OmbudsmanSA

DETERMINATION

External review pursuant to *Freedom of Information Act 1991*

Applicant:	**Hon Mark Parnell MLC**
Agency:	**Department of Primary Industries & Resources**
Ombudsman reference:	**2010/04200**
Agency reference:	**2010/000717**
Determination:	**The determination of the agency is *reversed***

REASONS FOR DETERMINATION

Background

Pre-application

1. In the year 2009 the Department of Primary Industries & Resources (**PIRSA** or **the agency**) and the then Department for Environment and Heritage (**DEH**) released for consultation a document regarding a joint project addressing both mineral/mining and environmental issues. The document was called 'Seeking a Balance - Conservation and resource use in the Northern Flinders Ranges' (**Seeking a Balance**).

2. Towards the end of Seeking a Balance was the invitation:

> We are seeking your comments on the management policies and zones up to **19 December 2009**. . .
>
> The final policy document will be released by DEH and PIRSA in early 2010. This document will take account of the submissions received, and further refinement of the management zones based on the latest scientific knowledge and spatial mapping information.

3. I understand that the deadline for submissions was extended until the end of January 2010. I also understand that the 'final policy document' is yet to be released. Whilst I am unaware of the reason(s) for this, nothing turns on the issue for present purposes.

4. The new government policy had the potential to affect one of Marathon's exploration leases. Accordingly, the company wished to make a submission. On 19 January 2010 Mr Peter Williams, Chairman of Marathon, emailed Dr Ted Tyne, Director of PIRSA's Mineral Resources Group, and asked:

> Could you please clarify for me if submissions you receive concerning the "Seeking a Balance" paper will be made public and the proposed timing of any release. The reason I ask is that the company has disclosure obligations to the ASX as I indicated in my letter to you of 15 January 2010[1].

5. Dr Tyne responded on the same day:

[1] I do not have a copy of Mr Williams' letter of 15 January 2010.

> There was no indication in the invitation for comment on Seeking A Balance that individual submissions would be made public - individual submissions will not therefore be released.

6. Marathon's 106 page submission (**the submission** or **the document**) was submitted to PIRSA on 28 January 2010. In the accompanying letter of the same date, Mr Williams wrote:

> We appreciate the comments in your email of 19 January 2010 that there is no indication in the invitation for comment that individual submissions would be made public. We have continuous disclosure obligations to the ASX which require that some of the information in the submission remain confidential. We therefore provide our submission on the basis that neither the submission itself nor any of the information in it will be made public without our prior consent.

7. On 29 January 2010 Marathon wrote to the Australian Securities Exchange (**ASX**) Company Announcement Office and advised that it had provided a submission to Seeking a Balance. A brief summary of its submission was included. Marathon's announcement to the ASX is also on the company's website.

8. On 2 February 2010 Dr Tyne wrote to Mr Williams and Marathon and advised:

> I acknowledge receipt of your company's submission on "Seeking a Balance". I also acknowledge that you have provided your submission on the basis that neither the submission itself nor any of the information in it will be made public without your company's prior consent.

9. Due to the 'high level of interest' in Seeking a Balance, the government decided to 'make submissions public'. However, as there had not been any prior indication that submissions might be made public, permission from submitters was sought first. On 2 March 2010 Mr Jason Irving of DEH wrote to Mr Williams to enquire whether Marathon agreed to its submissions being made public. Mr Irving indicated that the submission would not be made public if no response was received.

10. On 12 March 2010 Mr Williams wrote to Dr Tyne and advised that he considered receipt of Mr Irving's letter 'disturbing'.[2] Referring to previous communications on the issue, Mr Williams wrote:

> In our letter accompanying our submission on 28th January 2010 we advised you of the particular statutory obligations we must abide by as a public company, with JORC compliance for any public announcements we make. We lodged our submission based on your assurance that the contents would remain confidential and would thus allow us exemption under the ASX Listing Rules not to release the document to the market. We cannot therefore give you consent for our submission to be released in whole or in part under any circumstances.

The application

11. On 21 May 2010 Mr Parnell applied to PIRSA under the FOI Act for access to the submission.

Processing of the application (including internal review)

12. On 27 May 2010 Mr Tim Ingram, an FOI officer with PIRSA, wrote to Mr Williams and Marathon for the purpose of consultation under section 27 of the FOI Act. Mr Ashley Poke, a partner of the law firm Baker & McKenzie, responded on behalf of Mr Williams

[2] Given Mr Irving's indication that submissions would not be made public unless consent was given to do so by the submitter, I do not see why the letter needed to be characterised as 'disturbing'.

and Marathon on 8 June 2010. Mr Poke's letter contained detailed submissions (**the first FOI submissions**). In an email dated 10 June 2010 Mr Ingram advised Mr Poke that he was 'satisfied that the submission in question falls within the exempt categories you have claimed', and that a determination would be made accordingly.

