



Decision and Reasons for Decision

Citation:	<i>Adani Mining Pty Ltd and Department of Regional Development, Manufacturing and Water; Australian Conservation Foundation (Third Party) [2022] QICmr 23 (27 April 2022)</i>
Application Number:	316442
Applicant:	Adani Mining Pty Ltd t/as Bravus Mining and Resources ACN 145 455 205
Respondent:	Department of Regional Development, Manufacturing and Water
Third Party:	Australian Conservation Foundation Inc ABN 22 007 498 482
Decision Date:	27 April 2022
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - DISCLOSURE DECISION - CONTRARY TO PUBLIC INTEREST - objection to disclosure of document detailing water taken pursuant to permit issued under <i>Water Act 2000</i> (Qld) - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. On 9 November 2020 the respondent department (**Department**) granted the applicant water permit 623285. That water permit – which is publicly accessible under section 1009(1)(l) of the *Water Act 2000* (Qld)¹ – includes a condition requiring the applicant to account to the Department for extractions of water made under the permit.
2. The third party applied² to the Department under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to information regarding this condition, ie '[i]nformation provided to the Department by...[the applicant] in accordance with Condition 6 of Water Permit 623285'.

¹ The third party obtained a copy of the permit pursuant to this provision, as confirmed in the third party's email to OIC dated 17 February 2022.

² Application dated 18 June 2021.

3. The Department located various documents, including a single page recording dates and volumes of water extraction conducted under the permit. The Department decided to grant access to this information,³ contrary to the views of the applicant.⁴
4. The applicant applied⁵ for external review of the Department's decision to disclose, relevantly, parts of the single page of water extraction information.⁶
5. For the reasons set out below, I find that the applicant has not discharged the onus, imposed by section 87(2) of the RTI Act, of establishing that a decision not to disclose the page in question is justified. I therefore affirm the Department's decision.

Background

6. Significant procedural steps in the review are set out in the Appendix.

Reviewable decision

7. The decision under review is the Department's internal review decision dated 27 October 2021.

Evidence considered

8. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).⁷

Information in issue

9. The information in issue comprises part only of a single page, being information describing water extracted under water permit 623285 and which page was identified by the Department in the decision under review as '20-443 File A Page 6 of 12' (information in issue).⁸

Issues for determination

10. The decision under review is a 'disclosure decision'.⁹ As the applicant opposes this disclosure decision, it bears the onus of establishing that a decision not to disclose the

³ Subject to the redaction of a limited amount of information, discussed further in footnote 8 and the redaction of which the third party did not contest.

⁴ Whose views had been sought in accordance with section 37 of the RTI Act.

⁵ Application dated 24 November 2021.

⁶ There were some other pages identified and dealt with by the Department in its decision, including a duplicate of the sole page in issue. These additional pages are not in issue in this external review: see OIC's letter to the third party dated 4 March 2022.

⁷ Including the *Human Rights Act 2019* (Qld) (**HR Act**), to the extent necessary to do so. The application in this matter was made on behalf of a corporation, and the other participants are also a body corporate and an agency, such that at face value it may not appear necessary to consider the application of the, which only affords human rights to individuals in Queensland. However, Kingham J in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 at [90] indicated that where section 58(1) of the HR Act applies, there need be no mover to raise human rights issues because that section requires the relevant public entity to properly consider engaged human rights and to not act or make a decision that is not compatible with human rights. To the extent then that it is necessary to observe relevant rights under section 58(1) of the HR Act, I am satisfied that I have done so. This is because in observing and applying the law prescribed in the RTI Act, as I have done in this case, an RTI decisionmaker will be 'respecting and acting compatibly with' applicable human rights as stated in the HR Act (*XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) ('XYZ') at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].) In this regard, I note Bell J's observations at [573] of XYZ on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: 'it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.'

⁸ The Department decided to refuse access to segments of information on this page, on the basis those segments comprised personal information, disclosure of which would, on balance, be contrary to the public interest (see sections 47(3)(b) and 49 of the RTI Act). The third party did not contest this decision, and that redacted information is therefore not in issue in this review.

⁹ A 'disclosure decision' is a 'decision to disclose a document or information contrary to the views of a relevant third party obtained

information in issue is justified, or that I should give a decision adverse to the third party.¹⁰ The fundamental issue for determination is therefore whether the applicant has discharged this onus.

