



## Decision and Reasons for Decision

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Citation:	<i>Greenpeace Australia Pacific and Queensland Treasury; Northern Australia Infrastructure Facility (Third Party) [2018] QICmr 9 (1 March 2018)</i>
Application Number:	313258
Applicant:	Greenpeace Australia Pacific
Respondent:	Queensland Treasury
Third Party:	Northern Australia Infrastructure Facility
Decision Date:	1 March 2018
Catchwords:	ADMINISTRATIVE LAW – RIGHT TO INFORMATION – CONTRARY TO PUBLIC INTEREST INFORMATION – information concerning Northern Australia Infrastructure Facility – 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. Greenpeace Australia Pacific (**Greenpeace**) applied<sup>1</sup> to Queensland Treasury (**QT**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents concerning the Carmichael rail project, communicated between QT and the Northern Australia Infrastructure Facility (**NAIF**), created or received by QT between May 2015 and 16 December 2016.
2. QT identified an email dated 6 December 2016<sup>2</sup> and two attachments – a piece of correspondence, and a briefing paper.
3. QT refused access<sup>3</sup> to the information on the grounds disclosure would, on balance, be contrary to the public interest.
4. I affirm QT's decision. I am satisfied that disclosure of information remaining in issue in this review would, on balance, be contrary to the public interest.

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<sup>1</sup> Application dated 16 December 2016.

<sup>2</sup> From an officer of the Commonwealth's Export Finance and Insurance Corporation (**EFIC**).

<sup>3</sup> Internal review decision dated 14 March 2017.

## Background

5. Significant procedural steps taken by this Office (**OIC**) in conducting the external review are set out in the Appendix.

## Reviewable decision

6. The decision under review is QT's internal review decision dated 14 March 2017.

## Evidence considered

7. The evidence, submissions, legislation and other material I have considered in reaching my decision are disclosed in these reasons (including footnotes and Appendix).

## Information in issue

8. The information in issue at the commencement of this review comprised the entirety of all documents dealt with in the decision under review; ie, all of the email dated 6 December 2016 (**Email**),<sup>4</sup> and the two attachments to the Email.
9. QT, however, released part of the Email to Greenpeace during the course of the review. Greenpeace also withdrew its application<sup>5</sup> as it related to personnel particulars appearing in that document.
10. The information remaining in issue therefore comprises:
  - two segments of information appearing in the first paragraph of the Email;<sup>6</sup> and
  - the two attachments to the Email in entirety.
11. A copy of the information in issue, marked so as to reflect the above, will be supplied to QT along with these reasons.

## Relevant law

12. Under the RTI Act, a person has a right to be given access to documents of an agency.<sup>7</sup> However, this right is subject to limitations, including grounds for refusal of access.<sup>8</sup> Access may be refused to documents where disclosure would, on balance, be contrary to the public interest.<sup>9</sup>
13. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest and also explains the steps that a decision-maker must take in deciding the public interest<sup>10</sup> as follows:
  - identify any irrelevant factors and disregard them
  - identify relevant public interest factors favouring disclosure and nondisclosure

<sup>4</sup> The Email only occupies part of a page; information at the top of the relevant page is an internal QT email, not a 'communication between' QT and NAIF. This internal email is therefore outside the scope of Greenpeace's access application, and not in issue in this review.

<sup>5</sup> Letter from Greenpeace's solicitors dated 26 October 2017, and my letter in reply confirming their client's concessions dated 7 November 2017.

<sup>6</sup> Being the eighth, ninth and 16<sup>th</sup> to 19<sup>th</sup> words in the first sentence of that paragraph.

<sup>7</sup> Section 23(1)(a) of the RTI Act.

<sup>8</sup> Section 47 of the RTI Act sets out the grounds on which access may be refused to documents.

<sup>9</sup> Section 47(3)(b) of the RTI Act. The term 'public interest' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

<sup>10</sup> Section 49(3) of the RTI Act.

