

Determination

External review - section 39 *Freedom of Information Act 1991*

Applicant	Mr Brian March
Agency	Department of State Development
Ombudsman reference	2016/04164
Agency reference	BRIEFC/16/267
Determination	The determination of the agency is varied.

REASONS

Application for access

1. The applicant is a representative of the Eyre Peninsula Community Mine to Port Consultative Committee, which is a sub-committee of the Tumbay Bay Residents and Ratepayers Association Inc (**the Association**).
2. By application under the *Freedom of Information Act 1991* (**the FOI Act; FOIA**); the applicant requested access from the Department of State Development (**the agency; the department; DSD**) to:
 1. Copies of all documents, reports, records of communications to and from each government department pertaining to the Kookaburra Gully Graphite Project MLA [mineral lease application], inclusive of:
 - a) Department for Environment Water and Natural Resources
 - b) Eyre Peninsula Natural Resource Management Board
 - c) Environmental Protection Agency
 - d) Department for Planning Transport and Infrastructure
 2. A copy of SA Water Technical Report 2014/10 referred to in the response document.
 3. A copy of the mining report 'Open file envelope 5233' referred to in the response document.
 4. A copy of the department's assessment records and determinations and subsequent to legal advice supporting or denying the extinguishing of Native Title on the designated unmade road traversing MC 4373, being the property of the District Council of Tumbay Bay and, as we understand, leased to the adjacent property owner.
 5. A copy of the department's assessment records and determinations subsequent to legal advice supporting or denying the Notice of Entries issued by AGL [**Australian Graphite Limited; the company**] and the claimed authority held by AGL whilst Exempt Land remains in effect are valid

6. A copy of the Exploration PEPR [Program for Environmental Protection and Rehabilitation] relevant to the activities of AGL leading supporting the registration of MC 4372 ...
7. A copy of the Application to Register a Mineral Claim (MC 4372) Form 5.
8. A copy of the department's assessment records and determinations subsequent to legal advice supporting or denying that the Mineral Lease Application (MC 4372) was compliant with the Mining Act [1971 (**the Mining Act**)], this being inclusive of comment upon Exempt Land (on MC 4372) not being waived as required by the Mining Act s[s]9 and 9AA.
9. A copy of the Development Application for the proposed pipeline and the associated PER or EIS in support of the proposed action.
10. A copy of the Development Application for the upgrading of Pilaworta^[1] Road and it[s] associated PER or EIS in support of the proposed action.
11. Given the bilateral agreement between the State of South Australia and the Commonwealth on environmental matters, a copy of all documentation pertaining to the environmental approvals granted (as listed in 'issues 882 and 883' of the Response Document, again given that a significant proportion of this information has not been available for public scrutiny[]).
12. It is noted on 'Issue 1056', page 139 of the Response Document, the company has claimed no 'heavy water' is present at the site. Given that 'heavy water' has never been raised in this context, access is sought to all relevant information supportive of inclusion of this term in the Response Document.

3. The agency's website includes the following background information:

On 10 September 2015 Australian Graphite Pty Limited lodged a mining proposal under the *Mining Act 1971* for the Kookaburra Gully Graphite Project in the Koppio Hills of Eyre Peninsula.^[2]

Statutory public consultation commenced for the Kookaburra Gully Graphite Project on 17 September for a 6 week period. A request for a response document to respond to issues raised in submissions received during the Statutory Public Consultation period has been provided to Australian Graphite Pty Limited. The response document was submitted on 4 February 2016 which initiated the formal assessment of the Kookaburra Gully mining lease proposal [**the response document**].

On 3 June 2016 Australian Graphite Pty Limited were [sic] granted a mineral lease under the *Mining Act 1971* for the Kookaburra Gully Graphite Project in the Koppio Hills of Eyre Peninsula.³

4. The Association, in conjunction with the Port Lincoln Residents & Ratepayers Association Inc, made two lengthy submissions outlining concerns with the proposal and related issues during this process:

- *Response to Australian Graphite Pty Ltd Kookaburra Gully Graphite Mining Lease Proposal*, October 2015

¹ I note that the parties have spelled this road 'Pilaworta' at times and 'Pillaworta' at other times. Searches conducted via www.google.com.au in March 2017, reveal results for both spellings. I have proceeded on the basis that they are the same road.

² When Australian Graphite Pty Ltd made its application, AGL (Australian Graphite Limited) owned the graphite rights on the project area: Australian Graphite Pty Ltd, *Kookaburra Gully Mining Lease Proposal - Response Document*, 4, available via www.minerals.statedevelopment.sa.gov.au/mining/mines_and_quarries/kookaburra_gully_graphite_project (accessed 3 February 2017).

³ See www.minerals.statedevelopment.sa.gov.au/mining/mines_and_quarries/kookaburra_gully_graphite_project (accessed 3 February 2017). It also includes a link to the response document: Australian Graphite Pty Ltd, *Kookaburra Gully Mining Lease Proposal - Response Document*.

- *Commentary on the Response Document - AGL - Kookaburra Gully Graphite Project Mining Lease Application Supplementary Submission, March 2016.*⁴
5. The Kookaburra Graphite deposit is located approximately 35 kilometres north of Port Lincoln and 15 to 20 kilometres west of Tumby Bay,⁵ on Mineral Claims MC 4372 and MC 4743.⁶

Background

6. For ease of reference, procedural steps relating to the application and the external review are set out in the appendix.

Jurisdiction

7. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

8. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 7 April 2017. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
9. The applicant and nine interested parties provided submissions in response. I have considered these submissions in this determination. To date, the agency and 11 interested parties have not responded to my provisional determination.

Relevant law

10. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.⁷
11. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access.
12. The agency claims that the documents are exempt as documents affecting personal affairs (clause 6(1)), documents affecting business affairs (clauses 7(1)(b) and 7(1)(c)), internal working documents (clause 9(1)), documents subject to legal professional privilege (clause 10(1)),⁸ documents containing confidential material (clauses 13(1)(a) and 13(1)(b)), and documents concerning operations of agencies (clause 16(1)).⁹

⁴ The supplementary submission was not considered part of the formal statutory consultation process.

⁵ Department of State Development, *Assessment Report for the application of a mineral lease from Australian Graphite Ltd for the Kookaburra Gully graphite mine*, 6 May 2016, 11, available via www.minerals.statedevelopment.sa.gov.au/mining/mines_and_quarries/kookaburra_gully_graphite_project (accessed 3 February 2017). (The website refers to 15 kilometres west of Tumby Bay, whereas the *Assessment Report* refers to 20 kilometres.)

⁶ Australian Graphite Pty Ltd, *Kookaburra Gully Mining Lease Proposal - Response Document*, 4, available via www.minerals.statedevelopment.sa.gov.au/mining/mines_and_quarries/kookaburra_gully_graphite_project (accessed 3 February 2017).

⁷ *Freedom of Information Act 1991*, section 12.

⁸ The agency claimed that two documents are exempt under clause 10(1). Although the applicant does not seek my review of these documents, I intend to consider its application to document 17. I have a discretion to consider exemptions not relied upon by the agency: *Department of the Premier & Cabinet v Redford* (2005) 240 LSJS 171 [29].

⁹ The agency has failed to specify the relevant part(s) of clause 16(1)(a) relied upon in either its belated determination or schedule of documents. The agency has merely claimed that there is a 'likelihood' that disclosure of some of the documents would 'unreasonably' prejudice its operations.

13. The following exemption clauses are relevant to my external review:

Clauses 6(1) of Schedule 1 to the FOI Act

- (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

Clauses 7(1)(b) and 7(1)(c) of Schedule 1 to the FOI Act

- (1) A document is an exempt document—
- ...
- (b) if it contains matter—
- (i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and
 - (ii) the disclosure of which—
 - (A) could reasonably be expected to destroy or diminish the commercial value of the information; and
 - (B) would, on balance, be contrary to the public interest; or
- (c) if it contains matter—
- (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
 - (ii) the disclosure of which—
 - (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
 - (B) would, on balance, be contrary to the public interest.

Clause 9(1) of Schedule 1 to the FOI Act

- (1) A document is an exempt document if it contains matter—
- (a) that relates to—
 - (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and
 - (b) would, on balance, be contrary to the public interest.

Clause 10(1) of Schedule 1 to the FOI Act

- (1) A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.

Clauses 13(1)(a) and 13(1)(b) of Schedule 1 to the FOI Act

- (1) A document is an exempt document—
- (a) if it contains matter the disclosure of which would found an action for breach of confidence; or
 - (b) if it contains matter obtained in confidence the disclosure of which—
 - (i) might reasonably be expected to prejudice the future supply of such information to the Government or to an agency; and
 - (ii) would, on balance, be contrary to the public interest.

Clause 16(1) of Schedule 1 to the FOI Act

- (1) A document is an exempt document if it contains matter the disclosure of which—
- (a) could reasonably be expected—

- (i) to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency; or
 - (ii) to prejudice on the attainment of the objects of any test, examination or audit conducted by an agency; or
 - (iii) to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or
 - (iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions; or
 - (v) to have a substantial adverse effect on the conduct of industrial relations by an agency; and
- (b) would, on balance, be contrary to the public interest.
14. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
15. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Documents in issue

16. The agency initially identified 52 documents within the scope of the application.
17. During the course of my external review, the agency identified five additional documents, being attachments to document 29,¹⁰ numbered 29a to 29e.
18. By its determination dated 3 August 2016 and an email dated 15 August 2016 the agency:
- granted full access to 17 documents (numbered 12, 18, 19, 24,¹¹ 25, 27, 28, 29, 35, 36, 37, 38, 40, 41, 44, 47 and 49)
 - granted partial access to five documents (numbered 1, 2, 3, 11 and 31)
 - identified six documents (numbered 9, 21, 22, 23, 26 and 43) as duplicates of other documents
 - claimed that four documents (numbered 4, 5, 6 and 52) were fully, and one document (numbered 31¹²) was partially, outside the scope of the application for access
 - identified that the attachments to two documents (numbered 13 and 14) were publicly accessible.
19. The agency claims that the remaining documents and parts of documents are exempt under the FOI Act.
20. By email dated 17 August 2016, the applicant confirmed that he remained aggrieved by the agency's refusal to release the following:
- documents numbered 1, 2 and 31 (in part)
 - documents numbered 7, 8, 10, 15 to 17, 20, 29a to 29e, 30, 32 to 34, 39, 42, 45, 46, 48, 50 and 51 (in full)
- (the documents in issue).**

¹⁰ The agency advised my Office that it had interpreted the request for the Form 5 in application for access as being limited to the form itself, and excluding attachments to it.

