



## Decision and Reasons for Decision

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**Citation:** *Abbot Point Bulkcoal Pty Ltd and Department of Environment and Science; Mackay Conservation Group Inc (Third Party)* [2018] QICmr 26 (24 May 2018)

**Application Number:** 313516

**Applicant:** Abbot Point Bulkcoal Pty Ltd (ACN 010183534)

**Respondent:** Department of Environment and Science

**Third Party:** Mackay Conservation Group Inc (IA03355)

**Decision Date:** 24 May 2018

**Catchwords:** ADMINISTRATIVE LAW – RIGHT TO INFORMATION – EXEMPT INFORMATION – PREJUDICE THE INVESTIGATION OF A CONTRAVENTION OR POSSIBLE CONTRAVENTION OF THE LAW – information relating to the grant of a temporary emissions licence – objection by the applicant to the respondent’s decision to disclose information to the third party – whether disclosure could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law – whether exempt information to which access may be refused – sections 47(3)(a) and 48 and schedule 3, section 10(1)(a) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – EXEMPT INFORMATION – PREJUDICE A PERSON’S FAIR TRIAL OR THE IMPARTIAL ADJUDICATION OF A CASE – whether exempt information to which access may be refused – sections 47(3)(a) and 48 and schedule 3, section 10(1)(e) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST INFORMATION – whether disclosure of information would, on balance, be contrary to the public interest – sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

## REASONS FOR DECISION

### Summary

1. The third party applied<sup>1</sup> to the Department of Environment and Science (**Department**)<sup>2</sup> under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to certain information concerning the grant by the Department to the applicant of a Temporary Emissions Licence (**TEL**) and amended TEL for operations at the Port of Abbot Point under environmental authority permit number EPPR00577113 (**EAP**).<sup>3</sup>
2. The Department consulted the applicant under section 37(1)(a) of the RTI Act to obtain the applicant's views about disclosure of the responsive information located by the Department. The applicant objected to disclosure.
3. Contrary to the applicant's objection, the Department decided to release all responsive information to the third party.<sup>4</sup> The Department affirmed that decision on internal review.<sup>5</sup> The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review.<sup>6</sup>
4. During the course of the review, the applicant agreed to the release of the bulk of the responsive information, and the third party advised that it did not seek access to some information. This left in issue five segments of information contained on four pages. For the reasons set out below, I have decided to affirm the Department's decision that there are no grounds on which access to that information may be refused. The third party is therefore entitled to access the information under the RTI Act.

### Background

5. The Port of Abbot Point is Australia's northern-most coal export port. In 2011, the Queensland Government entered into a 99-year lease of the Port's operating terminal with Adani Abbot Terminal Pty Ltd, a subsidiary of the Indian conglomerate, the Adani group of companies. The terminal became known as the Adani Abbot Point Terminal. The terminal is operated by the applicant under an Operations and Maintenance Agreement. The applicant was originally a subsidiary of the Glencore group of companies. In 2016, Glencore sold its shares in the applicant to Adani's Abbot Point Operations Pty Ltd.
6. In late March 2017, Tropical Cyclone Debbie formed off the north Queensland coast. In anticipation of the cyclone crossing the coast on 28 March 2017, the applicant applied to the Department on 27 March 2017 for a TEL to discharge water from Abbot Point Terminal 1 outside the conditions of its EAP. The Department granted the TEL at 6.13pm on 27 March 2017. At 6.54pm on 27 March 2017, the applicant emailed a request to amend the TEL. The amended TEL was issued at 6.37pm on 28 March 2017.

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<sup>1</sup> By application dated 24 April 2017.

<sup>2</sup> At the time the application was made, the respondent agency was the Department of Environment and Heritage Protection. Under Machinery of Government changes that occurred during the course of the review, the respondent agency became the Department of Environment and Science.

<sup>3</sup> The third party specified in its application that it did not seek access to copies of the TEL, the amended TEL, the EAP, or any private/personal details. This information was therefore not in issue.

<sup>4</sup> By decision to the third party dated 28 June 2017 and by decision to the applicant dated 6 July 2017.

<sup>5</sup> Application for internal review dated 3 August 2017 and internal review decision dated 1 September 2017.

<sup>6</sup> By letter dated 29 September 2017. The third party applied for, and was granted, participant status in the review under section 89 of the RTI Act on 18 October 2017.

