



## Decision and Reasons for Decision

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**Citation:** *Adani Mining Pty Ltd and Department of Natural Resources, Mines and Energy; Land Services of Coast and Country Inc. (Third Party)* [2018] QICmr 20 (3 May 2018)

**Application Number:** 313322

**Applicant:** Adani Mining Pty Ltd ACN 145 455 205

**Respondent:** Department of Natural Resources, Mines and Energy

**Third Party:** Land Services of Coast and Country Inc.

**Decision Date:** 3 May 2018

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - EXEMPT INFORMATION - BREACH OF CONFIDENCE - information about water licences and permits in relation to a significant mining and infrastructure project - whether disclosure would found an action for breach of confidence - whether information is exempt under schedule 3, section 8 of the *Right to Information Act 2009* (Qld) - whether access to information may be refused under section 47(3)(a) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - CONTRARY TO PUBLIC INTEREST - information about water licences and permits in relation to a significant mining and infrastructure project - accountability, transparency and informed public participation - prejudice to business and commercial affairs of entities - deliberative process information - prejudice to the future supply of information - whether disclosure would, on balance, be contrary to the public interest under sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

## REASONS FOR DECISION

### Summary

1. Land Services of Coast and Country Inc. (**Land Services**) applied to the Department of Natural Resources, Mines and Energy<sup>1</sup> (**Department**) under the *Right to Information Act*

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<sup>1</sup> The access application and internal review application were made to the Department of Natural Resources and Mines which, due to machinery of government changes in December 2017 has since become the Department of Natural Resources, Mines and Energy.

2009 (Qld) (RTI Act) for access to applications<sup>2</sup> for water licences and water permits in relation to the Carmichael Coal Mine and Rail Project, and the North Galilee Basin Rail Project.<sup>3</sup>

2. The Department consulted with Adani Mining Pty Ltd (**Adani**) in response to the access application.<sup>4</sup> Adani objected to disclosure of all documents, primarily on the basis that disclosure would found an action for breach of confidence, or alternatively, on the basis that disclosure would, on balance, be contrary to the public interest.<sup>5</sup> The Department decided to grant access to the majority of the information, contrary to Adani's objections.<sup>6</sup> This decision was largely upheld on internal review.<sup>7</sup>
3. Adani then applied<sup>8</sup> to the Office of the Information Commissioner (**OIC**) for external review, contending the Department did not afford factors relating to Adani's business and financial affairs sufficient weight in favour of nondisclosure.<sup>9</sup>
4. OIC attempted to negotiate an informal resolution between the participants in this review. During this process, Adani withdrew its objections to the disclosure of certain information,<sup>10</sup> which was subsequently released to Land Services. Land Services then agreed that it would not seek access to certain personal information appearing in the documents.<sup>11</sup> However, Adani maintained its objections to a significant proportion of the information, and Land Services elected to pursue its application for that information. As such, this decision deals with the remaining information in issue, in respect of which a negotiated outcome could not be reached.
5. For the reasons set out below, I affirm the Department's internal review decision to disclose information under the RTI Act, contrary to Adani's objections.

## Background

6. Significant procedural steps relating to the external review are set out in the Appendix.
7. Adani proposes to establish an open-cut and underground coal mine in the Galilee Basin with a 189-kilometre railway line, and a 310-kilometre rail line connecting the Galilee Basin to the Port of Abbot Point (**Adani Projects**). The Adani Projects, and associated government approvals, have been the subject of significant community interest.<sup>12</sup> The use of water has been a particularly sensitive issue, with opponents raising issues related to ecological sustainability and impacts on surrounding landholders.
8. Turning to the relevant regulatory context, water is a natural resource that is required to be sustainably managed by the Government under the *Water Act 2000* (Qld) (**Water**

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<sup>2</sup> Including supporting documentation.

<sup>3</sup> Access application dated 21 April 2016. The date range applicable to the application was 1 January 2012 to 21 April 2016.

<sup>4</sup> By letter from the Department to Adani dated 31 October 2016, under section 37 of the RTI Act.

<sup>5</sup> By letter to the Department dated 25 November 2016.

<sup>6</sup> Decision dated 2 February 2017 to grant full access to 570 pages and to refuse access to 70 part pages on the basis that disclosure would, on balance, be contrary to the public interest.

<sup>7</sup> Internal review decision dated 30 March 2017 to grant full access to 564 pages, and to refuse access to 76 pages on the basis that disclosure would, on balance, be contrary to the public interest.

<sup>8</sup> External review application dated 3 May 2017.

<sup>9</sup> In addition to raising a range of other factors favouring nondisclosure.

<sup>10</sup> By email to OIC dated 8 February 2018.

<sup>11</sup> By email to OIC dated 12 March 2018 and 24 April 2018. The excluded information includes names, titles and roles of individuals employed in the private sector, signatures, signature blocks and execution clauses, contact details, and property names that reveal the name of the property owner.

<sup>12</sup> As evidenced by the significant media interest in the topic. See for example: Josh Robertson, 'Adani Groundwater Plan Risks Permanent Damage to Desert Springs', *ABC News Online*, 21 March 2018 <<http://www.abc.net.au/news/2018-03-21/adani-groundwater-plan-risks-permanent-damage-to-desert-springs/9569184>>, and Robert Quirk, 'Adani Carmichael mine: Water is too important for farmers to risk wasting it on a mine', *ABC News Online*, 7 July 2017 <<http://www.abc.net.au/news/2017-07-07/adani-mine-water-is-too-important-to-farmers/8686890>>. Accessed 1 May 2018.

**Act**). Under this legislation, the right to take or interfere with water is administered by the Department. There are a number of different water entitlements available under the Water Act, including licences, permits, allocations and interim allocations. Water licences and water permits are of particular relevance here, given the terms of the access application<sup>13</sup> and the content of the information in issue in the review.

