



## Decision and Reasons for Decision

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Citation:	<i>TerraCom Limited and Department of Natural Resources, Mines and Energy; Lock the Gate Alliance Limited [2018] QICmr [31] (2 July 2018)</i>
Application Number:	313446
Applicant:	TerraCom Limited
Respondent:	Department of Natural Resources, Mines and Energy
Third Party	Lock the Gate Alliance Limited
Decision Date:	2 July 2018
Catchwords:	<p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - DISCLOSURE PROHIBITED BY AN ACT - documents considered in making a decision to grant indicative approval for the transfer of a mining lease - whether disclosure prohibited by an Act - sections 47(3)(a) and 48 and schedule 3, section 12 of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - BREACH OF CONFIDENCE - documents considered in making a decision to grant indicative approval for the transfer of a mining lease - whether disclosure would found an action for breach of confidence - sections 47(3)(a) and 48 and schedule 3, section 8(1) of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - documents considered in making a decision to grant indicative approval for the transfer of a mining lease - accountability, transparency and informed public debate on important issues - impact of disclosure on business affairs, deliberative process and future supply of information - 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)</p>

## REASONS FOR DECISION

### Summary

1. The access applicant (the **third party** in this external review) applied to the Department of Natural Resources and Mines (**Department**) under the *Right to Information Act 2009*

(Qld) (**RTI Act**) for access to a range of documents relating to a decision to grant indicative approval for the transfer of the mining lease for the Blair Athol coal mine to the applicant's subsidiary, Orion Mining Pty Ltd (**Orion**). During the Department's processing of the application, the third party agreed<sup>1</sup> to narrow the scope of the application to:

*The Final Briefing Package relating to the decision to grant indicative approval for the transfer of the mining lease for the Blair Athol coal mine from Rio Tinto to TerraCom subsidiary Orion Mining Pty Ltd.*

2. The Department located 209 pages of responsive information. The Department consulted with the applicant under section 37 of the RTI Act in respect of the proposed release of 204 pages (**documents in issue**), seeking the applicant's views as to possible disclosure of that information to the third party.
3. The applicant objected to the disclosure of the documents in issue. Notwithstanding the applicant's objections, the Department decided<sup>2</sup> to grant the third party access to the documents in issue,<sup>3</sup> subject to the deletion of signatures and mobile telephone numbers appearing in six pages.
4. The applicant sought internal review of that decision and, on internal review, the Department affirmed the original decision.
5. The applicant then applied to the Information Commissioner for external review of the Department's decision.
6. Initially, the applicant indicated that its disclosure objections only related to '*confidential components*' of the documents in issue. In an attempt to informally resolve aspects of the review,<sup>4</sup> the Office of the Information Commissioner (**OIC**) sought the applicant's confirmation of what it understood to be the parts of the documents which should not be disclosed. However, the applicant did not provide that requested confirmation and, in its subsequent submissions to OIC, the applicant confirmed that its disclosure objections related to all information in the documents in issue.
7. During the course of the review, the third party was joined as a participant in the review.<sup>5</sup>
8. For the reasons set out below, I affirm the Department's decision and find that there is no basis under the RTI Act to refuse access to the information in issue in this review.

## Background

9. The resource authority issued for the Blair Athol mine is ML1804 (**Mining Lease**), which commenced on 1 December 1978 and has an expiry date of 30 November 2024.
10. In September 2016, an application was made to the Minister under the *Mineral Resources Act 1989* (Qld) (**MR Act**) seeking indicative approval for an assessable

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<sup>1</sup> By email date 20 March 2017.

<sup>2</sup> By decision to the third party dated 17 May 2017 and decision to the applicant dated 22 May 2017.

<sup>3</sup> The Department decide to grant inspection access to 18 pages of the documents in issue.

<sup>4</sup> Under section 90 of the RTI Act, the Information Commissioner is required to identify opportunities and processes for early resolution of an external review.

<sup>5</sup> Under section 89(3) of the RTI Act.

transfer of the Mining Lease to Orion (**IA Application**).<sup>6</sup> In deciding whether or not to give indicative approval under the MR Act, the Minister was required<sup>7</sup> to consider:

- the IA Application and any additional information accompanying the application
  - whether the transferee had the human, technical and financial resources to comply with the conditions of the Mining Lease; and
  - the public interest.
11. In an ASX Announcement dated 3 February 2017, the applicant stated it had received advice that the Department was minded to grant indicative approval for the Mining Lease transfer and attached a copy of a referenced letter from the Department dated 1 February 2017.
  12. On 20 February 2017, the Minister (by its delegate) granted indicative approval for the transfer of the Mining Lease to Orion, subject to certain conditions. The applicant's ASX Announcement dated 20 February 2017 attached a copy of that indicative transfer approval.
  13. In ASX Announcements dated 1 and 2 May 2017, the applicant stated that Orion had satisfied the conditions of the indicative transfer approval.
  14. Transfer of the Mining Lease to Orion occurred on 12 May 2017 and the applicant's ASX Announcement, dated 16 May 2017, confirmed that the Mining Lease transfer to Orion had been completed. The applicant's subsequent ASX Announcements confirm that Orion has undertaken coal production and rehabilitation activities on the Mining Lease.
  15. Significant procedural steps relating to the external review are set out in the Appendix.

### Reviewable decision

16. The decision under review is the Department's internal review decision dated 14 July 2017.

### Evidence considered

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

### Information in issue

18. On external review:
  - the third party confirmed that they did not seek access to signatures; and
  - the applicant accepted OIC's view that there was no basis under the RTI Act to refuse access to 20 pages of the documents in issue,<sup>8</sup> and these pages were disclosed to the third party.

<sup>6</sup> Before the Minister made a decision about the IA Application, the provisions of the MR Act relevant to regulating dealings with mining leases were replaced under the *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) (**Common Provisions**). However, under section 213(2) of the Common Provisions, Chapter 7, Part 1 of the MR Act continued to apply to the IA Application. References in this decision to the MR Act provisions are therefore references to the provisions that were applicable to the IA Application and not the current provisions of the MR Act.

<sup>7</sup> Under sections 318AAV and 318AAX of the MR Act.

<sup>8</sup> OIC conveyed a preliminary view to the applicant on 27 February 2018. The applicant was advised that if OIC did not receive a response to the preliminary view within a specified period, the applicant would be taken to have accepted the preliminary view and have no objection to the 20 pages being released to the third party. The applicant did not respond to OIC's preliminary view within the specified period.

19. The information remaining for consideration in this review (**information in issue**) comprises information, other than signatures and mobile telephone numbers, in 184 pages. That information generally falls into two broad categories:
- documents created by agencies in connection with the Department's consideration of the IA Application—being a tenure assessment,<sup>9</sup> a Queensland Treasury Corporation (**QTC**) assessment report and two QTC memoranda,<sup>10</sup> an email between the applicant and officers of the Department of Environment and Heritage Protection<sup>11</sup> and a Department letter addressed to Orion requesting further information<sup>12</sup> (**Category One Documents**); and
  - documents submitted to the Department by the applicant to support the IA Application—being a draft plan of operations,<sup>13</sup> a development plan,<sup>14</sup> a map titled '*Blair Athol Mine Waterway Diversions 05/12/2013*',<sup>15</sup> the applicant's correspondence to the Department<sup>16</sup> and an equity support deed<sup>17</sup> (**Category Two Documents**).

### Issues for determination

20. In this review, the Department determined that the information in issue should be disclosed.
21. As the decision under review is a disclosure decision,<sup>18</sup> the applicant bears the onus of establishing that a decision not to disclose the information in issue is justified or that the Information Commissioner should give a decision adverse to the third party (as access applicant).<sup>19</sup>
22. The applicant provided a number of submissions to OIC to support the nondisclosure of the information in issue,<sup>20</sup> which I have carefully considered. In summary, the applicant considers that recent Supreme Court decisions support its disclosure objections and disclosure of the information in issue would, on balance, be contrary to the public interest.
23. While the applicant confirmed to OIC that its disclosure objections relate to all the information in issue, it has referred to confidential material and sensitive internal information<sup>21</sup> that was provided to the Department on a commercial in confidence basis<sup>22</sup> and on the '*premise that the information being provided was to be kept confidential*'.<sup>23</sup> For this reason, although not specifically argued by the applicant, I have also considered whether the information in issue is exempt information, on the basis that its disclosure would found an action for breach of confidence.
24. Therefore, the issues to be determined are whether:

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<sup>9</sup> Pages 6-18 in File A.

<sup>10</sup> Pages 20-30 in File A.

<sup>11</sup> Page 133 in File A.

<sup>12</sup> Pages 168-169 in File A.

<sup>13</sup> Pages 31-94 in File A.

<sup>14</sup> Pages 95-111, 113-121 and 124-132 in File A.

<sup>15</sup> Page 144 in File A.

<sup>16</sup> Pages 145-165, 170-182 and 185-190 in File A.

<sup>17</sup> Pages 191-208 in File A.

<sup>18</sup> 'Disclosure decision' is defined in section 87(3) of the RTI Act as 'a decision to disclose a document or information contrary to the view of a relevant third party obtained under section 37' of the RTI Act.

<sup>19</sup> Section 87(2) of the RTI Act.

<sup>20</sup> As set out in the Appendix.

<sup>21</sup> External review application.

<sup>22</sup> Submissions dated 6 April 2018, reiterating submissions made to the Department on internal review, dated 16 June 2017.

<sup>23</sup> Submissions dated 6 April 2018.