13. On 2 July 2010 Ms Kim Potoczky, an accredited FOI officer with PIRSA, determined to refuse access to the submission (in full). Her reasons were given in an appendix to her letter, and the grounds of exemption were clauses 7(1)(a), 7(1)(b), 7(1)(c), 9(1), 13(1)(a) and 13(1)(b) of Schedule 1 to the FOI Act.

14. On 15 July 2010 Mr Parnell applied for an internal review of Ms Potoczky's refusal. In doing so he asserted that '[t]here is an enormous public interest in Marathon Resources' plans for the Northern Flinders Ranges'.

15. An email chain dating from 30 July 2010 to 10 August 2010 involving numerous officers provides a useful indication of PIRSA's thinking during the processing of the internal review. Initially, consideration was given by various quarters to the notion that the submission was not exempt in its entirety. Mr Vic Aquaro of PIRSA noted that 'not all the information in the submission is of a commercial nature' and some of the information 'appears to be not inherently confidential'. It was then ascertained that PIRSA's lease agreement with Marathon does not guarantee confidentiality and in fact refers to the FOI Act. It appears to have been decided that Mr Geoff Knight, PIRSA's Chief Executive Officer, would speak to the then Minister about the matter. Ms Lisa Farley of PIRSA then discovered that Marathon had published a summary of its submission on its website. It was suggested that Mr Knight be made aware, prior to meeting with the Minister, of the fact that some of the submission was now in the public domain. It was then announced that Mr Knight would 'uphold' the original refusal to release the document in its entirety, but that the reference in the determination to Marathon's summary on its website would remain to be helpful.

16. Mr Knight's internal review determination is dated 12 August 2010. Mr Knight confirmed Ms Potoczky's determination.

17. Mr Parnell applied for an external review on 21 August 2010. In doing so he asserted:

> I believe the Department has erred in addressing the 'public interest' test. There is enormous public interest in Marathon's plans for the Arkaroola Wilderness Sanctuary. Although Marathon Resources has requested their submission remain confidential, they sent their submission to the Department in response to a request from the Department for feedback from the public about a Government policy.

The application for external review

18. On 8 November 2010 I provided PIRSA and Marathon with my 'provisional determination'. I made the overarching statement that the submission is not exempt in its entirety, if for no other reason than the fact that Marathon published a summary of its submission on its website. I made preliminary comments on claims made by PIRSA and Marathon to date and I asked for final submissions. I specifically asked that submissions be aimed at specific information within the document, and that detailed evidence should be provided if claims are made that release of information would have, for instance, an adverse effect. I advised that, at that time, I was minded to reverse PIRSA's determination.

19. Also on 8 November 2010 I asked Mr Parnell if he would like to make submissions on the public interest test.

Submissions from the parties

20. Mr Parnell provided his arguments on the public interest in a letter dated 30 November 2010. I have had regard to them and I attach them as an appendix to my determination. PIRSA advised that it will rely on its determinations to date and that, in essence, it feels that the obligation of confidentiality to Marathon stands. Having been given extensions of time in which to do so, Marathon (through its solicitor Mr Poke) provided its submissions (**the FOI submissions**) in a letter from Mr Poke dated 11 January 2011. Marathon also objected to its FOI submissions being provided to Mr Parnell, and I note that Marathon's first FOI submissions contained the following limitation:

> This letter has been prepared at the specific request of Marathon to assist it in responding to the FOI request and it contains information that is subject to legal professional privilege in favour of our client and disclosure of this letter to you is done so on a confidential basis and is not a waiver of such legal professional privilege.

21. In its FOI submissions to me Marathon also indicated that its response is limited to 'fundamental issues' with my provisional determination, rather than all areas in which it considers there to be issues. Marathon 'reserved the right' to respond to all issues if it became necessary, depending on my response to its FOI submissions. Similar notions were expressed throughout the FOI submissions.

22. In my letter dated 8 November 2010 to PIRSA, a copy of which I asked be provided to Marathon, I advised:

> I have not provided Mr Parnell with a copy of the provisional determination at this time. I envisage doing so after receiving final submissions from PIRSA and Marathon, or I may proceed straight to a final determination. I ask that submissions be provided by PIRSA and Marathon within four weeks of the date of this letter. Following this, I may proceed to a determination.
>
> PIRSA and Marathon should identify any information in the provisional determination and their responses that they do not want disclosed to the applicant, and the reasons why. I will consider these reasons in the conduct of my review. Please note that I will assume there is no objection to matter in the provisional determination and the responses being released to the applicant, unless PIRSA and Marathon clearly state otherwise.

