



## Decision and Reasons for Decision

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**Citation:** *TerraCom Limited and Department of Transport and Main Roads; Office of the Leader of the Opposition (Third Party) [2019] QICmr 15 (9 May 2019)*

**Application Number:** 314347

**Applicant:** TerraCom Limited (ACN 143 533 537)

**Respondent:** Department of Transport and Main Roads

**Third Party:** Office of the Leader of the Opposition

**Decision Date:** 9 May 2019

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - EXEMPT INFORMATION - BREACH OF CONFIDENCE - information about a road use direction - whether disclosure of information would found an action for breach of confidence - whether exempt information to which access may be refused - sections 47(3)(a) and 48 and schedule 3, section 8 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - CONTRARY TO THE PUBLIC INTEREST - information about a road use direction - accountability, transparency and informed public debate - prejudice to business and commercial affairs of entities and future supply of information - whether disclosure 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 Office of the Leader of the Opposition (**OLO**) applied to the Department of Transport and Main Roads (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to a road use direction, a briefing paper and related correspondence with the owner or operator of the Blair Athol Mine (**Mine**).<sup>1</sup>
2. The Department located 15 pages of information responding to the access application and consulted TerraCom Limited (**TerraCom**)<sup>2</sup> under section 37 of the RTI Act about its

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<sup>1</sup> Access application dated 19 July 2018. The date range applicable to the application was 28 April 2017 to 19 July 2018.

<sup>2</sup> By letter dated 6 September 2018.

proposed disclosure of information in five pages. TerraCom objected to disclosure of all responsive information.<sup>3</sup>

3. The Department decided<sup>4</sup> to grant access to most of the information in the 15 pages,<sup>5</sup> contrary to TerraCom's objections. TerraCom sought internal review of that decision<sup>6</sup> and, on internal review, the Department decided<sup>7</sup> to disclose all information in the 15 pages, apart from signatures and mobile telephone numbers.<sup>8</sup>
4. TerraCom then applied<sup>9</sup> to the Office of the Information Commissioner (**OIC**) for external review. During the course of the review, OLO was joined as a participant.<sup>10</sup>
5. For the reasons set out below, I find that TerraCom has not discharged the onus, imposed by section 87(2) of the RTI Act, of establishing that a decision not to disclose information is justified. I affirm the Department's internal review decision to disclose information to OLO, as the information is not exempt information and its disclosure would not, on balance, be contrary to the public interest.

## Background

6. Significant procedural steps relating to the external review are set out in the Appendix.
7. Queensland's roads are a public resource and the State's road network includes State-controlled roads, which are managed by the Department.<sup>11</sup>
8. Certain uses of the road network are regulated by the *Mineral and Energy Resources (Common Provisions) Act 2014* (**Common Provisions Act**). Under that regulatory framework, the holder of a resource authority, such as a mining lease, must not use a public road<sup>12</sup> for a 'notifiable road use'<sup>13</sup> unless:
  - it has given notice of such proposed use to the relevant public road authority;<sup>14</sup> and
  - one of the following has occurred—(i) the relevant public road authority has provided consent to the carrying out of the use; (ii) a compensation agreement for the use has been signed; or (iii) an application has been made to decide the holder's compensation relating to the road.
9. A public road authority may also issue a road use direction<sup>15</sup> about the way the resource authority holder may use the road for the notifiable road use.<sup>16</sup> This is of particular

<sup>3</sup> By email dated 17 September 2018 and in a telephone conversation with the Department on 24 September 2018.

<sup>4</sup> Decision addressed to TerraCom dated 28 September 2018 and decision addressed to OLO dated 27 September 2018.

<sup>5</sup> The Department decided to delete mobile telephone numbers appearing on page 2, on the basis they were irrelevant to application, and refuse access to signatures appearing on pages 2 and 5 and a paragraph appearing on page 1, which the Department described as comprising 'TerraCom's forecasted monthly tonnage of coal to be hauled'.

<sup>6</sup> On 24 October 2018.

<sup>7</sup> On 21 November 2018.

<sup>8</sup> As referred to in footnote 5 above. On internal review, the Department decided to disclose the paragraph appearing on page 1 referred to in footnote 5.

<sup>9</sup> External review application dated 17 December 2018.

<sup>10</sup> Under section 89(3) of the RTI Act.

