Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***Palmer and Townsville City Council*** **[2019] QICmr 43 (3 October 2019)**
Application Number:	**314149**
Applicant:	**Palmer**
Respondent:	**Townsville City Council**
Decision Date:	**3 October 2019**
Catchwords:	**ADMINISTRATIVE LAW - MERITS REVIEW - time at which material facts are to be considered** **ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - BREACH OF CONFIDENCE - agreement between agency and another entity - parts of communications between agency and others - whether disclosure of information would found an action for breach of confidence - whether exempt information to which access may be refused - sections 47(3)(a) and 48 and schedule 3, section 8 of the *Right to Information Act 2009* (Qld)** **ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - whether disclosure of information would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)**

REASONS FOR DECISION

Summary

1. The applicant applied[1] to Townsville City Council (**Council**) under the *Right to Information Act 2009* (**RTI Act**) for access to the '*Agreement executed by the Mayor of the City of Townsville…with Imperium3 on or about 3 June 2018*', together with communications between the Mayor and/or staff, and representatives of various entities.

2. Council located a seven-page Memorandum of Understanding (**MoU**), and six pages of communications (**Correspondence**). By decision dated 14 August 2018, Council refused access to all of this information on the grounds it comprised exempt information, and information the disclosure of which would, on balance, be contrary to the public interest.

[1] Access application dated 5 July 2018.

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of Council's decision. Council agreed to release parts of the Correspondence to the applicant during the review, while the applicant did not pursue access to certain other parts of both the Correspondence and the MoU.

4. For the reasons explained below, I set aside Council's decision as it relates to the information remaining in issue. In substitution, I find that those parts of the MoU and Correspondence remaining in issue are not exempt information under the RTI Act, nor would their disclosure, on balance, be contrary to the public interest.

Background

5. The MoU and Correspondence relate to a proposal by a consortium headed by Imperium3 Pty Ltd (**Imperium3**) to develop and operate a battery manufacturing plant in Townsville.

6. By letter dated 20 March 2019, Council advised me that it wished to conduct third party consultation with Imperium3, in an attempt to informally resolve this review. I agreed to that suggestion, and Council wrote[2] to Imperium3 to this effect. Imperium3 did not reply to that correspondence.[3]

7. I then considered it appropriate to consult with Imperium3 directly. We twice wrote to Imperium3, inviting that company to raise any objections it may wish to make to the disclosure of the MoU and Correspondence, and to apply to participate in the review.[4]

8. The first of these letters, dated 21 May 2019, also stated that if we received no reply to our correspondence, we would proceed on the basis that Imperium3 did not object to disclosure.

9. No reply was received to that letter. However, Council subsequently advised[5] that it had separately communicated with Imperium3 in relation to the review,[6] and that Imperium3 had informed Council that it did object to disclosure.

10. In view of this advice, I once more wrote to Imperium3 by letter dated 20 June 2019, again offering it the opportunity to make submissions and apply to participate in the review. This letter advised Imperium3 that if no reply was received, I would proceed with the review on the information before me, and not attempt any further consultation with Imperium3.

11. Imperium3 did not reply to my 20 June 2019 letter.

12. Significant procedural steps relating to the external review are as otherwise set out in the Appendix.

Reviewable decision

13. The decision under review is Council's decision dated 14 August 2018.

[2] Letter dated 23 April 2019, supplied to me by Council on 17 May 2019.
[3] Council submissions dated 9 May 2019 (received 10 May 2019), paragraph 7.1.
[4] Section 89(2) of the RTI Act.
[5] Letter and submissions dated 13 June 2019. Similar advice was contained in letters from Council dated 18 and 20 June 2019.
[6] Ie, further to its 23 April 2019 letter, to which it had received no reply.

Evidence considered

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

Information in issue

15. The information in issue comprises:

- the MoU, excluding signatures appearing on the final page;[7] and
- segments of information appearing on the six pages of Correspondence (***other than*** non-Council email addresses and mobile telephone numbers, and information released during the review).[8]

Issues for determination

16. The issues for determination are whether the information in issue comprises:

- exempt information,[9] as information the disclosure of which would found an action for breach of confidence under schedule 3, section 8(1) of the RTI Act; and/or
- information the disclosure of which would, on balance, be contrary to the public interest.[10]

Relevant law

17. The primary object of the RTI Act is to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access.[11] The Act is to be applied and interpreted to further this primary object.[12]

18. Section 23 of the RTI Act gives effect to the Act's primary object, by conferring a right to be given access to documents. This right is subject to the RTI Act,[13] including grounds on which access may be refused.[14] These grounds relevantly allow an agency to refuse access to information to the extent it comprises exempt information,[15] and/or information disclosure of which would, on balance, be contrary to the public interest.[16] The grounds are to be interpreted narrowly,[17] and the RTI Act is to be administered with a pro-disclosure bias.[18]

19. Additionally, in a review of this kind, the agency '*who made the decision under review has the onus of establishing that the decision was justified or that the information commissioner should give a decision adverse to the applicant*'.[19]

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[7] See my letter to the applicant's solicitors dated 2 September 2019, conveying my preliminary view that access to these signatures may be refused and advising that if I did not hear from the applicant by 11 September 2019, I would proceed on the basis he accepted this preliminary view and these signatures would not remain in issue. No reply was received.
[8] See my letters to the applicant's representatives dated 23 July 2019 and 20 August 2019, the first in similar terms to the letter described in footnote 7, the second confirming information remaining in issue. Copies of both the MoU and Communications, marked so as to depict information not in issue, will accompany the copy of these reasons to be forwarded to Council.
[9] Section 47(3)(a) of the RTI Act.
[10] Section 47(3)(b) of the RTI Act.
[11] Section 3(1) of the RTI Act.
[12] Section 3(2) of the RTI Act.
[13] Section 23(1) of the RTI Act.
[14] Section 47 of the RTI Act.
[15] Section 47(3)(a) and 48 of the RTI Act.
[16] Section 47(3)(b) and 49 of the RTI Act.
[17] Section 47(2)(a) of the RTI Act.
[18] Section 44 of the RTI Act.
[19] Section 87(1) of the RTI Act.

20. Council therefore bears the onus in this review.

21. It is also convenient here to set out a general statement of principle applicable to the type of merits review conducted by the Information Commission when externally reviewing an agency decision under the RTI Act. This is the principle that the Information Commissioner must decide cases according to the material facts and circumstances which apply *at the time* the Information Commissioner comes to make the external review decision.

22. I have stated this principle at the outset, as the converse proposition underpins many of Council's submissions. In its 5 August 2019 submissions, for example, it contends that:

> *From a factual perspective, we consider that the Decision Notice issue date of 14 August 2018 is the latest time that the assessment of whether an action for breach of confidence would have founded could be made under the exemption in Schedule 3, section 8(1) of the RTI Act, and correspondingly, under this external review (including whether material is or may already be in the public domain at the relevant time under …the MOU).*
>
> *Under an external review process, the decision that is subject to review is an original decision or an internal review decision. While an external review may determine that the relevant decision is varied, amended or substituted, the OIC is still required to review a decision as made and in this sense is subject to the same temporal considerations that applied to the relevant decision. This means that, for example, in reviewing whether an original decision-maker's decision on the application of Schedule 3, section 8(1) of the RTI Act, the OIC is reviewing the assessment that was made by the original decision-maker in considering whether the disclosure of the relevant information in issue would found, in hypothetical terms, an action for a breach of confidence if released. While additional information arising since the making of an original decision can be taken into account in the external review process, the matter that is subject to the review is the question of whether such an action could be instituted at the time the decision was made. To take an alternative approach and assess the capacity to found an action for a breach of confidence at the time the external review decision was made would be contrary to the notion of conducting a "review of a decision".*

23. Elsewhere in those submissions, Council submits:

> *…we have been unable to identify any provision in the RTI legislation and/or case law decisions considering the relevant provisions that suggests…any public information released after the date of the* [decision under review] *can strictly be taken into account in assessing whether an action for breach of confidence would found in this matter.*

24. In a letter dated 20 August 2019, I set out the position on external review as stated in paragraph 21 above, referring Council to Information Commissioner Albietz's comments in *Beanland and Department of Justice and Attorney-General*,[20] where he said:[21]

> *… the relevant legal principles in this regard are, in my opinion, clear. They are stated at paragraph 35 (and re-stated at paragraph 58) of my reasons for decision in* Re Woodyatt. ***A tribunal which, like the Information Commissioner, is empowered to conduct a full review of the merits of an administrative decision under challenge, for the purpose of determining whether an applicant has a present entitlement to some right, privilege or benefit, ordinarily (unless there is a clear indication to the contrary in the relevant statute) has regard to the relevant facts and circumstances as they stand at the date of its decision****. As I said in* Re Woodyatt *at paragraph 58: A significant change in material facts or circumstances may mean that a requested document which was not exempt at the time of lodgement of an FOI access application, has become exempt by the time of making a decision in response to the application (and vice versa), but that is simply a risk which the applicant must bear given the nature of many of the exemption*

[20] (1995) 3 QAR 26.
[21] At [58]. Emphasis added.

> *provisions.* ***I must therefore consider whether the documents in issue are exempt on the basis of the material facts as they now stand****, rather than as at the time the applicants lodged their FOI access applications* [or, by extension, an agency makes its decision on an access application]*.*

25. Paragraph 35 of *Woodyatt*[22] as referred to in the above passage provides, as far as is relevant:[23]

> *35. As to the law to be applied by a tribunal which, like the Commonwealth Administrative Appeals Tribunal (the Commonwealth AAT) or the Queensland Information Commissioner, is empowered to conduct a full review of the merits of an administrative decision under challenge (see, respectively, s.43(1) of the* Administrative Appeals Tribunal Act 1975 *Cth and s.88(1) of the FOI Act), the respondent has referred me to the passage (well known to practitioners in this field) from* Re Costello and Secretary, Department of Transport *(1979) 2 ALD 934, at pp.943-4, which has been approved in many subsequent cases (see, for example,* Commonwealth of Australia v Esber *[1991] FCA 223; (1991) 101 ALR 35, an appeal from the Commonwealth AAT to a Full Court of the Federal Court of Australia, per Davies J at p.37). From that passage a number of propositions can be distilled.* ***A tribunal, empowered to conduct a full review of the merits of an administrative decision under challenge, ordinarily has regard to the relevant facts and circumstances as they stand at the date of its decision****, and ordinarily applies the law in force at the date of its decision. …*

26. I did not expect this to be an issue of controversy, as the relevant principle is well-settled and has been recognised and applied in Queensland in an FOI/RTI context for more than two decades. Accordingly, I did not invite Council to make submissions in reply to my letter explaining the principle. It nevertheless did so.

27. In a letter dated 27 August 2019, Council maintained its view that, in an external review under the RTI Act, I am constrained to have regard to facts applying as at the time Council made the decision under review.

28. Council's unsolicited submissions on this point – which I feel obliged to address – refer to various High Court and Administrative Appeal Tribunal cases.[24] Generally speaking, these cases note – as the Information Commissioner did in *Beanland* – that a given statute may impose temporal limits on the scope of merits review in a particular case.

