



Decision and Reasons for Decision

Citation:	<i>Straker and Sunshine Coast Regional Council; NBN Co Limited (Third Party)</i> [2016] QICmr 44 (28 October 2016)
Application Number:	312519
Applicant:	Straker
Respondent:	Sunshine Coast Regional Council
Third Party:	NBN Co Limited ACN 136 533 741
Decision Date:	28 October 2016
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - EXEMPT INFORMATION - BREACH OF CONFIDENCE - application for information held by Council about the National Broadband Network - general rollout information and negotiation communications about site selection for infrastructure development and terms of use of Council land - whether disclosure would found an action for breach of confidence - whether information is exempt under schedule 3, section 8 of the <i>Right to Information Act 2009</i> (Qld) - whether exception for deliberative process information applies - application of <i>Fairfax Doctrine</i> - whether disclosure would cause detriment to the public interest - whether access may be refused under sections 47(3)(a) of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - CONTRARY TO PUBLIC INTEREST INFORMATION - application for information held by Council about the National Broadband Network - general rollout information and negotiation communications about site selection for infrastructure development and terms of use of Council land - accountability and transparency - informed public participation in local planning processes - prejudice to business and commercial affairs of entities - prejudice to deliberative process of Council - prejudice to future supply of information to Council - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)</p>

REASONS FOR DECISION

Summary

1. The applicant applied to the Sunshine Coast Regional Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to:¹
 - documents provided to NBN Co Limited (**NBN Co**) (or its representatives) by Council relating to the NBN Co *'local government checklist'*;² and
 - correspondence with NBN Co relating to NBN Co's use of towers *'for the provision of NBN services'*.
2. The applicant clarified and narrowed the scope of his application with Council, specifically focusing on documents that specifically relate to the *'Maleny area'*.³ The applicant excluded documents relating to previous planning schemes, current and finalised development applications and information relating to fibre/copper cable outside the Maleny area.
3. Council located relevant documents and consulted with NBN Co about disclosure under section 37 of the RTI Act.⁴ NBN Co objected to disclosure of certain information, primarily on the basis that disclosure would found an action for breach of confidence, or alternatively, on the basis that disclosure would, on balance, be contrary to the public interest.⁵ Council then decided⁶ to:
 - grant access to 13 full pages
 - refuse access to 28 part pages (including the information that was the subject of NBN Co's objections) on the basis that disclosure would, on balance, be contrary to the public interest;⁷ and
 - refuse access to other documents because they were nonexistent.⁸
4. On internal review,⁹ Council affirmed its decision in relation to located pages,¹⁰ but did not decide that any documents were nonexistent.¹¹ The applicant then applied¹² to the Office of the Information Commissioner (**OIC**) for external review of the internal review decision, seeking full disclosure of the refused information and raising extensive public interest arguments favouring disclosure.
5. During the external review, due to sufficiency of search concerns raised by the applicant, Council conducted further searches and located 248 additional pages (**Additional**

¹ Access application dated 3 February 2015, received by Council on 6 February 2015.

² A list of information NBN Co and its contractors/agents may need to assist the NBN planning process, eg. zoning and overlay maps, development application requirements, information on whether there is any opportunity for co-development and co-investment with NBN Co works. See <<http://www2.nbnco.com.au/develop-or-plan-with-the-nbn/local-government-planning/local-government-checklist.html>> accessed on 20 October 2016.

³ Including information relating to fibre/copper cable in the Maleny Area. In an email to Council dated 19 February 2015, the applicant defined the *'Maleny area'* as including *'Cambroon, Conondale, Crystal Waters, Witta, Reesville, Central Maleny, North Maleny, South Maleny, Mary Cairncross/ Mountain View Road/ Stanley River Road area and Wottha'*.

⁴ By letter from Council to NBN Co dated 27 March 2015.

⁵ By letter to Council dated 17 April 2015.

⁶ Decision dated 21 April 2015. Council's decision indicated 12 pages were to be released in full and 29 pages in part. This appears to be an administrative/typographical error. OIC has confirmed that 13 pages were released in full and 28 in part.

⁷ Council's decision dated 21 April 2015 indicates that it decided to release 12 pages in full and 29 pages in part. This one page discrepancy appears to be an error.

⁸ Under section 47(3)(e) and section 52 of the RTI Act.

⁹ The applicant applied to Council for internal review on 19 May 2015.

¹⁰ Internal review decision dated 17 June 2015.

¹¹ In the internal review decision, Council did not specifically address the issue of nonexistent documents, but noted that it was *'satisfied that there was a sufficiency of search carried out with the original decision so as to identify all relevant documents to [the applicant's] application'*.

¹² On 11 July 2015.

Documents) that it considered may fall within the scope of the access application.¹³ Council advised OIC that it did not object to disclosure of the Additional Documents,¹⁴ subject to consultation with relevant third parties, including NBN Co.

6. OIC considered that NBN Co may be concerned about disclosure of the Additional Documents and therefore, invited it to participate in the review.¹⁵ In response, NBN Co:
 - did not object to certain information in the Additional Documents being released, and this was released to the applicant during the external review; and
 - raised objections about disclosure of the remaining information in the Additional Documents on the basis that disclosure would found an action for breach of confidence, and/or would, on balance, be contrary to the public interest.¹⁶
7. For the reasons set out below, I vary Council's internal review decision and find that:
 - access to certain information¹⁷ may not be refused under the RTI Act, as it is not exempt information and nor would its disclosure, on balance, be contrary to the public interest
 - access to certain information¹⁸ may be refused¹⁹ on the basis that it is exempt information as its disclosure would found an action for breach of confidence;²⁰ and
 - access to information on one page²¹ may be refused on the basis that its disclosure would, on balance, be contrary to the public interest.²²

Background

8. Significant procedural steps taken in processing the application and the external review are set out in the Appendix.
9. As discussed above, the terms of the access application (as narrowed with Council) relate particularly to the rollout of the National Broadband Network (**NBN**) in the Maleny area.
10. The NBN is a new national telecommunications network for the high speed carriage of communications.²³ NBN Co describes the NBN network as the *'most comprehensive and largest infrastructure development in Australia's history, using world class technology to provide access to fast broadband to every home and business in Australia'*.²⁴ The NBN is a *'national, wholesale only, open-access broadband network'*.²⁵ The technology used to deliver the NBN has been a matter of significant public debate, but for current purposes it is sufficient to note that the NBN network uses a mix of technologies depending on geographical location. These technologies include fibre optic cable, hybrid fibre-coaxial cable, fixed wireless towers and satellites.²⁶ In relation to the

¹³ Council's letter to OIC dated 8 April 2016.

¹⁴ With the exception of certain personal information, to which the applicant does not seek access.

¹⁵ By letter from OIC to NBN Co dated 29 April 2016, and confirmed in a telephone conversation on 7 June 2016.

¹⁶ By letter from NBN Co to OIC dated 27 May 2016.

¹⁷ The *'General Rollout Information'* as defined under the *'Information in issue'* heading on page 5 below.

¹⁸ On pages 19-23 of the information initially located by Council in response to the access application (including duplicates).

¹⁹ Under section 47(3)(a) of the RTI Act.

²⁰ Under section 48 and schedule 3, section 8 of the RTI Act. Due to the specific circumstances of this case, I have also found that disclosure of this information would, on balance be contrary to the public interest and therefore, access may also be refused under section 47(3)(b) of the RTI Act. See paragraphs 125 and 132 of these reasons for decision.

²¹ Part of the email on page 36 of the Additional Documents.

²² Under section 47(3)(b) of the RTI Act.

²³ Section 5 of the *National Broadband Network Companies Act 2011* (Cth).

²⁴ NBN Co, *Corporate Plan 2017*, page 8.

²⁵ NBN Co, *Corporate Plan 2017*, page 30.

²⁶ See NBN Co, *What is the nbn™ Multi Technology Mix?* at <<http://www.nbnco.com.au/blog/the-nbn-project/what-is-the-nbn-multi-technology-mix.html>>, accessed on 21 October 2016.

locality of concern to the applicant – the Maleny area – it is currently proposed that certain parts of this area are to be serviced by NBN fixed wireless towers.²⁷

11. The applicant is involved with a group that opposes fixed wireless towers in the Maleny hinterlands.²⁸ It is clear both from the information released during the course of the external review, and from the applicant's submissions to OIC, that there is a particular level of community sensitivity in Maleny concerning fixed wireless towers. The applicant's concerns centre around the potential for radio-communications transmitters (including NBN towers) to impact on local and regional scenic amenity, the health and welfare of the community, and property values.
12. Given NBN Co's role as a participant in this external review and the nature of the information in issue, it is also relevant to briefly set out some background concerning the company. NBN Co's objects are to 'roll-out, operate and maintain' the NBN²⁹ and it:
 - is wholly-owned by the Commonwealth of Australia
 - is a 'Government Business Enterprise' incorporated under the *Corporations Act 2001* (Cth)
 - has numerous reporting obligations to its shareholding Ministers under the *Public Governance, Performance and Accountability Act 2013* (Cth), the *Public Governance, Performance and Accountability Rule 2014* (Cth) and the *Commonwealth Government Business Enterprise Governance and Oversight Guidelines* (August 2015); and
 - is subject to a variety of other Commonwealth legislation, including legislation concerning telecommunications – most relevantly the *National Broadband Companies Act 2011* (Cth) – which provides the regulatory framework for NBN Co.
13. Certain information in issue in this review concerns the selection of a site for one specific fixed wireless tower in the Maleny area. The relevant background and current status of this process is that NBN Co has selected a preferred (Council owned) site for the tower, and this selection is public knowledge.³⁰ Council has confirmed to OIC that final site selection is yet to be negotiated between Council and NBN Co. Relevantly, Council has not yet received or decided on any development application from NBN Co.³¹

Reviewable decision

14. The decision under review is Council's internal review decision dated 17 June 2015 to refuse access to information³² on the basis that disclosure would, on balance, be contrary to the public interest.³³

Evidence considered

15. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).

²⁷ See NBN Co's Three Year Construction Plan at <<http://www.nbnco.com.au/learn-about-the-nbn/three-year-construction-plan.html>> (*Three Year Construction Plan*), accessed on 21 October 2016.

²⁸ While the access application names Mr Jim Straker as the applicant, his submissions and application material confirm that he is part of a local community action group known as *Towerless NBN for the Maleny Hinterlands* and that he applied for access to the information to use in preparing the group's objections to any development applications lodged by NBN Co in the Maleny area.

²⁹ Clause 4.1.1 of NBN Co's Constitution.

³⁰ This was confirmed by NBN Co by email to OIC dated 9 December 2015.

³¹ The information before OIC indicates that NBN Co proposes to install a new freestanding tower in Maleny (as opposed to co-locating on existing structures). This is not classified as a 'low impact facility' under the *Telecommunications (Low-impact Facilities) Determination 1997* (Cth) and accordingly, installation is subject to state and local planning approval processes.

³² In 28 pages.

³³ Under section 47(3)(b) of the RTI Act.

Information in issue

16. The information remaining in issue in this review can be categorised as:
- information and communications concerning facilitation of the rollout of the NBN in the relevant area (**General Rollout Information**);³⁴ and
 - potential sites for a fixed wireless NBN tower in Maleny (and comments and preferences in relation to these sites)³⁵ and part of one email³⁶ concerning the terms of using Council land for fixed wireless sites (**Negotiation Information**).
17. The applicant narrowed the scope of his application with Council³⁷ and again, on external review.³⁸ In addition to excluding information specifically relating to areas other than the 'Maleny area', the applicant also does not seek access to:
- names and contact details redacted from the initial documents located by Council³⁹
 - information relating to current and finalised development applications
 - planning information relating to previous planning schemes⁴⁰
 - information relating to fibre/copper cable outside the Maleny area⁴¹
 - the following personal and administrative information in the Additional Documents:
 - names and personal contact details (eg. mobile phone numbers) of Council staff
 - names and titles of NBN Co staff, contact details, signature blocks on emails and signatures
 - third party contractor details and identifying information
 - names and titles of meeting attendees and personal reasons for non-attendance at meetings
 - certain administrative information about the timing of meetings; and
 - leave information and other personal comments and information.
18. Accordingly, the information listed above does not form part of the information in issue in this review and therefore, is not addressed in these reasons for decision.

Issues for determination

19. The issues for determination in this review are:
- OIC's jurisdiction to consider access to documents originating with NBN Co
 - whether access to the General Rollout Information may be refused under the RTI Act on the basis that it is exempt information, or on the basis that disclosure is, on balance, contrary to the public interest; and
 - whether access to the Negotiation Information may be refused under the RTI Act on the basis that it is exempt information, or on the basis that disclosure is, on balance, contrary to the public interest.

³⁴ This information appears in the following Additional Documents: parts of emails (on pages 2, 7, 9, 10, 11, 21-24, 33-34, 66-69, 85, 88-89, 164, 166, 168-169, 171, 177, 178, 181, 188, 198, 241-244), a two way confidentiality and licence agreement (on pages 26-32), parts of NBN Co's presentation materials (on pages 49, 61, 94, 102, 110, 116, 125, 129, 135, 142, 148, 156, 216-221, 223, 228 and 231-237), a briefing paper (on page 210) and part of a communications plan (on page 247).

³⁵ On pages 19-23 of the information initially located by Council in response to the access application (including duplicates).

³⁶ Part of the email on page 36 of the Additional Documents.

³⁷ By email to Council dated 19 February 2015.

³⁸ In the external review application dated 11 July 2015 the applicant noted that he did not seek names and contact details, and this was confirmed in a letter to him from OIC dated 16 July 2016. In relation to the Additional Documents, the applicant narrowed the scope of the application in a telephone conversation with OIC on 2 June 2016 (OIC later confirmed this in an email to the applicant on 3 June 2016).

³⁹ In Council's internal review decision dated 17 June 2015, this was identified as 'Category A' information.

⁴⁰ However, the applicant expressly seeks access to information relating to procedures under the **current** planning scheme.

⁴¹ However, the applicant expressly seeks access to information relating to fibre/copper cable **in the Maleny area**.

20. In the circumstances of this review, there is a practical onus on the third party, NBN Co to establish that a decision not to disclose the information in issue, as described at paragraph 16 above, is justified.⁴²
21. On external review, the applicant raised concerns as to the sufficiency of Council's searches.⁴³ In response, OIC asked Council to conduct further searches,⁴⁴ and Council located the Additional Documents. This process satisfied the applicant's concerns regarding the sufficiency of Council's searches,⁴⁵ and accordingly, this is not an issue for determination in this external review.

