



Decision and Reasons for Decision

Citation: *Quandamooka Yoolooburrabee Aboriginal Corporation and Department of Natural Resources and Mines; Sibelco Australia Ltd (Third Party) [2014] QICmr [47] (19 November 2014)*

Application Number: 311817

Applicant: Quandamooka Yoolooburrabee Aboriginal Corporation

Respondent: Department of Natural Resources and Mines

Third Party: Sibelco Australia Ltd

Decision Date: 19 November 2014

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - legal advice relating to mining on North Stradbroke Island - waiver - whether exempt - sections 47(3)(a) and 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - CABINET INFORMATION - information relating to mining on North Stradbroke Island - documents comprised exclusively of exempt information - information brought into existence for the consideration of Cabinet - information that would reveal or prejudice Cabinet considerations - whether exempt - sections 47(3)(a) and 48 and schedule 3, section 2(1) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - BREACH OF CONFIDENCE - information relating to mining on North Stradbroke Island - whether disclosure would found an action for breach of confidence - whether exempt - sections 47(3)(a) and 48 and schedule 3, section 8(1) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - information relating to mining on North Stradbroke Island - accountability and transparency - positive and informed debate - background/contextual

information - business affairs - supply of information to government - prohibited by an Act - 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 Quandamooka Yoolooburrabee Aboriginal Corporation (**QYAC**) applied to the Department of Natural Resources and Mines (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to:

All documents relating to Sibelco's mining tenure proposal dated 1 May 2013 and "Discussion Paper – Sibelco's Operations on North Stradbroke Island" dated 30 May 2012 and consequential actions taken by Government to assess and analyse both documents.

2. The Department located 975 pages and decided to refuse access to them in their entirety on the basis that they contained information that was either exempt from disclosure,¹ or disclosure of the information would, on balance, be contrary to the public interest.²
3. QYAC sought external review of the Department's decision to refuse access.
4. During the external review, Sibelco Australia Ltd (**Sibelco**) was notified of the likely disclosure of information under the RTI Act which may be of concern to Sibelco³ and invited to participate in this review.⁴
5. For the reasons set out below, I vary the Department's decision.

Procedural matters

6. Significant procedural steps relating to the application and external review are set out in Appendix A.

Reviewable decision

7. The decision under review is the Department's decision dated 25 October 2013.

Material considered

8. Evidence, submissions, legislation and other material I have considered in reaching my decision are disclosed in these reasons (including footnotes and appendices).

¹ Sections 47(3)(a) and 48 and schedule 3, sections 2, 6 or 7 of the RTI Act.

² Sections 47(3)(b) and 49 of the RTI Act.

³ Section 97(4) of the RTI Act. In cases where the information was duplicated in the pages in issue, only one copy was provided for consultation purposes.

⁴ Section 89 of the RTI Act.

Information in issue

9. During the course of the external review, as a result of informal resolution processes, QYAC accepted⁵ OIC's preliminary view that:⁶
- 2 pages and parts of 2 pages are outside the scope of or irrelevant to the terms of the access application
 - parts of 2 pages are exempt from disclosure under sections 47(3)(a) and 48 and schedule 3, section 2(1) of the RTI Act;
 - 17 pages are exempt from disclosure under sections 47(3)(a) and 48 and schedule 3, section 6(c)(i) of the RTI Act;
 - parts of 33 pages are exempt from disclosure under sections 47(3)(a) and 48 and schedule 3, section 7 of the RTI Act; and
 - 25 pages and parts of 84 pages would, on balance, be contrary to the public interest to disclose under section 47(3)(b) of the RTI Act.
10. Further, the Department accepted⁷ OIC's preliminary view that 120 pages and parts of 70 pages are neither exempt from disclosure nor would their disclosure, on balance, be contrary to the public interest.⁸ Also, Sibelco accepted⁹ OIC's preliminary view that 42 pages and parts of 48 pages are neither exempt from disclosure nor would their disclosure, on balance, be contrary to the public interest.¹⁰
11. Accordingly, informal resolution processes eliminated some information that QYAC accepted could be refused, and some information that the Department and/or Sibelco accepted could be disclosed, from further consideration in this external review. This decision addresses the remaining **Information in Issue**.¹¹

Issues for determination

12. The issues for determination in this review are whether the Information in Issue is:
- exempt from disclosure; or
 - its disclosure would, on balance, be contrary to the public interest.
13. Accordingly, in this decision, I have divided my consideration of the Information in Issue into two parts. Firstly, in Part 1, I have considered whether the Information in Issue comprises exempt information. Then, in Part 2, I have considered whether it is, on balance, contrary to the public interest to disclose the Information in Issue.¹²

Part 1 Exempt information

14. Under the RTI Act a person has a right to be given access to documents of an agency unless access would, on balance, be contrary to the public interest.¹³ However, this right is subject to other provisions of the RTI Act, including the grounds on which an

⁵ Submissions dated 8 September and 20 October 2014 and telephone conversation with an officer of OIC on 7 November 2014.

⁶ See Table 1 in Appendix B for specific pages and part pages.

⁷ Submissions dated 30 September and 7 November 2014.

⁸ See Table 2 in Appendix B for specific pages and part pages.

⁹ Submissions dated 28 and 31 October 2014.

¹⁰ See Table 3 in Appendix B for specific pages and part pages. Note: the total number of pages and part pages includes duplicate copies of documents. However, for the purpose of consultation, Sibelco was only provided with one copy of each relevant document.

¹¹ Specific pages are identified throughout this decision where relevant.

¹² In Part 2, I only consider those parts of the Information in Issue that I find do not comprise exempt information.

¹³ Section 44(1) of the RTI Act.

agency may refuse access to documents. One such ground is that the information comprises exempt information.¹⁴

15. Relevantly for this review,¹⁵ three types of exempt information are:

- A. Information that would be privileged from production in a legal proceeding on the ground of legal professional privilege¹⁶
- B. Information brought into existence for the consideration of Cabinet, or information the disclosure of which would reveal any consideration of Cabinet or would otherwise prejudice the confidentiality of Cabinet considerations or operations¹⁷ (**Cabinet information**); and
- C. Information the disclosure of which would found an action for breach of confidence¹⁸ (**Breach of Confidence information**).

16. I will now consider whether the Information in Issue (or parts thereof) comprises these types of exempt information in turn.

A. Legal professional privilege information

Relevant law

- 17. Information will be exempt from disclosure if it would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP**).¹⁹
- 18. LPP attaches to confidential communications between a lawyer and client (including communications through their respective servants or agents) made for the dominant purpose of; seeking or giving legal advice or professional legal assistance; or, for use, or obtaining material for use, in legal proceedings that have commenced, or were reasonably anticipated, at the time of the relevant communication.²⁰ LPP also extends to any document which directly reveals, or which allows a reader to infer, the content or substance of a privileged communication.²¹
- 19. LPP may not apply or may be lost in certain circumstances. Given QYAC's submissions, it is necessary to consider one such circumstance – implied waiver of LPP – in this review.

Information in Issue considered

- 20. During the course of the external review, QYAC accepted OIC's view that LPP attaches to the six following types of documents in the Information in Issue²² comprising 434 pages and parts of 17 pages:²³

¹⁴ Sections 47(3)(a) and 48 of the RTI Act.

¹⁵ As a result of the nature of the Information in Issue and/or parties' submissions.

¹⁶ Schedule 3, section 7 of the RTI Act.

¹⁷ Schedule 3, sections 2(1)(a) and (b) of the RTI Act.

¹⁸ Schedule 3, section 8(1) of the RTI Act.

¹⁹ Schedule 3, section 7 of the RTI Act.

²⁰ *Esso Australia Resources Ltd v Commission of Taxation* (1999) 74 ALJR 339.

²¹ *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 569 (**Propend**); *AWB v Cole* (No.1) (2006) 152 FCR 382, 417 [132].

²² QYAC accepted OIC's view regarding the types of documents at i) and ii) in its submission dated 8 September and OIC's view regarding iii) to vi) in its submission dated 20 October 2014, subsequently clarified in a telephone conversation with an officer of OIC on 7 November 2014.

²³ Pages – File B: 1 to 53; File C: 24 to 35, 44 to 45, 121 to 152, 159 to 188, 215 to 218; File D: 18 to 77, 81 to 82, 84 to 161; File E: 84 to 87, 166 to 212; File F: 1 to 70; File G: 2, 53 to 91.

Parts of pages – File C: 111; File D: 83; File E: 12 to 23, 72, 156; and File G: 41.