¹¹ Document 24 was the only document released by email dated 15 August 2016. The rest of the documents were released with the agency's notice of determination dated 3 August 2016.

¹² The agency partially released the document to the applicant.

21. The applicant further advised that he did not wish to pursue access to:
- documents numbered 13 and 14
 - the information claimed to be out of scope in document 31¹³
 - documents claimed to be out of scope or duplicates, namely documents numbered 4, 5, 6, 21, 22, 23, 26 and 52
 - 'personal information relating to operatives of the company concerned' contained in the documents, namely the employees' names and mobile telephone numbers.
22. I note that the applicant also indicated that he was aggrieved by the agency's refusal to release parts of documents 3 and 11. The only information redacted from these documents is the name and mobile telephone number of a company employee, along with the signature of another company employee. Given that the applicant does not seek access to such information, I do not intend to consider documents 3 and 11 further.

Issues in this review

23. It is for me to consider whether the agency has justified its determination to refuse access to the documents in issue, or whether there is sufficient evidence before me from which I am able to be satisfied that all elements of the clauses relied on by the interested parties are established.¹⁴

Submissions

The agency

24. The agency claims that the documents in issue are exempt, in full or in part.
25. In support of its claims, the agency provided the following reasons in its belated notice of determination:

Documents 1, 2, 3, 11 and 31 - clause 6(1) - information in these documents has been redacted where it contains 'personal information that would be deemed unreasonable disclosure and contrary to the privacy of former DSD employees who have provided personal telephone numbers'.

Documents 1 and 2 - clauses 7(1)(b) and 7(1)(c) - information in these documents has been redacted where it concerns:

- 'the business and commercial affairs of Lincoln Minerals Pty Ltd and WSP/Parsons Brinckerhoff which, if released, would jeopardise the provision of information to the Government in the future'
- 'commercially sensitive details relating to drill site locations, and private business information that upon disclosure could unreasonably harm the commercial value of the information (data), and have an adverse effect on the professional conduct undertaken by discouraging and inhibiting future agreements with landowners'.

Documents 7, 8, 10, 15 to 17, 20, 30, 32 to 34, 39, 42, 45, 46, 48, 50 and 51 - clauses 9(1), 13(1)(a), 13(1)(b) and 16(1) - are considered "internal working documents" for the purposes of gathering opinions and advice to allow the agency to perform its decision making task of providing a comprehensive assessment of the mining application'. Disclosure could inhibit the provision of frank opinions and advice and unreasonably prejudice DSD's operations.

¹³ The information claimed to be outside the scope of the application is the third paragraph (a one-line sentence) of the email timed 10:12am (the first paragraph commences below the names of the addressees).

¹⁴ *Re Pope and Queensland Health* (1994) 1 QAR 616, [17].

Public interest test -

The disclosure of this information is contrary to the public interest as there is likelihood of inhibiting the confidence for supply of frank and expert opinions and advice through inter-governmental consultations, as well as unreasonably prejudicing the operations of DSD ...

... I have considered the arguments for and against release. It is acknowledged that there is a genuine public interest in releasing information held by Government. This leads to greater transparency and public confidence in government decision making processes.

However, it is not in the public interest to disclose certain information if, in doing so, it would undermine sensitive personal, business and commercial affairs, as well as operations of the agency (refer to Mineral Resources Division's policy for regulating mineral exploration and mining in South Australia). In this case the disclosure may lead to unnecessary debate ..., as well provision of a competitive advantage to interested third parties.

26. When the agency provided documents 29a to 29e to my Office, with respect to section G of the application (document 29), the agency advised that the certificate of title referred to as attached appeared to be 'missing', and it appeared to be 'devoid' of the following documents listed as part of the pro forma:

- a copy of the claim (that is, 'no co-ordinates of the actual claim')
- a 'copy of each land title to which the claim is over'
- 'notice of entry or proof of service'
- 'waiver of exemption'.

27. In evidence before the Natural Resources Committee on 17 October 2014, an agency representative provided the following evidence about the mining sector:

... because of the nature of the sector it takes many years of exploration for any discoveries to be made, and it is done through quite significant investment into exploration programs. So for the exploration and mining sector it is quite critical that we have a stable regulatory environment to ensure consistency ...

... minerals in South Australia are the property of the Crown and, in effect, for the benefit of the people ...¹⁵

28. In response to issues raised by members of the Natural Resources Committee, agency representatives provided the following responses:

We are committed to transparency, and we see that as a key part of our role to build trust with parliament, with community, with stakeholders... we are committed to providing all the information that we need to the community and all our stakeholders.¹⁶

If people don't trust the regulator, they lose touch, they lose confidence, they lose confidence in government.

... We make sure that every submission we get, every response we make, mining lease conditions, everything we do is on the web, and that's the critical bit. It's really the outcome: are you delivering an outcome in a regulatory space which the community has confidence in, and the way we do that is by transparency.¹⁷

All the mining lease PEPRs are certainly on the web...¹⁸

¹⁵ Evidence to Natural Resources Committee: DMITRE Response to NRC Report 91, Parliament of South Australia, Adelaide, 17 October 2014, 2 (Helen Thomas).

¹⁶ Evidence to Natural Resources Committee: DMITRE Response to NRC Report 91, Parliament of South Australia, Adelaide, 17 October 2014, 4 (Andrew Querzoli).

¹⁷ Evidence to Natural Resources Committee: DMITRE/DSD Response to NRC Report 91, Parliament of South Australia, Adelaide, 31 October 2014, 11 (Paul Heithersay).

¹⁸ Evidence to Natural Resources Committee: DMITRE/DSD Response to NRC Report 91, Parliament of South Australia, Adelaide, 31 October 2014, 12 (Paul Heithersay).

29. In oral submissions made to one of my legal officers on 4 April 2017, agency representatives expressed concern that disclosure of some of the documents could give the company an unfair advantage when making future applications.

The applicant

30. The applicant made detailed submissions when he applied for external review. In addition, he provided a number of supporting documents, including:
- Tumby Bay Residents & Ratepayers Association Inc, *Response to Australian Graphite Pty Ltd Kookaburra Gully Graphite Mining Lease Proposal*, October 2015
 - Tumby Bay Residents & Ratepayers Association Inc, *Commentary on the Response Document - AGL - Kookaburra Gully Graphite Project Mining Lease Application Supplementary Submission*, March 2016
 - correspondence to the agency's CEO dated April 2016
 - correspondence to the agency's CEO dated 16 November 2015
 - Evidence to Natural Resources Committee: DMITRE/DSD Response to NRC Report 91, Parliament of South Australia, Adelaide, 31 October 2014, 9-18
 - Evidence to Natural Resources Committee: DMITRE Response to NRC Report 91, Parliament of South Australia, Adelaide, 17 October 2014, 1-8.
31. By way of background to his external review application, the applicant explained that his application was made on the understanding that the agency 'is the lead agency in mining matters and ... it draws advice from other agencies in the process of making decisions', as well as a regulator. He submitted that:
- the 'project is to be undertaken in the Tod River Water Protection Zone which is administered by the District Council of Tumby Bay'
 - there are community concerns 'in relation to a number of mining ventures on [the] Lower Eyre Peninsula both in relation to activities of the companies involved, and also those of the Department', including about the potential impact of this project 'upon Pillaworta Creek and then the Tod River through pollution arising from the mining operations'
 - the agency's claim that landowners are consulted, 'as indicated in evidence to the [Natural Resources] Committee, appears to be without foundation'
 - there is a 'paucity of information provided by [the] Company in its application ... [a] lack of specific questions arising from Government agencies responsible to ensure regulatory requirements are met', and a lack of 'due diligence'
 - there is confusion about SA Water's position 'with respect to the future of the Tod Reservoir'
 - '[d]ata presented by the Company was for the most part not site specific and not representative of the hazards likely to be encountered ... as a consequence of the ... mining activities'
 - the company's response document 'contained two additional reports that were not subject to public scrutiny'
 - the proposed transport route required for the project will likely effect safety, landowners' property, and significant native vegetation
 - he made his FOI application to:
 - 'ensure compliance with current regulatory standards is being identified and met'
 - 'establish a transparency of the processes behind the making of any decisions ... within a known water protection zone' to provide 'landowners and the public with a clear understanding of how a particular decision is arrived at, especially when so many agencies are involved' and 'to remove the suspicion of "fast tracking" a project through the system'.

32. Following receipt of the agency's belated determination, along with the documents and parts of documents released by the agency, the applicant indicated that, in his view, it appeared that his FOI application had 'not been answered to the level expected'. He provided a detailed response, in which he reiterated a number of his earlier submissions. In addition, he submitted:
- that the three principal parties under the *Mining Act* are the Government, the mining companies and the landowners. 'The fourth party to the process is the community, given that any approval given by the Department is supposedly to meet the criteria of a "community licence to operate"'
 - '[t]he Tod River Wetland is ... registered as an area of National Significance'
 - '[t]he regional hydrology and geo-hydrology is not known, a position ... supported by evidence obtained under FOI...', giving rise to two significant concerns:
 - (a) that the mining activities may have a significant impact upon the groundwater system impacting upon those who rely upon groundwater to sustain their agricultural businesses or their personal requirements, given that there is no reticulated water supply in the location, and
 - (b) the impact upon the regional hydrology where the recharge of the Uley Wanilla Basin may be affected by reduced flows or by pollutants arising from mining activities, noting a similar situation in the Adelaide Plains with groundwater pollution arising from the old Mitsubishi site.