Jurisdiction

22. In its submissions to Council and to OIC,⁴⁶ NBN Co has raised a jurisdictional issue concerning the application of the *Freedom of Information Act 1982* (Cth) (**Cth FOI Act**). While NBN Co appears to recognise that this decision is required to be made under the RTI Act,⁴⁷ it also contends that:
- NBN Co is exempt from the operation of the Cth FOI Act in relation to documents in respect of its commercial activities⁴⁸ (**Cth Carve-out**)
 - the Cth Carve-out is relevant to NBN Co's arguments concerning prejudice to its commercial affairs and prejudice to intergovernmental relations; and
 - if the documents were released under the Queensland RTI Act despite the existence of the Cth Carve-out, that this may 'raise potential inconsistency issues, per s 109 of the Australian Constitution'.
23. I have considered NBN Co's submissions and I acknowledge that when a request is made to NBN Co for information under the Cth FOI Act,⁴⁹ it is necessary to consider the application of the Cth Carve-out. However, in this case, the access application was made to Council under the Queensland RTI Act, a separate information access scheme. Therefore, that is the applicable information access legislation for the purpose of this external review.
24. Section 23 of the RTI Act creates a legally enforceable right for any person to access 'documents of an agency'. Section 12 of the RTI Act relevantly defines 'document of an agency' as follows:

*...a document, other than a document to which this Act does not apply, in the possession or under the control of the agency whether brought into existence **or received in the agency**, and includes –*

(a) a document to which the agency is entitled to access;

⁴² Section 87 of the RTI Act. While the reviewable decision is not a 'disclosure decision', the respondent agency, Council, does not object to the disclosure of the General Rollout Information. As a result, the proper contradictor to the external review application is the third party objecting to disclosure of the information, i.e. NBN Co. A similar approach was recently taken in *Sunshine Coast Environment Council Inc and Department of National Parks, Sport and Racing; Springborg MP* (Third Party) [2016] QICmr 10 (4 March 2016), see [18] and the cases cited therein.

⁴³ Applicant's letter to OIC dated 10 February 2016.

⁴⁴ By letter from OIC to Council dated 26 February 2016.

⁴⁵ OIC's letter to the applicant dated 17 June 2016 noted that Council had located the Additional Documents and that OIC would proceed on the basis that this satisfied the applicant's concerns regarding the sufficiency of Council's searches. The applicant did not raise any further concerns in relation to this matter during the course of the external review.

⁴⁶ Submissions to Council dated 17 April 2015 and to OIC dated 27 May 2016.

⁴⁷ In NBN Co's submissions dated 27 May 2016 it 'acknowledges that the OIC must make its decision under the RTI Act'.

⁴⁸ I note that NBN Co is a 'prescribed authority' and is not entirely exempt from the Cth FOI Act. Rather, under section 7(2) and schedule 2, Part II of the Cth FOI Act, NBN Co is exempt from the operation of the Cth FOI Act in relation to documents in respect of its 'commercial activities'. 'Commercial activities' is relevantly defined in section 7(3A) of the Cth FOI Act as activities carried on by NBN Co on a commercial basis or activities carried on by NBN Co, that may reasonably be expected in the foreseeable future to be carried on by NBN Co on a commercial basis.

⁴⁹ Under section 15 of the Cth FOI Act.

(b) a document in the possession, or under the control, of an officer of the agency in the officer's official capacity.

(Emphasis added)

25. Council is an 'agency' under the RTI Act⁵⁰ and the relevant documents are in its possession. Whether the documents were brought into existence by Council, or received by Council from NBN Co (or its representatives) or other third parties, I am satisfied that they are 'documents of an agency' for the purposes of the RTI Act. Accordingly, the applicant has a right to be given access to these documents, subject to the other provisions of the RTI Act, including the grounds for refusal of access. I am satisfied that in deciding an application under the RTI Act, a decision maker has no jurisdiction to apply the Cth Carve-out or other grounds for refusing access set out in the Cth FOI Act.
26. Certain documents and entities are expressly excluded from the Queensland RTI regime⁵¹ and as such, are listed in schedules 1 and 2 of the RTI Act.⁵² Neither schedule lists NBN Co documents or the entity NBN Co. Had Parliament intended to specifically exclude NBN Co documents or the entity NBN Co from the scope of the Queensland RTI Act, I am satisfied that schedules 1 and/or 2 would in some way, reflect this.
27. Below, I have also considered the related issue of whether disclosure is '*prohibited by an Act*'⁵³ and NBN Co's arguments concerning prejudice to its commercial affairs and intergovernmental relations⁵⁴ in applying relevant public interest nondisclosure factors. In relation to NBN Co's submission concerning '*inconsistency issues*' under section 109 of the Constitution, I do not have any jurisdiction to decide on Constitutional matters.⁵⁵
28. Accordingly, I am satisfied that:
- the documents in issue in this review are '*documents of an agency*' to which the RTI Act applies; and
 - NBN Co documents, when in the possession or under the control of a Queensland government agency, are not excluded from the scope of the RTI Act.

General Rollout Information

29. As noted above, the General Rollout Information consists of information and communications concerning facilitation of the rollout of the NBN in the Maleny area. Broadly speaking, it consists of:
- parts of emails exchanged (i) between NBN Co (and its representatives) and Council, (ii) between Council and third parties and (iii) internally within Council
 - parts of NBN Co's materials used for presentations to Council about the rollout
 - a briefing note and part of a '*communications plan*'; and

⁵⁰ Under section 14 of the RTI Act, an 'agency' relevantly includes a local government.

⁵¹ By sections 11, 12, 14(2) and 17 and schedules 1 and 2 of the RTI Act.

⁵² However, documents created by the entities listed in schedule 2 will be subject to the RTI Act if they are in the possession or control of a Queensland government agency (under section 14(1) of the RTI Act). See analysis in *Seven Network (Operations) Limited and Department of Justice and Attorney-General; Carmody (Third Party)* [2016] QICmr 22 (27 June 2016) at [73] to [79].

⁵³ This is listed in schedule 4, part 3, item 22 of the RTI Act as a factor favouring nondisclosure in the public interest. See paragraphs 98 to 100 below.

⁵⁴ Paragraphs 80 to 92 and 93 to 97 (in relation to the General Rollout Information) and paragraphs 140 to 144 and 146 to 147 (in relation to Negotiation Information).

⁵⁵ Section 109 of the *Commonwealth of Australia Constitution Act* states that '*when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid*'. While I do not have jurisdiction to make findings concerning constitutional validity, by way of observation I note that the Cth FOI Act and the Qld RTI Act establish two separate information access regimes. The Cth FOI Act does not apply to access applications made to Queensland government agencies, and does not *prohibit* the disclosure of the information in issue in this review. See analysis of the '*prohibited by an Act*' nondisclosure factor at paragraphs 98 to 100 below.

- a 'two way confidentiality and licence agreement' entered into in October 2012 between Council and NBN Co (**Confidentiality Agreement**).⁵⁶

30. NBN Co claims that all of the General Rollout Information is exempt under schedule 3, section 8 of the RTI Act because its disclosure would found an action for breach of confidence. In the alternative, it also claims that disclosure would, on balance, be contrary to the public interest. The law and my findings in relation to both of these matters are set out below.

Relevant law – breach of confidence

31. The RTI Act is administered with a pro-disclosure bias meaning that access should be given to a document unless giving access would, on balance, be contrary to the public interest.⁵⁷ The RTI Act also sets out certain grounds on which access to information may be refused.⁵⁸ It is Parliament's intention that these grounds are to be interpreted narrowly.⁵⁹ Relevantly, access may be refused to exempt information.⁶⁰
32. Information will be exempt if its disclosure would found an action for breach of confidence (**Breach of Confidence Exemption**).⁶¹ It is well-settled that the Breach of Confidence Exemption refers to an action based in equity for breach of an *equitable obligation* of confidence.⁶² Where a contractual term requiring confidentiality exists and disclosure of information gives rise to an action for breach of contract, this in itself, is not sufficient to enliven the exemption, but will form part of the factual matrix relating to the circumstances of communication.
33. The Breach of Confidence Exemption must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the agency not to disclose relevant information.⁶³
34. For this exemption to apply, five cumulative elements must be established:⁶⁴
- a) information must be able to be specifically identified⁶⁵
 - b) information must have the necessary quality of confidence and will not extend to information that is generally known, useless or trivial⁶⁶
 - c) circumstances of the communication must create an equitable obligation of confidence⁶⁷

⁵⁶ The Confidentiality Agreement was attached to correspondence with NBN Co and relates to NBN Co's use of towers for provision of NBN services, amongst other things. In addition to forming part of the General Rollout Information, the terms of the Confidentiality Agreement are relevant in considering the breach of confidence exemption and certain nondisclosure factors.

⁵⁷ Section 44(1) of the RTI Act.

⁵⁸ Section 47(3) of the RTI Act.

⁵⁹ Section 47(2)(a) of the RTI Act.

⁶⁰ Sections 47(3)(a) and 48 and schedule 3 of the RTI Act.

⁶¹ Section 48 and schedule 3, section 8 of the RTI Act.

⁶² See *TSO08G and Department of Health* (Unreported, Queensland Information Commissioner, 13 December 2011) at [12] (**TSO08G**), citing *Callejo and Department of Immigration and Citizenship* [2010] AATA 244 (**Callejo**) at [163] to [166].

⁶³ *B and Brisbane North Regional Health Authority* [1994] QICmr 1 (**B and BNRHA**), a decision of the Information Commissioner analysing the equivalent exemption in the repealed *Freedom of Information Act 1992* (Qld) at [44].

⁶⁴ See *B and BNRHA* at [60] to [118]. The criteria stated in *B and BNRHA* have been consistently applied in the context of the RTI Act, see *TSO08G* at [13] and more recently in *Edmestone and Blackall-Tambo Regional Council* [2016] QICmr 12 (15 April 2016) at [14], *Australian Workers Union and Queensland Treasury; Ardent Leisure Limited (Third Party)* [2016] QICmr 27 (28 July 2016) at [16], *Queensland Newspapers and Department of Justice and Attorney General; Carmody (Third Party)* [2016] QICmr 24 (27 June 2016) at [120] and *Glass Media Pty Ltd and Department of the Premier and Cabinet; Screen Queensland Pty Ltd (Third Party); The Walt Disney Company (Australia) Pty Ltd (Fourth Party)* [2016] QICmr 30 (18 August 2016) (**Glass Media**) at [38].

⁶⁵ *B and BNRHA* at [60] to [63].

⁶⁶ *B and BNRHA* at [64].

⁶⁷ *B and BNRHA* at [76].

- d) disclosure to the access applicant must constitute an unauthorised use of the confidential information;⁶⁸ and
- e) disclosure would result in detriment to the party claiming confidentiality.⁶⁹

35. I have considered these elements in relation to the General Rollout Information below.

Findings

36. As noted above, there is a Confidentiality Agreement in place between Council and NBN Co. While I am unable to set out the terms of the agreement here,⁷⁰ it is sufficient to note that under this agreement, Council is bound by a term requiring confidentiality that I am satisfied only applies to *some* of the General Rollout Information. As explained above, the existence of this agreement alone is insufficient to enliven the breach of confidence exemption. While it is relevant to consider within the context of element (c), even where a contractual term requiring confidentiality exists it remains necessary to consider all five elements identified above to determine whether disclosure would found an action based in equity for breach of confidence.

37. In this case, I do not consider that element (e) is met in relation to **any** of the General Rollout Information.⁷¹ I also consider there are some difficulties in applying elements (b) and (c) to some of the General Rollout Information, for the reasons set out below.⁷²

(b) Quality of confidence

38. To establish element (b) the key inquiry is whether the subject information possesses a sufficient degree of secrecy for it to be the subject of a confidence.⁷³ The passing of time may reduce the secrecy of information and, particularly in the case of government information, may reduce the information to historical facts or even trivia.⁷⁴ Further, if information enters the public domain, or becomes public knowledge, it will no longer have the necessary quality of confidence.

39. In the case of the General Rollout Information, NBN Co objects to the release of certain information that I am satisfied is now in the public domain, including:⁷⁵

- a summary of an NBN Co public announcement
- community engagement and consultations that have taken place
- construction/development that has proceeded; and
- graphics and information that were previously included in public documents.⁷⁶

40. Further, I find that some of the information – particularly subject lines of emails and administrative information about meetings – is trivial.⁷⁷ While I accept that disclosure of these details may, at the time, have indirectly revealed that NBN Co's fixed wireless service was to be rolled out in the Sunshine Coast area (and when this was likely to

⁶⁸ *B and BNRHA* at [103] to [106].

⁶⁹ *B and BNRHA* at [111] citing *Attorney-General v Guardian Newspapers (No. 2)* [1990] 1 AC 109 (Lord Keith of Kinkel at 256).

⁷⁰ As the Confidentiality Agreement forms part of the General Rollout Information and is claimed by NBN Co to be exempt or contrary to the public interest to disclose. See section 108(3) of the RTI Act.

⁷¹ See paragraphs 50 to 65 below.

⁷² Elements (a) and (d) are readily established and are therefore, not in contention in relation to the General Rollout Information.

⁷³ *B and BNRHA* at [71].

⁷⁴ *B and BNRHA* at page 24.

⁷⁵ This information appears on pages 85, 94, 125, 129, 135, 217, 218, 232, 233 and 237 of the Additional Documents.

⁷⁶ For example, NBN Co objects to the release of a graphic and a heading on pages 94, 129 and 135 of the Additional Documents which have previously been included (with slightly amended formatting) in the 2011/2012 Commonwealth Budget. See <http://www.budget.gov.au/2011-12/content/glossy/regional/html/regional_overview_15.htm>, accessed 21 October 2016.

⁷⁷ Subject lines of emails on pages 21-23, 33-34, 66, 68, 164, 168-169, 177 and 241-244 of the Additional Documents and administrative information about meetings appearing on pages 66-67, 69, 164 and 168-169 of the Additional Documents.

occur), this information is now in the public domain. NBN Co has published such information through media releases, advertisements and its three year construction plan.⁷⁸

41. NBN Co contends that *'although certain information within the [Information in Issue] may be in the public domain, other information is secret and, it is compiled and utilised by [NBN Co] in a way such that the end product does have the requisite degree of secrecy'*.⁷⁹ While it is true that secrecy may attach to the way public information is utilised – for example, a customer list which compiles information from various publicly available trade directories⁸⁰ – I have reviewed the General Rollout Information and I cannot accept that this is the case here.
42. Accordingly, for the above reasons, I consider there is significant difficulty in satisfying element (b) in relation to General Rollout Information to the extent that it is already in the public domain or as I have found, trivial in nature.