- i) requests and other communications from the Department to Crown Law about the provision of legal advice
- ii) legal advice from Crown Law or the Solicitor-General to the Department
- iii) communications between Department legal officers and officers of various business units within the Department about seeking and providing legal advice
- iv) internal Department communications which discuss and/or refer to legal advice provided to the Department by Crown Law, the Solicitor-General or internal legal officers of the Department
- v) a summary of legal advice provided by Crown Law to the Department – this appears in a document created by Sibelco; and
- vi) a schedule, provided by the Department to Sibelco, which discusses and/or refers to legal advice received by the Department.

21. However, given QYAC's submissions (as set out at paragraph 23 below), I must consider whether the Department has disclosed any of these types of documents to Sibelco and, if so, whether doing so constitutes waiver of LPP.

Submissions

22. The Department maintains²⁴ that the six types of documents are all exempt from disclosure under schedule 3, section 7 of the RTI Act.

23. QYAC submits²⁵ that:

- if legal advice obtained by the Department has been disclosed to Sibelco, LPP will be waived and the information will therefore not be exempt; and
- the primary determination of whether LPP has been impliedly waived is still fairness, which must be read subject to the consistency of the disclosure with the purpose of obtaining the legal advice.²⁶

Findings

24. LPP may be waived either:

- intentionally, by the client or the client's agent disclosing a privileged communication to persons outside of the privileged relationship (express waiver);²⁷ or
- by implication of law, in circumstances where there is conduct by, or on behalf of, the client which is inconsistent with the maintenance of the privilege, whether the client intended that result or not (implied waiver).²⁸

25. The communications listed at i) to iii) are internal between officers of the Department, including Department legal officers, and officers of Crown Law and the Solicitor-General. The documents listed at iv) are internal Department documents. There is no evidence before me, including within the documents located by the Department in response to the access application, to suggest that the communications listed at i) to iv) have been disclosed to third parties external to the Department. Accordingly, I am satisfied that no question of waiver of LPP arises in relation to these documents.

²⁴ Decision dated 25 October 2013 and submissions dated 22 April and 30 September 2014.

²⁵ External review application dated 20 November 2013, submissions dated 8 September and 20 October 2014 and telephone conversation with an officer of OIC on 7 November 2014.

²⁶ Citing *Goldberg v Ng* (1995) 185 CLR 83 at [20] and *Mann v Carnell* (1999) 201 CLR 1 (*Mann*) at [30].

²⁷ *Goldberg v Ng* (1994) 33 NSWLR 639 (*Goldberg*) at 670.

²⁸ Also referred to as 'imputed waiver'. *Osland v Secretary to the Department of Justice* [2008] HCA 37 (*Osland*) at [45].

26. In relation to the documents listed at v) and vi),²⁹ I am satisfied that the Department has disclosed elements of legal advice it has received to Sibelco. Accordingly, I must consider whether this disclosure waives the LPP that QYAC otherwise accepts attaches to the legal advice in question.
27. The High Court decision of *Mann* provides authority for the position that when maintenance of LPP is inconsistent with the actions of the person entitled to the privilege, then waiver of privilege will be implied or imputed by law.³⁰ In this regard, the High Court of Australia stated as follows:³¹

Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is 'imputed by operation of the law'. This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege.

28. QYAC submits³² that, in *Mann*, the High Court did not reject the test of fairness applied in *Goldberg* for one of inconsistency, 'but rather held that the issue of fairness must be read subject to the consistency of the disclosure with the purpose of obtaining the legal advice'.
29. I am satisfied that the decision in *Mann* marked a change in the Court's approach to determining whether LPP has been impliedly waived. In *Mann*, the Court's following comments emphasise that inconsistency, rather than fairness as applied in *Goldberg*, is now the appropriate test:³³

What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and the maintenance of the confidentiality; not some overriding principle of fairness operating at large.

30. In other words, fairness is now merely one factor which may be relevant in determining whether a disclosure is inconsistent with the maintenance of LPP. The High Court affirmed the correctness of this approach in *Osland*.³⁴
31. QYAC also submits³⁵ that the present matter can be distinguished from the facts in *Mann* as the disclosure of privileged communications is by the Department to a third party, rather than by a member of Executive Government to a Member of Parliament. QYAC refers favourably to *Goldberg* and its fairness test. However, I am satisfied that the present matter is also distinguishable from that considered in *Goldberg*, where a solicitor provided privileged communications to his law society in response to a complaint, and asserted privilege over those communications in an attempt to disallow the complainant access to his response. I am unable to draw an analogy between the Department's position and the solicitor's position in *Goldberg* – that is, I do not consider that the Department gave Sibelco privileged information in an attempt to prevent QYAC from accessing it. To the extent that QYAC's submissions suggest that I should

²⁹ Regarding the documents appearing at v), parts of pages 111 of File C, 41 of File D and 72 and 156 of File E. Regarding the documents appearing at iv), parts of pages 12 to 23 of File E.

³⁰ *Mann*.

³¹ *Mann* at [29].

³² Submission dated 20 October 2014.

³³ *Mann* at [29].

³⁴ At [44]-[45].

³⁵ Submission dated 20 October 2014.

conclude that *Goldberg* is more analogous with the current circumstances than *Mann*, and therefore is a more relevant precedent than *Mann*, I am unable to do so.

32. The question of waiver must be considered in the context of the relevant circumstances and the facts of the particular case.³⁶ The High Court has recognised that disclosure of information that is subject to LPP, for a limited purpose in a specific context, does not necessarily amount to a general waiver of privilege.³⁷
33. In regard to the documents listed at v) and vi), I acknowledge QYAC's concerns that the Department disclosed legal advice to one of its key stakeholders, but not another, and accept that this may raise questions of fairness from QYAC's viewpoint.³⁸ However, on careful consideration, I consider that the facts of the present matter do not reveal an inconsistency on the part of the Department with the confidence that the LPP doctrine serves to protect. The Department communicated parts of its legal advice to Sibelco for a specific limited purpose.³⁹ I am satisfied that in disclosing elements of the legal advice it received, the Department was doing so for a specific, limited purpose. This was not inconsistent with the confidentiality of the legal advice, and it would not be unfair to maintain the privilege of the advice in such circumstances.

Conclusion – Legal professional privilege

34. I consider that the information that comprises the six types of documents listed at paragraph 20 attracts LPP, and that there has been no waiver of LPP regarding either the intra-departmental communications listed at i) to iv), or the legal advices that the Department disclosed to Sibelco listed at v) and vi).
35. Accordingly, I find that this information is exempt from disclosure under schedule 3, section 7 of the RTI Act and access to it may be refused under sections 47(3)(a) and 48 of the RTI Act. Given this position, it is not necessary for me to consider these documents further in this decision.

B. Cabinet information

Relevant law

36. The following types of Cabinet documents are taken to be comprised exclusively of exempt information⁴⁰ without any further consideration of their contents:
- (a) Cabinet submissions
 - (b) Cabinet briefing notes
 - (c) Cabinet agendas
 - (d) notes of discussions in Cabinet;
 - (e) Cabinet minutes
 - (f) Cabinet decisions
 - (g) drafts of documents (a) to (f) above.
37. Other information will also be exempt from disclosure if:

³⁶ *Osland* at [49] and [93].

³⁷ *Mann* at [29].

³⁸ Given, as QYAC submits, both the Government and Sibelco 'have potential future act compensation liability as against my client QYAC, as agents for the Quandamooka People'.

³⁹ That is, to facilitate negotiations in relation to sand mining on North Stradbroke Island, and the amendment of the *North Stradbroke Island Protection and Sustainability Act 2011 (NSIPS Act)*.

⁴⁰ Schedule 3, section 2(1) of the RTI Act.

- it was brought into existence for the consideration of Cabinet;⁴¹ or
- its disclosure would reveal any consideration of Cabinet, or would otherwise prejudice the confidentiality of Cabinet considerations or operations.⁴²

38. The term “consideration” is defined⁴³ as including:

- discussion, deliberation, noting (with or without discussion) or decision; and
- consideration for any purpose, including, for example, for information or to make a decision.