In this location, pollution of the groundwater supply would have extreme economic and social impact...
 - regarding the documents claimed exempt and in response to the agency's claims:
 - '[t]he location of the drill holes is critical to debate surrounding environmental impacts the "program" may have', to ensure compliance with legislation as part of the approval process. This is in the context of water courses, ground water, native flora and fauna, and environmentally significant areas, and with respect to impacts of a Development Plan for the local council
 - he accepts the core logs for particular drill holes are commercial in confidence, but not their locations
 - he believes the submissions about adverse effects and inhibiting future agreements are 'to protect the inadequacies of the documentation provided by the companies ... [to] the Department (as evidenced by the quality of the information ... recently disclosed under FOI) or the maintenance of secrecy at the expense of transparency ...'
 - opinions obtained by the agency to assist its assessment of the application 'are in the public interest'
 - disclosure of the information will facilitate an assessment of risks 'to the landowner and the community are mitigated against' and 'future risks to government are minimized' (regarding the latter point the applicant referred to rehabilitation costs being borne by the government/ taxpayer as a consequence of the Nairne pyrites mine)
 - the applicant questions the adequacy of the agency's assessment of the process, having regard to information already obtained in some instances, and the paucity of other information
 - it is arguable, that the 'proposal is a non-complying development having significant environmental impacts contrary to the [local council's] Development Plan and especially the Water Protection Zone'
 - 'there are significant concerns relating to the process and quality of opinion/expert advice as to negate the claim of "prejudicing the operations of DSD", if the advice and process is demonstrated to be wanting'
 - '[t]he FOI goes to determining the processes and quality of information supporting those processes and decisions ... The extent of documents "exempted" does not provide myself or the community with any degree of confidence that the process is transparent or ... conducted in accordance with the legislation.'

33. Members of the Natural Resources Committee have also noted the inherent tension between the agency's role as a promoter of mining on the one hand and its role as a regulator on the other.¹⁹ In so doing, members raised concerns about difficulties faced by constituents gaining access to PEPRs and their own observations of mining sites.²⁰
34. In response to my provisional determination, the applicant reiterated some of his previous submissions, particularly concerning the lack of transparency, and advised that he respected my provisional determination that emails dated 24 June, 26 June and 14 September 2015 in document 17 are exempt under clause 10(1). In addition, he:
- referred to paragraph 24 of my provisional determination dealing with the agency's 'apparent loss, or non-disclosure, of documentation relating to Document 29' (I understand that during a discussion between the applicant and one of my legal officers on 11 April 2017 that the applicant accepts these documents do not exist, but questions whether the mineral claim application is compliant without them)
 - submitted that the mineral claim application was processed by the agency and registered as a valid mineral claim under the *Mining Act*, despite the existence of exempt land within the area covered by the application (MC 4372) (in so doing he referred to section 9 of the *Mining Act*²¹ and a Warden's Court judgment²²)
 - submitted that if documentation showing compliance with the *Mining Act* 'for the registration of the Mineral Claim (MC 4372) ... does not exist then a question of legal administrative function might arise'
 - submitted that he seeks the documents to consider whether the registration of MC 4372 was valid or whether the agency:
 - 'self-deemed' the Mineral Claim Application without having a valid legal basis upon which to register ... [it] and therein did invalidly claim a Tenement Holder did have rights otherwise denied by the Mining Act'
 - submitted:
 - ... that without clear evidence of a valid Mineral Claim (MC 4372) ... there cannot be a validly approved Kookaburra Gully Graphite Project MLA that includes MC 4372. That without evidence recognised by the court then the Department is premature/misleading by its promoting that MC 4372 legally exists...
35. On 16 May 2017 the applicant confirmed that he seeks access to company employees' signatures and positions detailed in the documents, bearing in mind that the documents are 'legal documents'.

Interested parties

36. During the course of my external review, Ombudsman SA consulted 21 interested parties about information in the documents concerning their personal and/or business affairs, or inter-governmental relations.²³
37. I have ascribed a number to each of these interested parties. In all but three instances,²⁴ I will refer to the interested parties solely by this number so as to avoid

¹⁹ Evidence to Natural Resources Committee: DMITRE Response to NRC Report 91, Parliament of South Australia, Adelaide, 17 October 2014; Evidence to Natural Resources Committee: DMITRE/DSD Response to NRC Report 91, Parliament of South Australia, Adelaide, 31 October 2014.

²⁰ See for example Evidence to Natural Resources Committee: DMITRE Response to NRC Report 91, Parliament of South Australia, Adelaide, 17 October 2014, 4-6 (Hon RL Brokenshire MLC; Hon SW Key MP); Evidence to Natural Resources Committee: DMITRE/DSD Response to NRC Report 91, Parliament of South Australia, Adelaide, 31 October 2014, 11-13, 17-18 (Hon RL Brokenshire MLC; Hon GA Kandelaars MLC).

²¹ The applicant has emphasised that, under section 9, exempt land 'shall be exempt from mining operations ... and unless the benefit of the exemption is waived under section 9AA, no claim, lease or licence shall authorise prospecting, exploring or mining upon such land...'

²² *Borthwick & Ors v Australian Graphite P/L* (Unreported, Wardens Court of South Australia, Senior Warden Dr Cannon, 8 September 2015). This judgment forms part of document 14, which the agency has released to the applicant.

²³ In response to submissions received from interested party 10, on 16 May 2017 my Office undertook additional consultation with interested party 15, and consulted interested party 21.

²⁴ These being interested parties 10 to 12.

disclosing claimed exempt matter.²⁵ I will provide a schedule to the agency identifying the number ascribed to each interested party.

38. Interested parties numbered 1, 3, 17, 18, 20 and 21 consented or did not object to disclosure of the information about which they were consulted. Interested parties 6 and 10 to 12 raised objections to disclosure. To date, the remaining interested parties have not responded to my provisional determination.
39. The agency also consulted with two interested parties about various documents:
- Lincoln Minerals Limited/ Australian Graphite Limited - documents 1, 2, 3, 11 and 12
 - Parsons Brinckerhoff Australia Pty Ltd (copied to Lincoln Minerals Limited) - documents 2 and 7.

Lincoln Minerals Limited and Australian Graphite Pty Limited (interested parties 11 and 12)

40. In response to the agency, Lincoln Minerals Limited submitted that documents 1, 2 and 7 are exempt in full²⁶ and documents 3 and 11 are exempt in part.²⁷
41. Its consultation responses to the agency included the following submissions, which are relevant for the purposes of my external review:

Document 1 - figures 2 to 5 and document 2 - figures 3.1 to 3.5:

... contain information (locations of proposed drill holes, trenches and associated access tracks) that is commercially valuable and concerns the commercial affairs and operations of the Company. Its disclosure would diminish the commercial value of that information and that would be contrary to the public interest as it might prejudice the future supply of such information to a Government agency.

Drill hole and trench locations were based on proprietary interpretation of geophysical, geological and mineral resource data and have commercial implications in regard to the interpreted location of mineralization, the establishment and declaration to ASX of JORC Mineral Resources, and confidential planning by the company in relation to budgets, resource development and potential future mine plans. For example, the locations of geotechnical diamond core drill holes could be seen as an indication of where mining might be undertaken.

Lincoln Minerals Limited is a publicly listed company subject to strict rules regarding the public disclosure of drilling information. The Company does not and cannot release speculative information such as proposed drill hole or trench locations that could change or may not ever be drilled due to other factors ... To publicly disclose the extent and locations of drilling and trenching would be misleading and contrary to the public interest especially in this case when many of the proposed drill holes and trenches have not been drilled or excavated.

In addition, proposed drill sites, trenches and access tracks were all negotiated confidentially in conjunction with the landowners. Final locations of drill holes are subject to ongoing negotiation with landowners...

²⁵ *Freedom of Information Act 1991*, section 39(15) provides that I should avoid disclosing claimed exempt matter in my reasons.

²⁶ Although Lincoln Minerals has indicated 'N' (no) to releasing documents 1, 2 and 7, based on the reasons it has provided its claims of exemption appear limited to parts of documents 1 and 2. These parts are identified in the summary of Lincoln Mineral's submissions.

²⁷ The company's submissions regarding contact details of employees and former employees are no longer relevant given the narrowed application. The company only claimed that names and contact mobile telephone numbers were exempt from document 11.

Document 1 - appendices 1 and 2:

... contain names, signatures and private information negotiated in confidence between the landowners and Company representatives.

Document 2 - appendix C and table 2.2 on page 22:

... is a private letter based on negotiations between the landowners and Company representatives.

Document 1 - appendices 1 and 2; document 2 - appendix C and table 2.2 on page 22:

The landowners have repeatedly indicated ... that they are concerned by the release of this information due to recriminations ... [and have asked the company] to keep this information ... private and confidential.

Disclosing ... information [concerning the commercial affairs of the Company and landowners] can reasonably be expected to have an adverse effect on ... [such] affairs ... and discourage the entering into of future agreements... This would be contrary to public interest and the objectives of the State's mining laws.

Document 7:

... was an email response to ongoing confidential discussions ... based on a preliminary draft of AGL's Mining Lease Proposal (MLP) ... made PRIOR TO completion and lodging of the final MLP and therefore does not reflect either the formal ... response nor the final report and MLP.