<sup>11</sup> Other roads are managed by entities such as local government authorities.

<sup>12</sup> Which includes a State-controlled road.

<sup>13</sup> Under section 62 of the Common Provisions Act and section 26 of the *Mineral and Energy Resources (Common Provisions) Regulation 2016* (Qld) (**Common Provisions Regulation**), a 'notifiable road use' is defined to include the use of a public road to haul minerals that have been mined under the *Mineral Resources Act 1989* (Qld) at 'more than a haulage threshold rate'. Section 26(3) of the Common Provision Regulation then defines the 'haulage threshold rate' for a State-controlled road to be 50,000 tonnes a year.

<sup>14</sup> Under section 63(1)(a) of the Common Provisions Act. The matters which are required to be stated in the resource authority holder's notice given about a notifiable road use are specified in section 27 of the Common Provisions Regulation.

<sup>15</sup> Under section 64(1) of the Common Provisions Act.

<sup>16</sup> Section 64 of the Common Provisions Act also sets out matters which may be included in a road use direction.

relevance, given the information requested in the access application included the 'Road use direction issued to Orion Mining Pty Ltd/TerraCom in relation to the Blair Athol mine pursuant to the Mineral and Energy Resources (Common Provisions) Regulations 2016'.

10. TerraCom's subsidiary, Orion Mining Pty Ltd (**Orion**), acquired the Mine in 2017.<sup>17</sup>
11. A number of TerraCom's ASX Announcements refer to the recommencement of coal mining production at the Mine and the transport, by truck, of coal from the Mine to another rail load-out facility pending completion of a dedicated train load-out facility for the Mine.<sup>18</sup> On 1 May 2018, TerraCom announced<sup>19</sup> that it had ceased its trucking operations on 30 March 2018, when the Mine's train load out facility was completed.
12. In his tabled answer to Question on Notice No. 213,<sup>20</sup> the Minister for Transport and Main Roads stated as follows (**Minister's Statement**):

*[T]he Department ... has issued the owners of Blair Athol Mine, TerraCom, with a road use direction under the Mineral and Energy Resources (Common Provisions) Regulation 2016. This road use direction was issued for the temporary haulage of coal by the road network via the Peak Downs Highway and Gregory Developmental Road. It was proposed as a temporary measure until the construction of a rail link from Blair Athol to the existing rail line is completed. The road use direction has a number of conditions including requirement to supply a road impact assessment and mitigation strategies for any impacts to the road network. The road impact assessment will identify the costs associated with any reduction in road life or accelerated maintenance requirements as a result of the haulage.*

13. There has been significant community interest in the government approval processes associated with activities undertaken at the Mine, including the haulage of coal by truck on the State's road network.<sup>21</sup>

### Reviewable decision

14. The decision under review is the Department's internal review decision dated 21 November 2018.

### Evidence considered

15. 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

16. The information in issue is the information in 15 pages which the Department decided to disclose (**Information in Issue**).

<sup>17</sup> TerraCom's ASX Announcement dated 16 May 2017 confirmed that the transfer of the mining lease for the Blair Athol Mine to Orion has been completed. TerraCom's ASX Announcements are available on its website (<<https://terra.com/resources.com/>>).

<sup>18</sup> For example, TerraCom's ASX Announcements:

- dated 8 August 2017 stated 'For this interim period coal will be transported to a nearby train loading facility'
- dated 15 August 2017 stated 'As previously announced the first 6 months of coal sales will be transported to a nearby train loading facility'; and
- dated 8 March 2018 stated 'The commissioning of the dedicated rail load-out facility will allow the trucks which are currently transporting the coal to another rail load-out facility to be taken off the road'.

<sup>19</sup> In its March 2018 Quarterly Report, which is available on TerraCom's website.

<sup>20</sup> The Question on Notice was asked on 20 March 2018 and the answer was tabled on 13 June 2018. The tabled answer is accessible at <[https://www.parliament.qld.gov.au/documents/TableOffice/questionsAnswers/2018/213-2018.pdf#search=\(Blair%20AND%20athol\)>](https://www.parliament.qld.gov.au/documents/TableOffice/questionsAnswers/2018/213-2018.pdf#search=(Blair%20AND%20athol)>).