39. However, there are three exceptions to this exemption:

- if it is more than ten years after the information’s relevant date⁴⁴
- if the information was brought into existence before 1 July 2009;⁴⁵ and
- if the information has been officially published by decision of Cabinet.⁴⁶

Information in Issue considered

40. Given the parties’ submissions, it is necessary for me to determine whether the following documents in the Information in Issue are Cabinet information:⁴⁷

- **RCC Documents** – Resources Cabinet Committee (RCC) briefing notes and agenda papers, including drafts
- **ATP Submission** – an Authority to Prepare legislation submission, including drafts⁴⁸
- **Attachments** – to RCC Documents and the ATP submission
- **Department Emails** – emails containing information being considered by the RCC⁴⁹
- **Sibelco Discussion Paper** – a document by Sibelco titled *Discussion Paper – Sibelco’s Operations on North Stradbroke Island* dated 31 May 2014⁵⁰
- **Sibelco Commercial Imperative Document** – a document by Sibelco titled *North Stradbroke Island Legislation: The Commercial Imperative for 2013*
- **Sibelco Email** – email dated 19 September 2012, including attachment;^{51, 52}
- **Sibelco/Ashurst Correspondence** – correspondence exchanged between Sibelco (or Ashurst Australia as legal representative of Sibelco) and the Department in November 2012 and May 2013.⁵³

⁴¹ Schedule 3, section 2(1)(a) of the RTI Act.

⁴² Schedule 3, section 2(1)(b) of the RTI Act.

⁴³ Schedule 3, section 5 of the RTI Act.

⁴⁴ Schedule 3, section 2(1) of the RTI Act. For information considered by Cabinet, the “relevant date” is the date the information was most recently considered by Cabinet; otherwise, “relevant date” is the date the information was created – see definition of “relevant date” in schedule 3, section 2(5) of the RTI Act.

⁴⁵ The date on which schedule 3, section 2 commenced – schedule 3, section 2(2)(a) of the RTI Act.

⁴⁶ Schedule 3, section 2(2)(a) of the RTI Act.

⁴⁷ Pages – File A: 1 to 17, 32 to 33; File B: 59 to 68, 76 to 80; File C: 1 to 23, 48 to 67, 71 to 80, 87, 89, 91, 111, 114 to 116, 153 to 154, 222 to 225; File D: 1, 198 to 211; File E: 1 to 10, 24, 37 to 38, 48, 50, 52, 72, 75 to 77, 93 to 122, 126, 132, 134, 136, 156, 159 to 161; File F: 71 to 97, 103; File G: 11 to 13, 17, 19, 21, 41, 44 to 46, 52.

Parts of pages – File B: 73; File C: 37 to 43, 82, 85, 88, 90, 92, 99, 226 to 228; File E: 12-23, 46, 49, 51, 53, 60, 125, 127 to 130, 133, 135, 137, 144, 213 to 214; File G: 3 to 5, 15, 18, 20, 22, 29, 51.

⁴⁸ Note – some of these documents are titled ‘Approval to Prepare’ rather than ‘Authority to Prepare’; however, on consideration of their content and context, I am satisfied that they are drafts of an “Authority to Prepare” Cabinet submission.

⁴⁹ Primarily intra-departmental emails; however, some are to or from persons working for other departments.

⁵⁰ Except for parts of it that QYAC has accepted may be refused and parts of it that Sibelco has agreed to release.

⁵¹ A document titled *North Stradbroke Island sand mining policy announcement Key Messages (Key Messages Document)*.

⁵² Except for parts of it that QYAC has accepted may be refused.

⁵³ Except for parts of it that QYAC has accepted may be refused.

Submissions

41. The Department refers to the definition of “Cabinet”, which includes a Cabinet committee or subcommittee.⁵⁴ The Department maintains⁵⁵ that the RCC Documents, ATP Submission, Attachments and Department Emails are Cabinet information under schedule 3, section 2(1)(a) or (b) of the RTI Act.
42. Sibelco submits⁵⁶ that access to the Sibelco Discussion Paper, Sibelco Commercial Imperative Document, Sibelco Email and Sibelco/Ashurst Correspondence should also be refused on the basis that those documents comprise Cabinet information. In support of this claim, Sibelco submits that:
- Sibelco was requested to create documents to inform Government and Cabinet of its position
 - Sibelco’s purpose for creating the documents, and its understanding of why it was creating the documents, are relevant to their genealogy
 - Sibelco understood that the Sibelco Discussion Paper would form part of a Cabinet briefing note and it is therefore comprised exclusively of exempt information
 - the Sibelco Commercial Imperative Document was prepared in response to a specific request for the purpose of briefing Cabinet
 - the Sibelco Email contains information brought into existence for the consideration of Cabinet and/or to inform an authority to prepare legislation pertaining to North Stradbroke Island, particularly to support policy announcement in relation to such legislation; and
 - the Sibelco/Ashurst Correspondence is a direct response to a request for information to inform the RCC.
43. QYAC submits⁵⁷ that:
- documents prepared prior to a Cabinet submission or emails, including any attachments, containing information which was also being considered by Cabinet are not documents prepared for Cabinet
 - any emails or documents that came from or went to an external party, such as Sibelco, are not confidential and therefore not exempt; and
 - it may reasonably be inferred that the substance of any Cabinet submission may have been disclosed to Sibelco.

Analysis

Exceptions to the exemption

44. I have carefully considered the documents identified in paragraph 40 above. On their face, these documents display dates in 2012 or 2013. Given this information, I am satisfied that they were created on or around the dates marked on them. There is no evidence before me to indicate that:
- the documents were brought into existence before 1 July 2009;⁵⁸ or

⁵⁴ Schedule 3, section 2(5) of the RTI Act.

⁵⁵ Decision dated 25 October 2013 and submission dated 30 September 2014.

⁵⁶ Submissions dated 25 June 2014 and 28 October 2014.

⁵⁷ Submissions dated 8 September and 20 October 2014.

⁵⁸ The date on which schedule 3, section 2 commenced – schedule 3, section 2(2)(a) of the RTI Act.

- that it is more than ten years after the documents' relevant dates.⁵⁹
45. Further, there is no evidence before me to indicate that Cabinet has made any decision authorising publication of any of the documents.⁶⁰ In this regard, I note QYAC's submission that it may be reasonably inferred that the substance of Cabinet submissions have been disclosed to Sibelco. Whether or not such disclosure occurred, or can reasonably be inferred, does not give rise to this exception to the Cabinet information exemption.⁶¹ The exception only arises when the information in question is officially published by Cabinet.
46. In conclusion, I am satisfied that no exceptions to the Cabinet exemption apply. Thus, it is necessary to consider whether the Cabinet exemption applies to the documents.

Documents comprised exclusively of exempt information

47. The RCC Documents and ATP Submission comprise Cabinet submissions, briefing notes and agendas, and drafts of those documents. Such documents are types of documents that are taken to be comprised exclusively of Cabinet information under schedule 3, section 2(3) of the RTI Act. Accordingly, I find that the RCC documents and ATP Submission are exempt from disclosure under schedule 3, section 2(1) of the RTI Act.
48. Sibelco submits that it understood that the Sibelco Discussion Paper would form part of a Cabinet briefing note, and that document is therefore comprised exclusively of exempt information. I acknowledge Sibelco's submission that its Discussion Paper is a document that was prepared by Sibelco *'primarily in response to a request by, and for the consideration of the Hon. Minister Andrew Cripps, Minister for Natural Resources and mines'*⁶² to facilitate discussions between Sibelco and the Government about mining on North Stradbroke Island. However, I have carefully considered the Sibelco Discussion Paper and I am satisfied that it is not a Cabinet document listed in schedule 3, section 2(3) of the RTI Act.

Information brought into existence for the consideration of Cabinet

49. Under schedule 3, section 2(1)(a) of the RTI Act, information is exempt if it was brought into existence for the consideration of Cabinet. Sibelco submits⁶³ that, in addition to facilitating discussions with the Government, one of the purposes of the creation of the Sibelco Discussion Paper was for submission to or consideration by Cabinet. On this basis, Sibelco contends that its Discussion Paper was therefore brought into existence for the consideration of Cabinet.
50. Sibelco submits that the Sibelco Commercial Imperative Document, Sibelco Email and Sibelco/Ashurst Correspondence were also brought into existence for the consideration of Cabinet. In relation to these documents Sibelco submits⁶⁴ that it created them to inform the Government and Cabinet of Sibelco's position or in response to a specific request for the purpose of briefing Cabinet. I have carefully considered these

⁵⁹ Schedule 3, section 2(1) of the RTI Act. For information considered by Cabinet, the "relevant date" is the date the information was most recently considered by Cabinet; otherwise, "relevant date" is the date the information was created – see definition of "relevant date" in schedule 3, section 2(5) of the RTI Act.

