

OFFICIAL



Determination

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

Applicant:	Jackson Family Investments Australia Pty Ltd
Agency:	Department for Energy and Mining
Ombudsman reference:	2020/05327
Agency reference:	F2020/000947
Ombudsman Determination:	The determination of the agency is varied.
Date of Ombudsman determination:	31 March 2021
Issues considered:	Unreasonableness (personal affairs) Adverse effect on business affairs
Exemption clauses relied upon:	Clause 6(1) Clause 7(1)(c)
Legislation considered:	<i>Freedom of Information Act 1991</i> <i>Mining Act 1972</i>

Terms of the original application:

The Mine Operations Plan for Private Mine 220 - Brooks Road, Bakers Gully owned by Mineral Holding Pty Ltd and operated by Clay & Mineral Says Pty Ltd.

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REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (**the FOI Act**) the applicant requested access from the agency to:

The Mine Operations Plan for Private Mine 220 - Brooks Road, Bakers Gully owned by Mineral Holding Pty Ltd and operated by Clay & Mineral Says Pty Ltd.

Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.

Jurisdiction

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

Revised provisional determination

4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 4 January 2021. I informed the parties that subject to receipt and consideration of submissions from the parties, I proposed to reverse the agency's determination.
5. I received responses from the agency and interested party. I did not receive any further submissions from the applicant.
6. I considered the submissions of the parties and issued a revised provisional determination on 16 March 2021. In my revised provisional determination I informed the parties that subject to receipt and consideration of any further submissions from the parties, I proposed to vary the agency's determination.
7. I noted in my revised provisional determination that any discussion of whether the document was exempt pursuant to clause 12(1) had become redundant.
8. In the agency's original and internal review determination, the agency sought to rely on section 73Q of the *Mining Act 1971* (**the Mining Act**) as a basis for claiming that the document is exempt pursuant to clause 12(1). My provisional determination indicated that I did not agree with the agency's determination and that I intended to reverse it.
9. The interested party also drew reference to section 73Q in support of his submissions in response to my provisional determination.
10. Effective as of 1 January 2021, section 73Q was deleted from the Mining Act. I note that according to the Act's legislative history, the section has been removed and not amended or substituted.
11. Under section 39(11) of the FOI Act, during the course of a review I may take into account circumstances existing at the time of the review.
12. Accordingly I have not included any discussion of the application of clause 12(1) of the FOI Act in this determination.

13. The interested party submitted that he was satisfied with my revised provisional determination. I have not received any further submissions from the agency or applicant.
14. Accordingly my views are the same as those expressed in my revised provisional determination.
15. I note that in my revised provisional determination, I made comments about the way in which the agency handled the application for access and its submissions in response to my provisional determination.
16. I consider it appropriate to include those comments as additional commentary in this determination. I have made these comments at paragraphs 79 to 90.

Relevant law

17. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
18. 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. The following clauses are relevant to this external review:

6—Documents affecting personal affairs

- (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).
- (2) A document is an exempt document if it contains allegations or suggestions of criminal or other improper conduct on the part of a person (living or dead) the truth of which has not been established by judicial process and the disclosure of which would be unreasonable.
- (3) A document is not an exempt document by virtue of subclause (1) or (2) merely because it contains information concerning the person by or on whose behalf an application for access to the document is made.
- (3a) A document is an exempt document if it contains matter—
 - (a) consisting of information concerning a person who is presently under the age of 18 years or suffering from mental illness, impairment or infirmity or concerning such a person's family or circumstances, or information of any kind furnished by a person who was under that age or suffering from mental illness, impairment or infirmity when the information was furnished; and
 - (b) the disclosure of which would be unreasonable having regard to the need to protect that person's welfare.

7—Documents affecting business affairs

- (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—

¹ *Freedom of Information Act 1991*, section 12.

- (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.
- (2) A document is not an exempt document by virtue of this clause merely because it contains matter concerning the business, professional, commercial or financial affairs of the agency or other person by or on whose behalf an application for access to the document is made.
- (3) A document is not an exempt document by virtue of this clause if it is a contract entered into by the Crown or an agency after the commencement of this subclause.