### Reviewable decision

9. The decision under review is the Department's internal review decision dated 30 March 2017.

### Evidence considered

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

### Information in issue

11. The information in issue appears on 303 pages<sup>14</sup> that are comprised of applications for water licences and permits, and associated supporting correspondence, reports and materials. The information of concern to Adani, and that remains in issue in the review (**Information in Issue**)<sup>15</sup> generally comprises:

- water source/location information, and water source data<sup>16</sup>
- water demand information (including volume and rates of extraction required)
- impacts of Adani water extraction on downstream users
- proposed water use and storage locations
- information concerning proposed minimum flows and triggers for extraction
- diagrams of proposed bore construction
- a draft supporting document for a water licence application (**Supporting Document**); and
- other miscellaneous information provided by Adani with its applications, including proposed conditions such as permit timeframes, its proposed water supply strategy, existing and proposed water infrastructure and responses to issues raised by the Department.

### Issues for determination

12. The Department decided to release the Information in Issue contrary to the views of Adani. If a decision under external review is a 'disclosure decision'<sup>17</sup> the participant who opposes the disclosure decision has the onus of establishing that a decision not to disclose the document or information is justified, or that the Information Commissioner should give a decision adverse to the party who wishes to be given access to the

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<sup>13</sup> Which sought 'application and supporting documentation for any Water Licences or Water Permits for the Carmichael Coal Mine...or the Carmichael Coal Mine and Rail Project, and the North Galilee Basin Rail Project'.

<sup>14</sup> As noted at paragraph 4 above, certain information is no longer in issue in this review, and has either been released to Land Services, or is comprised of personal information to which Land Services does not seek access.

<sup>15</sup> Pages 51, 55, 81,142,145, 204, 238, 246, 256-260, 271, 304-305, 331, 334, 339, 344, 393, 400, 410, 436, 439-440, 520-523, 531-640, and parts of pages 2, 3, 4, 7-8, 14, 15, 19-20, 22-23, 25-26, 28-29, 31-33, 35-37, 42, 45, 47-48, 53-54, 68, 71, 73, 78-80, 82, 89, 94-95, 99-101, 104-106, 109-111, 113-114, 116-117, 119-122, 124-125, 127-129, 131-132, 144, 146-147, 154-155, 161, 163, 187-188, 196, 199-201, 203, 205-206, 214, 216, 217, 219, 235-236, 241-243, 245, 263-269, 272, 276-277, 297, 299, 301, 307, 309, 313, 317, 319-320, 322-323, 333, 335-336, 343, 350, 352, 376-377, 385, 388-390, 392, 394-395, 403-406, 408, 419, 422, 424, 427-428, 438, 441, 447-449, 451, 453, 455, 457, 463, 483, 485, 487, 490, 494, 499, 501, 503-504, 508-509, 514-515, 518-519, 524-526 and 529-530.

<sup>16</sup> Including depth and yield information for bores, and environmental impact mapping.

<sup>17</sup> Under section 87(3), disclosure decision relevantly includes a decision to disclose information contrary to the views of a relevant third party obtained under section 37.

document.<sup>18</sup> Accordingly, in this review, Adani has the onus of establishing that a decision not to disclose the Information in Issue is justified or that the Information Commissioner should give a decision adverse to Land Services.

13. In this review, the relevant issues for consideration are:

- whether the Information in Issue is exempt under schedule 3, section 8 of the RTI Act on the basis of breach of confidence; and
- whether disclosure of the Information in Issue would, on balance, be contrary to the public interest under section 49 of the RTI Act.

14. Adani also sought to argue that<sup>19</sup> that draft documents do not fall within the scope of the access application.<sup>20</sup> However, this issue was resolved during the review and, accordingly, is not addressed in these reasons for decision.

## Breach of confidence

### Relevant law

15. The primary object of the RTI Act is to give a right of access to information in the government's possession or under its control, unless, on balance, it is contrary to the public interest to give access.<sup>21</sup> It is Parliament's intention that the RTI Act is to be administered with a pro-disclosure bias<sup>22</sup> and must be applied and interpreted to further the primary object.<sup>23</sup>

16. There are certain limitations placed on the right of access, including grounds for refusal of access. Access may be refused to exempt information,<sup>24</sup> including where disclosure would found an action for breach of confidence (**Breach of Confidence Exemption**).<sup>25</sup>

17. It is well-settled that the Breach of Confidence Exemption refers to an action based in equity for breach of an *equitable obligation* of confidence.<sup>26</sup> Where a contractual term requiring confidentiality exists and disclosure of information gives rise to an action for breach of contract, this in itself is not sufficient to enliven the exemption, but will form part of the factual matrix relating to the circumstances of communication.

18. The Breach of Confidence Exemption must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the agency not to disclose relevant information.<sup>27</sup>

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<sup>18</sup> Section 87(2) of the RTI Act.

<sup>19</sup> The applicant acknowledged that, given the wording of section 37 of the RTI Act, scope is not a basis on which a third party may object to disclosure of information see *Campbell and North Burnett Regional Council; Melior Resources Incorporated (Third Party)* [2016] QICmr 4 (29 January 2016), at [18]; *6ZJ3HG and Department of Environment and Heritage Protection; OY76VY (Third Party)* [2016] QICmr 8 (24 February 2016), at [25].

<sup>20</sup> This contention is in relation to the Supporting Document which is marked as a draft.

<sup>21</sup> Section 3(1) of the RTI Act.

<sup>22</sup> Section 44(4) of the RTI Act.

<sup>23</sup> Section 3(2) of the RTI Act.

<sup>24</sup> Sections 47(3)(a) and 48 of the RTI Act.

<sup>25</sup> Section 48 and schedule 3, section 8 of the RTI Act.