⁶⁰ Schedule 3, section 2(2)(a) of the RTI Act.

⁶¹ *Beanland and Department of Justice and Attorney-General* (1995) 3 QAR 25 at [65]; and *Woodyatt and Minister for Corrective Services* (1995) 2 QAR 383 at [12].

⁶² Submission dated 25 June 2014.

⁶³ Submissions dated 25 June 2014 and 28 October 2014.

⁶⁴ Submission dated 28 October 2014.

documents. There is no indication on their face that the information requested by the Department from Sibelco would be included in a Cabinet submission.

51. In arguing that the Sibelco Discussion Paper, Sibelco Commercial Imperative Document, Sibelco Email and Sibelco/Ashurst Correspondence were brought into existence for the consideration of Cabinet, and therefore exempt under schedule 3, section 2(1)(a) of the RTI Act, Sibelco relied on the decision of *Hudson* (as agent for Fencray Ltd) and Department of the Premier, Economic and Trade Development (**Hudson**).⁶⁵ In that decision, the Information Commissioner stated:⁶⁶

This means that a document is not exempt merely because it has been submitted to Cabinet. Inquiries must be pursued into the “genealogy” of such a document, to establish the purpose for which it was brought into existence. The time of the creation of the document is the time at which the purpose for its creation is to be ascertained. The fact that it was subsequently decided to annex to a Cabinet submission, a document that was brought into existence for a purpose other than submission to Cabinet or Cabinet consideration, will not bring the document with s.36(1)(a). A document which is created for the purpose of assisting in the preparation of a draft or final Cabinet submission (or some other kind of document that is being created for the purpose of submission to Cabinet) would not itself have been brought into existence for the purpose of submission for consideration by Cabinet.

(Underlined portion relied upon by Sibelco)

52. In **Hudson**, “genealogy” inquiries were considered necessary regarding documents that were attached to a Cabinet submission and submitted to Cabinet. In contrast, the Sibelco Discussion Paper, Sibelco Commercial Imperative Document, Sibelco Email and Sibelco/Ashurst Correspondence in issue were not submitted to Cabinet. While the circumstances in *Hudson* may therefore be distinguished from those in this review, I consider that the comments in *Hudson* about the need to undertake inquiries into a document’s “genealogy”, in order to determine if it was created for the consideration of Cabinet, remain relevant.
53. As noted in paragraph 48, Sibelco submits that the Sibelco Discussion Paper was prepared to facilitate discussions between Sibelco and the Government about mining on North Stradbroke Island. I accept this and am also satisfied that the Sibelco Commercial Imperative Document, Sibelco Email and Sibelco/Ashurst Correspondence were created for the purpose of furthering that discussion between Sibelco and the Government in direct response to requests for further information.
54. While I acknowledge that Sibelco is of the belief that such facilitation extended to its provision of the documents to the Department for the purpose of their inclusion in submissions to Cabinet or the RCC, the reality is that, as a key stakeholder in the issue of mining on North Stradbroke Island, Sibelco could only create documents for consideration by the Department, which was ultimately responsible for consultation with stakeholders as part of its preparation of submissions to Cabinet. It is the role of a Department in such circumstances to then determine what, if any, of the information provided by stakeholders to include in those submissions. In other words, the fact that information within the Sibelco documents may possibly have found its way into

⁶⁵ (1993) 1 QAR 123.

⁶⁶ *Hudson* at [26] and in relation to section 36(1) of the now repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**). The form of section 36(1) under consideration in *Hudson* had similar requirements to schedule 3, section 2(1)(a) of the RTI Act, as it also contemplated that the relevant information was brought into existence for Cabinet consideration: see the Information Commissioner’s discussion of the similarity of these provisions in *Office of the Leader of the Opposition and Treasury Department* (Unreported, Queensland Information Commissioner, 7 July 2010), in which the Information Commissioner noted that ‘the approach in *Hudson* ... above is apt to apply...’ in considering the application of schedule 3, section 2 of the RTI Act.

departmental documents that were created for the purpose of consideration by Cabinet does not make Sibelco's documents themselves exempt.⁶⁷

55. In these circumstances, I consider that the Sibelco Discussion Paper, Sibelco Commercial Imperative Document, Sibelco Email and Sibelco/Ashurst Correspondence are arguably sources from which information may have been drawn by the Department to assist it in preparing documents which went before Cabinet or the RCC. I am satisfied that "source" documents of this kind cannot be said to comprise information brought into existence for the consideration of Cabinet. In this regard, I note the last sentence in the extract from *Hudson* referred to by Sibelco affirms this position:

*A document which is created for the purpose of assisting in the preparation of a draft or final Cabinet submission (or some other kind of document that is being created for the purpose of submission to Cabinet) would not itself have been brought into existence for the purpose of submission for consideration by Cabinet.*⁶⁸

56. On the basis of the above, I am satisfied that the Sibelco Discussion Paper, Sibelco Commercial Imperative Document, Sibelco Email and Sibelco/Ashurst Correspondence were not brought into existence for the consideration of Cabinet. Accordingly, I find that these documents are not exempt under schedule 3, section 2(1)(a) of the RTI Act.

Information that would reveal or prejudice Cabinet considerations

57. In considering the application of schedule 3, section 2(1)(b) of the RTI Act, the relevant question is whether it can be said that disclosure of the actual information in issue itself would reveal a consideration of Cabinet or otherwise prejudice Cabinet confidentiality or operations. It must be shown that any person viewing the documents would have revealed to them a consideration of Cabinet, or that relevant disclosure would otherwise prejudice Cabinet confidentiality.
58. I have carefully considered the Attachments and Department Emails. I note the Information Commissioner's previous comments in *Hudson*⁶⁹ and *Ryman and Department of Main Roads*,⁷⁰ in relation to the FOI Act predecessor of schedule 3, section 2(1)(b), that ordinarily, for a document to be exempt because its disclosure would reveal or prejudice a consideration of Cabinet, the document must be created contemporaneously with, or after, the relevant Cabinet consideration – for example, a document that records or minutes the consideration. Under the FOI Act, documents created contemporaneously with, or attached contemporaneously to, the Cabinet submissions or their drafts would usually be considered exempt under the FOI Act's "submitted to Cabinet", "drafts" or "extracts" categories of Cabinet information.⁷¹ The "reveal or prejudice Cabinet considerations" category of Cabinet information in the FOI Act arguably necessitated the restrictive interpretation of the FOI Act predecessor of schedule 3, section 2(1)(b) adopted in *Hudson* and *Ryman*, as a way of ensuring that the "submitted to Cabinet" and "reveal or prejudice Cabinet considerations" both served a purpose within that provision, and therefore that the provisions worked as a whole.
59. The "information was submitted to Cabinet" basis for exemption does not appear in the RTI Act. Nevertheless, the Explanatory Notes to the Right to Information Bill 2009 state that *[a]n attachment to the documents listed in sub-clause (3) may also be considered*

⁶⁷ *Secretary to the Department of Infrastructure v Asher* [2007] VSCA 272.

⁶⁸ *Hudson* at [26] regarding the FOI Act predecessor of schedule 3, section 2(1)(a) of the RTI Act.

⁶⁹ At [39]-[44].

⁷⁰ (1996) QAR 416 (*Ryman*) at [39]-[40].

⁷¹ Under the various forms of section 36(1)(a) (see *Woodyatt and Minister for Corrective Services* (1995) 2 QAR 383 at [12]), section 36(1)(f) and 36(1)(g) of the FOI Act respectively.

exempt information provided it falls within the general test in sub-clause (1)'.⁷² In these circumstances, I am not convinced that Parliament intended that schedule 3, section 2(1)(b) should be restricted from applying to any information created before the relevant Cabinet consideration in all instances – despite employing similar wording to its FOI Act predecessor. I am satisfied that, for information to be exempt under schedule 3, section 2(1)(b) of the RTI Act, it is simply necessary to determine whether, if a person viewed the information, a Cabinet consideration would be revealed to them, or the confidentiality of the Cabinet consideration would be prejudiced.

