



Decision and Reasons for Decision

Citation: *North Queensland Conservation Council Inc and Queensland Treasury* [2016] QICmr 21 (10 June 2016)

Application Number: 312534

Applicant: North Queensland Conservation Council Inc

Respondent: Queensland Treasury

Decision Date: 10 June 2016

Catchwords: **ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - CABINET INFORMATION** - information relating to the economic viability of government support for proposed mining projects - whether information would reveal considerations of Cabinet or otherwise prejudice confidentiality of Cabinet considerations - whether information is exempt under section 48 and schedule 3, section 2(1)(b) of the *Right to Information Act 2009* (Qld) - whether access may be refused under section 47(3)(a) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - CABINET INFORMATION - information relating to the economic viability of government support for proposed mining projects - documents created to inform Cabinet Budget Review Committee - whether information has been brought into existence in the course of the State's budgetary processes - whether information is exempt under section 48 and schedule 3, section 2(1)(c) of the *Right to Information Act 2009* (Qld) - whether access may be refused under section 47(3)(a) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - information relating to the economic viability of government support for proposed mining projects - accountability and transparency - prejudice to commercial affairs of an entity - prejudice to economy of the State, the Government's ability to obtain confidential information and deliberative processes of government - whether disclosure would, on balance, be contrary to the public interest under section 49 of the *Right to Information Act 2009* (Qld) - whether access may be refused under section 47(3)(b) of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. In December 2014, North Queensland Conservation Council Inc (**NQCC**) applied to Queensland Treasury (**Treasury**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to all documents relating to the assessment of the economic viability of the *'Adani projects in Queensland'*, any payment and subsidy information and related communications between various government agencies, and with the Adani group of companies (**Adani**).¹
2. Treasury located 1363 pages and decided to release 68 full pages and 232 part pages. Treasury refused access to the remaining information on the basis that it was exempt, or contrary to the public interest to disclose under the RTI Act.² On internal review, Treasury affirmed its original decision.
3. NQCC applied to OIC for external review of the internal review decision. On external review, NQCC has argued that the additional information should be *'lawfully released in the public interest'* based on a narrow reading of the exemptions, applying the pro-disclosure bias and a more appropriate weighting of the factors favouring disclosure of the information. NQCC also emphasised the *'significance and the widespread public controversy of the projects'* and the *'appropriateness of a large expenditure of public funds'*.³
4. For the reasons set out below, I find that access to the information in issue on external review may be refused under the RTI Act. In part, my decision is based on different grounds to those relied on by Treasury and therefore, I have varied the internal review decision. In summary, I find that access may be refused on the following grounds:
 - the information is exempt under schedule 3, section 2(1)(b) or (c) of the RTI Act;⁴ or
 - disclosure of the information would, on balance, be contrary to the public interest.⁵

Background

5. The information located by Treasury concerns Treasury's assessment of the economic viability of the Adani's proposed Carmichael Coal Mine and related infrastructure projects (**Adani Projects**) and considers various options for government assistance in relation to these projects.
6. Documents available on Treasury's Disclosure Log indicate that the Adani Projects will involve the largest coal mine in Australia and multibillion dollar investments in railway and port infrastructure.⁶ This has been recognised as a major project by the Queensland Coordinator General⁷ and the relevant mining leases were recently granted to Adani by the State Government.⁸

¹ Access application dated 17 December 2014. The Adani Group is a group of companies seeking to develop the largest coal mine in Australia, the Carmichael Coal Mine in Northern Queensland. The development of this mine will also involve the development of related rail and port infrastructure.

² Treasury also relied on sections 47(3)(f) and 53 of the RTI Act to refuse access commercially available information. NQCC did not seek internal or external review of this aspect of the decision and therefore, those pages are not in issue in this review.

³ External review application dated 27 July 2015.

⁴ Under section 47(3)(a) of the RTI Act.

⁵ Under section 47(3)(b) of the RTI Act.

⁶ As published on Treasury's Disclosure Log, *Reference 577 J Tager* available from: <https://www.treasury.qld.gov.au/about-us/right-to-information/previous-disclosure-log.php> (accessed on 19 May 2016).

⁷ Further details of this project appear on the Coordinator General's website at <http://www.statedevelopment.qld.gov.au/assessments-and-approvals/carmichael-coal-mine-and-rail-project.html> (accessed on 25 February 2016).

⁸ Ministerial statement dated 13 April 2016 available at <http://statements.qld.gov.au/Statement/2016/4/3/carmichael-mine-approvals-put-thousands-of-new-jobs-step-closer> (accessed on 14 April 2016).

7. During the timeframe of the access application, the former Deputy Premier announced that the Government was in negotiations with the Adani Group regarding direct investment in infrastructure to facilitate the Adani Projects.⁹ The Queensland Government has not made any further public announcements on this particular issue.
8. Significant procedural steps relating to the application and external review are set out in the Appendix to this decision.

Reviewable decision

9. The decision under review is Treasury's internal review decision dated 29 June 2015.

Material considered

10. Evidence, submissions, legislation and other material I have considered in reaching my decision are disclosed in these reasons (including footnotes and the Appendix).

Information in issue

11. The information to which NQCC seeks access comprises emails, correspondence and other internal records created and/or considered by Treasury staff in assessing the economic viability of the Adani Projects and the risks/benefits of the options available to the State Government, with respect to support for these projects. The information includes comprehensive financial, commercial and economic data and forecasts relevant to the Adani Projects.