23. This letter was accompanied by an information sheet which advises parties to an external review that submissions should include complete and accurate information (because I may finalise my review without contacting the parties again) and that I am not obliged to let the parties know my views before finalising my review.

24. I consider that Marathon was clearly advised that I may proceed straight to a final determination after receiving its FOI submissions, rather than considering limited submissions and only asking for complete submissions if I am still not satisfied that the document is exempt. Moreover, Marathon's solicitor communicated with my office on several occasions prior to providing its FOI submissions and the possibility of me accepting preliminary submissions was not raised. I also make the comment that Marathon has not identified information within its FOI submissions that it does not want disclosed to the applicant, nor given reasons why - rather, it has asserted that its entire response should not be provided to Mr Parnell.

25. It is my intention to provide my determination at this time, based upon the two sets of FOI submissions provided by Marathon (firstly to PIRSA and then to me) as to why it thinks its submission to Seeking a Balance should not be released. Where I consider it necessary to refer to Marathon's FOI submissions for the purpose of providing reasons for my determination as required by section 39(13) of the FOI Act, I will do so in a general manner.

External review process and relevant exemption provisions

26. Under section 48 of the FOI Act the onus is on an agency to justify its determination in my external review.

27. Section 39(11) of the FOI Act provides that I may confirm, vary or reverse the determination of PIRSA, based on the circumstances existing at the time of review.

28. Section 20(1)(a) of the FOI Act provides that an agency may refuse access to a document if it is an 'exempt document'. An 'exempt document' is defined by section 4 as 'a document that is an exempt document by virtue of Schedule 1' (the exemption clauses, many of which require that a document contain certain 'matter' for it to be an exempt document). However, section 20(4) further 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 access to the document to that limited extent.

29. Numerous exemption clauses have been relied upon by PIRSA and Marathon.

Documents affecting business affairs

30. Clause 7 of Schedule 1 to the FOI Act provides that:

> (1) A document is an exempt document–
> (a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person; or
> (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.

31. There are numerous tests in clause 7, several of which need to be satisfied, depending upon the particular exemption claim. The first is that matter must either:
- be **a trade secret**; or
- consist of **information that has a commercial value** to an agency or person; or
- consist of **information concerning the business, professional, commercial or financial affairs** of an agency or person (in this case Marathon).

32. Whilst the last type of matter is wider than the first two types, it is not so wide so as to encompass everything *relating* to Marathon. It will not, for instance, cover a viewpoint, or opinion, merely because the viewpoint or opinion belongs to Marathon. Then, and unless the matter in question constitutes a trade secret, I would have to be persuaded that:

    - disclosure of that information could reasonably be expected to either:

- diminish the commercial value of the information; or
- have an adverse affect on a person's business, professional, commercial or financial affairs; or
- prejudice the future supply of such information to the government or to an agency; and

- disclosure of that information would, on balance, be contrary to the public interest.

Internal working documents

33. Clause 9 of Schedule 1 to the FOI Act provides that:

> (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) the disclosure of which would, on balance, be contrary to the public interest.

Confidential information

34. Clause 13 of Schedule 1 to the FOI Act provides that:

> (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.

35. Clause 13(1)(a) requires that the disclosure of a document would or 'could'[3] found an action for breach of confidence (in either contract or equity). For it to be said that disclosure could give rise to a breach of confidence in equity, several elements would need to be established:[4]

- The confider (in this case Marathon) 'must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question'.
- The confider must be able to show that 'the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge)'.
- The confider must be able to show that 'the information was received . . . in such circumstances as to import an obligation of confidence'.
- The confider must be able to show that 'there is actual or threatened misuse of that information'.

36. For a claim under clause 13(1)(b) to be successful, I would need to be satisfied that matter was 'obtained in confidence' and that the disclosure of that matter might reasonably be expected to prejudice the future supply of such information to the government or to an agency. It is not, for instance, sufficient to assert that information that was supplied to PIRSA would not have been supplied had it been known by the party supplying it that it would be disclosed under the FOI Act. In my view, clause 13(1)(b) envisages a future damage to the supply of a similar type of information.

[3] See *Bray and Smith v Workers Rehabilitation & Compensation Corporation* (1994) 62 SASR 218 at 226.
[4] *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443 per Gummow J.