Taken by itself, the response is ... incomplete. To publicly disclose the document would be misleading and contrary to the public interest.

The response items identified and discussed ... were incorporated in the final report which was included in its entirety as an Appendix in the formal MLP ... submitted on 28 February 2015 and which was released for review ...

42. In response to my provisional determination, Lincoln Minerals Limited and Australian Graphite Pty Limited provided joint submissions. They included the following:²⁸

Documents 1 (extracts), 2 (extracts), and 29b to 29d - documents affecting personal affairs

... the disclosure of mobile telephone numbers particularly and the disclosure of names and the position of personal within an organisation and signatures is personal information which should be exempt from disclosure and redacted from the documents .. if ... released.²⁹

Documents 1, 2 and 7 - documents affecting business affairs

In our submission one of the most valuable assets in relation to any mining or exploration project is the mining information that is garnered as a result of the study and evaluation of geological testing, data analysis, sampling and other work carried out by the proponent of any mining project. The information obtained and its analysis to determine the existence[,] location and extent of ore bodies and mineral deposits ("mining information") is valuable and in our submission, persuasive in any determination against disclosure under the FOIA where that information may be released into the public domain by reason of its diminution in value upon disclosure.

²⁸ Paragraph numbers omitted.

²⁹ As indicated in my provisional determination, the applicant does not seek access to 'personal information relating to operatives of the company concerned' contained in the documents, namely the employees' names and mobile telephone numbers.

Release into the public domain devalues the information. Were a project proponent to transfer its mining interests to another party the value of that mining information package must be diminished if some part of the package of mining information is already publicly available.

...

It is difficult to imagine any more important or valuable information than the actual location of drill sites in respect to which mining information might relate. Disclosure of this information to the market provides valuable information to industry competitors about the mining operations, and in this case, the Proponent's proposed Kookaburra Gully Graphite mine operation.

Relevant determinations/decisions

...

One matter before the Administrative Appeals Tribunal³⁰ concerned a freedom of information application under commonwealth legislation similar to the FOIA to access documents relating to an intra-uterine contraceptive device.

In that case, the tribunal considered the commercial value of information in documents in respect to which disclosure was sought.

...

... the Tribunal (at page 595 of the report [paragraph 31]) observed that it had evidence before it that the information in (the documents) had a commercial value. 'We accept that their disclosure would diminish it. Having inspected (the documents) we have come to the conclusion that these (documents) fall within the category of documents to which exemption should be accorded under (the Act). The compilation of the information in (the document) must have accounted for considerable time and money. To the extent that the statistical information contained in the document is dispersed to the world generally, the value of that investment must be substantially diminished.'^{31]}

In our submission the location of drill sites is similar. The Proponents have expended resources to obtain information from which are determined the locations of drill sites. The disclosure of that information must diminish its value.

Public Interest Test

...

In our submission insufficient weight has been given to the public's interest in ensuring and promoting confidence in the maintenance of sound business and commercial transactions and this together with the other public interest factors referred to in the Provisional Determination 'contrary' to disclosure are, in our submission, persuasive and outweigh the factors in favour of disclosure.

Documents 1 and 2 - documents containing confidential material

...

In our Submission the following documents should be treated confidentially between the parties and not disclosed:-

- Document 1, Appendix 1, Waivers of Exemption - drilling and trenching (Forms 23A and 23B at pages 23-27 of EPEPR - Kookaburra Gully);
- Document 1, Appendix 2, Letter from landholder (page 29);
- Document 2, Letter from landholder (page c-1);

³⁰ *Organon (Australia) Pty Ltd and others* 1989 AAT 588 [sic - *Re Organon (Aust) Pty Ltd & Department of Community Services & Health* (1987) 13 ALD 588].

³¹ In *Re Organon (Aust) Pty Ltd & Department of Community Services & Health* (1987) 13 ALD 588 the documents are numbered 3 and 4 (see paragraph [31]), however it is clear that document 4 was not in contention during the appeal (see paragraph [8]). Document 3 is described as 'information of a statistical nature supplied in response to a request from the Department either in specific terms, or in pursuance of guidelines laid down for marketing approval applications' (see paragraph [7]).

It is submitted that these documents comprise agreements and communications between landowners and the Proponent. Though not identified as confidential, nevertheless, the documents comprising agreements between the parties were made in confidence in the expectation that they would be kept in confidence strictly between the parties and should therefore not be disclosed.

Parsons Brinckerhoff Australia Pty Ltd (interested party 10)

43. In response to the agency, Parsons Brinckerhoff Australia Pty Ltd only submitted that parts of document 2 are exempt. It quoted Lincoln Minerals' submissions about such parts, and specifically cited clauses 6(1), 7(1)(b) and 7(1)(c).
44. In response to my provisional determination, Parsons Brinckerhoff advised that it opposed disclosure of document 7, particularly the email dated 13 February 2015 and points 1, 2 and 6 of the attachment.³² Parsons Brinckerhoff has submitted that:
- the document 'contains commercially in confidence information'
 - they are particularly concerned about the disclosure of:
 - points 1 and 6, which refer 'to the data and sampling regime of another company on another mining project which itself is subject to commercial confidence'
 - point 2, which discusses Parsons Brinckerhoff's 'internal data and testing regime that is internally commercial in confidence and is specialist intellectual property'
 - '[a]ll project-relevant EPBC information is publicly available on the Department of Environment and the Energy's website'.

Interested party 6

45. Interested party 6 expressed strong objection to the disclosure of information concerning them. They submitted that:
- there is plenty of publicly available information about the mining activities
 - the 'private papers' are between them and the company only, in particular the letter dated 5 June 2013 is 'private and confidential' and includes their names, signatures and private details about their agreement with the mining company
 - they provided this information to the company on the understanding that it would be confidential
 - they do not understand why the applicant wants the information; the applicant should only need to understand how the company manages its activities
 - since 2014 mining companies have had to use different forms. These new forms do not disclose as much information about landholders as the documents under review
 - people in the district get very upset about mining; it is a controversial issue
 - for the last eight years or so people have stopped talking to them; this has affected them socially
 - disclosure could also lead to questions about the management of the land and the locations selected for drillsites.

The documents

46. Given that the applicant does not seek the names and telephone numbers of the company's employees, the following dot-pointed information is in issue from the documents partially released to the applicant:

³² Interested party 10 refers to points of the email. As the email itself contains minimal information I have proceeded on the basis that interested party 10 is referring to points in the attachment to the email.

From document 1: application for exploration work approval, dated June 2013

- the titles on page 3
- the figures on pages 19 to 22 (figures 2 to 5)
- the names of the landowners in section A on pages 23 and 26
- the roles and dates signed in section F on pages 23 and 26, sections H and I on page 25 and section I on page 27
- the witness' name and signature in sections H and I on page 25
- the names, roles, dates and signatures in section H on page 27
- the text, signatures, names and telephone number redacted from page 29

From document 2: declaration of environmental factors, dated June 2013

- the figures on page 27 to 29, 31, 32 (figures 3.1 to 3.5)³³
- the text, signatures, names and telephone number redacted from appendix 3³⁴

From document 31: three internal agency emails dated 26 October 2015

- an agency employee's work email address.

47. The remaining documents in issue, claimed fully exempt, may be described as follows:

Document 7: email from Parsons Brinkerhoff to the agency dated 13 February 2015, an internal agency email dated 16 February 2015, and an air quality response document

Document 8: internal agency email dated 5 March 2015 and two agency file notes dated 2 March and 4 March 2015

Document 10: adequacy check against determination dated 12 March 2015

Document 15: circulation for comment for proposal received on 10 September 2015³⁵

Document 16: circulation for comment for proposal received on 10 September 2015

Document 17: emails between Parsons Brinkerhoff and the Commonwealth Department for Environment (**Commonwealth Department**) dated 19 June and 22 June 2015, the Commonwealth Department and the agency dated 23 June 2015 and between the agency and the Crown Solicitor's Office dated 24 June, 26 June and 14 September 2015

Document 20: emails between the agency and both the Environment Protection Authority (**EPA**) and the Department of Environment, Water and Natural Resources (**DEWNR**), dated 15 September and 16 September 2015, and a pro forma circulation for comment for proposal received on 10 September 2015

Document 29a: certificate of title

Document 29b: notice of entry, including proof of service

Document 29c: notice of entry, including proof of service

Document 29d: notice of entry, including proof of service

Document 29e: location of pegging claim

Document 30: an email between DEWNR and the agency dated 26 October 2015,³⁶ and an attached email chain between a third party and DEWNR dated 22 October 2015

Document 32: internal EPA emails dated 20 January and 27 October 2015, and circulation for comment for proposal received on 10 September 2015

Document 33: internal EPA email dated 28 October 2015

³³ Figures 3.1, 3.2 and 3.3 on pages 27, 28 and 29 of document 2 are duplicates of figures 2, 3 and 5 on pages 19, 20 and 22 of document 1.

³⁴ This is a duplicate of the information redacted from page 29 of document 1.

³⁵ A number of versions of the circulation for comment document form part of the documents in issue.

³⁶ This is a duplicate of part of document 31, which has been partially released.