Issues to be considered

12. In this decision, I have considered whether access to the information in issue may be refused on the basis that it is:
 - A. exempt information, the disclosure of which would reveal a consideration of Cabinet (**Cabinet Information**)¹⁰
 - B. exempt information brought into existence in course of the State's budgetary processes (**Budgetary Processes Information**);¹¹ or
 - C. information, the disclosure of which would, on balance, be contrary to the public interest (**CTPI Information**).¹²
13. The applicant has confirmed to OIC that it is not seeking information identified by Treasury as commercially available, subject to legal professional privilege or comprising the personal information of third parties.¹³ Therefore, such information is not dealt with in this decision.

⁹ Media release dated 17 November 2014 available at: <http://statements.qld.gov.au/Statement/2014/11/17/historic-agreements-bring-jobs-to-queensland>.

¹⁰ 290 pages in full and 37 pages in part. Under sections 47(3)(a), 48 and schedule 3, section 2(1)(b) of the RTI Act.

¹¹ 265 pages in full and 49 pages in part. Under sections 47(3)(a), 48 and schedule 3, section 2(1)(c) of the RTI Act.

¹² 309 pages in full and two pages in part. Under sections 47(3)(b) and 49 of the RTI Act. This includes information which Treasury found to be exempt under schedule 3, section 8 of the RTI Act, on the basis of breach of confidence. On external review, OIC formed, and conveyed to participants, the preliminary view that the requirements of this exemption were not satisfied.

¹³ The issues to be considered on external review were confirmed by the applicant's representative during a phone discussion with OIC on 14 September 2015. Subsequently, the applicant's representatives also indicated that it did not seek information OIC considered to be subject to legal professional privilege, in response to OIC's preliminary view letter dated 4 March 2016.

A. Cabinet Information

Relevant law

14. Under the RTI Act a person has a right to be given access to documents of an agency unless access would, on balance, be contrary to the public interest.¹⁴ However, this right is subject to other provisions of the RTI Act, including the grounds on which access to information may be refused.
15. Access may be refused to exempt information.¹⁵ Relevantly, the RTI Act provides that information is exempt information if:
 - it has been brought into existence for the consideration of Cabinet;¹⁶ or
 - its disclosure would reveal any consideration of Cabinet or would otherwise prejudice the confidentiality of Cabinet considerations or operations.¹⁷
16. The term '*consideration*' is defined as including '*discussion, deliberation, noting (with or without discussion) or decision, and consideration for any purpose, including, for example, for information or to make a decision*'.¹⁸
17. The following types of Cabinet documents are taken to be comprised exclusively of exempt information¹⁹ without any further consideration of their contents:
 - (a) Cabinet submissions
 - (b) Cabinet briefing notes
 - (c) Cabinet agendas
 - (d) notes of discussions in Cabinet
 - (e) Cabinet minutes
 - (f) Cabinet decisions
 - (g) drafts of documents (a) to (f) above.
18. There are three exceptions to this exemption:
 - if it is more than 10 years after the information's relevant date²⁰
 - if the information was brought into existence before 1 July 2009;²¹ or
 - if the information has been officially published by decision of Cabinet.²²

Findings

19. I am satisfied that the exceptions to the exemption do not apply as the Cabinet Information was brought into existence after 1 July 2009 and has not been officially published. I acknowledge the applicant's submission that there have been some public announcements regarding the subject matter of the Cabinet Information.²³ However, there is no evidence available to OIC that the Cabinet Information itself has been officially published.

¹⁴ Section 44(1) of the RTI Act.

¹⁵ Sections 47(3)(a) and 48 of the RTI Act.

¹⁶ Schedule 3, section 2(1)(a) of the RTI Act.

¹⁷ Schedule 3, section 2(1)(b) of the RTI Act.

¹⁸ Schedule 3, section 2(5) of the RTI Act.

¹⁹ Schedule 3, section 2(3) of the RTI Act.

²⁰ Schedule 3, section 2(1) of the RTI Act. For information considered by Cabinet, the '*relevant date*' is the date the information was most recently considered by Cabinet; otherwise, '*relevant date*' is the date the information was brought into existence, schedule 3, section 2(5) of the RTI Act.

²¹ Schedule 3, section 2(2)(a) of the RTI Act.

²² Schedule 3, section 2(2)(b) of the RTI Act.

²³ Applicant's submission to OIC dated 1 April 2016 which refers to a Cabinet publication from March 2015 concerning Adani and the Abbot Point Growth Gateway Project.

20. The Cabinet Information includes drafts of Cabinet Budget Review Committee (**CBRC**)²⁴ submissions, discussion papers, information prepared for the Treasurer and correspondence between relevant officers within Treasury, Queensland Treasury Corporation (**QTC**), Queensland Investment Corporation, the Department of Premier and Cabinet and the Department of State Development (**DSD**).
21. To the extent that some documents are drafts of Cabinet submissions, I am satisfied that these documents comprise exclusively exempt information under schedule 3, section 2(3) of the RTI Act. These draft submissions include reports of a factual nature.²⁵ The applicant submits that reports of a factual or statistical nature are only exempt if the disclosure of these reports would reveal Cabinet considerations. I have carefully considered these documents and I am satisfied that while they may be factual in nature, the disclosure of this information is likely to reveal a consideration of Cabinet.²⁶
22. The remaining Cabinet Information includes briefing notes, discussion papers, emails (and attachments) sent to or from staff of Treasury. Many of these emails refer to specific Cabinet submissions. Generally this information discusses the economic viability of the Adani Projects and the options considered by the State at the time in relation to investment in or support of the Adani Projects. In considering whether this information is exempt, it is firstly relevant to consider whether its disclosure would reveal any consideration of Cabinet. If that question is answered in the negative, it is then relevant to consider whether disclosure would otherwise prejudice the confidentiality of Cabinet considerations or operations.
23. The applicant refers to the Information Commissioner's comments in *Ryman and Department of Main Roads*,²⁷ that were made in relation to similar provisions under the repealed *Freedom of Information Act 1992 (Qld) (FOI Act)*, In *Ryman*, the Information Commissioner found that ordinarily, for a document to be exempt because its disclosure would reveal or prejudice a consideration of Cabinet, the document must be created contemporaneously with, or after, the relevant Cabinet consideration – for example, a document that records or minutes the consideration. The applicant considers this approach should be taken in applying the Cabinet exemption to the information in issue in this review.²⁸
24. Schedule 3, section 2(1)(b) of the RTI Act states that information is exempt if its '*disclosure would reveal any consideration of Cabinet or would otherwise prejudice the confidentiality of Cabinet considerations or operations*'.²⁹ In my view, the words of this section do not explicitly require the relevant information to be created contemporaneously or shortly after the relevant Cabinet meeting/discussion. Rather, as set out more recently in *Quandamooka*³⁰ and in the context of the RTI Act, I consider that the relevant question is whether, if a reasonable person viewed the information, a Cabinet consideration would be revealed to them, or the confidentiality of the Cabinet considerations or operations would be prejudiced. In my view, the answer to this largely depends on the particular nature of the information in question, the circumstances relating to creation of the information and the other information available to the decision maker, under the RTI Act.

