

## PRECIOUS METALS AND DOME

OFFICE OF THE INFORMATION  
COMMISSIONER (W.A.)

File Ref: 97009  
Decision Ref: D01297

Participants:

Precious Metals Australia Limited  
Complainant  
  
- and -  
  
Department of Minerals and Energy  
Respondent

### DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - reverse FOI complaint - complaint by a third party against a decision of an agency to give access to an access applicant - documents relating to a mining tenement - clause 4(1) - whether documents contain matter that would constitute a trade secret of any person - clause 4(2) - information having commercial value - whether disclosure would destroy or diminish commercial value - clause 4(3) - business, professional, commercial or financial affairs - whether disclosure could reasonably be expected to have adverse effect - whether disclosure could reasonably be expected to prejudice future supply of information to the Government or to an agency - access to edited copies of documents - section 102 - the onus of the third party to establish that access should not be given.

*Freedom of Information Act 1992 (WA)* ss.33, 102(2); Schedule 1 clause 4.

*Mining Act 1978 (WA)* s.48(c)

*Mining Regulations 1981 (WA)* regulation 14

*Re Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310).

*Re Yerilla Gems Pty Ltd, Gembank Limited and WA Gem Explorers Pty Ltd and Department of Minerals and Energy* (1 November 1996, unreported, D05896).

*Re Slater and State Housing Commission of Western Australia* (22 February 1996, unreported, D01396).

*Re Hassell and Health Department of Western Australia* (13 December 1994, unreported, D02594).

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

*Re Pastoralists' and Graziers' Association and Department of Land Administration* (25 August 1995, unreported, D02795)

## **DECISION**

The decision of the agency is confirmed. The matter in dispute which is described in the schedule attached to my reasons for decision, is not exempt.

**B.KEIGHLEY-GERARDY**  
**INFORMATION COMMISSIONER**

17th April 1997

## REASONS FOR DECISION

### BACKGROUND

1. This complaint arises out of a decision by the Department of Minerals and Energy ('the agency') to give access to edited copies of documents of the agency pursuant to a request by an access applicant under the *Freedom of Information Act 1992* ('the FOI Act'). In this instance, Precious Metals Australia Limited ('the complainant') is a third party to the access application who objects to the disclosure of the requested documents in the form proposed by the agency. The complainant claims that certain matter in the requested documents should be deleted from those documents on the ground that it is exempt matter under clause 4 of Schedule 1 to the FOI Act.
2. The requested documents relate to a mining tenement held by the complainant under the *Mining Act 1978* ('the Mining Act'). I understand that the complainant purchased mining tenement M80/359 from a third party ('the previous owner') in January 1996 and, in July 1996, the complainant lodged with the agency, the necessary documents to effect the transfer of that mining tenement from the previous owner to the complainant. Mining tenement M80/359 was originally held by the previous owner in the form of a prospecting licence, P80/1121.
3. Pursuant to s.48(c) of the Mining Act, the holder of a prospecting licence may only extract such amounts of earth, soil, rock, stone, etc. as does not exceed the prescribed amount, or such larger amount as may be approved by the Minister for Mines ('the Minister'). Regulation 14 of the *Mining Regulations 1981* prescribes 500 tonnes as the maximum amount of material which may be extracted by the holder of a prospecting licence. A proposal to extract an amount of material greater than the prescribed limit requires the written approval of the Minister.
4. On 16 April 1993, in accordance with s.48(c) of the Mining Act, the previous owner applied to the agency for approval to extract more than the prescribed amount of material from its mining tenement, P80/1121. In support of that application, the previous owner provided a "Notice of Intention to Commence Mining" (NOI) to the agency, together with associated documents, including an application to convert P80/1121 to a mining lease, M80/359. The previous owner's application to surrender the prospecting licence in favour of mining lease M80/359 was approved by the agency on 7 July 1993.
5. Thereafter, the previous owner received approval to commence development and operation of the mining project described in the previous owner's NOI dated 16 April 1993, in accordance with certain conditions. One of those conditions was that no development or mining could commence until the tenement holder had submitted a plan of the proposed operations to the State Mining Engineer ('the SME') for assessment. A further condition stated that the approval of the SME

was required if any expansion or alteration of operations beyond those initially approved, was proposed.