- balance the relevant factors favouring disclosure and nondisclosure; and
  - decide whether disclosure of the information would, on balance, be contrary to the public interest.
14. Schedule 4 of the RTI Act contains non-exhaustive lists of various factors that may be relevant in determining the balance of the public interest. In reaching my decision, I have carefully considered the entirety of these lists, together with the information in issue, QT's initial and internal review decisions, and all participant submissions.<sup>11</sup>

## Findings

### *Irrelevant factors*

15. I have taken no irrelevant factors into account.

### *Factors favouring disclosure*

16. Having considered all relevant material, I consider that, along with the general public interest in promoting access to government-held information, disclosure of the information in issue could reasonably be expected to:
- promote open discussion of public affairs;<sup>12</sup>
  - contribute to positive and informed debate on important issues or matters of serious interest;<sup>13</sup> and
  - ensure effective oversight of public funds.<sup>14</sup>
17. The Carmichael rail project is a matter of considerable community interest and debate. Disclosure of information relating to the project, such as that in issue, could reasonably be expected to promote open discussion of the 'pros and cons' of the project, contribute to informed debate on the project's merits and ensure any decisions to advance public monies are made transparently and accountably.
18. QT's decision also cites schedule 4, part 2, item 11 as a factor favouring disclosure.<sup>15</sup> This factor will apply where disclosure of information could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision. At the time this review commenced, no final government decision had been made in relation to infrastructure funding for the Carmichael rail project. Accordingly, my preliminary view was that this factor had no application in this case.<sup>16</sup>

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<sup>11</sup> Including NAIF's submissions dated 8 August 2017 and 14 December 2017. NAIF objected to disclosure of the information in issue on various grounds, including that the information comprised exempt information to which access may be refused under section 47(3)(a) of the RTI Act, as information disclosure of which would found an action for breach of confidence (see schedule 3, section 8 of the RTI Act). As I am satisfied that grounds otherwise exist for refusing access to the information in issue, it has not been necessary for me to address NAIF's additional grounds in these reasons.

<sup>12</sup> Schedule 4, part 2, item 1 of the RTI Act recognises a public interest in promoting '*open discussion of public affairs and enhancing the Government's accountability*'; as explained further below (note 24), the expression '*the Government*' confines the scope of this factor to the Queensland Government – as I have also explained below, the information in issue really concerns the operations of NAIF, rather than the Queensland Government, and thus disclosure would not appear to greatly advance Queensland Government accountability, particularly in view of the latter's decision to veto NAIF funding, as noted in paragraphs 19 and 22. I am, however, satisfied that disclosure would promote open discussion of public affairs.

<sup>13</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>14</sup> Schedule 4, part 2, item 4 of the RTI Act.

<sup>15</sup> Page 2.

<sup>16</sup> Letter to Greenpeace dated 5 October 2017.

19. During the course of the review, however, the Queensland Government announced that it would veto any funding decision made by the Commonwealth Government via NAIF.<sup>17</sup> I still consider, however, that the relevant factor has no application. The information in issue does not identify reasons why the Queensland Government elected to veto any NAIF funding.

### **Additional factors favouring disclosure – Greenpeace submissions**

20. Greenpeace submits<sup>18</sup> that the following additional factors also operate to favour disclosure in this case:
- disclosure could reasonably be expected<sup>19</sup> to inform the community of the Government's operations<sup>20</sup>
  - disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;<sup>21</sup> and
  - disclosure could reasonably be expected to contribute to the protection of the environment.<sup>22</sup>
21. I have considered these factors and Greenpeace's submissions about the application of each below.

### ***Inform community of the Government's operations***

22. Greenpeace initially raised this factor in submissions dated 26 October 2017. Following the decision of the Queensland Government to veto NAIF funding – reportedly due, at least in part, to a desire to manage potential conflict of interest issues – Greenpeace lodged further submissions<sup>23</sup> arguing for the application of this factor, citing the Queensland Public Service Code of Conduct and speculating that disclosure may:

*shed light on the relationship between NAIF and the Queensland government [and therefore] it will be able to better inform the community as to why decisions were made to veto the decision and if the conflict of interest between the Qld premier and her partner who worked on the application for Adani was an interest which had influence over governance.*

...

*It is in the public interest that the conflict of interest...be managed correctly and the access of the information in issue will be able to assist in that inquiry.*

23. Properly characterised, these submissions go more to advancing a case for the application of schedule 4, part 2, item 11 (discussed above), and item 5 (addressed below). Insofar as they are relevant to this item 3, it remains the case that having assessed the information in issue there is little within it which would inform the community

<sup>17</sup> <https://www.brisbanetimes.com.au/politics/queensland/premier-to-veto-adani-loan-following-alleged-imp-smear-campaign-20171103-p4ywss.html>

<sup>18</sup> Submissions dated 26 October 2017.