(c) Circumstances of the communication

43. To establish element (c), I must be satisfied that the information was communicated and received on the basis of a mutual understanding of confidence. The understanding must have existed at the time of the communication and may be express or implied.⁸¹ This is usually the most difficult requirement to satisfy and requires that the *'recipient should be fixed with an enforceable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it.'*⁸²
44. The Information Commissioner has previously indicated that the relevant circumstances to consider in determining element (c) include, but are not limited to, the:
- nature of the relationship between the parties
 - nature and sensitivity of the information
 - purpose/s for which the information was communicated
 - nature and extent of any detriment to the interests of the information-supplier that would follow from an unauthorised disclosure of the information; and
 - circumstances relating to the communication.⁸³
45. After considering the above, I am prepared to accept that *some* of the General Rollout Information was communicated from NBN Co to Council on the basis of a mutual understanding of confidence. While generally, it is not information of particular sensitivity, some of the information was subject to the Confidentiality Agreement and concerns details of the rollout that NBN Co would not ordinarily release publicly.⁸⁴ This demonstrates an intention of the parties that this information was communicated and received on the basis of a mutual understanding of confidence.

⁷⁸ NBN Co issued a media release on 26 February 2013 titled *'Parts of Gympie and the Sunshine Coast regions to receive high-speed NBN fixed wireless'*. It also issued an advertorial titled *'High-speed National Broadband Network fixed wireless for Sunshine Coast local government area'*. Both documents indicate that NBN Co works with local councils as part of the rollout process. NBN Co's current three-year construction plan also lists the anticipated technology for *'Maleny and surrounds'* as *'fixed wireless'* and the estimated rollout date as 2016. See <http://www.nbnco.com.au/learn-about-the-nbn/three-year-construction-plan.html>, accessed on 21 October 2016.

⁷⁹ Submissions to OIC dated 27 May 2016.

⁸⁰ *B and BNRHA* at page 24.

⁸¹ *B and BNRHA* at [90].

⁸² *B and BNRHA* at [76].

⁸³ *B and BNRHA* at [84].

⁸⁴ In this regard, I note NBN Co's submissions dated 27 May 2016 concerning potential brand damage and frustration in the market caused by disclosure of estimated rollout dates. While I acknowledge that there may be some reputational advantage for NBN Co in keeping some rollout information secret until its predetermined announcement date, I do not consider that any of the General Rollout Information is so sensitive as to give rise to a presumption of confidence.

46. I acknowledge NBN Co's particular concerns about disclosure of the Confidentiality Agreement. In submissions to OIC, NBN Co contends that the Confidentiality Agreement falls 'squarely within the meaning of "Confidential Information" in clause 1.1 of that agreement'.⁸⁵ Having considered the terms of the Confidentiality Agreement, I do not consider that this is as uncontentious as NBN Co's submits. However, I accept it is arguable that the Confidentiality Agreement covers itself. While I do not consider that it is particularly sensitive in nature – it appears to reflect a standard agreement of this nature and contains many 'boilerplate' terms – I am prepared to accept that it was communicated and received on the basis of a mutual understanding of confidence.
47. However, to the extent that the information is **not** covered by the Confidentiality Agreement,⁸⁶ I am not satisfied that there is any evidence of a mutual understanding of confidence. I acknowledge the use of the term '*confidential*' in a number of the emails between NBN Co and Council, but having considered the context of the relevant information, I consider that this was intended to flag the temporary secrecy of the information prior to the media announcement of the rollout in the relevant area. It does not point to any ongoing obligation of confidence on Council.⁸⁷ As discussed at paragraph 40 above, the relevant announcement has long since been made. Accordingly, even where the relevant emails are marked as '*confidential*', having considered the nature of the information and the circumstances under which it was communicated, I do not consider that it was communicated and received on the basis of any ongoing mutual understanding of confidence.
48. Further, much of the General Rollout Information comprises correspondence **from Council** to NBN Co (or its representatives), **between Council** and external third parties (including, in one case, a journalist) or **internal** Council correspondence.⁸⁸ This information cannot be said to reflect a communication from NBN Co (or its representatives) as confider, to Council as a recipient. Given that NBN Co is the relevant hypothetical plaintiff in an action for breach of confidence, to the extent that the information does not originate from NBN Co (or its representatives) as confider, this precludes a finding that NBN Co is owed a duty of confidence in relation to this information.⁸⁹
49. For the above reasons, I am satisfied that some,⁹⁰ but not all, of the General Rollout Information satisfies requirement (c).

(e) Detriment

50. In any event, I am satisfied that requirement (e) – the requirement of detriment – cannot be satisfied in relation to any of the General Rollout Information. In considering this requirement, it is necessary to consider the application of the '*Fairfax Doctrine*'.⁹¹ This doctrine requires that public bodies claiming that information is confidential must demonstrate that disclosure of the information would be detrimental to the public interest

⁸⁵ NBN Co's submissions to OIC dated 18 August 2016.

⁸⁶ Or a copy or draft of this agreement. For example, the following pages are comprised of correspondence (and attachments) that took place prior to Council and NBN Co entering the Confidentiality Agreement: pages 2, 7, 9-11, 21-22, 23-24, 33-34, 49 and 61 of the Additional Documents.

⁸⁷ I note that in any event, such markings are only one factor to be evaluated in the circumstances of a case and are not determinative. See *B and BNRHA* at [91].

⁸⁸ For example, some of the General Rollout Information appearing on pages 2, 7, 9-11, 21-22, 24, 34, 66 - 68, 85, 164, 166, 169, 242 and 244.

⁸⁹ *Glass Media* at [44] to [53].

⁹⁰ General Rollout Information that is subject to the Confidentiality Agreement and which was sent **from** NBN Co (or its representatives) **to** Council.

⁹¹ The principles enunciated by Mason J in *Commonwealth of Australia v John Fairfax & Sons Limited and Others* (1981) 55 ALJR 45 (*Fairfax*).

(and not just to themselves) in order to successfully establish such as claim.⁹² In a recent decision on an external review involving a government-owned corporation, the Right to Information Commissioner outlined the application of the *Fairfax Doctrine*:⁹³

73. *In considering the detriment requirement, the nature of the body said to be the confider ... must be taken into account. As governments control information in a representative capacity, a higher burden is imposed on government bodies and entities than on private individuals to justify the secrecy of information in their possession.*
74. *As Mason J explained in Commonwealth of Australia v John Fairfax and Sons Ltd, the leading Australian case in this area, **government plaintiffs claiming information is subject to an equitable obligation of confidence owed to them must demonstrate that disclosing relevant information would be detrimental to the public – and not the government confider’s – interest.** Unless it can be established that disclosure is likely to injure the public interest, it will not be protected, and in the context of the RTI Act, a claim for exemption under schedule 3, section 8 will fail.*

(Emphasis added)

51. In its submissions to OIC,⁹⁴ NBN Co contends that a number of factors ‘*weigh against [NBN Co] being characterised as a “public body” for the purposes of the doctrine*’, including:

- NBN Co being a public company limited by shares with a board of directors and a constitution
- that none of NBN Co’s directors hold political office, and that all were selected for their private sector experience
- NBN Co’s structure as a public company rather than the ‘*typical structure of a statutory authority or public utility*’
- that Commonwealth ownership of NBN Co is a ‘*stage in a broader context, which is intended to result in potential privatisation and operation as a non-government commercial entity*’
- that, due to the large number and worth of contracts entered into by NBN Co, it could not be readily wound up by the Commonwealth without extensive financial, legal as well as ‘*other significant economic costs and dislocation in the telecommunications and related industries*’; and
- that NBN Co has flexibility and discretion in operational, technology and network design decisions within the constraints of its funding agreement with the Commonwealth.

52. The following comments of Senior Member (SM) Bayne of the Administrative Appeals Tribunal (AAT) in *Sullivan v Department of Industry, Science and Technology and Australian Technology Group Pty Ltd (Sullivan)*⁹⁵ are relevant in considering the application of the *Fairfax Doctrine*⁹⁶ to a proprietary company largely owned by the Commonwealth:⁹⁷

⁹² *Kalinga Woolloowin Residents Association Inc and Department of Employment, Economic Development and Innovation; City North Infrastructure Pty Ltd (Third party)* (Unreported, Queensland Information Commissioner, 19 December 2011) (**Kalinga and DEEDI**) and *Kalinga Woolloowin Residents Association Inc and Brisbane City Council; City North Infrastructure Pty Ltd (Third Party); Department of Treasury (Fourth Party)* (Unreported, Queensland Information Commissioner, 9 May 2012) (**Kalinga and BCC**), applying principles enunciated by Mason J in *Fairfax*.

⁹³ *Glass Media* at [73] to [74]. Internal citations and references omitted.

⁹⁴ Dated 27 May 2016.

⁹⁵ [1997] AATA 192.

⁹⁶ Under the provision of the *Freedom of Information Act 1982* (Cth) that is equivalent to schedule 3, section 8 of the RTI Act.

⁹⁷ Internal citations and references omitted.

27. I turn first to whether ATG should be regarded as a public body for the purposes of the Fairfax doctrine. A number of matters are relevant in this respect. In his oral evidence...Mr Harbour deposed that ATG is "99% plus" owned by the Commonwealth, and that the Commonwealth has been the sole source of shareholder funds for the ATG. He conceded that the Commonwealth could wind up ATG without any difficulty. Mr Harbour said that the ATG's auditor is the Commonwealth Auditor-General. This by itself is some indication of the public status of ATG. Furthermore, the "Statement" at annexure B to Dr Read's affidavit included documents called "Draft ATG Guidelines" and "Public Interest Safeguards", and the latter in particular indicates the extent of Commonwealth control over ATG's activities.
28. On the other hand, the Respondent pointed to evidence from Mr Harbour that while a public servant and a Senator were directors of this company incorporated under the Corporations Law, the Commonwealth had appointed a majority of the directors from the private sector. Other than through the two non-private sector directors, the Commonwealth had not sought to influence decisions made by the Board of ATG.
29. There is very little guidance in the case-law as to what bodies may be regarded as sufficiently public in nature as to be affected by the Fairfax doctrine. What was said above by Mason CJ in *Plowman* indicates that the doctrine applies to "statutory authorities or public utilities". **A body such as ATG, albeit that it is a public company almost wholly owned by the Commonwealth, might not in ordinary usage be regarded as a statutory authority or a public utility. But I do not take Mason CJ's reference to "statutory authorities or public utilities" as exhausting the range of bodies beyond government Departments which are affected by the Fairfax doctrine.** The Chief Justice approved of the observation of Professor Finn that in the public sector "(t)he need is for compelled openness, not for burgeoning secrecy". **In a functional sense, ATG is a public sector body.**

(Emphasis added)

53. SM Bayne's above approach has been endorsed by a Deputy President of the AAT⁹⁸ and applied by the Information Commissioner in external reviews under the RTI Act.⁹⁹
54. I accept, for the purposes of the laws of Queensland, NBN Co is not a public authority or an instrumentality or agency of the Crown¹⁰⁰ and that NBN Co is a public company limited by shares with directors that do not hold public office, and that it operates 'at arm's length from the Government'.¹⁰¹ On the other hand, NBN Co is a 'government business enterprise'¹⁰² which is currently wholly owned and funded by the Commonwealth.¹⁰³
55. NBN Co is also subject to audit by the Commonwealth Auditor-General,¹⁰⁴ and has numerous responsibilities to report to its shareholding ministers under the *Public Governance, Performance and Accountability Act 2013* (Cth).¹⁰⁵ Despite NBN Co's submissions,¹⁰⁶ I am also satisfied that NBN Co could readily be wound up by the

⁹⁸ Callejo at [167] to [172].

⁹⁹ See for example *Kalinga and DEEDI, Kalinga and BCC, Glass Media*.

¹⁰⁰ Section 95 of the *National Broadband Network Companies Act 2011* (Cth).

¹⁰¹ NBN Co, *Statement of Expectations*, 24 August 2016.

¹⁰² Section 5(2)(e) of the *Public Governance, Performance and Accountability Rule 2014* (Cth).

¹⁰³ Under the Commonwealth Ownership Provisions in the *National Broadband Network Companies Act 2011* (Cth), the Commonwealth is required to retain ownership of NBN Co, until the Commonwealth Ownership Provisions cease to have effect (which occurs when certain preconditions, within the control of the Government, have been met). Section 5.8 of NBN Co's *Corporate Plan 2017* indicates that NBN Co is currently funded with Commonwealth equity within the constraints of a public equity capital limit of \$29.5 billion. The plan indicates that anticipates that NBN Co will use debt funding in the future (by the end of the 2017 financial year), when NBN Co 'has sufficient cash flows and track record to support private sector debt without explicit Commonwealth support'.

¹⁰⁴ Section 98 of the *Public Governance, Performance and Accountability Act 2013* (Cth) and section 17 of the *Auditor-General Act 1997* (Cth).

¹⁰⁵ In particular, see chapter 3 of the *Public Governance, Performance and Accountability Act 2013* (Cth).

¹⁰⁶ To OIC dated 27 May 2016.

Commonwealth,¹⁰⁷ in the relevant sense that the Commonwealth has the legal power to do so.¹⁰⁸ While NBN Co's directors may have been selected for their private sector experience as NBN Co contends, they were selected and may be replaced by the Commonwealth government.¹⁰⁹

56. NBN Co's 'public status' is also reinforced by its establishment documents. In particular, NBN Co's Constitution limits its powers under the Corporations Act to '*only to do all things that are necessary, convenient or incidental to carry out the objects set out in rule 4.1.1 and which are **consistent with Australian Government policy** as communicated to the Company by the Commonwealth from time to time*'.¹¹⁰ While I accept that NBN Co has '*flexibility and discretion in operational, technology and network design*',¹¹¹ it is clear that the Commonwealth has ultimate strategic control over the entity. This is outlined in NBN Co's Board Charter, which provides that:¹¹²

the Board regards [NBN Co] as bound by and required to implement Australian Government policy as set out in formal communications from both the Shareholder Ministers as well as to exercise its powers in the best interest of [NBN Co].