7. Following the cyclone, the Department investigated whether the applicant had breached the conditions of the amended TEL and contravened provisions of the *Environmental Protection Act 1994* (Qld) (**EP Act**). On 20 July 2017, the Department advised the applicant that the investigation had concluded. It found that the applicant had breached the conditions of the amended TEL and it issued the applicant with a Penalty Infringement Notice (**PIN**). The applicant disputed the PIN and, on 9 August 2017, it elected to have the PIN heard and determined by the Magistrates Court. As a result of those court proceedings, the Department recommenced an investigation into the alleged infringement.
8. At the time the RTI access application was processed by the Department and its access decision given, the Department had not recommenced its investigation into the alleged breach of the TEL. In its decision, the Department therefore rejected one of the grounds for objection raised by the applicant – that disclosure could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law – on the basis that the Department’s investigation had concluded. In its application for external review, the applicant noted that the Department had recommenced its investigation subsequent to giving its decision on access. The applicant reiterated its reliance on prejudice to the Department’s ongoing investigation as a basis for its objection to disclosure. It also claimed that disclosure could reasonably be expected to prejudice the impartial adjudication of the case by the Magistrates Court.
9. Significant procedural steps taken during the external review are set out in the Appendix to this decision.

#### **Reviewable decision**

10. The decision under review is the Department’s internal review decision dated 1 September 2017.

#### **Evidence considered**

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

#### **Information in issue**

12. The information in issue (**Information in Issue**) comprises segments of information contained on pages 14 and 18 on File A, and on pages 15 and 16 on File B.<sup>7</sup> A copy of the Information in Issue, marked up to reflect my decision, will be sent to the Department with these reasons for decision.

#### **Onus**

13. As the Department decided to disclose the Information in Issue to the third party under the RTI Act, the applicant has the onus of establishing that a decision not to disclose the information is justified, or that the Information Commissioner should give a decision adverse to the person who wishes to be given access to the document.<sup>8</sup>

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<sup>7</sup> Pages 15 and 16 on File B consist of a signed and unsigned copy of the same file note.

<sup>8</sup> Section 87(2) of the RTI Act.

## Applicant's objections to disclosure

### **Exempt information**

14. The RTI Act gives a right of access to documents of government agencies.<sup>9</sup> This right is subject to other provisions of the RTI Act, including grounds of which access may be refused. Access may be refused to information to the extent the information comprises 'exempt information'.<sup>10</sup>
15. The applicant claims that the Information in Issue is exempt information under:
- schedule 3, section 10(1)(a) of the RTI Act – *information is exempt if its disclosure could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law ... in a particular case*; and
  - schedule 3, section 10(1)(e) – *information is exempt if its disclosure could reasonably be expected to prejudice a person's fair trial or the impartial adjudication of a case*.

### **Contrary to the public interest**

16. A further ground on which access to information may be refused under the RTI Act is where disclosure of the information would, on balance, be contrary to the public interest<sup>11</sup> within the meaning of section 47(3)(b) and section 49 of the RTI Act.
17. The applicant claims that disclosure of the Information in Issue would, on balance, be contrary to the public interest because:
- *disclosure could reasonably be expected to impede the administration of justice generally, including procedural fairness*;<sup>12</sup> and
  - *disclosure could reasonably be expected to impede the administration of justice for a person*.<sup>13</sup>

## Exempt information - relevant law

### **Meaning of 'could reasonably be expected to'**

18. The words 'could reasonably be expected to' call for a decision-maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible or merely speculative, and expectations that are reasonably based: that is, expectations for the occurrence of which real and substantial grounds exist.<sup>14</sup>
19. Accordingly, in order for the relevant provisions of the RTI Act to apply, I must be satisfied that there is a reasonably based expectation (and not mere speculation or a mere

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<sup>9</sup> Section 23 of the RTI Act.

<sup>10</sup> Section 47(3)(a) of the RTI Act.

<sup>11</sup> The words *public interest* refer to considerations affecting the good order and functioning of the community and government affairs for the wellbeing of citizens. This means that, in general, a public interest 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.

<sup>12</sup> Schedule 4, part 3, item 8 of the RTI Act.

<sup>13</sup> Schedule 4, part 3, item 9 of the RTI Act.