<sup>19</sup> The phrase 'could reasonably be expected' requires discrimination between '...unreasonable expectations and reasonable expectations, between what is merely possible (eg, merely speculative/conjectural "expectations") and expectations which are reasonably based, ie expectations for the occurrence of which real and substantial grounds exist.'; *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [154]-[160]. Other authorities note that the words 'require a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous' to expect a disclosure of the information in issue could have the prescribed consequences relied on': *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) 228 CLR 423, and *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, at 190.

<sup>20</sup> Schedule 4, part 2, item 3 of the RTI Act.

<sup>21</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>22</sup> Schedule 4, part 2, item 13 of the RTI Act.

<sup>23</sup> Dated 21 November 2017.

of the Queensland Government's operations. To the extent that any information does apprise a reader of Queensland Government operations, it would largely appear to comprise that contained in those parts of the Email already released to Greenpeace.

24. The information remaining in issue consists of communications and routine operational information of a commercial and financial nature generated by NAIF, and while its disclosure might inform the community of that entity's operations, it does not inform the community on Queensland Government operations,<sup>24</sup> nor reveal the latter's policies, guidelines or codes of conduct.
25. Accordingly, I find that schedule 4, part 2, item 3 of the RTI Act does not apply in the circumstances of this review.

***Allow or assist inquiry into possible deficiencies in conduct of agency/official***

26. Greenpeace originally submitted that disclosure of the information in issue may allow inquiry into possible deficiencies in conduct on the part of NAIF. As noted above, during the course of the review the Queensland Government announced that it would veto any NAIF loan concerning the Carmichael project, with the Queensland Premier reportedly concerned to avoid a potential conflict of interest.<sup>25</sup> Following this announcement, Greenpeace additionally argued<sup>26</sup> that:

*The Premier has...stated that the Queensland Government has not played a role in assessing the NAIF application. Based on the potential for a conflict of interest arising in the circumstances...disclosure of the information may disclose deficiencies in the conduct of a Government official if it discloses any evidence that the State Government has played a role or made a decision about Adani's NAIF loan.*

27. The words 'agency or official' as used in this factor only encompass Queensland Government entities and officers.<sup>27</sup> Insofar as Greenpeace's case for the application of this factor is premised on disclosure allowing or assisting inquiry into possible deficiencies in the conduct of NAIF or other Commonwealth agencies or officials, it cannot, therefore, succeed.
28. As for Greenpeace's contention that disclosure may 'disclose deficiencies in the conduct of a [Queensland] Government official...', there is nothing within the information in issue that I have assessed to suggest the existence of any deficiency in the conduct of any Queensland Government agency or official (or, indeed, any other entity or public officer), or to allow a reasonably based conclusion that disclosure of the information in issue could assist any inquiry into same. I am constrained in the detail I can give as to the nature of the information in issue.<sup>28</sup> It is sufficient for the purposes of these reasons to note, however, that the information and the circumstances in which it was created and communicated appear to be routine and proper.
29. In these circumstances, my view is that this factor does not arise for consideration.

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<sup>24</sup> Noting that the reference in this factor to the entity of 'the Government' is a reference to such entity in and for Queensland; ie, the Queensland Government: section 35(1)(a) of the *Acts Interpretation Act 1954* (Qld).

<sup>25</sup> See note 17.

<sup>26</sup> Submissions dated 21 November 2017.

<sup>27</sup> Note 24. See also sections 14 and 16 of the RTI Act, sections 6 and 33 of the *Acts Interpretation Act 1954* (Qld) and the *Government Owned Corporations Act 1993* (Qld), section 5.

<sup>28</sup> Section 108 of the RTI Act.