- recent Supreme Court decisions support nondisclosure of the information in issue under the RTI Act
  - the information in issue is exempt information; and
  - disclosure of the information in issue would, on balance, be contrary to the public interest.
25. Before considering these issues, it is necessary to deal with the following preliminary matters.
26. As noted in paragraph 2 above, the applicant was consulted under section 37 of the RTI Act about the disclosure of the documents in issue. That section provides that an agency may give access to a document that contains information the disclosure of which may reasonably be expected to be of concern to a government, agency or person—the relevant third party—only if the agency has taken the steps that are reasonably practicable to obtain the views of the relevant third party about whether:
- the document is a document to which the RTI Act does not apply; or
  - the information is exempt information or contrary to the public interest information.
27. The grounds of objection which the applicant, as a consulted party, may raise under section 37 of the RTI Act are therefore limited.
28. The applicant submitted<sup>24</sup> that certain parts of the information in issue<sup>25</sup> *‘should not be contemplated when considering whether to grant an indicative approval for a mining lease’*. To the extent this submission argues that parts of the information in issue fall outside the scope of the access application, I cannot take it into account as it does not address either of the dot points set out in paragraph 26 above.
29. However, for the sake of clarity and having carefully considered the terms of the access application and the information in issue, I am satisfied that all of the information in issue does fall within the scope of the access application in any event.
30. As noted in paragraph 19 above, the Category One Documents include a QTC report and memoranda. QTC is the Queensland Government’s central financing authority and corporate treasury service provider. It was established under the *Queensland Treasury Corporation Act 1988* (Qld) (**QTC Act**) as a ‘corporation sole’, that consists solely of a nominated office holder, being the Under Treasurer of Queensland.<sup>26</sup> QTC has responsibility for sourcing and managing debt funding to finance Queensland’s borrowing requirements in the most cost-effective manner and providing financial and risk management advice and services to the Queensland Government and Queensland public sector bodies.<sup>27</sup>
31. Under the RTI Act:
- a person has a right to be given access to the documents of an agency, however, an agency does not include entities to which the Act does not apply<sup>28</sup>
  - *‘an entity to which this Act does not apply’* is defined as the entities listed in schedule 2, part 1 and the entities mentioned in schedule 2, part 2 in relation to the function mentioned in that part;<sup>29</sup> and

<sup>24</sup> External review application.

<sup>25</sup> Being pages 31-94 and 95-132 in File A.

<sup>26</sup> QTC’s functions are set out in section 17 of the QTC Act.

<sup>27</sup> <https://www.qtc.com.au/about-qtc/>.

<sup>28</sup> Sections 23 and 14 of the RTI Act.

<sup>29</sup> Section 17 of the RTI Act.

- QTC is an entity to which the RTI Act does not apply in relation to QTC's borrowing, liability and asset management related functions.<sup>30</sup>
32. To inform itself about whether the applicant had the necessary financial resources to meet the Mining Lease conditions, the Department engaged QTC to provide a financial assessment. I am satisfied that the QTC report and memoranda in the Category One Documents relate to QTC's financial risk management advisory function and are not documents relating to QTC's borrowing, liability and asset management functions. Accordingly, schedule 2, part 2, item 9 does not operate to exclude the QTC report and memoranda from the operation of the RTI Act.
33. The front page of the QTC report in the Category One Documents contains a footnote, which relevantly states '*Copyright: This paper is Copyright© the State of Queensland (Queensland Treasury Corporation), all rights reserved under Australian laws*'.
34. If giving access in the form requested by an applicant would involve an infringement of the copyright of a person **other than the State**, section 68(4) of the RTI Act allows an agency to refuse access in the requested form and give access in another form (such as by inspection). In this regard, I note that the Department decided to give access by inspection to 18 pages of the information in issue which it considered were subject to copyright.
35. Section 7 of the QTC Act provides that QTC represents the Crown and, subject to the QTC Act, has and may exercise and claim all the powers, privileges, rights and remedies of the Crown. Taking this and the structure of QTC into consideration, I am satisfied that the provisions of section 68(4) of the RTI Act do not apply to the QTC report in the Category One Documents and there is no basis to refuse access to the QTC report in the form requested by the applicant, that is, a copy of the document.
36. In summary, on these preliminary issues, I find that:
- I am unable to take into account the applicant's submissions to the extent they argue that parts of the information in issue fall outside the scope of the access application, however, I am satisfied that all of the information in issue does fall within the scope of the application in any event; and
  - there is no basis under the RTI Act to refuse access to the QTC report in the form requested by the applicant.
37. I will now address each of the issues for determination in turn.

### Effect of Supreme Court decisions

38. The applicant has referred to the following Supreme Court decisions (**Court Decisions**) in support of its disclosure objections:
- *Lock the Gate Alliance Ltd v The Minister for Natural Resources and Mines* [2018] QSC 21; and
  - *Lock the Gate Alliance Ltd v Chief Executive under the Environmental Protection Act 1994* [2018] QSC 22.
39. The applicant submitted<sup>31</sup> that:

<sup>30</sup> Schedule 2, part 2, item 9 of the RTI Act.

<sup>31</sup> Submissions dated 6 April 2018.

- the outcomes of these Court Decisions have created ‘*case law precedence [sic] for withholding information pertaining to both the indicative approval and mining operations activities*’; and
- ‘*The applications made by [the third party] were made under a relevant Act and a Judge dismissed both cases. Pursuant to Schedule 4, Part 3, item 22, disclosure of information can be withheld if prohibited by an Act. A conclusion can be drawn that all information being requested under this external review should be withheld as a judge dismissing both cases under relevant Acts has the capability to be deemed prohibited by an Act through the Judge’s interpretation of the facts and circumstances presented to them*’.

40. I understand the applicant’s submissions detailed above to have threefold meaning. Firstly, that the Information Commissioner, applying the doctrine of precedent, is required to determine that access to the information in issue should be refused. Secondly, the Court Decisions have the effect of expanding the definition of exempt information in schedule 3, section 12 of the RTI Act—I will take this aspect of the applicant’s submissions into account in considering whether the information in issue is exempt information. Thirdly, the Court Decisions should be taken into account when considering the factor favouring nondisclosure in schedule 4, part 3, item 22 of the RTI Act—I will consider this aspect of the applicant’s submissions in my consideration of whether disclosure of the information in issue would, on balance, be contrary to the public interest.

### **Findings - Legal precedent**

41. Under the doctrine of precedent, a lower court is bound to follow decisions that have been made by higher courts on similar facts and issues. This ensures that cases of a similar nature (for example, with similar facts or similar questions of law) are decided using the same principles as previous similar cases. As a decision-maker, the Information Commissioner applies the doctrine of precedent.
42. The issue to be determined in this external review is whether there is a basis under the RTI Act to refuse access to the information in issue, which comprises information in a final briefing package relating to the Department’s decision to grant indicative transfer approval for the Mining Lease.
43. The Court Decisions concern the third party’s applications, under section 38 of the *Judicial Review Act 1991* (Qld) (**JR Act**), for orders that the respondents in the Court Decisions provide the third party with statements of reasons in relation to:
- the decision made under the MR Act to grant indicative approval for transfer of the Mining Lease; and
  - a decision made under the *Environmental Protection Act 1994* (Qld) (**EP Act**) concerning the amount and form of financial assurance required under a condition of the environmental authority for the Blair Athol mine.
44. Under the JR Act:
- a person who is aggrieved by a decision to which the JR Act applies may request a written statement in relation to the decision;<sup>32</sup> and
  - where the written statement is not provided within 28 days, the person may apply to the court for an order under section 38 of the JR Act.

<sup>32</sup> Section 32 of the JR Act. Section 4 of the JR Act defines the types of decisions the JR Act applies to.

45. Section 7 of the JR Act defines who will be a ‘person aggrieved by a decision’. In the Court Decisions, Justice Bowskill determined that the third party was not a person aggrieved by a decision and, therefore, the third party was not entitled, under the JR Act, to request the statements of reasons sought in those proceedings.
46. The Court Decisions therefore involved questions of standing, under the JR Act, in judicial review proceedings concerning statements of reasons requested under section 32 of the JR Act. In contrast, matters before the Information Commissioner on external review concern the jurisdiction of the RTI Act and the *Information Privacy Act 2009* (Qld) (**IP Act**)—legislation designed to facilitate open and transparent government through access to information.
47. A person’s standing and right to access documents of an agency is established in the RTI Act<sup>33</sup> and IP Act and an agency should decide to give access to information unless giving access would, on balance, be contrary to the public interest.<sup>34</sup> This right of access is distinct from the right to seek the statements of reasons considered in the Court Decisions. The question of standing is not an issue in the matter before me—the third party has satisfied the requirements of the RTI Act to seek access to the information in issue.
48. I have carefully reviewed the Court Decisions and I am satisfied that the facts and issues being considered in this external review are different to the facts and issues that were considered by Justice Bowskill in the Court Decisions. Accordingly, I consider that the reasoning in the Court Decisions is not binding authority for either a refusal of access to the information in issue under the RTI Act, or refusal to deal with the access application under the RTI Act.

## Exempt information

### Relevant law

49. As noted in paragraphs 31 and 47 above, a person has a right under the RTI Act to be given access to documents of an agency.
50. There are some limitations on the right of access, including grounds for refusal of access.<sup>35</sup> It is Parliament’s intention that these grounds are to be interpreted narrowly.<sup>36</sup>
51. One such ground for refusal of access is where documents include exempt information.<sup>37</sup> Relevantly in this review, information will qualify as exempt information<sup>38</sup> if its disclosure:
  - is prohibited by one of the legislative provisions listed in schedule 3, section 12 of the RTI Act; and
  - would found an action for breach of confidence (**Breach of Confidence Exemption**).<sup>39</sup>

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<sup>33</sup> Section 23(1) of the RTI Act. I also note that the requirements for a valid access application are set out in section 24 of the RTI Act.