<sup>14</sup> See *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at paragraphs 62-63. See also *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [160]. Other authorities note that the words 'require a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous to expect a disclosure of the information could have the prescribed consequences relied upon'. *Smolenski v Commissioner of Police, NSW Police* [2015] NSWCATAD 21 at [34], citing *Commissioner of Police, NSW Police Force v Camilleri (GD)* [2012] NSWADTAP 19 at [28], *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [61] and *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 190.

possibility, or something that is irrational or absurd or ridiculous) that the consequences identified in the exemption will follow as a result of the Information in Issue being disclosed.

20. Whether the expected consequence is reasonable requires an objective examination of the relevant evidence. The expectation must arise as a result of disclosure of the information in issue, rather than from other circumstances.

**Meaning of ‘prejudice’**

21. The word ‘prejudice’ is not defined in the RTI Act or in the *Acts Interpretation Act 1954* (Qld). Therefore, it is appropriate to consider the ordinary meaning of the word. The Macquarie Dictionary contains a number of definitions for the word ‘prejudice’. The most relevant are:

- ‘resulting injury or detriment’; and
- ‘to affect disadvantageously or detrimentally’.<sup>15</sup>

**Schedule 3, section 10(1)(a)**

22. The plain words of this exemption require that:
- there is a current or ongoing investigation into a contravention or possible contravention of the law; and
  - there is a reasonably based expectation that disclosure of the information could prejudice that investigation; and
  - none of the exceptions contained in schedule 3, section 10(2), apply.
23. I am satisfied that none of the exceptions in schedule 3, section 10(2) apply in the circumstances of this case.

**Schedule 3, section 10(1)(e)**

24. The plain words of this exemption require that:
- a person is to be subject to a trial for a criminal offence,<sup>16</sup> or a case is to be the subject of some form of adjudication by a formal decision-maker, including civil litigation;<sup>17</sup> and
  - there is a reasonably based expectation that disclosure of the information could prejudice the fairness of the person’s trial, or prejudice the impartiality of the adjudication; and
  - none of the exceptions contained in schedule 3, section 10(2), apply.
25. I am satisfied that none of the exceptions in schedule 3, section 10(2) apply in the circumstances of this case.

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<sup>15</sup> See *Re Daw and Queensland Rail* (Unreported, Queensland Information Commissioner, 24 November 2010) at [16].

<sup>16</sup> *Uksi and Redcliffe City Council; Cook (Third Party)* (1995) 2 QAR 629.

<sup>17</sup> *Queensland Community Newspapers Pty Ltd and Redland Shire Council; Civic Projects (Raby Bay) Pty Ltd (Third Party); Sinclair Knight Merz (Fourth Party); Coffey Partners International Pty Ltd (Fifth Party)* (1998) 4 QAR 262.

## Public interest balancing test – relevant law

26. In terms of the meaning to be given to the phrase ‘could reasonably be expected to’ as it appears in the relevant public interest factors, I repeat the comments in paragraphs 18-20 above.
27. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest<sup>18</sup> and explains the steps a decision-maker must take, as follows:<sup>19</sup>
- 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 in issue would, on balance, be contrary to the public interest.

## Submissions

28. The applicant provided submissions in support of its objection to disclosure of the Information in Issue on several occasions throughout the review, and in relevant parts of its applications for internal and external review.<sup>20</sup> Those submissions may be summarised as follows:
- the applicant disputed the PIN and elected to refer the matter to the Magistrates Court for determination
  - following that referral, the Department re-commenced its investigation into the alleged breach of the TEL and that investigation is ongoing
  - the Information in Issue is directly relevant to the investigation as it involves the factual context underpinning the scope of the TEL’s authorisation
  - the applicant has also appealed, in the Planning and Environment Court, an environmental evaluation notice issued by the Department that relates to matters involving the TEL
  - the Department’s conduct towards the applicant in relation to the alleged breach of the TEL and the associated investigation has been ‘highly unusual, questionable and at times improper’:<sup>21</sup>
    - the Department allowed representatives from three environmental groups to accompany representatives of the Department and the Office of the Minister to the Abbot Point site shortly after the cyclone in connection with the alleged breach of the TEL and without the applicant’s consent
    - information provided by the applicant in a formal, confidential interview with the Department was leaked to the media, leading to the publication of a number of media articles that relate to matters the subject of the current investigation, with the relevant information reported out of context and manipulated, in a misleading way, to be extremely prejudicial to the applicant’s reputation and position with respect to the current investigation<sup>22</sup>
    - the Department maintains a webpage<sup>23</sup> on which it publishes extensive information in relation to its investigation into the alleged breach of the TEL

<sup>18</sup> Schedule 4 of the RTI Act – a non-exhaustive itemisation of potentially relevant considerations.