13—Documents containing confidential material

- (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.
 - (2) A document that is a contract entered into by the Crown or an agency after the commencement of this subclause is not an exempt document by virtue of subclause (1) unless—
 - (a) it contains matter the disclosure of which would, under a term of the contract, constitute a breach of the contract or found an action for breach of confidence; and
 - (b) that term of the contract has been approved by—
 - (i) in the case of a contract entered into by the Crown—a Minister; or
 - (ii) in the case of a contract entered into by a State Government agency—the responsible Minister for the agency; or
 - (iii) in the case of a contract entered into by an agency that is not a State Government agency—the agency.
19. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
20. 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

21. The agency identified one document within the scope of the application.
22. The agency initially determined the document was exempt in part pursuant to clauses 6(1) and 12(1).
23. The agency has since indicated that it no longer considers the document exempt, but that it may potentially be exempt pursuant to clauses 7 and 13 subject to consultation with the interested party.
24. The interested party has expressed his view that the document contains information which he considers is exempt pursuant to clauses 7 and 13.
25. Whilst the agency did not initially rely upon clauses 7 and 13, and has not explicitly stated that it considers them to be applicable, in *Department of the Premier and Cabinet v Redford* the District Court held that I have discretion to consider exemptions not relied upon by the agency.²
26. Accordingly I will treat the document in issue as if it has been claimed exempt in part pursuant to clauses 7 and 13.

Issues in this review

27. The issue for me to determine is whether the agency has justified its position to refuse access to the document in part, and whether I should confirm, vary or reverse the agency's determination.

Consideration**Clause 7 - Documents affecting business affairs**

28. The interested party has provided submissions indicating his view that certain parts of the document are exempt pursuant to clause 7. The interested party has not indicated which subclause of clause 7 he considers applicable, however on my viewing of the submissions and my consideration of the document, I consider clause 7(1)(c) is the most appropriate clause for consideration under the circumstances.
29. For a document to be exempt pursuant to clause 7(1)(c) each of the following criteria must apply:
 - the document contains information concerning the business, professional, commercial or financial affairs of any agency or any other person
 - the disclosure of that information 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
 - the disclosure of that information would, on balance, be contrary to the public interest.
30. The phrase 'business, professional, commercial or financial affairs' is not defined in the FOI Act. 'Business affairs' has been held to mean activities carried out with the view to make a profit, and not just affairs derived from or to do with business. The Queensland Information Commissioner has commented that:

² *Department of the Premier & Cabinet v Redford* (2005) 240 LSJS 171 [29].

For a matter to relate to 'business affairs' in the requisite sense, it should ordinarily, in my opinion, relate to the affairs of a business undertaking which is carried in an organised way (whether full time or only intermittent) with the purpose of obtaining profits or gains (whether or not they actually be obtained).³

31. The courts in Victoria have also held that for the 'business affairs' exemption to apply, the information at hand must relate to matters of business, commercial or financial nature and 'not merely be derived from a business or concerning it or have some connection with it'.⁴
32. I agree with this view in considering the meaning of 'business affairs' under clause 7(1)(c).
33. Based on my reading of the document and the submissions put forward by the interested party, who runs a mining operation for profit, I am satisfied that the document contains information concerning his business affairs.
34. The next criteria to determine is whether disclosure of that information 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.
35. I do not consider disclosure of the information would prejudice the future supply of such information to the agency, as the disclosure of such information is a requirement of operating a private mine.
36. However I do consider disclosure would have an adverse effect on the business affairs of the interested party.
37. The interested party has identified, with specificity, which parts of the document contain information that, if disclosed, would have an adverse effect on his business affairs. The interested party has also clearly identified what the anticipated adverse effect would be.
38. Given this, I am satisfied that the second element of clause 7(1)(c) has been established.
39. I now turn to whether disclosure of the information in the document would, on balance, be contrary to the public interest.
40. I consider the following factors appropriate to consider:

In favour of disclosure

- fulfilling the objects of the FOI Act, particularly the public interest in promoting openness and accountability of government agencies when dealing with commercial interests
- providing members of the public with information which may be of special interest to them
- that 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'.⁵

³ *Stewart and Department of Transport* (1993) 1 QAR 227, [103].

⁴ *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441; The President's view regarding the interpretation of 'business affairs' was upheld on appeal to the Full Court of the Supreme Court (*Accident Compensation Commission v Croom* [1991] 2 VR 322).

⁵ *Ipex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54, 80.