<sup>34</sup> Section 44 of the RTI Act. This is referred to as the ‘pro-disclosure bias’.

<sup>35</sup> Set out in section 47(3) of the RTI Act.

<sup>36</sup> Section 47(2)(a) of the RTI Act.

<sup>37</sup> Section 47(3)(a) of the RTI Act. Schedule 3 of the RTI Act sets out the types of information that comprise exempt information: section 48 of the RTI Act.

<sup>38</sup> Schedule 3 of the RTI Act contains a number of exemption provisions and these two are relevant in this review.

<sup>39</sup> Schedule 3, section 8 of the RTI Act.



### **Findings - Prohibited by an Act**

52. The Court Decisions dismissed the third party's applications under the JR Act for orders that statements of reasons be provided to the third party. In those decisions, Justice Bowskill did not consider or address schedule 3, section 12 of the RTI Act (or any other provision of the RTI Act).
53. The applicant submitted<sup>40</sup> that:
- the JR Act is a '*relevant Act*'; and
  - the dismissal of the applications under a relevant Act deems disclosure of the information in issue to be prohibited by an Act.
54. The Court Decisions did not prohibit the disclosure of information to the third party under the JR Act or the RTI Act. Instead, they determined that the third party was not a person entitled under the JR Act to request the statements of reasons sought in the applications.
55. No provision of the JR Act is listed in schedule 3, section 12 of the RTI Act or prohibits the disclosure of information.<sup>41</sup>
56. Taking these matters, and the requirement to narrowly interpret the grounds on which access may be refused under section 47 of the RTI Act,<sup>42</sup> I am satisfied that the Court Decisions have not expanded the definition of exempt information in schedule 3, section 12 of the RTI Act. I therefore find that the information in issue is not exempt information under the provisions of schedule 3, section 12 of the RTI Act.

### **Findings - Breach of confidence**

57. The Breach of Confidence Exemption requires consideration of whether an equitable obligation of confidence exists. The test for this exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency faced with an application under the RTI Act for access to the information in issue.<sup>43</sup>
58. The following cumulative requirements must be established to give rise to an equitable obligation of confidence:<sup>44</sup>
- (a) the information must be capable of being specifically identifiable as information that is secret, rather than generally available
  - (b) the information must have the necessary quality of confidence
  - (c) the circumstances of the communication must create an equitable obligation of confidence

<sup>40</sup> Submissions dated 6 April 2018.

<sup>41</sup> I note that even if a provision of the JR Act did prohibit disclosure, the RTI Act overrides such a provision—section 6 of the RTI Act.

<sup>42</sup> Section 47(2)(a) of the RTI Act.

<sup>43</sup> See *B and Brisbane North Regional Health Authority* [1994] 1 QAR 279 (*B and BNRHA*), a decision of the Information Commissioner analysing the equivalent exemption in the repealed *Freedom of Information Act 1992* (Qld) at [44]. For a restatement of the criteria in the context of the RTI Act, see *TSO08G and Department of Health* (unreported, Queensland Information Commissioner, 13 December 2011) (*TSO08G*).

<sup>44</sup> See *B and BNRHA* at [60] to [118]. The criteria stated in *B and BNRHA* have been consistently applied in the context of the RTI Act, see *TSO08G* at [13] and more recently in *Edmestone and Blackall-Tambo Regional Council* [2016] QICmr 12 (15 April 2016) at [14]; *Australian Workers Union and Queensland Treasury*; *Ardent Leisure Limited (Third Party)* [2016] QICmr 28 (28 July 2016) at [16]; and *Glass Media Pty Ltd and Department of the Premier and Cabinet*; *Screen Queensland Pty Ltd (Third Party)*; *The Walt Disney Company (Australia) Pty Ltd (Fourth Party)* [2016] QICmr 30 (18 August 2016) at [38].

- (d) disclosure of the information to the access applicant must constitute an unauthorised use of the confidential information; and
- (e) disclosure must cause detriment to the confider.

59. If any of the five cumulative elements enumerated above cannot be satisfied, then a claim for exemption based on this provision must fail. In relation to the information in issue, I do not consider that requirement (c) can be satisfied.

**Requirement (c) - the circumstances of the communication must create an equitable obligation of confidence**

60. During the processing of the access application, the applicant argued that all documents it provided in support of the IA Application were submitted '*commercial in confidence, in a draft form*' and that such information contained confidential material and sensitive internal information about the ongoing business affairs of the applicant's group of companies. The applicant reiterated those submissions on external review<sup>45</sup> and further submitted that the information it provided in support of the IA Application remains confidential and sensitive '*beyond the indicative approval process*'<sup>46</sup> and it was provided to Government on a confidential basis.<sup>47</sup> I note that these submissions relate to part only of the information in issue (being information the applicant provided to the Department, which primarily comprises the Category Two Documents).
61. The information in issue, on its face, does not identify that it is confidential or that it contains the applicant's confidential or commercial in confidence information, or that the applicant's information was being provided to the Department in confidence. It is information, prepared or received by the Department, for the purpose of the Minister deciding whether or not to give indicative transfer approval. As noted in paragraph 10 above, the Minister is required to consider a number of matters under the regulatory framework for the IA Application. There is nothing in the MR Act which imposes any obligation of confidentiality on the Department in relation to information created or obtained by the Department under that regulatory framework.
62. I note that the information in issue records that:
- the Department specifically requested certain information from the applicant in order to progress consideration of the IA Application;<sup>48</sup> and
  - the Department's request for information gave no undertaking to receive the requested information in confidence and in fact stated: '*To ensure that completeness and natural justice is provided to all relevant parties, DNRM requires Orion's response to these queries within 20 business days of the date of this letter*'.
63. I also note that, when providing information to the Department in response to the specific request referred to in paragraph 62 above, the applicant did not seek any undertaking to receive the information in confidence from the Department and did not identify that the information it was providing (or any part of it) was confidential or commercial in confidence or that it was providing information on the basis that it was to be kept confidential by the Department.<sup>49</sup> Other information the applicant provided to the Department to progress the IA Application addressed matters raised in QTC's assessment report and memoranda, which the Department obtained in order to inform

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<sup>45</sup> External review application.

<sup>46</sup> External review application.

<sup>47</sup> Submissions dated 6 April 2018.

<sup>48</sup> Pages 168-169 in File A.

<sup>49</sup> For example, pages 170-182 in File A.

itself about whether the applicant had the necessary financial resources to comply with the Mining Lease conditions. Again, in providing this information to the Department, the applicant did not identify that it was confidential or commercial in confidence or that it was being provided on the basis that it was to be kept confidential by the Department.

64. There is nothing in the material before me, apart from the applicant's submissions, which would have enlivened any expectation that information the applicant provided in support of the IA Application was being provided on the premise that it would be kept confidential by the Department. In these circumstances, and taking the regulatory framework into account, I am not satisfied that any reasonable person, receiving information on the same basis as the information was received by the Department, would have thought that the information was being provided by the applicant in confidence.
65. Further, I consider that any unilateral expectation by the applicant that the information it provided to the Department would be kept confidential beyond the indicative approval process is not sufficient to establish a reasonable expectation that the information was disclosed in circumstances which created an equitable obligation of confidence.
66. As the applicant has noted,<sup>50</sup> the QTC memoranda, which form part of the Category One Documents, state that QTC's advice in those documents, as it relates to the applicant, was provided to the Department '*for its exclusive use and is not for the [sic] distribution to third parties*'. The QTC memoranda specifically respond to additional information the applicant provided to the Department which, as noted above, was not identified at the time of its provision as being confidential or commercial in confidence. Accordingly, while I have considered the referenced notation on the QTC memoranda in determining whether requirement (c) is satisfied, I do not consider it is determinative.
67. I also note that under both the original and the internal review decisions, the Department decided to disclose the information in issue to the third party under the RTI Act. I consider that the Department's willingness to disclose the information lends further support to the view that there was no mutual understanding of confidence between the Department and the applicant, or the Department and QTC, regarding the information created or obtained by the Department under the regulatory framework in respect of the IA Application.
68. Having carefully considered the information in issue, the regulatory framework and the applicant's submissions, I am not satisfied that the applicant has met the onus of establishing that any part of the information in issue is information which was communicated in circumstances which created an equitable obligation of confidence owed by the Department to the applicant. Accordingly, requirement (c) is not made out, and the information in issue therefore cannot comprise exempt information under schedule 3, section 8 of the RTI Act.

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

### ***Relevant law***

69. Under the RTI Act, access may also be refused to information if its disclosure would, on balance, be contrary to the public interest.<sup>51</sup> In assessing whether disclosure of

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<sup>50</sup> External review application.

<sup>51</sup> Sections 47(3)(b) and 49 of the RTI Act. The term '*public interest*' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

information would, on balance, be contrary to the public interest, a decision maker must:<sup>52</sup>

- identify factors irrelevant to the public interest and disregard them
- identify factors in favour of disclosure of information
- identify factors in favour of nondisclosure of information; and
- decide whether, on balance, disclosure of the information would be contrary to the public interest.

70. I have addressed each category of the information in issue below.

### **Findings - Category One Documents**

#### **Irrelevant Factors**

71. The applicant submitted<sup>53</sup> that disclosure of some of the Category One Documents ‘has the potential to cause conflict’ and that some information in the Category One Documents contains ‘misleading comments’. Under the RTI Act, irrelevant factors arise where disclosure of information could reasonably be expected to:

- cause embarrassment to the Government or cause a loss of confidence in the Government;<sup>54</sup> and
- result in an access applicant misinterpreting or misunderstanding the document.<sup>55</sup>

72. Accordingly, to the extent these submissions could be interpreted as contending that disclosure of the Category One Documents could cause embarrassment or a loss of confidence or lead to misinterpretation or misunderstanding, I have not taken these, or any other irrelevant factor, into account.