<sup>21</sup> As evidenced by media reporting, such as the articles titled 'Mine operator wants to cart coal on Peak Downs', Daily Mercury, 7 September 2017, accessible at <<https://www.dailymercury.com.au/news/mine-operator-wants-to-cart-coal-on-peak-downs/3221406/>> and 'Four triple road trains to do coal haul along highway', Daily Mercury, 12 September 2017, accessible at <<https://www.dailymercury.com.au/news/four-triple-road-trains-to-do-coal-haul-along-high/3222572/>>.

## Onus on external review

17. The decision under review is a '*disclosure decision*'.<sup>22</sup> As the review participant who opposes the disclosure decision, TerraCom bears the onus in this review 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 OLO, as the party who wishes to be given access to the Information in Issue.<sup>23</sup>

## Issues for determination

18. TerraCom contends that the Information in Issue is confidential and that certain public interest factors favouring nondisclosure arise in respect of the Information in Issue.
19. The issues for determination are therefore whether:
- the Information in Issue is exempt information, specifically information, the disclosure of which would found an action for breach of confidence; and
  - disclosure of the Information in Issue would, on balance, be contrary to the public interest.

## Exempt information – Breach of confidence

### Relevant law

20. Under the RTI Act, a person has a right to be given access to documents of government agencies.<sup>24</sup> However, this right is subject to a number of exclusions and limitations, including grounds on which access may be refused. It is Parliament's intention that these grounds are to be interpreted narrowly.<sup>25</sup>
21. One such ground is where information comprises exempt information.<sup>26</sup> Exempt information includes information, the disclosure of which would found an action for breach of confidence<sup>27</sup> (**Breach of Confidence Exemption**).
22. 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 be owed to that plaintiff by the agency, in respect of information in the possession or control of the agency.<sup>28</sup>
23. For the Breach of Confidence Exemption to apply, each of the following five cumulative requirements must be established:<sup>29</sup>

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<sup>22</sup> A '*disclosure decision*' is defined to include a decision to disclose information contrary to the views of a relevant third party obtained under section 37 of the RTI Act—section 87(3)(a) of the RTI Act.

<sup>23</sup> Under section 87(2) of the RTI Act.

<sup>24</sup> Section 23 of the RTI Act. The RTI Act is required to be administered with a pro-disclosure bias—section 44(4) of the RTI Act.

<sup>25</sup> Section 47(2)(a) of the RTI Act.

<sup>26</sup> Section 47(3)(a) of the RTI Act. Schedule 3 of the RTI Act sets out the types of information that comprise exempt information.

<sup>27</sup> Schedule 3, section 8(1) of the RTI Act.

<sup>28</sup> *B and Brisbane North Regional Health Authority* [1994] 1 QAR 279 (**B and BNRHA**) at [44]. This decision of the Information Commissioner analysed the equivalent exemption in the repealed *Freedom of Information Act 1992* (Qld).

<sup>29</sup> See *B and BNRHA* at [57] to [58]. These criteria have been consistently applied in the context of the RTI Act, see *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].

- (a) information must be able to be specifically identified
- (b) information must have the necessary quality of confidence and will not extend to information that is generally known, useless or trivial
- (c) circumstances of the communication must create an equitable obligation of confidence
- (d) disclosure to the access applicant must constitute an unauthorised use of confidential information; and
- (e) disclosure would result in detriment to the party claiming confidentiality.

## Findings

### Requirement (b) – necessary quality of confidence

24. TerraCom submitted<sup>30</sup> that the Information in Issue ‘*includes information which was not available in the public domain (and therefore confidential on [sic] nature, especially as TerraCom is an ASX listed entity)*’.
25. Taking into consideration:
  - the nature of the Information in Issue
  - the publicly accessible information in TerraCom’s ASX Announcements
  - media reporting about TerraCom’s truck haulage of coal from the Mine;<sup>31</sup> and
  - the Minister’s Statement,

I am satisfied that a significant portion of the Information in Issue does not have the quality of confidence necessary to satisfying requirement (b).<sup>32</sup>

### Requirement (c) – circumstances of communication

26. Determining whether requirement (c) is met requires an assessment of all relevant circumstances surrounding communication of confidential information,<sup>33</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>34</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>35</sup>
27. As the Information in Issue generally relates to TerraCom’s publicly announced road haulage of coal from the Mine,<sup>36</sup> it is relevant to consider the regulatory framework under which TerraCom’s announced coal haulage, and its disclosure of information to the Department about that haulage, occurred.
28. The Common Provisions Regulation requires that certain matters be addressed in a resource authority holder’s notice of a notifiable road use,<sup>37</sup> such as:

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<sup>30</sup> External review application.