57. Accordingly, based on the indicia outlined by SM Bayne, I am satisfied that NBN Co is a public sector body in the relevant '*functional sense*'. I do not accept that NBN Co is, in a functional sense, a private commercial entity, as NBN Co contends.
58. NBN Co also submitted that the *Fairfax Doctrine* should be '*confined to the receipt of ordinary governmental information, rather than commercial information*', and in a related argument, contends that entities pursuing commercial activities for the benefit of government should not be encompassed by the doctrine. In support of this proposition, NBN Co cites the High Court decision of *Esso Australia Resources Ltd v Plowman*,¹¹³ and notes that Mason CJ made an express distinction between '*governmental secrets*' on the one hand and '*personal and commercial secrets*' on the other. The full relevant passage of the High Court judgment is as follows:

39. *The courts have consistently viewed governmental secrets differently from personal and commercial secrets. As I stated in The Commonwealth of Australia v. John Fairfax and Sons Ltd., the judiciary must view the disclosure of governmental information "through different spectacles". This involves a reversal of the onus of proof: the government must prove that the public interest demands non-disclosure.*

40. *This approach was not adopted by the majority of the House of Lords in British Steel Corporation v. Granada Television Ltd., where the confidential documents in question revealed the internal mismanagement of a statutory authority. In passing, the majority attributed to the public interest exception a very narrow scope, stating that, although disclosure was of public interest, it was not in the public interest. I would not accept this view. The approach outlined in John Fairfax should be adopted when the information relates to statutory authorities or public utilities because, as Professor Finn notes, in the public sector "(t)he need is for compelled openness, not for burgeoning secrecy". The present case is a striking illustration of this principle. Why should the consumers and the public of Victoria be denied knowledge of what happens in these arbitrations, the*

¹⁰⁷ Under section 97 of the *National Broadband Network Companies Act 2011* (Cth), that Act does not prevent an NBN corporation being wound up under the *Corporations Act 2001* (Cth). Accordingly, NBN Co may be wound up by its shareholding Ministers.

¹⁰⁸ Despite there being inconvenience or cost of doing so.

¹⁰⁹ Clause 5.4 of NBN Co's Constitution.

¹¹⁰ My emphasis. Under clause 4.1.1 of NBN Co's Constitution, its objects are to '*roll-out, operate and maintain a national wholesale broadband network while working closely with the Commonwealth during the implementation study in order to facilitate the implementation of Australian Government broadband policy and regulation.*'

¹¹¹ As indicated in NBN Co's submissions to OIC dated 27 May 2016 and explained in part 2.1 of NBN Co's *Corporate Plan 2017*.

¹¹² Clause 2.3(d). Note that under subclause (c), the best interests of NBN Co are defined by reference to '*the objects and purposes of [NBN Co] including Australian Government policy communicated to [NBN Co] from time to time and set out in the GBE Guidelines*'.

¹¹³ (1995) 183 CLR 10.

outcome of which will affect, in all probability, the prices chargeable to consumers by the public utilities?

(Footnotes omitted)

59. The above passage does not support the position that the *Fairfax Doctrine* should be confined in the way that NBN Co contends. To the contrary, the case involved documents concerning a commercial arbitration involving the sale of natural gas to two public utilities, and in this context, Mason CJ noted the need for '*compelled openness, not for burgeoning secrecy*', and questioned why consumers and members of the public should be denied information that is relevant to the prices chargeable to consumers by these public utilities.

60. Relevantly, the Right to Information Commissioner recently confirmed:¹¹⁴

...whether the Fairfax Doctrine is enlivened in a particular case turns on a proper characterisation of the entity claiming to be owed an obligation of confidence, rather than the information said to be subject to such obligation. If the said entity is a public sector body within the broad meaning of that concept as stated in Sullivan, relevant information must axiomatically comprise 'government information' of some type.

61. Accordingly, I am satisfied that the General Rollout Information is '*government information*' in the relevant sense, and the *Fairfax Doctrine* applies to it.

62. As I have found that the *Fairfax Doctrine* applies to NBN Co (and accordingly, to the General Rollout Information), I am now required to assess whether disclosure of the information would be detrimental to the public interest. In this case, much of the information is either:

- innocuous¹¹⁵
- out of date;¹¹⁶
- relatively '*high-level*'; or
- already in the public domain.¹¹⁷

63. I have analysed public interest factors for and against disclosure at length below in finding that access may not be refused to the General Rollout Information under section 47(3)(b) of the RTI Act. For present purposes, it is sufficient to note that although there are some factors favouring nondisclosure, there are also significant public interest factors favouring disclosure in this case. In considering whether potential detriment to the public interest requires nondisclosure of information, it is, as SM Bayne observed in *Sullivan*, '*also relevant to have regard to the public interest in disclosure of the documents*'.¹¹⁸

64. The NBN is the '*most comprehensive and largest infrastructure development in Australia's history*',¹¹⁹ carried out by a government owned and funded entity, implementing Australian government policies. The General Rollout Information deals with how NBN Co has undertaken this project in a particular local government area, and how the local council in this area has facilitated it. It has previously been held that there is a manifest public interest in the community having access to information concerning the operations of entities which are entirely government-owned, taxpayer funded and charged with carrying out public duties.¹²⁰ To this end, I consider disclosure of the

¹¹⁴ *Glass Media* at [91].

¹¹⁵ For example, administrative meeting arrangements between Council and NBN Co's representatives.

¹¹⁶ For example, a large portion of the information is '*pre-announcement*', as discussed at paragraph 40 and 47 above.

¹¹⁷ See paragraphs 38 to 39 above.

¹¹⁸ At paragraph 37.

¹¹⁹ NBN Co, *Corporate Plan 2017*, page 8.

¹²⁰ *Kalinga and DEEDI* at [54] and *Kalinga and BCC* at [50].

General Rollout Information would advance the public interest, rather than cause it any detriment.

65. NBN Co has raised particular concerns about the Confidentiality Agreement which forms part of the General Rollout Information. While I am prepared to accept, as discussed above, that the first four elements of the Breach of Confidence Exemption are met in relation to this document, I am not satisfied that its disclosure could lead to any additional level of detriment to the public interest, than disclosure of the remaining General Rollout Information. The fact that a document concerns confidentiality does not, of itself, confer on it any special added quality of confidence. To the contrary, this document comprises standard or relatively generic provisions which are common to documents of this kind. It establishes the basis for communication of information between NBN Co and Council, and its disclosure will allow the public to see how the rollout is facilitated between these bodies.
66. Accordingly, I am satisfied that the relevant detriment required by element (e) of the Breach of Confidence Exemption and the *Fairfax Doctrine* is not made out in relation to the Confidentiality Agreement.

Conclusion

67. For the above reasons, I find that the detriment required to found an equitable action for a breach of confidence by NBN Co is not established, and the General Rollout Information therefore, cannot comprise exempt information under schedule 3, section 8 of the RTI Act.

Contrary to the public interest

68. NBN Co also contends that disclosure of the General Rollout Information would, on balance, be contrary to the public interest.

Relevant law

69. An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.¹²¹ The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest¹²² and explains the steps that a decision-maker must take¹²³ in deciding the public interest as follows:
- identify any irrelevant factors and disregard them
 - identify relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure of the information would, on balance, be contrary to the public interest.

Irrelevant factors

70. NBN Co contends that disclosure of the General Rollout Information would tend to undermine confidence in its brand and cause frustration in the market when ‘services are

¹²¹ Section 47(3)(b) and 49 of the RTI Act. The term public interest refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

¹²² Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

¹²³ Section 49(3) of the RTI Act.

not activated or construction is not commenced as first planned'.¹²⁴ I have not taken this into consideration to the extent that it relates solely to loss of confidence in NBN Co, or embarrassment that might arise as a result of disclosure of the General Rollout Information.¹²⁵

71. To the extent that this submission is relevant to the issue of prejudice to NBN Co's business and commercial affairs, I have considered this in paragraphs 80 to 92 below.

Factors favouring disclosure

72. The significance of the NBN is discussed at paragraph 9 and paragraph 64 in relation to the *Fairfax Doctrine*. As noted above, the General Rollout Information discloses information about the progress (in a particular local government area) of a very significant public infrastructure project being carried out by a Commonwealth government-owned entity at significant cost to taxpayers.
73. Although the information is general in nature (when compared to the Negotiation Information) and, in places, only provides administrative details of meetings between Council and NBN Co, I am satisfied that disclosure would promote open discussion of the rollout of this significant publicly funded project in the Sunshine Coast area (and Maleny in particular) and that it would enhance Council's accountability and inform the community of its operations by revealing its role in facilitating the rollout.¹²⁶
74. The applicant contends that it is in the public interest to release the General Rollout Information because NBN Co's proposals in the area have potential to impact on local and regional scenic amenity, health and welfare of people and wildlife, and property values in the area.¹²⁷ While the General Rollout Information does not specifically address these matters in any meaningful way,¹²⁸ I am satisfied that releasing the information would generally contribute to positive and informed debate about matters relevant to these concerns, including:¹²⁹
- the rollout of the NBN in the area
 - NBN Co's choice of technology for the area
 - Council's role in facilitating the rollout; and
 - NBN Co's approach to collaborating with Council.
75. I consider the above matters are of serious concern to the community generally, given the scale and importance of the NBN, but are of particular concern in Maleny, where there is a particularly high level of community concern about the rollout.¹³⁰
76. I am also satisfied that, to a certain extent, the General Rollout Information could reasonably be expected to ensure effective oversight of expenditure of public funds.¹³¹ While the information does not specifically reveal expenditure or costs, it does provide a

¹²⁴ NBN Co's submissions to OIC dated 27 May 2016.

¹²⁵ Schedule 4, part 1 of the RTI Act sets out a **non-exhaustive** list of factors that are irrelevant to deciding the public interest. One of these factors is that '*disclosure of the information could reasonably be expected to cause embarrassment to the Government or to cause a loss of confidence in the Government*'. While NBN Co is not '*the Government*' within the meaning of RTI Act, it is a Commonwealth Government Business Enterprise funded with public money, and on this basis, I do not consider embarrassment or loss of confidence as relevant factors favouring nondisclosure.

¹²⁶ Schedule 4, part 2, item 1 and item 3 of the RTI Act.

¹²⁷ Applicant's submissions to OIC dated 16 July 2016.

¹²⁸ And for this reason, I do not consider that the factors favouring disclosure concerning the protection of the environment (schedule 4, part 2, item 13 of the RTI Act) or environmental or health risks or measures relating to public health and safety (schedule 4, part 2, item 14 of the RTI Act) are relevant to the General Rollout Information.

¹²⁹ Schedule 4, part 2, item 2 of the RTI Act.

¹³⁰ This community concern is evident from the information released during the course of the external review.

¹³¹ Schedule 4, part 2, item 4 of the RTI Act.

Council officer's estimate of the value of NBN Co investment in the area, and allow general scrutiny of the rollout process, timelines and choice of technology for the area. This, in turn, would allow the public to make an informed judgement about expenditure on and 'value for money' of the NBN in relation to the area.

77. Given the scale and importance of the NBN, and the public concern about the rollout in this particular area, I consider that the factors concerning open discussion of public affairs, accountability and operations of Council, and positive and informed debate carry significant weight. I note that the General Rollout Information does not reveal any information concerning the cost of the NBN to taxpayers. Rather, the information provides general insight into NBN Co investment in the area, and a Council estimate of the value of this investment. On this basis I afford the factor concerning effective oversight of expenditure of public funds low weight.

Factors favouring nondisclosure

78. NBN Co claims that disclosure of the General Rollout Information could reasonably be expected to prejudice:
- its business, professional, commercial or financial affairs (**Business Prejudice Factor**);¹³² and
 - intergovernmental relations¹³³
79. NBN Co also contends that disclosure of the information could reasonably be expected to cause a public interest harm by:
- disclosing deliberative process information (**Deliberative Process Harm Factor**)¹³⁴
 - disclosing information concerning its business, professional, commercial or financial affairs in circumstances where disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of this type of information to government in the future (**Business Harm Factor**);¹³⁵ and
 - disclosing information of a confidential nature that was communicated in confidence in circumstances where disclosure could reasonably be expected to prejudice the future supply of information of this type.¹³⁶

Business, professional, commercial or financial affairs of entities

80. NBN Co's submissions, to a great extent, appear to be based on the assertion that disclosure of the General Rollout Information would 'expose a significant amount of information about [NBN Co's] commercial activities'.¹³⁷ In this regard, I acknowledge that NBN Co is required to 'operate its business on a commercial basis' and 'it is a commercial entity operating in a market environment and can compete and innovate like other companies in this environment'.¹³⁸
81. However, as previously held by the Right to Information Commissioner, under the RTI Act, the mere fact that information discusses commercial issues of entities does not, of itself, lead to an automatic presumption that disclosure under the RTI Act would be

¹³² Schedule 4, part 3, item 2 of the RTI Act.

¹³³ Schedule 4, part 3, item 14 of the RTI Act.

¹³⁴ Schedule 4, part 4, item 4 of the RTI Act.

¹³⁵ Schedule 4, part 4, item 7(1)(c) of the RTI Act.

¹³⁶ Schedule 4, part 4, item 8 of the RTI Act.

¹³⁷ NBN Co's submissions to OIC dated 27 May 2016.

¹³⁸ Subject to legal and policy parameters. See NBN Co's *Statement of Expectations* dated 24 August 2016.

contrary to the public interest.¹³⁹ When commercial information of entities come into the possession or control of an agency, this information is subject to the RTI Act. The necessary approach is *'to balance the interests of commercial undertakings which have supplied material to government agencies and the interests of members of the public in gaining access to that information'*.¹⁴⁰

82. In this regard, NBN Co contends that a series of significant consequences may unfold as a result of releasing prospective rollout information that is subject to change. NBN Co's submissions cite and paraphrase the submissions of NBN Co's chairman, Mr Bill Morrow, to the Senate Environment and Communications Legislation Committee concerning release of estimated rollout dates.¹⁴¹ In summary, NBN Co submits that disclosure could:

- undermine confidence in its brand and cause frustration in the market
- cause NBN Co's customers (Registered Service Providers) to *'go to market'* based on incorrect public expectations about NBN service provision
- cause Registered Service Providers to spend less on marketing
- cause people to use alternative services, result in a lower take-up rate and a lower internal rate of return on investment; and
- ultimately, compromise its ability to roll out the NBN network at the lowest reasonable cost along with its capacity to generate shareholder value.