29. Council argues that the RTI Act imposes such limits:

> *The RTI Act indicates that the rights of an agency decision-maker to conduct an 'internal review' are not temporally limited by information or matters 'as they stood' at the time the original decision-maker made their decision as section 80(2)* [of the] *RTI Act states that:* On an internal review of a decision, the reviewer must make a new decision as if the reviewable decision had not been made.
>
> *In Council's view, the above-mentioned provision would permit the agency reviewer to consider information and matters completely afresh and that arises or becomes known after the date of the original decision.*
>
> *However, no such wording is apparent in the provisions of Pt 9 of the RTI Act concerning external review.*

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[22] *Woodyatt and Minister for Corrective Services* (1995) 2 QAR 383. Emphasis added.
[23] The current review involves no question of changes to legislation, accrued rights, or the application of section 20 of the *Acts Interpretation Act 1954* (Qld), to which the balance of this extracted paragraph was directed.
[24] *Shi v Migration Agents Registration Authority* (2008) HCA 31 (***Shi***); *Baum and Secretary, Department of Education, Employment and Workplace Relations* [2008] AATA 1066 (28 November 2008); *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16 (***Frugtniet***).

> *The rights granted to applicants under section 87 of the RTI Act on 'external review' are to 'have the decision reviewed' by the OIC in circumstances where the onus is placed on the agency of establishing that the decision was justified'. We take this to mean the decision 'was justified' by reference to relevant facts and circumstances at the time the decision under review was made.*
>
> *We also note that whilst section 105 of the RTI Act allows the Information Commissioner to decide any matter in relation to the access application* 'that could, under this Act, have been decided by an agency or Minister'*, it does not provide that the Information Commissioner is to proceed on the basis that the reviewable decision 'has not been made'.*
>
> *Similarly, the Information Commissioner when examining the operation of the 'commercial affairs' exemption on external review in* Re Cannon and Australian Egg Farms *(1994) 1QAR 491 [56] said:*
>
> "The information in issue must have commercial value to an agency or another person at the time that an FOI decision-maker comes to apply [the exemption] ..." *[emphasis added]*
>
> *The reference in the Schedule 3 exemption to 'would found an action for breach of confidence' also appears indicative of placing a temporal limitation on the information and evidence available to be considered by the OIC upon external review.*
>
> *…*
>
> ***Concluding Remarks***
>
> *Based on the above case law analysis, and considering the language in the RTI Act itself, we consider that the nature of the decision to be made by the OIC in this particular matter does indicate that the OIC's attention is to be confined to the state of evidence as at a particular time when considering an action for breach of confidence 'would found', in particular.*

30. I do not accept Council's arguments. I see no reason to question Information Commissioner Albietz's approach as set out in *Woodyatt* and *Beanland*, nor to depart from that approach in conducting an external review under the RTI Act.

31. Further, I see nothing in the authorities cited by Council in its submissions on this issue that is inconsistent with my proceeding in this manner. None precludes such an approach; in fact, they appear to expressly endorse its legitimacy, subject only to possible statutory limitations that may exist from case to case.

32. Council referred me, for example, to paragraph [99] of Hayne and Heydon JJ's judgment in *Shi v Migration Agents Registration Authority*,[25] a case concerning interpretation of, relevantly, provisions of the *Administrative Appeals Tribunal Act 1975* (**AAT Act**) analogous to sections 105(1) and 110(1) of the RTI Act. It is worth setting out not just that paragraph, but several surrounding paragraphs (footnotes omitted):

> *The Tribunal's task*
>
> *96. In reviewing MARA's decision to cancel the appellant's registration, the Tribunal was empowered (by s 43(1) of the AAT Act) to exercise all the powers and discretions conferred by the* Migration Act *on MARA. The questions for the Tribunal in reviewing the cancellation decision were first, whether the Tribunal was satisfied that either of the s 303(1) grounds said to be engaged in this case was made out, and secondly, whether the Tribunal should exercise the powers given by s 303(1) to cancel or suspend the appellant's registration or to caution him. That is, the first questions for the Tribunal were whether it was satisfied that the appellant "is not a person of integrity or is*

[25] Citation above, footnote 24.

otherwise not a fit and proper person to give immigration assistance" and whether it was satisfied that the appellant had not complied with the Code of Conduct.

97. MARA's contention, in this Court and in the courts below, that the question for the Tribunal was whether the correct or preferable decision when MARA made its decision was to cancel the appellant's registration, should be rejected. It finds no footing in the relevant provisions. To frame the relevant question in the manner urged by MARA would treat the Tribunal's task as confined to the correction of demonstrated error in administrative decision-making in a manner analogous to a form of strict appeal in judicial proceedings. But that is not the Tribunal's task.

98. It has long been established that:

> "The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one *on the material before him*. The question for the determination of the Tribunal is whether that decision was the correct or preferable one *on the material before the Tribunal.*" *(emphasis added)*

And MARA accepted in argument in this Court that in conducting its review the Tribunal was not limited to the record that was before MARA. It submitted, however, that the Tribunal had to consider the circumstances "as appear from the record before it as they existed at the time of the decision under review".

99. Once it is accepted that the Tribunal is not confined to the record before the primary decision-maker, it follows that, unless there is some statutory basis for confining that further material to such as would bear upon circumstances as they existed at the time of the initial decision, the material before the Tribunal will include information about conduct and events that occurred after the decision under review. If there is any such statutory limitation, it would be found in the legislation which empowered the primary decision-maker to act; there is nothing in the AAT Act which would provide such a limitation.

100. The AAT Act provides for the review of decisions by a body, the Tribunal, that is given all of the powers and discretions that are conferred on the original decision-maker. As Brennan J rightly pointed out in an early decision of the Tribunal, not all of the powers that the Tribunal may exercise draw upon the grant of powers and discretions to the primary decision-maker:

> "A decision by the Tribunal pursuant to s 43(1)(a) to affirm the original decision leaves the original decision intact, and that is the only decision which takes effect under the enactment: the original powers are not drawn upon by the Tribunal's order. Equally, a decision to set aside the decision under review and remit the matter for reconsideration pursuant to s 43(1)(c)(ii) requires the original repository of the powers and discretions to exercise them afresh: they are not exercised by the Tribunal. Section 43(1) grants the original powers and discretions to the Tribunal, but it does not require the Tribunal to exercise them unless the Tribunal is making a fresh order the effectiveness of which depends upon their exercise."

But subject to that qualification, the Tribunal's task is "to do over again" what the original decision-maker did.

101. Nothing in the provisions of the Migration Act fixed a particular time as the point at which a migration agent's fitness to provide immigration assistance was to be assessed. Unlike some legislation providing for pension entitlements, in which the critical statutory question is whether a criterion was met or not met at a particular date, such as the date of cancellation of entitlements, the provisions of s 303 of the Migration Act contained no temporal element. It follows that when the Tribunal reviews a decision made under s 303, the question which the Tribunal must consider (is the Tribunal satisfied that the person concerned is not a fit and proper person to give immigration assistance?) is a

> *question which invites attention to the state of affairs as they exist at the time the Tribunal makes its decision. MARA's argument to the contrary should have been rejected in the courts below.*

33. The RTI Act confers powers on the Information Commissioner in a manner equivalent to the AAT Act: section 105(1) of the RTI Act, like section 43(1) of the AAT Act, allows the Information Commissioner to decide any matter in relation to an access application that could, under the RTI Act, have been decided by an agency. Section 110(1) of the RTI Act, meanwhile, obliges the Information Commissioner to make a written decision either affirming, varying, or setting aside an agency decision, in the same way section 43(1) of the AAT Act obliges the AAT.[26]

34. Absent some clear indication to the contrary – a '*statutory constraint*', to quote the words of Hayne and Heydon JJ – it seems to me that the general position in an external review under the RTI Act will therefore be as it is under the AAT Act: that is, the position clearly set out in *Woodyatt* and *Beanland*.[27] Or, as Kirby J stated it in *Shi*:[28]

> ***When making a decision, administrative decision-makers are generally obliged to have regard to the best and most current information available.*** *This rule of practice is no more than a feature of good public administration. When, therefore, the Tribunal elects to make "a decision in substitution for the decision so set aside", as the Act permits, it would be surprising in the extreme if the substituted decision did not have to conform to such a standard.*

35. The RTI Act contains no '*statutory constraints*' of the kind mentioned in *Shi*; none of the matters raised by Council can, in my view, fairly be read as comprising a '*clear indication*' that there should be any variation from the usual approach set out in *Woodyatt* and *Beanland*. The relevant portion of section 87 of the RTI Act is set out in full at paragraph 19 above – it does not begin and end in the manner quoted by Council, but by obliging an agency in Council's position to establish that the Information Commissioner should give a decision adverse to an applicant, envisages the taking into account of matters as at the date of any decision by the Information Commissioner. Commissioner Albietz saw no reason to construe the materially similar FOI predecessor provision in the manner contended by Council.[29] Nor do I in relation to section 87 of the RTI Act.

36. Similarly, I do not accept that I should read the differences between sections 80(2) and 105 of the RTI Act as giving rise to a '*clear indication*' that external review should be temporally confined: section 105 of the RTI Act, identical to the FOI provision it replaced and which was before the Information Commissioner in *Woodyatt* and *Beanland*,[30] accommodates the default approach explained by Information Commissioner in each of those cases. If these decisions are, as Council appears to contend, insufficient to demonstrate this proposition, then it should be clear from *Shi*, which, as noted, establishes that the Commonwealth analogue of section 105 of the RTI Act requires consideration of facts and circumstances as they apply at the time a reviewing body comes to make its decision. There was nothing in equivalent provisions of the AAT Act that Hayne and Heydon JJ could identify as imposing such a limitation. Nor is there anything that I can identify in the RTI Act.

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[26] Unlike section 110(1) of the RTI Act, section 43(1) of the AAT Act also confers a power on the AAT to remit matters for reconsideration; section 110(1) of the RTI Act does not contain this power, but I cannot see that this divergence is of any consequence for the purposes of determining the time at which material facts are to be taken into account.
[27] Similarly, the High Court's recent decision in *Frugtniet* seems to take Council's case nowhere: as is expressly stated in the very passage cited by Council, merits review is, absent exceptional circumstances, to be conducted '*as if the original decision-maker were deciding the matter at the time that it is before the AAT*': [15].
[28] [41].
[29] Section 81 of the FOI Act.
[30] The FOI Act was reprinted in the period between these decisions (Reprint 4 to Reprint 5); the relevant provision, section 88(1), was unaltered.

37. References to the language of particular exemption provisions, meanwhile, seems to be neither here nor there: schedule 3, section 8(1) of the RTI Act, cited by Council, is worded in the present tense.[31]

38. Equally, in referring to an '*FOI decision maker*', the Information Commissioner was, in the passage from *Cannon and Australian Quality Egg Farms*[32] cited by Council, doing no more than referring to whoever was charged with considering given circumstances at a particular point in time – an agency decision maker, an internal reviewer, or the Information Commissioner on external review. And even if he was not, those comments, made in May 1994, would clearly have been displaced by the unambiguous February 1995 statement of applicable principle in *Woodyatt*, followed and affirmed in *Beanland* later that same year.[33]

39. The general approach stated in each of those latter decisions was formulated in a statutory context substantially similar, if not identical, to that applying under the RTI Act. That approach is conformable with the purpose and object of the RTI Act,[34] and consistent with the authorities cited by Council.[35]

40. Given this, I am, as noted, satisfied that the *Woodyatt* approach should be maintained for the purposes of merits review conducted under Part 9 of the RTI Act; there is, in short, no '*statutory basis for confining*' an external review conducted under Part 9 in the manner contended by Council.

41. I will now address the substantive issues in this review.

Findings

Breach of Confidence Exemption

42. Council, as noted, decided that the information in issue comprised exempt information under schedule 3, section 8(1) of the RTI Act. That provision provides that information is exempt information if its disclosure would found an action for a breach of confidence (**Breach of Confidence Exemption**).