<sup>19</sup> Section 49(3) of the RTI Act.

<sup>20</sup> See the applicant’s submissions dated 19 February 2018 and 14 March 2018.

<sup>21</sup> Submission dated 14 March 2018.

<sup>22</sup> This issue was raised by the applicant in its submissions of 19 February 2018 and 14 March 2018. It did not provide copies of, or links to, relevant articles.

<sup>23</sup> The applicant provided the following reference: <https://www.ehp.qld.gov.au/management/caley-valley-wetland/>

- and that includes information that is not otherwise publicly available, including court documents and maps of the Abbot Point site
- although the webpage ostensibly provides information on ‘locations of recent interest’ for environmental monitoring, it is ‘heavily focused’ on the applicant as an entity, rather than the areas surrounding the Abbot Point site as a location for monitoring
  - representatives of the Department acted improperly in asking the applicant whether it would be prepared to withdraw its opposition to the PIN if the Department were to amend the PIN to relate to a fictional land-based release, rather than the alleged breach involving a release to marine waters
  - the Department commenced its formal investigation into the alleged breach of the TEL after the PIN was issued rather than before, and has repeatedly refused to provide a Statement of Reasons for issuing the PIN;
- the Department has behaved in a manner more combative and less cooperative than it might in analogous matters involving less public scrutiny
  - Adani-related projects have consistently been the subject of extreme and unprecedented scrutiny and public criticism by the media and environmental groups and this ongoing public vitriol is concerning in the context of the Department’s investigation, the likely hearing in the Magistrates Court and the Planning and Environment Court appeal<sup>24</sup>
  - there is a real and significant risk that further inflammation of public prejudice will influence the Department’s approach to its dealings with the applicant as the Department will be pressured into being seen by the public to be ‘cracking down’ or ‘taking a stand against’ the applicant and this would be extremely prejudicial to the applicant’s right to procedural fairness
  - the ‘Labor government’ is frequently reported in the media as conferring with environmental groups on policy in respect of Adani entities<sup>25</sup>
  - in light of the Department’s ‘highly unusual, and at times improper and questionable behaviour’<sup>26</sup> towards the applicant in its investigations following the cyclone, and the frequent media coverage of the influence of environmental groups on ‘Labor government’ decision-making, there is a real and significant risk that release of the Information in Issue will influence the Department’s approach to its dealings with the applicant in the ongoing investigation
  - it is critical that the Department be permitted to conclude its investigation in a proper and independent manner, and without undue third party input or publicity
  - the release of the information can only be prejudicial to the applicant’s rights to procedural fairness<sup>27</sup>
  - on the basis of this, the expected harm arising from release of the Information in Issue is not speculative
  - the release of the Information in Issue is likely to cause extreme and unfair prejudice to the applicant; and
  - there is no public interest in release of the Information in Issue as it is already in the possession of the investigating agency.
29. Given that the Department recommenced its investigation into the alleged breach of the TEL subsequent to it giving its decision granting access to the third party, I asked the Department,<sup>28</sup> on the commencement of the external review, whether it still held the view

<sup>24</sup> Submission dated 19 February 2018.

<sup>25</sup> The applicant provided copies of two media articles in support of this argument: *Labor prepared to revoke Adani coalmine licence if elected, says Cousins* (The Guardian) 27 February 2018; and *Geoff Cousins reveals how Bill Shorten wavered on Adani mine* (The Guardian) 28 February 2018. I note that these articles refer to the leader of the federal Labor party although the applicant referred to the ‘Labor government’ in its submissions.

<sup>26</sup> Submission dated 14 March 2018.

<sup>27</sup> Application for internal review dated 3 August 2017.