Document 34: internal EPA emails dated 22 October and 28 October 2015, and circulation for comment for proposal received on 10 September 2015

Document 39: emails between the agency and multiple government agencies and SA Water dated 16 September 2015, and between the agency and the EPA dated 29 October 2015, with four attachments:

1. internal EPA email dated 28 October 2015³⁷
2. email between the agency and multiple government agencies and SA Water dated 16 September 2015³⁸ and internal EPA emails dated 18 September, 28 October and 29 October 2015, and circulation for comment for proposal received on 10 September 2015
3. internal EPA emails dated 22 October and 28 October 2015, and circulation for comment for proposal received on 10 September 2015³⁹
4. internal EPA emails dated 20 January and 27 October 2015, and circulation for comment for proposal received on 10 September 2015⁴⁰

Document 42: emails between the agency and multiple government agencies and SA Water dated 16 September 2015,⁴¹ and between the agency and the Department of Planning, Transport and Infrastructure (DPTI) dated 29 October and 30 October 2015

Document 45: emails between the agency and multiple government agencies and SA Water dated 16 September 2015,⁴² and internal agency emails dated 29 October and 6 November 2015

Document 46: an email between the agency and DEWNR dated 3 November 2015, internal agency emails dated 3 November and 10 November 2015, and a circulation for comment for proposal received on 10 September 2015

Document 48: emails between the agency and Parsons Brinkerhoff dated 20 November and 23 November 2015 and the agency and the EPA dated 23 November 2015

Document 50: emails between the agency and DPTI dated 15 January 2016

Document 51: emails between the agency and multiple government agencies and SA Water dated 16 September 2015,⁴³ and between the agency and DPTI dated 29 October and 30 October 2015 and 20 January 2016.⁴⁴

Consideration

Information claimed out of scope - documents 30 and 31

48. The agency has redacted the following information from document 31:
 - an agency employee's work email address
 - the third paragraph (a one-line sentence) of the email timed 10:12am (the first paragraph commences below the names of the addressees).
49. This information is duplicated in document 30.
50. The agency claims, and I accept, that the third paragraph of the email timed 10:12am does not relate to the Kookaburra Gully Graphite Project and is therefore outside the scope of the access application. I note that the applicant has advised that he does not seek access to this paragraph.

³⁷ This is a duplicate of document 33.

³⁸ This email appears elsewhere as part of document 39.

³⁹ This is a duplicate of document 34.

⁴⁰ This is a duplicate of document 32.

⁴¹ This is a duplicate of parts of document 39.

⁴² This is a duplicate of parts of document 39.

⁴³ This is a duplicate of parts of document 39.

⁴⁴ This is a duplicate of part of document 42.

51. Additionally, I note that in response to a query raised by my Office, the agency advised that when the documents were released to the applicant 'document 31 was accidentally inserted between the pages of the previous document. The supposed attachment (sections E - G - 2 pages; Appendix A - 1 page; Attachment - 2 pages; and a map - 1 page) is actually the remainder of Document 29'.⁴⁵
52. Accordingly, it appears that the only information redacted from document 31 that the applicant seeks access to is the email address of an agency employee. I am not satisfied that it is exempt under the FOI Act.

Conclusion

53. Document 31 should be released after redacting the information that is outside the scope of the application, namely the third paragraph (a one-line sentence) of the email timed 10:12am (the first paragraph commences below the names of the addressees).
54. I will consider the agency's other claims with respect to the remainder of document 30, that is, after excluding the third paragraph of the email timed 10:12am, below.

Clause 6(1) - documents 1, 2, 10, 15, 29a to 29e, 34 and 39

55. The agency and interested parties 11 and 12 claim that documents 1 and 2 are exempt under clause 6(1). Interested parties 11 and 12 rely on this clause with respect to documents 29b to 29d as well. I have also considered the application of clause 6(1) to documents 10, 15, 29a, 29e, 34 and 39.⁴⁶
56. The applicant has advised that he does not seek access to 'personal information relating to operatives of the company concerned' contained in the documents, namely the employees' names and mobile telephone numbers. He does, however, seek access to their signatures and positions detailed in the documents.
57. The term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act. The term has also been held to involve 'matters of private concern to an individual'⁴⁷ and the 'composite collection of activities personal to the individual concerned'.⁴⁸ The definition specifically excludes 'the personal affairs of a body corporate'.
58. In *Treglown v SA Police* the South Australian District Court said that when interpreting 'unreasonable' in clause 6, a decision maker needs:

... to consider not merely the content of the information which is sought to be disclosed, although in some circumstances that may be sufficient, but, as well, its relationship with other material known to the applicant, its level of sensitivity, the attitude of the person affected by the disclosure, the circumstances in which the information was originally obtained, whether it was already known to the applicant, the nature of the applicant's interest in it and any disclosed intentions with respect to its use.⁴⁹

59. Only documents 1 and 29b to 29d include the signatures and positions of company employees.⁵⁰ I am not satisfied that such information in these documents constitutes their personal affairs within the meaning of clause 6(1), however. They have been included in the documents in a professional or employment context. I note that only one of the company's employees referred to in the relevant documents is decipherable from

⁴⁵ The agency claims that document 30 is exempt in full.

⁴⁶ Documents 10, 15, 34 and 39 refer to landowners by name, and include comments about property they own.

⁴⁷ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625, citing *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 and *Young v Wicks* (1986) 13 FCR 85 at 88-89.

⁴⁸ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

⁴⁹ *Treglown v SA Police* (2011) 278 LSJS 231, [133], considering *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALD N257, 259 and *Victoria Police v Marke* (2008) 23 VR 223, [18] and [106]-[103].

⁵⁰ The parts of document 2 under review do not include such details.

their signature in any event, and that person has a high profile within the company. Further and in any event, it would still be necessary to show that disclosure of the positions and signatures in this context would be unreasonable.

60. I accept that documents 1, 2, 10, 15, 29a to 29e, 34 and 39 contain information concerning the personal affairs of other interested parties, including private telephone numbers and addresses, as well as information about rights over properties. Parts of documents 1 (page 29) and 2 (appendix 3) also include landowners' opinions about their property and detail agreements with the company and a third party.
61. I will therefore consider whether or not disclosure of the documents would be unreasonable. In so doing, I intend to consider whether disclosure of the company employees' positions and signatures would be unreasonable, even though I do not accept that such information constitutes their personal affairs in this context.
62. The applicant is clearly aware of publicly available information. My Office has consulted interested parties 1 to 3 and 6 to 9 about information in the documents concerning their personal affairs. Much of the information is routine and/or reflects information that is publicly available or has been previously disclosed.⁵¹ The information was obtained or created by the agency in the course of assessing the company's mining proposal. The company has advised that interested party 6 objects to disclosure of information about them because they consider it private and confidential. Interested party 6 confirmed this view in communications with my Office. Interested parties 11 and 12 have also raised objections on behalf of their employees. Interested parties 2 and 7 to 9 did not respond to my Office's consultation letters. I have borne in mind the applicant's submissions about his motives for seeking access to the documents as set out above.
63. In addition to the factors above, the documents' contents and the parties' submissions, I have considered the following public interest factors:

In favour of disclosure:

- fulfilling the objects of the FOI Act, particularly the public interest in :
 - promoting openness of the agency's decision-making processes
 - promoting accountability of the agency and its staff, particularly given the agency's regulatory role under the *Mining Act*
 - facilitating more effective participation by members of the public
- the ongoing relevance of the information to the applicant and the Association
- information that is publicly available or has been previously disclosed about interested parties 1 to 3 and 6 to 9 and employees of interested parties 11 and 12
- the circumstances in which the agency obtained or created the documents
- the time that has elapsed, and events that have occurred, since the documents were created
- expectations of confidentiality are 'always subject to the provisions of the FOIA and cannot be affected by any representation ... that greater confidentiality might be accorded to material than properly reflects the effect of the FOIA'⁵²

Contrary to disclosure:

- fulfilling the objects of the FOI Act, particularly the public interest in the preservation of personal privacy (the FOI Act generally does not restrict the use of information once it is released)
- objections raised by the agency and interested parties 6,⁵³ 11 and 12

⁵¹ For example, as a result of the agency's belated determination or my Deputy's determination in a previous external review under the FOI Act (Ombudsman SA reference: 2014/06242; agency reference: BRIEFC/14/1317).

⁵² *Ipex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54, 70. In addition, the FOI Act has been in operation for more than 20 years.

⁵³ Interested party 6 submitted that they have been ostracised from their community for the last eight years or so. Whilst I accept this submission, the social ostracism clearly has not arisen as a result of disclosure of the documents under review,

- the time that has elapsed, and events that have occurred, since the documents were created.
64. I am not satisfied that it would be unreasonable to disclose the documents. In saying this, I consider the public interest in promoting openness and accountability; the ongoing relevance of the information to the applicant and the Association; and information that is publicly available or has previously been released to be persuasive factors. I have also borne in mind the context in which the information appears, particularly insofar as it relates to the company's employees.

Conclusion

65. I am not satisfied that documents 1, 2, 10, 15, 29a to 29e, 34 and 39 are exempt under clause 6(1).

Clauses 7(1)(b) and 7(1)(c) - documents 1, 2, 7, 8, 10, 15 to 17, 20, 29a to 29e, 30, 32 to 34, 39, 42, 45, 46, 48, 50 and 51

66. The agency and/or some of the interested parties claim that parts of documents 1, 2 and 7 are exempt under clauses 7(1)(b) and 7(1)(c). I have considered the application of these clauses to the documents in issue, excepting document 31.