Moreover, I would have to be satisfied that the disclosure of the matter would, on balance, be contrary to the public interest.

Discussion

37. I confirm the overarching statement in my provisional determination that, in my view, the submission is not exempt in its entirety. Whilst there are others, a primary reason is that Marathon published a summary of its submission on its website. At the very least, matter within the submission that mirrors or is very similar to the matter in the published summary could have been released to Mr Parnell (see section 20(4) of the FOI Act).

38. In giving what I take to be a qualified acceptance of the above view, Marathon has pointed out that its submission to Seeking a Balance was 107 pages in length and that what was described on its website as 'a brief summary' contains less than one page of extracts - Marathon therefore asserts that the brief summary is clearly not a summary of its submission. Whether or not it is aptly described as a summary or not, I acknowledge that what is on the website is only a small portion of what is in the submission. I also note that Marathon does not object to the extracts of its submission that mirror what has already been released from being released.

39. Unfortunately, the majority of Marathon's submissions are levelled at the document in its entirety, rather than discrete matter within it, and I again refer to the notion of 'exempt matter' in section 20(4) of the FOI Act, and that matter that is not exempt matter should be released. Nevertheless, I note that in its FOI submissions to PIRSA dated 8 June 2010 Marathon identified several types of 'commercial in confidence' information it would not wish to have disclosed. Whilst Marathon's identification of these types of information were inclusive rather than exclusive, I have had regard to them in assessing whether I consider there to be any exempt matter within the document. They are:

    (a) information concerning trade secrets of Marathon - for example, formulation of emerging mineralisation model and strategic approach to the permitting process relating to the granting of mining leases; and
    (b) information which would have a commercial value to other persons - for example, advantages to other companies (unhindered in their operations) relating to Marathon's strategies related to the granting of a mining lease; and
    (c) other information concerning the business, professional, commercial or financial affairs of Marathon - for example, size of emerging deposit and economic benefits of the project to South Australia, and in particular the Northern Flinders Ranges region and its stakeholders and information relating to the commercial arrangements between Marathon and the landowners for services.

40. Without such information being pinpointed, I have had some difficultly in locating it. In my opinion, there are no 'trade secrets' of Marathon within the document. I agree that the document contains information regarding the minerals on Marathon's tenement but I would not describe this information as an 'emerging mineralisation model'[5] or consider it a trade secret. The information regarding the 'permitting process' in my view appears to be a general description of the requirements under existing law and policy. Likewise, the information relating to the granting of a mining lease appears general, and in my view, disclosure would not give a competitive advantage to Marathon's competitors. It seems to me that what has commercial value to Marathon is the lease itself and the minerals that have been found within the tenement, not the information contained within the document that might be *about* the lease and minerals.

[5] If this phrase is used to connote a kind of theoretical model, rather than a model relating specifically and only to this particular tenement.

41. I am satisfied that there is matter within the document consisting of information (other than trade secrets or information that has a commercial value in and of itself to Marathon) concerning the business, professional, commercial or financial affairs of Marathon (ie information caught by clause 7(1)(c)(i) of Schedule 1 to the FOI Act). For instance, the document contains specific dollar figures for past or proposed future expenditure, and projections or opinions of Marathon about the amount of minerals the tenement might contain.[6] I am not convinced that the disclosure of such information could reasonably be expected to have an adverse effect on Marathon's business affairs. The lease over the tenement belongs to Marathon and I do not see why information regarding the amount of minerals it contains or proposed outlay by Marathon would assist any other party in a manner that is adverse to Marathon. I am prepared to accept however that the disclosure of some of this information could reasonably be expected, in the circumstances, to prejudice the future supply of such information to the government or to an agency. The circumstances include the fact that Marathon did not believe that its submission on Seeking a Balance would be released outside of the government. The circumstances also include the JORC rules, which I will discuss in due course with respect to other information in the submission and the submission as a whole.[7] I accept that Marathon may not have included in its submission *some* of this information if it was aware that the submission would be disclosed under the FOI Act, and I accept that disclosure of this information in this instance could reasonably be expected to prejudice the future supply of such information (not only by Marathon but also by others that become aware of disclosure in this case). This is a factor against the public interest in the release of such information. Moreover, I do not think that disclosing this information would further the public interest, in that the public interest would be served by the release of the remainder of the document. In saying this, I have had regard to Mr Parnell's submissions on the public interest. This specific information is:

- page 7, 3rd dot point - dollar figure regarding further exploration/expenditure
- page 7, 7th dot point - dollar figure regarding further exploration/expenditure
- page 7, 8th dot point - dollar figure regarding further exploration/expenditure
- page 8, 10th dot point - dollar figure regarding payment to third party
- page 14, third section, second dot point, first sub-dot point, last sentence - opinion regarding mineral potential
- page 14, third section, second dot point, second sub-dot point, last sentence - opinion regarding mineral potential
- page 15, first sub-dot point, last sentence - opinion regarding mineral potential
- page 15, first dot point, last four lines - opinion regarding mineral potential
- page 15, 2nd dot point - dollar figure regarding exploration/expenditure
- page 20, first paragraph - dollar figure regarding further exploration/expenditure
- page 20 final sentence - dollar figure regarding further exploration/expenditure
- page 21, table at top of page - all dollar figures, components and total regarding further exploration/expenditure
- page 21, second paragraph - dollar figure regarding further exploration/expenditure
- page 24, first full paragraph - dollar figure regarding payment to third party
- page 24, second paragraph - two dollar figures regarding exploration/expenditure
- page 25, table at top of page - all component and total dollar figures regarding payments to third party
- page 27, second paragraph, last sentence - opinion regarding mineral potential
- section 9, pages 63 onwards, opinions regarding mineral potential (including diagrams/figures from which opinions can be deduced), namely:

[6] This may be what Marathon is referring to by the phrase 'emerging mineralisation model'. If so, I consider that such information falls more aptly into clause 7(1)(c)(i) rather than 7(1)(b) as I am of the opinion that it is the minerals themselves, rather than information about the minerals, that is of commercial value. To the extent that information about mineral deposits has, in and of itself, a commercial value because it affects the share price, I would expect that such information has already been disclosed. I am not satisfied that any further such information that is not able to be released to shareholders and the stock market at large can have a commercial value.

[7] JORC refers to the Joint Ore Reserves Committee of Australasia.

- page 63, paragraph beneath figure 8
- page 64, second paragraph, 2nd and 3rd sentences
- page 64, third paragraph, 2nd and 3rd sentences
- page 64, fourth paragraph, 2nd and 3rd sentences
- page 65, up until third full paragraph
- page 65, third paragraph, dollar figure
- page 65, fourth paragraph, first line, amount
- page 66, Figure 10
- page 66, first paragraph, second line, dollar figure
- page 66, second paragraph, third and fifth lines, amounts
- page 66, second paragraph, last sentence
- pages 67 to 71 (two Figures per page), Figures 11 to 20
- page 72, section 9.1.2, distance in fourth line, amount in fifth line and last six words in last line
- pages 73 to 74, Figures 22 to 24
- page 74, section 9.1.3, first paragraph
- pages 75 to 76, Figures 25 to 28
- page 77, second paragraph, first sentence of the third paragraph, fourth paragraph, first sentence of the fifth paragraph and the first sentence of the sixth paragraph
- pages 78 to 82, Figures 30 to 35

42. I therefore determine that Marathon's submission is an exempt document under section 20(1)(a) as the above information is exempt matter under clause 7(1)(c) of Schedule 1 to the FOI Act. However, in accordance with section 20(4), I consider it would be practicable to provide, and that Mr Parnell would want, a copy of the document from which exempt matter has been deleted. I therefore turn to Marathon's and the agency's claims that the whole document (including the remaining matter in the document) is exempt from release.

Arguments made by Marathon

The circumstances in which Marathon's submission was received

43. In my earlier correspondence to PIRSA (and Marathon), I stated that to the extent that PIRSA, through Dr Tyne's correspondence with Mr Williams circa 2 February 2010 and previously, intended to 'guarantee' that the submission would be treated confidentially, this is unfortunate for the reasons given by Judge Lunn in *Ipex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54 (***Ipex***), as cited in paragraph 26 of one of my previous determinations.[8] I referred to comments I made in that determination at paragraphs 22 to 31 about exemption claims in the context of business dealings with the government, and I expressed the view that those comments are also relevant in circumstances where businesses provide consultation submissions to the government on matters of policy, as is the case in this matter. I also refer to the recent comments of Judge Brebner in *Ekaton Corporation Pty Ltd v Chapman & Department of Health, Department of Health v Chapman* [2010] SADC 150 (Unreported, Judge Brebner, 9 December 2010), a matter also involving confidential information, at paragraph 63 where he said:

> It follows that the Act still provides for truly confidential information imparted during the course of negotiations. In this regard it is to be assumed that both government and the private sector will be aware of the [FOI] Act and of the kind of information which it protects and that which it does not and that the parties will thus be able to structure their negotiations accordingly. It also follows that if it is only non-confidential information that is liable to disclosure, then there can be no real inhibition on negotiation of the kind suggested.