<sup>31</sup> Such as the articles referenced in footnote 21.

<sup>32</sup> Section 108(3) of the RTI Act provides that the Information Commissioner must not include information that is claimed to be exempt information or contrary to the public interest information in reasons for a decision on external review. Given TerraCom’s claims that the Information in Issue is exempt information and contrary to the public interest information, I am unable to provide any further detail about the Information in Issue in these reasons for decision.

<sup>33</sup> *B and BNRHA*, at [84]. As noted at paragraph 25, I am not satisfied that all the Information in Issue is of a confidential nature.

<sup>34</sup> *B and BNRHA* at [76].

<sup>35</sup> *B and BNRHA* at [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>36</sup> As noted at footnote 32, given section 108(3) of the RTI Act, I am unable to provide any further details about the Information in Issue in these reasons.

<sup>37</sup> Section 27 of the Common Provisions Regulation.

- the public roads proposed to be used
  - the type of vehicles proposed to be used
  - the material proposed to be hauled
  - the total weight of material proposed to be hauled in a year
  - the period of proposed public road use; and
  - the frequency of vehicle movements.
29. Neither the Common Provisions Act nor the Common Provisions Regulation impose any obligation of confidentiality on a public road authority in relation to either a notice provided about a proposed notifiable road use, any consent that is given by the public road authority for that use, or any issued road use direction.
30. Against this regulatory framework, 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 TerraCom concerning correspondence exchanged between them on the subject of TerraCom's use of Queensland's public roads for the haulage of coal.
31. TerraCom submitted that:
- the information in issue is confidential and commercial in confidence<sup>38</sup>
  - it provided confidential information '*which was not to be distributed beyond the department*';<sup>39</sup> and
  - *[c]orrespondence between TerraCom and relevant government agencies (or any other business we exchange information with) should be treated as Confidential and not be required to be marked to that effect*.<sup>40</sup>
32. I have carefully reviewed the Information in Issue. This information does not, on its face, identify that it comprises or contains TerraCom's confidential or commercial in confidence information, or that it was provided by TerraCom on the basis that it would not be distributed beyond the Department. I am unable to identify any information in the Information in Issue itself that could reasonably be construed as communicating TerraCom's intention that the information be treated in confidence by the Department.
33. I have also noted the Department's willingness to disclose the Information in Issue. This willingness indicates that the Department was unaware of, or did not accept, TerraCom's position that the information provided by it was not to be distributed beyond the Department. Consequently, I am unable to identify any mutual understanding of confidence<sup>41</sup> between the Department and TerraCom in respect of communications exchanged about TerraCom's proposed road haulage of coal.
34. In these circumstances, I am not satisfied that any reasonable person would have thought that the Information in Issue was received, created or communicated confidentially, or that the Department is fixed with an obligation of confidence in respect of that information. While TerraCom may have hoped for, or even expected, confidentiality in its communications with the Department about road haulage of coal from the Mine, its conduct alone (where it was the confider of information) cannot unilaterally and conclusively impose an obligation of confidence upon the Department.<sup>42</sup>
35. For these reasons, I consider that requirement (c) is not established.

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<sup>38</sup> External review application.

<sup>39</sup> External review application.

<sup>40</sup> Submissions dated 16 February 2019.

<sup>41</sup> *Edmystone and Blackall-Tambo Regional Council* [2016] QICmr 12 (15 April 2016) at [21].

<sup>42</sup> *B and BNRHA* at [91].

### **Requirement (e) - detriment to the party claiming confidentiality**

36. TerraCom submitted that disclosure of the Information in Issue could prejudice its commercial or financial affairs and impede the Department's ability to '*receive other confidential information in the future*'.<sup>43</sup> However, notwithstanding its onus in this review, TerraCom has not elaborated on:
- the nature of the prejudice it claims could occur as a result of disclosing the Information in Issue; and
  - how disclosure of any information it provided to the Department under a regulatory framework could be expected to cause the unspecified prejudice or impede the Department's ability to obtain similar information in the future.
37. In these circumstances, and taking into consideration information that is already in the public domain about TerraCom's road haulage of coal and the road use direction, I am not satisfied that the relevant detriment for requirement (e) is established.