<sup>28</sup> OIC letter dated 10 November 2017.

that the Information in Issue ought to be released to the third party. The Department initially advised<sup>29</sup> that, while it took the position that the investigation did not directly concern the Information in Issue but, rather, concerned information exchanged after the grant of the TEL, it nevertheless considered that, because of the high level of public and media interest in Adani projects, disclosure of the Information in Issue may result in media releases which could have the potential to prejudice the investigation, '*depending on the statements made and material released*'. However, when I expressed the preliminary view<sup>30</sup> that these arguments were too speculative or conjectural to form reasonably based expectations, the Department accepted my preliminary view<sup>31</sup> and advised that it did not object to disclosure.

## Findings

### ***Is the Information in Issue exempt information under schedule 3, section 10(1)(a) of the RTI Act?***

30. No, for the reasons that follow.
31. The Department confirmed on 26 April 2018 that its investigation remains ongoing. The investigation is in relation to a possible breach by the applicant of the EP Act. I am therefore satisfied that the first requirement of schedule 3, section 10(1)(a) is satisfied.
32. The second requirement is that disclosure of the particular Information in Issue could reasonably be expected to prejudice the investigation. The applicant's argument, in essence, is that given the intense public scrutiny to which all Adani projects are subject, and the anti-Adani sentiment expressed by environmental groups and the Labor party<sup>32</sup> which is regularly reported on in the media, public disclosure of the Information in Issue could reasonably be expected to, firstly, result in negative publicity and associated public pressure, and, secondly, that this publicity and pressure could reasonably be expected to influence the Department to act unfairly towards the applicant in conducting its investigation, thereby prejudicing the investigation. The applicant points to alleged instances where it submits that the Department has already acted unfairly towards it to support the likelihood of this occurring.
33. During the course of the review, I expressed to the applicant the preliminary view that this argument was too speculative or conjectural to form the basis of a reasonably-held expectation. I maintain that view.
34. Firstly, the applicant's submissions do not focus upon the specific Information in Issue, and explain precisely how disclosure of that particular information could reasonably be expected to have the prejudicial effects contended for. It submits simply that the Information in Issue is directly relevant to the investigation as it involves 'factual context underpinning the scope of the TEL's authorisation'. I accept that the information on page 18 of File A and on pages 15 and 16 of File B is factual in nature, however, the information on page 14 of File A could fairly be described as an incidental comment at the end of an email from the applicant to the Department.
35. The factual information concerns an historical situation that existed at a release point at the Abbot Point site *prior* to the cyclone event. While it is information that the Department may have taken into account in making its decision about the TEL, it is not directly

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<sup>29</sup> Department's emails of 14 November 2017 and 11 January 2018.

<sup>30</sup> OIC letter dated 1 February 2018.

<sup>31</sup> Department's email of 20 February 2018.

<sup>32</sup> See footnote 25. The applicant referred in its submissions to the 'Labor government' but the media articles it provided in support concerned the federal Labor party.



relevant to the Department's investigation, which is focused on events occurring *after* the grant of the amended TEL. This information is, of course, already known to the Department. I would therefore have to accept that it is of such a nature that it is reasonable to expect, firstly, that its public release would result in negative publicity and scrutiny (by the media, or environmental groups or the Labor party) and secondly, that this adverse publicity and level of scrutiny will further prejudice public opinion against Adani so as to pressure the Department into conducting its investigation into the applicant's actions in an unfair or otherwise prejudicial manner.

36. I consider these expectations to be merely speculative or merely possible, rather than expectations for which real and substantial grounds exist. The applicant has not explained why release of the particular Information in Issue would portray the applicant in such a negative light as to expect that such a level of public criticism and 'vitriol' will result, other than to submit, in effect, that this is always how the applicant and its projects are portrayed. And, whether or not there is any substance to the applicant's contention that the Department has already acted towards it in an unfair or combative manner (making it reasonably likely, according to the applicant, that the public release of the Information in Issue will further influence the Department's prejudicial attitude towards it and cause it to conduct its investigation unfairly), I would note that this dispute regarding the PIN is to be heard in the Magistrates Court. I do not consider that there are reasonable grounds for expecting that the Department would act in a manner prejudicial to the investigation when the investigation will be scrutinised by a court and where the applicant will have an opportunity to bring any perceived irregularities in the investigation to the court's attention in any event.
37. For the reasons explained, I find that the Information in Issue is not exempt information under schedule 3, section 10(1)(a) of the RTI Act.