60. On careful consideration of the information before me, I am satisfied that the documents contain information that, if disclosed to a person, would directly (in the case of the Attachments) or indirectly (in the case of Department Emails, and draft versions of the Attachments) reveal information provided to the RCC or Cabinet⁷³ to that person. I am satisfied that the particular nature of this information could reasonably be expected to reveal the RCC or Cabinet's noting of some information, and the focus of its discussions, deliberations and decisions regarding other information.⁷⁴ In this regard, I note that the Attachments are not reports of a type that should usually be released in response to an RTI application, if not by administrative release beforehand. Further, I am satisfied that disclosure of the documents would prejudice the confidentiality of Cabinet considerations, as awareness of their contents would reduce or remove the confidentiality of RCC or Cabinet considerations occurring in relation to information in the RCC Documents and ATP Submission. Accordingly, I find that these documents are exempt from disclosure under the second limb of schedule 3, section 2(1)(b) of the RTI Act.
61. In relation to the Sibelco Discussion Paper, Sibelco Commercial Imperative Document, Sibelco Email and Sibelco/Ashurst Correspondence:
- there is no evidence on the face of the documents which reveals they were themselves considered by Cabinet or otherwise connects them to a Cabinet consideration; and
 - neither the Department nor Sibelco have provided a submission addressing how disclosure of these documents would reveal they were considered by Cabinet or that disclosure would otherwise prejudice Cabinet confidentiality.
62. In these circumstances, I am unable to see how anyone viewing these documents would have a consideration of Cabinet revealed to them, nor how their disclosure could prejudice the confidentiality of Cabinet considerations.
63. I note the previous comments of the Information Commissioner in *Ryman* that:⁷⁵

I am not prepared to find that the test for exemption under the [FOI Act predecessor of schedule 3, section 2(1)(b)] is established because the Department, through its own disclosures of information extraneous to the matter in issue, claims that disclosure of the matter in issue, in connection with that extraneous information, would involve the disclosure of information noted by Cabinet or would otherwise prejudice the confidentiality of Cabinet considerations or operations.

The test for exemption under [the FOI Act predecessor of schedule 3, section 2(1)(b)] is to be evaluated by reference to the effects of disclosure of the matter in issue itself.

⁷² Explanatory Notes to the Right to Information Bill at page 59.

⁷³ Both of which satisfy the definition of "Cabinet" in schedule 3, section 2(5) of the RTI Act. Given section 108(3) of the RTI Act, which provides that a decision must not include information that is claimed to be exempt information, I am unable to set out any more information regarding the nature of this information.

⁷⁴ See definition of "consideration" in schedule 3, section 2(5) of the RTI Act.

⁷⁵ *Ryman* at [43]-[44].

64. In *Ryman*, the extraneous information was the Department's submission that it had verified that maps in issue were similar to, but not the same as, a map attached to the Cabinet submission. Employing the same reasoning, I am not prepared to accept Sibelco's assertion that the Sibelco Discussion Paper, Sibelco Commercial Imperative Document, Sibelco Email and Sibelco/Ashurst Correspondence were submitted to Cabinet, or contained information that was submitted to Cabinet, and that disclosure would therefore reveal or prejudice Cabinet considerations. This submission is, in my view, even less persuasive than the situation in *Ryman*, given that Sibelco is not in a position to verify the contents of the documents that were ultimately submitted to Cabinet. Similarly, I cannot accept that legislative amendments related to issues discussed in the Sibelco documents, or ensuing media commentary about those amendments, combined with the Sibelco documents themselves, render those documents capable of revealing or prejudicing Cabinet considerations. I am satisfied that such extraneous information cannot be used to re-cast the Sibelco documents as indicative of Cabinet considerations.
65. For these reasons, I find that the Sibelco Discussion Paper, Sibelco Commercial Imperative Document, Sibelco Email and Sibelco/Ashurst Correspondence are not exempt from disclosure under schedule 3, section 2(1)(b) of the RTI Act.

Conclusion – Cabinet

66. On the basis of the above, I find that the RCC Documents, ATP Submission, Attachments and Department Emails comprise exempt information under schedule 3, section 2(1) of the RTI Act. Therefore, the Department may refuse access to this information under section 47(3)(a) and 48 of the RTI Act. Given this position, it is not necessary for me to consider these documents further in this decision.
67. However, I am not satisfied that the Sibelco Discussion Paper, Sibelco Commercial Imperative Document, Sibelco Email or Sibelco/Ashurst Correspondence comprise exempt information under schedule 3, section 2(1) of the RTI Act. Accordingly, I have considered whether these documents, along with some other Information in Issue, comprise Breach of Confidence information below.

C. Breach of confidence information

Relevant law

68. Information will be exempt from disclosure if its disclosure would found an action for breach of confidence.
69. For the breach of confidence exemption to apply, the following five cumulative elements must be established:⁷⁶
- a) information must be capable of being specifically identifiable as information that is secret, rather than generally available
 - b) information must have the necessary quality of confidence - it will not extend to information that is generally known, useless or trivial⁷⁷
 - c) circumstances of the communication must create an equitable obligation of

⁷⁶ See the Information Commissioner's analysis in *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (**B and BNRHA**), applying section 46(1)(a), the equivalent exemption under the repealed FOI Act. For a recent restatement of the criteria in the context of the RTI Act, see *TSO08G and Department of Health* (Unreported, Queensland Information Commissioner, 13 December 2011).

⁷⁷ *B and BNRHA* at [68]-[70].

- confidence
- d) disclosure to the applicant for access must constitute an unauthorised use of the confidential information; and
- e) disclosure would result in detriment to the plaintiff.

Information in Issue considered

70. Given the submissions made by Sibelco and the Department, it is necessary for me to determine whether the following documents in the Information in Issue contain Breach of Confidence information:

- i) Sibelco Discussion Paper
- ii) Sibelco Commercial Imperative Document
- iii) Sibelco Email
- iv) Sibelco/Ashurst Correspondence
- v) **Schedule Information** – columns of information appearing in various schedules or tables prepared by Sibelco or the Department that set out Sibelco's position and preferred options in relation to mining leases;⁷⁸ and
- vi) **Royalties Table** – a table prepared by the Department which sets out Sibelco's historic and estimated annual royalties from operations on North Stradbroke Island.⁷⁹

Submissions

71. Sibelco submits⁸⁰ that it provided information to the Department '*solely in circumstances importing an obligation of confidence*', and it was done '*on the basis that the information would be kept confidential*'. In this regard, Sibelco's submissions expressly refer to the Sibelco Discussion Paper,⁸¹ Sibelco/Ashurst Correspondence,⁸² Schedule Information⁸³ and Royalties Table.⁸⁴ In relation to the Royalties Table, Sibelco submits⁸⁵ that:

...chapter 11, part 4 of the Mineral Resources Act 1989 (MRA) contains strict confidentiality provisions in relation to royalty information obtained or held under that chapter and makes it an offence for a public official to disclose that information. Section 334D of the MRA also provides that a public official cannot be compelled to disclose information, even to a court (except for the administration or enforcement under the MRA).

72. However, Sibelco also refers generally to the "detailed information" that it provided to the Government and Cabinet⁸⁶ (via the Department) and asserts that this information comprises Breach of Confidence information. Consequently, I understand that Sibelco's submissions regarding breach of confidence apply to all of the documents listed in paragraph 70 above.

73. Consistent with Sibelco's submissions, the Department submits⁸⁷ that the Sibelco Discussion Paper, Sibelco Commercial Imperative Document, Sibelco/Ashurst

⁷⁸ Parts of pages – File C: 37 to 43, 82; File E: 12 to 23, 128 to 129; File G: 4 to 5.

⁷⁹ Page – File G: 1.

⁸⁰ Submissions dated 25 June 2014 and 28 and 31 October 2014.

⁸¹ Submission dated 25 June 2014 at pages 3-4.

⁸² Submission dated 28 October 2014 at page 3.

⁸³ Again, submission dated 28 October 2014 at page 3.

⁸⁴ Submission dated 31 October 2014 at page 2.

⁸⁵ Submission dated 31 October 2014.

⁸⁶ Submission dated 28 October 2014 at page 4.

⁸⁷ Submission dated 30 September 2014.

Correspondence and Schedule Information are exempt on the basis that disclosure of them would found an action for breach of confidence.