6. In January 1996, after the complainant had purchased M80/359 from the previous owner, the complainant submitted a fresh NOI to the agency, setting out in detail the complainant's revised proposals for future development and operation of that mining tenement.
7. On 1 July 1996, an access applicant applied to the agency under the FOI Act for access to all NOI's, approved NOI's and any addenda to those notices, relating to several mining leases specified by the access applicant. After receiving that access application, the agency notified the complainant and the previous owner that the agency had received the access application and provided each of them with copies of the documents held by the agency which concerned them. The purpose of that notification by the agency was to consult with the complainant and the previous owner, pursuant to s.33 of the FOI Act, in order to assist the agency to decide whether any of the requested documents contained any matter that may be exempt under clause 4 of Schedule 1 to the FOI Act, before the agency made its decision on whether to give access to the requested documents.
8. The previous owner did not reply to the agency. However, I understand that the previous owner sent the agency's letter and the copy documents to the complainant. On 8 August 1996, the complainant made certain submissions to the agency and, subsequently, identified specific matter within the documents sent to it by the previous owner and within the documents sent to it by the agency which it claimed was exempt matter and provided the agency with submissions in support of its claims. However, the complainant did not identify the specific sub-clause of clause 4 which it relied upon, nor did it include in its submissions to the agency any factual material in support of its claims for exemption.
9. On 19 August 1996, the agency informed the complainant that it had decided to grant the access applicant full access to 26 folios of the requested documents and access to edited copies of 25 other folios, and to refuse access to 2 folios. On 20 September 1996, the complainant applied for internal review of the agency's decision. On internal review, the agency varied the initial decision and decided to delete some additional matter from some of the disputed documents. However, the complainant remained aggrieved by that decision. Thereafter, the agency deferred the granting of access to the requested documents to enable the complainant to exercise its rights of review under the FOI Act. On 5 December 1996, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

## **REVIEW BY THE INFORMATION COMMISSIONER**

10. I obtained copies of the requested documents from the agency, together with a copy of the file maintained by the agency in respect of this matter. Thereafter, my Legal Officer attempted to arrange a preliminary conference with the

complainant and its solicitor to discuss its concerns and the claims for exemption. However, shortly before the date set for that conference, I was informed by the solicitor representing the complainant that the complainant did not wish to attend, nor to make any further submissions in support of its claims for exemption. Further, I was informed that the complainant was content to rely on the material before me, including the submissions made by the complainant to the agency in the first instance.

11. After examining the matter remaining in dispute between the parties and considering the material then before me, it became evident to me that the agency had deleted from the requested documents most, but not all, of the matter identified by the complainant as being exempt matter. It was also evident to me that the only matter in dispute between the parties was that matter which the complainant claimed was exempt under clause 4, but which the agency had decided not to delete from the documents.
12. On 13 March 1997, I informed the parties in writing of my preliminary view of this complaint, including my reasons. Based on the material then before me, and taking into account the onus on the complainant under s.102(2) of the FOI Act, it was my preliminary view that the complainant had not established a claim for exemption under clause 4 for the matter remaining in dispute. I did not receive any further submissions from the complainant in support of its claims. However, I have been informed by the complainant's solicitor that the complainant does not accept my preliminary view. Therefore, I must determine this matter by a formal decision.

### **THE MATTER IN DISPUTE**

13. The agency's decision on access is not contested by the access applicant. The access applicant did not seek to be joined as a party to this complaint. Clearly, the matter which the complainant claims is exempt and which the agency decided not to disclose to the access applicant is not in dispute. Accordingly, I have not considered that matter in my decision. However, the complainant disputes the agency's decision not to delete certain other matter which it claims is exempt matter. Therefore, it is only that matter (that is, the matter which the agency refused to delete from the requested documents in accordance with the submission of the complainants) that is the subject of this decision. For convenience, the disputed matter is described in the schedule attached to these reasons for decision.
14. In dealing with the access application, the agency identified 53 folios as "documents" falling within the ambit of the access application. Those 53 folios comprise 8 discrete documents and of those 8 documents, only 5 contain the matter in dispute between the parties. The 5 disputed documents are as follows:

Document	Description
1	Notice of Intention to Commence Mining (7 pages), dated 16 April 1993, with appendices A-H.
3	Letter from the previous owner to the agency, dated 20 August 1993.
5	Letter from the agency to the previous owner, dated 1 October 1993, with schedule of conditions attached.
7	Letter from the agency to the previous owner, dated 2 November 1993, with schedule of conditions attached.
8	Addendum to approved NOI from the complainant, dated January 1996.