***Contribute to the protection of the environment.***

30. As stated in paragraph 24, the information in issue can be generally characterised as routine operational commercial and financial information generated by NAIF. It is not information detailing potential environmental threats or risks that might then be addressed if disclosed. I do, however, acknowledge Greenpeace's arguments as to the application of schedule 4, part 2, item 13 of the RTI Act – particularly, the submissions<sup>29</sup> that:
- the factor does not require that disclosure of information could reasonably be expected to '*directly*' contribute to the protection of the environment; and
  - in view of NAIF's obligations to develop and observe policies concerning environmental matters, disclosure could '*contribute to the protection [of the environment] in evaluating any environmental policies in place*'.
31. My initial view was that there were not reasonable grounds to expect that disclosure of information of the kind actually in issue in this case<sup>30</sup>— commercial correspondence and routine financial information generated by NAIF — could advance the public interest considerations embodied in this factor. Having given the matter further, careful, consideration, I accept that disclosure of the information in issue may enable the community to assess NAIF compliance with any environmental policies to which it is subject. Disclosure could, in this manner, contribute to the protection of the environment, albeit indirectly.
32. I would, however, afford the factor minimal weight, in view of the fact that, as Greenpeace's initial submissions appear to concede,<sup>31</sup> any contribution would at best be indirect. While Greenpeace in later submissions<sup>32</sup> contended that disclosure would '*contribute directly and [the factor] should be afforded significant weight*', my view is that its original submissions correctly characterise the environmental effect of any disclosure. Disclosure of information revealing compliance or otherwise with environmental policies would not directly avert potential environmental hazard or protect the environment. Any such contribution to the protection of the environment would at best be a second order consequence of disclosure, much less direct than disclosure of information actually describing environmental issues or identifying potential environmental harms.<sup>33</sup>

***Factors favouring nondisclosure***

33. Disclosure of the information in issue could, in my view, reasonably be expected to:
- cause a public interest harm, by divulging information of a confidential nature that was communicated in confidence by or for another government,<sup>34</sup>
  - prejudice intergovernmental relations;<sup>35</sup> and
  - prejudice QT's ability to obtain confidential information.<sup>36</sup>

<sup>29</sup> Dated 21 November 2017.

<sup>30</sup> Noting that the expectation of what '*could reasonably be expected to occur*' must flow from disclosure of relevant information itself, rather than other circumstances: *Murphy and Treasury Department* (1995) 2 QAR 744, at paragraph 54.

<sup>31</sup> Submissions dated 26 October 2017.

<sup>32</sup> Dated 21 November 2017.

<sup>33</sup> Such as information revealing the users and locations of poisonous baits: *Moore and Rockhampton Regional Council* (Unreported, Queensland Information Commissioner, 18 April 2012), or information revealing compliance with environmental obligations by an entity engaged in activities with direct environmental impact (quarrying): *Daglish and Redland City Council; Barro Group Pty Ltd (Third Party)* (Unreported, Queensland Information Commissioner, 13 June 2013).

<sup>34</sup> Schedule 4, part 4, section 1(1)(b) of the RTI Act.

<sup>35</sup> Schedule 4, part 3, item 14 of the RTI Act.

<sup>36</sup> Schedule 4, part 3, item 16 of the RTI Act.

### Public interest harm – affecting relations with other governments

34. The RTI Act presumes the existence of a public interest harm, if disclosure could divulge information of a confidential nature that was communicated in confidence by or for another government.
35. I consider that the information in issue meets the requirements of this harm factor. Its disclosure would plainly divulge – reveal<sup>37</sup> – the information. Further, this information is:
- information of a confidential nature, being information not generally known or accessible,<sup>38</sup>
  - information that was communicated in confidence, as information communicated on the mutual understanding that it would be treated in confidence by QT; and
  - information communicated by or for another government – that is, the Commonwealth Government.
36. As regards the second point above, whether information has been communicated in confidence is a question of fact. The test inherent in the phrase '*communicated in confidence*' requires a decision-maker to be satisfied that a communication of confidential information has occurred in circumstances where the supplier's need or desire for confidential treatment (of the supplier's identity, or information supplied, or both) has been expressly or implicitly conveyed (or otherwise must have been apparent to the recipient) and has been understood and accepted by the recipient, giving rise to an express or implicit mutual understanding that the relevant information would be treated in confidence.<sup>39</sup>
37. Having assessed the information in issue and all relevant circumstances, I am satisfied that the information in issue was communicated to QT by or on behalf of another government,<sup>40</sup> on the shared understanding that it would be treated confidentially. QT's very decision to refuse access to the information, together with the:
- commercially sensitive nature of the information in issue, and endorsements as to confidentiality appearing on the bulk of that information,<sup>41</sup>
  - context in which that information was communicated – ie, within the context of a relationship governed by a Master Facility Agreement<sup>42</sup> between the State and Commonwealth containing express obligations of confidence; and
  - handling by QT of the information following receipt,<sup>43</sup>
- together clearly evidence a mutual understanding of confidence sufficient to establish this harm factor.
38. Disclosure of the information in issue would therefore give rise to this public interest harm.