11. Resolving this issue requires determining whether the ground for refusing access to the information in issue relied on by the applicant is established: relevantly, whether disclosure of the information in issue would, on balance, be contrary to the public interest.

Relevant law

12. The RTI Act's primary object is to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access.¹¹ The Act must be applied and interpreted to further this primary object.¹²
13. Section 23 of the RTI Act gives effect to the Act's primary object, by conferring a right to be given access to documents. This right is subject to other provisions of the RTI Act,¹³ including grounds on which access may be refused.¹⁴ One of these grounds permits an agency to refuse access to a document to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest.¹⁵
14. The RTI Act requires a decision-maker to take the following steps in deciding the public interest:¹⁶
 - identify any irrelevant factors and disregard them
 - identify relevant public interest factors favouring disclosure and nondisclosure of the information in issue
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.
15. Schedule 4 to the RTI Act contains non-exhaustive lists of irrelevant factors, and factors favouring disclosure and nondisclosure. I have had regard to schedule 4 in reaching this decision,¹⁷ and disregarded irrelevant factors as set out in schedule 4, part 1 of the RTI Act.

Discussion

under section 37 of the RTI Act: section 87(3)(a) of the RTI Act.

¹⁰ Section 87(2) of the RTI Act.

¹¹ Section 3(1) of the RTI Act.

¹² Section 3(2) of the RTI Act.

¹³ Section 23(1) of the RTI Act.

¹⁴ Section 47 of the RTI Act. The grounds are to be interpreted narrowly (section 47(2)(a) of the RTI Act), and the Act is to be interpreted with a pro-disclosure bias (section 44 of the RTI Act).

¹⁵ Sections 47(3)(b) and 49 of the RTI Act. The term '*public interest*' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests, although there are some recognised public interest considerations that may apply for the benefit of an individual: Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 *AIAL Forum* 12, 14.

¹⁶ Section 49 of the RTI Act.

¹⁷ I have also had regard to the totality of the submissions made by the applicant, including in its communications with the Department.

16. The information in issue describes dates and times at which water was extracted under the relevant permit, and the volumes extracted. The applicant argues¹⁸ that disclosure of this information could reasonably be expected to prejudice and/or adversely affect its:

...business affairs because:

- (a) *read together, the water volume and rates set out in Water Permit 623285 and the ...[information in issue] would allow a reader to calculate the approximate unit rates, which have been commercially negotiated between Bravus and the adjoining landowner; and*
 - (b) *disclosure of the water volume and rates previously negotiated could reasonably be expected to cause a competitive harm by weakening Bravus' negotiating position when engaging with landowners or other third parties in the future.*
17. The applicant also submitted¹⁹ that disclosure of the information in issue could reasonably be expected to lead to 'secondary boycott' activity, causing it further 'competitive harm' (the particulars of which submission are set out in the excerpted text appearing in paragraph 19 below).
18. Nondisclosure and harm factors will apply to favour nondisclosure of information, where disclosure could reasonably be expected²⁰ to prejudice, relevantly, business affairs,²¹ or would disclose information concerning business, professional, commercial or financial affairs, and could reasonably be expected to have an adverse effect on those affairs.²²
19. OIC was not, however, persuaded that the applicant had made a case for application of relevant factors, and conveyed a preliminary view to this effect by letter to the applicant dated 8 February 2022. We relevantly noted as follows:²³

...[The information in issue] discloses dates and times at which water was extracted under the permit, and the volumes extracted. I can identify no way in which disclosure of this extraction information – detailing past events, and which only reveals amounts extracted within the allowable 'ceiling' conferred by...[Water Permit 623285], the latter ceiling being a matter of public record – could reasonably be expected to adversely affect

¹⁸ Submissions accompanying its application for external review, dated 24 November 2021.

¹⁹ As above.