²⁴ Schedule 3, section 2(5) of the RTI Act provides that '*Cabinet*' includes a Cabinet committee or subcommittee. CBRC is a Cabinet committee for this purpose.

²⁵ Under schedule 3, section 2(4) of the RTI Act a report of a factual or statistical information attached to a document identified in schedule 3, section 2(3) of the RTI Act is only exempt if it was brought into existence for the consideration of Cabinet or its disclosure would disclose a consideration of Cabinet.

²⁶ Schedule 3, section 2(4)(a) of the RTI Act.

²⁷ (1996) QAR 416 (*Ryman*) at [39]-[40]. See also *Hudson, as agent for Fencray Pty Ltd, and the Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 at [39]-[44]

²⁸ Applicant's submission to OIC dated 1 April 2016.

²⁹ Schedule 3, section 2(b) of the RTI Act.

³⁰ *Quandamooka Yoolooburrabee Aboriginal Corporation and Department of Natural Resources and Mines; Sibelco Australia Ltd (Third Party)* [2014] QICmr [47] (19 November 2014) (*Quandamooka*) at [57]-[59].

25. The applicant also refers to the decision in *Sunshine Coast Environment Council Inc*,³¹ which indicated that there must be evidence on the face of the relevant document which reveals the information was considered by Cabinet or which otherwise connects the document to a Cabinet consideration.³² In that decision, the Acting Assistant Information Commissioner was not satisfied that there was a sufficient nexus between the information in issue and any particular Cabinet consideration, in order for the information to be considered exempt.
26. I am satisfied that the Cabinet Information, if disclosed to a reasonable person, would reveal the considerations of Cabinet to that person. This information directly discusses the contents of Cabinet submissions, the results of Cabinet considerations or other matters to be put before Cabinet.³³ I am satisfied that disclosure of this information could reasonably be expected to reveal Cabinet's noting of some information, and the focus of its discussions, deliberations and decisions regarding other information. I am satisfied that the facts of *SCECI* can be distinguished from this case in the sense that the Cabinet Information details the very information that was taken into account or noted by Cabinet in its deliberations and therefore, a sufficient nexus is established. While this information does not comprise a draft or final submission, I am satisfied that this it discloses specific considerations and deliberations of Cabinet.³⁴
27. The applicant questions how internal Departmental emails could reveal considerations of Cabinet and contends that it is not apparent what specific confidential Cabinet operations would be prejudiced by disclosure of these emails.³⁵ I am satisfied that the content of the relevant emails disclose specific matters that were considered by Cabinet. This is clear either on the face of the emails themselves or due to the content of other information in issue.³⁶ For this reason, I consider that the relevant emails comprise exempt information. Given this finding, I consider it is unnecessary to consider the meaning of '*Cabinet operations*' in the context of the second limb of schedule 3, section 2(1)(b) of the RTI Act.
28. The applicant also contends that the Cabinet exemption should be applied narrowly in relation to information that is not exclusively exempt, such as the Departmental emails. I acknowledge that the grounds for refusal under the RTI Act are to be applied narrowly.³⁷ However, I am satisfied that the Departmental emails meet the requirements of the Cabinet exemption for the same reasons explained above. I am also satisfied that given the particular nature of the information in issue, it would not be practicable to partially release the documents containing Cabinet information, with the exempt information removed, as sought by the applicant.³⁸

Conclusion

29. I am satisfied that the Cabinet Information comprises exclusively exempt information or its disclosure would reveal a consideration of Cabinet. Accordingly, I am satisfied that access may be refused to this information under section 47(3)(a) of the RTI Act.

³¹ *Sunshine Coast Environment Council Inc and Department of National Parks, Sport and Racing; Springborg MP (Third Party)* [2016] QICmr 10 (4 March 2016) (**SCECI**).

³² *SCECI* at [48].

³³ Given section 108(3) of the RTI Act, which provides that a decision must not include information that is claimed to be exempt information, I am prevented from disclosing any more details regarding the nature of this information.

³⁴ In making this finding, I have also taken into account the content of a draft Cabinet submission concerning the subject matter of this application.

³⁵ Applicant's submissions dated 1 April 2016.

³⁶ Which I am prevented from disclosing in these reasons due to section 108(3) of the RTI Act.

³⁷ Under section 47(2) of the RTI Act.

³⁸ Under section 74 of the RTI Act.

B. Budgetary Processes Information

Relevant law

30. The RTI Act provides that information is exempt if it has been brought into existence in the course of the State's budgetary processes.³⁹ To determine whether information is exempt under this section it is necessary to consider the circumstances under which the information in issue was brought into existence. The exceptions set out in paragraph 18 above also apply in relation to this provision.