***Is the Information in Issue exempt information under schedule 3, section 10(1)(e) of the RTI Act?***

38. No, for the reasons that follow.
39. The Department confirmed on 26 April 2018 that the Magistrates Court has not yet heard the matter. There would also appear to be ongoing proceedings in the Planning and Environment Court. I am therefore satisfied that the first requirement of schedule 3, section 10(1)(e) is satisfied in that there is a case that is to be the subject of some form of adjudication by a formal decision-maker, including civil litigation. The applicant provided no evidence or submissions to support a case that there is an individual or individuals who are subject to a trial for a criminal offence and I have therefore not had further regard to that part of the exemption provision.
40. The second requirement is that disclosure of the particular Information in Issue could reasonably be expected to prejudice the impartiality of the adjudication. While relying on the other general submissions that it had made about expected prejudicial effects, the only specific submission that the applicant made regarding the requirements of schedule 3, section 10(1)(e) was that the *'ongoing public vitriol is concerning in the context of ... the likely hearing in the Magistrates Court and the Planning and Environment Court appeal'*.<sup>33</sup>
41. Even if I were to be satisfied that disclosure of the Information in Issue could reasonably be expected to result in negative publicity and 'public vitriol' (and I am not, for the reasons explained above), there is no evidence before me to support a finding that it is reasonable

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<sup>33</sup> In its submissions dated 19 February 2018.

to expect that such publicity and vitriol would result in a court failing to discharge its primary duty to determine the issues before it in a fair and impartial manner. As far as I am aware, the nature of the proceedings are such that they will not be heard before a jury. The applicant has not made any submission to that effect. The absence of a jury restricts the ability of any third parties, including environmental groups, to affect the impartiality of the adjudication. However, even if a jury were to be present, I consider it is merely speculative, rather than an expectation for which real and substantial grounds exist, to suggest that disclosure of the Information in Issue would result in prejudice to the impartiality of the adjudication. There is no evidence before me to support such a finding.

42. I therefore consider the applicant's submission to be wholly speculative in nature, rather than one for which real and substantial grounds exist.
43. For the reasons explained, I find that the Information in Issue is not exempt information under schedule 3, section 10(1)(e) of the RTI Act.

***Would disclosure of the Information in Issue, on balance, be contrary to the public interest?***

44. No, for the reasons that follow.

**Irrelevant factors**

45. I have taken no irrelevant factors into account in making my decision.

**Public interest factors favouring nondisclosure**

46. The applicant argues that disclosure of the Information in Issue could reasonably be expected to impede the administration of justice generally, including procedural fairness. (Although it also cited the relevance of schedule 4, part 3, item 9 in its submissions - impede the administration of justice for an individual - the applicant provided no information or evidence to establish that an individual or individuals are subject to the administration of justice in the circumstances of this case, and I therefore have not had further regard to this public interest factor).
47. I reject the applicant's submission that release of the Information in Issue '*can only be prejudicial to the applicant's rights to procedural fairness, thereby impeding the administration of justice*'. Procedural fairness, or natural justice, means acting fairly in administrative decision-making. It relates to the fairness of the procedure by which a decision is made. I am unable to identify how disclosure under the RTI Act of the Information in Issue (which is not directly relevant to the issues in dispute) could give rise to a reasonable expectation that the Department or a court, in their decision-making processes, will somehow deny the applicant procedural fairness, thereby impeding the administration of justice. The mere fact that the public may become aware of information does not affect the obligation on a decision-maker to observe the rules of procedural fairness in making a decision. Moreover, the applicant itself has knowledge of the Information in Issue and is therefore in a position to respond to it in the context of the Department's investigation or a court hearing. For the reasons I have already explained, I consider it is mere speculation to suggest that disclosure of the Information in Issue will cause the Department to act unfairly towards the applicant. As noted, the dispute about the PIN is to be determined by a court. It is reasonable, in the absence of evidence to the contrary, to expect that a court will discharge its duty to decide the matter in a fair and impartial manner, and in accordance with the principles of procedural justice. Again, as far as I am aware, the proceedings will not be heard by a jury, therefore restricting the

ability of any third parties to somehow interfere with, or impede, the administration of justice. However, as noted above, even if a jury were to be present, I consider it is merely speculative to suggest that disclosure of the Information in Issue could reasonably be expected to impede the administration of justice. There is no evidence before me to support such a finding.