Clause 7(1)(b)

67. Interested parties 11 and 12 have referred to a judgment of the Administrative Appeals Tribunal in support of their position that locations of the drill sites are commercially valuable and disclosure of that information could destroy or diminish its value.⁵⁴
68. In order to satisfy clause 7(1)(b), the document must contain information that has a commercial value to the agency or another person. The terms 'commercial' and 'value' are not defined in the FOI Act, and should be accorded their ordinary meaning.
69. I am not satisfied that the documents in issue contain information that has a commercial value to the agency, the company or anyone else.
70. With specific reference to the figures in the documents, I am not satisfied that the locations of proposed drill sites have an intrinsic commercial value. I consider that such information would be of no commercial value to anyone without rights over the land in question. Additionally, I note that the documents do not reveal the bases for proposing some sites over others. That said, I accept that mining licenses, agreements to conduct mining operations on particular land, and the results of tests conducted on potential drill sites are commercially valuable.
71. Interested party 10 has claimed, with specific reference to point 2 of document 7, that its 'internal data and testing regime ... is internally commercial in confidence and is specialist intellectual property'.⁵⁵ Although they have not cited any specific exemption

and I am not satisfied that their disclosure would alter others' behaviour towards them. In saying this, I note that the issue has been ongoing for some eight years and mining is already a controversial issue in the area. The issue of whether there was a reasonable expectation of harassment and intimidation arising from disclosure of information rather than from other circumstances was considered by the Queensland Information Commissioner in the context of a provision of the *Right to Information Act 2009 (Qld)* that has no equivalent in the FOI Act (SA): *2LFF0D and Lockyer Valley Regional Council* [2017] QICmr 10 (22 March 2017), available at <https://www.oic.qld.gov.au/decisions/2lff0d-and-lockyer-valley-regional-council-2017-qicmr-10-22-march-2017> (accessed 16 May 2017). I nevertheless accept that the decision is not a binding authority in South Australia.

⁵⁴ *Re Organon (Aust) Pty Ltd & Department of Community Services & Health* (1987) 13 ALD 588.

⁵⁵ Parsons Brinckerhoff has claimed that information in document 7 constitutes its 'intellectual property'. I comment that there is no specific exemption that applies to 'intellectual property' *per se*. The agency may nevertheless refuse to give an applicant access to a copy of a document if doing so would infringe copyright, and instead give access by way of inspection: *Freedom of Information Act 1991*, section 22(c).

clause, I will consider whether it is commercially valuable. I am not satisfied that any information in document 7 has a commercial value to Parsons Brinckerhoff. In saying this, I note that both the agency's requests and Parsons Brinckerhoff's responses contain minimal information about its data or testing regimen. In addition, it appears that there is significant information in the public domain about accepted testing processes,⁵⁶ as well as the process adopted by Parsons Brinckerhoff.⁵⁷

72. It is also necessary to show that disclosure of the document could reasonably be expected to destroy or diminish the commercial value of *that information*. I intend to consider this element, despite not being satisfied that the documents contain commercially valuable information.
73. Given that the company has rights over the land in question, I fail to see how disclosure of the documents could destroy or diminish the value of the claimed exempt information. Again, I note that the documents do not reveal the bases for proposing some sites over others. In this sense, I consider that information about the location of drill sites (or drill cuts, trenches, or tracks and vegetation, for that matter) is distinguishable from statistical information Organon provided to a Commonwealth agency when seeking approval to import an intrauterine contraceptive device (IUD). Although little is revealed in the judgment about the nature of the statistical information under review by the Tribunal, given the context in which it was provided, I accept the possibility that its disclosure could have benefitted manufacturers of competing IUD devices and/or contraceptives, whether to improve their products or marketing, expand their distribution network, or rebut the information provided by Organon, and thereby diminished the value of the statistical information to Organon.⁵⁸
74. With respect to the information concerning Parsons Brinckerhoff, I note that a considerable amount of information about the testing process adopted regarding the Kookaburra Gully Graphite Mine proposal has been published.⁵⁹ Accordingly, I do not accept that disclosure of document 7 could destroy or diminish the value of the claimed exempt information.
75. Clause 7(1)(b) also includes a public interest test, which I will consider below.

Clause 7(1)(c)

76. Some of the interested parties are clearly operating businesses. The documents concern applications made, and operations undertaken, in the course of those businesses. It may be that some of the landowners and leaseholders are also operating businesses on the relevant properties. I accept that the documents in issue, other than document 31, contain information concerning the 'business affairs' of those interested

⁵⁶ See for example: *AS/NZS 3580.1.1.2007: Methods for sampling and analysis of ambient air - Part 1.1: Guide to siting air monitoring equipment* and Department of Environment and Conservation (NSW), *Approved Methods for the Modelling and Assessment of Air Pollutants in New South Wales*, August 2005 (the latter is available via <http://www.environment.nsw.gov.au/resources/air/ammodelling05361.pdf> (accessed 18 May 2017)).

⁵⁷ See for example: Parsons Brinckerhoff (for Lincoln Minerals Limited), *Kookaburra Gully Graphite Mine - Air Quality Assessment*, 7 May 2015, being Appendix C to Parsons Brinckerhoff (for Australian Graphite Limited), *Kookaburra Gully Graphite Project Mining Lease Proposal (MC 4372 and MC 4373)*, September 2015 and Department of State Development, *Assessment Report for the application of a mineral lease from Australian Graphite Ltd for the Kookaburra graphite mine*, 6 May 2016, item 8.5 (page 150ff) both available via http://www.minerals.statedevelopment.sa.gov.au/mining/mines_and_quarries/kookaburra_gully_graphite_project (accessed 18 May 2017)).

⁵⁸ *Re Organon (Aust) Pty Ltd & Department of Community Services & Health* (1987) 13 ALD 588.

⁵⁹ See for example: Parsons Brinckerhoff (for Lincoln Minerals Limited), *Kookaburra Gully Graphite Mine - Air Quality Assessment*, 7 May 2015, being Appendix C to Parsons Brinckerhoff (for Australian Graphite Limited), *Kookaburra Gully Graphite Project Mining Lease Proposal (MC 4372 and MC 4373)*, September 2015 and Department of State Development, *Assessment Report for the application of a mineral lease from Australian Graphite Ltd for the Kookaburra graphite mine*, 6 May 2016, item 8.5 (page 150ff) both available via http://www.minerals.statedevelopment.sa.gov.au/mining/mines_and_quarries/kookaburra_gully_graphite_project (accessed 18 May 2017)).

parties within the meaning of clause 7(1)(c)(i).⁶⁰ It is arguable that some of the documents also concern the business affairs of other government agencies.

77. I am not satisfied that disclosure of the documents in issue could reasonably be expected to 'prejudice the future supply of such information to the Government or to an agency'. In saying this, section 70B of the *Mining Act* is apposite.⁶¹ The relevant subsections provide:

70B—Preparation or application of program under this Part

- (1) The holder of a mining tenement must not carry out mining operations unless a program that complies with the requirements of this Part is in force for those operations.
- (2) A program under subsection (1) must
 - (a) specify the mining operations that the holder of the mining tenement proposes to carry out in pursuance of the tenement; and
 - (b) set out—
 - (i) the environmental outcomes that are expected to occur as a result of the mining operations (including after taking into account any rehabilitation proposed by the holder of the tenement and other steps to manage, limit or remedy any adverse environmental impacts); and
 - (ii) the criteria to be adopted to measure those environmental outcomes; and
 - (c) incorporate information about the ability of the holder of the mining tenement to achieve the environmental outcomes set out under paragraph (b); and
 - (d) set out such other information as may be required by a condition of the tenement or by the regulations; and
 - (e) comply with any other requirements prescribed by the regulations.
- (3) The Minister may, on application by the holder or holders of 2 or more mining tenements, determine that a program may relate to a group of mining tenements within a particular area and, in such a case—
 - (a) the holder or holders of the mining tenements within the ambit of the determination may prepare and furnish a combined program for the purposes of this section; and
 - (b) this section will apply to the holder or holders of the mining tenements with such modifications as may be necessary for the purpose.
- (4) A program under subsection (2) or (3) must be provided in a manner and form specified or approved by the Minister...

78. In addition, under the *Mining Act*, applications 'for an exploration licence must be made in a manner and form determined by the Minister and must be lodged with the Director of Mines', and be accompanied by specified information.⁶² Tenement holders are, or can be, compelled to provide information; samples; reports; and 'other material required by the regulations' to either the Minister or the Director of Mines.⁶³

⁶⁰ See for example *Stewart and Department of Transport* (1993) 1 QAR 227.

⁶¹ Section 70B comes under Part 10A of the *Mining Act 1971*, which is entitled 'Programs for environment protection and rehabilitation'.

⁶² *Mining Act 1971*, sections 29(1) and 29(2).

⁶³ See for example: *Mining Act 1971*, sections 29(3); 32; 77B and 77C and *Mining Regulations 2011*, regulations 85 and 86. Tenement holders are also obliged to retain specified documentation for various periods of time. See for example: *Mining Act 1971*, sections 77 and 77A and *Mining Regulations 2011*, regulation 84.

79. I have also borne in mind that interested parties 17, 18 and 20 are not opposed to the release of information they provided to the agency, and interested party 21 is not opposed to the release of information about it.

80. Regarding the phrase ‘could reasonably be expected to have an adverse effect’, the District Court has commented that:

We are in the field of predictive opinion. The question is whether there is a reasonable expectation of adverse effects... that is not fanciful, imaginary or contrived, but rather is reasonable, that is to say based on reason, namely ‘agreeable to reason: not irrational, absurd or ridiculous’...⁶⁴

81. It will be sufficient:

if any adverse effect is established... However, it must be something which can be properly categorised as an adverse effect and not something so de minimus [sic] that it would be properly regarded as inconsequential... It will be sufficient if the adverse effect is produced by that document in combination with other evidence which is before the Court on the appeal.⁶⁵

82. Having regard to the submissions provided to date, I am not persuaded that disclosure of the documents could reasonably be expected to have an adverse effect on any interested party’s business affairs. The company already has rights over the relevant land under the *Mining Act*, and the landowners and leaseholders have rights under the *Real Property Act 1886* or arising out of a contract. I have also had particular regard to the nature of the claimed exempt information concerning Parsons Brinckerhoff and the circumstances in which the relevant documents were created, namely in support of the Kookaburra Gully Graphite Mine proposal. In addition, I note that there appears to be considerable information in the public domain about the project,⁶⁶ and information about landholders which is publicly available or has been released under the FOI Act.

83. That said, if disclosure of any of the documents were to reveal that any of the interested parties had not complied with their obligations under the PEPRs, or any of the agencies had not performed their responsibilities adequately, I accept that their reputations may be adversely affected and they may have to expend further resources to remedy shortcomings.