43. The test for exemption under the Breach of Confidence Exemption must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence said to be owed to that plaintiff by an agency such as Council.[36]

44. Council contends that, under the MoU, it is contractually obliged to Imperium3 to keep the information in issue confidential, and that disclosure would therefore breach that obligation, founding an action for breach of confidence. It relies on an equitable obligation of confidence in the alternative.

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[31] And in his lead decision on its interpretation and application, *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (***B and BNRHA***), Commissioner Albietz appears to have envisaged that whether the exemption is established is a matter to be determined at time the particular decision falls to be made – whether by '*the primary decision maker, internal reviewer, or external review authority, as the case may be*.' [85]. See also [71(i)]. The provision analysed in *B and BNRHA*, section 46(1)(a) of the repealed FOI Act, was, as far as is relevant, identical to schedule 3, section (8)(1) of the RTI Act.
[32] (1994) 1 QAR 491 (***Cannon***).
[33] November 1995.
[34] *Shi*, at [51] (Kirby J).
[35] In this regard, see *44ZNEO and Department of Health* (Unreported, Queensland Information Commissioner, 31 March 2010), the Information Commissioner citing *Shi* in support of the position that *'the OIC, as a body empowered to conduct a full review of the merits of an administrative decision under challenge, is entitled to consider the facts as they are at the time of its decision.*': [75].
[36] *B and BNRHA*, at [44].

45. There is no question that the Breach of Confidence Exemption will accommodate actions for breach of confidence founded on either of the above bases – equity, or contract.[37] I must therefore address the entirety of Council's claims in this regard.

46. In doing so, it would be preferable to set out the clause of the MoU on which Council bases its contractual claim – the **Confidentiality Clause** – in full in these reasons. That clause is, however, itself information claimed to be exempt and/or contrary to the public interest to disclose, and I am unable to do so.[38] I have therefore discussed it and the nature of the MoU in general terms, in a manner that avoids any direct disclosure but nevertheless conveys their thrust and effect.

Contractual obligation of confidence

47. Concerning contractual obligations of confidence, in *B and BNRHA* Information Commissioner Albietz said: [39]

> *In the context of s.46(1)(a) the word "confidence" must be taken to be used in its technical, legal sense, thus:*
>
> > *"*A confidence is formed whenever one party ('the confider') imparts to another ('the confidant') private or secret matters on the express or implied understanding that the communication is for a restricted purpose*."* (F Gurry "Breach of Confidence" in P Finn (Ed.) Essays in Equity; Law Book Company, 1985, p.111.)
>
> *My references to a cause of action for breach of a contractual obligation of confidence must be understood in this sense. A contractual term requiring that certain information be kept secret will not necessarily equate to a contractual obligation of confidence: an issue may arise as to whether an action for breach of the contractual term would satisfy the description of an "action for breach of confidence" (so as to fall within the scope of s.46(1)(a) of the FOI Act). An express contractual obligation of confidence ordinarily arises in circumstances where the parties to a disclosure of confidential information wish to define clearly their respective rights and obligations with respect to the use of the confidential information, thereby enabling the parties to anticipate their obligations with certainty. A mere promise to keep certain information secret, unsupported by consideration, is incapable of amounting to a contractual obligation of confidence, and its effectiveness as a binding obligation would depend on the application of the equitable principles discussed in more detail below.*

48. I recognise the express language used in the Confidentiality Clause as regards the imposition of obligations. It is not, however, clear that there has been any exchange of consideration moving in support of this clause. In the absence of same, the Confidentiality Clause appears to be a '*mere promise incapable of amounting to a contractual obligation of confidence*'.

49. I raised this concern with Council during the review.[40] Council submitted in reply:[41]

> *In relation to the OIC's queries as to whether consideration has passed, TCC wish to inform the OIC that at a practical level, each of the parties to the MOU have devoted considerable time, money and effort to progress the matters outlined in the MOU since its signing, and continue to do so as evidenced in the various media reports and ASX releases that were issued at or subsequent to the signing of the MOU. For example, Magnis Resources* [an entity I understand has an interest in Imperium3] *issued a trading halt and a price sensitive release on 5 June 2018 which specifically highlighted the importance of the MOU in 'fast tracking' the project and acknowledges that the Council has 'hired a highly experienced dedicated resource*

[37] *Ramsay Health Care Ltd v Information Commissioner & Anor* [2019] QCATA 66 (***Ramsay***).
[38] Section 108(3) of the RTI Act. Similarly, in view of the constraint imposed by section 108(3), I have taken a guarded approach when relying on public sources of information which may duplicate information in in issue in this review.
[39] At [45].
[40] Letter dated 23 July 2019.
[41] Submissions dated 5 August 2019.

> *to wholly focus on facilitating the fast tracking of key milestones' and then again on 27 August 2018 (after the Decision Notice was issued), Magnis noted that the Council was 'compiling site information' ….*
>
> *Similarly, in relation to the ASX Media Release referenced by the OIC… Imperium3 Chairman … thanked and acknowledged "Townsville City Council for the continuous support provided towards our project in Townsville…."*

50. While some of the above may be relevant to a consideration of whether an equitable obligation exists, I do not accept that this submission answers the doubt raised in paragraph 48. Council, as noted, bears the onus in this review. On this point, I am not satisfied that it has discharged that onus. My view is that the Confidentiality Clause does not establish a contractual obligation requiring Council to keep confidential any of the information in issue.

51. Having said that, I note that mutual promises may be sufficient to support a contract.[42] It may be that within the MoU[43] there is an exchange of such promises or commitments, sufficient to give the Confidentiality Clause the force of contract. Council has not made any such submission. Nevertheless, in the interests of completeness I will further consider the position, in the event the conclusion in the preceding paragraph is incorrect.

MoU

52. Assuming, then, that there has been a movement of consideration sufficient to give the Confidentiality Clause the force of contract, I accept that the clause is drawn broadly enough to cover the MoU (I have considered the Correspondence separately below).

53. In the particular circumstances of this case, however, I am not satisfied that a court would enforce the Confidentiality Clause in support of an action for breach of confidence as against Council, at the suit of Imperium3.

54. Having regard to relevant judicial comment, I consider that where, as here, one party to a claimed contractual obligation of confidence is a government agency with a concomitant duty to account to the public it represents, the law will imply a qualification on any such obligation to the extent that may be necessary to serve that duty. As Brennan J stated in *Esso Australia Resources Ltd v Plowman* (***Esso***):[44]

> *Where a party is in possession of a document or information and is under a duty at common law or under statute to communicate the document or information to a third party, no contractual obligation of confidentiality can prohibit the performance of that duty…*
>
> …[relevant public authorities] *have a duty – possibly a legal duty…but at least a moral duty … – to account to the public for the manner in which they perform their functions. Public authorities are not to be taken, prima facie, to have bound themselves to refrain from giving an account of their functions in an appropriate way: sometimes by giving information to the public directly, sometimes by giving information to a Minister, to a government department or to some other public authority.*

55. Brennan J's judgment in *Esso* was subsequently invoked by Finn J of the Federal Court in *Hughes Aircraft Systems International v Airservices Australia*,[45] His Honour noting that:

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[42] *Perry v Anthony* [2016] NSWCA 56 at [26] citing *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847, at 855.
[43] The general nature and effect of which is described in my letter to Council dated 19 February 2019, at page 2.
[44] (1995) 183 CLR 10, at 35, 37-38.
[45] (1997) 146 ALR 1 (***Hughes***), at 88-89, cited with approval in *Seeney and Department of State Development* (2004) 6 QAR 354 (***Seeney***), at [199].

> [the relevant government agency] … *operated in the constitutional environment of responsible government. This necessarily entails that it was accountable in some measure to the public: see* Esso Australia Resources Ltd v Plowman *(1995) 183 CLR 10 at 37-38 per Brennan J*
>
> …
>
> *Parties who contract with government agencies must, in matters of confidentiality, be taken to have done so subject to such lawful rights of access to information in the agency's hands as our laws and system of government confer on others. It is not necessary for me to consider here the efficacy (if any) of an attempt by contract to exclude, for example, such a minister's right, and hence to exclude some part of the machinery of an agency's accountability: cf the views of Brennan J in* Esso Australia Resources Ltd v Plowman*, above*.

56. Finally, I note Kirby J's observation in *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd*:[46] '*Can it seriously be suggested that … private agreement can…exclude from the public domain matters of legitimate public concern?*'[47]

57. In this case, I consider it is important to bear in mind the fact that, objectively assessed, the MoU is **not** information solely imparted by and proprietary to Imperium3, such as trade secrets, intellectual property or other commercially sensitive information it has entrusted to Council in exchange for a contractual promise by Council not to disclose that information.[48] Rather, it is a mutual agreement co-authored – and thus essentially co-owned – by Council, and the broader community Council represents.

58. That community has, in my view, a legitimate concern in gaining access to what its representatives have agreed to and communicated on its behalf.

59. Accordingly, even if the Confidentiality Clause is capable of imposing a contractual obligation, I am not persuaded that Council has established that disclosure by it of the MoU under the right of access conferred by section 23 of RTI Act would comprise a breach of that obligation.

60. Council resists the above finding, essentially arguing that the case law from which the judicial observations noted at paragraphs 54-56 are derived from factual and legal contexts distinct from statutory information access schemes such as the RTI Act.

61. Given the broad language with which these observations is expressed, however, I consider them expansive enough to apply beyond the particular contexts in which each were delivered.

62. In other words, I consider that principles of the kind extracted in paragraphs 54-56 may permissibly be extended to applications for access to documents made under a statute, the purpose of which is to provide a right of access to information in government possession or control.[49] This is particularly so, where those documents are, as here, a direct by-product of government action and agreement,[50] disclosure of which would allow the community to fully scrutinise and understand what government has entered into on its behalf.

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[46] (1995) 36 NSWLR 662.
[47] At 675.
[48] And Imperium3 has not, as noted, sought to argue to the contrary.
[49] And which, as noted, is to be administered with a pro-disclosure bias, with grounds for refusing access to be read narrowly: paragraph 18.
[50] Noting here Parliament's recognition that '*the community should be kept informed of government's operations…*': RTI Act Preamble, section 1(c).