83. In terms of the Business Prejudice Factor, I do not accept that release of the General Rollout Information could reasonably be expected to give rise to the prejudices identified by NBN Co. The phrase *'could reasonably be expected to'* requires an expectation that is reasonably based (ie. not absurd, irrational or ridiculous).¹⁴² I note that a very small amount of the General Rollout Information relates to specific predicted rollout dates. To the extent that the General Rollout Information does contain dates, I do not consider it reasonable to expect that another business would rely on dates provided in this format (slideshows and emails to Council) alone to *'go to market'* with a NBN product, particularly given that it is relatively dated and a significant amount of up-to-date rollout information for the area is now available on NBN Co's official website.¹⁴³

84. In terms of the remaining prejudices claimed by NBN Co, I acknowledge that in order to protect its reputation and brand, NBN Co has a general policy of not publicly releasing prospective rollout information that is subject to change. However, in this review, I am required to consider the particular information in issue (the General Rollout Information) and determine whether disclosure could reasonably be expected to give rise to the relevant prejudice. Having considered the General Rollout Information, I do not consider that disclosure is reasonably likely to result in a lower take-up rate of NBN Co services, or the other consequential prejudices claimed.

85. As noted at paragraph 62 above, to the extent that the General Rollout Information contains information other than dates, it is relatively innocuous, out of date, *'high level'* and much of it is in the public domain. To the extent that it does contain estimated rollout dates, as discussed at paragraph 70 above, I do not consider that potential loss of confidence or embarrassment to NBN Co alone (without any consequent prejudice to its business or commercial affairs) is a relevant consideration. I do not have any evidence

¹³⁹ In relation to a Queensland government-owned company: *Kalinga and BCC* at [79].

¹⁴⁰ *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 at [32].

¹⁴¹ Senate Environment and Communications Legislation Committee Estimates, *Official Committee Hansard* (20 October 2015), 153 – 155 available at <http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/ecctte/estimates/supp1516/index> accessed on 28 October 2016.

¹⁴² See *Channel Seven and Redland City Council* (Unreported, Queensland Information Commissioner, 30 June 2011) at [20].

¹⁴³ See NBN Co's *Three Year Construction Plan*.

of any other specific prejudices to NBN Co's commercial or business affairs, and accordingly, I am not satisfied that the Business Prejudice Factor applies in relation to the General Rollout Information.

86. For the Business Harm Factor to arise,¹⁴⁴ I must be satisfied that the General Rollout Information:
- concerns the business, professional, commercial or financial affairs of NBN Co; and
 - disclosure could reasonably be expected to:
 - have an adverse effect on those affairs; or
 - prejudice future supply of like information to government.
87. The General Rollout Information consists of information about the rollout of the NBN in the relevant area,¹⁴⁵ which is a Commonwealth infrastructure project that NBN Co performs as a government-owned and funded enterprise. It does not, for example, directly relate to any commercial agreement for the sale of goods or services, or the use of another entity's infrastructure on commercial terms.¹⁴⁶ Despite this, I am prepared to accept that, broadly speaking, the General Rollout Information does concern NBN Co's business affairs,¹⁴⁷ in the sense that NBN Co's '*business*' is to '*roll-out, operate and maintain a national wholesale broadband network*'.¹⁴⁸ Accordingly, the first limb of the Business Harm Factor is made out. However, unlike the Cth Carve Out under the Cth FOI Act,¹⁴⁹ the Business Harm Factor also requires that disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice future supply of like information to government.
88. The adverse effect required by the Business Harm Factor is almost invariably financial in nature (either directly or indirectly). In most cases the question of whether disclosure of information could reasonably be expected to have an adverse effect will turn on whether the information is capable of causing competitive harm to the relevant entity.¹⁵⁰ While I acknowledge that NBN Co is part of a competitive commercial wholesale market, in the sense that it sells NBN services to a variety of retailers, the General Rollout Information does not directly relate to this activity. Rather it relates to infrastructure development, and in particular, the construction of the network in a particular area. Having carefully considered the General Rollout Information, I cannot see how release of this information could reasonably be expected to result in competitive harm to NBN Co. Accordingly, I am not satisfied that disclosure would be reasonably likely to have any adverse effect on NBN Co's business, professional, commercial or financial affairs.
89. In relation to prejudice of future supply of like information to government, NBN Co relevantly contends that it provides as much information to local councils as possible in order to minimise delays and potential objections, and disclosure of the General Rollout Information could:

¹⁴⁴ Schedule 4, part 4, item 7(2) contains an exception to the Business Harm Factor in item 7(1) if what would be disclosed concerns only the business, professional, commercial or financial affairs of the person by, or on whose behalf, an application for access to the document containing the information is being made. I do not consider this exception applies here.

¹⁴⁵ And communications concerning facilitation of this with Council.

¹⁴⁶ Unlike the documents in issue in the decision of *Internode Pty Ltd and NBN Co Ltd* [2012] AICmr 4 (20 January 2012) (*Internode*), concerning NBN Co's Cth Carve-Out under the Cth FOI Act.

¹⁴⁷ The words '*business, professional, commercial or financial*' have been interpreted as meaning '*a business undertaking carried on in an organised way for the purpose of generating income or profits, or is otherwise involved in an ongoing operation involving the provision of goods or services for the purpose of generating income or profits*': *Seeney, MP and Department of State Development; Berri Limited* (Third Party) (2004) 6 QAR 354 concerning the application of the equivalent provisions of the now repealed *Freedom of Information Act 1992* (Qld).

¹⁴⁸ Clause 4. 1 of NBN Co's Constitution.

¹⁴⁹ As applied in *Internode*.

¹⁵⁰ *Kalinga and BCC*, [89].

... cause [NBN Co] to reconsider this approach, and possibly provide less confidential information to councils. This, in turn, may potentially result in less cooperative negotiations, more objections and an adverse impact on [NBN Co's] ability to rollout our network across the country efficiently and at the lowest possible cost. This may result in significant public interest harm, specifically, [NBN Co] ability to generate profitable returns for our Shareholders and provide essential services to the Australian public.

90. I accept that disclosure of the General Rollout Information covered by the Confidentiality Agreement¹⁵¹ (including the Confidentiality Agreement itself) could – to a certain extent – reasonably be expected to discourage NBN Co, and other infrastructure developers from early and detailed collaboration with Council (and other local governments) on their projects. That is, infrastructure developers may not communicate with Council (or other local governments) at an early stage in relation to their projects if they believe their correspondence may be subject to disclosure under the RTI Act, even where there is a contractual confidentiality clause in place. Accordingly, I am satisfied that the Business Harm Factor applies to the information that is covered by the Confidentiality Agreement.
91. However, in terms of the weight to be attributed to this factor, NBN Co's own submissions to OIC indicate that the reason for providing information to Council is to *'minimise delays and potential objections, which could in turn slow down the NBN rollout'*. Given NBN Co's mandate to rollout the NBN,¹⁵² and Government's expectation that it *'engage productively and collaboratively with its stakeholders'* (including local communities),¹⁵³ I consider any reluctance to cooperate with local councils would be minimal, regardless of whether the General Rollout Information is released under the RTI Act. More broadly, given local governments' specialised knowledge of their area and their development approval role, any failure by other infrastructure developers to collaborate and share information with local governments would be likely to prejudice their operations to a far greater extent than the disclosure of information about their projects. Accordingly, to the extent that the Business Harm Factor applies, it attracts only low weight.
92. Finally, NBN Co contends that release of the General Rollout Information by Council will adversely effect NBN Co's ability to obtain confidential information from its *'suppliers, related commercial entities and potential business partners'* in the future, or that they will supply this information to NBN Co but at an increased cost. I am not satisfied that this is the case. The General Rollout Information either relates to, or is produced by Council, NBN Co (or its representatives) or members of the public concerned or interested in the rollout. None of the information originates from or reveals the business affairs of NBN Co's suppliers, related commercial entities or potential business partners. On this basis, I am not satisfied that disclosure of this information could reasonably be expected to prejudice the future supply of information from these third parties to NBN Co.

Intergovernmental relations

93. NBN Co contends that if the same application was made to it under the Cth FOI Act, it would be likely to be entitled to refuse access to the General Rollout Information on the basis of the Cth Carve Out (discussed at paragraph 22 above).¹⁵⁴ NBN Co further submits that if *'applicants could access information from one State body, but the same information is likely to be exempt under another jurisdiction's public information access regime'* this could potentially prejudice relations with the Commonwealth.

¹⁵¹ Discussed at paragraph 29 above.

¹⁵² Clause 2.1 of NBN Co's Corporate Plan, 2017 states that *'in 2009, [NBN Co] was established to build and operate Australia's first ever national, wholesale-only, open-access broadband network. [NBN Co's] objective is to ensure all Australians have access to fast broadband as soon as possible, at affordable prices, and at least cost to taxpayers'*. See also clause 4.1.1 of NBN Co's Constitution which provides that its objects are to *'roll-out, operate and maintain a national wholesale broadband network'*.

¹⁵³ NBN Co, *Statement of Expectations*, 24 August 2016.

¹⁵⁴ NBN Co is exempt from the operation of the Cth FOI Act in relation to documents in respect of its commercial activities.

94. The RTI Act recognises that the public interest will favour nondisclosure of information where disclosure could reasonably be expected to prejudice intergovernmental relations.¹⁵⁵
95. I am not satisfied that the relevant prejudice could reasonably be expected to arise in the circumstances of this case. Queensland's RTI Act applies to documents in the possession or under the control of Queensland government agencies.¹⁵⁶ In many cases, this can include information authored by private companies and parties external to Queensland government that has been provided to an agency. Similarly, information of Queensland government agencies and business/private entities that is in the possession of Commonwealth agencies will be subject to the provisions of the Cth FOI Act. Each information access regime has different requirements and applies to the entities as provided for in the legislation, subject to the other provisions of the Acts. I cannot accept that lawfully applying valid, current legislation in the relevant jurisdiction could reasonably be expected to prejudice intergovernmental relations. I do not consider this an outcome that was intended by Parliament in enacting beneficial information access legislation.
96. NBN Co also contends that disclosure of the General Rollout Information would '*divulge information of a confidential nature that was communicated to the Council in confidence, [and] may set an incorrect presumption that information exchanged in confidence with [NBN Co] will not be protected in Queensland, or in other States and Territories*'.¹⁵⁷ As I have found that the General Rollout Information does not meet the Breach of Confidence Exemption requirements, I am unable to accept this submission as I do not consider the information is of a confidential nature, as NBN Co contends.
97. Based on the above, I find that disclosure of the General Rollout Information could not reasonably be expected to prejudice relations between Council and/or the Queensland Government and the Commonwealth and therefore, this factor does not apply.

Prohibited by an Act

98. Where disclosure of information is prohibited by an Act, this gives rise to a factor favouring nondisclosure in the public interest. While this factor has not been raised by Council or NBN Co, I consider it is relevant in considering the submissions made by NBN Co in relation to the Cth FOI Act and Cth Carve-out.
99. The Cth FOI Act relevantly provides:
- a person who wishes to obtain access to a document of an '*agency*' may request access to it¹⁵⁸
 - an '*agency*' includes NBN Co¹⁵⁹
 - however, NBN Co is subject to the Cth Carve-out, that is, it is exempt from the operation of the Cth FOI Act in relation to documents in respect of its '*commercial activities*';¹⁶⁰ and
 - '*commercial activities*' means activities carried on by NBN Co on a commercial basis, or activities, carried on by NBN Co, that may reasonably be expected in the foreseeable future to be carried on by NBN Co on a commercial basis.¹⁶¹

¹⁵⁵ Under schedule 4, part 3, item 14 of the RTI Act.

¹⁵⁶ And Ministers.

¹⁵⁷ NBN Co's submissions to OIC dated 27 May 2016.

¹⁵⁸ Section 15 of the Cth FOI Act.

¹⁵⁹ Under section 4 of the Cth FOI Act, an '*agency*' includes a '*prescribed authority*', and a '*prescribed authority*' includes NBN Co.

¹⁶⁰ Section 7(2) of the Cth FOI Act.

¹⁶¹ Section 7(3A) of the Cth FOI Act. Under section 7(4) of the Cth FOI Act, a reference to documents in respect of particular activities shall be read as a reference to documents received or brought into existence in the course of, or for the purposes of, the carrying on of those activities.

100. In summary, this means that NBN Co is subject to the Cth FOI Act, but is exempt from its operation in relation to documents received or brought into existence in the course of, or for the purposes of, carrying on its commercial activities.¹⁶² However, the Cth FOI Act does not *prohibit* disclosure these documents. To the contrary, the Cth FOI Act specifically does not limit the power of an agency to give access to information or a document, whether or not access to the information has been requested under the Cth FOI Act.¹⁶³ Accordingly, I am satisfied that disclosure of the General Rollout Information is not prohibited by an Act, and this nondisclosure factor does not apply.

Deliberative process

101. The public interest favours nondisclosure of information where disclosure could reasonably be expected to:

- prejudice a deliberative process of government (**Deliberative Process Prejudice Factor**);¹⁶⁴ or
- cause a public interest harm through disclosure of an opinion, advice or recommendation that has been obtained, prepared or recorded or a consultation or deliberation that has taken place, in the course of, or for, the deliberative processes involved in the functions of government (**Deliberative Process Harm Factor**).¹⁶⁵

102. The General Rollout Information is comprised of information and communications concerning facilitation of the rollout of the NBN in the relevant area. I accept that it consists of a '*consultation*' that has taken place between NBN Co and Council about the rollout. However, I am not satisfied that this consultation was part of any relevant '*deliberative process*', for the reasons set out below.

103. Deliberative processes involved in the functions of government have been defined as '*...thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action*'.¹⁶⁶ It has also been defined as '*careful consideration with a view to decision*'.¹⁶⁷ I am satisfied that the documents do not disclose any consultation that has taken place in the course of any '*thinking process*' of Council.¹⁶⁸ The consultation in the General Rollout Information can more accurately be described as NBN Co keeping Council informed of its intentions in relation to the rollout, setting the terms in relation to flow of information, explaining the rollout process and NBN Co's process of community engagement. Unlike the information about appropriate sites for wireless towers (discussed below), the General Rollout Information does not relate to any current '*thinking processes*' of Council.

104. On this basis, I am satisfied that neither the Deliberative Process Prejudice Factor nor the Deliberative Process Harm Factor apply in relation to the information. I do not have any evidence before me of potential prejudice to an ongoing deliberative process, and I do not consider that disclosure of the General Rollout Information would reveal a consultation that has taken place in the course of, or for, any deliberative process

¹⁶² As summarised by the Australian Information Commissioner in *Internode*.

¹⁶³ See '*Objects – information or documents otherwise accessible*' in the Cth FOI Act.

¹⁶⁴ Schedule 4, part 3, item 20 of the RTI Act.