84. Clause 7(1)(c) also includes a public interest test.

Clause 9(1) - documents 1, 2, 7, 8, 10, 15 to 17, 20, 29a to 29e, 30, 32 to 34, 39, 42, 45, 46, 48, 50 and 51

85. With the exception of documents 1, 2 and 31, the agency claims that all of the documents in issue are exempt under clause 9(1).

86. To justify a claim that a document is exempt pursuant to clause 9(1), it must be shown that it satisfies paragraphs (a) and (b) of clause 9(1).

87. The scope of clause 9(1)(a) is wide, particularly given the words ‘that relates to’.

88. The ‘opinion, advice or recommendation’ must nevertheless have been obtained, or the ‘consultation or deliberation’ must have taken place, ‘in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency’.

⁶⁴ *Ipex Info Tech v Dept of Info Tech Services* (1997) 192 LSJS 54, applying *Re Actors Equity Association of Australia* (1985) (No 2) 7 ALD 584 at 590.

⁶⁵ *Ipex Info Tech v Dept of Info Tech Services* (1997) 192 LSJS 54, 65.

⁶⁶ Searches conducted via www.google.com.au in March 2017, using the name of the project, “Kookaburra Gully Graphite”.

89. Having considered the contents of all of the documents claimed exempt, I am satisfied that they all contain matter that relates to:
- an opinion, advice or recommendation that has been prepared or recorded; or
 - a consultation or deliberation that has taken place, in the course of, or for the purpose of the agency's decision-making functions.
90. Accordingly, I will confine my consideration of clause 9(1) below, to whether disclosure of the documents within the scope of the narrowed application would, on balance, be contrary to the public interest.

Clause 10(1) - document 17

91. I intend to consider the application of clause 10(1) to document 17 even though the agency has not relied on it.
92. Clause 10(1) allows an agency to refuse an applicant access to a document where the document would be able to be withheld from disclosure in any hypothetical legal proceedings on the grounds of legal professional privilege.
93. In *Esso Australia Resources Limited v The Commissioner of Taxation*, the High Court decided that a document is privileged from production in legal proceedings if it is a confidential communication between a client and their solicitor that was created for the dominant purpose of obtaining or giving legal advice; or if it is a confidential communication made for the dominant purpose of use, or obtaining material for use in, pending or anticipated legal proceedings.⁶⁷
94. Dominant has been held to mean a 'ruling, prevailing or most influential' purpose.⁶⁸
95. Having regard to the contents of the emails dated 24 June, 26 June and 14 September 2015, I am satisfied that they represent confidential communications between the agency and its solicitor, created for the dominant purpose of giving and/or obtaining legal advice. They would therefore be privileged from production in legal proceedings on the ground of legal professional privilege.
96. Accordingly, I am satisfied that document 17 is exempt under clause 10(1).
97. I am not satisfied that the emails dated 19 June, 22 June and 23 June 2015 would be so privileged, however. Accordingly, I will consider the agency's other claims of exemption with respect to these emails below.

Clauses 13(1)(a) and 13(1)(b) - documents 1, 2, 7, 8, 10, 15 to 17, 20, 29a to 29e, 30, 32 to 34, 39, 42, 45, 46, 48, 50 and 51

98. With the exception of documents 1, 2 and 31, the agency claims that all of the documents in issue are exempt under clause 13(1)(a). Some of the interested parties have claimed that parts of documents 1, 2 and 7 were also received 'in confidence' or are 'commercial in confidence'.

Clause 13(1)(a)

99. To succeed in claiming clause 13(1)(a) as a basis for refusing access to a document it is necessary to demonstrate that the relevant document contains matter 'the disclosure of which would found an action for breach of confidence'. The obligation of confidence may be contractual or equitable. In addition, 'would' should be read as 'could'.⁶⁹

⁶⁷ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

⁶⁸ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49, 64-65.

⁶⁹ *Bray and Smith v WorkCover* (1994) 62 SASR 218 at 226 to 227.

100. An equitable obligation of confidence is a duty not to disclose information because the information was given and received in circumstances which would make it unconscionable for the confidant to disclose the information in a way the confider has not authorised. A number of criteria must be satisfied:⁷⁰
- the information must be capable of being identified with specificity
 - the information must have the necessary quality of confidence
 - the information must have been received in circumstances which import an obligation of confidence
 - there must be actual or threatened misuse of the information.
101. Information that is publicly available cannot, in my view, have the necessary quality of confidence.
102. I accept, however, that not all of the information in the documents is publicly available. The applicant's submissions, and the application for access itself, support this view. To date, however, the interested parties have not satisfied me that some or all of the information in the documents has the necessary quality of confidence.
103. I am not persuaded that the information was received, first by the companies or other government agencies and then by the agency, in circumstances which would import an obligation of confidence. In saying this, I note the obligation to provide PEPRs and other information imposed by the *Mining Act* (discussed above) and the discretion to release such documents under sections 77D(1) and 77D(3) of the *Mining Act*. The consent of the mining tenement holder is not a prerequisite to releasing current tenements, if the Minister has consented to this course. I am also mindful of information in the documents that is publicly available.
104. I accept that if the other criteria for founding an action for breach of confidence are satisfied, release of the documents under the FOI Act would constitute their misuse.
105. For the exemption to apply, it may also be necessary for the confider to show '(at least for confidences reposed within government), that unauthorised use would be to the detriment of the' confider.⁷¹ If detriment is an essential element, my view is that it is easily established. It would be sufficient, for example, to show that disclosure would cause distress to the confiders.

Conclusion

106. Based on the information currently before me, my view is that not all of the criteria set out above have been satisfied, and the documents are therefore not exempt under clause 13(1)(a).

Clause 13(1)(b)

107. To succeed in claiming clause 13(1)(b) as a basis for refusing access to a document, each of the following criteria must be satisfied:
- that matter in the document was 'received under an express or inferred understanding that [it] would be kept confidential',⁷²
 - that disclosure of the matter might reasonably be expected to prejudice the future supply of such information to the Government or an agency
 - that disclosure of the matter would, on balance, be contrary to the public interest.

⁷⁰ *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150 (Unreported, Judge Brebner, 9 December 2010) at [38] affirming the test from *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443.

⁷¹ *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443. See, however, *Trevorrow v State of South Australia* (2005) 94 SASR 44.

⁷² See *Re Maher and Attorney General's Department* (1985) 7 ALD 731 at 737.

108. The agency has referred to clause 13(1)(b) in its belated notice of determination, but not in its schedule of documents. Further and in any event, it has not claimed that it received the documents from the interested parties under an express or inferred understanding that they would be kept confidential. Although the agency has claimed that it received some information from other agencies confidentially, it has not provided any evidence to support this claim.⁷³ Some of the interested parties have claimed that parts of the documents are confidential between them and the landowners. Parsons Brinckerhoff claims that document 7 contains information about another project is subject to 'commercial confidence', as well as 'internally commercial in confidence'. The bases for these claims are limited, and in my view insufficient to justify exemption under this clause, however.
109. Based on the submissions received to date, and having regard to the obligations on mining licence applicants and tenement holders imposed by the *Mining Act* (referred to above), I am not satisfied that:
- the agency *received* the documents under an express or inferred understanding of confidentiality
 - interested parties 10 to 12 *received* the information from landholders and/or other interested parties under an express or inferred understanding of confidentiality
 - interested party 10 can be said to have received information from itself in confidence.
110. Further, and in any event, I am not satisfied that disclosure of the documents in issue 'might reasonably be expected to prejudice the future supply of *such* information to the government or to an agency' for the reasons set out in relation to clause 7(1)(c) above.
111. Even if both elements of clause 13(1)(b)(i) are satisfied, I would still need to be satisfied that disclosure of the documents would, on balance, be contrary to the public interest test, as required by clause 13(1)(b)(ii). I have considered the public interest test below.
- Clause 16(1) - documents 7, 8, 10, 15 to 17, 20, 29a to 29e, 30, 32 to 34, 39, 42, 45, 46, 48, 50 and 51**
112. With the exception of documents 1, 2 and 31, the agency claims that all of the documents in issue are exempt under clause 16(1).
113. To satisfy clause 16(1)(a) an agency must show that disclosure of a document could reasonably be expected to 'prejudice' or 'have a substantial adverse effect' on specified operations of 'an agency'.
114. The agency has not specified which subclause(s) of clause 16(1)(a) it is relying on. It has merely submitted that the documents 'are considered "internal working documents" for the purposes of gathering opinions and advice to allow the agency to perform its decision making task of providing a comprehensive assessment of the mining application'.⁷⁴
115. In the absence of further clarification from the agency, based on the above submissions, I will proceed on the basis that the agency is claiming that disclosure of the documents could reasonably be expected to have a substantial adverse effect on the effective performance by the agency of its functions, as required by clause 16(1)(a)(iv).⁷⁵

⁷³ The agency made this submission during a meeting with one of my legal officers on 4 April 2017.

⁷⁴ These submissions also relate to the agency's claims under clauses 9(1), 13(1)(a) and 13(1)(b).

⁷⁵ This is consistent with the approach set out in my provisional determination.

116. The phrase ‘could reasonably be expected’ means that the claimed effect that disclosure of the documents would have is not ‘fanciful, imaginary or contrived’, or ‘irrational, absurd or ridiculous’.⁷⁶
117. The phrase ‘substantial adverse effect’ is important when considering clause 16(1)(a)(iv). It is not defined in the FOI Act. In the decision of *Treglown v SA Police* the South Australian District Court said that the phrase:

should be interpreted as indicating a ‘degree of gravity’ ... or an effect ‘that is “sufficiently serious or significant to cause concern to a properly informed reasonable person” ... (references omitted).⁷⁷

118. Based on the evidence before me, I am not satisfied that disclosure of the documents could reasonably be expected to have a substantial adverse effect on the effective performance of the agency’s functions given its powers and the obligations on applicants under the *Mining Act*, as well as the views of interested parties 17, 18, 20 and 21. Further and in any event, I consider any obligation on the agency to address community concerns (for example, with respect to compliance with licensing conditions) as a result of disclosure of the documents to form part of the agency’s regulatory functions.
119. Clause 16(1) also includes a public interest test.