### THE COMPLAINANT'S ONUS UNDER S.102(2)

15. Section 102(2) of the FOI Act provides that, if a third party initiates or brings proceedings opposing the giving of access to a document, the onus is on the third party to establish that access should not be given, or that a decision adverse to the access applicant should be made. Since the complainant opposes the agency's decision to give access, either in part or in full, to the requested documents, the complainant bears the onus of satisfying me that access should not be given.
16. In order to displace the access applicant's statutory right of access under the FOI Act, the complainant must, therefore, establish that the disputed matter is exempt matter as defined in the FOI Act. Whilst the complainant is not required to establish a case for exemption on the balance of probabilities, the minimum requirement is that there must be some probative material which supports the claims for exemption. Merely expressing an objection in the terms of an exemption clause is insufficient for that purpose. On that point, I refer to the comments of Owen J in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, 15 June 1995, unreported, Library No. 950310), where His Honour said, at p.44:

*"How can the [Information] Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had "real and substantial grounds for thinking that the production of the document could prejudice that supply" or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision-maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be*

*persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasoned decision-maker."*

As I have said, the complainant chose not to make any submissions to me but, rather, chose to rely upon the previous submissions made to the agency in support of its claims for exemption.

## **THE EXEMPTION**

17. The complainant claims that the disputed matter described in the schedule to these reasons for decision is exempt under clause 4 of Schedule 1 to the FOI Act. Clause 4, so far as is relevant, provides:

### **"4. Commercial or business information**

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

### **Limits on exemptions**

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

18. In my decision in *Re Yerilla Gems Pty Ltd, Gembank Limited and WA Gem Explorers Pty Ltd and Department of Minerals and Energy* (1 November 1996, unreported, D05896) I discussed the scope and meaning of the exemptions in sub-clauses (1), (2) and (3) of clause 4. As the circumstances in that complaint are not dissimilar to those in the complaint before me in this instance, and in particular, with respect of the complainant's claims for exemption, I repeat the views I expressed in *Re Yerilla* at paragraphs 16-24, on the scope and meaning of clauses 4(1), 4(2) and 4(3) of Schedule 1 to the FOI Act.
19. As I have said before, I consider it to be clear from the specific words of clause 4 that the exemption in each of sub-clauses (1), (2) and (3) is directed at protecting different types of information from disclosure under the FOI Act. Although a complainant, or an agency may make alternative claims for exemption for documents, or parts of documents, under more than one of those sub-clauses, the same information cannot be exempt under more than one of those sub-clauses. However, different matter within a document may be exempt under different sub-clauses of clause 4. The complainant has not specified which sub-clause or sub-clauses it relies on, nor identified the particular matter to which each exemption provided by clause 4 is claimed to apply.
- (a) Clause 4(1)**
20. In my view, in order to establish an exemption under clause 4(1), the documents in question must contain some information which could clearly be considered to be a trade secret of a person (including an incorporated body). However, on the basis of my examination of the disputed matter, and in the absence of any assistance from the complainant in identifying particular matter in the documents considered to be its trade secrets, I have been unable to determine whether any matter would constitute a trade secret of any person, including the complainant. Accordingly, I find that the disputed matter is not exempt under clause 4(1).
- (b) Clause 4(2)**
21. Clause 4(2) is concerned with the protection of matter which is not a trade secret, but which has a commercial value to a person, which value could reasonably be expected to be destroyed or diminished if the matter were disclosed. Whilst I do not consider that the commercial value of matter needs to be quantified or assessed in order for it to be covered by this sub-clause, the exemption nonetheless consists of two parts and the requirements of both parts (a) and (b) must be satisfied in order to establish a *prima facie* claim for exemption under clause 4(2).
22. In my view, matter has a commercial value if it is valuable for the purpose of carrying on the commercial or business activities of an organisation or body: see my comments in *Re Slater and State Housing Commission of Western Australia* (22 February 1996, unreported, D01396), at paragraphs 10-13. In *Re Slater* I dealt with a claim for exemption under clause 10(3) and, as clause 10(3) is in similar terms to clause 4(2), except that it applies to the commercial activities of



agencies, I consider the discussion in paragraphs 10-13 of that decision to be equally applicable in this instance. Although I also consider that information describing the commercial or business relationships between parties may, in certain circumstances, have a commercial value, there is nothing before me on that point.