Contrary to disclosure

- the objections to disclosure raised by the interested party
 - the current ongoing commercial value of the information to the interested party
 - the potential effect on the ability of the agency to deal effectively in the context of a competitive market environment
 - assumptions of confidentiality on the part of interested party
41. In weighing up the factors, I consider that disclosure of some of the information indicated by the interested party would, on balance, be contrary to the public interest.
 42. In considering the above factors, I find the public interest related to the operation of the agency itself to be of limited application in this instance. Rather I consider the most heavily weighted factors are the ones related to the interested party's commercial interests, and the applicant's interest in the document.
 43. Based on my reading of the document, I understand its purpose is to ensure that private mine operators comply with legislative and regulatory requirements in conducting their mining business.
 44. Given this, I consider that where the document specifies the ways in which the private mine adheres to government regulations, the information should be released.
 45. On the other hand, the document also details specific business and commercial information of the private mine owner. This information is directly related to the interested party's commercial interest.
 46. As the plan has been approved, I consider it a reasonable assumption that the agency has approved the private mine owner as meeting the legislative and regulatory requirements, and the interested party has not raised objections to disclosure of the majority of the document.
 47. Where the objections have been raised, the interested party has specified with clarity what that information is and how it is directly related to his carrying on of his business.
 48. I consider that there is a public interest in allowing private mine operators to maintain some level of privacy in the operation of their business without fear that any and all information provided to the agency would be released without regard to its commercial value.
 49. I do not consider the airing of a private individual's commercial information, where it is not specifically linked to the functions of an agency, to the detriment of the private individual, to be in the public interest.
 50. Accordingly I agree that some of the information in the document is exempt pursuant to clause 7(1)(c).
 51. The information I concur is exempt pursuant to clause 7(1)(c) occurs on pages 6, 11, 13-19, 22, 26, 27 and 79. The applicant has identified specifically which information this is, and I have provided a copy of the specific details to the agency for identification purposes.
 52. The applicant has also stated his view that pages 90 to 119 are exempt in full pursuant to clause 7(1)(c).

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53. I disagree that pages 90 to 119 are exempt in their entirety. The interested party has provided details about the type of information the document contains which affects his business affairs.
 54. Under section 39(15) of the FOI Act I should avoid disclosure in my reasons any matter which the agency claims is exempt matter.
 55. Whilst the agency has changed its claim and no longer states the information is exempt, I consider it appropriate to treat the interested party's claim that the information is exempt as falling within the ambit of section 39(15).
 56. Accordingly I cannot reveal with specificity the information which I consider is or is not exempt.
 57. However, pages 90 to 119 relate to a specific topic which is set out in the title of the section. I consider that there is a public interest in disclosing the topic of this section.
 58. Where the information in this document does not directly relate to the reasons why the interested party has claimed the information is exempt, I consider the information should be disclosed.

Clause 13 - Documents containing confidential material

59. The third party submits that pages 126 to 168 should be exempt in full pursuant to clause 13.
60. In the third party's submission to my Office he made the following statement:

One of the rights that [Private Mine] owners have is the right to a partially confidential mine operations plan under 73 Q Mining Act 1971. The confidentiality has been granted to protect us from competition and the release of commercially sensitive information.
61. As discussed earlier in my determination, section 73Q of the Mining Act no longer applies.
62. However I am mindful that the operation of section 73Q of the Mining Act in the past may have led to an expectation of confidence when the interested party provided the document to the agency.
63. Before its removal, section 73Q of the Mining Act provided:

73Q - Registration of mine operation plans

 - (1) A mine operations plan must be registered on the Mining Register.
 - (2) However, a mine operations plan is not available for public inspection but the following must be provided to a person on application under this section:
 - (a) the name of the proprietor of the mine; and
 - (b) the location of the mine; and
 - (c) an extract showing the objectives and criteria applying as part of the plan.
64. Given the wording of the section, I do not consider it implied a quality of confidence.
65. To state that something is not available for public inspection is substantially different to an expectation of confidentiality.

66. Accordingly, I do not consider clause 13 applies to the document in issue.

Clause 6 - Documents affecting personal affairs

67. I note that whilst the interested party raised clause 13 specifically and referred to confidentiality, the interested party has raised issues which would fall more appropriately within the scope of clause 6(1).

68. With respect to pages 126 to 168, the interested party provided the following statement:

The reason is because this is private and personal information (Clause 13 FOI Act). Residential addresses, phone numbers and emails should remain private. Persons should be able to make comments without any fear that they will become public. People who have participated in the consultation regarding PM 220 have done so on the basis that have done so on the basis that their comments will be private.

69. Given the term 'private and personal information' used by the interested party, in my view it is appropriate to consider the application of clause 6(1).

70. For a document to be exempt pursuant to clause 6(1):

- it must contain information concerning the personal affairs of any person (not including the applicant); and
- the disclosure of that information would be unreasonable.

71. The term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act. Among other things, it provides that 'personal qualities or attributes' are a person's personal affairs. The term has also been held to involve 'matters of private concern to an individual'⁶ and the 'composite collection of activities personal to the individual concerned'.⁷

72. I accept that the residential addresses, phone numbers and email addresses of individuals should be redacted. I consider these to be matters of private concern.