The public interest test - clauses 7(1)(b)(ii)(B), 7(1)(c)(ii)(B), 9(1)(b), 13(1)(b)(ii) and 16(1)(b) - documents 1, 2, 7, 8, 10, 15 to 17, 20, 29a to 29e, 30, 32 to 34, 39, 42, 45, 46, 48, 50 and 51

120. Given my view that clauses 7(1)(c)(i) and 9(1)(a) have been satisfied, and the possibility that clause 7(1)(c)(ii)(A) may be satisfied, I will consider whether or not the public interest test has been met.

121. In considering the public interest, I have had regard to the factors and submissions referred to above. Public interest considerations relevant to this matter are:

In favour of disclosure:

- fulfilling the objects of the FOI Act, particularly the public interest in:
 - promoting openness of the agency’s decision-making processes
 - promoting accountability of the agency and its staff, particularly given the agency’s regulatory role under the *Mining Act*
 - facilitating more effective participation by members of the public
- the public interest in ensuring that the mining tenement holders are fulfilling their obligations
- the objects of Part 10A of the *Mining Act*, include to:⁷⁸
 - ...
 - (b) ensure that mining operations that have (or potentially have) adverse environmental impacts are properly managed to reduce those impacts as far as reasonably practicable and eliminate, as far as reasonably practicable, risk of significant long term environmental harm; and
 - (c) ensure that land adversely affected by mining operations is properly rehabilitated
- the ongoing relevance of the information to the applicant and the Association
- the possible effects of the project on surrounding property, including the water catchment

⁷⁶ *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 63-64.

⁷⁷ *Treglown v SA Police* [2011] SADC 139 (Unreported, South Australian District Court, Judge Herriman, 20 December 2011), [203], considering *Harris v ABC* (1983) 50 ALR 551 and *Konieczka v South Australian Police* [2006] SADC 134 (unreported, Judge Boylan, 8 December 2006), following *Thiess and The Department of Aviation* (1986) 9 ALD 454.

⁷⁸ *Mining Act 1971*, section 70A.

- the time that has elapsed, and events that have occurred, since the documents were created, including the granting of a mineral lease for the Kookaburra Gully Graphite Project
- the agency's commitment to transparency⁷⁹
- information in the documents that is publicly available (for example, via the Lands Titles Office and the Internet) or has been disclosed under the FOI Act
- the views of interested parties 1, 3, 17, 18, 20 and 21
- expectations of confidentiality are 'always subject to the provisions of the FOIA and cannot be affected by any representation ... that greater confidentiality might be accorded to material than properly reflects the effect of the FOIA'⁸⁰

Contrary to disclosure:

- objections to disclosure raised by the agency and interested parties 6 and 10 to 12
 - the granting of a mineral lease for the Kookaburra Gully Graphite Project
 - the draft nature of a number of the documents⁸¹
 - with respect to document 8 - the public interest in preserving the confidentiality of legal advice.
122. In response to my provisional determination, interested parties 11 and 12 submitted that I had given insufficient weight to the 'public's interest in ensuring and promoting confidence in the maintenance of sound business and commercial transactions'. While I accept that there is a legitimate public interest in profitable and commercially sound business transactions taking place, I am not satisfied that disclosure of the documents would put such transactions at risk. I have therefore not considered this factor as one weighing against disclosure.
123. I consider that there is a strong public interest in preserving the confidentiality of legal advice. Disclosure of one dot-point half way down the file note dated 2 March 2015 that forms part of document 8 would reveal legal advice.⁸² In my view, it would, on balance, be contrary to the public interest to reveal this dot-point.
124. Accordingly, I am satisfied that document 8 is exempt under clause 9(1).
125. I am not satisfied that disclosure of documents 1, 2, 7, 10, 15, 16, 20, 29a to 29e, 30, 32 to 34, 39, 42, 45, 46, 48, 50 and 51, the emails dated 19 June, 22 June and 23 June 2015 in document 17, or the remainder of document 8, would, on balance, be contrary to the public interest. In saying this, my view is that the public interest in openness and accountability and facilitating more effective participation, the ongoing relevance of the information to the applicant and the Association, and the fact that some of the information in the document is publicly accessible are persuasive factors in this matter, and outweigh the factors against disclosure.

Conclusion

126. I am satisfied that document 8 is exempt under clause 9(1).
127. I am not satisfied that documents 1, 2, 7, 10, 15, 16, 20, 29a to 29e, 30, 32 to 34, 39, 42, 45, 46, 48, 50 and 51, and the emails dated 19 June, 22 June and 23 June 2015 in document 17, are exempt under clauses 7(1)(b), 7(1)(c), 9(1), 13(1)(b) or 16(1).

⁷⁹ Evidence to Natural Resources Committee: DMITRE Response to NRC Report 91, Parliament of South Australia, Adelaide, 17 October 2014, 4 (Andrew Querzoli).

⁸⁰ *Iplex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54, 70. In addition, the FOI Act has been in operation for more than 20 years.

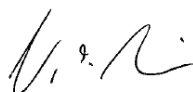
⁸¹ In my view this factor should be accorded little weight, however, as the dates on the documents or the emails to which they are attached put them into context within the overall process.

⁸² This is the only dot-point that commences with a hollow circle symbol ('O').

Determination

128. In light of my views above, I vary the agency's determination to enable the documents in issue to be released after redacting the company operatives' names and telephone numbers, along with:

- the dot-point detailing legal advice in the file note dated 2 March 2015 in document 8
- the emails dated 24 June, 26 June and 14 September 2015 from document 17
- the third paragraph (a one-line sentence) of the email timed 10:12am (the first paragraph commences below the names of the addressees) from documents 30 and 31.⁸³



Wayne Lines
SA OMBUDSMAN

1 June 2017

⁸³ In so doing, I have applied section 20(4) of the *Freedom of Information Act 1991*, which provides that if it is practicable to give access to a copy of a document from which the exempt matter has been deleted, and it appears that the applicant would wish to be given access to such a copy, the agency must give the applicant access to a copy of the document to this limited extent.

APPENDIX - 2016/04164

Procedural steps

Date	Event
22 February 2016	The agency received the FOI application dated 16 February 2016.
24 March 2016	The agency failed to determine the application within the 30 day period required by the FOI Act, ¹ and is deemed to have refused access to the documents. ²
13 April 2016	The agency received the internal review application dated 11 April 2016.
28 April 2016	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³
2 May 2016	The agency advised the applicant that it was continuing to process the application, by email.
17 May 2016	The Ombudsman received the applicant's request for external review dated 11 May 2016.
19 May 2016	The Ombudsman advised the agency of the external review and requested submissions and documentation.
24 June 2016	The agency requested suspension of the external review proceedings ⁴ to attempt a settlement and for the agency to provide a determination to the applicant, by letter dated 21 June 2016.
28 June 2016	Ombudsman SA granted the agency's request for a suspension until 18 July 2016 and advised the applicant accordingly, by emails.
26 July 2016	The agency provided the Ombudsman with its submissions and documentation, by letter dated 25 July 2016.
3 August 2016	The agency made a belated determination to partially and fully release some documents. ⁵
10 August 2016	Ombudsman SA sought the applicant's response to the agency's belated determination.
13 August 2016	Ombudsman SA received the applicant's submissions in response to the agency's belated determination.

¹ *Freedom of Information Act 1991*, section 14(2).

² *Freedom of Information Act 1991*, section 19(2).

³ *Freedom of Information Act 1991*, section 29(5).

⁴ In accordance with *Freedom of Information Act 1991*, section 39(5)(c)(2).

⁵ In accordance with *Freedom of Information Act 1991*, section 19(2a).

15 August 2016	The agency released an additional document to the applicant.
16 August 2016	Ombudsman SA wrote to the applicant to clarify the scope of the external review, by email.
17 August 2016	The applicant confirmed the narrowed scope of the application for access, by email.
23 to 24 August 2016	Ombudsman SA sought further submissions and documentation from the agency, by email.
26 August 2016	The agency provided further documentation and submissions, by email.
9 to 10 March 2017	Ombudsman SA sought and received further information from the agency by email.
21 March to 4 April 2017	Ombudsman SA liaised with the agency about consulting interested parties, by emails and in person. The agency provided additional submissions.
7 April 2017	The Ombudsman issued his provisional determination to the parties.
18 April 2017	Interested party 6 provided submissions in response to the Ombudsman's provisional determination, by telephone.
19 April 2017	Interested parties 1 and 3 provided submissions in response to the Ombudsman's provisional determination, during separate telephone discussions.
21 April 2017	Interested party 18 provided submissions in response to the Ombudsman's provisional determination, by email.
26 April 2017	Interested parties 10 and 20 provided submissions in response to the Ombudsman's provisional determination, in separate emails.
27 April 2017	Interested party 17 provided submissions in response to the Ombudsman's provisional determination, by email.
4 May 2017	Interested parties 11 and 12 provided submissions in response to the Ombudsman's provisional determination, in a joint email.
15 May to 16 May 2017	Ombudsman SA sought and received clarification from the applicant about the scope of his application.
16 May 2017	Ombudsman SA undertook additional consultation with respect to interested party 15, and consulted with interested party 21, by separate emails attaching the Ombudsman's provisional determination.
22 May 2017	Interested party 21 responded to the consultation invitation, by email.