### **Conclusion**

38. As set out above, I consider that requirements (c) and (e) are not established, and requirement (b) is not established with respect to most of the Information in Issue. In these circumstances, the five cumulative requirements for the Breach of Confidence Exemption cannot be satisfied. Accordingly, I find that the Information in Issue is not exempt information under the Breach of Confidence Exemption, and cannot be refused on this ground.

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

#### ***Relevant law***

39. Another ground which may be relied on to refuse access to information is that its disclosure would, on balance, be contrary to the public interest.<sup>44</sup> The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest<sup>45</sup> and explains the steps that a decision-maker must take<sup>46</sup> in deciding the public interest as follows:
- identify any irrelevant factors and disregard them<sup>47</sup>
  - 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.

#### ***TerraCom's submissions***

40. TerraCom asserts that a number of factors favouring nondisclosure of the Information in Issue are relevant to the Information in Issue, namely, where disclosure of the information could reasonably be expected to:

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<sup>43</sup> External review application.

<sup>44</sup> Sections 47(3)(b) of the RTI Act.

<sup>45</sup> In schedule 4 of the RTI Act. However, factors listed in schedule 4 are not exhaustive. In other words, factors that are not listed may also be relevant.

<sup>46</sup> Section 49(3) of the RTI Act.

<sup>47</sup> I have not taken any irrelevant factors into account.

- prejudice the private, business, professional, commercial or financial affairs of entities (**business prejudice factor**);<sup>48</sup> and
- prejudice an agency's ability to obtain confidential information (**confidential information prejudice factor**).<sup>49</sup>

41. Noting that TerraCom bears the onus of establishing that that the Information in Issue should not be disclosed, OIC invited Terracom to provide details of the prejudice it contends will be caused by disclosure of the Information in Issue.
42. While I have referenced and addressed below the information TerraCom provided in support of its assertions, I must apply the process specified in section 49(3) of the RTI Act in assessing whether disclosure of the Information in Issue would, on balance, be contrary to the public interest. That is, I must identify and attribute weight to all relevant factors favouring disclosure *and* nondisclosure, and then balance them against one another. The factors favouring nondisclosure which TerraCom relies upon may not necessarily be determinative of the public interest.

## Findings

### Irrelevant factors

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

### Factors favouring disclosure

44. The RTI Act recognises that the following public interest factors favouring disclosure will arise where disclosing information could reasonably be expected to:
- enhance the Government's accountability<sup>50</sup>
  - contribute to positive and informed debate on important issues or matters of serious interest<sup>51</sup>
  - inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by Government in its dealings with members of the community;<sup>52</sup> and
  - reveal the reason for a government decision and any background or contextual information that informed the decision.<sup>53</sup>
45. TerraCom submitted<sup>54</sup> it has made announcements with respect to the hauling of coal on State-controlled roads and *'therefore has provided the public with sufficient information to that effect (including relevant tonnes hauled in periods and conditions)'* and the additional details in the Information in Issue *'should be withheld and not released'*.<sup>55</sup> I have noted the ASX announcements made by TerraCom about its coal haulage on State-controlled roads.<sup>56</sup> I have also noted the Minister's Statement, which confirms that the Department issued a road use direction to TerraCom for that haulage.
46. The publication of the information TerraCom has placed into the public domain via its ASX announcements does not, as TerraCom suggests, obviate the right to access

<sup>48</sup> Schedule 4, part 3, item 2 of the RTI Act.

<sup>49</sup> Schedule 4, part 3, item 16 of the RTI Act.

<sup>50</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>51</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>52</sup> Schedule 4, part 2, item 3 of the RTI Act.

<sup>53</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>54</sup> Submissions dated 16 February 2019.

<sup>55</sup> Submissions dated 16 February 2019.

<sup>56</sup> For example, TerraCom's ASX Announcements noted at footnote 18.



government held information under the RTI Act. However, in considering whether access to the Information in Issue may be refused under the RTI Act, I have considered whether the information in TerraCom's ASX announcements advances the abovementioned factors favouring disclosure to such degree that disclosure of the Information in Issue would advance those same factors little, if at all, further. In such circumstances, the factors would warrant no more than low weight.