Findings

Documents i) to v)

74. I have carefully considered the documents listed at para 70 above. I am satisfied that the Information in Issue in documents i) to v) does not have the necessary quality of confidence to satisfy element b) noted at paragraph 69 above, as the information:
- is of a general nature, eg. it discloses that Sibelco was communicating with the Department about mining on North Stradbroke Island; and
 - relates to information that is otherwise generally known, eg:
 - background information about Sibelco's North Stradbroke Island mining operations; and
 - the conditions imposed by the *North Stradbroke Island Protection and Sustainability Act 2011 (NSIPS Act)* on Sibelco's mining leases as set out in the NSIPS Act.
75. Similarly, while the information contained in documents i) to v) is specifically identifiable, I am not satisfied that it is secret. On the information before me, much of it is either generally known or generally available as noted at paragraph 74. Accordingly, I am not satisfied that the Information in Issue in documents i) to v) meets element a) noted at paragraph 69 above.
76. Given my findings that the Information in Issue in documents i) to v) does not meet the first two cumulative elements required to establish that disclosure of the information would found an action for breach of confidence, I am satisfied that the Information in Issue in those documents does not comprise exempt information of the type set out in schedule 3, section 8(1).
77. However, for the sake of completeness, I will consider Sibelco's submissions that the Sibelco Discussion Paper satisfies element c). Sibelco submits⁸⁸ that its Discussion Paper was developed and shared '*in circumstances importing an obligation of confidence ...*'. Further, Sibelco submits that it expected that this document '*would remain confidential as Cabinet documents.*' Sibelco also points to the email disclaimer contained within the covering email forwarding the Sibelco Discussion Paper to the Department on 1 June 2012 as evidence of its belief the information was being provided confidentially.
78. I have considered the content of the email disclaimer and in my view, it carries minimal weight in support of confidentiality as such disclaimers are widely used in electronic communications, primarily to protect emails which are inadvertently sent to an unintended addressee. I also note there is no specific request in the subject line or the body of the email to keep the information confidential. I have also considered the fact that the Sibelco Discussion Paper is watermarked as 'Confidential Draft'. I do not consider this imposes an obligation of confidence on the Department as it is not possible for the confider's conduct to unilaterally impose an obligation on the confidant by labelling information as confidential, if the information lacks the requisite degree of secrecy.⁸⁹ I am satisfied that while the email disclaimer and watermark are factors to be taken into account, they are insufficient, on their own, to establish that the

⁸⁸ Submission dated 25 June 2014 at page 3.

⁸⁹ *B and BNRHA* at [91].

circumstances of the communication of the Sibelco Discussion Paper created an equitable obligation of confidence.⁹⁰ Therefore, I am satisfied that element c) is not met in relation to the Sibelco Discussion Paper.

79. Sibelco did not provide similarly detailed submissions regarding why it considers that documents ii) to v) listed at paragraph 69 satisfy element c).⁹¹ Accordingly, apart from Sibelco's general assertion that it provided all of the documents to the Department in circumstances importing an obligation of confidence, and a similarly brief submission made by the Department, there is no other information before me to suggest that this was the case. I note that the onus to present such information rests with Sibelco and the Department.⁹² In these circumstances, I consider that there is insufficient evidence to find that element c) is satisfied regarding documents ii) to v).

The Royalties Table

80. In terms of the Royalties Table, I am satisfied that this document contains information that is sufficiently secret and non-trivial to satisfy requirements a) and b). Accordingly, it is necessary to consider whether the information in the Royalties Table satisfies element c) – that is, whether the information in that Table was communicated to the Department in circumstances that enliven an equitable obligation of confidence.
81. Sibelco contends that the Royalties Table contains information which is confidential information⁹³ obtained under Chapter 11 of the *Mineral Resources Act 1989* (Qld) (**MR Act**) and that this operates to exempt the information from disclosure under schedule 3, section 8 of the RTI Act. Under the MR Act:
- the holder of a mining lease must:
 - pay the prescribed royalty and maintain a record of the payment of the royalty which can be readily produced to the Minister;⁹⁴ and
 - give the Minister a royalty estimate for a stated future period if requested;⁹⁵ and
 - a public official⁹⁶ is prohibited from disclosing confidential information other than in circumstances permitted under the MR Act.⁹⁷
82. Element c) requires that the information is communicated in circumstances that create an equitable obligation of confidence. While the MR Act contains a statutory provision that prohibits the disclosure of information obtained about the payment of royalties, I do not consider that this provision is sufficient to create an equitable obligation of confidence, given that the obligation on holders of mining leases to provide such information arises as a result of a generally applicable statutory provision that applies independently of any agreement to provide that information. Therefore, I am satisfied that element c) is not met in relation to the Royalties Table. Given this finding, I need not consider the remaining cumulative elements of this exemption.

⁹⁰ *B and BNRHA* at [71] and [91].

⁹¹ Sibelco submissions refer to the Sibelco/Ashurst Correspondence and the Schedule Information (see page 3 of submission to dated 28 October 2014), but simply assert that the exemption applies 'for the same reasons as the Discussion Paper'.

⁹² Section 87 of the RTI Act.

⁹³ Section 334A of the MR Act defines *confidential information* as information disclosed to, obtained by, or otherwise held by, a public official under or in relation to Chapter 11 of the MR Act.

⁹⁴ Sections 320, 326 and 326A of the MR Act.

⁹⁵ Section 327A of the MR Act.

⁹⁶ Under section 334A of the MR Act, a public official is a person who is, or has been, a public sector employee or other person, performing functions under or in relation to the administration or enforcement of the MR Act.

⁹⁷ Section 334B of the MR Act.

Conclusion – Breach of confidence

83. As set out above, I consider that the Sibelco Discussion Paper, Sibelco Commercial Imperative Document, Sibelco Email, Sibelco/Ashurst Correspondence, Schedule Information and Royalties Table do not satisfy the cumulative elements required to establish that disclosure of them would found an action for breach of confidence. In these circumstances, I am satisfied that all six documents listed at paragraph 70 do not comprise exempt information of the type set out in schedule 3, section 8(1) and the Department cannot refuse access to them under sections 47(3)(a) and 48 of the RTI Act.
84. Accordingly, it is necessary to consider whether disclose these documents would be contrary to the public interest in Part 2 of this decision.

Part 2 Contrary to public interest information

85. An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.⁹⁸ The RTI Act identifies various factors for and against disclosure that may be relevant to deciding whether, on balance, it is contrary to the public interest to disclose information.⁹⁹
86. It has been noted in decisions of OIC that 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.

Information in Issue considered

87. Given my findings that the Sibelco Discussion Paper, Sibelco Commercial Imperative Document, Sibelco Email, Sibelco/Ashurst Correspondence, Schedule Information and Royalties Table do not comprise exempt information, it is also necessary to consider whether their disclosure would be contrary to the public interest.

Irrelevant factors

88. No irrelevant factors arise in the circumstances of this case.

Factors favouring disclosure

89. Public interest factors in favour of disclosure will arise where disclosure of information could reasonably be expected to enhance government accountability, contribute to positive and informed debate on important issues or matters of serious interest, inform the community of Government's operations and provide reasons/background information for government decisions.¹⁰⁰
90. The Information in Issue generally concerns Sibelco's operations on North Stradbroke Island and the steps taken by the Government to extend sand mining until 2035 by

⁹⁸ Under section 47(3)(b) of the RTI Act.

⁹⁹ Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant in a particular case.

¹⁰⁰ Schedule 4, part 2, items 1, 2, 3, 4 and 11 of the RTI Act.

amending the NSIPS Act.¹⁰¹ Sand mining operations on North Stradbroke Island have been a topic of substantial media interest and public debate. I am satisfied that disclosure of the Information in Issue would significantly:

- enhance the accountability and transparency of the Department and inform the community of the Department's operations in relation to the future of sand mining on North Stradbroke Island
- contribute to positive and informed debate about issues relating to the future of sand mining on North Stradbroke Island; and
- provide the community with background or contextual information that informed decisions relating to the future of sand mining on North Stradbroke Island.

91. Accordingly, I afford these factors substantial weight in favour of disclosure.

Factors favouring nondisclosure

Business affairs

92. Sibelco submits¹⁰² that:

- the Information in Issue is of high commercial value and much of the information contained within the documents relates to specific legal or commercial risks
- the amendment of the NSIPS Act has not diminished the sensitivity of the information as many of the risks remain live
- the amendment of the NSIPS Act did not address all of Sibelco's preferred outcomes
- other consequences of the NSIPS Act and its amendment are still being worked through
- disclosure would affect Sibelco's ability to negotiate on matters and affect relationships with other stakeholders on North Stradbroke Island, particularly the Quandamooka People; and
- the royalty amounts, contained within the Royalties Table, disclose sensitive information about Sibelco's mining operations including future production

93. Sibelco's submissions raise the following public interest factors in favour of nondisclosure:

- disclosure could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities;¹⁰³ and
- disclosure could reasonably be expected to cause a public interest harm because it would disclose information concerning the business, professional, commercial or financial affairs of an agency or another person and could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of this type to government.¹⁰⁴

94. During the course of the external review, QYAC has accepted that disclosure of certain information would, on balance, be contrary to the public interest and access is no longer sought. Included in this category of information is details about the specific operational and financial impact of the NSIPS Act on Sibelco's mining operations, Sibelco's preferred options, the steps required to achieve those outcomes and the

¹⁰¹ These amendments were passed in November 2013.