#### **Factors favouring disclosure**

73. The applicant’s submissions do not focus to any great extent on the factors favouring disclosure, however, the applicant has submitted<sup>56</sup> that ‘*The basis of the reasons for disclosure are flawed as there appears to have been more favoured weighting to disclosure of the information without considering the cumulated weighting for the factors contributing to non-disclosure of the information*’.

74. As noted in paragraph 69 above, section 49(3) of the RTI Act requires that I consider factors favouring disclosure and nondisclosure in determining whether disclosure would, on balance, be contrary to the public interest. In accordance with those requirements, I set out below my consideration of the factors I have taken into account, and the weighting I attribute to them, in deciding whether it would be contrary to the public interest to release information.

#### **Accountability and transparency factors**

75. The Government must be accountable to the public for the decisions it makes under the regulatory framework for dealing with applications to transfer mining tenements. The Category One Documents are documents prepared by agencies, which were considered

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<sup>52</sup> Section 49(3) of the RTI Act.

<sup>53</sup> External review application.

<sup>54</sup> Schedule 4, part 1, item 1 of the RTI Act.

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

<sup>56</sup> Submissions dated 6 April 2018.

under the regulatory framework in determining whether to grant indicative transfer approval for the Mining Lease. They specifically include:

- a document titled '*Tenure assessment for the indicative approval of the transfer of mining Lease 1804*'—this document records the Department's assessment of the IA Application against the requirements of the regulatory framework; and
- an assessment the Department requested from QTC in order to determine whether the applicant's group of companies had the financial resources to comply with the conditions of the Mining Lease.

76. Given the significance of mining projects to the Queensland and Australian economy and the local community (which is recognised in the applicant's ASX Announcements), the following public interest factors in favour of disclosure of the Category One Documents arise for consideration (I have referred elsewhere in this decision to these factors collectively as the accountability and transparency factors):

- promote open discussion of public affairs and enhance the Government's accountability<sup>57</sup>
- contribute to positive and informed debate on important issues or matters of serious interest<sup>58</sup>
- inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by Government in its dealings with members of the community;<sup>59</sup> and
- reveal the reason for a government decision and any background or contextual information that informed the decision.<sup>60</sup>

77. I note that the Queensland Government has recently undertaken a review of Queensland's financial assurance framework (conducted by QTC).<sup>61</sup> It was noted in the review that:

- under current arrangements, the State obtains financial assurance from the companies that undertake mining activities to mitigate the financial risk that the State will bear the cost of rehabilitating land disturbed by mining activities; and
- there are key disadvantages with the current arrangements, which include that it does not protect the State's financial interest and does not promote good environmental outcomes; and
- certain initiatives would improve the outcome for the State through reduced exposure and proactive management of the remaining risk.

78. I also note the Queensland Government's recent invitation for public submissions about its discussion paper entitled '*Better Mine Rehabilitation for Queensland*', which outlined a proposed new policy for mine rehabilitation in Queensland and sought feedback from the public on the proposed reform measures.<sup>62</sup>

79. In my view the observations within the review of the financial assurance framework and the release of the discussion paper on mine rehabilitation demonstrate that the

<sup>57</sup> Schedule 4, part 2, item 1 of the RTI Act.

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

<sup>59</sup> Schedule 4, part 2, item 3 of the RTI Act.

<sup>60</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>61</sup> This report may be accessed via <<https://www.treasury.qld.gov.au/growing-queensland/improving-rehabilitation-financial-assurance-outcomes-resources-sector/better-mine-rehabilitation-queensland/>>.

<sup>62</sup> This paper may be accessed via <<https://www.treasury.qld.gov.au/growing-queensland/improving-rehabilitation-financial-assurance-outcomes-resources-sector/better-mine-rehabilitation-queensland/>>. It is noted that the Mined Land Rehabilitation Policy has been approved by the Queensland Government following consultation with stakeholders who provided feedback to this discussion paper.

Government's handling of such matters are matters of serious interest; that they are matters about which Government considers the public should be well informed; and they are matters about which the Government must be transparent and accountable.

80. The indicative transfer approval, the applicant's acquisition of the Blair Athol Mine and the recommencement of mining activities on the Mining Lease are matters that have received media attention.<sup>63</sup> I also note that the applicant's ASX Announcements also address the decision-making process for the indicative transfer approval and the perceived public benefits of the Mining Lease transfer to Orion.<sup>64</sup> In particular, I note the applicant's ASX Announcement dated 1 May 2017 quotes the following statement made by Orion's Chairman:

*"The transfer has been subject to an extensive and exhaustive process of review with numerous State Government agencies confirming that TerraCom has the human, technical and financial capacity to operate Blair Athol. Coupled with \$93.1 million in financial assurances, the approval is positive proof that TerraCom has the capacity to successfully rehabilitate and mine Blair Athol."*

81. I consider this further demonstrates that the indicative transfer approval, the conditions of that approval and the decision-making process that led to that approval are matters of serious interest.
82. The applicant submitted<sup>65</sup> that, to the extent the Category One Documents include or reference the information it provided in support of the IA Application, such information included working drafts, which were 'at a point in time preparation of the documents', provided for information purposes. While I note that certain updated documents were later provided by the applicant in connection with other legislative requirements, I am satisfied that disclosure of these parts of the Category One Documents would provide a complete picture of the information that was submitted for consideration of the IA Application within the regulatory framework and which was taken into account in the government decision to grant indicative approval for transfer of the Mining Lease to Orion.
83. In light of the above, I consider that the accountability and transparency factors are enlivened in favour of disclosure of the Category One Documents because disclosure of those documents could reasonably be expected to:
- promote open discussion and accountability of the Government in relation to the approval process for the IA Application and the information obtained and considered in that process<sup>66</sup>
  - contribute to positive and informed debate on the government's decision-making process relating to the IA Application, which is a matter of serious interest<sup>67</sup>
  - enable scrutiny of the government's reasons for granting indicative transfer approval under the regulatory framework and the conditions imposed in that approval;<sup>68</sup> and

<sup>63</sup> For example, <<http://www.afr.com/business/mining/former-rio-tinto-executive-buys-blair-athol-coal-mine-for-1-20160703-gpxsa9>> and <<https://www.brisbanetimes.com.au/politics/queensland/almost-5-million-transferred-for-blair-athol-mine-bought-for-1-20180124-p4yyt6.html>>.

<sup>64</sup> The applicant's ASX Announcements are publicly accessible at <<http://terracomresources.com/investors/asx-announcements/>>. It is noted that the ASX announcements dated 3 February 2017, 31 May 2017, 18 July 2017 refer to the generation of taxes and royalties for the State and additional benefits to the local community such as '[p]rogressive rehabilitation of one of Queensland's oldest coal mines' and '[t]he Resumption of coal mining and export sales from the Blair Athol Coal mine providing the local, state and federal economies with increased economic activity, employment, royalties and taxation'.

<sup>65</sup> External review application.

<sup>66</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>67</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>68</sup> Schedule 4, part 2, item 3 of the RTI Act.

- inform the community about the basis upon which the Department assessed and was satisfied about Orion's ability to meet the Mining Lease obligations (including that Orion had the human, technical and financial resources to comply with the conditions of the Mining Lease and address rehabilitation obligations relating to historic mining activities).<sup>69</sup>
84. In terms of the weight to be afforded to these factors, I consider there is a strong public interest in facilitating appropriate public scrutiny of government decisions made under the legislative framework for providing indicative transfer approval for mining leases. Mining tenement conditions include rehabilitation obligations. The inability of mining tenement holders to discharge their rehabilitation obligations could place a large financial burden on the State and this is a matter of great public concern. Here, significant historical mining activities had been conducted on the Mining Lease prior to the IA Application. While the conditions the Department imposed in its indicative transfer approval may be publicly accessible, there is a significant public interest in the Department being accountable for and transparent about the basis upon which the Minister decided that Orion had the technical and financial capability to meet the Mining Lease obligations, including rehabilitation obligations related to the historical mining activities. In this regard, I also note that there has been recent media reporting about the applicant's financial capability.<sup>70</sup>
85. Taking into consideration the nature of the Category One Documents, the public interest in open and accountable decision making in the regulatory framework under which the indicative transfer approval decision was made, I afford significant weight to each of the accountability and transparency factors favouring disclosure.<sup>71</sup>

***Disclosure would reveal that the information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant***

86. A public interest factor favouring disclosure arises where disclosure could reasonably be expected to reveal that information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.<sup>72</sup> Given the applicant's submissions<sup>73</sup> that particular statements in the Category One Documents are misleading or factually incorrect, I have considered whether this factor favouring disclosure is relevant to the Category One Documents.
87. As noted in paragraph 10 above, the regulatory framework identifies what the Minister is required to consider in deciding whether or not to give indicative transfer approval under the MR Act. The Category One Documents record assessments conducted by government officers of the matters that required consideration under the regulatory framework. Ultimately, indicative transfer approval was granted after taking the Category One Documents into consideration. The applicant may not agree with particular components of these assessments and may consider that certain conclusions are inconsistent with matters dealt with in the applicant's ASX Announcements, however, there is no objective evidence before me to indicate that, at the time the Category One Documents were created, the information in them was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.

<sup>69</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>70</sup> Such as <<http://www.abc.net.au/news/2018-01-24/blair-athol-company-given-millions-in-surplus-enviro-funding/9353802>>, which references the Independent Auditor's Report included in the applicant's ASX Announcement dated 28 February 2018.