<sup>37</sup> The dictionary definition of 'divulge' being 'to disclose or reveal (something private, secret, or previously unknown)': Macquarie Dictionary Online (accessed 22 February 2017).

<sup>38</sup> Inaccessibility being the basic requirement for satisfying this aspect of the harm factor: *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at paragraph 71, concerning an identical requirement as contained in section 46(1)(b) of the former *Freedom of Information Act 1982* (Qld).

<sup>39</sup> *McCann and Queensland Police Service* (1997) 4 QAR 30 at paragraph 34.

<sup>40</sup> In this regard, I am satisfied that both NAIF and EFIC, as Commonwealth entities, represent '*another government*' for the purposes of this factor.

<sup>41</sup> And statements to this effect in those parts of the Email released to Greenpeace.

<sup>42</sup> A copy of which was supplied to OIC for the purposes of this review.

<sup>43</sup> Internal circulation of the information in issue within QT notes its confidentiality (ie the out of scope segment at the top of the page containing the Email).

39. Greenpeace disputes the application of this harm factor, although its submissions also raise matters and considerations that have no bearing on the harm factor's application.<sup>44</sup> As best as I can gather, Greenpeace queries whether the information in issue is confidential, and whether it was communicated in confidence.
40. On the former point, there is nothing at all before me to suggest that the information in issue is anything other than confidential as against—inaccessible to—Greenpeace.
41. As to the second, Greenpeace is generally correct in stating that matters I have identified in paragraph 37 may not of themselves be sufficient to establish the required understanding of confidence in a particular case. Considered cumulatively, however, I am satisfied that relevant considerations in this case justify a finding that the information in issue was communicated in confidence – that it was communicated on the express or implicit mutual understanding that it would be treated confidentially by QT.
42. The remainder of Greenpeace's submissions on this issue raise, as noted, matters irrelevant to the application of schedule 4, part 4, section 1 of the RTI Act – discursing, for example, on the requirements of the deliberative process harm and nondisclosure factors,<sup>45</sup> and the '*affecting confidential communications*' harm factor,<sup>46</sup> none of which I have taken into account in reaching my decision.
43. Greenpeace submits,<sup>47</sup> for example, that '*it has not yet been considered that the information in issue is a deliberative process*', and notes that '*a reasonable expectation of prejudice to...[a] deliberative process must be established*'. These issues have no bearing on the applicability of schedule 4, part 4, section 1 of the RTI Act nor any other of the considerations favouring nondisclosure I have taken into account in reaching my decision. Similarly, it is not necessary for me to outline '*...any reasons as to why [disclosure of the information in issue] could prejudice any future deliberations*',<sup>48</sup> nor contemplate whether disclosure of that information could reasonably be expected to prejudice the future supply of similar information – again, such matters concern nondisclosure considerations that I have not identified as applying in this review.
44. On that basis, it is not necessary to engage further with Greenpeace's submissions in this regard. It is sufficient to note that, as stated in paragraph 37, I am satisfied the requirements for the application of schedule 4, part 4, section 1 are in this case met.

### **Prejudice intergovernmental relations**

45. The information in issue was communicated to QT by or for the Commonwealth, on, as discussed above, the understanding that it would be treated confidentially. Disclosure by QT contrary to that understanding would constitute a breach of trust on the part of the Queensland Government and could, therefore, reasonably be expected to prejudice relations between the Commonwealth and Queensland Governments.
46. In reaching this conclusion, I have had regard to Greenpeace's reliance<sup>49</sup> on OIC's observations as to the application of this nondisclosure factor in *Straker and Sunshine*

<sup>44</sup> Such as the separate and distinct requirements for establishing the breach of confidence exemption prescribed in schedule 3, section 8 of the RTI Act, canvassed in its 26 October 2017 submissions.

<sup>45</sup> Schedule 4, part 4, section 4 and schedule 4, part 3, item 20 of the RTI Act respectively, particularly as discussed and applied in an earlier OIC decision, *Abbott and University of Queensland* (Unreported, Queensland Information Commissioner, 16 October 2012).