Findings

31. Firstly, I do not consider that any of the exceptions to this exemption apply as the relevant information was brought into existence in late 2014 and has not been officially published by decision of Cabinet.
32. The RTI Act does not define the words '*State's budgetary processes*'⁴⁰, however, I am satisfied that one of the processes contemplated by this section is the State's annual budgetary process recognised on the Queensland Treasury website which lists 11 separate components that together make up the annual budget process.⁴¹ The first and fourth of these components refer to the role of the CBRC in relation to:
- considering an overall strategy for the budget
 - identifying key areas for resource allocation that respect the government priorities, fiscal principles and key budget decisions; and
 - considering specific departmental budget submissions.
33. The Queensland Government Cabinet Handbook further provides that CBRC generally works closely with the Treasury Department in relation to obtaining financial information in order to make informed decisions on financial and budgetary matters.⁴²
34. I am satisfied that information brought into existence by Treasury for the purposes of advising CBRC in performing its primary role in identifying key areas for resource allocation and making key budget decisions, would be captured by this provision.
35. In this case, the following circumstances are particularly relevant:⁴³
- Treasury has confirmed that its involvement in matters relating to the Adani Projects for the timeframe of the access application was for the specific purpose of providing the CBRC with detailed financial and economic data to consider prior to making investment decisions
 - Treasury and QTC staff were involved in assessing the economic viability of the Adani Projects for the sole purpose of providing this information to CBRC; and
 - the relevant CBRC considerations would have had a direct and significant impact on the State's budget had the CBRC settled on a particular course of action.

³⁹ Under schedule 3, section 2(1)(c) of the RTI Act.

⁴⁰ Also, this exempt information provision has not been considered in a published decision of the Information Commissioner and there was no equivalent provision in the repealed FOI Act.

⁴¹ Treasury website: <https://treasury.qld.gov.au/budget-finance/budget-process/index.php> accessed on 9 May 2016.

⁴² Cabinet Handbook: <http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/cabinet-handbook/committees/review-committee.aspx> accessed on 11 April 2016.

⁴³ This information was both evident on the face of the information in issue and also confirmed to OIC in a telephone discussion on 12 April 2016, by a Treasury officer closely involved in the creation of the information in issue.

36. I am satisfied that information created by staff of Treasury or QTC in relation to the economic viability of the Adani Projects, for the timeframe of this application, was created specifically to inform CBRC deliberations.
37. The applicant submits that not all considerations of the CBRC would have budgetary consequences⁴⁴ and that the State budgetary processes exemption should be interpreted narrowly in line with section 47(2) of the RTI Act. In this case, I am satisfied that the relevant CBRC considerations can be directly linked to the budgetary process as CBRC was considering the State's potential allocation of significant financial resources and specifically requested information on the relevant financial issues from Treasury.
38. The applicant also refers to the 2015-2016 annual Queensland Government budget documents to argue that the information in issue was not part of any agency's specific budget submission.⁴⁵ I do not consider the exemption in schedule 3, section 2(1)(c) of the RTI Act requires such evidence. In my view, the connection between the creation of the relevant information in issue and the CBRC budgetary advisory process is clear on the face of the documents available to OIC in this review.

Conclusion

39. I am satisfied that the Budgetary Processes Information was created for the purpose of informing CBRC in relation to its specific budgetary advisory role, and that this forms part of the State's budgetary processes. Therefore, I find that this information is exempt⁴⁶ and access to it may be refused under section 47(3)(a) of the RTI Act.

C. CTPI Information

Relevant law

40. Access to information may also be refused where disclosure, would, on balance, be contrary to the public interest.⁴⁷ The RTI Act is to be administered with a pro-disclosure bias.⁴⁸
41. The RTI Act identifies various factors that may be relevant to deciding the balance of the public interest⁴⁹ and explains the steps that a decision-maker must take⁵⁰ in deciding the public interest as follows:
 - (i) identify any irrelevant factors and disregard them
 - (ii) identify relevant public interest factors favouring disclosure and nondisclosure
 - (iii) balance the relevant factors favouring disclosure and nondisclosure; and
 - (iv) decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

⁴⁴ Applicant's submissions dated 4 May 2016.

⁴⁵ Applicant's submissions dated 4 May 2016.

⁴⁶ Under schedule 3, section 2(1)(c) of the RTI Act

⁴⁷ Sections 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.

⁴⁸ Section 44 of the RTI Act.

⁴⁹ Schedule 4 of the RTI Act sets out the factors relevant to deciding whether disclosure of information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive and therefore, other factors may also be relevant in a particular case.

⁵⁰ Section 49(3) of the RTI Act.

Findings

42. The CTPI Information consists of information in the following documents:
- Due Diligence Assessment of the Adani Projects completed by DSD staff
 - Bank Feasibility Study commissioned by Adani; and
 - 2013 report completed by Treasury staff in relation to coal mining, attached to an email sent within the timeframe of the access application.
43. I am satisfied that these documents were brought into existence outside of Treasury for purposes other than informing CBRC deliberations and for this reason, do not fall within the budgetary processes exemption discussed above. In reaching my decision on this information I have carefully considered the extensive submissions made by the applicant throughout this external review, and in two related (current) external reviews.⁵¹

Irrelevant factors

44. I have not taken any irrelevant factors into account in reaching this decision. In particular, I have not considered whether the disclosure of the relevant information could reasonably be expected to embarrass or cause a loss of confidence in the current or former Governments.⁵²