<sup>26</sup> See *TSO08G and Department of Health* (Unreported, Queensland Information Commissioner, 13 December 2011) at [12] (**TSO08G**), citing *Callejo and Department of Immigration and Citizenship* [2010] AATA 244 at [163] to [166].

<sup>27</sup> *B and Brisbane North Regional Health Authority* [1994] QICmr 1 (**B and BNRHA**), a decision of the Information Commissioner analysing the equivalent exemption in the repealed *Freedom of Information Act 1992* (Qld) at [44].

19. For this exemption to apply, five cumulative elements must be established:<sup>28</sup>
- a) information must be able to be specifically identified<sup>29</sup>
  - b) information must have the necessary quality of confidence and will not extend to information that is generally known, useless or trivial<sup>30</sup>
  - c) circumstances of the communication must create an equitable obligation of confidence<sup>31</sup>
  - d) disclosure to the access applicant must constitute an unauthorised use of confidential information;<sup>32</sup> and
  - e) disclosure would result in detriment to the party claiming confidentiality.<sup>33</sup>

### Findings

20. As noted, the requirements for establishing the Breach of Confidence Exemption enumerated in paragraph 19 are **cumulative**; if any of the five cannot be satisfied, then a claim for exemption based on this provision must fail. In relation to the Information in Issue, I do not consider that the third of the five cumulative requirements – ‘requirement (c)’ – can be satisfied.
21. Ascertaining whether this requirement is met requires an assessment of all relevant circumstances surrounding communication of confidential information,<sup>34</sup> so as to determine whether the *‘recipient should be fixed with an enforceable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it.’*<sup>35</sup> The relevant circumstances include (but are not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and the circumstances relating to its communication.<sup>36</sup>
22. In relation to the relevant circumstances, Adani’s submissions may be summarised as follows:<sup>37</sup>
- the Information in Issue is not *‘public property’* or *‘public knowledge’*, and has not been circulated to the public or third parties (other than confidentially to advisers)
  - one document was stamped as a *‘confidential draft’*<sup>38</sup>
  - certain information is *‘very obviously confidential and sensitive in nature’*
  - certain controls were put in place to *‘manage the flow of information between Adani and the Department’*, including by avoiding providing documents electronically, and in one case, Adani officers travelled to a regional Department office to make ‘live updates’ rather than sending the documents electronically; and
  - these controls were suggested by the Department, and the Department had knowledge that this approach was taken to ensure the confidentiality of the documents.

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

<sup>29</sup> *B and BNRHA* at [60] to [63].

<sup>30</sup> *B and BNRHA* at [64].

<sup>31</sup> *B and BNRHA* at [76].

<sup>32</sup> *B and BNRHA* at [103] to [106].

<sup>33</sup> *B and BNRHA* at [111] citing *Attorney-General v Guardian Newspapers (No. 2)* [1990] 1 AC 109 (Lord Keith of Kinkell at 256).

<sup>34</sup> *B and BNRHA*, at [84].

<sup>35</sup> *B and BNRHA* at [76].

<sup>36</sup> *B and BNRHA* at paragraphs [82] and [84], citing *Smith Kline and French Laboratories (Aust) Limited and Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291, pp.302-3.

<sup>37</sup> As set out in Adani’s consultation response to the Department dated 25 November 2016, with further detail provided in submissions to OIC dated 20 April 2018.

<sup>38</sup> The Supporting Document.

23. The labelling of information as '*confidential*' will ordinarily constitute a relevant circumstance to be evaluated when determining whether an enforceable obligation of confidence is imposed, but it is generally not, of itself, determinative of the issue.<sup>39</sup> When considered within context, such labelling may not be intended by the author to impose any enforceable obligations of confidence, rather, it may merely indicate that the author of the document wished it to reach its addressee without being opened by an intermediary.<sup>40</sup> Accordingly, while I have considered the 'confidential draft' stamp in determining whether requirement (c) is satisfied, I do not consider it is determinative.
24. In relation to the information management processes raised by Adani, it is clear<sup>41</sup> that at least some of the Information in Issue was conveyed through ordinary processes (ie. email or post). To the extent that there were arrangements in place to convey certain information in person (or in any event, not by email), I consider that this does indicate some sensitivity, however, I am not satisfied that it demonstrates that the Department had '*constructive knowledge of the circumstances of confidentiality...*' as Adani contends.
25. Adani further submits that the nature and sensitivity of the information is such that it is clearly confidential.<sup>42</sup> It is unclear why it is particularly sensitive, other than the general background to the matter being one of significant public debate and that it involves Adani's operations. In support of its contention that certain information is confidential Adani cites the following passage of *National Education Advancement Programs (NEAP) Pty Ltd v Ashton*.<sup>43</sup>
- ...as a matter of first principle, if a person was given a document which on the face of it screamed out that it was confidential, that the document would come into the category of one where the recipient would be deemed to have known that the information was confidential.*
26. In order to understand the meaning of this passage, it is necessary to look at the context of that case, which involved an action for breach of confidence against a third party tutor in relation to an exam paper. In that matter, Young J went on to discuss the disclosure of an examination paper where the examination has not yet been sat (and marked as such),<sup>44</sup> and a facsimile transmission received in error that reveals the discovery of gold at a certain location. In contrast to the examples provided by Young J in that case, I am not satisfied that water demand information or development and output of a mining operation '*screams out*' as confidential.
27. In the broader context, all rights to the use, flow and control of water in Queensland are vested in the State, and the Department is responsible for authorising (or otherwise) persons and entities to take or interfere with water (which relevantly includes by issuing water licences and permits).<sup>45</sup> Adani communicated the Information in Issue to the Department in order to obtain the relevant water entitlements. Further, the Water Act provides that water resources are to be obtained through a '*transparent*' process.<sup>46</sup> In

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<sup>39</sup> *B and BNRHA* at [91].