<sup>46</sup> Schedule 4, part 4, section 8 of the RTI Act.

<sup>47</sup> Submissions dated 21 November 2017.

<sup>48</sup> As above.

<sup>49</sup> Application for internal review dated 14 February 2016.



Coast Regional Council; NBN Co Limited (Third Party) (**Straker**),<sup>50</sup> where it was decided that the factor did not apply to information communicated by the third party to the respondent Council. Relevant comments were expressly confined to the circumstances of that case, and largely premised on the fact that, unlike the present matter, the information in issue in *Straker* was not possessed of any quality of confidence.<sup>51</sup>

47. I have also taken into account Greenpeace's later submissions<sup>52</sup> questioning the application of this nondisclosure factor, on the basis NAIF is '*separate from the Commonwealth Government*'. NAIF is a corporate Commonwealth entity, subject to federal Ministerial oversight (the responsible Minister being in turn accountable to the Commonwealth parliament).<sup>53</sup> EFIC (the entity which, as noted, actually communicated the information in issue to QT) is, as I understand, similarly constituted.<sup>54</sup>
48. Dealings between such public entities, and QT, the key budgetary agency of the Queensland Government, in my view comprise intergovernmental relations within the meaning of this factor. The factor applies to favour nondisclosure of the information in issue.

### **Prejudice ability to obtain confidential information**

49. Disclosure of the information in issue – in circumstances where it was communicated subject to a mutual understanding of confidence – could also reasonably be expected to prejudice QT's ability to obtain confidential information in the future, by undermining confidence in QT's ability to observe agreements as to confidentiality.
50. In this regard, I am here contemplating QT's ability to obtain confidential information generally, and not from the specific entities – EFIC and NAIF – which communicated information in this case. As Greenpeace correctly submits,<sup>55</sup> the regulatory regime establishing NAIF and governing its relationship with State governments requires communication of information such as that in issue to the Queensland Government. It is in recognition of this fact that, contrary to QT's decision, I do not consider the public interest harm factor prescribed in schedule 4, part 4, section 8 of the RTI Act to be established in this case.<sup>56</sup> Accordingly, I have not taken this latter harm factor into account in balancing the public interest.
51. It is, however, in my view reasonable to expect that QT's ability to obtain confidential information – from sources generally – may be impaired or prejudiced, were it to disclose the information in issue despite having, as noted above, received that information subject to a shared understanding of confidence. I consider this factor favours nondisclosure of the information in issue.

### **Balancing the public interest**

52. I acknowledge the general public interest in furthering access to government-held information, and the strong public interest in ensuring decisions concerning public infrastructure funding are made as transparently as possible, and with adequate

<sup>50</sup> [2016] QICmr 44 (28 October 2016), at [95].

<sup>51</sup> At [96].

<sup>52</sup> Dated 26 October 2017.

<sup>53</sup> <http://www.naif.gov.au/about-us/naif-governance/> (accessed 27 October 2017).

<sup>54</sup> Comprising a statutory corporation established under the *Export Finance and Insurance Corporation Act 1991* (Cth), wholly owned by the Commonwealth of Australia: <https://www.efic.gov.au/about-efic/our-governance/efic-act/> (accessed 30 October 2017).

<sup>55</sup> Application for internal review dated 14 February 2016.

<sup>56</sup> As it appears unlikely that disclosure of the information could reasonably be expected to prejudice future supply of information of the type in issue, as required by schedule 4, part 4, section 8(1)(b) of the RTI Act.

accountability. As noted above, I also recognise that the Carmichael project is a matter of considerable community discussion, and accept that there is a sizeable public interest in providing the community with access to information that could reasonably be expected to foster informed debate as to the project's merits. It is also relevant, however, that since the commencement of this review, the Queensland Government has, as noted, publicly announced its decision to veto any NAIF funding for the Carmichael project. Given no funding can, on my understanding, now issue via the State, the Queensland Government's decision in this regard could be argued to temper the force of these pro-disclosure considerations. Nevertheless, mindful of the public attention that has focused on the project, I afford relevant factors significant weight.