63. Such an approach would seem to be consistent with the High Court's requirement that the translation of private law confidentiality principles sufficiently accommodates the scope and purpose of public law regimes into which those principles may need to be imported: in this case, the information access regime established by the RTI Act.[51] Indeed, to find otherwise would appear to be tantamount to granting agencies such as Council the licence, through appropriately-worded clauses, to '*exclude some part of the machinery of an agency's accountability*': ie, the very statute by which Parliament intended to '*emphasise and promote the right to government information*'.[52]

64. In this vein, I cannot accept Council's 9 May 2019 submissions as to the effect of one of the subclauses to the Confidentiality Clause,[53] which provision can arguably be read as a purported renunciation by Council, in the absence of third party permission, of the former's authority to disclose information under the RTI Act. [54]

65. Council does not require the permission of any entity to disclose information in its possession or under its control, as requested by way of a valid application for access under the RTI Act. This is because it has the express authority of Parliament to do so, as embodied in the decision-making powers conferred on Council by Chapter 3, Part 5 of the Act, and the explicit discretion to release information, even where grounds for refusal might otherwise exist.[55]

66. On this point, it is worth setting out in full the observations of the Information Commissioner in *B and BNRHA* as to the relationship between the RTI Act's predecessor, the FOI Act, and the general law of confidence:

> *99 It appears that a government agency cannot by agreement or conduct bind itself so as to guarantee that confidential information imparted to it will not be disclosed under the FOI Act. Thus, a Full Court of the Federal Court of Australia in* Searle Australia Pty Ltd v Public Interest Advocacy Centre *(1992) 108 ALR 163 at p.180 was prepared to say:*
>
> > "Prior to the coming into operation of the FOI Act, most communications to Commonwealth Departments were understood to be confidential because access to the material could be obtained only at the discretion of an appropriate officer. With the commencement of the FOI Act on 1 December 1982, not only could there be no understanding of absolute confidentiality, access became enforceable, subject to the provisions of the FOI Act. No officer could avoid the provisions of the FOI Act simply by agreeing to keep documents confidential. The FOI Act provided otherwise."
>
> *100 This statement is correct also in respect of the Queensland FOI Act, but it perhaps requires some further explanation. A government agency may become subject to an obligation of confidence under the general law, enforceable at the suit of the confider. It is well recognised, however, that an obligation of confidence, whether equitable or contractual, can be overridden by compulsion of law, in particular by a statutory provision compelling disclosure of information – see for example Gurry at p.359;* Smorgon and Australia & NZ Banking Group Limited & Ors; Commissioner of Taxation & Ors and Smorgon & Ors *(1976) 134 CLR 475 at 486-90. Section 21 of the FOI Act is a provision of this kind. It confers a legally enforceable right to be given access "under this Act" to documents of an agency and official documents of a Minister. An obligation*

[51] *Minister for Immigration and Citizenship v Kumar* [2009] HCA 10, cited in *Ramsay*, at [74].
[52] RTI Act Preamble, section 3.
[53] Paragraphs 4.5 and 4.5.
[54] Noting, apart from anything else, that this particular subclause would not appear to extend to either the Correspondence or the MoU, for reasons explained at footnote 10 to my letter to Council dated 23 July 2019.
[55] Expressed generally in section 44(4) of the RTI Act, and more specifically at sections 47(2)(b), 48(3) and 49(5). Additionally, an agency in Council's position deciding or otherwise electing to disclose information enjoys express statutory protection from, relevantly, any action for a breach of confidence: section 170(1)(c) of the RTI Act. The only step an agency may be obliged to take as regards external third parties is to obtain their views as to potential disclosure of requested information, under section 37 of the RTI Act: those views in no way binding the agency.

> *of confidence may continue to bind the government undisturbed, until such time as an application is made under s.25 of the FOI Act for access to the relevant confidential information, whereupon the obligation of confidence may potentially be overridden. The right conferred by s.21 of the FOI Act, however, is expressed to be "subject to this Act". The FOI Act itself sets out a scheme whereby an agency or Minister dealing with an application for access to documents made under s.25, is conferred by s.28(1) with a discretion to refuse access to exempt matter or an exempt document. This means that, notwithstanding that a document satisfies all of the criteria for exemption under one of the exemption provisions in Part 3 Division 2, an agency or Minister nevertheless has a discretion to disclose the document to an applicant for access under the FOI Act with the benefit of the protections conferred by Part 6 of the FOI Act in respect of that disclosure (in particular s.102 provides in effect that no action for breach of confidence will lie in respect of the authorising or giving of access where the access was required or permitted by the Act to be given). On the other hand, if a document meets the criteria set out in one of the exemption provisions in Part 3, Division 2 of the FOI Act, an agency or Minister is entitled to exercise the discretion conferred by s.28(1) to refuse access to the exempt matter or exempt document. Thus, the fact that disclosure of a particular document would found an action for breach of confidence under the general law is a test which, if satisfied, will permit an agency or Minister to exercise its discretion under s.28(1) to refuse access to the particular document.*
>
> *101 An agency or official cannot, however, by a contractual or other undertaking fetter the exercise of a discretionary power conferred by statute by binding the agency or official to exercise the discretion in a particular way (see* Ansett Transport Industries (Operations) Pty Ltd v Commonwealth of Australia *(1977) 139 CLR 54 per Mason J at p.74-75: "To hold otherwise would enable the executive by contract in an anticipatory way to restrict and stultify the ambit of a statutory discretion which is to be exercised at some time in the future in the public interest or for the public good"). Thus, information held by a government agency subject to an enforceable obligation of confidence can be disclosed to an applicant for access under the FOI Act, through a lawful exercise of the s.28(1) discretion by an officer authorised to make such a decision in accordance with s.33 of the FOI Act. (In theory, the obligation of confidence would remain enforceable under the general law, apart from the occasions when it was overridden by a lawful disclosure made under the FOI Act. However, an obligation of confidence may itself be rendered unenforceable if the confidential information subsequently passes into the public domain. Section 102(2) of the FOI Act may be of significance in this regard.)*
>
> *102 This explains the Full Federal Court's comment in* Searle Australia Pty Ltd v PIAC *that there could be no understanding of absolutely confidentiality, and that no officer could avoid the provisions of the Commonwealth FOI Act simply by agreeing to keep documents confidential. I should add that when reviewing a decision under Part 5 of the Queensland FOI Act, the Information Commissioner does not have the discretionary power possessed by Ministers or agencies to permit access to exempt matter: see s.88(2) of the FOI Act.*

67. The above analysis would seem to apply equally to the RTI Act, in view of the provisions noted above – particularly the express discretion to disclose information, even where grounds for refusing access might otherwise exist.[56] Accordingly, to the extent the relevant subclause might in any way purport to exclude those powers or fetter that discretion, it would, as noted, appear to be of no effect.[57]

Correspondence

68. Much of the information remaining in issue on these pages comprises individuals' names and business contact particulars. In its 5 August 2019 submissions, Council indicated that, at least as regards names, '*the redactions made by Council were on the basis of privacy matters*.'

[56] Sections 47(2)(b) and 48(3) of the RTI Act.
[57] See also *Westfield Management Ltd v AMP Capital Property Nominees Ltd* [2012] HCA 54, at [46].

69. I have addressed '*privacy matters*' below, in dealing with contrary to public interest arguments. For the sake of completeness, however, it is necessary that I also deal with the possible application of the Breach of Confidence Exemption to this information, given the decision under review applies the provision to all information.[58]

70. Most of the information remaining in issue in the Correspondence pre-dates the MoU,[59] and any contractual obligations it may purport to impose, relevantly, the segments remaining in issue on the first, second, fifth and sixth Correspondence pages.

71. It therefore appears that the only basis on which disclosure of this latter information might qualify for exemption under the Breach of Confidence Exemption of the RTI Act is pursuant to an equitable obligation of confidence. This is dealt with below.

72. Council accepts '*that some parts of the Correspondence pre-date the signing of the MOU*'.[60] It goes on, however, to submit that:

> *…as identified in* Gurry on Breach of Confidence *at 4.14, it is well accepted that the Courts will enforce an oral contract or an oral and partly written contract in relation to the confidentiality surrounding certain information particularly in this case given the parties' long history and past practice of treating as confidential all information shared between TCC and the various legal entities that form part of the Imperium3 consortium, including I3PL..'*

73. The above contention may of itself be correct. Council's submissions following this statement do not, however, evidence any such '*oral contract or an oral and partly written contract*', but assert, in broad-brush terms, that '*discussions and negotiations*' between Council and Imperium3 or related entities were conducted on the basis of a '*high degree of confidentiality*'. Considerations of this kind may be relevant in assessing whether an equitable obligation of confidence exists; they fall short, however, of permitting a conclusion that contractual obligations were established in advance of the execution of the MoU.

74. Although not argued by Council and, in view of its onus, thus not strictly necessary for me to consider, there is in theory another basis on which those parts of the Correspondence pre-dating the MoU might attract contractual protection: by way of an implied contractual relationship, so as to bring this pre-MoU information within the ambit of the Confidentiality Clause or some broader contractual obligation of confidence.

75. As the Information Commissioner recognised in *B and BNRHA*, the law may construct an implied contract around parties not otherwise in a subsisting contractual relationship.[61] Having regard to the specific information in question in this case – being names, published business addresses and contact particulars, and on the sixth page, comment as to the execution of agreements,[62] rather than commercial intelligence or information of value to Imperium3, communicated with a view to winning Council's custom – I do not accept that it would do so here.

76. Accordingly, I cannot see that segments pre-dating the MoU can be the subject of any contractual obligation of confidence.

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[58] Council's 5 August 2019 submissions also state a claim for exemption of the Correspondence under the Breach of Confidence Exemption.
[59] The MoU was apparently signed on 3 June 2018 - a proposition with which Council agrees (5 August 2019 submissions).
[60] 5 August 2019 submissions.
[61] At [48].
[62] Now seemingly an issue of little sensitivity, given relevant agreements have been finalised and publicised – as noted in my letter to Council dated 19 February 2019, the only information of any obvious substance in the Correspondence appears to be a certain segment on the sixth page, which has been reported or published in a number of sources (see, for example, sources noted at footnotes 10 and 11 to that letter).

77. As for the segments post-dating the MoU, these essentially comprise three personal names and a company name. As noted, Council has stated that, at least as regards the first names, it refused access to these '*on the basis of privacy matters*', matters dealt with later in these reasons.

78. Assuming, however, that the *entirety* of the Correspondence information remaining in issue *is* prima facie subject to the Confidentiality Clause – and that that clause amounts to something more than a mere promise – there are two further reasons its disclosure would not breach the Confidentiality Clause.

79. The first is an express exception to the clause, permitting disclosure of information that might otherwise have attracted its operation, but which is public. As matters presently stand,[63] the information remaining in issue on these pages appears to fall within this exception.[64]

80. The second is the exception the law would, in my view, read into the Confidentiality Clause, as explained at paragraphs 54-58 above. With whom and about what Council was communicating, in making or proposing arrangements and/or having discussions at on behalf of the community, is a matter of legitimate public concern.

Equitable obligation of confidence

81. The Information Commissioner has historically identified five cumulative criteria as being necessary to establish an equitable obligation of confidence, as follows:[65]

    (a) relevant 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 – ie, it must not be trivial or useless, and must have a degree of secrecy sufficient for it to be subject to an obligation of conscience
    (c) circumstances of the communication must create an equitable obligation of confidence
    (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 plaintiff.

82. The Information Commissioner explained the inclusion of the fifth criterion, detriment, in *B and BNRHA*, at [109]-[111] of that decision. There is, however, now doubt as to the necessity to establish detriment in cases such as the present, where the party said to be owed an obligation of confidence is a non-government actor.[66] In this case, I cannot see that it is a matter I need to address, as I consider that Council's claim for an equitable obligation of confidence binding it in favour of Imperium3 fails, if not at the second

[63] The thrust of Council's submissions on this issue being, as I understand, that I should be confining myself to considering what may have been in the public domain at the date of its, rather than my, decision: a proposition which, as explained above, I do not accept.
[64] See footnote 1 to my 29 July 2019 letter to Council for sources of and references to some of this information, including the status of the company name. See also footnote 20 to my letter to Council dated 23 July 2019, and sources cited at footnotes 10 and 11 of my 19 February 2019 letter to Council. The hyperlinks cited in footnote 1 of my 29 July 2019 letter are no longer accessible. I have, however, included with the copy of these reasons forwarded to Council copies of other materials obtained by OIC from the public domain, demonstrating public accessibility of some of this information. Additionally, since the date of those letters further material has come to my attention publicising the execution of the MoU, which includes information Council claims is confidential – relevant material will also be included with the copy of these reasons forwarded to Council.
[65] *B and BNRHA*, [57]-[58].
[66] *Ramsay*, at [91]-[96]. For the position where the 'hypothetical plaintiff' is a government entity, see *B and BNRHA*, at [110], citing *The Commonwealth v John Fairfax & Sons Ltd* [1980] HCA 44, and which analysis I do not understand to have been disturbed by *Ramsay*, particularly in view of the fact that that decision expressly quotes the material passage of Mason J's judgment in *Fairfax*, from which relevant principles derive (*Ramsay*, at [75]).

cumulative requirement stated in paragraph 81, then at the third requirement, (c). I raise the matter of detriment, only to signal that this is an issue in relation to which RTI administrators should anticipate further development and clarification.