23. In its submissions to the agency, the complainant claims, among other things, that some of the matter in the requested documents is commercially confidential information and, further, that it has commercial value to the complainant because it is information owned by the complainant. The complainant claims, in respect of the documents concerning the previous owner, that they have a commercial value because the complainant had paid the previous owner a substantial sum of money for the right to prospect and mine the tenements and to obtain the information now sought by the access applicants.
24. I dealt with a similar claim in my decision in *Re Hassell and Health Department of Western Australia* (13 December 1994, unreported, D02594), at paragraphs 32-40. In that decision, I accepted as correct the comments of the Queensland Information Commissioner ('the Commissioner') in *Re Peter Gerard Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 concerning the meaning of the phrase "commercial value". In *Re Cannon* the Commissioner said, at page 16, that he was "...not prepared to accept that the investment of time and money is a sufficient indicator in itself of the fact that information has a commercial value. It could be argued on that basis that most, if not all, of the documents produced by a business will have a commercial value because resources were invested in their production, or money expended in their acquisition."
25. In this instance, there is no evidence to support the complainant's claims on this aspect of the matter and, for reasons similar to those given in paragraph 40 in my decision in *Re Hassell*, I reject the complainant's submission in that respect.
26. Even if I were satisfied that the disputed matter falls within the terms of clause 4(2)(a), the complainant is also required to satisfy part (b) of that sub-clause. In its submission to the agency, the complainant made a number of general statements to the effect that certain matter was commercially confidential information which should not be disclosed to the access applicant because that information could be used to the detriment of the complainant. However, those claims alone, in my view, are insufficient to establish the exemption, as they are not supported by any other material.
27. Documents 1 and 3 were created by the previous owner and documents 5 and 7 comprise correspondence from the agency to the previous owner. They contain information relating to the previous owner's proposal to commence mining on mining tenement M80/359. Further, bearing in mind the age of those documents, I consider it unlikely that information which might have been commercially valuable to the previous owner at an earlier time, still has a commercial value now, such that its disclosure could reasonably be expected to destroy or diminish that value. When consulted by the agency, the previous owner apparently chose

not to respond and did not inform the agency of his current concerns, if any, about such matters.

28. As the complainant has not seen fit to elaborate on its concerns as to why the disclosure of information provided to the agency by the previous owner in 1993 is information that has a commercial value to the complainant which could reasonably be expected to be destroyed or diminished by disclosure under the FOI Act in 1997, I do not consider the complainant has discharged the onus it bears under s.102(2) of the FOI Act. Therefore, I find the disputed matter in Documents 1, 3, 5 and 7 is not exempt under clause 4(2) of Schedule 1 to the FOI Act.
29. Document 8 contains information about the complainant's proposed mining operations on tenement M80/359. However, in the absence of any assistance from the complainant in identifying matter in that document which is particularly sensitive from a commercial viewpoint, I am unable to determine whether the document contains any matter of a kind that falls within the terms of clause 4(2)(a). Therefore, as the complainant has not provided any submissions which identify the commercial information which is of value to the complainant and explained why the value of that information could reasonably be expected to be destroyed or diminished by its disclosure, I do not consider the complainant has discharged its onus under s.102(2). Accordingly, I find the disputed matter in Document 8 is not exempt under clause 4(2).

**(c) Clause 4(3)**

30. The exemption in clause 4(3) is more general in its terms than those provided by clause 4(1) and 4(2). In order to establish the exemption under clause 4(3), the matter must be information of the type described in sub-clause 4(3)(a) and it must be shown either that disclosure of that information could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of a person, or that disclosure could reasonably be expected to prejudice the future supply of that kind of information to the Government or to an agency.
31. I am satisfied that some of the disputed matter may be described as matter which relates to the business, professional, commercial or financial affairs of a person such that it is within the terms of clause 4(3)(a). However, the great majority of that information is contained in Documents 1, 3 5 and 7 and it relates to the previous owner of the mining tenement and not the complainant. The only apparent connection between the complainant and that information is that it is information about a 1993 mining proposal on a tenement now owned by the complainant. The previous owner did not make any submissions to the agency on the point, although given the opportunity to do so. As the previous owner sold the mining tenement to the complainant in January 1996, I am not satisfied, on the material before me, that disclosure of the disputed matter in Documents 1, 3, 5 and 7 could reasonably be expected to have an adverse effect on the