48. For the reasons explained, I do not consider that the public interest factors contained in schedule 4, part 3, items 8 and 9 have any application to the Information in Issue and I afford them no weight in the public interest balancing test.
49. I have considered the other public interest factors contained in schedule 4, parts 3 and 4 of the RTI Act that weigh in favour of nondisclosure, however, I am satisfied that none applies to the Information in Issue.

### **Public interest factors favouring disclosure**

50. The applicant argues that there is no public interest in disclosure of the Information in Issue because it is already in the hands of the Department as the investigating agency. However, such a submission fails to take account of the pro-disclosure bias of the RTI Act which requires information to be disclosed unless its disclosure would, on balance, be contrary to the public interest.<sup>34</sup>
51. The preamble to the RTI Act states that Parliament recognises that in a free and democratic society:
- (a) *there should be open discussion of public affairs; and*
  - (b) *information in the government's possession or under the government's control is a public resource; and*
  - (c) *the community should be kept informed of government's operations, including, in particular, the rules and practice followed by government in its dealings with members of the community; and*
  - (d) *openness in government enhances the accountability of government; ...*
52. I find that the following public interest factors weigh in favour of disclosure of the Information in Issue:
- disclosure could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability<sup>35</sup>
  - disclosure of the information could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest<sup>36</sup>
  - disclosure could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community;<sup>37</sup> and
  - disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.<sup>38</sup>
53. The Department discharges, on behalf of the public of Queensland, an important regulatory function aimed at protecting the environment from harm. I consider that

<sup>34</sup> See section 3(1) and section 44 of the RTI Act.

<sup>35</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>36</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>37</sup> Schedule 4, part 2, item 3 of the RTI Act.

<sup>38</sup> Schedule 4, part 2, item 11 of the RT Act.

disclosure of the Information in Issue could reasonably be expected to promote and enhance the accountability of the Department in its decision-making processes by informing the public of information that was before the Department when it made its decision to grant the TEL and the amended TEL. The granting of a TEL is a significant decision, given the potential environmental consequences. I consider there is a public interest in disclosing to the community (on whose behalf the Department makes the decision) information that informed or was relevant to the decision so as to allow the community to fully assess the reasonableness or otherwise of the decision.

54. Having regard to the Information in Issue, I afford significant weight to the public interest factors favouring disclosure of the segments of information appearing on page 18 on File A, and on pages 15 and 16 on File B. Given its incidental nature, I afford low weight to the public interest factors favouring disclosure of the sentence in issue on page 14 of File A.

### **Balancing the public interest**

55. For the reasons explained, I find that there are no public interest factors favouring nondisclosure of the Information in Issue. I am therefore satisfied that disclosure of the Information in Issue would not, on balance, be contrary to the public interest.

### **DECISION**

56. I affirm the Department's decision to grant the third party access to the Information in Issue. I find that the Information in Issue is not exempt information and nor would its disclosure, on balance, be contrary to the public interest.
57. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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Louisa Lynch  
**Acting Right to Information Commissioner**

**Date: 24 May 2018**

## APPENDIX

### Significant procedural steps

Date	Event
29 September 2017	OIC received the applicant's application for external review of the Department's decision.
18 October 2017	OIC advised the parties that it had accepted the applicant's application for external review. OIC granted the third party's application to become a participant.
10 November 2017	OIC requested that the Department advise about the current status of its investigation.
14 November 2017	The Department advised that its investigation had recommenced and was ongoing.
12 December 2017	OIC advised the third party of the information provided by the Department.
20 December 2017	OIC requested that the Department provide further information about its investigation.
11 January 2018	The Department provided the requested information.
1 February 2018	OIC conveyed a written preliminary view to the applicant and the Department.
19 February 2018	The applicant advised that it consented to the release of certain information and provided written submissions in support of the nondisclosure of the remaining information.
20 February 2018	The Department advised that it accepted OIC's preliminary view.
23 February 2018	The third party advised OIC that it wished to continue to pursue access to the information remaining in issue.
28 February 2018	OIC expressed to the applicant an oral preliminary view regarding the information remaining in issue.
1 March 2018	The third party advised that it did not wish to pursue access to information comprising position descriptions.
14 March 2018	The applicant provided final written submissions in support of its objection to disclosure.
26 April 2018	The Department confirmed that its investigation was ongoing and that the matter had not yet been heard in the Magistrates Court.