¹⁰² Submissions dated 25 June 2014 and 28 and 31 October 2014.

¹⁰³ Schedule 4, part 3, item 2 of the RTI Act.

¹⁰⁴ Schedule 4, part 4, section 7(1)(c) of the RTI Act.

consequential impacts on Sibelco's operations. This is the type of information the disclosure of which could reasonably be expected to:

- provide competitors with information enabling them to gain a commercial advantage
- negatively impact on Sibelco's ability to maintain relationships with other stakeholders on North Stradbroke Island; and
- detrimentally affect Sibelco's ability to utilise the information in future negotiations.

95. The information which remains in issue contained within the Sibelco Discussion Paper and Sibelco Commercial Imperative Document is of a general nature or relates to information that is otherwise generally known or already within the public domain in some form. For example, the information discloses:

- that Sibelco was communicating with the Department about mining on North Stradbroke Island
- background information about the purpose of the creation of the documents
- background information about Sibelco's North Stradbroke Island mining operations (historical, non-financial and non-technical information); and
- general statements about the impact on Sibelco's operations of the NSIPS Act and amending the NSIPS Act.

96. While the above information relates to Sibelco's business affairs, I am satisfied that disclosure could not reasonably be expected to prejudice Sibelco's business affairs, given that very little financial or technical information is provided, and the lack of detail regarding that which is provided. Further, I am satisfied that disclosure could not reasonably be expected to prejudice the future supply of this type of information, as businesses will always seek to engage government to obtain competitive advantage in the particular areas in which they operate. I therefore afford these factors low weight in relation to the Sibelco Discussion Paper and Sibelco Commercial Imperative Document.

97. In relation to the Sibelco Email, the information is of a general nature, and simply reveals that Sibelco was communicating with the Department about mining on North Stradbroke Island, or is already within the public domain in some form. For example, the information contained within the Key Messages attached to one of the emails contains information which has been disclosed by the Government in its communications with the media in promoting its plans for amending the NSIPS Act. For these reasons, disclosure of this type of information could not reasonably be expected to prejudice Sibelco's business affairs. As above, I consider these types of communications are essential for private companies involved in negotiations with government and therefore, it is also my view that the future supply of this type of information to government would not be prejudiced through disclosure. I therefore afford these factors no weight in relation to the Sibelco Email.

98. In relation to the Sibelco/Ashurst Correspondence, some of the information is of a general nature, and reveals no more than that Sibelco was communicating with the Department about mining on North Stradbroke Island. The remaining information is about Sibelco's preferred outcomes for amendment of the NSIPS Act in relation to each of Sibelco's mining leases. While this information is slightly more detailed than what appears in the Schedule Information, it remains relatively undetailed. Considering this, and the presently applicable version of the NSIPS Act, I cannot see how disclosure of the Sibelco/Ashurst Correspondence could reasonably be expected to prejudice Sibelco's business affairs. As above, I consider these types of

communications are essential for private companies involved in negotiations with government and therefore, it is also my view that the future supply of this type of information to government would not be prejudiced through disclosure. I therefore afford these factors low weight in relation to the Sibelco/Ashurst Correspondence.

99. In relation to the Schedule Information,¹⁰⁵ the information comprises a brief description of Sibelco's preferred outcomes for amendment of the NSIPS Act in relation to each of Sibelco's mining leases, for example, the date to which Sibelco was seeking to extend the mining lease. Given the brief nature of the descriptions and considering the presently applicable version of the NSIPS Act, I cannot see how disclosure of the Schedule Information could reasonably be expected to prejudice Sibelco's business affairs or the future supply of this type of information to government. I therefore afford these factors no weight in relation to the Schedule Information.
100. The Royalties Table sets out historical and estimated amounts payable by Sibelco to the Queensland Government as a result of operations on North Stradbroke Island. The figures given are lump sum figures for each financial year up to 2009-10 plus future estimated amounts up to 2026-27. In my view, such information has a degree of commercial sensitivity for suppliers of goods and services operating in a competitive market. Generally, the lump sum total price is less sensitive than details of the supplier's pricing structure. In the circumstances of this matter, the information contained within the Royalties Table is the less sensitive lump sum figures. Therefore, I afford the factors favouring nondisclosure relating to business affairs and future supply of this type of information moderate weight in favour of nondisclosure.

Confidential information

101. As noted at paragraphs 71 and 72 above, Sibelco submits¹⁰⁶ that it provided the documents remaining in issue to Government in circumstance importing an obligation of confidence and that if it were disclosed, it would discourage other companies from providing full and frank disclosure to government when their interests would be affected by legislation.
102. Sibelco's submission raises the following public interest factors in favour of nondisclosure:
- disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information;¹⁰⁷ and
 - disclosure could reasonably be expected to cause a public interest harm because the information consists of information of a confidential nature that was communicated in confidence and disclosure of the information could reasonably be expected to prejudice the supply of information of this type.¹⁰⁸
103. As discussed in the '*Breach of Confidence information*' section of these reasons, I am satisfied that the information does not meet the requirement of secrecy or have the necessary quality of confidence,¹⁰⁹ and/or the circumstances of the communication of the information do not create an equitable obligation of confidence.¹¹⁰ In addition, I consider that the kinds of communications contained within the Information in Issue between Sibelco and the Department are essential if private organisations are seeking

¹⁰⁵ Including comparable information contained within internal departmental documents.

¹⁰⁶ Submissions dated 25 June 2014 and 28 and 31 October 2014.

¹⁰⁷ Schedule 4, part 3, item 16 of the RTI Act.

¹⁰⁸ Schedule 4, part 4, section 8(1) of the RTI Act.

¹⁰⁹ Elements a) and b) of the five cumulative elements that must be satisfied to establish a breach of confidence.

¹¹⁰ Element c) of the five cumulative elements.

to obtain a benefit from Government, such as amendment of legislation to allow commercial operations to continue.¹¹¹

104. Accordingly, I am satisfied that disclosure of the Information in issue could not reasonably be expected to prejudice the Department's ability to obtain confidential information, nor prejudice the supply of information of this type in the future. I therefore afford these factors no weight.

Prohibited by an Act

105. Sibelco submits¹¹² that the confidentiality provisions contained within the MR Act make it an offence for a public official to disclose royalty information and, therefore, disclosure of the Royalties Table would cause a public interest harm. As noted above, the Royalties Table sets out historical and estimated amounts payable by Sibelco to the Queensland Government as a result of operations on North Stradbroke Island.
106. Sibelco's submission raises a public interest factor in favour of nondisclosure where disclosure of the information is prohibited by an Act.¹¹³ However, information is not exempt from disclosure under the RTI Act by virtue of the fact that its disclosure is prohibited by the MR Act. Rather, the prohibition is simply one of a number of public interest factors to be considered.¹¹⁴
107. In my view, the public interest in nondisclosure of the Royalties Table is significant, given that disclosure of the information contained within the Royalties Table is prohibited by the MR Act.

Balancing the public interest

108. On careful consideration of the factors set out above, I am satisfied that the weight to be given to the factors in favour of nondisclosure relating to the business affairs of Sibelco and that disclosure of royalties information is prohibited by the MR Act, outweigh the public interest factors favouring disclosure of the Royalties Table. Accordingly, I find that disclosure of the Royalties Table would, on balance, be contrary to the public interest and therefore, access may be refused under section 47(3)(b) of the RTI Act.
109. In relation to the remaining documents or parts of documents – that is, the Sibelco Discussion Paper, Sibelco Commercial Imperative Document, Sibelco Email, Sibelco/Ashurst Correspondence, Schedule Information – I am satisfied that disclosure would significantly enhance the accountability of government in terms of its dealings with Sibelco and amendment of the NSIPS Act. This is a matter of serious interest to the community and I am satisfied that disclosure would contribute to positive and informed debate about this issue. In my view, these factors carry substantial weight in favour of disclosure and they outweigh the relevant factors favouring nondisclosure of information about Sibelco's business affairs and future provision of information of this kind to government, which carry only low weight as the Information in Issue is general, widely known and its disclosure cannot be linked to any specific prejudice. Accordingly, I find that disclosure of the Information in Issue would not, on balance, be contrary to

¹¹¹ *B and BNRHA* at paragraph 161.