<sup>40</sup> *Ibid.* Citing *Re Wolsley and Department of Immigration* (1985) 7 ALD 270 at 274.

<sup>41</sup> From the information released to Land Services during the course of the review.

<sup>42</sup> As set out in Adani's consultation response to the Department dated 25 November 2016, with further detail provided in submissions to OIC dated 20 April 2018.

<sup>43</sup> (1995) 33 IPR 281 at 290.

<sup>44</sup> I note that in that case, the examination paper was not clearly marked, and the Court held that it was *not* a document which was obviously confidential when it was received by the defendant.

<sup>45</sup> Section 26 and 27 of the *Water Act*.

<sup>46</sup> Section 2(2)(e) of the *Water Act*. In *Seven Network Operations Limited and Safe Food Production Queensland; Food business (Third Party)* (Unreported, Queensland Information Commissioner, 10 February 2012), it was held that the context of the operative statutory framework was a relevant matter to consider when deciding whether the circumstances of the communication create an equitable obligation of confidence.

addition, the Department decided to disclose the Information in Issue to Land Services under the RTI Act. I consider that the Department's willingness to disclose the Information in Issue lends support to the view that the Department did not consider the circumstances of the communication to be confidential.<sup>47</sup> Against this regulatory framework and background, and in light of my findings above, I do not consider that it is reasonable, in the absence of any more compelling evidence, to find that there existed any mutual understanding of confidence between the Department and Adani.

28. While Adani may have hoped for, or even expected, confidentiality, the confider's conduct alone cannot unilaterally and conclusively impose an obligation of confidence.<sup>48</sup> In this case, I am not satisfied that Adani has met the onus of establishing that the Department agreed – explicitly or implicitly – to receive the Information in Issue confidentially. Accordingly, element (c) is not made out, and the Information in Issue therefore, cannot comprise exempt information under schedule 3, section 8 of the RTI Act.

## **Public interest considerations**

### ***Relevant law***

29. Under the RTI Act, access to information may be refused if its disclosure would, on balance, be contrary to the public interest.<sup>49</sup> The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest<sup>50</sup> and explains the steps that a decision-maker must take<sup>51</sup> in deciding the public interest as follows:

- identify any irrelevant factors and disregard them
- identify relevant public interest factors favouring disclosure and nondisclosure
- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosing the information in issue would, on balance, be contrary to the public interest.

### ***Irrelevant factors***

30. Adani has submitted<sup>52</sup> that some of the information is in draft, or is historical, and that disclosure may cause a loss of confidence in Adani if it is taken to be current or accurate.
31. I have not taken this submission into consideration to the extent that it relates solely to the potential for the applicant (or others) to misinterpret or misunderstand the Information in Issue.<sup>53</sup> To the extent that there is potential for reputational damage to Adani, I have considered this at paragraph 44 below.

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<sup>47</sup> A matter also relied upon in *Edmestone and Blackall-Tambo Regional Council* [2016] QICmr 12 (15 April 2016) at [21].

<sup>48</sup> *B and BNRHA*, paragraph 91.

<sup>49</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>50</sup> Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

<sup>51</sup> Section 49(3) of the RTI Act.

<sup>52</sup> In its internal review application dated 2 March 2017.

<sup>53</sup> Schedule 4, part 1, item 2.

## Factors favouring disclosure

32. In its decision on internal review, the Department stated:<sup>54</sup>

*...there has been some media attention regarding these projects and some of the issues aired in the public arena have centred around the governments conduct and processes in relation to these projects.*

*Given the level of community interest in the impact to Queensland of Adani's Carmichael and North Galilee projects, in my opinion, it is necessary that the government maintains a pro-disclosure bias in order that discussions around matters of importance to the community are conducted with the fullest information available.*

*I am satisfied that there is a manifest public interest in allowing the public access to the information, in order that they may **scrutinise what the government committed to, and whether doing so represented a sound decision.***

[emphasis added]

33. Having considered the nature of the Information in Issue and the public interest arguments highlighted by the Department above, I am satisfied that disclosure could reasonably be expected to:

- promote open discussion of public affairs and enhance the Government's accountability<sup>55</sup>
- contribute to informed debate on important issues and matters of serious interest<sup>56</sup>
- inform the community of the Department's operations;<sup>57</sup> and
- reveal the reason for a government decision and the background and contextual information that informed the decision.<sup>58</sup>

34. In terms of the weight to be attributed to these factors, the Information in Issue is comprised of applications (and supporting information) submitted to the Department by a private entity to benefit from the use of a natural resource for private commercial gain, in respect of a project that has been, and remains, the subject of considerable public debate and community concern. In this context, I consider it is vital for there to be transparency in the approach taken by the Department in managing natural resources such as water. Furthermore, there is a strong public interest in scrutinising the decisions made by the Department in performing this function and I find that disclosing the Information in Issue would serve these factors to a significant extent. The use of water for mining projects, and in particular, for the Adani Projects—which are of a significant scale and subject to a high level of community interest—is a matter of great public concern, and I am satisfied that release of this information would significantly contribute to informed public debate.

35. Adani's submissions understandably focus on apprehended prejudice to its own (primarily commercial) interests, and do not focus to any great extent on the factors favouring disclosure. However, Adani does submit that the '*release of draft or historical versions of the information in issue would not contribute to an informed debate about the Carmichael Project*'. Adani further notes that many of the documents have been superseded and are no longer current or of value in considering the future of the project and its water licences and permits.<sup>59</sup> However, I am satisfied that even where further

<sup>54</sup> Internal review decision dated 30 March 2017 at page 7.

<sup>55</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>56</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>57</sup> Schedule 4, part 2, item 3 of the RTI Act.