²⁰ The phrase 'could reasonably be expected' requires a reasonable expectation, ie one that is reasonably based, and not irrational, absurd or ridiculous: *Sheridan and South Burnett Regional Council and Others* (Unreported, Queensland Information Commissioner, 9 April 2009) at [189] – [193], referring to *Attorney-General v Cockcroft* (1986) 64 ALR 97 ('Cockcroft'). This test requires a decision-maker to distinguish 'between what is merely possible ... and expectations that are reasonably based' and for which 'real and substantial grounds exist': *B and Brisbane North Regional Health Authority* [1994] QICmr 1, a decision of the Information Commissioner analysing the equivalent exemption in the repealed *Freedom of Information Act 1992* (Qld), at [154]-[160]. Other jurisdictions have similarly interpreted the phrase 'as distinct from something that is irrational, absurd or ridiculous': *Smolenski v Commissioner of Police, NSW Police* [2015] NSWCATAD 21 at [34], citing *Commissioner of Police, NSW Police Force v Camilleri (GD)* [2012] NSWADTAP 19 at [28], *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [61] and *Cockcroft* at [190].

²¹ Schedule 4, part 3, items 2 and 15 of the RTI Act. The former provides for a factor favouring nondisclosure of information where disclosure could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities; the latter where disclosure of the information could reasonably be expected to prejudice trade secrets, business affairs or research of an agency or person. As is apparent from the submissions quoted in paragraphs 16 and 19, the applicant only raises potential prejudice to business affairs.

²² Schedule 4, part 4, section 7(1)(c) of the RTI Act. This harm factor will also apply where disclosure of information could reasonably be expected to prejudice future supply of information of this type to government. The applicant's 24 November 2021 submissions accompanying its application for external review expressly state that it does not contend disclosure would lead to any such prejudice. This harm factor and the two nondisclosure factors identified in the preceding footnote have been discussed in various OIC decisions, which note that they are generally premised on the reasonable possibility of 'competitive harm' resulting if information is disclosed – see, for example, *Kalinga Woolloowin Residents Association Inc and Brisbane City Council; City North Infrastructure Pty Ltd (Third Party); Treasury Department (Fourth Party)*, Unreported, Queensland Information Commissioner, 9 May 2012.

²³ Footnotes omitted.

and/or prejudice [the applicant's] business, commercial, etc affairs, whether in the manner argued by... [the applicant] or more generally. This Report, in essence, reveals nothing more than that water was extracted, in permissible quantities, and in accordance with a publicly available statutory instrument.

I also note your comments in the letter accompanying [the applicant's] application for external review that... [the applicant]:

...experiences difficulties in contracting with third parties due to secondary boycotts driven by activists, protestors and opponents of the Carmichael Coal Mine. For example, Market Forces operates a website titled "The Adani List", which pressures entities to either avoid or cease providing services to Bravus. Bravus submits that releasing the Information in Issue – which could reasonably be expected to weaken its position when negotiating with landowners and other third parties in the future – would further compound the issues experienced by Bravus in contracting with third parties, resulting in additional competitive harm.

Submissions of this kind arguably comprise public interest matters of the kind Parliament has expressly proscribed me from taking into account: schedule 4, part 1, item 3 of the RTI Act. ...

In any event, I do not think it reasonable to conclude that disclosure of a document showing particulars of legally-allowable water extraction – the Permit enabling which is generally-available information – might have the consequences apprehended by [the applicant]. Any such consequences would, to my mind, have been far more likely to flow from granting of the permit itself – which matter is, as noted, generally available.

[The applicant] has not established public interest considerations telling against release of the... [information in issue].

Even if it had, there are multiple public interest factors favouring disclosure of the [the information in issue]. Apart from the general public interest favouring release of government held information, disclosure of this document will allow the community to be satisfied that those granted permits to extract a finite public resource are abiding by conditions governing same, and foster confidence in the Department's monitoring and regulation of such permits and resultant extraction. This will, in turn, promote open discussion of public affairs and enhance Departmental accountability, and contribute to positive and informed debate on an issue of serious interest/public importance. By revealing information received by the Department pursuant to conditions imposed by the Department in its role as steward of a key natural resource, disclosure will also inform the community of Departmental operations, and, by enhancing the Department's accountability in this regard, contribute to the protection of the environment.

These are critical public interests, attracting substantial weight.

Given the importance of prudent water resource management, any one of the above factors is, in my preliminary view, sufficient to justify disclosure of the [the information in issue]. Together, I am satisfied that they would tip the balance of the public interest decisively in favour of release.