<sup>71</sup> Schedule 4, part 2, items 1, 2, 3 and 11 of the RTI Act.

<sup>72</sup> Schedule 4, part 2, item 12 of the RTI Act.

<sup>73</sup> External review application.

88. Accordingly, I do not consider that this factor favouring disclosure applies to the Category One Documents.

### Factors favouring nondisclosure

89. The applicant's submissions raise a number of factors favouring nondisclosure of the Category One Documents, which broadly concern its business affairs, confidentiality and deliberative process. Specifically, the applicant identified the factors favouring nondisclosure of the Category One Documents that it considers relevant, namely, where disclosure could reasonably be expected to:
- prejudice the private, business, professional, commercial or financial affairs of entities (**business affairs prejudice factor**)<sup>74</sup>
  - impede the administration of justice generally, including procedural fairness<sup>75</sup>
  - impede the administration of justice for a person<sup>76</sup>
  - prejudice the economy of the State<sup>77</sup>
  - intergovernmental relations<sup>78</sup>
  - prejudice an agency's ability to obtain confidential information;<sup>79</sup> and
  - prejudice a deliberative process of government.<sup>80</sup>
90. As noted in paragraph 40 above, I have also considered the applicant's submission that the Court Decisions should be taken into account when considering the factor favouring nondisclosure in schedule 4, part 3, item 22 of the RTI Act (that is, where disclosure is prohibited by an Act).

### Business affairs

91. In addition to the *business affairs prejudice factor*, the RTI Act recognises that disclosure of information concerning the business, professional, commercial or financial affairs of an agency or another person could reasonably be expected to cause a public interest harm where the disclosure 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 (**business affairs harm factor**).<sup>81</sup>
92. Apart from asserting the business affairs prejudice factor applies to the Category One Documents and that it has '*stringent controls and policies in place to ensure information is kept confidential and/or disclosed to all stakeholders on the ASX to ensure a free market*',<sup>82</sup> the applicant has not enunciated what prejudice could be expected, in the circumstances of this review, to arise from disclosure of the Category One Documents (or its business and financial affairs information within the Category One Documents).
93. The Category One Documents record agency assessments of matters required to be considered under the regulatory framework in respect of the IA Application. In assessing the IA Application and whether Orion had the human, technical and financial resources to comply with the Mining Lease conditions, the government officers who prepared the

<sup>74</sup> Schedule 4, part 3, item 2 of the RTI Act.

<sup>75</sup> Schedule 4, part 3, item 8 of the RTI Act.

<sup>76</sup> Schedule 4, part 3, item 9 of the RTI Act.

<sup>77</sup> Schedule 4, part 4, item 12 of the RTI Act.

<sup>78</sup> Schedule 4, part 4, item 14 of the RTI Act.

<sup>79</sup> Schedule 4, part 3, item 16 of the RTI Act.

<sup>80</sup> Schedule 4, part 3, item 20 of the RTI Act.

<sup>81</sup> Schedule 4, part 4, section 7(1)(c) of the RTI Act.

<sup>82</sup> Submissions dated 6 April 2018. These submissions also refer to the redaction of certain information released in respect of a separate access application (which is not the subject of an external review). As the issues requiring determination in each external review are necessarily considered on the particular facts and circumstances of each review, I do not consider the redaction of information released in response to a separate access application is a relevant consideration in this review.



Category One Documents referred to, and commented on, information the applicant provided for the purpose of progressing the IA Application within the regulatory framework, including information about the business and financial affairs of the applicant's group of companies. I am therefore satisfied that parts of the Category One Documents can be characterised as information about the business and financial affairs of the applicant and its subsidiaries.

94. Given this business and financial affairs information is information the applicant provided in order to progress consideration of the IA Application under the regulatory framework and indicative transfer approval for the Mining Lease was granted, I am not satisfied that disclosure of such business and financial affairs information could reasonably be expected to prejudice the future supply of information of this type to government.
95. However, to the extent the Category One Documents comprise such business and financial affairs information, I consider the disclosure of that information could reasonably be expected to cause some level of prejudice or adverse effect on those commercial and financial affairs and the prejudice factor and harm factor favouring nondisclosure are relevant. In determining the weight to be afforded to the factors favouring nondisclosure, I have taken into consideration the publicly accessible information about the business and financial affairs of the applicant's group of companies; the historical mining activities conducted on the Mining Lease; the financial assurance conditions of the indicative transfer approval; and the Mining Lease conditions. I also note that there is no evidence before me which indicates that the applicant's competitors would be in a position to use such commercial and financial affairs information to their own advantage or of any corresponding disadvantage it would cause to the applicant's group of companies. In these circumstances, I consider that moderate weight should be afforded to the business affairs prejudice and harm factors<sup>83</sup> in respect of the business and financial affairs information within the Category One Documents.

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

96. While not specifically raised by the applicant, given the applicant's submissions that information it provided in support of the IA Application contains confidential and sensitive internal information, I have also considered whether disclosing the Category One Documents could reasonably be expected to:
- prejudice trade secrets, business affairs or research of an agency or a person;<sup>84</sup> and/or
  - cause a public interest harm because it would disclose trade secrets of an agency or another person or information or other information that has a commercial value to an agency or another person, and could reasonably be expected to destroy or diminish the commercial value of the information.<sup>85</sup>
97. In the context of this review, a trade secret refers to a method, process, knowledge or technology used by a company which it intends to keep confidential.<sup>86</sup>
98. While the Category One Documents may refer to information provided by the applicant about its business and financial affairs, which is primarily information in the Category Two Documents, I consider that such information cannot be characterised as the

<sup>83</sup> Schedule 4, part 3, item 2 and part 4, item 7(1)(c) of the RTI Act.

<sup>84</sup> Schedule 4, part 3, item 15 of the RTI Act.

<sup>85</sup> Schedule 4, part 4, sections 7(1)(a) and (b) of the RTI Act.

<sup>86</sup> In *Cannon and Australian Quality Egg Farms Ltd* (1994) QAR 491 at [43], the Information Commissioner cited a statement in the decision of *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* (1967) VR 37 which referred a trade secret as 'any formula, pattern or device or compilation of information which gives an advantage over competitors who do not know or use it'.

applicant's trade secrets. Taking into consideration the content of the Category One Documents, the Mining Lease conditions, the indicative transfer approval conditions and the applicant's extensive ASX Announcements about its acquisition of and activities on the Mining Lease, I am not satisfied that disclosing the Category One Documents would prejudice, destroy or diminish the applicant's trade secrets or information that has commercial value to the applicant or its subsidiaries. Accordingly, I do not consider these factors favouring nondisclosure<sup>87</sup> apply to the Category One Documents.

### ***Deliberative process***

99. The RTI Act contains two public interest factors concerning the deliberative processes of government which favour nondisclosure of information. Firstly, where disclosure of information could reasonably be expected to prejudice a deliberative process of government (**deliberative process prejudice factor**);<sup>88</sup> and secondly, the RTI Act recognises that disclosure of information could reasonably be expected to cause a public interest harm through disclosure of an opinion, advice or recommendation that has been obtained, prepared or recorded or a consultation or deliberation that has taken place in the course of, or for, the deliberative processes involved in the functions of government (**deliberative process harm factor**).<sup>89</sup>
100. The applicant submitted<sup>90</sup> that the deliberative process prejudice factor is relevant and has referred to the extensive deliberative process '*that was undertaken*' and that the indicative approval process '*took a total of 5 months*'. However, the applicant has not enunciated what prejudice to a deliberative process could be expected, in the circumstances of this review, to arise from disclosure of the Category One Documents.
101. Deliberative processes involved in the functions of government have been defined as '*...thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action*'.<sup>91</sup>
102. For the deliberative process prejudice factor to apply, a reasonable expectation of prejudice to the relevant deliberative process must be established. As noted in paragraphs 12 and 14 above, indicative approval for transfer of the Mining Lease to Orion was issued and, following satisfaction of relevant transfer conditions, the Mining Lease was transferred to Orion. I also note that an environmental authority for the Mining Lease, which provides the required authorisation to undertake environmentally relevant activities (such as resource and mining activities), has been issued to Orion.<sup>92</sup> The applicant's ASX announcements also confirm that, post transfer, various activities have been undertaken on the Mining Lease. In this case, the relevant deliberative process is the process relating to the IA Application or, more broadly, the transfer of the Mining Lease to Orion. That relevant deliberative process has concluded and there is no outstanding government decision to be made. I am therefore satisfied that no reasonable expectation of prejudice to the deliberative process arises from disclosure of the Category One Documents. Accordingly, I do not consider that the deliberative process prejudice factor applies to the Category One Documents.

<sup>87</sup> Schedule 4, part 3, item 15 and schedule 4, part 4, sections 7(1)(a) and (b) of the RTI Act.

<sup>88</sup> Schedule 4, part 3, item 20 of the RTI Act.

<sup>89</sup> Schedule 4, part 4, section 4(1) of the RTI Act. The deliberative process harm factor does not apply in the circumstances specified in Schedule 4, part 4, sections 4(2)-(4) of the RTI Act.

<sup>90</sup> Submissions dated 6 April 2018.

<sup>91</sup> *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 (**Eccleston**) at [28-30] citing with approval the definition given in *Re Waterford and Department of Treasury (No.2)* (1984) 5 ALD 588 at [606].

<sup>92</sup> This document may be accessed at <<https://environment.ehp.qld.gov.au/env-authorities/pdf/epml00876713.pdf>>.