¹⁶⁵ Schedule 4, part 4, item 4 of the RTI Act.

¹⁶⁶ *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at [28-30] citing with approval the definition given in *Re Waterford and Department of Treasury* (No.2) (1984) 5 ALD 588 at 606.

¹⁶⁷ *Ibid*.

¹⁶⁸ And nor do I consider that the General Rollout Information reveals any '*thinking process*' of NBN Co, but this is not relevant given that NBN Co is not '*government*' for the purposes of the provision. For the purposes of the laws of Queensland, NBN Co is not a public authority or an instrumentality or agency of the Crown: Section 95 of the *National Broadband Network Companies Act 2011* (Cth). This is a different analysis to that required to determine if NBN Co is a public sector body in the '*functional sense*' required by the Fairfax Doctrine discussed above.

involved in the functions of government. Finally, having considered the General Rollout Information, I do not accept that either of the examples of information covered by the Deliberative Process Harm Factor provided in schedule 4, part 4, item 4 of the RTI Act are 'directly analogous' to the General Rollout Information as NBN Co contends.¹⁶⁹

Supply of confidential information

105. The RTI Act provides that the public interest will favour nondisclosure if:

- disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information (**Confidential Prejudice Factor**);¹⁷⁰ and/or
- the information is of a confidential nature and was communicated in confidence, and disclosure could reasonably be expected to prejudice the future supply of information of this type (**Confidential Harm Factor**).¹⁷¹

106. NBN Co contends that:¹⁷²

... the circumstances in which the Council received the Documents gave rise to obligations of confidence. The release of the Documents could therefore potentially found an action for breach of confidence. This could have obvious adverse impacts upon the Council and/or nbn, including reputational damage as well as potential legal costs. If the Council were to release the Documents, nbn is of the opinion that it could potentially and adversely affect the Council's ability to obtain confidential information from other business partners in the future. This could also potentially undermine the Council's ability to negotiate commercially sound business arrangements or obtain the best quality service providers, particularly for infrastructure projects. As the decision that the Documents should be released would ultimately come from the OIC, the disclosure could impact other councils in Queensland in the same way. Arguably, that would not be in the best interests of the Council, its ratepayers or the public interest broadly. nbn is of the opinion that the potential impact on Council's – and Queensland councils' broadly – ability to negotiate sound arrangements for infrastructure projects is a public interest harm that should be given considerable weight.

In addition, nbn is also of the opinion that the potential release of confidential information within the Documents could set a precedent in Queensland – and more broadly across the country. This could adversely impact upon nbn's ability to make similar confidential undertakings with councils and State bodies, as well as with other commercial entities. The ability to obtain, exchange or provide information in confidence is a key attribute to any commercial player, including nbn. The potential release of the Documents may adversely impact upon nbn's ability to attract quality commercial partners, as well as effectively undertake commercial negotiations in a very competitive market – or require nbn to pay a premium for services. This would most likely have an adverse impact upon nbn's ability to function as a commercial player.

As outlined above, nbn's standard practise is to provide local government authorities with information regarding nbn's rollout in confidence and for distribution to its staff for their internal purposes only. If, as a result of disclosure of the Documents, nbn generally provided less information to councils in the future, this may result in less cooperative negotiations, more objections and an adverse impact on nbn's ability to rollout our network across the country efficiently and at the lowest possible cost. This could ultimately impact upon nbn's ability to generate profitable returns for our Shareholders and provide essential services to the Australian public.

¹⁶⁹ NBN Co submissions to OIC dated 27 May 2016.

¹⁷⁰ Schedule 4, part 3, item 16 of the RTI Act.

¹⁷¹ Schedule 4, part 4, item 8 of the RTI Act.

¹⁷² In its submissions to OIC dated 27 May 2016.

107. In terms of the Confidentiality Prejudice Factor, I accept that in relation to the information that is covered by the Confidentiality Agreement, disclosure could reasonably be expected to prejudice Council's ability to obtain confidential information in the future. That is, third parties may be less inclined to provide information to Council in confidence in the knowledge that it may be released under the RTI Act. Accordingly, in relation to the information covered by the Confidentiality Agreement, I am satisfied that the Confidentiality Prejudice Factor applies.
108. In relation to the Confidentiality Harm Factor, I have noted in discussing the Breach of Confidence Exemption, that a significant amount of the General Rollout Information could not be said to comprise '*information of a confidential nature that was communicated in confidence*'. To the extent that it is however, I accept that the Confidentiality Harm Factor applies. Disclosure of this information could reasonably be expected to prejudice the future supply of similar information from NBN Co to Council, and more broadly, could reasonably be expected to prejudice the future supply of preparatory development information (including information about infrastructure development) to local governments in Queensland.
109. However, as discussed in relation to the Business Harm Factor at paragraph 91 above, NBN Co's own submissions to OIC indicate that not providing the relevant information to local councils in the future may have an adverse impact on NBN Co's ability to rollout its network across the country efficiently and at the lowest possible cost. Given NBN Co's mandate to rollout the NBN,¹⁷³ and the Commonwealth Government's expectation that it '*engage productively and collaboratively with its stakeholders*' (including local communities),¹⁷⁴ I consider any reluctance to cooperate with Council (or with local governments generally) would be minimal. Similarly, given local governments' specialised knowledge of their area and their development approval role, failing to collaborate and share information with local governments would be likely to prejudice developers and infrastructure construction entities to a far greater extent than would disclosing information about their projects.
110. Accordingly, to the extent that the Confidentiality Prejudice Factor and Confidentiality Harm Factor apply to the General Rollout Information, I consider the relevant prejudice and harm to be relatively minor, and accordingly, I afford them low weight.

Conclusion

111. For the reasons explained above, I afford significant weight to each of the public interest factors favouring disclosure that concern open discussion of public affairs, Council's accountability, informing the community of Council's operations and positive and informed debate. As set out above, the NBN is a public infrastructure project of immense scale at significant cost to taxpayers. Council's accountability and its operations in relation to facilitating the rollout are of particular relevance in the geographical area, given the level of public concern about the NBN rollout. Given the particular nature of the documents, I have attributed low weight to the factor concerning effective oversight of expenditure of public funds.
112. On the other hand, I am not satisfied that a number of the nondisclosure factors raised by NBN Co arise. To the extent that the Business Harm Factor, the Confidentiality Prejudice Factor and Confidentiality Harm Factor are relevant, I have afforded them low

¹⁷³ Clause 2.1 of NBN Co's Corporate Plan, 2017 states that '*in 2009, [NBN Co] was established to build and operate Australia's first ever national, wholesale-only, open-access broadband network. [NBN Co's] objective is to ensure all Australians have access to fast broadband as soon as possible, at affordable prices, and at least cost to taxpayers*'. See also clause 4.1.1 of NBN Co's Constitution which provides that its objects are to '*roll-out, operate and maintain a national wholesale broadband network*'.

¹⁷⁴ NBN Co, *Statement of Expectations*, 24 August 2016.

weight. While there may be some reluctance in future supply to Council of information that is subject to a confidentiality agreement (and local governments) in the future, that failure to collaborate with Council is likely to prejudice infrastructure development entities to a greater extent than would disclosure of the information.

113. On balance, I find that disclosure of the General Rollout Information would not be contrary to the public interest and therefore, there is no basis on which to refuse access under section 47(3)(b) of the RTI Act.

Negotiation Information

114. The Negotiation Information is comprised of potential sites for a fixed wireless NBN tower in Maleny (and comments and preferences in relation to these sites) and one email communication concerning the terms of using Council land for fixed wireless sites. NBN Co contends that this information is exempt, because its disclosure would found an action for breach of confidence, and both NBN Co and Council contend that disclosure would, on balance, be contrary to the public interest.

Breach of confidence

115. The relevant law in relation to the Breach of Confidence Exemption is set out in paragraphs 31 to 35 above.
116. Some of the Negotiation Information has been **authored by** Council and sent to NBN Co (or its representatives). At first glance, this would seem sufficient to preclude a finding that these parts of the Negotiation Information are subject to the Breach of Confidence Exemption.¹⁷⁵ However, having carefully considered the information, I am satisfied that to the extent information was communicated **from** Council, the information is in the nature of a re-communication.¹⁷⁶ Although I am not able to disclose the content of the information in these reasons,¹⁷⁷ it is sufficient to say that the nature of it is such that it is impossible to separate Council's input from NBN Co's. Accordingly, I am satisfied that even where the Negotiation Information consists of parts of emails sent by Council to NBN Co (or its representatives), it remains relevant to consider the Breach of Confidence Exemption with NBN Co as the hypothetical plaintiff.
117. I consider below whether the Negotiation Information satisfies the five cumulative elements of the Breach of Confidence Exemption.

(a) specifically identifiable

118. It is possible to identify the Negotiation Information with specificity. This is not a matter of contention in this external review.

(b) necessary quality of confidence

119. The Negotiation Information is the subject of ongoing negotiations between Council and NBN Co about the location of a specific NBN tower, and the terms of using Council land for such towers. Although some information about the location of the tower in Maleny has been made publicly available, the process is ongoing, and the various site options have not all been made public. Accordingly, I do not consider that the information is

¹⁷⁵ As NBN Co is the relevant hypothetical plaintiff in an action for equitable breach of confidence, to the extent that information is not authored by NBN Co (or its representatives) as confider, this would ordinarily preclude a finding that NBN Co is owed a duty of confidence in relation to this information. See paragraph 48 above.

¹⁷⁶ For a discussion of this issue see *Glass Media* at [46] to [47].

¹⁷⁷ Section 108(3) of the RTI Act.

generally known. I also do not consider that options for the location of public infrastructure and the terms of use of Council owned land to be useless or trivial.

(c) circumstances of the communication

120. To establish element (c), I must be satisfied that the information was communicated and received on the basis of a mutual understanding of confidence. The following circumstances¹⁷⁸ are relevant to the Negotiation Information about proposed sites:

- the Confidentiality Agreement between NBN Co and Council
- the nature and sensitivity of the information (ie. it concerns an ongoing negotiation between NBN Co and Council about specific sites); and
- the detriment to NBN Co that would flow from unauthorised disclosure of the information (including the effect of disruptive debate about options that are unlikely to proceed).

121. On the basis of the above, I am satisfied that the Negotiation Information *about proposed sites for a fixed wireless tower*¹⁷⁹ was communicated to Council in circumstances which give rise to an equitable obligation of confidence.

122. However, on the information before me, there is no basis for finding that the Negotiation Information *concerning the terms of use of Council land*¹⁸⁰ was communicated in confidence. While I acknowledge that the information is of a sensitive nature, the circumstances of the communication are such that there is no evidence of an express or implied understanding that the information was communicated from NBN Co (or its representatives) to Council on a mutual understanding of confidence. In particular, the email is not covered by the Confidentiality Agreement, and there is no clear statement of confidentiality in the email itself.

(d) unauthorised use

123. To establish element (d), the relevant inquiry is whether disclosure under the RTI Act would involve a misuse of the confidential information.¹⁸¹ I am satisfied that disclosure of the Negotiation Information about the proposed sites in this circumstance is not authorised by NBN Co, and accordingly, this element is readily satisfied.

(e) detriment

124. As noted above in relation to the General Rollout Information, in considering the requirement of detriment, the *Fairfax Doctrine* is relevant to consider in this case.¹⁸² The law in relation to the *Fairfax Doctrine* and its application to NBN Co is set out in detail above at paragraphs 50 to 64. Adopting that reasoning, I am satisfied that the *Fairfax Doctrine* applies to NBN Co, and accordingly, it is necessary to consider whether disclosure of the Negotiation Information would be detrimental to the public interest (and not just to NBN Co) in order to successfully establish a claim of breach of confidence.

125. In the case of the Negotiation Information, I am satisfied that disclosure would be detrimental to the public interest. I have analysed public interest factors for and against disclosure below in finding that access may be refused to the Negotiation Information under section 47(3)(b) of the RTI Act. For present purposes, it is sufficient to note that

¹⁷⁸ See *B and BNRHA* at [84] and the discussion of circumstances relevant to determining element (c), at paragraph 44 above.

¹⁷⁹ On pages 19-23 of the information initially located by Council in response to the access application (including duplicates).

¹⁸⁰ Part of the email on page 36 of the Additional Documents.

¹⁸¹ *B and BNRHA* at [103].

¹⁸² The principles enunciated by Mason J in *Fairfax*.

although there is a significant public interest in community access to information about publicly funded infrastructure projects, there is an ongoing deliberative process to which these particular documents relate, and I consider significant public interest harm could reasonably be expected to result from release. Accordingly, I find that element (e) is satisfied in relation to the Negotiation Information.

Exception

126. Schedule 3, section 8(2) of the RTI Act provides an exception to the Breach of Confidence Exemption. It relevantly provides that '*deliberative process information*'¹⁸³ is **not exempt information** unless it consists of information communicated by an entity **other than** the State, an agency, or a person in the capacity of an officer of an agency.¹⁸⁴ Accordingly, in this case, if information is found to be deliberative process information and communicated by Council, it will be subject to the exception and therefore, not exempt information.
127. I am satisfied that the Negotiation Information is '*deliberative process information*'. It discloses a consultation or deliberation that has taken place in the course of Council's thinking process about potential sites for a fixed wireless NBN tower and the terms of use of Council land for a fixed wireless tower.
128. However, I am also satisfied that the Negotiation Information was communicated by an entity other than the State or an agency or a person in the capacity of an agency as it was communicated by NBN Co (or its representatives) to Council. To the extent that some of the Negotiation Information is comprised of information in emails sent by Council to NBN Co, the information is in the nature of a re-communication.¹⁸⁵ All of the information contains and is comprised of information communicated by NBN Co (or its representatives) to Council, and it is impossible to separate Council's input from that of NBN Co. Accordingly, I am satisfied that the exception to the Breach of Confidence Exemption does not apply in relation to any of the Negotiation Information.

Conclusion

129. For the reasons set out above, I find that the Breach of Confidence Exemption:
- (a) applies to Negotiation Information *about potential sites for a fixed wireless NBN tower in Maleny* (and comments and preferences in relation to these sites);¹⁸⁶
 - (b) does not apply to Negotiation Information *concerning the terms of use of Council's land* (because element (c) is not satisfied).¹⁸⁷
130. Accordingly, I find that access to the information at (a) above may be refused under section 47(3)(a) of the RTI Act on the basis that it is exempt information. However, I am satisfied that the information at (b) is not exempt information and therefore, there is no basis to refuse access to it under section 47(3)(a) of the RTI Act.