20. The applicant was invited to make submissions in reply to the above. The applicant made no submissions (other than to request this formal decision),²⁴ and thus did not challenge our preliminary reasoning.
21. The applicant, as noted, bears the onus in this review. As it has elected not to put before me submissions addressing the matters stated in OIC's 8 February 2022 preliminary view and set out above, I consider it reasonable for me to both:

²⁴ By email from the applicant's representatives, dated 22 February 2022.

- adopt that preliminary view as final for the purposes of this decision, and
 - find that the applicant has not discharged the onus imposed on it by section 87(2) of the RTI Act.
22. In summary, I am not on the information before me, and for the reasons stated in OIC's 8 February 2022 letter as extracted above, satisfied that disclosure of the information in issue could reasonably be expected to prejudice and/or adversely affect the applicant's business etc. affairs. Nor do I consider its release would have any other detrimental consequences of the kind asserted by the applicant.²⁵
23. Given the RTI Act's pro-disclosure bias, it is not strictly necessary to identify factors favouring release: the absence of any factors favouring nondisclosure means the balance of the public interest, by default, tilts in favour of release.
24. Yet even if the applicant *had* established one or more nondisclosure factors, there are, as was made clear in our 8 February 2022 letter, several substantially weighted public interest factors telling in favour of disclosure of the information in issue, each enough to justify release.²⁶
25. Careful water stewardship is in my view a matter of significant public importance. With this in mind, I consider that any one of the pro-disclosure factors identified in OIC's 8 February 2022 letter would be sufficient to justify release of the information in issue. Taken cumulatively, and in the absence of meaningful submissions from the applicant challenging the application of and weighting accorded to those factors by OIC in our 8 February 2022 letter,²⁷ I am satisfied that these various considerations would²⁸ tip the balance of the public interest in favour of disclosure.

Conclusion

26. The applicant has not established that a decision not to disclose the information in issue is justified, or that I should give a decision adverse to the third party. It has therefore not discharged the onus imposed by section 87 of the RTI Act.
27. The third party is therefore entitled to access the information in issue, in accordance with the right of access conferred by section 23 of the RTI Act.

DECISION

28. I affirm the decision under review.
29. I have made this decision under section 110(1) of the RTI Act, as a delegate of the Information Commissioner under section 145 of the RTI Act.

²⁵ Or at all.

²⁶ These are adequately summarised and their relevance explained in the passages from our 8 February 2022 letter extracted above; applicable statutory references are the Object to the RTI Act (from which derives the general public interest in promoting access to government-held information), and schedule 4, part 2, items 1-3 and 13 of the RTI Act (the latter erroneously referenced as 'item 3' in OIC's 8 February 2022 letter, a consequence of typographical error).

²⁷ The letter accompanying the applicant's application for external review contained the statement that '*factors favouring nondisclosure outweigh the factors favouring disclosure*'. A bare assertion of this kind is in my view insufficient to discharge the onus imposed by section 87 of the RTI; in any event, the submissions contained in that letter were overtaken by OIC's 8 February 2022 letter excerpted above, to which the applicant made, as noted, no substantive reply.

²⁸ Should any considerations favouring nondisclosure apply, contrary to my view.

A Rickard
Acting Right to Information Commissioner

Date: 27 April 2022

APPENDIX

Significant procedural steps

Date	Event
24 November 2021	OIC received the applicant's application for external review.
25 November 2021	OIC requested preliminary documents from Department.
30 November 2021	OIC received the preliminary documents from Department, as requested.
1 December 2021	OIC advised the third party of the applicant's application for external review, and requested the third party advise as to whether they continued to seek access to the information in issue.
3 December 2021	The third party confirmed that they continued to seek access to the information in issue.
8 December 2021	OIC accepted the applicant's application for external review and requested the information in issue from Department. The Department supplied OIC with the information in issue.
8 February 2022	OIC conveyed a preliminary view to the applicant.
17 February 2022	The third party supplied OIC with a copy of water permit 623285.
22 February 2022	The applicant replied to OIC's 8 February 2022 preliminary view, maintaining objections to disclosure, and requesting a formal decision.
4 March 2022	OIC undertook consultation in relation to the information in issue. OIC wrote to the third party, confirming the exclusion from the review of a number of documents and invited it to apply to participate in the review.
22 March 2022	OIC concluded consultation. The third party applied to participate in the review.
11 April 2022	OIC confirmed to the third party that it was a participant in the review.