Factors favouring disclosure

45. Under section 44(1) of the RTI Act there is a pro-disclosure bias in deciding access to documents and this is the starting point for considering disclosure of the CTPI Information.
46. I consider the following factors also favour the disclosure of information, as disclosure could reasonably be expected to:
- promote open discussion of public affairs and enhance the Government's accountability⁵³
 - contribute to positive and informed debate on important issues⁵⁴
 - inform the community of the Government's operations;⁵⁵ and
 - ensure effective oversight of expenditure of public funds.⁵⁶
47. The subject matter of the CTPI Information can be described as financial, commercial and economic advice and assessments made available to the Government in relation to the Adani Projects. These projects are expected to have a significant impact on the Queensland economy and community. The CTPI Information records the specific data and economic forecasts that were available to the former Government in making investment decisions about the Adani Projects. For these reasons, I am satisfied that disclosure of the CTPI Information could reasonably be expected to:
- promote open discussion about the Government's considerations of the Adani Projects
 - contribute to positive and informed debate within the community about the impact and economic merits of the Adani Projects
 - provide the community with significant background and detailed contextual information in relation to the Adani Projects; and

⁵¹ Applicant's submissions dated 27 July 2015, 1 April 2016, 4 May 2016 in this external review, and submissions dated 16 May 2016 in relation to external review numbers 312639 and 312645.

⁵² In response to the concerns raised by the applicant in its external review application dated 27 July 2015.

⁵³ Schedule 4, part 2, item 1 of the RTI Act.

⁵⁴ Schedule 4, part 2, item 2 of the RTI Act.

⁵⁵ Schedule 4, part 2, item 3 of the RTI Act.

⁵⁶ Schedule 4, part 2, item 4 of the RTI Act.

- provide additional information about the economic outlook of the Adani Projects so as to ensure effective oversight of any future decisions made by Government on whether to expend public funds in relation to the Adani Projects.
48. I am satisfied that the above factors in favour of disclosure carry significant weight. While there has been a change in Government since this information was initially communicated, I consider that this information is still relevant to the current Government's considerations and related public debate. I am satisfied that it is in the public interest for matters such as the Adani Projects to be the subject of informed public debate and I consider that disclosure of the CTPI Information would assist in such debate. I am not however persuaded that any further weight should be attributed to the factors favouring disclosure on the basis of the applicant's contentions regarding the poor economic outlook for the Adani Projects.⁵⁷ This is because, regardless of the economic outlook of each project, the fact that the Government has considered the expenditure of taxpayer funds in supporting these projects, in itself, warrants significant weight to be attributed to this factor.
49. I have also considered whether disclosure of the CTPI Information could reasonably be expected to reveal the reason for a Government decision and any background or contextual information that informed the decision.⁵⁸ In considering this factor, I note that the former Government made public statements with respect to its intended approach to the Adani Projects.⁵⁹ However, before a final decision was reached, the Government changed. Given the change in Government and the timing of the CTPI Information, as well as the fact that the CTPI Information does not detail any particular decision made by Government, I have only given this factor low weight.
50. The applicant also contends that disclosure could reasonably be expected to:
- allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;⁶⁰ and
 - advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies.⁶¹
51. The CTPI Information does not discuss any specific actions taken by the Government in any detail nor does it discuss how individuals or entities will be treated in their dealings with agencies. I am satisfied the above factors do not apply to documents assessing the economic viability of the proposed Adani Projects.
52. The applicant submits that disclosure of the CTPI Information could reasonably be expected to contribute to the protection of the environment.⁶² I am satisfied that this factor does not apply as the CTPI Information focuses on commercial and financial matters and does not provide any information regarding environmental impacts. While I acknowledge that there is significant public debate regarding the environmental impacts of the Adani Projects, I am not satisfied that the disclosure of the particular CTPI Information would contribute to the protection of the environment.
53. The applicant also contends that the disclosure of the information could reasonably be expected to reveal the information was out of date, misleading, gratuitous, unfairly subjective or irrelevant. The applicant refers to a recent decision of the Land Court⁶³ relating to financial

⁵⁷ Applicant's submissions dated 1 April 2016.

⁵⁸ Schedule 4, part 2, item 11 of the RTI Act.

⁵⁹ Applicant's submissions dated 1 April 2016 refer to a media release by then Deputy Premier Seeney available from: <http://statements.qld.gov.au/Statement/2014/11/17/historic-agreements-bring-jobs-to-queensland>.

⁶⁰ Schedule 4, part 2, item 5 of the RTI Act.

⁶¹ Schedule 4, part 2, item 10 of the RTI Act.

⁶² Schedule 4, part 2, item 13 of the RTI Act.

⁶³ *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48, 15 December 2015.

and economic statements provided by Adani. I have considered the Land Court decision and while I am prevented from describing the CTPI Information in any significant detail,⁶⁴ on the evidence available to OIC, I am unable to identify how its disclosure could reasonably be expected to reveal that it was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.⁶⁵ Accordingly, I consider that this factor does not apply.

Factors favouring nondisclosure

Prejudice the private, business, professional, commercial or financial affairs of entities⁶⁶ or the business affairs of a person⁶⁷