¹⁸³ '*Deliberative process information*' means an opinion, advice or recommendation that has been obtained prepared or recorded, or a consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of government. '*Deliberative processes involved in the functions of government*' have been defined as '*...thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action*': *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at [28-30] citing with approval the definition given in *Re Waterford and Department of Treasury* (No.2) (1984) 5 ALD 588 at 606.

¹⁸⁴ Schedule 3, section 8(2) of the RTI Act.

¹⁸⁵ See paragraph 116 above.

¹⁸⁶ On pages 19-23 of the information initially located by Council in response to the access application (including duplicates).

¹⁸⁷ Part of the email on page 36 of the Additional Documents.

Contrary to the public interest

131. Council¹⁸⁸ and NBN Co¹⁸⁹ both contend that disclosure of the Negotiation Information would, on balance, be contrary to the public interest. The relevant law in relation to deciding the public interest is set out at paragraph 69 above.
132. No irrelevant factors arise in relation to the Negotiation Information. I consider below the public interest factors favouring disclosure and nondisclosure.¹⁹⁰

Factors favouring disclosure

133. The applicant has submitted¹⁹¹ that it is in the public interest to have full details of infrastructure proposals available for communities, as these proposals effect the amenity of the area, property values and businesses in the area, and, in relation to fixed wireless towers in particular, there are potential health consequences for local residents. I acknowledge that generally, there is community concern regarding the potential health and visual effects of radio-communications transmitters, including NBN Co's fixed wireless towers. This is a matter of particular concern in Maleny, where there is an increased level of community concern about related health issues and infrastructure development in general.¹⁹²
134. The applicant has also submitted, and I accept, that there is a public interest in having access to information about site selection prior to a development application being lodged. The Information Commissioner has previously noted that there is a public interest in providing access to preliminary planning proposals at a timely stage in the process, as this promotes informed public participation in the processes of government.¹⁹³
135. Accordingly, I am satisfied that disclosing the Negotiation Information could reasonably be expected to:
- promote open discussion of the proposal for a fixed wireless tower in Maleny and different site options in relation to this proposal, and enhance Council's accountability in relation to its part in this process and negotiations the terms of use of Council owned land by NBN Co for fixed wireless towers¹⁹⁴
 - contribute to positive and informed debate about various site options and the appropriate terms of use of Council owned land by NBN Co;¹⁹⁵ and
 - provide some insight into Council's operations,¹⁹⁶ and the background to any final decision on its site preferences and any future development approval granted in relation to fixed wireless towers in the Maleny area.¹⁹⁷

¹⁸⁸ In its internal review decision dated 17 June 2015.

¹⁸⁹ In its submissions to Council dated 17 April 2015.

¹⁹⁰ While I have found that some of the Negotiation Information is exempt due to the Breach of Confidence Exemption, the examination of public interest factors below is necessary for the purpose of demonstrating my reasons in relation to application of the *Fairfax Doctrine*. While it is generally unnecessary for a decision maker to consider a further ground for refusal of access when one has already been established, the circumstances of this case necessitate an analysis of public interest factors in relation to **all** of the Negotiation Information.

¹⁹¹ In his external review application dated 19 May 2015 and submissions to OIC dated 10 February 2016.

¹⁹² This community concern is evident from the information released during the course of the external review.

¹⁹³ *Johnston and Brisbane City Council* (Unreported, Queensland Information Commissioner, 6 December 2013) (*Johnston*) at [20] citing *Johnson and Department of Transport; Department of Public Works* (2004) 6 QAR 307 at [39].

¹⁹⁴ Schedule 4, part 2 item 1 of the RTI Act.

¹⁹⁵ Schedule 4, part 2, item 2 of the RTI Act.

¹⁹⁶ Schedule 4, part 2, item 3 of the RTI Act.

¹⁹⁷ Schedule 4, part 2, item 11 of the RTI Act.

136. On the other hand, I also note that in this case, NBN Co has kept the community informed by a number of 'community engagement activities',¹⁹⁸ including a public meeting concerning its preferred site.¹⁹⁹ The information already released to the applicant by Council and during this external review also provides some insight into Council's operations, in that it shows that Council and NBN Co were engaged in consultation concerning site selection. This lowers the weight to be attributed to these factors.
137. While the Negotiation Information provides further background concerning Council's preferences, and some information concerning the background negotiations concerning use of Council land, it is generally procedural in nature and does not demonstrate any level of critical analysis. It does not, for example, provide any level of insight into:
- the reasoning behind technology selected to deliver the NBN to Maleny
 - any health concerns or risks related to the selection of this technology or more broadly to the rollout of the NBN in Maleny;²⁰⁰ or
 - Council's views on or involvement with these issues.
138. For these reasons, I afford the factors favouring disclosure listed above moderate weight.
139. I am also satisfied that, to a certain extent, the Negotiation Information could reasonably be expected to ensure effective oversight of expenditure of public funds.²⁰¹ A number of the suggested sites are owned by Council, and as noted above, one email in particular relates to the terms of NBN Co using Council land. Disclosure of this information could reasonably be expected to ensure effective oversight of public funds by NBN Co (which is funded by taxpayers) and Council. However, I consider that this factor should only be given low weight, as the information concerning use of Council land appears to be informal and preliminary, and none of the Negotiation Information provides sufficient detail to provide any in-depth or detailed analysis of the expenditure of public funds.

Factors favouring nondisclosure

Private, business, professional, commercial and financial affairs of entities

140. If disclosure of information could reasonably be expected to prejudice the private, business, commercial or financial affairs of entities,²⁰² this gives rise to a public interest factor in favour of nondisclosure.²⁰³
141. NBN Co contends that the release of the Negotiation Information concerning potential sites for a fixed wireless NBN tower in Maleny could reasonably be expected to prejudice its business, commercial and financial affairs because the site data is subject to 'live commercial negotiations', and release would allow landowners to 'reverse engineer' NBN Co's approach to site selection which would enable landowners to seek higher site rental rates.²⁰⁴ While I accept that the negotiation process is ongoing, I am not satisfied that disclosure of the Negotiation Information concerning potential sites for a fixed wireless NBN tower in Maleny would be reasonably likely to result in the prejudice that

¹⁹⁸ NBN Co's submission dated 7 December 2015 set out a number of community engagement activities in the Maleny area, including notices posted to residents and published in the local newspaper, briefings of stakeholder groups and public meetings.

¹⁹⁹ In particular, a site specific information session was held at Maleny Community Centre on 14 May 2015.

²⁰⁰ And for this reason, I do not consider that the factors favouring disclosure concerning the protection of the environment (schedule 4, part 2, item 13 of the RTI Act) or environmental or health risks or measures relating to public health and safety (schedule 4, part 2, item 14 of the RTI Act) are relevant to the General Rollout Information.

²⁰¹ Schedule 4, part 2, item 4 of the RTI Act.

²⁰² Section 36 and schedule 1 of the *Acts Interpretation Act 1954* (Qld) defines 'entity' to include 'a person and an unincorporated body'; 'person' to include 'an individual and a corporation'; and 'individual' to mean 'a natural person'.

²⁰³ Schedule 4, part 3, item 2 of the RTI Act.

²⁰⁴ The relevant part of NBN Co's submission was repeated in Council's internal review decision dated 17 June 2015.

NBN Co contends. A number of NBN Co fixed wireless towers have been built, both in the Sunshine Coast area, and around the country. Accordingly, if individuals were motivated to 'reverse engineer' NBN Co's approach to site selection they could do so by simply considering the completed towers and the attributes of the sites that they have been built (or co-located) on. Accordingly, I cannot accept that release of this information would give rise to any relevant further prejudice.

142. However, I am satisfied, in relation to the Negotiation Information concerning the terms of use of Council land, that disclosure could reasonably be expected to prejudice NBN Co's commercial affairs. It constitutes a preliminary negotiation with Council about the terms of a commercial agreement, and this negotiation is ongoing as the rollout continues in Council's local government area. I accept that release may impact on its ability to negotiate terms of use with Council and other local governments in the future. In terms of the weight to be attributed to this factor, while I acknowledge that it could be utilised by other property owners negotiating with NBN Co in other areas, the extent of the potential prejudice is reduced by the nature of the communication. It appears to be informal, preliminary and does not show any final conclusion concerning the terms of use of Council's land. Accordingly, I attribute this factor only moderate weight.
143. I also accept that disclosure of the Negotiation Information concerning potential sites may impact on decisions concerning property purchases in the area, and accordingly disclosure could reasonably be expected to prejudice the financial affairs of surrounding residents. OIC has previously held that the following could reasonably be expected to financially prejudice residents if disclosed:
- documents concerning sites under consideration by the local council for a proposed bioreactor landfill²⁰⁵
 - a report identifying properties as subject to flooding impacts in the context of Road Upgrade options under consideration by Council;²⁰⁶ and
 - road upgrade options and recommendations to improve traffic in the South West Corridor and project documentation.²⁰⁷
144. Similarly in this case, I consider release of the Negotiation Information about site selection is reasonably likely to inflict unnecessary financial harm to property owners surrounding the sites that are listed, but ultimately are not subject to installation of the tower. In terms of the weight to be attributed to this factor, the extent and the impact of the likely prejudice to surrounding residents in this case is not as significant as the examples listed above. Accordingly, I attribute this factor moderate weight.
145. Finally, I consider that the Business Harm Factor²⁰⁸ also applies to the Negotiation Information, as release of the information would disclose information about the commercial affairs of NBN Co, and that this could reasonably be expected to prejudice the future supply of information of this type (ie. preliminary thoughts on negotiations, development and site selection information), both to Council, and to other local governments in Queensland. However, as discussed in relation to the General Rollout

²⁰⁵ *Metcalf and Maroochy Shire Council* (Unreported, Queensland Information Commissioner, 19 December 2007) (*Metcalf*) at [59].

²⁰⁶ *Pallara Action Group Inc and Brisbane City Council* (Unreported, Queensland Information Commissioner, 21 September 2012) (*Pallara*) at [32].

²⁰⁷ To the extent that this information was about significant changes, which if implemented, were likely to have a significant impact on residential land and residents' amenity – eg. changes to existing road routes. See *Johnston* at [52].

²⁰⁸ Schedule 4, part 4, item 7(1)(c) of the RTI Act. Set out above at paragraph 79 in relation to the General Rollout Information. As noted in relation to the General Rollout Information, schedule 4, part 4, item 7(2) contains an exception to the Business Harm Factor in item 7(1) if what would be disclosed concerns only the business, professional, commercial or financial affairs of the person by, or on whose behalf, an application for access to the document containing the information is being made. I do not consider this exception applies here.

Information above,²⁰⁹ given local governments' critical role in identifying local issues or requirements that need to be taken into consideration for the rollout of the NBN (and other infrastructure projects)²¹⁰ and the need to negotiate with Council concerning the use of its land, I consider that the flow of information to Council (and other local governments) would not be impaired to a great extent by release of this information under the RTI Act. For this reason, I afford the Business Harm Factor low weight.

Intergovernmental relations and prohibited by an Act

146. Both Council and NBN Co have raised this factor in relation to the Negotiation Information. NBN Co's submission appears to focus on this factor in the context of the Cth Carve Out.²¹¹ For the same reasons as discussed in relation to the General Rollout Information at paragraphs 93 to 97 above, I do not consider that this factor applies.
147. For the same reasons as discussed at paragraph 98 to 100 above in relation to the General Rollout Information, I also do not consider that disclosure of the Negotiation Information is prohibited by an Act. Accordingly, I do not consider that the factor favouring nondisclosure set out in schedule 4, part 3, item 22 applies.

Deliberative process

148. As noted in relation to the General Rollout Information, the public interest favours nondisclosure of information where disclosure could reasonably be expected to:
- prejudice a deliberative process of government (**Deliberative Process Prejudice Factor**);²¹² or
 - cause a public interest harm through disclosure of an opinion, advice or recommendation that has been obtained, prepared or recorded or a consultation or deliberation that has taken place, in the course of, or for, the deliberative processes involved in the functions of government (**Deliberative Process Harm Factor**).²¹³
149. In relation to the Deliberative Process Prejudice Factor, it is relevant to determine whether there is an ongoing deliberative process of Council that will be prejudiced by release of the Negotiation Information. In this regard, the applicant submits that the relevant deliberative process for a site at a location '*only commences when the Development Application is lodged*'.²¹⁴ While I accept that there are a number of separate steps involved, I consider that the relevant deliberative process encompasses all of these steps, including Council's entire '*thinking process*' about proposed development.²¹⁵ This includes the steps prior to a development application being lodged, such as preliminary negotiation with an infrastructure developer about the proposal.
150. In relation to the proposed installation of the fixed wireless tower in Maleny, the relevant '*thinking process*' began with NBN Co's initial contact with Council over the proposed site. I consider that this process may come to an end by Council making a final decision

²⁰⁹ At paragraph 91.

²¹⁰ See '*Local Government Planning*': <<http://www.nbnco.com.au/develop-or-plan-with-the-nbn/local-government-planning/local-government-checklist.html>>, accessed on 21 October 2016.

²¹¹ In its submissions to Council dated 17 April 2015, NBN Co states '*if applicants could obtain information from one State body, but the same information is likely to be exempted under another jurisdiction's FOI regime, this could potentially cause an adverse impact on intergovernmental relations*'.

²¹² Schedule 4, part 3, item 20 of the RTI Act.

²¹³ Schedule 4, part 4, item 4 of the RTI Act.

²¹⁴ Applicant's submissions to OIC dated 10 February 2016, page 3, 5 and 6.

²¹⁵ See discussion of deliberative process at paragraph 102 above.

on a site after an application is made under the *Sustainable Planning Act 2009* (Qld),²¹⁶ or alternatively, by NBN Co advising Council that it is withdrawing the proposal to build a tower in the area or altering its plans so that Council approval is not required. On the evidence available to OIC, none of these events have occurred, and in fact, Council and NBN Co are still in the process of reaching agreement as to an appropriate site.