<sup>58</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>59</sup> Submissions dated 20 April 2018.



updated documents were later provided to the Department, disclosure of the Information in Issue would provide a complete picture of the application process, and the information provided to the Department at different stages. Further, within the context of the scale of the Adani Projects, and the ongoing approvals process for these projects, I do not consider that the passing of four to seven years reduces (to any relevant extent) the importance of the community being informed about the Department's role in the process. The fact that certain documents have been superseded may, to a limited extent, reduce their contribution to informed public debate, but I remain of the view that the insight they provide remains significant, given the circumstances of this case.

36. On this basis, I consider that each of the above factors favouring disclosure carry significant weight.

### **Factors favouring nondisclosure**

37. Adani's submissions<sup>60</sup> raise a number of nondisclosure factors, predominantly concerning its business affairs, confidentiality, and deliberative process. In particular, Adani submits that disclosure of the Information in Issue could reasonably be expected to:

- prejudice its business, professional, commercial or financial affairs (**Business Prejudice Factor**)<sup>61</sup>
- prejudice a deliberative process of government (**Deliberative Process Prejudice Factor**)<sup>62</sup>
- cause a public interest harm by:
  - disclosing deliberative process information (**Deliberative Process Harm Factor**)<sup>63</sup>
  - disclosing a trade secret of Adani<sup>64</sup>
  - disclosing information that has a commercial value to Adani, and could reasonably be expected to destroy or diminish the commercial value of the information<sup>65</sup>
  - disclosing information concerning its business, professional, commercial or financial affairs in circumstances where disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of this type of information to government in the future (**Business Harm Factor**);<sup>66</sup> and
  - disclosing information of a confidential nature that was communicated in confidence in circumstances where disclosure could reasonably be expected to prejudice the future supply of information of this type.<sup>67</sup>

### **Business Affairs**

38. I acknowledge that the Information in Issue in this review relates directly to water requirements for the Adani Projects and that water is an important component of these projects. I am satisfied that the information relates to Adani's business or commercial affairs. However, as previously held by the Right to Information Commissioner, under the RTI Act, the mere fact that information relates to commercial issues of entities does

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<sup>60</sup> Submissions to OIC dated 31 October 2017 and 20 April 2018, and Adani's consultation response to the Department dated 25 November 2016, its internal review application dated 2 March 2017 and the external review application dated 3 May 2017.

<sup>61</sup> Schedule 4, part 3, item 2 of the RTI Act.

<sup>62</sup> Schedule 4, part 3, item 20 of the RTI Act.

<sup>63</sup> Schedule 4, part 4, section 4 of the RTI Act.

<sup>64</sup> Schedule 4, part 4, section 7(1)(a) of the RTI Act.

<sup>65</sup> Schedule 4, part 4, section 7(1)(b) of the RTI Act.

<sup>66</sup> Schedule 4, part 4, section 7(1)(c) of the RTI Act.

<sup>67</sup> Schedule 4, part 4, section 8. I have also considered schedule 4, part 3, item 16 of the RTI Act.

not, of itself, lead to an automatic presumption that disclosure under the RTI Act would be contrary to the public interest.<sup>68</sup> When commercial information of entities comes into the possession or control of an agency, this information is subject to the RTI Act. The necessary approach is '*to balance the interests of commercial undertakings which have supplied material to government agencies and the interests of members of the public in gaining access to that information*'.<sup>69</sup>

39. Further, the Business Prejudice Factor and Business Harm Factor require that the expected prejudice/adverse effect is reasonably based (i.e. neither absurd, irrational nor ridiculous).<sup>70</sup> It is not enough to simply assert that disclosure will result in some kind of adverse consequence. There must be some evidentiary basis from which it may be inferred that disclosure of relevant information could reasonably be expected to result in such prejudice or adverse effect.

40. In this case, Adani submits the Information in Issue:<sup>71</sup>

- is not in the public domain, and is comprised of '*highly commercially sensitive and confidential information of considerable commercial value to Adani*'
- could enable competitors to obtain the exact water requirements for the Adani Projects
- could be used by competitors to '*reverse engineer*' confidential information about Adani's proposed operations, including production targets
- could have an adverse effect on Adani's commercial negotiations (particularly in relation to pricing and valuation); and
- could have an adverse effect on Adani's business reputation and goodwill, impacting Adani's ability to negotiate with third parties in relation to the Adani Projects.

41. More specifically, Adani submits:<sup>72</sup>

*With respect to documents containing **current water demand information** [their emphasis], we submit that if obtained by Adani's competitors, the information in the documents could reasonably be expected to cause competitive harm to Adani by enabling competitors to obtain the exact water requirements for the relevant projects. For example, it is likely competitor proponents of other coal projects in the Galilee Basin could and would appropriate to their own benefit the disclosed water demand, water supply and water balance information...Adani as 'first mover' in the region is seriously exposed to its competitors making the most out of disclosure of its water demand and water supply information.*

*Nor should it be ignored that the proponent behind other projects in the Galilee Basin are highly sophisticated and well resourced. Adani is concerned as to the distinct possibility that water demand, water supply and water balance information could be input into modelling used by these competitors to more accurately 'reverse engineer' many different insights into Adani's proposed operations, including Adani's production targets.*

42. While I accept that the Information in Issue would reveal Adani's water strategy and requirements for the Adani Projects, there is nothing before me (aside from Adani's

<sup>68</sup> These comments were made in relation to a Queensland government-owned company, but remain relevant here: *Kalinga Wooloowin Residents Association Inc and Brisbane City Council; City North Infrastructure Pty Ltd (Third Party); Department of Treasury (Fourth Party)* (Unreported, Queensland Information Commissioner, 9 May 2012) at [79].