103. The Category One Documents:

- do contain opinions, advice and recommendations that were obtained, prepared or recorded and a consultation that took place in the course of the deliberative processes associated with the IA Application; and
- are not information of the type referred to in schedule 4, part 4, sections 4(3) and 4(4) of the RTI Act.<sup>93</sup>

104. However, given indicative transfer approval was granted and the Mining Lease has now been transferred to Orion, I consider any public interest harm that could reasonably be expected to occur from disclosure of the Category One Documents would be minimal. I also note that the Department did not raise concerns that disclosure of the opinions, advice and recommendations in the Category One Documents, which were obtained or prepared within the regulatory framework, could cause a public interest harm. I consider this lends further weight to any reasonably expected harm being very minimal. Accordingly, I afford the deliberative process harm factor low weight.

***Confidential information***

105. The Category One Documents were prepared by agencies within the regulatory framework for considering the IA Application. I therefore consider that this factor favouring nondisclosure can only be considered in respect of information in the Category One Documents which references or comments on the information provided by the applicant in support of the IA Application.

106. As noted in paragraphs 61 to 67 above in relation to the Breach of Confidence Exemption:

- when providing information to the Department, the applicant did not seek any undertaking from the Department to keep information it provided confidential and did not identify that the information it was providing (or any part of it) was confidential or commercial in confidence or that it was providing information on the basis that it was to be kept confidential by the Department; and
- there is nothing in the MR Act which imposes any obligation of confidentiality concerning information created or obtained by the Department under the regulatory framework for determining whether to grant indicative transfer approval for the Mining Lease.

107. However, even if the Category One Documents (or the parts of them comprising information provided to the Department by the applicant and QTC) were considered to be confidential information, for this nondisclosure factor to apply, I must also be satisfied that disclosure of such information could reasonably be expected to prejudice the future supply of similar information. Here, the applicant, and QTC, provided information to the Department for the specific purpose of progressing consideration of the IA Application under the regulatory framework. Some of that information was provided in response to specific Department requests. However, other information provided by the applicant which appears in the Category One Documents was information the applicant itself considered would support the IA Application under the regulatory framework and was unsolicited by the Department (and which would address matters raised during the assessment process about its financial resources).

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<sup>93</sup> In particular, I am satisfied that the QTC report and memoranda within the Category One Documents was commissioned by the Department in the course of the deliberative process for the IA Application and QTC is not a body or organisation established within an agency or prescribed under a regulation. I am also satisfied that the provisions of schedule 4, part 4, section 4(2) do not apply to the Category One Documents.

108. As noted in paragraph 10 above, the Minister was required under the MR Act to consider a number of matters in deciding whether or not to grant indicative transfer approval. In light of this and the fact that, under the MR Act, an application for indicative approval to transfer a mining lease must be accompanied by ‘*the information the Minister requires to make a decision*’, it is unlikely that disclosure of information provided to the Department for consideration under the regulatory framework would have any impact on the Department’s ability to obtain similar information in the future. Accordingly, I afford low weight to this factor<sup>94</sup> favouring nondisclosure.

***Prejudice the economy of the State and intergovernmental relations***

109. The RTI Act contains a number of public interest factors concerning disclosure impacts on the economy of the State and intergovernmental relations. The applicant has argued that in this case the public interest factors favouring nondisclosure arise because disclosure of the Category One Documents could reasonably be expected to prejudice the economy of the State or intergovernmental relations (**prejudice factors**).<sup>95</sup> I note that in addition to these prejudice factors, the RTI Act also recognises that disclosure of information could reasonably be expected to cause a public interest harm where disclosure could cause damage to relations between Queensland and another government, divulge confidential information communicated by or for another government, have a substantial adverse effect on the ability of the government to manage the State’s economy or expose persons to unfair advantage by premature disclosure of information concerning proposed government action or inaction in the course of or for managing the State’s economy (**harm factors**).<sup>96</sup>
110. While the applicant submitted<sup>97</sup> the prejudice factors are relevant, it did not identify the nature of the expected prejudice or enunciate how such prejudice could be expected to arise from disclosure of the Category One Documents. Nevertheless, I have given consideration to these prejudice factors and also the harm factors below.
111. As I have previously noted, indicative transfer approval for the Mining Lease was granted and, following satisfaction of relevant transfer conditions, the Mining Lease has been transferred to Orion. The relevant government action in this case is therefore finalised. The Category One Documents do not relate to intergovernmental relations and do not contain confidential information communicated by or for another government. They instead record agency assessments, within a regulatory framework, of the IA Application which sought indicative approval for transfer of the Mining Lease between non-government entities. While royalties associated with the recommencement of mining and extractive activities on the Mining Lease may be of some relevance to the State’s economy, there is nothing before me which evidences that any prejudice to the State’s economy or adverse effect on the ability of the government to manage the State’s economy could reasonably be expected to arise from disclosure of the Category One Documents.
112. In these circumstances, I am satisfied no prejudice or harm to Queensland’s economy and no prejudice or harm to intergovernmental relations could be anticipated from disclosing the Category One Documents. Accordingly, I find that both these prejudice and harm factors favouring nondisclosure<sup>98</sup> do not apply.

<sup>94</sup> Schedule 4, part 3, item 16 of the RTI Act.

<sup>95</sup> Schedule 4, part 2, items 12 and 14 of the RTI Act.

<sup>96</sup> Schedule 4, part 4, sections 1 and 9 of the RTI Act.

<sup>97</sup> External review application and submissions dated 18 December 2017.

<sup>98</sup> Schedule 4, part 3, items 12 and 14 and schedule 4, part 4, sections 1 and 9 of the RTI Act.

### ***Procedural fairness and administration of justice***

113. Before the Court Decisions were published, the applicant submitted<sup>99</sup> that disclosure of the Category One Documents could impede the outcome of those court proceedings and, therefore, these factors favouring nondisclosure were relevant.
114. Given the referenced proceedings have been finalised by the Court Decisions, there is no material before me which indicates disclosure of the Category One Documents could be expected to impede the administration of justice or procedural fairness for the applicant or any other individual or entity. I therefore find that these factors favouring nondisclosure<sup>100</sup> do not apply.

### ***Personal information***

115. Two of the Category One Documents include contact details for public sector employees (email addresses and one landline telephone number)<sup>101</sup> and one private individual (an email address).<sup>102</sup> This information comprises the personal information of those individuals.<sup>103</sup> I have therefore considered, in respect of those portions of personal information, the public interest factors favouring nondisclosure which relate to protection of personal information and privacy.<sup>104</sup>
116. Information relating to the day-to-day work duties and responsibilities of a public sector employee may generally be disclosed under the RTI Act, despite it falling within the definition of personal information. This is because the potential harm from disclosing routine personal work information is, in most circumstances, minimal or nonexistent.<sup>105</sup> For this reason, I afford no weight to these factors favouring nondisclosure in respect of the contact details of Departmental officers.
117. The email address of the private individual is publicly accessible in the attachment to Terracom's ASX Announcement dated 3 February 2017. I consider this reduces the prejudice to that individual's privacy that could be expected from disclosure of that email address and minimises the extent of the harm that could be anticipated from disclosure. For this reason, I afford low weight to these factors favouring nondisclosure in respect of one private individual's email address.

### ***Prohibited by an Act***

118. As noted in paragraphs 52, 54 and 55 above:
- the Court Decisions did not consider or address any provision of the RTI Act or prohibit the disclosure of information to the third party; and

<sup>99</sup> Submissions dated 18 December 2017.

<sup>100</sup> Schedule 4, part 3, items 8 and 9 of the RTI Act.

<sup>101</sup> Page 133 in File A.

<sup>102</sup> Pages 133 and 168 in File A.

<sup>103</sup> Personal information is information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion—schedule 5 of the RTI Act and section 12 of the *Information Privacy Act 2009* (Qld).

<sup>104</sup> Schedule 4, part 3, item 3 and schedule 4, part 4, section 6(1) of the RTI Act.

<sup>105</sup> In *Australian Broadcasting Corporation and Psychologists Board of Australia* (Unreported, Queensland Information Commissioner, 3 January 2012) the Assistant Information Commissioner explained (at paragraph 20) that this is due to a number of factors including that: (i) public service officers are employed in the business of government which delivers services to the public and the public is generally entitled to know the identity of the service deliverers, advice givers and decision-makers and (ii) a reasonable public service officer would expect that information that is solely their routine personal work information would be made available to the public. Refer also to *Mewburn and Department of Natural Resources and Mines* [2016] QICmr 31 (19 August 2016).

- no provision of the JR Act, being the Act under which the applications considered in the Court Decisions were made, prohibits disclosure of information of the nature of the information in issue.

119. Taking this and the requirement to narrowly interpret the grounds on which access may be refused under section 47 of the RTI Act, I am satisfied that this factor favouring nondisclosure<sup>106</sup> does not apply to the Category One Documents.

#### ***Other factors favouring nondisclosure***

120. I have carefully considered all factors listed in schedule 4, parts 3 and 4 of the RTI Act, and can identify no other public interest considerations telling in favour of nondisclosure of the Category One Documents. Taking into consideration the nature of the Category One Documents, I cannot see how its disclosure could, for example, impede the protection of the environment.<sup>107</sup>

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

121. I have taken into account the general pro-disclosure bias of the RTI Act.<sup>108</sup> I also consider that there are a number of public interest factors favouring disclosure of the Category One Documents. I am satisfied that the government's accountability and transparency will be enhanced by informing the public about the decision-making process for the IA Application, the information obtained and considered in that process and the reasons for granting the indicative transfer approval (and its conditions). The accountability and transparency factors carry significant weight. Certain nondisclosure factors relating to the applicant's business and financial affairs information within the Category One Documents apply, however, I consider these factors carry only moderate weight. I also consider that the nondisclosure factors relating to the Department's ability to obtain confidential information and the protection of personal information and privacy deserve only low weight in respect of certain parts of the Category One Documents.