151. In relation to the Negotiation Information concerning the terms of use of Council's land, I understand that there are ongoing negotiations concerning NBN Co's use of Council land for its infrastructure. While agreement has been reached in relation to certain locations, it is ongoing in others, including in areas such as Maleny where a site has not yet been finally selected. Council has advised that there is no agreement in place that applies generally to all such negotiations between itself and NBN Co. Accordingly, I am satisfied that Council's '*thinking process*' about the terms of use of its land by NBN Co is current and ongoing.
152. In relation to the potential prejudice to these two ongoing deliberative processes, it is well established that there is a public interest in government being able to:²¹⁷
- make informed decisions in the course of carrying out its functions and in doing so, to have access to the widest possible range of information and advice without fear of interference; and
 - maintain the confidentiality of their deliberative process in some circumstances, particularly where those deliberative process relate to ongoing negotiations.
153. It has also previously been held that prejudice to a deliberative process can arise where releasing a document would cause disruptive public debate, reallocation of resources to deal with the disruption (resources which would otherwise be involved in finalising the deliberative process) and interference with the ability of an agency to objectively consider its options and reach a decision.²¹⁸ I consider this is reasonably likely to apply here, as the deliberative process is at an early stage, Council is yet to decide on any development application in relation to the proposed fixed wireless tower or decide on the terms of use of its land, and there is likely to be a high level of community consternation at the list of suggested sites and use of Council land for NBN fixed wireless towers more generally.
154. I am also satisfied that the Deliberative Process Harm Factor applies. The Negotiation Information discloses a consultation that has taken place in the course of, or for, the '*thinking process*' of Council in relation to the proposed installation of the fixed wireless tower in Maleny, and the terms of the use of its land for towers.
155. The next step is to assess the weight of these factors. The Negotiation Information relates to infrastructure that generally gives rise to a high degree of concern in the community about scenic amenity, health impacts and, to a lesser extent, property values. Disclosure is likely to cause disagreement, anxiety and a level of community unrest about various options that may not (and in some cases are very unlikely to) eventuate.²¹⁹ Accordingly, it is my preliminary view that these factors carry significant weight.

²¹⁶ This is consistent with previous decisions of the Information Commissioner concerning Council's deliberative process in relation to infrastructure development. See *Metcalf* at [22].

²¹⁷ *Pallara* at [42] citing *Metcalf* at [47].

²¹⁸ *Pallara* at [42-43] and *Johnston* at [39] and [42].

²¹⁹ This is a factor which has previously been given significant weight in the context of infrastructure development (in particular, changes to existing road routes): see *Johnston* at [42].

Supply of confidential information

156. As set out in relation to the General Rollout Information, the RTI Act provides two nondisclosure factors concerning confidential information, being the Confidential Prejudice Factor²²⁰ and the Confidential Harm Factor.²²¹ As discussed in relation to the Breach of Confidence Exemption above, I do not consider that the Negotiation Information concerning use of Council land by NBN Co was confidential. Accordingly, I find that the Confidential Prejudice Factor and the Confidential Harm Factor do not apply to this information.
157. In terms of the Negotiation Information concerning potential sites for a fixed wireless tower in Maleny, I consider that the Confidential Prejudice Factor applies. The information was communicated confidentially, and is subject to the Confidentiality Agreement. I accept that disclosure could reasonably be expected to result in third parties being reluctant to provide information to Council in confidence if it was known that the information may be released under the RTI Act.
158. I am also satisfied that the Confidential Harm Factor applies to this information. As discussed in relation to the Breach of Confidence Exemption above,²²² I am satisfied that the information is of a confidential nature and was communicated in confidence. Disclosure could reasonably be expected to prejudice the future supply of information of this type (ie. preliminary development and site selection information), both to Council, and to other local governments in Queensland. This harm factor contains an exception for certain '*deliberative process information*' that is identical to the exception to the Breach of Confidence Exemption discussed at paragraph 126 to 128 above. For the same reasons as discussed above, I do not consider this exception applies.
159. In terms of the weight to be attributed to these factors, I acknowledge the importance of the flow of information between Council and infrastructure developers, and in particular, with NBN Co (and its representatives) for the design and deployment of the NBN network. Local governments have broad powers and responsibilities in relation to their local government area,²²³ and accordingly, it is in the public interest that they are included at an early stage in the planning of infrastructure projects. On the other hand, given local governments' critical role in identifying local issues or requirements that need to be taken into consideration for the rollout of the NBN (and other infrastructure projects),²²⁴ I consider that the flow of information to Council (and other local governments) would not be impaired to a great extent by release of this information under the RTI Act. For this reason, to the extent that they apply, I afford these factors low weight.

Balancing the relevant factors

160. In addition to the pro-disclosure bias, there are several factors which favour disclosure of the Negotiation Information. Generally, there is a public interest in the community being able to discuss, debate and understand proposals regarding the installation of significant infrastructure in their area, Council's role, the terms of use of Council's land and the expenditure of public funds for such proposals. However, given that NBN Co has already conducted community consultation concerning the proposed location of the

²²⁰ Schedule 4, part 3, item 16 of the RTI Act.

²²¹ Schedule 4, part 4, item 8 of the RTI Act.

²²² At paragraphs 119 to 122.

²²³ See section 9 of the *Local Government Act 2009 (Qld)*.

²²⁴ See '*Local Government Planning*': <<http://www.nbnco.com.au/develop-or-plan-with-the-nbn/local-government-planning/local-government-checklist.html>>, accessed on 21 October 2016.

relevant tower and given the limited nature of the Negotiation Information, these factors carry low to moderate weight.

161. On the other hand, I am satisfied that disclosure of certain information²²⁵ could reasonably be expected to prejudice the commercial affairs of NBN Co, and disclosure of the remaining information could reasonably be expected to prejudice the financial affairs of residents surrounding the proposed sites. I am also satisfied that disclosure of the Negotiation Information could reasonably be expected to give rise to some reluctance to provide development and early negotiation information to Council (and other local governments) in the future.²²⁶ However, in this case it is the Deliberative Process Prejudice Factor and the Deliberative Process Harm Factor that carry determinative weight. The relevant process is at an early stage and given the community interest in the project, disclosure is likely to cause reallocation of Council resources to deal with a level of community unrest, particularly about options and terms of use that may not (and in some cases, are unlikely to) eventuate.

Conclusion

162. On balance, I find that the public interest factors favouring nondisclosure outweigh the factors favouring disclosure. Accordingly, I find that disclosure of the Negotiation Information would, on balance, be contrary in the public interest, and therefore, access to this information may be refused under section 47(3)(b) of the RTI Act.

DECISION

163. I vary Council's internal review decision and find that:

- access to certain information²²⁷ may not be refused under the RTI Act, as it is not exempt information and nor would its disclosure, on balance, be contrary to the public interest
- access to certain information²²⁸ may be refused²²⁹ on the basis that it is exempt information²³⁰ and due to the specific circumstances of this case, I have also found that disclosure of this particular information would, on balance be contrary to the public interest and therefore, access may also be refused on that basis;²³¹ and
- access to information on one page²³² may be refused on the basis that its disclosure would, on balance, be contrary to the public interest.²³³

164. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

K Shepherd
Assistant Information Commissioner

Date: 28 October 2016

²²⁵ The information concerning NBN Co's use of Council land for its infrastructure.

²²⁶ And accordingly, the Business Harm Factor applies, and the Confidential Information Prejudice Factor and Confidential Information Harm Factor applies to information covered by the Confidentiality Agreement. To the extent they apply, these factors carry some (albeit low) weight. See analysis at paragraphs 145 and 156 to 159 above.

²²⁷ The 'General Rollout Information' as defined under the 'Information in issue' heading on page 5 above.

²²⁸ On pages 19-23 of the information initially located by Council in response to the access application (including duplicates).

²²⁹ Under section 47(3)(a) of the RTI Act.

²³⁰ Under section 48 and schedule 3, section 8 of the RTI Act.

²³¹ Under section 47(3)(b) of the RTI Act.

²³² Part of the email on page 36 of the Additional Documents.

²³³ Under section 47(3)(b) of the RTI Act.

APPENDIX 1

Significant procedural steps

Date	Event
6 February 2015	Council received the access application.
19 February 2015	The applicant narrowed the scope of the access application.
27 March 2015	Council consulted with NBN Co concerning the access application.
17 April 2015	NBN Co objected to the release of certain information.
21 April 2015	Council issued its decision to the applicant.
19 May 2015	The applicant applied for internal review of Council's decision.
17 June 2015	Council issued its internal review decision to the applicant, affirming its original decision but not raising the issue of nonexistent documents.
11 July 2015	OIC received the external review application.
13 July 2015	OIC notified Council the external review application had been received and requested relevant procedural information.
13 July 2015	OIC received the requested information from Council.
16 July 2015	OIC notified the applicant and Council that it had accepted the external review application and asked Council to provide additional information.
20 July 2015	OIC provided an update to the applicant and clarified that the external review was in his name, and not in the name of a group.
22 July 2015	OIC received the requested information from Council.
17 August 2015	OIC provided the applicant with an update on the status of the review.
4 September 2015	OIC provided Council with an update on the status of the review.
25 September 2015	OIC provided the applicant with an update on the status of the review.
14 October 2015	OIC contacted Council to clarify the status of the site selection process.
16 October 2015	OIC received information from Council concerning the status of the relevant site selection process.
12 November 2015	OIC advised NBN Co by telephone of the review and NBN Co confirmed that it maintained its objection to the release of the requested information.
13 November 2015	OIC provided the applicant with an update on the status of the review.
19 November 2015	OIC requested NBN Co to confirm that it continued to object to the release of certain information and if so, to provide background information relevant to the external review.
20 November 2015	OIC provided Council with an update on the status of the review.
30 November 2015	NBN Co asked OIC for an extension of time to provide information.
1 December 2015	OIC granted NBN Co the requested extension of time.
7 December 2015	OIC received the requested information from NBN Co.
9 December 2015	OIC confirmed with NBN Co its preferred site for a fixed wireless tower in Maleny and confirmed that this information was publicly available.

11 December 2015	OIC provided Council and the applicant with an update on the status of the review. Council confirmed that no development application had been received in relation to NBN Co's preferred site for a fixed wireless tower in Maleny.
4 February 2016	OIC conveyed a preliminary view to the applicant that access to the information in issue in the review may be refused because disclosure would, on balance, be contrary to the public interest, and that there were no reasonable grounds to require Council to conduct any further searches for documents. OIC asked for submissions supporting the applicant's case by 19 February 2016.
10 February 2016	The applicant advised OIC that the preliminary view was not accepted, provided submissions supporting his case and set out his concerns regarding the sufficiency of Council's searches.
12 February 2016	OIC provided Council with an update on the status of the review.
16 February 2016	OIC confirmed with the applicant that his submissions had been received.
19 February 2016	OIC provided the applicant with an update on the status of the review.
26 February 2016	OIC confirmed to Council its preliminary view that access to the information in issue in the review could be refused, raised the applicant's concerns regarding sufficiency of searches and requested that Council conduct further searches for documents and provide submissions to OIC by 14 March 2016.
1 March 2016	Council requested an extension of time to provide submissions. OIC granted an extension of time for Council to make further submissions.
31 March 2016	Council provided OIC with an update concerning their pending submissions.
1 April 2016	OIC granted Council a further extension of time to make submissions.
5 April 2016	OIC contacted Council concerning its submissions and discussed difficulties with searches. OIC granted Council a further extension of time to make submissions.
8 April 2016	OIC received the requested information from Council.
13 April 2016	OIC received copies of the Additional Documents from Council.
22 April 2016	OIC provided the applicant with an update on the status of the review. Council confirmed certain background information relevant to the review.
26 April 2016	OIC informed NBN Co that Council had located the Additional Documents and provided information concerning the consultation process.
29 April 2016	OIC wrote to NBN Co and explained the recent steps taken in the review, conveyed its preliminary view about the Additional Documents and sought NBN Co's views about the Additional Documents. OIC asked Council to provide NBN Co with a copy of the Additional Documents.
4 May 2016	OIC received an extension of time request from NBN Co.
5 May 2016	Council confirmed that the Additional Documents had been provided to NBN Co on 3 May 2016.
6 May 2016	OIC granted NBN Co an extension of time to make submissions.
27 May 2016	OIC received submissions from NBN Co objecting to disclosure of some of the Additional Documents.
30 May 2016	OIC received a copy of the Additional Documents from NBN Co with redactions showing its objections.
31 May 2016	OIC provided NBN Co with an update on the status of the review and sought clarification on their submissions.

2 June 2016	OIC provided the applicant with an update on the status of the review.
3 June 2016	OIC provided Council with an update on the status of the review. OIC confirmed with the applicant that some of the information in the Additional Documents did not fall within the scope of his access application, and that he did not seek access to some other information.
7 June 2016	NBN Co clarified their objection concerning certain Additional Documents and OIC confirmed that NBN Co would like to be a participant in the review.
10 June 2016	OIC contacted Council to confirm relevant background information.
14 June 2016	OIC advised NBN Co that information no longer in issue would be released to the applicant.
16 June 2016	NBN Co requested a copy of the redacted document before it was released to the applicant.
17 June 2016	OIC confirmed to the applicant that Council had agreed to release some of the Additional Documents and asked that he advise OIC if he sought access to the information deleted from these documents. OIC also confirmed its view in relation to the initial documents located by Council. OIC provided NBN Co with the Additional Documents to be released to the applicant.
21 June 2016	NBN Co clarified its objections in relation to 3 pages of the Additional Documents, and confirmed that it did not object to the release (with information deleted in accordance with OIC's email dated 17 June 2016 and on the 3 additional pages). OIC conveyed a letter to Council requesting that the Additional Documents (with information that was the subject of NBN Co's objections deleted) be released to the applicant.
23 June 2016	Council confirmed release of a copy of the Additional Documents (with information that was the subject of NBN Co's objections deleted) to the applicant.
5 July 2016	The applicant advised OIC that he had not received the Additional Documents due to a technology problem. Council re-sent the documents to the applicant.
12 July 2016	OIC contacted Council to confirm relevant background information.
16 July 2016	The applicant provided submissions to OIC concerning the information deleted from the Additional Documents.
20 July 2016	The applicant advised OIC of his correspondence with NBN Co.
21 July 2016	OIC clarified with the applicant that a decision has not been made in relation to the review, and provided an update on the status of the review.
5 August 2016	OIC confirmed that it would shortly issue a formal decision and acknowledged NBN Co's strong objections in relation to the information remaining in issue. OIC invited NBN Co to provide further and final submissions.
18 August 2016	OIC provided the applicant with an update on the status of the review and advised the applicant of OIC's view concerning the breach of confidence exemption. OIC invited the applicant to provide further and final submissions. The applicant confirmed that he did not wish to make any further submissions. NBN Co provided OIC with further and final submissions.
6 September 2016	OIC provided Council with an update on the status of the review.
29 September 2016	OIC contacted Council to confirm relevant background information.
21 October 2016	OIC notified the applicant that OIC would shortly be issuing a final decision.