54. A significant portion of the CTPI Information details financial information and forecasts in relation to the proposed Adani Projects. I consider that disclosure of this information could reasonably be expected to prejudice the commercial and financial affairs of Adani as the information contained in the Due Diligence Assessment and Bank Feasibility Study outlines economic forecasts and profit expectations of the Adani Projects. I am satisfied that disclosure of this information could reasonably be expected to prejudice Adani's commercial affairs by impeding its ability to negotiate with potential investors and future subcontractors.
55. The applicant's submissions refer to a range of publicly available information, Government announcements and media articles that indicate the Adani Projects have a poor economic outlook.⁶⁸ While I have considered this information, I am not satisfied that the availability of this information negates the likelihood of a further negative effect on Adani's commercial and business affairs. The Due Diligence Assessment and Bank Feasibility Study detail the commercial strategies undertaken by Adani in Australia and its broader global business activities. I consider that disclosure of this information could reasonably be expected to negatively impact Adani's ability to compete in the mining industry, particularly where its competitors can access its key strategic planning documents and key financial data.
56. The applicant contends that disclosure of the CTPI Information could not reasonably prejudice the commercial affairs of entities, as Adani is a single entity and this factor refers to the plural, *entities*. I do not accept this submission for several reasons. Firstly, Adani is a group of companies and not a single entity at law.⁶⁹ I am also satisfied that in accordance with section 32C of the *Acts Interpretation Act 1954* (Qld) (**AI Act**) a use of words in the plural in legislation, includes reference to the singular.⁷⁰
57. The applicant also contends⁷¹ that the relevant public interest factor in this case, is whether disclosure of the information in issue could reasonably be expected to prejudice the business affairs of a person. Section 36 of the AI Act defines '*person*' to include a '*corporation*'. I am satisfied that this public interest factor is also relevant with respect to the business affairs of each of the Adani companies that are invested in the Adani Projects. For the reasons I have already explained, I am satisfied that disclosure of the Bank Feasibility Study and Due Diligence Assessment would significantly impact on the business and commercial affairs of these corporations. Accordingly, I also attribute significant weight to this factor.
58. I acknowledge the applicant's submission that given the lapse of time since the creation of the relevant documents, recent developments with respect to the Adani Projects and the

⁶⁴ Due to the operation of section 108 of the RTI Act.

⁶⁵ Schedule 4, part 2, item 12 of the RTI Act.

⁶⁶ Schedule 4, part 3, item 2 of the RTI Act.

⁶⁷ Schedule 4, part 3, item 15 of the RTI Act.

⁶⁸ Applicant's submissions dated 1 April 2016.

⁶⁹ As confirmed on Adani Australia's website at <http://www.adaniaustralia.com/about-us>.

⁷⁰ I do not accept the applicant's submissions dated 16 May 2016 (made in related reviews, see note 51 above) that the RTI Act demonstrates a contrary intention.

⁷¹ Applicant's submissions on two related external reviews dated 16 May 2016.

published information regarding the economic forecasts, that the weight to be attributed to these factors is reduced. Having carefully considered the CTPI Information, I am not satisfied that the information already available and the passage of time has necessarily reduced the likely prejudice to the commercial and business affairs of Adani that could reasonably be expected from disclosure of the CTPI Information. Accordingly, I do not consider that the weight to be attributed to these two factors is reduced and I have therefore attributed significant weight to these two factors in favour of nondisclosure.

Prejudice the economy of the State

59. I am satisfied that disclosure of the CTPI Information could reasonably be expected to prejudice the economy of the State⁷² in being able to:
- obtain commercial investment advice without concern of broader disclosure; and
 - negotiate on competitive commercial terms with third parties regarding State investment in large infrastructure projects.
60. Treasury has explained that negotiations remain ongoing between the Government and Adani regarding infrastructure investment options.⁷³ Specifically the Due Diligence Assessment and 2013 Treasury Report into coal mining in Queensland includes internal advice provided to Government in relation to the various investment options available to it and the likely returns and risks of those investments. Disclosure of the Government's internal investment advice to the general public, including the private sector entities which the Government seeks to conduct commercial negotiations with could reasonably be expected to have a significant adverse impact on the Government's ability to conduct these negotiations on a commercial and competitive basis. For this reason I have attributed this factor in favour of nondisclosure significant weight.
61. I acknowledge that there is a significant public interest in disclosing information provided to Government to inform its decision making processes, as discussed above. However, I also consider that it is important that the Government is able to protect the commercial interests of its constituents by ensuring that they are on equal footing with other private sector investors when considering large scale investment options such as the Adani Projects. With respect to the Adani Projects specifically, the Government is competing with private and public sector entities globally in considering the commercial returns of these projects. I consider that broader disclosure of the Government's internal investment advice would put it at a significant disadvantage and could reasonably be expected to weaken its bargaining position in any future related or similar transactions.
62. The applicant submits that *'the evidence of the poor economic outlook of the projects... indicates a potential burden on the State's economy that substantially undermines this factor'*.⁷⁴ My findings on this public interest factor do not consider the specific merits of the State's investment in the Adani Projects. Rather, it is my view that in general, the State should have the capacity to obtain internal commercial and investment advice in relation to the risks and benefits of its investment options without the general disclosure of this advice. In my view, if this type of information were to be routinely disclosed under the RTI Act, the State would be at a disadvantage in competitively negotiating with third parties to arrive at the best commercial result for the State, its constituents and the broader economy. Accordingly, I find that disclosure of this type of information could reasonably be expected to prejudice the economy of the State and I have attributed this factor significant weight.

⁷² Schedule 4, part 3, item 12 of the RTI Act.

⁷³ Treasury's submissions dated 24 February 2016.

⁷⁴ Applicant's submissions dated 4 May 2016.

63. I do not however consider that the relevant public interest harm factor⁷⁵ applies as I am not satisfied that disclosure of the CTPI Information could reasonably be expected to ‘*have a substantial adverse effect on the ability of government to manage the economy of the State*’.