<sup>69</sup> *Cannon and Australian Quality Egg Farms Ltd* (1994)1 QAR 491 (**Cannon**) at [32].

<sup>70</sup> *Attorney-General's Department v Cockcroft* (1986) 64 ALR 97 at 106.

<sup>71</sup> As summarised in submissions to OIC dated 31 October 2017, and reiterated in submissions dated 20 April 2018. These matters are also raised in Adani's consultation response to the Department dated 25 November 2016, its internal review application dated 2 March 2017 and the external review application to OIC dated 3 May 2017.

<sup>72</sup> In its external review application dated 3 May 2017. Almost identical submissions were made in the internal review application dated 2 March 2017.

assertions) to demonstrate that disclosure could reasonably be expected to allow Adani's competitors to 'reverse engineer' insights into its operations, so as to confer an advantage on those competitors, with a corresponding disadvantage on Adani. Adani has secured certain entitlements to use water, along with other government approvals for the proposed project. Accordingly, it appears that Adani has successfully exploited its 'first mover' advantage. There is no evidence before me that competitors—even those who are sophisticated and well-resourced—would be in a position to exploit this information, even if they ascertain water requirements, strategies or production targets.

43. Adani also submits that release of Information in Issue that is in draft or historical form, will allow for comparison with other information that is/will be in the public domain. Adani contends that this will give its competitors and other stakeholders in the Galilee Basin the '*opportunity to compare and contrast old and current data to their own ends and to the material detriment of Adani*'.<sup>73</sup> I accept that certain parts of the Information in Issue may allow for a comparison between historical and current predictions of water demand and mining operations. However, other than a contention that competitors will use this information to '*their own ends*' or that it will provide '*valuable insights*' there is no evidence before me of any relevant prejudice or adverse effect to Adani. Accordingly, I do not consider this potential comparison process gives rise to the Business Prejudice Factor or Business Harm Factor.
44. In relation to Adani's submissions concerning commercial negotiations, I accept Adani's submission<sup>74</sup> that these negotiation processes are ongoing. I also accept that increased public debate of this high profile issue could reasonably be expected to occur as a result of disclosure of the Information in Issue, and this debate may, to a certain extent, impact on Adani's business reputation and goodwill.<sup>75</sup> Although this is unlikely to result in loss of '*customers*' in the traditional sense, I accept that it may impact on Adani's profits through difficulty in negotiating with third party stakeholders. I do not have any evidence before me that disclosing the Information in Issue would have any more direct impact on commercial negotiations (for example, by revealing specific information that would put Adani at a commercial disadvantage), and nor am I satisfied that disclosing the Information in Issue could reasonably be expected to prejudice or have an adverse effect on Adani in relation to the price the Department sets for water.<sup>76</sup> However, to the extent that disclosure may result in difficulties in negotiating with third parties, I afford the Business Prejudice Factor and Business Harm Factor moderate weight.<sup>77</sup>
45. The Business Harm Factor will also apply where disclosure could reasonably be expected to prejudice future supply of like information to government. I accept, that in relation to some information, Adani may have supplied more information than was strictly required in order to support its application. It has previously been held in relation to infrastructure developments that developers may be discouraged from communicating with agencies at an early stage in relation to their projects if they believe their correspondence may be subject to disclosure under the RTI Act.<sup>78</sup> Similarly here, I consider that applicants for water entitlements may be discouraged from providing a full range of information to the Department in support of their application if they believe this information may be

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<sup>73</sup> Internal review application dated 2 March 2017 and the external review application to OIC dated 3 May 2017. By way of example, Adani notes in its application that by modelling of the differences, a competitor could be provided with valuable insights into how Adani may have adjusted its production levels over the intervening period of time or changed other expected values of key parameters of the project.

<sup>74</sup> Set out in its internal review application dated 2 March 2017, and external review application dated 3 May 2017, and, in relation to '*contractors*' generally in submissions to OIC dated 20 April 2018.

<sup>75</sup> Loss of business reputation and goodwill '*feared ultimately for its potential to result in loss of income or profits, through loss of customers*' has previously been held to constitute a relevant adverse effect: *Cannon* at [82].

<sup>76</sup> As Adani appears to contend in its internal and external review applications.

<sup>77</sup> I note that this also gives rise to a factor favouring disclosure, as discussed at paragraph 33 to 34 above.

<sup>78</sup> *Straker and Sunshine Coast Regional Council; NBN Co Limited (Third Party)* [2016] QICmr 44 (28 October 2016) (*Straker*) at [91]. I note, however, that unlike this matter, the relevant information in *Straker* was covered by a confidentiality agreement.

disclosed. Accordingly, I am satisfied that the Business Harm Factor applies. However, in terms of the weight to be attributed to this factor, I do not consider that the flow of information to government would be impaired to any great extent. Entities provide information to the Department because they are required to do so in order to apply for water entitlements, or they consider that it supports their application. Given the Department's role in approving water licence and permit applications, any failure by entities to provide information would be likely to prejudice their operations to a far greater extent than the disclosure of information about their applications. Accordingly, in relation to future supply of information to Government, the Business Harm Factor attracts only low weight.

### Deliberative Process

46. In relation to the Deliberative Process Prejudice Factor, I understand that the relevant applications have now been decided. I do not have any evidence before me of potential prejudice to an ongoing deliberative process, even where Adani is '*presently pursuing several applications for ... entitlements*'.<sup>79</sup>
47. In relation to the Deliberative Process Harm Factor, I note that '*deliberative processes involved in the functions of government*' have been defined as '*...thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action*'. It has also been defined as '*careful consideration with a view to decision*'.<sup>80</sup> In this regard, I note that the Information in Issue is comprised of information submitted to the Department **by Adani**, and it is arguable that it does not reveal the Department's thinking process. Further, much of the information is factual (eg. water source information and locations, and water source data, water demand information etc.), and so falls within the exception to the Deliberative Process Harm Factor for '*factual or statistical information*'.<sup>81</sup> It should be noted that to the extent the Information in Issue is not factual, given the nature of the information, and the fact that the relevant applications have been decided, I consider the harm that could reasonably be expected to occur would be minimal. I note the Department has not raised concerns with or made submissions to OIC about any harm to its own deliberative processes. Accordingly, even if it is accepted that Deliberative Process Harm Factor may apply, I consider this factor carries only low weight.