73. However I do not agree that the commentary provided between pages 126 to 168 is exempt information. Having read the pages, it does not seem apparent that the information was obtained or sought with an explicit or implied indication that the commentary would remain private or confidential.

74. As the information relates to an opinion given in response to a consultation process, I do not consider that they are sufficiently linked to being the personal affairs of matters of private concern to the individuals in question.

75. I further note that certain parts of pages 126 to 168 of the document contains information which was provided by the applicant, and would also already be known to the applicant.

76. I do not consider any of the commentary found between pages 126 to 168 in and of itself can be described as relating to personal affairs. Out of an abundance of caution however I would agree that the names of the people who provided the commentary should be redacted to ensure the commentary is divorced from any possibility that it relates to an individual's personal affairs.

⁶ *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.

⁷ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

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77. On the basis of the above, I do not consider disclosure of the commentary contained in documents 126 to 168 would be unreasonable.
 78. Accordingly with the exception of names, residential addresses, phone numbers and email addresses, I do not consider pages 126 to 168 are exempt pursuant to clause 6(1).

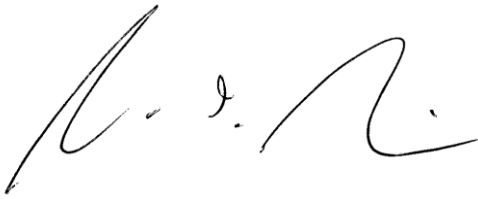
Comment

79. In response to my provisional determination proposing to reverse the agency's determination, the agency raised no objections and indicated that it would abide by any final determination issued.
80. However the agency indicated that the document may pertain to the business affairs of the interested party and made the following statement:

It is therefore possible the document (or parts thereof) could be an exempt document under Clauses 7 and/or 13 of Schedule 1 of the FOI Act. If that is correct, then it may be necessary for the mine owner to be consulted prior to a proposed release of the document under the FOI Act.
81. The agency provided a copy of my provisional determination to the interested party, and suggested that my Legal Officer should contact the interested party to ascertain his views.
82. I note that under section 48 of the FOI Act, the onus is on the agency to justify its determination.
83. Given this, I consider the above statement and simple provision of my provisional determination to the interested party was unhelpful in deciding whether to confirm, vary or reverse the agency's determination.
84. To suggest that it is *possible* that a document *could* be exempt with no further explanation is hardly a determinative view, let alone a justified one.
85. If I were to determine this external review based solely on the information and submissions made to me by the agency, there is nothing before me which would lead me to conclude that the document is exempt in full or in part.
86. I note that my Legal Officer contacted the interested party and received submissions from him. The interested party's submissions formed the sole basis of my consideration in my revised provisional determination.
87. I received no further input from the agency since issuing my revised provisional determination and the interested party's submissions have remained the sole basis upon which I have made my determination.
88. In viewing the agency's original determination, its internal review determination and its submissions in response to this external review, I note that there is a concerning lack of engagement in how the agency has approached its obligations under the FOI Act.
89. I consider it unreasonable that the agency abdicated its onus under section 48 entirely to the interested party.
90. The interested party should not have been placed in a position where he, as a lay person, bore responsibility for providing the only substantive submissions in the course of this external review.

Determination

91. In light of my views above, I vary the agency's determination in the following manner:
- pages 6, 11, 13-19, 22, 26, 27 and 79 are to be released in part, in accordance with the interested party's submissions
 - pages 90 to 119 are to be released in part to the extent discussed at paragraphs 53 to 58
 - pages 126 to 168 are to be released in part to the extent that names, residential addresses, phone numbers and email addresses should be redacted
 - the remainder of the document is to be released in full.



Wayne Lines
SA OMBUDSMAN

31 March 2021

APPENDIX

Procedural steps

Date	Event
31 August 2020	The agency received the FOI application dated 31 August 2020.
9 September 2020	The agency determined the application.
6 October 2020	The agency received the internal review application dated 6 October 2020.
21 October 2020	The agency confirmed the determination.
29 October 2020	The Ombudsman received the applicant's request for external review dated 29 October 2020.
29 October 2020	The Ombudsman advised the agency of the external review and requested submissions and documentation.
18 November 2020	The agency provided the Ombudsman with its submissions and documentation.
4 January 2021	The Ombudsman issued his provisional determination and invited submissions from the parties.
22 February 2021	The Ombudsman received submissions from the interested party.
16 March 2021	The Ombudsman issued his revised provisional determination and invited submissions from the parties.