47. As noted at paragraphs 7 to 9 above, Queensland's roads are a public resource, and the regulatory framework in the Common Provisions Act and Common Provisions Regulation outlines the manner in which the State regulates the use of this public resource by companies undertaking mining and extractive activities. The government's approval process for TerraCom's road haulage of coal on State-controlled roads has, as noted in paragraph 13 above, been the subject of significant community interest. I consider that disclosure of the Information in Issue would enable public scrutiny of the Department's regulatory approval for a private entity to use State-controlled roads for coal haulage, including the information it considered in granting the approval and the conditions that it attached to the approval. The information in TerraCom's ASX announcements does not allow a similar degree of scrutiny. By enabling this scrutiny, disclosure of the Information in Issue would, in my opinion, advance the abovementioned factors significantly.
48. More generally, the safety, condition and maintenance of the State's roads are matters of significant community interest and concern. The ability to engage in informed public discussion about how the approval issued to TerraCom addressed the potential impacts of the commercial haulage of coal by a private entity on the safety, conditions and maintenance of State-controlled roads is, in my opinion, served a very small amount by the information in TerraCom's ASX announcements. On the other hand, this ability is significantly enhanced by disclosure of the Information in Issue.
49. Given these considerations, I consider that the factors favouring disclosure noted at paragraph 44 above apply and deserve significant weight.

### **Factors favouring nondisclosure**

#### ***Business affairs***

50. As noted at paragraph 40 above, TerraCom contends that the business prejudice factor is relevant to the Information in Issue because '*the hauling of coal on public roads could be deemed part of the Company's business plan*' and the Information in Issue '*outlines the means in which the company delivered its plan*'.<sup>57</sup> The RTI Act also recognises that disclosing information concerning the business, professional, commercial or financial affairs of an agency or another person, could reasonably be expected to cause a public interest harm where it would have an adverse effect on those affairs or to prejudice the future supply of information of this type to government (**business harm factor**).<sup>58</sup>
51. As the Information in Issue generally relates to TerraCom's publicly announced road haulage of coal from the Mine, I acknowledge that it contains some information about TerraCom's business and commercial affairs.<sup>59</sup>
52. However, this business and commercial affairs information was provided to, or created by, the Department in compliance with a regulatory framework, namely the framework set out in the Common Provisions Act and the Common Provisions Regulation. Under

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<sup>57</sup> External review application.

<sup>58</sup> Schedule 4, part 4, item 7(1)(c) of the RTI Act.

<sup>59</sup> As noted at footnote 32, given section 108(3) of the RTI Act, I am unable to provide any further details about the Information in Issue in these reasons.

this regulatory framework, the provision of certain information by resource authority holders is required for the lawful undertaking of notifiable road uses. Given this position, I am not satisfied that disclosure of the Information in Issue could reasonably be expected to prejudice the future supply of information of this type to government. Accordingly, I do not consider that this aspect of the business harm factor<sup>60</sup> applies.

53. Establishing a reasonable expectation of prejudice to or adverse effect on<sup>61</sup> to an entity's business, commercial or financial affairs requires more than simply asserting that disclosure will result in prejudice or 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 particular prejudice or adverse effect.
54. TerraCom has not detailed the nature of the claimed prejudice nor how, in the circumstances of this review, such prejudice could be reasonably expected to arise from disclosing the Information in Issue, or any particular part of it. Nor is it clear to me how any prejudice to, or adverse effect on, TerraCom's business, commercial or financial affairs would arise from disclosure of the Information in Issue, particularly in circumstances where the fact a road use direction was issued to TerraCom is already in the public domain, and TerraCom has also publicly announced that it hauled coal by truck on the State's road network for a period of time.
55. Based on the material before me, including the regulatory framework under which TerraCom's haulage of coal was permitted to occur, and the abovementioned publicly available information about this haulage being permitted and occurring, I find that any prejudice to, or adverse effect on, TerraCom's business, commercial or financial affairs that could be reasonably be expected to flow from disclosure of TerraCom's commercial and business affairs information would be minimal. Accordingly, I afford low weight to the business prejudice factor and the adverse effect aspect of the business harm factor<sup>62</sup> in respect of TerraCom's business and affairs information within the Information in Issue.

