest in doing so.

87. In particular, I recognise a public interest in the public having confidence that persons taking fauna for scientific purposes have the appropriate licence and the agency being able to give that assurance. In my opinion, the licence conditions attached to a Regulation 17 licence sufficiently satisfy that particular public interest. As advised by the agency, those conditions provide for circumstances in which licensees are required to produce their licences. Since collectors' names and the date the information was collected are already made available to the public, I consider that particular public interest is largely satisfied.
88. Favouring non-disclosure, I recognise that there is a strong public interest in maintaining personal privacy. That particular public interest is recognised by the inclusion in the FOI Act of the exemption in clause 3(1). In my view, that public interest may only be displaced by some other considerably stronger public interest that requires the disclosure of private information about another person.
89. In this case, there is no evidence that any of the third parties has consented to his or her personal information – that is, the licensee details – being disclosed to the complainant. Further, I note that the agency imposes no requirement on a licensee to disclose or publish their licensee details, other than in a particular context, as identified by the agency. In view of that, I do not consider that it is in the public interest for the licensee details to be placed in the public domain by way of the FOI process in this case, particularly where there is no demonstrable benefit to the public in doing so.
90. In weighing the competing public interests, I am not persuaded that the general right of access and the regime of openness and accountability inherent in the FOI Act requires the disclosure to the complainant of personal information about other people in this case. I do not consider that those public interest factors favouring disclosure outweigh the very strong public interest in the protection of the personal privacy of third parties in this instance. Accordingly, I consider that the limit on the exemption in clause 3(6) does not apply and that licensee details in the requested document are exempt under clause 3(1) of Schedule 1 to the FOI Act.

#### **CLAUSE 5(1)(a) – LAW ENFORCEMENT**

91. The agency claims that the precise locations of threatened and priority species in the requested document – that is, the data recorded in the site, latitude, longitude, easting, northing and geocode accuracy fields submitted in the Survey Returns collected in the FSD – is exempt under clause 5(1)(a) of Schedule 1 to the FOI Act.

92. Clause 5, insofar as it is relevant, provides:

**“5. Law enforcement, public safety and property security, matter prejudicial etc. to**

(1) *Matter is exempt matter if its disclosure could reasonably be expected to —*

(a) *impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law;*

...

(4) *Matter is not exempt matter under subclause (1) or (2) if —*

(a) *it consists merely of one or more of the following —*

(i) *information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by the law;*

(ii) *a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law; or*

(iii) *a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law;*

*and*

(b) *its disclosure would, on balance, be in the public interest.*

(5) *In this clause —*

...

***contravention*** *includes a failure to comply;*

***the law*** *means the law of this State, the Commonwealth, another State, a Territory or a foreign country or state.”*

93. The complainant made no further submissions to me in relation to this issue.

**The agency’s further submissions**

94. The agency advises that neither NatureMap nor the FSRS allows for the public download of the precise locations of threatened and priority species because this data is deemed to be sensitive, for example, the precise location details of nesting sites for certain birds that are attractive to the bird trade. The agency

clarified that threatened species are a statutory listing and priority species are a non-statutory conservation listing. Both classifications are regarded as being 'species of conservation concern' due to their conservation status; restricted distribution; their usual occurrence in low numbers; and sensitivity to impacts.

95. Specifically, the agency informed me that threatened species are those deemed by the Minister for Environment ('the Minister') to be rare or likely to become extinct under section 14(4) of the *Wildlife Conservation Act 1950* ('the WC Act') and that priority species are poorly known and appear to be rare or threatened. They are monitored to ensure their conservation status does not decline.
96. The agency confirmed that all fauna native to Australia, as defined in s.6 of the WC Act, are protected fauna under that Act unless declared otherwise, and thus come under the licensing provisions of that Act. Consequently, both threatened and priority fauna are protected fauna within the meaning of the WC Act.
97. The agency submits that the precise locations of threatened and priority species are only made available to persons granted higher level access through NatureMap for legitimate research purposes (usually bona fide researchers) or by direct application to the agency on a fee-for-service basis by persons undertaking conservation or management works, where the disclosure is in the best interests of the species. The agency requires certain information from persons who seek to access the precise locations of threatened and priority species and this vetting procedure is to prevent, detect, investigate and deal with a contravention or possible contravention of the WC Act. The agency advises that those restrictions minimise the opportunity for inappropriate use of threatened and priority species data.
98. The agency advised that the reason it controls that information is to protect threatened and endangered species from being targeted by illegal traders and illegal taking of the fauna. The taking of fauna otherwise than under licence is an offence under ss.14(1) and 16(1) of the WC Act.
99. The agency submits that the precise locations of threatened and priority species are exempt under clause 5(1)(a) of Schedule 1 to the FOI Act because "*the restriction of access to sensitive information is a well established means of protecting threatened fauna which serves to prevent contraventions or possible contraventions of law as it relates to threatened and priority species.*"

## CONSIDERATION

100. The exemption in clause 5(1)(a) is concerned with preserving the effectiveness of any method or procedure for, among other things, preventing any contravention or possible contravention of the law, with the proviso that those methods or procedures are themselves lawful: see *Re Sanfead and Medical Board of Western Australia* [1995] WAICmr 50 at [10]-[12].