83. Addressing requirements (a)-(c), both the MoU and the Correspondence can be specifically identified. Requirement (a) is met.

84. As for the second requirement, (b), to satisfy this criteria it must be shown that the '*circumstances are of sufficient gravity*'[67] to warrant equitable protection:

> *... the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it. ...*
>
> *The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia.*[68]

85. I have recorded above my view that the Correspondence information is, as a matter of fact, public. It does not possess the 'necessary quality of confidence' and cannot, therefore, form the basis of an equitable obligation of confidence.

86. As regards the MoU, there is nothing before me to suggest that that document is itself in the public domain, although matters to which it relates have, as noted, been the subject of fairly extensive reportage and public comment.

87. Given this, I did in preliminary correspondence with Council question whether the MoU was possessed of sufficient '*intrinsic importance*'[69] to attract the operation of an obligation of conscience binding Council not to disclose the MOU. I will proceed on the basis it does, and that as regards the MoU, requirement (b) is satisfied.

88. I am not, however, persuaded that requirement (c) is satisfied – whether as regards the MoU or, if my view as to the lack of secrecy concerning the Correspondence information is incorrect, that latter information.

89. Requirement (c) requires that information must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider.[70]

90. In *B and BNRHA*,[71] the Information Commissioner stated that, when considering this requirement:[72]

> *…the fundamental inquiry is aimed at determining, on an evaluation of the <u>whole of the relevant circumstances</u> in which confidential information was imparted to the defendant, whether the defendant's conscience ought to be bound with an equitable obligation of confidence. The relevant circumstances will include (but are not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and circumstances relating to its communication.*

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[67] *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, at 47-48 (Megarry J), as cited in *B and BNRHA*, at [68].
[68] *Attorney-General v Guardian Newspapers (No. 2)* [1990] 1 AC 109 at p.282, per Lord Goff, as cited in *B and BNRHA*, at [67].
[69] See *el Casale v Artedomus (Aust) Pty Ltd* [2007] NSWCA 172 (18 July 2007), at [133].
[70] *B and BNRHA*, [76]-[102].
[71] At [84].
[72] At [82], citing the Full Court of the Federal Court of Australia in *Smith Kline and French Laboratories (Aust) Limited & Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at pp 302-4. See also *Ramsay*, at [79].

91. To put it another way, the touchstone in assessing whether requirement (c) is satisfied '*lies in determining what conscionable conduct requires of an agency in its treatment of information claimed to have been communicated in confidence*'.[73]

92. Regarding the Correspondence, there is nothing on the face of these communications themselves[74] to suggest that those parts remaining in issue were made subject to any agreed understanding as to their confidence. As discussed above, most of the information remaining in issue on these pages pre-dates the MoU and the agreement as to confidentiality embodied in that document's Confidentiality Clause. Additionally, in view of its age and generally routine nature, I am not persuaded that an obligation of confidence ought reasonably be inferred from the circumstances[75] of any of this information's communication[76] – noting, once again, the lack of any direct submission from Imperium3 to the contrary, the party (or 'plaintiff with standing') whose interests any obligation would protect.

93. The several names on the third and fourth pages of the Correspondence, meanwhile, do post-date the MoU and the shared intention as to confidentiality reflected in its Confidentiality Clause. However, that, and any general concerns as to confidentiality Council submits have pervaded its dealings with Imperium3 and associates,[77] are but two factors to be taken into account in assessing whether these names were communicated in confidence.

94. More pertinent, in my view, is the nature and lack of sensitivity of this information:[78] these names are not, as alluded to above,[79] information Imperium3 or its membership appear to regard as secret,[80] and thus not information Council ought to regard itself as being conscience-bound to keep confidential.

95. As for the MoU, I am obviously cognisant of the Confidentiality Clause, reflecting an intention on the part of Imperium3 and Council to protect information that may have been imparted to the former by the latter. I further acknowledge Council's submissions as to the negotiating context in which the MoU was developed, which it contends was '*characterized by emphasizing the high degree of confidentiality to be afforded*' relevant negotiations.[81]

96. Additionally, I note Council's submissions[82] that it may have discussed matters related to the transaction envisaged in the MoU in a closed meeting,[83] although I am not persuaded this fact of itself should be accorded especial significance in assessing whether equity would bind Council to keep the MoU confidential. On Council's submissions and its own available materials,[84] that closed meeting did not concern the

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[73] *Pearce and Qld Rural Adjustment Authority; Various Landholders (Third Parties)* (1999) 5 QAR 242 at [84].
[74] I acknowledge that Pages 1 and 5 contain a typical 'boilerplate' email disclaimer referring to confidentiality. Given the small size and positioning of this text at the foot, rather than the commencement, of relevant communications, and its generic and equivocal terms, I do not regard it as reflecting a serious request that the information redacted from the emails in which it appears be held confidentially.
[75] Including general concerns as to confidentiality Council submits accompanied all negotiations between it and Imperium3 (touched on again below at paragraph 95, in discussing the MoU).
[76] As the Information Commissioner recognised might be done in an appropriate case: *B and BNRHA*, at [89].
[77] See, for example, Council's 13 June, 20 June and 5 August 2019 submissions.
[78] Relevant considerations: *B and BNHRA*, [82], cited at paragraph 90 above, and remembering that my primary finding as regards this information is that it is not actually secret, and thus does not satisfy cumulative requirement (b), let alone requirement (c).
[79] Paragraph 77.
[80] Which would appear to be a relevant consideration: see *B and BNRHA* at [87], paraphrasing Gurry's observations that '*…in assessing whether a confidant ought to have known that a disclosure was made for a limited* [confidential] *purpose, the courts will take into account the confider's own attitude and conduct with respect to preserving the secrecy of the allegedly confidential information.*'
[81] 5 August 2019 submissions. A similar point is made in its 13 June 2019 submissions, and at paragraph 4.8(c) of its 9 May 2019 submissions.
[82] See paragraph 4.8(d) of Council's 9 May 2019 submissions.
[83] Under section 275 of the *Local Government Regulation 2012* (Qld).
[84] Relevant materials to accompany the copy of these reasons to be sent to Council.

MoU, but a proposed allocation of Council land to Imperium3 for use by the latter and/or related entities, in their business operations. Noting again the restriction imposed on me by section 108(3) of RTI Act, I am limited in the detail I can give on this point. It is sufficient to note that I cannot see that disclosure of the MoU[85] would reveal matters Council may have been concerned to keep confidential by way of its closed meeting.

97. I also note Council's advice[86] that Imperium3 understood the MoU would be kept confidential, and has raised with Council concerns as to its release. While I accept this, I think it fair and reasonable to take into account the fact that Imperium3 has not, despite express invitation, actually pressed any such concerns directly with me during the course of this review. This causes me to question the extent of its current concerns in this regard, and, assuming some do exist, discount their weight in evaluating all relevant circumstances in this case.

98. I have reached the above conclusion, fully conscious, particularly, of Council's 5 August 2019 submissions to the contrary, in which Council sets out what it perceives to be matters from which I should infer that the MoU is a matter of commercial importance to Imperium3, irrespective of its own lack of submissions in this review to that effect.

99. The MoU may, as Council submits, have been a matter of some sensitivity to Imperium3 and its constituent members at prior points in time. Council refers to trading suspensions requested by listed entities associated with Imperium3, at or around the time of the MoU's execution: to my mind, this suggests that it was the *fact* of the signing of the MoU and the potential impact of this occurrence on share pricing, rather than the *contents* of that document, that was a matter of perceived sensitivity.

100. Additionally and in any event, I am, as discussed extensively earlier in these reasons, required to determine questions of access having regard to facts and circumstances as they currently stand, and can only make such a determination based on the information before me, including that which review participants (and those invited to participate) have elected to put by way of evidence and submissions. Taking into account the amount of information concerning Imperium3 and related entities' Townsville proposal that is now in the public domain, and without the benefit of any direct representations from that company to the contrary,[87] I do not think it unreasonable to infer that any commercial sensitivity Imperium3 may once have wished to have protected (whether from this applicant or more generally) has, from its perspective, now abated.[88]

101. Further, even if it had been put to me directly and forcefully, Imperium3's position, while undoubtedly relevant, is by no means determinative. As the observations of the senior judges above make clear, a party in Imperium3's position '*must, in matters of confidentiality, be taken to have done so subject to such lawful rights of access to information in the agency's hands as our laws and system of government confer on others*.'[89]

102. Turning to considerations telling against the imposition of an equitable obligation of confidence, first is the nature of the information actually comprising the MoU: information which, objectively assessed, appears possessed of no obvious commercial or other sensitivity. As I have alluded to earlier, it is not the case, for example, that the MoU

[85] Or, indeed, any of the information in issue.
[86] As related, for example, in Council's letter and accompanying submissions dated 13 June 2019, and its 18 and 20 June 2019 letters.
[87] The entity which would appear to be that best placed to press any such concerns.
[88] In drawing these conclusions, I am ***not*** concluding that Imperium3 has consented to disclosure of the information in issue, such as to amount to its waiving or releasing Council from any claim to confidentiality Imperium3 might claim to be owed. Council's 13 June and 5 August 2019 submissions go to some length to rebut any such suggestion, which I had ventilated in 4 June 2019 correspondence to Council.
[89] Finn J in *Hughes*, cited in full at paragraph 55.

embodies intellectual property, trade secrets or commercial intelligence communicated by Imperium3 to Council, disclosure of which could be expected to allow a competitor[90] to '*look over the shoulder*' of Imperium3,[91] or confer a 'leg up' or commercial advantage on the former that it would not otherwise enjoy. It is a relatively standard 'agreement to agree'.

103. Also pertinent is the fact that the MoU is not, as I have noted, information proprietary or exclusive to Imperium3 that was in turn given to Council on the understanding Council would hold it confidentially. Rather, it is an agreement created conjointly with, and thus, in practical terms, 'co-owned'[92] by Council: and, as a consequence, the broader community in whose interests Council acts.

104. Further, in considering whether information has been communicated in circumstances giving rise to an equitable obligation of confidence, an RTI decision-maker may, as I understand recent appeal decisions, permissibly have regard to public interest considerations:[93]

> *[82]* ***…In the case of information produced to and held by a government agency, it can be accepted that the public interest in having access to the particular information is one of the factors to be considered when ascertaining whether or not that information is held under an obligation of confidence.*** *Indeed, it may be a factor to which considerable weight attaches. But it is not the sole determining factor. It needs to be weighed in the mix of all the relevant circumstances under which the information was imparted to ascertain whether the information is held subject to an equitable obligation of confidence.* (Emphasis added.)

105. In this case, as discussed further below, the decision under review accurately identifies several public interest considerations telling in favour of disclosure of the information in issue. These can be coupled with the public interest in informing the community of Council operations, and the general public interest in promoting access to information in government possession or control.

106. With these considerations in mind, I am satisfied that, having regard to '*the mix of all the relevant circumstances*'[94] applicable in this particular case, conscionable conduct would not require Council, as a public authority with a duty to account to the community, to keep confidential from that community a high-level agreement to agree of which Council is co-signatory, nor parts of routine communications[95] issued or fielded by the local community's principal local government representative (the Mayor), in discharge of her official duties and presumably at some public expense.