#### **Trade secrets and commercial value**

56. While not specifically raised by TerraCom, I have also considered whether disclosing the Information in Issue could reasonably be expected to:
  - prejudice trade secrets, business affairs or research of an agency or person;<sup>63</sup> and
  - cause a public interest harm because it would disclose trade secrets of an agency or another person or information that has a commercial value to an agency or another person and that disclosure could reasonably be expected to destroy or diminish the commercial value of the information.<sup>64</sup>
57. In the context of this review, a trade secret refers to a method, process, knowledge or technology used by a company which it intends to keep confidential.<sup>65</sup> While I am unable detail the contents of the Information in Issue, I am satisfied that it does not include information which could be characterised as the trade secrets or research of TerraCom or any other entity.

<sup>60</sup> Schedule 4, part 4, item 7(1)(c) of the RTI Act.

<sup>61</sup> As required by the business prejudice factor and the business harm factor respectively.

<sup>62</sup> Schedule 4, part 3, item 2 and schedule 4, part 4, item 7(1)(c) of the RTI Act respectively.

<sup>63</sup> Schedule 4, part 3, item 15 of the RTI Act.

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

<sup>65</sup> In *Cannon and Australian Quality Egg Farms Ltd (1994)* QAR 491 at [43], the Information Commissioner cited a statement in the decision of *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd (1967)* VR 37, which referred a trade secret as 'any formula, pattern or device or compilation of information which gives an advantage over competitors who do not know or use it'.

58. As noted in paragraphs 51 and 55, while the Information in Issue contains some information about TerraCom's business and commercial affairs, I consider any prejudice to TerraCom's business affairs that could be reasonably be expected to flow from disclosure of that information would be minimal. I also acknowledge that the Information in Issue may have some commercial value to TerraCom. However, I consider it unlikely that disclosure of the Information in Issue would diminish or destroy this commercial value in any significant way, if at all, given the information in the public domain about TerraCom's trucking of coal and the issued road use direction. For this reason, I afford these factors favouring nondisclosure<sup>66</sup> low weight.

### **Confidential information**

59. In addition to the confidential information prejudice factor noted at paragraph 40 above, the RTI Act recognises that disclosing information of a confidential nature that was communicated in confidence will cause a public interest harm where that disclosure could reasonably be expected to prejudice the future supply of information of this type (**confidential information harm factor**).<sup>67</sup>

60. TerraCom submitted that:

- the Information in Issue *'includes information which was not available in the public domain (and therefore confidential on [sic] nature, especially as TerraCom is an ASX listed entity);*<sup>68</sup> and
- *[c]orrespondence between TerraCom and relevant government agencies (or any other business we exchange information with) should be treated as Confidential and not be required to be marked to that effect'*.<sup>69</sup>

61. As I have previously noted:

- taking into consideration information that is already in the public domain about TerraCom's trucking of coal on public roads, not all the Information in Issue can be characterised as being of a confidential nature
- the Information in Issue is not, on its face, identified as confidential or commercial in confidence
- the Department's willingness to disclose the Information in Issue indicates that the Department was unaware of, or did not accept, TerraCom's understanding that the information was communicated in confidence; and
- neither the Common Provisions Act or the Common Provisions Regulation impose any obligation of confidentiality in respect of information provided about a proposed notifiable road use, any consent given to such use or any issued road use direction.

62. Based on the material before me, I am not satisfied that the Information in Issue is of a confidential nature or that it was communicated in confidence.

63. However, even if the Information in Issue, or some of it, could be characterised as confidential information, for these factors favouring nondisclosure to apply, I must also be satisfied that its disclosure could reasonably be expected to prejudice the Department's ability to obtain confidential information or the future supply of this type of information.<sup>70</sup>

<sup>66</sup> Schedule 4, part 3, item 15 and schedule 4, part 4, items 7(1)(a) and (b) of the RTI Act.

<sup>67</sup> Schedule 4, part 4, item 8(1) of the RTI Act.

<sup>68</sup> External review application.

<sup>69</sup> Submissions dated 16 February 2019.

<sup>70</sup> As required by the confidential information prejudice factor and the confidential information harm factor respectively.