53. There is, on the other hand, a clear public interest in avoiding prejudice to the relationship between the State and other governments – particularly, given Australia's federal structure, the Commonwealth government – such as would be likely to occur were information communicated in confidence by the latter to be released by the former.
54. I also consider that, by breaching an understanding of confidence shared by the Commonwealth and State, and concerning a prominent national matter, releasing or divulging the information in issue would give rise to a public interest harm of considerable magnitude.
55. Disclosure in such circumstances is also reasonably likely, in my view, to erode trust in the ability of QT to respect understandings of confidence generally, and so to impair or prejudice the ability of QT to obtain confidential information in the future.
56. Given the importance of ensuring that public agencies such as QT are able to field confidential information from other governments and entities, and in preserving the integrity of mutual understandings of confidence as shared between the State and the Commonwealth, I consider that the factors telling against release in this case warrant substantial weight.
57. Accordingly, while the issue is relatively finely balanced, I am nevertheless of the view that the factors favouring nondisclosure outweigh those in favour of disclosure. Disclosure of the information in issue would, on balance, be contrary to the public interest.
58. Access to the information in issue may therefore be refused under section 47(3)(b) of the RTI Act.

### **Greenpeace's submissions – public interest balancing**

59. I foreshadowed my findings on the public interest as set out above in correspondence<sup>57</sup> to Greenpeace during the course of this review. Greenpeace disputed the manner in which I had, on a preliminary basis, weighted and balanced public interest factors, citing a decision of the Administrative Appeals Tribunal<sup>58</sup> in support of its case for access.
60. Despite Greenpeace's submissions, I am satisfied that the factors I have identified above as favouring nondisclosure are sufficient in this case to outweigh any telling in favour of release of the information in issue.<sup>59</sup>

<sup>57</sup> Dated 5 October 2017 and 7 November 2017.

<sup>58</sup> *MacTiernan and Secretary, Department of Infrastructure and Regional Development* (2016) 154 ALD 168, cited in submissions dated 26 October 2017.

<sup>59</sup> Including those additional factors contended for by Greenpeace and analysed at paragraphs 22-29 above or which I have otherwise found do not apply, in the event my findings as to non-application are incorrect.

61. Assessing the weight to be accorded any given factor is a question of fact, to be determined on a case-by-case basis, having regard to the facts and circumstances particular to the matter at hand. Decisions from other jurisdictions such as that cited by Greenpeace—turning as they must on their own distinct facts and law<sup>60</sup>—are thus ultimately of limited assistance in assessing whether disclosure under Queensland's RTI Act in a specific case would, on balance, be contrary to the public interest.
62. I also note the various concerns cited by Greenpeace in its submissions through the course of this review as to the Carmichael project specifically and NAIF governance and operations more generally. As I have endeavoured to make clear above, I have taken into account the considerable community interest in relevant matters and factored this into my assessment of competing public interest considerations; it is for this very reason that I recognise that the question as to where the public interest lies is in this case finely balanced.
63. Nevertheless, having independently assessed and weighted relevant public interest considerations in accordance with the steps prescribed in section 49 of the RTI Act, and having regard to the pro-disclosure bias stated in section 44 of the Act, I am of the view that disclosure of the information in issue in this case would, on balance, be contrary to the public interest.

### Pro-disclosure bias

64. Finally, Greenpeace submits that in reaching a conclusion that access to the information in issue may be refused, I have failed to recognise the pro-disclosure bias expressed in section 44 of the RTI Act. Section 44 relevantly provides that the RTI Act '*should be administered with a pro-disclosure bias*'.<sup>61</sup> The Act also recognises, however, circumstances in which access may legitimately be refused to documents and information. Section 44(1) of the RTI Act, for example, provides:

#### **44 Pro-disclosure bias in deciding access to documents**

- (1) *It is the Parliament's intention that if an access application is made to an agency or Minister for a document, the agency or Minister should decide to give access to the document **unless giving access would, on balance, be contrary to the public interest.***

...<sup>62</sup>

(My emphasis.)

65. Similarly, section 47 of the RTI Act explicitly specifies the several grounds on which access may be refused,<sup>63</sup> including entitling an agency to refuse access to a document to the extent it comprises information the disclosure of which would, on balance, be contrary to the public interest under section 49.
66. I am cognisant of the pro-disclosure bias, and have borne it in mind at relevant times during the course of this review<sup>64</sup> and in reaching my decision in this matter.<sup>65</sup> Having

<sup>60</sup> Noting, for example, the distinct structure of the exemption provisions contained within the Commonwealth *Freedom of Information Act 1982*, and the differing requirements for establishing same (such as the requirement in section 47B of that Act that disclosure of information could reasonably be expected to damage relations between the Commonwealth and the State, rather than merely prejudice intergovernmental relations).