122. On balance, I find that the factors favouring disclosure of the Category One Documents outweigh the factors favouring nondisclosure. Accordingly, I find that disclosure of the Category One Documents would not, on balance, be contrary to the public interest.

#### ***Findings - Category Two Documents***

##### **Irrelevant factors**

123. I do not consider that any irrelevant factors arise in respect of the Category Two Documents and I have not taken any irrelevant factors into account.

##### **Factors favouring disclosure**

124. As noted in paragraph 73 above, the applicant's submissions do not focus to any great extent on the factors favouring disclosure.

125. I have carefully reviewed the Category Two Documents (being documents the applicant submitted in support of the IA Application). For the reasons set out in paragraphs 77-85 above in respect of the Category One Documents, I afford the same weight to the

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<sup>106</sup> Schedule 4, part 3, item 22 of the RTI Act.

<sup>107</sup> Schedule 4, part 3, item 11 of the RTI Act.

<sup>108</sup> Section 44 of the RTI Act.

accountability and transparency factors favouring disclosure<sup>109</sup> regarding the Category Two Documents.<sup>110</sup>

### **Factors favouring nondisclosure**

126. I refer to the applicant's submissions set out at paragraph 89 above regarding the public interest factors favouring nondisclosure which it considers are relevant to the Category One Documents. While the applicant submitted<sup>111</sup> that particular nondisclosure factors apply to most of the Category Two Documents, it has also generally submitted<sup>112</sup> that the public interest factors favouring nondisclosure of the Category One Documents are also relevant to the Category Two Documents.

### **Business affairs**

127. The applicant generally submitted<sup>113</sup> that the Category Two Documents contain confidential and sensitive information about its ongoing business affairs and their disclosure would prejudice the business and commercial affairs of Orion. In respect of the equity support deed, the applicant submitted<sup>114</sup> that this deed references Orion and its other Australian subsidiaries and its disclosure would therefore also disclose the commercial arrangements of those other entities—I understand this submission to mean that disclosure of the equity support deed would prejudice the business and commercial affairs of the applicant, Orion and the applicant's other subsidiaries. Beyond this, however, the applicant has not elaborated on what prejudice or adverse effect could reasonably be expected to occur as a result of disclosing the Category Two Documents.
128. As noted in paragraph 91 above, the RTI Act contains two public interest factors concerning business affairs which favour nondisclosure of information—the business affairs prejudice factor and the business affairs harm factor.
129. The map titled '*Blair Athol Mine Waterway Diversions 05/12/2013*',<sup>115</sup> on its face, is a document prepared by one of the prior holders of the Mining Lease. The applicant has not identified how this map is the applicant's business and financial affairs information or how its disclosure would cause any prejudice to, or have an adverse effect on, the applicant's business and financial affairs. Nor can I discern any impact to the applicant of disclosing a document prepared by the former owner of the mine. I therefore consider that the business affairs prejudice and harm factors<sup>116</sup> do not apply to this document.
130. In respect of the Category Two Documents other than the map referenced above, I am satisfied that they can be characterised as information about the business and financial affairs of the applicant and its subsidiaries.
131. In respect of the equity support deed in the Category Two Documents, I note that the applicant's publicly accessible ASX Announcement dated 3 February 2017, which attached a copy of the Department's letter dated 1 February 2017, contains the following statement:

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<sup>109</sup> As listed in paragraph 76.

<sup>110</sup> The applicant's submissions referred to in paragraph 86 did not relate to the Category Two Documents. For the sake of clarity, I consider that there is no evidence before me which indicates that the factor favouring disclosure in schedule 4, part 2, item 12 of the RTI Act is relevant to the Category Two Documents and, accordingly, I have not considered it in relation to the Category Two Documents.

<sup>111</sup> External review application.

<sup>112</sup> In submissions dated 18 December 2017 and 6 April 2018.

<sup>113</sup> External review application.

<sup>114</sup> Submissions dated 6 April 2018.

<sup>115</sup> Page 144 in File A.

<sup>116</sup> Schedule 4, part 3, item 2 and part 4, item 7(1)(c) of the RTI Act.

*TerraCom Limited (**TerraCom or the Company**) (ASX: TER) is pleased to announce that its wholly owned and operated subsidiary, Orion Mining Pty Limited, has received advice from the Queensland Government Department of Natural Resources and Mines that it is "...minded to grant an indicative approval subject to conditions ..." for the transfer of the mining lease for the Blair Athol Coal Mine, Central Queensland.*

*TerraCom has advised the Queensland Government that it can meet the conditions, which the TerraCom Board does not believe are onerous.*

132. Condition 3 of the Department's letter dated 1 February 2017 states:

*Orion to provide a copy of the 'parent company guarantee' given by TerraCom Limited (**TerraCom**) in favour of Orion indicating that TerraCom has guaranteed that it will provide Orion with any necessary financial assistance Orion may request in order to comply with their statutory obligations connected with ML 1804 including obligations under the Mineral Resources Act 1989, the Environmental Protection Act 1994, the Coal Mining Safety and Health Act 1999 and the Water Act 2000.*

133. I also note that the Department decided to provide access by inspection to the 18 pages which comprise the equity support deed.

134. The provision, and the general effect, of parent company guarantees in arrangements for commercial undertakings is not novel. Taking into consideration the applicant's public statements about the indicative transfer approval conditions and the context in which the equity support deed was provided to the Department, I find that there is no evidence before me which supports a reasonable expectation that providing the third party with an opportunity to inspect the equity support deed could cause any prejudice or adverse effect to the business and commercial affairs of the applicant, Orion or any of the applicant's other subsidiaries or prejudice the future supply of such information to the Department (in circumstances where such information is required in order to obtain a benefit from government). Accordingly, I do not consider that providing access by inspection to the equity support deed gives rise to the business affairs prejudice or harm factors.

135. For the reasons set out in paragraph 94 above, I am not satisfied that disclosure of the remaining Category Two Documents—being a draft Plan of Operations for the period November 2016 to December 2017 (**Plan of Operations**)<sup>117</sup> and a draft Amended Later Development Plan for the period 1 December 2016 to 1 December 2023 (**Development Plan**)<sup>118</sup> and the applicant's correspondence to the Department—could reasonably be expected to prejudice the future supply of information of this type to government.

136. The applicant submitted<sup>119</sup> that these remaining Category Two Documents were provided to the Department for '*information purposes only*'. Under that regulatory framework, in determining whether to grant indicative transfer approval, the Minister was required to consider any additional information accompanying the IA Application. The applicant's correspondence to the Department, which forms part of the remaining Category Two Documents, notes that the applicant was providing this information to support consideration of the IA Application within the regulatory framework. In these circumstances, I am unable to conclude that the remaining Category Two Documents were submitted for '*information purposes only*' or that the Department considered they were submitted on that basis.

137. In the mining and extractive industry in Queensland, plans of operations, development plans and rehabilitation strategies are not unique documents and they necessarily

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<sup>117</sup> Pages 31-94 in File A.

<sup>118</sup> Pages 95-132 in File A.

<sup>119</sup> External review application.



address the conditions of the mining lease they relate to. The applicant's ASX Announcements also extensively reference many of the matters that are addressed in the remaining Category Two Documents (such as its resource estimates, production forecasts and the activities being undertaken on the Mining Lease, including rehabilitation activities).

138. The applicant also submitted<sup>120</sup> that the Plan of Operations and the Development Plan were '*point in time preparations*' and not the final versions submitted by the applicant. However, the applicant has not enunciated what prejudice or adverse effect to its ongoing business affairs could be expected from the disclosure of draft documents of this nature.
139. The Plan of Operations states, on its title page, that:
- it is a '*Re-submission of an updated plan of operations to facilitate payment of Financial Assurance post-transfer of title on ML1804*'; and
  - it highlights changes the applicant made to the then current plan of operations (that is, the previous tenement holder's approved plan)—it is noted that these highlighted changes are not extensive and do not alter the previous document in any substantive way.
140. I also note that the Action Program section of the Plan of Operations<sup>121</sup> (which sets out how the environmental authority holder will comply with the conditions of the environmental authority and implement relevant control strategies during the term of the plan) contains only the applicant's inconsequential changes to the previous tenement holder's action program and specifically notes that '*Updated Terracom and Orion Mining documentation will be used in achieving and complying with the Action Plan*'.
141. A care and maintenance plan was in place for the Mining Lease at the time the Development Plan was submitted in support of the IA Application. The Development Plan identified its principal objectives, which include providing the Department with an understanding of the nature and extent of the development and production proposed by the applicant to allow the Department to assess the proposed development and whether it was appropriate. I note that certain information from the applicant's two ASX Announcements dated 7 November 2017 appears in the Development Plan, including information from a JORC Reserve and Resource Statement,<sup>122</sup> reserve estimates, seam maps and a summary of the applicant's proposed mining operation.
142. In these circumstances, there is nothing before me to demonstrate that disclosure of the Plan of Operations and Development Plan could reasonably be expected to provide any commercial advantage to the applicant's competitors or a corresponding disadvantage to the applicant and Orion.
143. I acknowledge that disclosure of the Plan of Operations and Development Plan may enable the public to identify changes that occurred between the applicant's submitted drafts and final versions, as well as the changes the applicant proposed to make to the previous tenement holder's plans. However, taking into consideration the extensive information which is publicly available about the applicant's reserve estimates and its planned and actual operations on the Mining Lease, there is nothing before me to indicate that any prejudice or adverse effect on the applicant's business and financial affairs could flow from this potential comparison process.