[8] www.ombudsman.sa.gov.au/freedom-of-information/2010-00093.pdf

44. Marathon considers that there is no authority at law for my extension of Judge Lunn's reasoning in *Ipex* to circumstances where businesses provide consultation submissions to the government on matters of policy. Marathon asserts that circumstances involving business dealings with government should be treated fundamentally different from the position where the government seeks submissions on an important public policy issue and in doing so asserts that submissions will be treated confidentially. With respect, whilst I acknowledge that *Ipex* related to a different setting than the one I am presently considering, and whilst there may not be a decided case involving the same circumstances, I do not see why the reasoning in *Ipex* cannot be extended. In my view, Judge Lunn was saying that the provisions of the FOI Act cannot be overridden by a purported guarantee of confidence by the government. Such a guarantee will be relevant to both clauses 13(1)(a) and 13(1)(b), but in neither case will it be the sole relevant factor. The former has numerous elements which need to be satisfied (including, in my view, an assessment of the actual information subject to the purported guarantee), whilst the latter includes a public interest test.[9] In short, I do not see why my previous comments (based on the reasoning of Judge Lunn) cannot apply to circumstances involving submissions on a matter of important government policy where the provider of a submission is only one party likely to be affected by the policy.

45. Given the factual basis on which Marathon's submission was provided, Marathon does not consider there to be any basis for suggesting that some parts of the submission might be confidential while others are not. In my view, this tends to belie Marathon's concession that at least the parts of the submission that Marathon itself has released on its website could be provided to the applicant. In any event, it is my view that an argument based primarily on the circumstances in which the submission was given and received, without regard to the nature of the particular matter within the document, is best suited to clause 13(1)(b), which involves two further tests including the public interest test.

Is there an equitable obligation of confidence?

46. Factually, I accept that the submissions were given and received in circumstances considered by Marathon and PIRSA to be confidential. However, I am not satisfied that the intention of the parties is sufficient to show that 'the information was received in such circumstances as to import an obligation of confidence'. In my view, some examination of the nature of the information in question is required before deciding whether an obligation of confidence is inherent, and it is an objective 'reasonable person' test.

47. The information was received in the context of a public submission process. It concerns the Arkaroola Wilderness Sanctuary, which has been the subject of considerable public discussion for several years, including discussion regarding Marathon and its mining tenement. On this basis, I am not satisfied that the reasonable person would consider the government to be obliged to keep the whole of submissions it receives confidential when it takes such submissions into consideration in arriving at such an important public policy.

48. It is unfortunate that Marathon relied on PIRSA's representations that it would not disclose its submission, given the operation of the FOI Act. Moreover, I am not saying that no part of Marathon's submission could be subject to an equitable obligation of confidence. However, over and above the matter referred to in paragraph 41, I am not satisfied that the remainder of the document is subject to an equitable obligation of confidence.

[9] Again, the purported guarantee will be relevant to the public interest test, but it will not be the sole factor.

A contractual obligation of confidence

49. I am not satisfied that there is a contractual obligation of confidence merely because Marathon expressly submitted the document on a confidential basis, and that the document was accepted by PIRSA on that basis. Firstly, I am not satisfied that Dr Tyne either had the authority to or intended, via his email on 19 January 2010, to create a legally enforceable contract between PIRSA and Marathon. Intention aside, and even if the requirements of offer and acceptance have been met,[10] I am not satisfied that there was the requisite consideration to give rise to a contractual obligation of confidence.

Other grounds for keeping the document confidential - clause 13(1)(b)

50. I have accepted that the submissions were given and received in circumstances considered by Marathon and PIRSA to be confidential. In considering whether disclosure of the document might reasonably be expected to prejudice the future supply of information to the government, Marathon's interests in contributing to the consultation process should be considered. Given the potential impact of the policy on Marathon's exploration lease, it was in its interest to provide a submission to the government. I do not accept that no information would have been provided by Marathon, even if subsequent disclosure was envisaged. I accept that Marathon may have been selective in the information it chose to include if it envisaged release of the document under the FOI Act. However, even if I were to accept Marathon's contention that it would not have provided a submission if release was envisaged, I am not satisfied that disclosing the document other than the matter referred to in paragraph 41 might reasonably be expected to prejudice the future supply of information to the government or an agency.

The JORC Code - would disclosure be against Marathon's ASX obligations?