Prejudice an agency’s ability to obtain confidential information

64. Treasury’s decision indicates that the financial data contained in the Due Diligence Assessment and the Bank Feasibility Study was provided by Adani on the understanding that it would remain confidential. While OIC did not obtain submissions from Adani in this external review, Treasury consulted with Adani prior to making its decision. At that stage, Adani indicated that it only provided the Bank Feasibility Study and information contained in the Due Diligence Assessment to the State on the understanding that it would remain confidential and be used for the limited purpose of considering its investment options.⁷⁶
65. Having carefully considered the sensitive commercial nature of this information, I am of the view that its disclosure could reasonably be expected to prejudice the supply of this type of confidential information to the Government in the future. This is because Adani provided the Bank Feasibility Study, as well as the data relied upon by DSD staff in the Due Diligence Assessment, on the specific condition that this information remained confidential. In the circumstances, I am satisfied that the information provided by Adani was confidential in nature and that therefore, both the public interest factor in favour of nondisclosure as well as the harm factor in relation to the disclosure of confidential information both apply.⁷⁷
66. Adani provided this particular information in order to allow the Government to fully consider its investment options. There is no evidence before OIC to suggest that Adani was compelled to provide this information for any other reason but the limited purpose of negotiating possible investment by the State Government. I am satisfied that if this information were to be routinely disclosed under the RTI Act, it would impact on the willingness of third parties such as Adani to provide similar information to the Government in the future.
67. While I am prevented from disclosing the specific content of the CTPI Information,⁷⁸ I can confirm that the information contained in the Due Diligence Assessment and Bank Feasibility Study is the type generally provided by entities seeking to attract investors and is provided on a confidential basis to allow investors to make an informed decision. While the Due Diligence Assessment was authored by DSD, the information in the document is based on the Bank Feasibility Study confidentially provided by Adani. For this reason, I consider the exception to the harm factor⁷⁹ does not apply as the information, while constituting deliberative process information⁸⁰, was communicated to Treasury by Adani.
68. The applicant submits that any due diligence assessments should otherwise form part of the publicly available documents for large scale infrastructure projects.⁸¹ The question of which documents should be made publicly available in relation to large scale infrastructure projects is a broader government policy matter and is beyond OIC’s jurisdiction on external review. In this case, I am satisfied that the relevant information was provided by Adani on the understanding that it would be confidential and its disclosure at this stage, particularly where no final decision has been reached on investment in the Adani Projects, would have the effect of deterring the provision of similar information by third parties in the future. Accordingly, I have given these factors significant weight in favour of nondisclosure.

⁷⁵ Schedule 4, part 4, item 9 of the RTI Act.

⁷⁶ Letter dated 20 April 2015 from Adani to Treasury.

⁷⁷ Schedule 4, part 3, item 16 and schedule 4, part 4, section 8 of the RTI Act.

⁷⁸ Due to the operation of section 108(3) of the RTI Act.

⁷⁹ Schedule 4, part 4, section 8(2) of the RTI Act.

⁸⁰ See paragraph 73 below.

⁸¹ Applicant’s submissions dated 1 April 2016.

69. The applicant questioned the application of these factors given my view that the breach of confidence exemption in schedule 3, section 8 of the RTI Act is not made out.⁸² I am satisfied that the circumstances required to establish the breach of confidence exemption can be more onerous than those required to give rise to the relevant public interest factors. It is not necessarily the case that if the exemption does not apply to certain information that the confidential information public interest factors will also not apply. The requirements of each provision are different and must be assessed separately.⁸³

Deliberative process

70. The RTI Act recognises that a public interest factor favouring nondisclosure will arise where disclosing information could reasonably be expected to prejudice a deliberative process of government (**Nondisclosure Factor**).⁸⁴ The RTI Act also provides that disclosing information could reasonably be expected to 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 (**Harm Factor**).⁸⁵
71. Once it is established that the information in issue is deliberative process information, the Harm Factor will apply. It is then relevant to consider the nature and extent of the public interest harm that may result through disclosure.⁸⁶ For the Nondisclosure Factor to apply, a reasonable expectation of prejudice to the relevant deliberative process must be established. In this case, I am satisfied that both factors apply to the CTPI Information.
72. The Information Commissioner has previously referred with approval to the following comments in considering the meaning of ‘*deliberative processes*’ involved in the functions of an agency:⁸⁷

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one’s course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action ...

73. In my view, the CTPI Information is deliberative process information as it was prepared or communicated in the course of deliberating on, and evaluating matters relating to, proposed mining projects. The applicant submits that some of the Government’s deliberations in relation to the relevant Adani Projects are complete. I have carefully considered the CTPI Information and Treasury’s submissions⁸⁸ and in my view, the specific Government deliberations discussed in the CTPI Information are ongoing.
74. NQCC questions whether any of the exceptions to the Harm Factor apply in this case. Schedule 4, part 4, item 4(2) of the RTI Act provides that the deliberative processes considered in the Harm Factor apply only until public consultation starts. There is no evidence to suggest there has been any public consultation in relation to the CTPI Information and

⁸² Applicant’s submissions dated 16 May 2016 (made in related reviews)

⁸³ However, as stated above, this decision does not examine the breach of confidence exemption as both parties accepted my view that it did not apply to the information in issue.

⁸⁴ Schedule 4, part 3, item 20 of the RTI Act.

⁸⁵ Schedule 4, part 4, item 4 of the RTI Act.

⁸⁶ In *Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206 at [34] the Information Commissioner considered, in the context of the provision relating to deliberative process information under the FOI Act that ‘*specific and tangible harm to an identifiable public interest (or interests) would result from disclosure*’. I consider that this is a relevant consideration when applying the Harm Factor under the RTI Act.

⁸⁷ *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at paragraphs [28]-[30] citing with approval the definition given in *Re Waterford and Department of Treasury (No.2)* (1984) 5 ALD 588 at 606. The Information Commissioner’s decision involved the repealed FOI Act but I am satisfied the comments remain relevant under the RTI Act.

⁸⁸ Dated 24 February 2016 and confirmed in a subsequent phone discussion with OIC on 12 April 2016.

therefore this exception does not apply. The Harm Factor also does not apply to information that appears in an agency's policy document, factual or statistical information, or expert opinion or analysis. I am satisfied that the CTPI Information does not comprise any of these categories of information.