64. TerraCom submitted<sup>71</sup> that disclosure of the Information in Issue will impede the Department's ability to 'receive other confidential information in the future', however, TerraCom has not detailed how this claimed impediment could be expected, in the circumstances of this review, to arise from disclosing the Information in Issue, or any particular part of it.
65. In this regard, I am able to confirm that the Information in Issue includes some information TerraCom provided to the Department. As mentioned at paragraph 52 above, under the regulatory framework, the provision of certain information by resource authority holders is required for the lawful undertaking of notifiable road uses. Also, in this matter, TerraCom publicly announced its temporary trucking of coal and the Minister's Statement confirmed that a road use direction was issued to TerraCom in respect of that announced road use. Taking into consideration the requirements of the regulatory framework and the publicly accessible information about TerraCom's trucking of coal, I am not satisfied that disclosing the Information in Issue could reasonably be expected to prejudice the future supply of information to government about notifiable road uses.
66. For these reasons, I do not consider that these factors favouring nondisclosure<sup>72</sup> apply to the Information in Issue.

#### **Other factors**

67. For the sake of completeness, I confirm that, in addition to the factors favouring nondisclosure canvassed above, I have also given careful consideration to the other factors listed in schedule 4, parts 3 and 4 of the RTI Act. Having scrutinised these factors, I can identify no other factors telling in favour of nondisclosure of the Information in Issue, beyond those identified above. For example, I cannot see how disclosure of the Information in Issue is prohibited by an Act,<sup>73</sup> or could reasonably be expected to prejudice security, law enforcement or public safety;<sup>74</sup> impede the protection of the environment;<sup>75</sup> prejudice the flow of information to the police or another law enforcement or regulatory agency;<sup>76</sup> or prejudice or harm a deliberative process of government.<sup>77</sup>

#### **Balancing the public interest**

68. I have taken the general pro-disclosure bias of the RTI Act<sup>78</sup> into account. I consider that the accountability and transparency factors favouring disclosure of the Information in Issue carry significant weight. To the extent that nondisclosure factors relating to TerraCom's business and financial affairs information and the commercial value of such information apply, I consider these factors carry only low weight.
69. On balance, I consider that the factors favouring disclosure of the Information in Issue outweigh the factors favouring nondisclosure. Accordingly, I find that disclosure of the Information in Issue would not, on balance, be contrary to the public interest and access to it may not be refused on this ground.

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<sup>71</sup> External review application.

<sup>72</sup> Schedule 4, part 3, item 16 and schedule 4, part 4, item 8(1) of the RTI Act.

<sup>73</sup> Schedule 4, part 3, item 22 of the RTI Act.

<sup>74</sup> Schedule 4, part 3, item 7 of the RTI Act.

<sup>75</sup> Schedule 4, part 3, item 11 of the RTI Act.

<sup>76</sup> Schedule 4, part 3, item 13 of the RTI Act.

<sup>77</sup> Schedule 4, part 3, item 20 and schedule 4, part 4, item 4 of the RTI Act.

<sup>78</sup> Section 44 of the RTI Act.

## **Conclusion**

70. For the reasons outlined above, I find that TerraCom has not discharged the onus, imposed by section 87(2) of the RTI Act, of establishing that the Information in Issue should be refused, either on the ground that it is exempt information, or on the ground that its disclosure would, on balance, be contrary to the public interest.

## **DECISION**

71. I affirm the Department's decision to grant access to the Information in Issue, as no grounds for refusing access under the RTI Act have been established.
72. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**A Rickard**  
**Assistant Information Commissioner**

**Date: 9 May 2019**

## APPENDIX

### Significant procedural steps

<b>Date</b>	<b>Event</b>
17 December 2018	OIC received the external review application.
21 January 2019	OIC notified TerraCom and the Department that the external review had been accepted and asked the Department to provide information.
25 January 2019	OIC received the requested information from the Department.
30 January 2019	OLO confirmed it continued to seek access to the Information in Issue.
31 January 2019	OIC conveyed a preliminary view to TerraCom and invited TerraCom to provide submissions if it did not accept the preliminary view.
16 February 2019	OIC received TerraCom's submissions.
18 February 2019	OIC spoke to the applicant, received additional submissions and provided the applicant with an update on the status of the review.
4 April 2019	OLO confirmed to OIC that it wished to participate in the external review.