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<sup>120</sup> External review application.

<sup>121</sup> Pages 47-94 in File A.

<sup>122</sup> This ASX Announcement is referenced in the Development Plan.

144. I have taken these matters and the publicly accessible information about the applicant's business and financial affairs (such as its financial arrangements and its planned, and actual, activities on the Mining Lease) into account. I accept that the remaining Category Two Documents relate to the business and commercial affairs of the applicant and Orion. However, given the nature of these documents and the context in which they were provided, I consider that any prejudice or adverse effect that could reasonably be expected to flow from their disclosure would be relatively limited and, accordingly, I afford moderate weight to the business affairs prejudice and harm factors.<sup>123</sup>

### ***Prejudice intergovernmental relations***

145. As noted in paragraph 109 above, two public interest factors favouring nondisclosure of information are recognised in the RTI Act concerning intergovernmental relations—firstly, where disclosure could reasonably be expected to prejudice intergovernmental relations (**prejudice factor**)<sup>124</sup> and secondly, where disclosure could reasonably be expected to cause a public interest harm because it could cause damage to relations between Queensland and another government or divulge confidential information communicated by or for another government (**harm factor**).<sup>125</sup>
146. In the external review application, the applicant submitted that the prejudice factor concerning intergovernmental relations<sup>126</sup> is relevant to most of the Category Two Documents.
147. For the reasons set out in paragraphs 111-112 in respect of the Category One Documents, I find that the prejudice and harm factors relating to intergovernmental relations which favour nondisclosure do not apply to the Category Two Documents.

### ***Confidential information***

148. The applicant submitted<sup>127</sup> that this factor is relevant to most of the Category Two Documents.
149. The reasons set out in paragraphs 106-108 relate to the components of the Category One Documents which reference or comment on the information provided by the applicant in support of the IA Application. Given the Category Two Documents comprise information the applicant submitted in support of the IA Application, the reasoning in paragraphs 106-108 also applies to the Category Two Documents. Accordingly, I consider that it is unlikely that disclosure of the Category Two Documents, which were provided to the Department for consideration under the regulatory framework, would have any impact on the Department's ability to obtain similar information in the future. I afford low weight to this factor<sup>128</sup> favouring nondisclosure of the Category Two Documents.

### ***Deliberative process***

150. The RTI Act contains, as noted in paragraph 99 above, two public interest factors concerning deliberative process which favour nondisclosure of information—the deliberative process prejudice factor and the deliberative process harm factor.

<sup>123</sup> Schedule 4, part 3, item 2 and part 4, item 7(1)(c) of the RTI Act.

<sup>124</sup> Schedule 4, part 2, item 14 of the RTI Act.

<sup>125</sup> Schedule 4, part 4, section 1 of the RTI Act.

<sup>126</sup> Schedule 4, part 3, item 14 of the RTI Act.

<sup>127</sup> External review applicant.

<sup>128</sup> Schedule 4, part 3, item 16 of the RTI Act.

151. As noted in paragraph 102 above:

- indicative approval for the transfer was issued and the Mining Lease has been transferred to Orion; and
- the deliberative process in respect of the IA Application (and more generally the transfer of the Mining Lease to Orion) has concluded and there is no outstanding government decision to be made.

152. I am therefore satisfied that no reasonable expectation of prejudice to any deliberative process arises from disclosure of the Category Two Documents. For these reasons, I do not consider that the deliberative process prejudice factor<sup>129</sup> applies to the Category Two Documents.

153. The Category Two Documents comprise information the applicant provided in support of the IA Application. As noted in paragraph 62 above, some of the Category Two Documents were provided by the applicant in response to a specific Department request to enable consideration of the IA Application to be progressed. I am therefore satisfied that they contain opinions, advice and recommendations that were obtained, prepared or recorded and a consultation that took place in the course of the deliberative processes associated with the IA Application. However, given the issuing of the indicative transfer approval finalised those deliberative processes, I consider any harm to deliberative process that could reasonably be expected to occur from disclosure of the Category Two Documents would be minimal. Accordingly, I afford the deliberative process harm factor low weight.<sup>130</sup>

#### ***Other factors favouring nondisclosure***

154. For the reasons set out in paragraphs 98, 111-112, 114 and 118-119 in respect of the Category One Documents, I find that:

- the nondisclosure factors concerning destroying or diminishing the commercial value of information and impeding procedural fairness and the administration of justice do not apply to the Category Two Documents<sup>131</sup>
- the nondisclosure factors relating to prejudice to the economy of the State and trade secrets do not apply to the Category Two Documents;<sup>132</sup> and
- the Court Decisions do not give rise to the factor favouring nondisclosure where disclosure of information is prohibited by an Act in relation to the Category Two Documents.<sup>133</sup>

155. I have carefully considered all factors listed in schedule 4, parts 3 and 4 of the RTI Act, and can identify no other public interest considerations telling in favour of nondisclosure of the Category Two Documents.

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

156. For the reasons outlined above, I consider that disclosure of the Category Two Documents will enhance the government's accountability and transparency by informing the public about the decision-making process concerning the IA Application and the documents required to be considered in that decision-making process. I have afforded

<sup>129</sup> Schedule 4, part 3, item 20 of the RTI Act.

<sup>130</sup> Schedule 4, part 4, section 4 of the RTI Act.

<sup>131</sup> Schedule 4, part 3, items 8 and 9 and schedule 4, part 4, sections 7(1)(a) and (b) of the RTI Act.

<sup>132</sup> Schedule 4, part 3, items 12 and 15 and schedule 4, part 4, sections 7(1)(a) and (b) of the RTI Act.

<sup>133</sup> Schedule 4, part 3, item 22 of the RTI Act.

these accountability and transparency factors significant weight. Certain factors favouring nondisclosure apply as the Category Two Documents relate to the business and financial affairs of the applicant and its subsidiaries, however, I have afforded these factors only moderate weight. I also consider only low weight should be afforded to the nondisclosure factor relating to the Department's ability to obtain confidential information in the future.

157. I find that, on balance, the factors favouring disclosure outweigh the factors favouring nondisclosure of the Category Two Documents and, therefore, disclosing those documents would not, on balance, be contrary to the public interest.

## **Conclusion**

158. For the reasons outlined above, I find that the information in issue should be disclosed to the third party as it is not exempt information and its disclosure would not, on balance, be contrary to the public interest. I am satisfied that the applicant has not discharged the onus, imposed by section 87(2) of the RTI Act, of establishing that the information in issue should not be released to the third party or that the Information Commissioner should give a decision adverse to the third party.

## **DECISION**

159. I affirm the Department's internal review decision to grant access to the information in issue as the information in issue is neither exempt information under the RTI Act and nor would its disclosure, on balance, be contrary to the public interest.
160. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**Assistant Information Commissioner Corby**

**Date: 2 July 2018**

## APPENDIX

### Significant procedural steps

Date	Event
10 August 2017	OIC received the external review application.
18 August 2017	OIC notified the applicant and the Department that it had accepted the external review application and asked the Department to provide information.
23 August 2017	OIC received requested information from the Department.
30 August 2017	The third party confirmed to OIC that they continued to seek access to the documents in issue.
30 October 2017	OIC spoke to the applicant about identifying what information the applicant's disclosure objections related to.
23 November 2017	OIC asked the Department to send to the applicant a copy of the documents in issue, marked up to reflect OIC's understanding of the information which was the subject of the applicant's disclosure objections.  OIC asked the applicant to confirm if the marked up documents correctly identified the information which the applicant considered should not be disclosed and that the applicant did not object to disclosure of the remaining information.
18 December 2017	OIC received the applicant's submissions which clarified that it objected to disclosure of all information in the documents in issue and argued that, to ensure the outcomes of proceedings before the Supreme Court were not impeded, the documents in issue should not be disclosed.
8 February 2018	The third party confirmed that, notwithstanding the proceedings before the Supreme Court, they continued to seek access to the documents in issue. OIC requested further information from the Department.
12 February 2018	OIC spoke with the applicant and conveyed a preliminary view that there was no basis under the RTI Act to refuse disclosure of certain documents in issue which were in the public domain.
22 February 2018	The Court Decisions were published by the Supreme Court.
27 February 2018	OIC wrote to the applicant, confirming the preliminary view about disclosure of documents in the public domain and invited the applicant to provide submissions if it did not accept the preliminary view.
1 March 2018	OIC received requested information from the Department.
21 March 2018	OIC confirmed to the applicant that it was taken to have accepted the preliminary view about disclosure of documents in the public domain and those documents would be released to the third party. OIC conveyed a preliminary view to the applicant about the remaining documents in issue and invited the applicant to provide submissions if it did not accept that preliminary view.  OIC asked the Department to release certain documents to the third party in accordance with OIC's preliminary view about disclosure of documents in the public domain.  OIC spoke to the third party and confirmed that the Department was releasing some documents to the third party in accordance with OIC's preliminary view about disclosure of documents in the public domain. The third party confirmed that it did not seek access to signatures within the remaining documents in issue.

<b>Date</b>	<b>Event</b>
6 April 2018	OIC received the applicant's submissions.
18 April 2018	OIC acknowledged the applicant's submissions and confirmed that a formal decision would be issued to finalise the external review.
2 May 2018	OIC spoke with the applicant and confirmed that its disclosure objection related to all information in the remaining documents in issue. OIC spoke to the third party and confirmed that a formal decision would be issued to finalise the external review. The third party confirmed that it wished to participate in the external review.
11 May 2018	OIC confirmed to the third party that it was a participant in the external review and did not seek access to signatures in the remaining documents in issue.