75. As it is my view that the CTPI Information is deliberative process information, and that the exceptions to the Harm Factor do not apply, I must now consider the level of harm that is likely to result from the disclosure of the CTPI Information.
76. I am satisfied that the CTPI Information is not publicly available and its disclosure at this stage, when the Government is yet to make a final decision, could have a negative impact on the decision making and consultation process. The CTPI Information details financial information and forecasts in relation to the proposed Adani Projects and while I acknowledge it was obtained under the previous Government, I am satisfied that this information remains relevant to the current Government's considerations.
77. The applicant submits that press releases by the current Government indicate that it has made a decision ruling out investment in the proposed Adani projects.⁸⁹ It is not my role to interpret public media statements. In the context of this external review, Treasury has confirmed, and I accept that the Government has not reached a final decision in relation to the issue of support for the Adani Projects.⁹⁰
78. I am satisfied that the disclosure of the CTPI Information prior to the Government's finalisation of its deliberative process on its investment in the Adani Projects is likely to have a detrimental impact on the Government's ability to continue considering its options and engage in open and frank negotiations with third parties including Adani. I am therefore satisfied that disclosure of the CTPI Information is likely to prejudice the deliberative process of Government and cause significant public interest harm in prejudicing these processes. I have attributed both the Nondisclosure Factor and Harm Factor significant weight in favour of nondisclosure of the CTPI Information.

Balancing the public interest factors

79. The CTPI Information comprises three different documents that were created or communicated to the former Queensland Government in order to inform its decision making processes with respect to the Adani Projects. I am satisfied that, in addition to the general prodisclosure bias,⁹¹ there are a number of public interest factors favouring disclosure of all of the CTPI Information which, for the reasons discussed above, deserve significant weight.
80. With respect to the factors favouring nondisclosure, the 2013 Treasury Report does not address the Adani Projects specifically and is unlikely to cause any significant prejudice to Adani's commercial affairs or the future ability of the Government to obtain confidential information from third parties. However, it was prepared by Treasury staff to provide commercial advice to the Government and I am satisfied that disclosure of this type of information could have an adverse impact on the State economy as well as prejudicing ongoing deliberative processes. I am satisfied that the weight of these factors exceeds that of the factors favouring disclosure with respect to the 2013 Treasury Report.
81. In relation to the Bank Feasibility Study and Due Diligence Assessment, I am satisfied that disclosure is likely to cause a significant public interest harm by interfering in the Government's deliberative process and prejudicing the Government's ability to conduct this deliberative process. I also consider that disclosure of information in the Due Diligence

⁸⁹ Applicant's submissions dated 1 April 2016.

⁹⁰ Treasury's submissions dated 12 April 2016.

⁹¹ Under section 44 of the RTI Act, as noted in the applicant's submissions dated 15 January 2016.

Assessment and Bank Feasibility Study is likely to have a detrimental impact on the commercial affairs of Adani and prejudice the likelihood of the State obtaining similar information in the future. I am satisfied that the significant weight of these factors favouring nondisclosure outweighs the weight I have given to the factors favouring disclosure.

Conclusion

82. On the basis of the above, I find that disclosure of the CTPI Information would, on balance, be contrary to the public interest and access to it may therefore, be refused under section 47(3)(b) of the RTI Act.

DECISION

83. For the reasons set out above, I vary the decision under review and find that access to the information in issue may be refused under section 47(3)(a) or (b) of the RTI Act on the basis that it comprises:
- exclusively exempt Cabinet information or information the disclosure of which would reveal a consideration of Cabinet
 - exempt information brought into existence in the course of the State's budgetary processes; or
 - information, the disclosure of which would, on balance, be contrary to the public interest.
84. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Katie Shepherd
Assistant Information Commissioner

Date: 10 June 2016

APPENDIX

Significant procedural steps

Date	Event
17 December 2014	Treasury received the access application.
1 May 2015	Treasury issued its decision on the access application.
29 May 2015	Treasury received the application for internal review.
29 June 2015	Treasury issued its internal review decision.
27 July 2015	OIC received the external review application.
7 August 2015	OIC notified the applicant and Treasury that the external review application had been accepted for external review. OIC asked Treasury for copies of the information in issue and other procedural documents.
26 August 2015	Treasury provided OIC with the requested documents.
14 September 2015	OIC contacted the applicant's representative by phone to confirm the issues in the external review.
6 October 2015	OIC requested further information from Treasury about third party consultation.
13 October 2015	Treasury provided OIC with the requested information.
29 October 2015	OIC requested a copy of the Confidentiality Deed from Treasury as referred to in its internal review decision.
12 November 2015	OIC received a copy of the Confidentiality Deed from Treasury.
15 December 2015	OIC telephoned the applicant's representatives to provide an update on the external review and to confirm the issues being considered.
16 February 2016	OIC requested additional submissions from Treasury.
24 February 2016	OIC received submissions from Treasury.
4 March 2016	OIC conveyed a preliminary view to the applicant and invited the applicant to provide submissions in response.
1 April 2016	OIC received the applicant's submissions in response to the preliminary view.
4 April 2016	OIC contacted the applicant by phone and confirmed the outstanding issues on external review. The applicant confirmed that it no longer sought external review of the information claimed to be subject to legal professional privilege.
12 April 2016	Treasury provided OIC with additional submissions by telephone.
14 April 2016	OIC provided the applicant with a further preliminary view.
4 May 2016	The applicant provided submissions in response to the further preliminary view.
16 May 2016	The applicant made additional submissions on two related external reviews raising matters relevant to public interest factors under consideration by OIC to in this external review.