107. This is a finding made in full acknowledgement of the fact that, as Council submits and I have noted above, there is a deal of information otherwise in the public domain, as made available by Council itself or Imperium3 and/or its members. To the extent such information has been published by Council, it is to be commended.

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[90] Whether the applicant, or more generally.
[91] *News Corporation v NCSC* (1984) 57 ALR 550, cited in Council's 5 August 2019 submissions.
[92] This phrase was used in the UK Court of Appeal in *Murray v Yorkshire Fund Managers Ltd* [1998] 1 WLR 951 (***Murray***); I included that citation in making this point of practical 'co-ownership' in correspondence with Council during the review. Council has taken issue with the reference to *Murray*; as I understand that decision, it is authority for the proposition that information developed jointly may be the subject of an equitable obligation of confidence restraining one of its '*co-owners*' (see *Australian Broadcasting Corporation and Townsville City Council; Adani Mining Pty Ltd (Third Party) & Ors* [2019] QICmr 7 (12 March 2019), at [43] (***ABC***)). This is a proposition I would have thought Council would be inclined to adopt, given past doubts expressed by the Deputy Information Commissioner as to whether documents which have come about as negotiation between a government and a third party, such as the MoU, could be said to have been 'communicated' by the third party: *Aries Tours Pty Ltd and Environmental Protection Agency* (Unreported, Queensland Information Commissioner, 28 March 2002), at [55]. In any event, I am using the phrase and concept of 'co-ownership' here in an ordinary, natural sense.
[93] *Ramsay*, at [82].
[94] *Ramsay* at [82], quoted in full above at 104.
[95] Ie, the information remaining in issue in the Correspondence.

108. It still remains the case, however, that Council is accountable to the community for agreements it enters on its behalf and, when all relevant circumstances are taken into account – including, in this context, the pro-disclosure bias with which the RTI Act is to be administered, Parliament's express mandate that grounds for exemption be read narrowly, and the lack of any requirement that an access applicant justify the making of a particular application – I am not persuaded equity would restrain Council from making such agreements available to members of the community, nor parts of communications concerning such agreements, of the kind in issue in this case.

109. The information in issue is not exempt information under the Breach of Confidence Exemption.

Contrary to the public interest

110. Council alternatively argues that disclosure of the information in issue would, on balance, be contrary to the public interest. This comprises a further ground on which access to information may be refused under the RTI Act.[96]

111. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest[97] and explains the steps that a decision-maker must take, as follows:[98]

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

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

'Could reasonably be expected'

113. The factors for deciding the public interest itemised in schedule 4 to the RTI Act generally require that the particular outcome each seeks to promote or protect against '*could reasonably be expected*' to result from disclosure. In assessing whether an event '*could reasonably be expected*' to occur, the Information Commissioner has said:[99]

> *The words call for the decision-maker … to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.*

114. Other authorities note that the words *'could reasonably be expected'*:[100]

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[96] Section 47(3)(b) of the RTI Act.
[97] Schedule 4 of the RTI Act sets out non-exhaustive lists of potentially relevant considerations. The phrase '*public interest*' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests, although there are some recognised public interest considerations that may apply for the benefit of an individual: Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 *AIAL Forum* 12, 14.
[98] Section 49(3) of the RTI Act.
[99] *B and BNRHA* at [154]-[160].
[100] *Smolenski v Commissioner of Police, NSW Police* [2015] NSWCATAD 21 at [34], citing *Commissioner of Police, NSW Police Force v Camilleri (GD)* [2012] NSWADTAP 19 at [28], *McKinnon v Secretary, Department of Treasury* [2006] HCA 45, at [61] and *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, at 190.

> *… "require a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous" to expect a disclosure of the information in issue could have the prescribed consequences relied on.*

115. I have kept the above in mind in identifying public interest considerations for and against disclosure of the information in issue.

116. Council identified three public interest factors favouring disclosure, deciding that disclosure of the information in issue could reasonably be expected to:

- promote open discussion of public affairs and enhance the Government's accountability[101]
- contribute to positive and informed debate on important issues or matters of serious interest; and[102]
- ensure effective oversight of expenditure of public funds.[103]

117. I agree that, together with the general public interest in promoting access to government-held information,[104] each of the above factors favours disclosure in this case. I consider it reasonable to expect that disclosure of the information in issue will help to promote discussion of Council's involvement in and support for the Imperium3 proposal, enhance Council's accountability for that support, and by maximising the available information, foster informed debate on an important issue: Council backing of a private proposal, with an aim to achieving beneficial economic outcomes.

118. While Imperium3's proposal does not, on the information before me, involve expenditure of public funds, it is, as noted, proposed to allocate Council land to the consortium, something I consider the third factor listed above is broad enough to accommodate. If it is to be read narrowly, then there is in any event a strong public interest in disclosing information that helps to give the full picture of what it is Council is staking community resources against, and which can help to ensure effective oversight of allocation of public resources.

119. In addition to the above considerations, I consider that, as a product of Council deliberation, negotiation, communication and agreement, disclosure of the information in issue could also reasonably be expected to inform the community of Council operations: another factor favouring disclosure in the public interest.[105]

120. Council afforded the first and third considerations listed in paragraph 116 significant weight, and the second moderate weight. I agree with these weightings, and adopt them for the purposes of this decision.

121. As for the additional considerations I have identified – the general public interest in promoting access to government-held information, and in informing the community of Council operations, I afford these, too, substantial weight, embodying as each does the

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[101] Schedule 4, part 2, item 1 of the RTI Act. There is judicial authority that the expression '*the Government*' as used in this item refers to the 'elected government of the day': *Carmody v Information Commissioner & Ors* [2018] QCATA 14, [151]-[152] (as against, in that case, 'the judiciary'). As local government is elected, the phrase would seem broad enough to operate in the current context. If, however, '*the Government*' is to be read as referring to elected *State* 'Government', then bearing in mind the list of factors in schedule 4 of the RTI Act is not exhaustive, I would have regard to a separate and distinct consideration favouring disclosure, in identical terms as this item but referring instead to 'local government' instead of '*the Government*'.
[102] Schedule 4, part 2, item 2 of the RTI Act.
[103] Schedule 4, part 2, item 4 of the RTI Act.
[104] Implicit, for example, in the preamble to the RTI Act, section 3 of the RTI Act, and the pro-disclosure bias stated in section 44 of the RTI Act.
[105] Schedule 4, part 2, item 3 of the RTI Act, adopting and applying the comments in note 101 above, in the event this particular consideration is to be confined to state executive government only.

strong public interest in ensuring government in Queensland, including local government, is conducted as transparently as possible.[106]

Factors favouring nondisclosure

122. In the decision under review, Council found that disclosure of the information in issue could reasonably be expected to:

- cause a public interest harm, through disclosure of personal information (**PI Harm Factor**)[107]
- cause a public interest harm through disclosure of deliberative process information (**DP Harm Factor**)[108]
- prejudice a deliberative process (**DP Prejudice Factor**)[109]
- prejudice business, commercial or financial affairs;[110] and
- give rise to the confidential communications public interest harm factor set out in schedule 4, part 4, section 8 of the RTI Act (the **CCHF**), and prejudice Council's ability to obtain confidential information.[111]

123. On external review, Council also contended that a consideration favouring nondisclosure was the fact that matters related to the information in issue were considered in a closed council meeting, held under section 275 of the *Local Government Regulation 2012* (Qld) (**LG Regulation**).

124. I will address each of these in turn.

Disclose personal information

125. Council decided that the PI Harm Factor operated to favour nondisclosure in this case. That factor provides that disclosure of information '*could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person, whether living or dead.*'

126. Council's decision does not particularise the information to which it contends the harm factor applies. As noted above, however, in its submissions dated 5 August 2019, it stated that redactions in the Correspondence were made '*on the basis of privacy matters*.'

127. Having independently reviewed the information in issue, I have identified information comprising personal information across all pages of the Correspondence – generally, names of officers of Imperium3 or associated entities.[112] There is also a limited amount of personal information in the execution clauses on the last page of the MoU – again, names.

128. I accept that disclosure of this personal information would give rise to the PI Harm Factor. It is then necessary for me to evaluate the extent of public interest harm that could be

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[106] A public interest reflected in the very existence of the RTI Act, and Parliament's recognition that in a '*free and democratic society there should be open discussion of public affairs*', that information '*in the government's possession or under the government's control is a public resource*', and that '*the community should be kept informed of government's operations…*': RTI Act, Preamble, sections 1(a)-(c).
[107] Schedule 4, part 4, section 6 of the RTI Act.
[108] Schedule 4, part 4, section 4 of the RTI Act.
[109] Schedule 4, part 3, item 20 of the RTI Act.
[110] Schedule 4, part 3, item 2 of the RTI Act.
[111] Schedule 4, part 3, item 16 of the RTI Act.
[112] Noting that any personal information of Council officers or employees in these Correspondence pages has been released, and is not in issue, while the applicant did not, as noted, seek to press for access to mobile telephone numbers and non-Council email addresses.

expected to result from that disclosure, and balance that harm against considerations favouring disclosure.[113]

129. The personal information contained in the Correspondence concerns sophisticated businesspersons, with public profiles and whose roles as proponents of the facility the subject of the MoU is a matter of public record.[114] None of this information appears particularly secret, sensitive, or private, and I do not consider its disclosure would cause any significant public interest harm.

130. Two of the three names in the MoU, meanwhile, are Council officers, and thus public officials – Council has not sought to argue a case for the application of the relevant harm factor to these names. To the extent the PI Harm factor may apply, I consider that any public interest harm presumed to follow disclosure of the names of public officers appearing in a routine, official context would be minimal.

131. The third name in the MoU is that of an Imperium3 representative, one of those also identified in the Correspondence. The considerations explained in paragraph 129 apply equally to this instance of the same personal information – its disclosure would occasion no significant public interest harm.

132. In summary, I consider that the public interest harm resulting from disclosure of any personal information would be marginal, and that the PI Harm Factor warrants correspondingly minimal weight in balancing the public interest.

133. I should also make clear that I do not accept that disclosure of any of this personal information could reasonably be expected to prejudice protection of any individual's right to privacy. This is a separate nondisclosure factor, set out in schedule 4, part 3, item 3 of the RTI Act. Council did not rely on this factor in the decision under review. Its reference to '*privacy matters*' in submissions quoted above means that I should, as a matter of prudence, nevertheless address it.

134. The concept of '*privacy'* is not defined in the RTI Act, but can essentially be viewed as the right of an individual to preserve their personal sphere free from interference from others.[115] In this case, Council's election not to rely on this factor in the decision under review was, in my view, correct: this information falls outside any '*personal sphere*' of businesspersons named in the Correspondence and MoU – it concerns the public business activities and aspects of relevant individuals' lives, rather than their personal or private domains. I can see no basis for finding that disclosure of information of this kind could reasonably be expected to prejudice protection of any individual's right to privacy.

135. Similarly, I see no scope for the operation of the privacy nondisclosure factor to either of the Council officer names contained in the MoU – they appear in the context of the occupation of public roles and discharge of public duties, not relevant individuals' '*personal spheres*'.

136. In the event the findings in paragraphs 134 and 135 were incorrect, I would be required to weight the privacy nondisclosure factor. In view of the nature of this information and the business or official, rather than personal, context in which it appears, I would give the factor minimal weight.

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[113] See generally section 49 of the RTI Act, and particularly subsection (4), which provides that '*the fact that 1 or more schedule 4, part 4 harm factors of the relevant factors favouring nondisclosure is a harm factor does not of itself mean that, on balance, disclosure of the information would be contrary to the public interest.*'

[114] See particularly material referred to at footnote 64.