- business, professional, commercial or financial affairs of any person, including the previous owner.
32. Further, as that matter is now over three years old and has no apparent relevance to the current mining operations of the complainant on mining tenement M80/359 - and the complainant has offered nothing in support of its claims and it is not evident from the documents themselves - I am also not satisfied that its disclosure could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the complainant. There is also nothing before me to suggest that disclosure of those documents could reasonably be expected to prejudice the future supply to the Government or an agency of information of the kind contained in them. Accordingly, I find the matter in dispute in Documents 1, 3, 5 and 7 is not exempt under clause 4(3) of Schedule 1 to the FOI Act.
33. Document 8 is the only document which has been created by the complainant. It was submitted to the agency in accordance with the conditions attached to the mining lease which were transferred to the complainant following the purchase of M80/359, in order to obtain approval to carry out mining operations substantially different in nature to the mining operations originally proposed by the previous owner. Document 8 contains information about the current proposal in respect of the complainant's business operations. Having examined that document, I am satisfied that there is information in that document which is within the terms of clause 4(3)(a). However, most of that matter is not in dispute between the parties as the agency proposes to delete it from Document 8.
34. In respect of the matter remaining in dispute in Document 8, which the complainant claims is exempt matter and which the agency decided not to delete, I do not consider the complainant's claims have satisfied the requirements of part (b) of clause 4(3). The complainant submits that the matter is commercially sensitive; is irrelevant and misleading; will be of benefit to third parties; will be used against the complainant; and that it will be misconstrued and misused by the access applicant. However, there is no probative material before me to support any of those claims. There is no explanation of how the information might be used against the complainant, nor what adverse effect on its affairs could reasonably be expected to follow from disclosure. In the absence of such material, the complainant's claims are merely speculative.
35. Therefore, I am not satisfied that the evidence before me is sufficient to show that disclosure of the matter in dispute in Document 8 could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the complainant. Further, as the disputed matter in Document 8 is information which a tenement holder is obliged to provide to the agency in order to obtain approval to conduct mining operations, I do not accept that disclosure could reasonably be expected to prejudice the future supply of that kind of information to the Government or the agency: see also my comments on this point in *Re Pastoralists' and Graziers' Association and Department of Land Administration* (25 August 1995, unreported, D02795), at paragraphs 23 and 24.

36. In this instance, it appears to me that the agency has carefully considered the submissions of the complainant and, in light of its familiarity with the disputed documents and its experience, has decided to edit those documents to protect the personal privacy and business interests of third parties, including the complainant. In my view, the editing proposed by the agency is generous in protecting the interests of the complainant. Further, based on the material before me, I cannot see any reason for expecting that the disclosure of edited copies of the documents would adversely affect the current or future business interests of the complainant. Accordingly, for the reasons given, I find the disputed matter described in the schedule to these reasons for decision is not exempt matter under clause 4 of Schedule 1 to the FOI Act.

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## SCHEDULE OF DISPUTED MATTER

Document	Date	Folio	Description of disputed matter
1	16/04/93	1	All of lines 1-8; Line 9, except the 6th and 7th words; All of lines 10-14; Line 15, first word only; and All of lines 27-34.
		2	All of paragraph 1, except the last 7 words of line 2 and the first and ninth words of line 3; Paragraph 9, the first 10 words; Paragraph 11, the first 5 and last 4 words of line 1; and the first 2 words of line 2.
		3	All of paragraph 1, except the first 3 words of line 2; All of paragraph 2, except the first 2 words of line 1; All of paragraph 8; All of paragraph 9, except the first 2 and the last 3 words of line 2; the last 3 words of line 3; and all of line 4.
		4	All of paragraph 1; All of paragraph 4, except the first 8 words of line 4; All of paragraphs 5, 6 and 7.
		5	All of paragraphs 1, 4, 5 and 7.
		6	All of paragraphs 3, 4, 5, 6, and 9; All of paragraph 10, except the first 10 words in line 1.
		7	All of paragraph 2, including sub-paragraphs 1 and 2.
		Appendix D	All of Appendix D.
		Appendix F	All of Appendix F, except the third party name and address at lines 1-4; the third party name in line 5; the third party name (twice appearing) in paragraph 5; and the signature and signature block at the bottom of the page.
1		Appendix G (page 1)	All of page 1 of Appendix G, except the third party name in line 4; the third party name in line 17; and the signature and third party names appearing in the signature block at the bottom of the page.
1		Appendix G (page 2)	All of page 2 of Appendix G, except the 6 lines of data appearing in the Table.
3	20/08/93		All of paragraph 4, except words 3-8 of line 2.

5	01/10/93	1	All of paragraph 1; All of paragraph 4, except the monetary amount appearing in line 1 and line 3.
5		2	The monetary amount appearing in paragraph 8 of the schedule of conditions.
7	02/11/93	1	All of paragraph 1; All of paragraph 2, except the last word of line 1 and the 1st word of line 2.
8	January 1996	4	Paragraph 2, the last 2 words of line 2 and all of line 3; Paragraph 5, the 11th and 12th words of line 1; All of paragraph 7; Paragraph 9, the last 2 words of line 2.
		5	All of paragraphs 1 and 3.
		8 (page 2)	All of paragraph 2.
		9 (page 4)	All four paragraphs under Item 1.5; The last paragraph.
		10 (page 5)	All of paragraphs 1, 2, 3, 6 and 7.
		12 (page 7)	All of paragraphs 1, 6 and 7; The table and the last sentence.
		13 (page 8)	All.
		24 (page 19)	All of paragraphs 2, 3, 4, 5, 7 and 8.
		26 (page 21)	The last three paragraphs.