51. In my letter to PIRSA (and Marathon) dated 8 November 2010 I discussed the relevance of the JORC Code in the following terms:

> 36. At various times (see for examples paragraphs 7 and 11), Marathon has argued that release of its submission would be in breach of ASX's listing rules, and I refer to pages 4 and 5 of the FOI submissions in which Marathon's solicitors expand upon the argument.
>
> 37. The argument can be summarised as:
>
> - ordinarily, Marathon must comply with the Listing Rules;
> - rule 5.6 provides that any 'report' prepared by Marathon 'must be prepared in accordance with Appendix 5A', being the 'JORC Code';
> - on this occasion, given the 'confidential terms' offered to Marathon (ie that the report would not be made public), Marathon decided it did not need to prepare its submission in accordance with the JORC Code;
> - its submission does not comply with the JORC Code; and therefore
> - disclosure of Marathon's submissions has the potential to create legal and compliance (and reputational) problems for Marathon.
>
> 38. I have already addressed the issue of confidentiality in general (in this and my previous determination). My views are also applicable within this context. I add that I am unsure of which part of the Listing Rules or the JORC Code would require 'some of the information in the submission [to] remain confidential', as stated in Mr Williams' 28 January 2010 letter.

[10] I assume Marathon to be saying that Marathon's 'offer' would be the provision of its submission on the condition that it was confidential, and that PIRSA's 'acceptance' was the agreement to take the submission on that basis.

39. I note that Rule 5.6 provides that a report must be prepared in accordance with the JORC Code:

> if the report includes a statement relating to any of the following.
>
> - Exploration results.
> - Mineral resources or ore reserves

40. I consider that much of the submission does not relate to Marathon's 'exploration results' or 'mineral resources or ore reserves'. I am therefore not satisfied that the JORC Code could apply to these parts of the submission.

41. The FOI submissions do not explain *why* the submission (or parts thereof) does not comply with the JORC Code. At present I am not satisfied that it does not.

42. I refer to the second full paragraph of page 5 of the FOI submissions regarding the recognition in the JORC Code that companies may need or wish to provide a report 'for a non-public purpose and in these circumstances, will not be required to comply with the reporting requirements set out in the JORC Code'. This is said to include 'reports prepared by companies for submission to State and Federal Government agencies where providing information to the investing public is not the primary intent'. The submissions continue by saying that 'Marathon specifically relied on the fact that its submission to the SA Government would be confidential and non-public to frame the information in its submission'.

43. If Marathon's submission is excused from the requirements of the JORC Code by virtue of the fact that it is a report for submission to the State Government in circumstances where providing information to the investing public is not the primary intent, I am not necessarily satisfied that Marathon's further reliance on confidentiality of the information so provided is actually required. If compliance with the JORC CODE is not actually required, how can one logically be called to account for non-compliance? Furthermore, I note that the fifth 'guideline' for clause 5 suggests that:

> *The term 'regulatory requirements' as used in Clause 5 is not intended to cover reports provided to State and Federal Government agencies for statutory purposes, where providing information to the investing public is not the primary intent. If such reports become available to the public, they would not normally be regarded as Public Reports under the JORC Code (see also guidelines to Clauses 19 and 37).*

44. In my view, the above paragraph envisages that such reports may become available to the public, which could be said to negate any obligation of confidence owed on this basis alone.

45. I am not presently satisfied that the submission is exempt on the basis that it does not comply with the JORC Code. Marathon may wish to provide expert evidence, for instance from a suitably qualified member of the ASX's Enforcement Unit, on which parts of the submission are non-compliant with the Listing Rules and why.

52. Marathon does not consider it appropriate or relevant for the ASX to give expert evidence, and advised me that should I require further information or expert evidence to enable me to form a reasoned view I should say so and Marathon will seek to provide me with additional information. For reasons already given I have decided to provide my determination.

53. I accept that it was never intended by Marathon that its submission would be made public. I further accept that the submission contains, for instance, information about the potential mineral and economic value of the tenement that may not be in a JORC compliant manner. Such information is in my view, however, addressed by the matter referred to in paragraph 41. I am not satisfied that the remaining matter within the submission would be non-compliant.

54. Marathon states that it is not clear on the points made in paragraphs 43 to 45 of my earlier letter (see above), and Marathon's views are based upon what it has been told by the ASX about what would be non-compliant. I do not have the benefit of detailed information from the ASX. Nevertheless, and in the absence of having discreet information highlighted to me, I consider that Marathon's concerns in this regard should be allayed by my conclusions regarding the matter in paragraph 41.

Would disclosure of the document be, on balance, contrary to the public interest?