[115] Paraphrasing the Australian Law Reform Commission's definition of the concept in 'For your information: Australian Privacy Law and Practice' (Report No. 108, August 2008) vol 1, 148 [1.56].

Affecting confidential communications

137. The CCHF will only arise if:

- information consists of information of a confidential nature
- the information was communicated in confidence; and
- its disclosure could reasonably be expected to prejudice the future supply of such information.

138. The associated nondisclosure factor requires only that disclosure could reasonably be expected to prejudice an agency's '*ability to obtain confidential information*'.

139. The repealed FOI Act contained an exemption provision, section 46(1)(b), which was stated in materially similar terms as the CCHF. The Information Commissioner's comments on the application of that predecessor provision can therefore be applied when considering the application of the CCHF. In considering the first requirement for its application – confidentiality – the Information Commissioner observed in *B and BNRHA*:

> *148 In my opinion, this criterion calls for a consideration of the same matters that would be taken into account by a court in determining whether, for the purpose of satisfying the second element of the equitable action for breach of confidence, the information in issue has the requisite degree of relative secrecy or inaccessibility. The matters referred to in paragraphs 71 to 72 above will also therefore be relevant to the question of whether this first criterion for the application of s.46(1)(b) is satisfied. It follows that, although it is not a specific statutory requirement, it will for practical purposes be necessary to specifically identify the information claimed to be of a confidential nature, in order to establish that it is secret, rather than generally available, information. The question of whether the information in issue is of a confidential nature is to be judged as at the time the application of s.46(1)(b) is considered. Thus if information was confidential when first communicated to a government agency, but has since lost the requisite degree of secrecy or inaccessibility, it will not satisfy the test for exemption under s.46(1)(b).*

140. As discussed above, those parts of the Correspondence remaining in issue do not seem to be of a confidential nature, and thus not information that may be the subject of the CCHF.

141. As for the MoU, as noted above in discussing the Breach of Confidence Exemption, I accept this document may be regarded as confidential. I am also prepared to accept that the second requirement for the application of the CCHF, communication in confidence, is met. In this context, this phrase requires evidence of mutual agreement that relevant information is to be treated in confidence.[116] Whether or not it actually establishes contractual or equitable obligations, the mere presence of the Confidentiality Clause would seem to evidence a mutual understanding it would be kept confidential.

142. I am not, however, persuaded that Council has justified a finding that the third requirement is met. Any information contained in the MoU (or, indeed, the Correspondence) has been communicated to Council by Imperium3 with a view, at least in part, to the latter securing Council support for the proposed project, including obtaining from Council the benefit of an allocation of land for the establishment of local operations. I acknowledge that this benefit will apparently be given by Council in exchange for a stake in the Imperium3 project.[117] Nevertheless, it is reasonable to conclude that the

[116] *B and BNRHA* at [152].
[117] The website of one of the Imperium3 consortium members notes that '*400 hectares*' has been '*offered for small equity stake in project*': http://magnis.com.au/batteries-gigafactories/townsville-australia (accessed 17 September 2019).

proposed allocation of land will be of material assistance to Imperium3. As the Information Commissioner has previously noted:[118]

> *Where persons are under an obligation to continue to supply such ... information (e.g. for government employees, as an incident of their employment; or where there is a statutory power to compel the disclosure of the information) or persons must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information) then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information. In my opinion, the test is not to be applied by reference to whether the particular* [supplier] *whose ... information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of the sources available or likely to be available to an agency.*

143. I do not consider it reasonable to expect that disclosure of any of the information in issue that may have been communicated to Council by Imperium3 or associated entities would cause a substantial number of prospective business proponents – standing to benefit from an allocation of real property – to be '*more reticent*'[119] to communicate similar information to the public agencies proposing to extend such a benefit in the future. Nor, by extension, do I consider disclosure in these circumstances could reasonably be expected to prejudice Council or any other agency's ability to obtain any such confidential information.

144. Accordingly, I am not satisfied that disclosure of the MoU (or the information remaining in issue in the Correspondence) could reasonably be expected to prejudice either:

- supply of like information to Council in the future; or
- Council's ability to obtain such information, as is necessary to enliven schedule 4, part 3, item 16 of the RTI Act.

145. These factors do not, therefore, apply to favour nondisclosure of the information in issue.

146. If this analysis is incorrect, it would be necessary to weight the CCHF and associated nondisclosure factor. If this is so, I would, in view of:

- the considerable amount of material in the public domain about Imperium3 and associated entities' Townsville proposal, and Council's involvement in and support for same; and
- the fact the information in issue does not, as noted, appear to embody any intellectual property or commercially sensitive information,

give each only minimal weight.

Deliberative process information

147. As noted, Council decided that disclosure of the information in issue could reasonably be expected to:

- cause a public interest harm through disclosure of deliberative process information;[120] and
- prejudice a deliberative process.[121]

[118] *B and BNRHA* at [161].
[119] Council's 9 May 2019 submissions, paragraph 5.4.
[120] Schedule 4, part 4, section 4(1) of the RTI Act – the DP Harm Factor.
[121] Schedule 4, part 3, item 20 of the RTI Act – the DP Prejudice Factor.

148. The DP Harm Factor provides 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.

149. The DP Harm Factor cannot apply to purely factual material.[122] Additionally, and importantly, it ***only*** covers information '*which can properly be characterised as opinion, advice or recommendation, or a consultation or deliberation, that was directed towards the deliberative processes, or as they are sometimes referred to… the "pre-decisional thinking processes" of an agency or Minister*.'[123]

150. Council merely asserted the application of the DP Harm Factor: in neither its decision nor its submissions during the course of this review did it articulate an argument as to how any of the information remaining in issue could be characterised as opinion, advice, recommendation, consultation or deliberation of a type that may be subject to the operation of the DP Harm Factor. Given it carries the onus, the absence of any submissions would seem sufficient to justify a finding by me that the DP Harm Factor can have no application.

151. I have nevertheless turned my mind to the DP Harm Factor's potential operation. Having done so, I cannot see that it can have any application to any of the information remaining in issue.

152. The MoU cannot be characterised as an *'opinion'*, *'advice'* or *'recommendation'*, or *'consultation'* or *'deliberation'*. It is a finalised, not *'pre-decisional'*, document, embodying a concluded *'agreement to agree'*. Its disclosure would not, therefore, result in disclosure of an opinion, advice, recommendation, consultation or deliberation that has taken place in the course of, or for, the deliberative processes involved in the functions of government.

153. The DP Harm Factor cannot apply to favour nondisclosure of the MoU.

154. As for the Correspondence, much of the information remaining in issue on these pages comprises factual information – names and business particulars, for example. This information is expressly excluded from the ambit of the DP Harm Factor.

155. In fact, the only information that might arguably be characterised as an opinion or advice, recommendation, consultation or deliberation are the three segments of information redacted from the sixth page of the Correspondence. I cannot see, however, that such opinion or advice was obtained for '*the deliberative processes involved in the functions of government*'. There is no evidence before me that it was taken into account in Council or any other government's '*pre-decisional thinking processes*', nor that it was '*obtained*' in the course of or for any deliberative process involved in the functions of government. The DP Harm Factor cannot, therefore, apply to favour nondisclosure of this information.

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[122] Schedule 4, part 4 section 4(3)(b) of the RTI Act.

[123] *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 (***Eccleston***), at [30]. *Eccleston* concerned section 41(1) of the repealed FOI Act, but these comments are relevant to the interpretation of this aspect of the DP Harm Factor, worded identically.

156. In the event the findings in the preceding paragraphs are incorrect, and the information in issue could be said to comprise information within the ambit of the DP Harm Factor, then that factor presumes that disclosure of this information would give rise to a public interest harm.

157. It would then be necessary to consider the extent of the resultant public interest harm, and assess its weight in balancing the public interest. My view is that, when the nature and age of the information is taken into account, together with:

- the fact that issues raised in the three segments on the sixth page of the Correspondence have been overtaken by the passage of time (such as the signing of the MoU and other agreements); and, again,

- the amount of information about the MoU, the Townsville proposal, Council's role, and the proponents' intentions that is publicly available,[124]

that public interest harm would be slight. I would afford it minimal weight.

158. As for the DP Prejudice factor, Council will no doubt be required to engage in future deliberative processes, assuming Imperium3's proposal progresses. What Council has not done, however, is establish how disclosure of an agreement to agree, the fact and broad effect of which has been publicly reported, or dated information of the kind remaining in issue in the Correspondence, could reasonably be expected to prejudice any such future processes. Bearing in mind the considerations stated in paragraph 157, I do not consider Council has discharged its onus.

159. The DP Prejudice Factor does not apply to favour nondisclosure of any of the information in issue. Again, if I am incorrect in this conclusion, and it is necessary to consider this factor in balancing the public interest, I would give it minimal weight in view of the nature of the information in issue and the considerations summarised in paragraphs 157 and 158.

Prejudice business and other affairs

160. Council decided that disclosure of the information in issue could reasonably be expected to 'prejudice' the 'business affairs' of an entity, citing schedule 4, part 3, item 2 of the RTI Act.[125] The 'entity' identified in the decision under review as the entity whose affairs Council decided may be prejudiced is an entity not in any way associated with matters the subject of the access application; I assume this was a typographical error, and the intended reference was to Imperium3.

161. Council's reasoning makes broad-brush claims as to the putative prejudice, asserting that disclosure of the information in issue would '*result in a competitive disadvantage for the Entity*' by according '*competitors and service providers with a clear commercial advantage to the detriment of the Entity*'.

162. Beyond these general assertions, however, Council's reasons do not explain or evidence how disclosure of the particular information in issue before me could result in such detriment.

163. In the absence of such explanation, and/or submissions from the 'entity' standing to incur any detriment or prejudice, I consider that there is insufficient information before me to permit a finding that disclosure of the information in issue could reasonably be expected

[124] See particularly materials cited at footnotes 62 and 64.
[125] Paragraph 3.6(a) of the decision under review.

to give rise to any of the prejudices identified in schedule 4, part 3, item 2 of the RTI Act. As I have noted above, the information in issue lacks any obvious commercial sensitivity, and I am not satisfied that this nondisclosure factor applies in the circumstances of this case.

164. In the interests of completeness, I should note that Council's decision did not seek to rely on the substantially similar nondisclosure factor in schedule 4, part 3, item 15 of the RTI Act, nor the business affairs harm factor in schedule 4, part 4, section 7(1)(c) of the RTI Act.[126]

165. Additionally, it did not claim that it apprehended any prejudice to or adverse effect on its *own* business, professional, commercial or financial affairs were the information in issue to be disclosed.

166. It did, however, in the decision under review paraphrase some of the language of these related nondisclosure and harm factors.[127] Further, in its submissions dated 5 August 2019, Council quoted a passage from the Information Commissioner's decision of *Cannon*,[128] in a context suggesting it did harbour concerns disclosure may impinge on Council's own affairs:[129]

> *Drawing the line between disclosure of information which promotes an appropriate level of accountability and public scrutiny of a government agency operating in a competitive commercial environment, and disclosure which unduly impedes the effective pursuit of that agency's operations, will often involve fine questions of judgment.*

167. Given this, it seems necessary that I turn my mind to the potential application of each of these additional considerations, and whether relevant affairs of Council might be prejudiced or adversely affected by disclosure of the information in issue.

168. I am satisfied none of schedule 4, part 3, items 2 or 15, or schedule 4, part 4, section 7(1)(c) of the RTI Act applies to favour nondisclosure in this case: whether by reference to the affairs of Imperium3 or related entities, Council, or any other person, entity or agency.