101. The leading authority on the meaning of the phrase ‘could reasonably be expected to’ is the decision of the Full Federal Court in *Attorney General’s Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180. That case held, at [40], that those words 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.
102. In *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167, which determined an appeal that arose out of my decision in *Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Anor* [2010] WAICmr 35, the Court of Appeal confirmed at [60] that the correct approach to the construction of the phrase ‘could reasonably be expected to’ was set out in the decision of *Cockcroft*.
103. The term ‘the law’ is defined broadly in clause 5(5) to encompass the law of all jurisdictions, both in Australia and overseas, and is not limited in its application to the criminal law only: see, for example, my decision in *Re Apache* at [140].
104. In this case the relevant law for the purpose of clause 5(1)(a) is the WC Act. It contains specific provisions that protect all fauna in the State, unless declared otherwise by the Minister (see s.14(1) of the WC Act) and fauna that are rare, likely to become extinct, or are otherwise in need of special protection (see s.14(4) of the WC Act). It is an offence under ss.14(4), 16 and 16A of the WC Act to take (see s.16) or possess (see s.16A) fauna protected under s.14 of the WC Act (penalty of \$10,000). The agency submits that threatened and priority species are protected fauna within the meaning of the WC Act. However, I note section 17 of the WC Act also makes it an offence to undertake certain dealings with fauna (i.e. breeding, exporting, selling), whether protected or not, without the authority of a licence. In addition, s. 26 of the WC Act makes it an offence to contravene any of the provisions in that Act.
105. Past decisions of this office have discussed the meaning of the word ‘impair’ in clause 5(1)(a) and concluded that it has a similar meaning to the word ‘prejudice’: see for example *Re Blight and Police Force of Western Australia* [1996] WAICmr 46 at [15]-[16]. I agree with that view.
106. The agency submits that the relevant lawful methods or procedures in this case for preventing any possible contravention of the WC Act include restricting access to the precise locations of threatened and priority species.
107. On the plain meaning of the words in clause 5(1)(a), I accept that the agency’s decision to not publicly identify the precise locations of threatened and priority species – including omitting that information from view through NatureMap – is a lawful procedure for protecting those species under the WC Act and for preventing any contravention or possible contravention of that law for the purpose of clause 5(1)(a).

108. The agency contends that the effectiveness of that procedure would be impaired by the disclosure of the precise locations of threatened and priority species because it would enable poachers to locate and potentially obtain threatened and priority species, which are protected fauna under the WC Act.
109. Under the FOI Act, disclosure to an access applicant is considered to be, in effect, disclosure to the world at large because no restrictions can be placed on the use that may be made of a document to which access is given: see *Re Australia First Party (NSW) Inc. and Department of Commerce* [2010] WAICmr 32.
110. In my opinion, the disclosure of the precise locations of threatened and priority species could reasonably be expected to impair the effectiveness of the agency's procedures for preventing threatened and priority species from being taken illegally and in contravention of ss.16, 16A or 17 of the WC Act. In my view, such disclosure would render the agency's efforts to restrict that information ineffective and futile.
111. In light of the above, I accept the agency's submissions in respect of the precise locations of threatened and priority species and I consider that all of that information in the requested document is exempt under clause 5(1)(a), as the agency claims.
112. The exemption in clause 5(1)(a) is subject to the limits on the exemption in clause 5(4). However, I consider that none of the limits in clause 5(4)(a) apply in this case. Accordingly, the question of whether or not disclosure of the disputed document would, on balance, be in the public interest does not arise for my consideration.

## CONCLUSION

113. I find that:
- (i) except for those parts of the requested document described in paragraphs (ii) and (iii) below, the requested document is available for free distribution to the public so that, pursuant to section 6 of the FOI Act, the access rights in the FOI Act do not apply to that document;
  - (ii) the licensee details – as defined in paragraph 38(f) of this decision – in the requested document are not available for purchase by the public or free distribution to the public so that, pursuant to section 6 of the FOI Act, the access rights in the FOI Act do apply. However, the licensee details are exempt under clause 3(1) of Schedule 1 to the FOI Act; and
  - (iii) the precise locations of threatened and priority species – as defined in paragraph 38(f) of this decision – in the requested document are not available for purchase by the public or free distribution to the public so that, pursuant to section 6 of the FOI Act, the access rights in the FOI Act

do apply. However, the precise locations of threatened and priority species are exempt under clause 5(1)(a) of Schedule 1 to the FOI Act.

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