55. Other than the matter referred to in paragraph 41, I am not satisfied that disclosing the remainder of the document:

- would constitute a disclosure of trade secrets;
- would constitute a disclosure of information of a commercial value which could reasonably be expected to destroy or diminish the commercial value of the information;
- would constitute a disclosure of other information concerning the business, professional, commercial or financial affairs of Marathon which:
  - 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
  - would, on balance, be contrary to the public interest;
- would or could found an action for breach of confidence;
- would constitute a disclosure of matter obtained in confidence which might reasonably be expected to prejudice the future supply of such information to the government or to an agency.

56. In the event that any such matter not highlighted to me could be said to fall within the above, and clauses 7(1)(a) and 13(1)(a) aside, I am not satisfied that the disclosure of the document without the matter referred to in paragraph 41 would, on balance, be contrary to the public interest.

57. The government's proposal, *Seeking a Balance*, is an important public policy document concerning the conflicting (or at the very least different) interests of mineral exploration and mining on the one hand and environmental protection and conservation on the other. As Mr Parnell has noted, Marathon's submission was provided in the context of a public consultation process affecting public policy and public land (albeit controlled land). The very fact that the government decided to open the draft policy up to public consultation emphasises the public interest in the policy.

58. In my view there is a strong public interest in government decision making concerning the Arkaroola area being as open as possible. This enhances government accountability. I do not agree with Marathon's argument that the government should be able to keep from the public the submissions made by key stakeholders (who will often, as in this case, have a vested interest in the ultimate decision). The ramifications of this would lessen the accountability of the government's final decision - if the public is unaware of key factors taken into consideration, they can not make up their own minds as to whether the decision was the appropriate one. This goes both ways. That is, it is not only Marathon's submission that should be released if requested.

59. I agree that it will sometimes be appropriate, even in circumstances of public consultation, for some information supplied to the government to be withheld from the public, and I have concluded that some matter in Marathon's submission is exempt from disclosure. However, it is not appropriate to withhold the entire document - at the very least, the main arguments made to the government should be released.[11] I have

[11] I note Mr Parnell's phrase 'the significant, generic and in principal arguments'.

taken into consideration the fact that an officer of PIRSA agreed to accept the entire submission in confidence, and that Marathon relied upon this purported guarantee, but in my view this is outweighed by the need to disclose the majority of the document. I also understand that Seeking a Balance may no longer be proceeding as a government policy. However, it is clear that the government's policy and decision making regarding the Arkaroola area, including Marathon's interests in it, is still very much a live issue. Therefore, that Seeking a Balance itself may no longer be the preferred policy direction does not affect my decision.

60. In my view it would not, on balance, be contrary to the public interest to release Marathon's submission on Seeking a Balance with the matter referred to in paragraph 41 deleted.

Internal working documents

61. In my previous letter to PIRSA (and Marathon) I expressed reservations about the submission being classed an 'internal working document'. This might be different if, for example, the government had specifically engaged Marathon as a consultant to provide an expert report prior to making a decision, rather than invited submissions from the general public as occurred in the present case.

62. Marathon did not provide submissions to me specifically on clause 9. To the extent that it might be argued that Marathon's submission relates to an opinion or advice, or a consultation in the course of, or for the purpose of, the decision-making functions of the government, a minister or an agency, I am not satisfied that disclosure of the submission would be, on balance, contrary to the public interest as required by clause 9(1)(b).

Determination

63. Marathon's submission is an exempt document under section 20(1)(a) of the FOI Act as the matter referred to in paragraph 41 is exempt matter under clause 7(1)(c) of Schedule 1 to the FOI Act. The remaining matter is not however exempt matter under clauses 7, 9 or 13. In accordance with section 20(4), I consider it would be practicable to provide, and that Mr Parnell would want, a copy of the document from which exempt matter has been deleted.

64. In light of my reasoning above, I vary PIRSA's determination, pursuant to section 39(11) of the FOI Act.

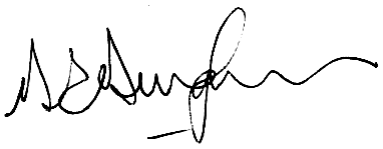
Right of Appeal

65. Any person aggrieved by my determination may appeal to the District Court of South Australia under section 40(2) of the FOI Act.

66. PIRSA may also appeal against my determination, but only on a question of law and only with the permission of the court, under section 40(1) of the FOI Act.

67. Under section 40(3) of the FOI Act, any such appeals should be commenced within 30 days after receiving notice of my determination; or in the case of a person who is not given notice of my determination, within 30 days after the date of my determination.

68. PIRSA should defer giving access to the redacted document for the appeal period. If no appeals are lodged, the redacted document should be given to Mr Parnell.



Richard Bingham
SA OMBUDSMAN

5 April 2011