<sup>61</sup> Section 44(4).

<sup>62</sup> Section 44 goes on in subsection (4) to confer a discretion to disclose documents even if grounds for refusal under the RTI Act are otherwise established – this discretion (repeated in section 49(5)) is expressly denied OIC on external review: section 105(2) of the RTI Act.

<sup>63</sup> Section 47(1) of the RTI Act.

<sup>64</sup> As I advised Greenpeace by letter dated 7 November 2017.

<sup>65</sup> See paragraph 63.

followed the steps required of me by section 49 of the RTI Act, I have concluded that disclosure of the information in issue would, on balance, be contrary to the public interest. In accordance with the express language of the RTI Act, my finding in this regard establishes the ground for refusing access to information prescribed in section 47(3)(b) of the RTI Act.

67. In a similar vein, Greenpeace also argued that I failed to have regard to sections 49(1) and 49(3)(g) of the RTI Act. This argument is misconceived; the obligation to give access to information stated in each is — as is also stated in each — subject to an exception where providing access would, on balance, be contrary to the public interest. For the reasons given above, my view is that in this case, that exception is enlivened.
68. The suggestion by Greenpeace that a '*non-disclosure bias has been applied*' is rejected, and misapprehends the nature of the right of access conferred by the RTI Act — a right that is not absolute, but, as discussed above, is subject to exception in cases where disclosure of information would, on balance, be contrary to the interest. As explained above, I consider that this is such a case.

## DECISION

69. I affirm the decision under review. Access may be refused to the information in issue, under section 47(3)(b) of the RTI Act.
70. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**L Lynch**  
**Acting Right to Information Commissioner**

**Date: 1 March 2018**

## APPENDIX

### Significant procedural steps

Date	Event
23 March 2017	OIC received the external review application.
24 March 2017	OIC notified QT of the application and requested procedural documents.
29 March 2017	OIC received requested documents from QT.
20 April 2017	OIC notified the applicant and QT that it had accepted the applicant's application for external review. OIC requested QT supply documents relevant to the review.
30 May 2017	OIC officers inspected the information in issue.
1 June 2017	OIC requested provision by QT of a copy of the information in issue.
8 June 2017	OIC received a copy of the information in issue from QT.
18 July 2017	OIC wrote to QT setting out a preliminary assessment of the information in issue. OIC requested QT seek the views of both EFIC and NAIF in response to the preliminary view.
8 August 2017	OIC received a response from QT conveying objections to disclosure of information from NAIF and EFIC.
11 August 2017	OIC received further correspondence from QT, forwarding NAIF's objections to disclosure.
28 August 2017	OIC received further submissions from QT concerning nondisclosure of the information in issue.
29 August 2017	OIC wrote to QT by email seeking agreement to possible release of some information in issue.
5 September 2017	QT agreed to release part of the information in issue.
12 September 2017	OIC wrote to NAIF, concerning the status of the information in issue.
5 October 2017	OIC requested QT release some information to the applicant. OIC wrote to the applicant conveying the preliminary view that access to most of the remainder of the information in issue may be refused, and seeking confirmation as to whether the applicant wished to press for access to a limited amount of information comprising officer contact particulars.
26 October 2017	The applicant's solicitors wrote to OIC, advising their client did not seek contact particulars. The applicant's solicitors otherwise advised that their client did not accept OIC's preliminary view, and set out submissions in support of the applicant's case for access.
7 November 2017	OIC wrote to the applicant's solicitors addressing the submissions raised in the latter's 26 October 2017 correspondence and reiterating OIC's preliminary view.
21 November 2017	OIC received further submissions from the applicant's solicitors.
23 November 2017	OIC wrote to the applicant's solicitors, QT and NAIF advising of the status of the review. NAIF was invited to apply under section 89 of the RTI Act to participate in the review.
14 December 2017	OIC received from NAIF an application to participate in the review.
5 February 2018	OIC wrote to the to the applicant's solicitors, QT and NAIF advising of the status of the review. NAIF was advised of the acceptance by OIC of its application to participate.