169. The reasoning at paragraphs 161-163 above is, in the absence of a clearly articulated case by either the agency with the onus of proving its claims, or the entity standing to be prejudiced or adversely affected, sufficient to dispose of any argument that disclosure of the information in issue could reasonably be expected to prejudice the trade secrets, business affairs or research of Imperium3, or adversely affect that entity's business affairs.

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[126] Schedule 4, part 4, section 7(1)(c) will apply where disclosure of information would disclose information concerning the business, professional, commercial or financial affairs of an agency or another person could reasonably be expected to have an adverse effect upon those affairs or prejudice the future supply of information of this type to government. As regards this latter harm – prejudice to supply of information – I am not satisfied there is any basis to conclude it would be reasonably likely to occur: see paragraphs 142-143 (noting that I cannot see how it could arise by reference to Council's, rather than Imperium3 or some other external entity's, affairs).

[127] Eg, by referring to 'adverse effect'. In its 5 August 2019 submissions, Council also made an incidental reference to the information in issue being of 'commercial value' to Imperium3 and associates. Schedule 4, part 4, section 7(1)(b) of the RTI Act recognises that a public interest harm will arise where disclosure would disclose 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 that information. The meaning of 'commercial value' in this context was explained by the Information Commissioner in *Cannon*, at [54]-[55]: either that information is valuable for the purposes of carrying on commercial activity, or there exists a genuine arm's length buyer prepared to pay for the information. In the absence of any developed submissions from Council on this point, or any at all from Imperium3, I am not prepared to find that the specific information in issue before me has any commercial value within the meaning of this factor.

[128] Citation at footnote 32

[129] At [110].

170. I am similarly unpersuaded that disclosure could prejudice or adversely affect Council's business or related affairs. In considering the identically-worded FOI predecessor to schedule 4, part 4, section 7(1)(c) of the RTI Act,[130] the Information Commissioner explained that it:

> *should apply only to the extent that an agency is engaged in a business undertaking carried on in an organised way for the purpose of generating income or profits, or is otherwise involved in an ongoing operation involving the provision of goods or services for the purpose of generating income or profits*.[131]

171. Given the similarity in wording, I consider that the two business affairs nondisclosure factors[132] may, at least to the extent they address business, professional, commercial or financial affairs,[133] also be fairly read in the manner explained by the Information Commissioner above: they only apply to information concerning agency activities or affairs that are carried on in a business-like fashion for the purpose of generating income or profits.

172. The decision cited by Council, *Cannon*, concerned affairs of this kind: the affairs of an entity responsible for the marketing and sale of Queensland-produced eggs into an open and competitive commodity market.

173. I question whether Council's activities, in agreeing to explore the possibility of providing public support for Imperium3's proposed Townsville operations, can be regarded as a '*competitive commercial*' activity that might stand to be prejudiced by disclosure of any of the information in issue. On the contrary, it strikes me as activity of a fundamentally governmental, rather than commercial, character.[134] Council has not specified how it could, in conducting preliminary negotiations with Imperium3, be said to be operating in a for-profit, business-like fashion or a '*competitive commercial environment*' of the kind considered in *Cannon*, and in the absence of such explanation, I am not persuaded that this is the case.

174. In any event, I do not consider this case to be one of '*fine judgment*'. I do not think it reasonable to conclude that disclosure of either an agreement to agree nor the limited amount of information remaining in issue in the Correspondence will impede the 'effective pursuit' by Council or any other entity of their operations, howsoever they may be characterised, whether as regards the Imperium3 proposal, or more generally. Council has placed nothing before me that would allow me to conclude otherwise.

175. To repeat, then, I am not satisfied that any of the business affairs nondisclosure or harm factors apply to favour nondisclosure of any of the information in issue.

176. Assuming, once again, that any or all of these factors did arise to be balanced, I would give each only minimal weight, for reasons explained above: broadly, Imperium3's lack of direct submission as to any prejudice it might conceivably suffer, the absence of any detailed submissions from Council as to apprehended prejudice or adverse effect, the quantity of information in the public domain, and the now-dated nature of the Correspondence information.

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[130] Section 45(1)(c).
[131] *Seeney*, at [93].
[132] That is, schedule 4, part 3, items 2 and 15 of the RTI Act.
[133] There is nothing before me to suggest private affairs, or trade secrets or research would be prejudiced by disclosure (and Council has not sought to argue same), and I have therefore confined my consideration of each to the extent they encompass business, professional, commercial or financial affairs.
[134] See *Seeney*, at [49]-[51], observations made in a comparable context.

Information considered in closed Council meeting

177. Finally, Council has relied on the fact that certain matters relating to Imperium3's proposals were discussed in a closed meeting under section 275 of the LG Regulation. I considered a similar argument in *ABC*.[135] In that case, however, the specific information in issue (or at least its substance) had been the subject of consideration in closed meeting.

178. In the present case, what I understand was considered by Council in closed session was not the information in issue, but a separate issue – the proposal to allocate Council land for use by Imperium3 or associated entities. As discussed in paragraph 96, I cannot see that disclosure of any of the information in issue would infringe the confidentiality of the relevant closed meeting. Accordingly, I do not consider the occurrence of this closed meeting gives rise to a consideration favouring nondisclosure of that information.

179. If this conclusion is wrong, I would be required to allocate a weight to this 'closed meeting' consideration. I approached this task in *ABC* as follows:

> *144. It is, of course, then necessary to give weight to that consideration. In doing so, it is relevant to bear in mind that while in legislating section 275 of the LG Regulation Parliament may, as TCC decided, have recognised a* 'public interest in ensuring that certain matters discussed by Council should not be publically disclosed'*, in enacting the RTI Act – particularly:*
>
> - *the right of access enshrined in section 23, and*
> - *section 6, overriding any other provisions in other Acts prohibiting disclosure –*
>
> *Parliament has also determined that there is a prevailing public interest in enabling public access to information in the government's possession or under the government's control, including that in the possession or under the control of local governments. This is a right that has existed in Queensland in one enactment or another for more than 25 years, and one the existence of which I expect all local governments would be aware – such that they would appreciate that information discussed in closed session, insofar as it falls to be recorded in a document as defined in the RTI Act, may be subject to disclosure in accordance with that right. In the circumstances, I afford this consideration telling against disclosure of the Term Sheet modest weight.*

180. In this case, given the relatively peripheral connection between Council's closed meeting and the information in issue, I would afford this consideration even less weight, and give it only minimal weight.

Balancing the public interest

181. I have identified above several factors or considerations favouring disclosure of the information in issue, which I consider warrant moderate to substantial weight.

182. As against this, I am not satisfied that any factors or considerations operate to favour nondisclosure of the information in issue – apart from the PI Harm Factor, to a limited amount of personal information.[136]

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[135] [141]-[145].

[136] For the sake of completeness, I should note that in submissions dated 13 June 2019, Council relayed to me Imperium3's concerns as to the identity of the applicant, and the use he may intend to put any information that may be accessed. Information access processes of the kind set down in the RTI Act are generally regarded as both '*applicant and motive blind*' (*S v the Information Commissioner* [2007] UKIT EA/2006/0030, at [19]), and applicant identity and motive are irrelevant considerations: *State of Queensland v Albietz* [1996] 1 Qd R 215 and *Australian Workers' Union and Queensland Treasury; Ardent Leisure Limited (Third Party)* [2016] QICmr 28 (28 July 2016), [40]-[41] and Schedule 4, part 1 items 2 and 3 of the RTI Act.

183. Where multiple factors apply to favour disclosure of information – some substantial – and none tell against, there is obviously no basis for finding that disclosure of that information would, on balance, be contrary to the public interest. Accordingly, I find that disclosure of any non-personal information in issue would not, on balance, be contrary to the public interest.

184. As regards personal information, I am satisfied that the public interests in furthering access to government-held information, and promoting Council openness and accountability, displace the minimally-weighted PI Harm Factor. The balance of the public interest therefore favours disclosure of relevant information, and its disclosure would not, on balance, be contrary to that public interest in the particular circumstances of this case.

185. In the event my identification of factors and considerations favouring nondisclosure may be incorrect, and some or all discussed above do apply to the information in issue, then I nevertheless remain of the view that disclosure would not, on balance, be contrary to the public interest. I have accorded relevant factors and considerations favouring nondisclosure notional weightings above. These weightings would be insufficient to displace the general public interest in promoting access to government-held information, and the three substantial and one moderately-weighted factor favouring disclosure that I have identified.

DECISION

186. I set aside the decision under review dated 14 August 2018. In substitution, I find that Council has not demonstrated that the decision under review was justified, or that I should give a decision adverse to the applicant. No grounds exist for refusing access to the information in issue.

Louisa Lynch
Acting Information Commissioner

Date: 3 October 2019

APPENDIX

Significant procedural steps

Date	Event
10 September 2018	OIC received the applicant's external review application.
11 September 2018	OIC notified Council and the applicant that the review application had been received and requested procedural documents from Council.
18 September 2018	OIC received the requested documents from Council.
9 October 2018	OIC notified Council and the applicant that the application for external review had been accepted. OIC requested the Information in Issue from Council.
5 November 2018	OIC received the requested documents from Council.
19 February 2019	OIC conveyed a written preliminary view to Council, advising that there were no grounds for refusing access to the Information in Issue.
6 March 2019	Council requested a 10-day extension of time to respond to OIC's preliminary view. OIC granted an extension of time to 20 March 2019.
20 March 2019	OIC received Council's submissions advising that Council intended to consult with relevant third parties.
22 March 2019	OIC accepted Council's proposal to consult with third parties.
23 April 2019	Council requested an extension of time. OIC granted an extension of time to 10 May 2019.
9 May 2019	OIC received Council's advice on third party consultation and submissions in reply to OIC's 19 February 2019 preliminary view.
21 May 2019	OIC wrote to Imperium3 by way of formal consultation.
4 June 2019	OIC conveyed a second preliminary view to Council.
13 June 2019	OIC received from Council submissions in reply to OIC's second preliminary view.
18 June 2019	OIC received further correspondence from Council, concerning contact with Imperium3.
20 June 2019	OIC wrote to Council concerning consultation with Imperium3. Council responded to OIC's letter of same date. OIC wrote again to Imperium3 by way of consultation.
3 July 2019	Council notified OIC advising of preparedness to disclose some information.
9 July 2019	OIC wrote to Council, asking it to arrange disclosure of information. OIC further wrote to the applicant's representatives, asking they advise whether the applicant continued to seek access to information remaining in issue.
16 July 2019	The applicant's solicitor advised OIC that the applicant continued to seek access to the remaining Information in Issue.

Date	Event
23 July 2019	OIC conveyed another written preliminary view to Council, reiterating that there were no grounds for refusing access to most of the Information in Issue. OIC conveyed a written preliminary view to the applicant's solicitors, advising that the personal information of other individuals could be refused.
5 August 2019	OIC received submissions in reply from Council.
20 August 2019	OIC wrote to Council and the applicant as to the status of the review, advising that some personal information no longer remained in issue, and confirming that the next step would comprise a formal decision.
27 August 2019	OIC received further submissions from Council.
2 September 2019	OIC wrote to the applicant, conveying a preliminary view that access to some additional personal information may be refused.
6 September 2019	OIC wrote to Council seeking clarification as to some of the information in issue. Council replied, providing the requested clarfication.
24 September 2019	OIC wrote to Council and the applicant, confirming personal information the subject of OIC's 2 September 2019 letter to the applicant no longer remained in issue.