### Trade Secrets and Commercial Value

48. A factor favouring nondisclosure arises where disclosure of the Information in Issue would disclose '*trade secrets*' of an agency or another person. A trade secret has been described as '*any formula, pattern or device or compilation of information which gives an advantage over competitors who do not know or use it*'.<sup>82</sup> In the context of the Commonwealth *Freedom of Information Act 1982* (Cth), the Federal Court has noted the issue of whether information is a trade secret is primarily a question of fact for the decision-maker, and that while the ambit of the term is not easy to delineate, it adopted the following definition:<sup>83</sup>

*...a trade secret is information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret. I would add first, that it must be information*

<sup>79</sup> As noted in the internal and the external review applications.

<sup>80</sup> *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at [28-30] citing with approval the definition given in *Re Waterford and Department of Treasury* (No.2) (1984) 5 ALD 588 at 606.

<sup>81</sup> Schedule 4, part 4, section 4(3)(b) of the RTI Act.

<sup>82</sup> *Cannon* at [43], citing *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37.

<sup>83</sup> *Re Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 108 ALR 163 at [34], citing *Lansing Linde Ltd v. Kerr* (1990) 21 IPR 529 at 536.

used in a trade or business, and secondly that the owner must limit the dissemination of it or at least not encourage or permit widespread publication.

49. Adani has submitted<sup>84</sup> that:

*...a trade secret includes a compilation of information which gives an advantage over competitors who do not know it or use it. Many of the reports contain information relating to water supply studies and hydrology of river and creek flows. Adani has had to commission the reports in order to apply for the water licences permits. We note here are however a number of other proposed mines within the vicinity of Carmichael Mine. It is likely that the proponents of these and other projects will use Adani's commissioned reports in the consideration of their own water permits, or for future permits. Adani may also be competing with these other proponents in relation to any future permit applications.*

50. Having reviewed the Information in Issue, and Adani's submissions, I am not satisfied that the information meets the definition of 'trade secret'. Firstly, to be a trade secret, the information must be used in or useable in trade (ie. it must be an asset of the trade). For example, while financial particulars of a business may be confidential when a person obtains it in the course of a relationship that requires confidentiality (for example, in the hands of an employee, solicitor or accountant), information of this type will not ordinarily constitute a trade secret, as it is not able to be used for the ongoing benefit of the business.<sup>85</sup> Here, Adani has submitted that some information is superseded or historical, and accordingly, I am not satisfied that it is currently usable in trade. Secondly, to the extent the Information in Issue is comprised of current information, I am not satisfied – noting that Adani bears the onus of proof in this matter – that in the circumstances,<sup>86</sup> the Information in Issue (or parts of it) would give an advantage to competitors or that disclosure would be liable to cause real (or significant) harm to Adani. Accordingly, I do not consider that the nondisclosure factor concerning trade secrets applies in the circumstances of the matter.

51. For similar reasons, I do not consider that the nondisclosure factor concerning information of commercial value applies in this case. Information has commercial value if:<sup>87</sup>

- it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged (i.e. because it is important or essential to the profitability or viability of a continuing business operation, or a pending 'one-off' commercial transaction); or
- a genuine arms-length buyer is prepared to pay to obtain that information from that agency or person, such that the market value of the information would be destroyed or diminished if it could be obtained from a government agency which has possession of it.

52. While I acknowledge that water is essential to the Adani Projects, I am not satisfied that the *Information in Issue* itself has commercial value in the relevant sense. The fact that the information relates to a matter of commercial value, does not give the information itself the necessary quality. To the contrary, information submitted to government during past application processes is not important to the profitability or viability of Adani's continuing business operations or a pending transaction. Nor does it appear that there

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<sup>84</sup> Submissions dated 20 April 2018

<sup>85</sup> *Re Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 108 ALR 163 at [38].

<sup>86</sup> Including as outlined at paragraph 42 above.

<sup>87</sup> *Cannon* at [54]-[55], considering section 45(1) of the repealed *Freedom of Information Act 1992* (Qld). The information must have a commercial value at the time that the decision is made; information which was once valuable may become aged or out-of-date such that it has no remaining commercial value: [56].

would exist any independent third party purchaser – a genuine ‘arm’s-length’ buyer – prepared to pay for access to the specific information used by Adani in support of its applications.

53. Adani has also submitted that:<sup>88</sup>

*...releasing the information in issue would diminish the commercial value of this information to Adani, because other proponents would not have to expend monies on expert reports to undertake a preliminary assessment when considering whether and where to make a water licence permit application. This places Adani at a relative disadvantage vis-à-vis other proponents because they are able to utilise Adani’s reports for free.*

54. In relation to this submission, it is questionable as to whether another entity would be in position to utilise reports prepared specifically for the Adani Projects in its own applications for a water entitlement. However, putting this practical consideration aside, I note the Information Commissioner’s previous findings concerning the relevance of expenditure of time and money to the concept of ‘commercial value’:<sup>89</sup>

*I am not prepared to accept that the investment of time and money is a sufficient indicator in itself of the fact that information has a commercial value. It could be argued on that basis that most, if not all, of the documents produced by a business will have a commercial value because resources were invested in their production, or money expended in their acquisition. This is surely too broad a proposition. Information can be costly to produce without necessarily being worth anything. At best, the fact that resources have been expended in producing information, or money has been expended in acquiring it, are factors that may be relevant to take into account in determining whether information has a commercial value.*

55. Accordingly, while I have considered Adani’s submission that it has expended money on the Information in Issue, this is not sufficient to give rise to this nondisclosure factor. Accordingly, I find that this factor does not apply to the Information in Issue.