¹¹² Submission dated 31 October 2014.

¹¹³ Schedule 4, part 3, item 22 of the RTI Act.

¹¹⁴ In contrast, for those types of information covered by the provisions listed in schedule 3, section 12 of the RTI Act, Parliament has determined that disclosure of would, on balance, be contrary to the public interest in all instances, and has therefore designated such information as exempt information—see section 48(2) of the RTI Act.

the public interest and therefore, access may not be refused under section 47(3)(b) of the RTI Act.

DECISION

110. For the reasons set out above, I vary the decision under review and find that the Department is entitled to refuse access to:

- the following information on the ground that it comprises exempt information:
 - 181 pages and part of one page under section 47(3)(a) and 48 of the RTI Act and schedule 3, section 2 of the RTI Act
 - 434 pages and parts of 17 pages under section 47(3)(a) and 48 of the RTI Act and schedule 3, section 7 of the RTI Act; and
- one page on the ground that disclosure of this information would, on balance, be contrary to the public interest under sections 47(3)(b) and 49 of the RTI Act.

111. Further, I find that the Department is not entitled to refuse access to 38 pages and parts of 45 pages, as no ground for refusal of access applies to that information.

112. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

A Rickard
Acting Assistant Information Commissioner

Date: 19 November 2014

APPENDIX A

Significant procedural steps

Date	Event
22 July 2013	The Department received QYAC's access application under the RTI Act.
29 July 2013	The Department consulted with QYAC under section 42 of the RTI Act, as it had formed the view that the work involved in dealing with the access application would substantially and unreasonably divert the resources of the Department from their use in the performance of the Department's functions.
30 July 2013	QYAC agreed to amend the terms of the access application by narrowing the date range to be searched.
25 September 2013	The Department consulted with Sibelco under section 37 of the RTI Act.
10 October 2013	Sibelco objected to the disclosure of information provided for consultation with the Department's letter dated 25 September 2013.
25 October 2013	The Department issued its decision on the access application.
20 November 2013	QYAC applied to OIC for external review of the Department's decision.
20 November 2013	OIC notified the Department of the external review application and requested procedural documents in relation to the application.
25 November 2013	The Department provided OIC with the requested procedural documents.
2 December 2013	OIC notified QYAC and the Department that OIC had accepted the application for external review.
13 December 2013	The Department provided OIC with a copy of the 975 pages considered in the Department's decision.
26 March 2014	By letter, OIC requested a submission from the Department regarding some of the information.
22 April 2014	The Department provided a written submission as requested.
24 April 2014	By letter, OIC directed the Department to consult with Sibelco about disclosure of 89 pages to which the Department had decided to refuse access (on the ground that disclosure would, on balance, be contrary to the public interest).
30 May 2014	By letter, the Department consulted with Sibelco under section 37 of the RTI Act as directed.
25 June 2014	By letter, the Department provided OIC with a submission enclosing Sibelco's written response, also dated 25 June 2014, to the Department's consultation letter dated 30 May 2014.
26 August 2014	By letter, OIC conveyed a preliminary view to the Department about information contained within 99 pages and invited the Department to provide a submission. In that letter, OIC also sought further information from the Department about its claim that 244 pages of the information being considered were exempt from disclosure under schedule 3, section 2(1) of the RTI Act.
26 August 2014	By letter, OIC conveyed a preliminary view to QYAC about information contained within 630 pages and parts of 4 pages and invited QYAC to provide a submission.
8 September 2014	QYAC provided a written submission.
30 September 2014	The Department provided a written submission.
2 October 2014	By letter, OIC conveyed a preliminary view to the Department about some of the submissions provided by the Department on 30 September 2014 and

Date	Event
	invited the Department to respond.
3 October 2014	By letter, OIC notified Sibelco of the likely disclosure of information under the RTI Act which may be of concern to Sibelco and conveyed a preliminary view in relation to that information. OIC also invited Sibelco to participate in the external review and provide submissions supporting its case, if Sibelco objected to disclosure of any of the information upon which it was consulted.
8 October 2014	By email, the Department advised OIC that it did not oppose any of the matters raised in OIC's letter dated 2 October 2014.
10 October 2014	By letter, OIC conveyed a further preliminary view to QYAC about 345 pages and invited QYAC to provide a submission.
20 October 2014	QYAC provided a written submission.
24 October 2014	By letter, OIC asked the Department if it would provide Sibelco with certain documents to assist Sibelco in responding to OIC's preliminary view.
28 October 2014	Sibelco provided a written submission.
31 October 2014	By email, OIC asked the Department if it maintained its claim that information in a two page document was either exempt from disclosure or its disclosure would, on balance, be contrary to the public interest.
31 October 2014	Sibelco provided a further written submission.
3 November 2014	By email, OIC asked the Department for further information about information in a one page document.
7 November 2014	The Department provided a written submission in response to OIC's emails dated 31 October and 3 November 2014.
7 November 2014	By telephone, QYAC provided clarification of its submissions dated 8 September and 20 October 2014.

APPENDIX B

Informal resolution during the external review

Table 1 Information that QYAC accepted was outside the scope of its application or could be refused

Ground	Pages	Part pages
Outside scope or irrelevant	File B: 74 to 75	File B: 73 File D: 83
Cabinet		File E: 90 to 91
Parliamentary privilege	File B: 54 to 58, 69 to 72 File C: 189 to 191 File F: 98 to 102	
Legal professional privilege		File A: 19 to 20 File C: 37 to 43, 82 to 83, 199, 201 to 202, 207 to 208, 213 to 214 File D: 6, 9 to 10, 12, 15 to 16, 166, 168 to 169 File E: 42 to 43, 90 to 91 File G: 4 to 5
Contrary to the public interest to disclose under section	File C: 47, 97, 100, 109 to 110, 112 to 113 File E: 58, 61, 70 to 71, 73 to 74, 142, 145, 154 to 155, 157 to 158 File G: 27, 30, 39 to 40, 42 to 43	File A: 21 File B: 82 File C: 36, 69, 72, 81, 85, 88, 90, 96, 98 to 99, 101 to 102, 104, 106 to 108, 111, 193, 209, 212, 214, 220, 226 to 228 File D: 2, 80, 174 File E: 11, 24, 38, 44 to 46, 49, 51, 57, 59 to 60, 62 to 63, 65, 67 to 69, 72, 89, 123, 125, 127, 130, 133, 135, 141, 143 to 144, 146 to 147, 149, 151 to 153, 156, 213 to 214 File G: 3, 7, 14 to 15, 18, 20, 26, 28 to 29, 31 to 32, 34, 36 to 38, 41, 51

Table 2 Information that the Department accepted could not be refused

Pages	Part pages
File A: 18, 22 to 35, 37 to 44 File B: 81, 83 File C: 46, 68, 70 to 71, 81 to 83, 155 to 158, 192, 194 to 198, 200, 203 to 206, 210 to 211, 219, 221 File D: 3 to 5, 7 to 8, 11, 13 to 14, 17, 78 to 79, 162 to 165, 167, 170 to 173, 175 to 197 File E: 25 to 37, 39 to 41, 82 to 83, 88, 92, 124 File G: 6, 8 to 10, 52	File A: 19 to 21, 36 File B: 82 File C: 36 to 43, 69, 72, 84, 193, 199, 201 to 202, 207 to 209, 212 to 214, 220, 226 to 228 File D: 2, 6, 9 to 10, 12, 15 to 16, 80, 166, 168 to 169, 174 File E: 11 to 24, 38, 42 to 45, 89, 90 to 91, 123 File G: 4 to 5, 7, 14, 51

Table 3 Information that Sibelco accepted could not be refused

Pages	Part pages
<p>File C: 71, 86, 93 to 95, 103, 105, 117 to 120</p> <p>File E: 37, 47, 54 to 56, 64, 66, 78 to 81, 131, 138 to 140, 148, 150, 162 to 165</p> <p>File G: 16, 23 to 25, 33, 35, 47 to 50</p>	<p>File C: 72, 85, 92, 96, 98 to 99, 101 to 102, 104, 106 to 108</p> <p>File E: 38, 46, 53, 57, 59 to 60, 62 to 63, 65, 67 to 69, 130, 137, 141, 143 to 144, 146 to 147, 149, 151 to 153</p> <p>File G: 3, 14 to 15, 22, 26, 28 to 29, 31 to 32, 34, 36 to 38</p>