### **Confidential Information**

56. In relation to the factor concerning disclosure of information of a confidential nature,<sup>90</sup> as noted above at paragraphs 20 to 28 in relation to the Breach of Confidence Exemption, I do not consider that the Information in Issue is confidential. However, even if it were confidential, for the relevant nondisclosure factor to apply, disclosure must reasonably be expected to prejudice the future supply of information of this type. In this case, as outlined in relation to the Business Harm Factor at paragraph 45 above, entities provide information to the Department because they are required to do so in order to apply for water entitlements, or they consider that it supports their application. Given the Department’s role in approving water licence and permit applications, any failure by entities to provide information would be likely to prejudice their operations to a far greater extent than the disclosure of information about their applications. For this reason, even if this nondisclosure factor did apply, I would afford it low weight.<sup>91</sup>

### **Balancing the public interest**

57. I have taken into account the pro-disclosure bias which is to be applied when deciding access to documents.<sup>92</sup> In this case, I also consider there are very strong public interest

<sup>88</sup> Submissions to OIC dated 20 April 2018.

<sup>89</sup> Cannon at [52].

<sup>90</sup> Schedule 4, part 4, section 8 of the RTI Act.

<sup>91</sup> I have also considered the factor set out in schedule 4, part 3, item 16 of the RTI Act, and the same reasoning applies to this factor. I do not consider that the Information in Issue is confidential, but even if it were, disclosure would not significantly prejudice the Department’s ability to obtain such information.

<sup>92</sup> Section 44 of the RTI Act.

considerations in favour of disclosure. The Adani Projects are the subject of considerable community debate, and the Information in Issue is comprised of applications (and supporting information) provided to government during an application process by Adani to use water, a finite natural resource. I am satisfied that disclosure of the Information in Issue would serve to significantly enhance transparency and accountability in this process. While I accept that certain nondisclosure factors (in particular, in relation to Adani's business affairs)<sup>93</sup> apply, I consider these factors carry only low to moderate weight in the circumstances of this case.

58. On balance, I find that the factors favouring disclosure outweigh the factors favouring nondisclosure in this case. Accordingly, I find that disclosure of the Information in Issue would not, on balance, be contrary in the public interest.

## **DECISION**

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

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K Shepherd  
**Assistant Information Commissioner**

**Date: 3 May 2018**

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<sup>93</sup> I have also taken into account the Deliberative Process Harm Factor, and the factors concerning flow of confidential information, but consider that to the extent they apply or may apply, these factors carry only low weight.

## APPENDIX

### Significant procedural steps

<b>Date</b>	<b>Event</b>
3 May 2017	OIC received the external review application and requested relevant procedural documents from the Department.
9 May 2017	OIC received the requested procedural documents from the Department.
22 May 2017	OIC notified the applicant and the Department that the external review had been accepted. OIC requested further information from Department.
24 May 2017	OIC received the requested information from the Department
7 July 2017	OIC spoke to the applicant and provided them with an update on the status of the review.
4 September 2017	OIC spoke to the Department and provided them with an update on the status of the review.
7 September 2017	OIC spoke to the applicant and the Department to discuss an informal resolution proposal and received submissions in response.
25 September 2017	OIC spoke to the Department, requested and received further information and received additional submissions. OIC requested submissions from the access applicant.
26 September 2017	OIC conveyed a written preliminary view to the applicant and requested submissions in response. OIC provided the Department with a written update on the status of the review and requested the Department provide information to the applicant.
27 September 2017	OIC received notice the Department had provided the requested documents to the applicant.
5 October 2017	OIC provided the access applicant with an update on the status of the review.
31 October 2017	OIC received the applicant's response to the preliminary view.
13 November 2017	OIC spoke to the Department and provided them with an update on the status of the review.
28 November 2017	OIC provided clarification to the applicant on some remaining issues and requested additional information.
15 December 2017	OIC provided the access applicant with an update on the status of the review.
19 December 2017	OIC received further submissions, and the requested information, from the applicant.
21 December 2017	OIC provided the applicant with an update on the status of the review.
9 January 2018	OIC provided the Department with an update on the status of the review.
1 February 2018	OIC provided the applicant with an update on the status of the review and requested submissions.
8 February 2018	OIC received the requested submissions from the applicant.
9 February 2018	OIC provided the access applicant and the Department with an update on the status of the review and requested the Department release additional information to the access applicant.



Date	Event
13 February 2018	OIC received confirmation from the Department they had released the additional information to the access applicant.
27 February 2018	OIC spoke to the access applicant and received additional information in response.
8 March 2018	OIC spoke to the access applicant and requested submissions.
12 March 2018	OIC received the requested submission from the access applicant.
29 March 2018	OIC conveyed an additional written preliminary view to the applicant and requested submissions in response.
5 April 2018	OIC spoke to the access applicant and provided them with an update on the status of the review.
10 April 2018	OIC spoke to the applicant and provided them with an update on the status of the review.
20 April 2018	OIC received the requested submissions from the applicant.
24 April 2018	<p>OIC spoke to the access applicant and provided them with an update on the status of the review and requested submissions. OIC received the requested submissions.</p> <p>OIC provided a written update on the status of the review to the applicant and advised that OIC does not accept confidential submissions.</p>
27 April 2018	The applicant confirmed that it did not wish to withdraw its most recent submissions made to OIC.
1 May 2018	The applicant sought to withdraw certain wording contained in previous submissions made to OIC.