Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***Australian Broadcasting Corporation and Townsville City Council; Adani Mining Pty Ltd (Third Party) & Ors*** **[2019] QICmr 7 (12 March 2019)**
Application Number:	**313782**
Applicant:	**Australian Broadcasting Corporation**
Respondent:	**Townsville City Council**
Third Party:	**Adani Mining Pty Ltd (ACN 145 455 205)**
Fourth Party:	**Wagners Industrial Services Pty Ltd (ACN 105 730 489)**
Decision Date:	**12 March 2019**
Catchwords:	**ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - CABINET INFORMATION - information concerning infrastructure proposal - whether information brought into existence in course of local government's budgetary processes - whether exempt information to which access may be refused - sections 47(3)(a) and 48 and schedule 3, section 4B of the *Right to Information Act 2009* (Qld)** **ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - BREACH OF CONFIDENCE - 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. In October 2017, Townsville City Council (**TCC**), Rockhampton Regional Council (**RRC**) and representatives of Adani interests[1] signed a '**Term Sheet**' concerning the potential development of an airstrip servicing Adani's proposed Carmichael coal operations.

[1] No Adani corporate vehicle was specified; I have proceeded in this review on the basis the entity representing Adani interests is Adani Mining Pty Ltd (**Adani**), an assumption confirmed in correspondence from Adani's solicitors dated 11 September 2018.

2. The Australian Broadcasting Corporation (**ABC**) applied to TCC under the *Right to Information Act 2009* (**RTI Act**) for access to the Term Sheet.

3. TCC refused the ABC access to the Term Sheet, on the grounds it comprised exempt information, and information disclosure of which would, on balance, be contrary to the public interest.

4. The ABC applied to the Office of the Information Commissioner (**OIC**) for external review of TCC's decision.

5. For the reasons explained below, I set aside TCC's decision. I find that the Term Sheet is not exempt information under the RTI Act, nor would its disclosure, on balance, be contrary to the public interest. On that basis, the ABC is entitled to access the Term Sheet.

Background

6. OIC sought the views of each of RRC, Adani and Wagners Industrial Services Pty Ltd (**Wagners**) during the course of the review, as to possible disclosure of the Term Sheet.

7. RRC advised that it had no objections to disclosure, and did not further participate in the review process.

8. Adani, on the other hand, objected to disclosure. Although not a signatory to the Term Sheet, Wagners also objected to its disclosure. Each of these entities was joined as a participant in the review, and the substance of each participant's position was conveyed to the other through the course of the review.[2]

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

Reviewable decision

10. The decision under review is TCC's decision dated 1 March 2018, refusing access to the Term Sheet.

Evidence considered

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

Information in issue

12. The information in issue is the 21-page Term Sheet.

Issues for determination

13. TCC, Adani and Wagners all argue that the Term Sheet comprises:

- exempt information,[3] as information disclosure of which found an action for a breach of confidence under schedule 3, section 8(1) of the RTI Act; and/or
- information disclosure of which would, on balance, be contrary to the public interest.[4]

[2] A process which I am satisfied afforded each participant procedural fairness, contrary to submissions made by TCC (see, for example, submissions dated 28 August and 11 December 2018).
[3] Section 47(3)(a) of the RTI Act.
[4] Section 47(3)(b) of the RTI Act.

14. TCC further argues that the Term Sheet is information brought into existence in the course of TCC's budgetary processes, and is therefore exempt information under sections 47(3)(a) and 48, and schedule 3, section 4B of the RTI Act.

15. The issues for determination, therefore, are whether one or more of the above grounds for refusing access are established. I have addressed each below, beginning with TCC's claim that the Term Sheet comprises exempt 'budgetary processes' information.[5]

Budgetary information

16. The RTI Act gives people a right to access documents of government agencies.[6] This right is subject to other provisions of the RTI Act, including grounds on which access may be refused. Access may be refused to information, to the extent the information comprises 'exempt information'.[7] Schedule 3, section 4B of the RTI Act provides that budgetary information for local governments is exempt information:

> ***4B Budgetary information for local governments***
>
> *(1) Information brought into existence in the course of a local government's budgetary processes is exempt information for 10 years after the date it was brought into existence.*
>
> *(2) Subsection (1) does not apply to information officially published by decision of the local government.*

17. The phrase 'budgetary processes' is not defined in the RTI Act, and resort must therefore be had to the ordinary meaning of these words. In ascertaining the meaning of the phrase, however, I must also have regard to both Parliament's direction that the RTI Act be administered with a pro-disclosure bias,[8] and its express injunction that grounds for refusing access to information be interpreted narrowly.[9]

18. With each of these obligations in mind, I consider that for information to qualify for exemption under schedule 3, section 4B, it should comprise information brought into existence in connection with, or as a part of,[10] the discharge by a local government authority of budgetary duties and obligations imposed by section 12(4)(b) and Chapter 4 of the *Local Government Act 2009* (Qld) (**LG Act**); the former which requires the mayor of a local council to prepare a budget to present to the local government, the latter which governs local government finances and accountability.[11]

19. Reading the exemption in this manner not only accords with the natural meaning of the words 'budgetary processes' – the statutory duties and functions noted above involving systematic series of actions[12] relating to the estimation of a local government's income and expenditure, and planning for allotment of that local government's funds[13] – but with Parliament's mandate that grounds for refusing access under the RTI Act be read narrowly.

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[5] I did, during the review, consider on my own initiative the potential application of the prescribed crime body exemption contained in schedule 3, section 10(4) of the RTI Act. Enquiries with the relevant prescribed crime body – the Crime and Corruption Commission – led me to conclude the provision had no application.
[6] Section 23 of the RTI Act.
[7] Sections 47(3)(a) and 48 of the RTI Act.
[8] Section 44 of the RTI Act.
[9] Section 47(2)(a) of the RTI Act.
[10] Paraphrasing Murphy J in *Window v Phosphate Co-Operative Co of Australia Ltd* [1983] 2 VR 287, 297 (considering the meaning of the phrase *'in the course of'*, as discussed and applied in *Glass Media Pty Ltd and Department of the Premier and Cabinet; Screen Queensland Pty Ltd (Third Party); The Walt Disney Company (Australia) Pty Ltd (Fourth Party)* [2016] QICmr 30 (18 August 2016) (**Glass Media**),at note 32.
[11] Including regulating rates, charges (Chapter 4, Part 1), and fees (Chapter 4, Part 2), and requiring consideration of the budget as presented by the mayor under section 12(4)(b) (section 107A of the LG Act).
[12] Paraphrasing the dictionary definition of *'process'*: *Macquarie Dictionary Online*: https://www.macquariedictionary.com.au/.
[13] Paraphrasing the dictionary definition of *'budget'*: as above.

20. I conveyed the thrust of the above reasoning to TCC by letter dated 28 November 2018, in explaining my preliminary view that the Term Sheet did not qualify for exemption under schedule 3, section 4B of the RTI Act. While TCC's submissions in reply[14] maintained its claim for exemption under this provision, arguing that parts of the Term Sheet had been '*considered in closed session by Council in the context of its budgeting process*', it did not seek to contend that the Term Sheet was brought into existence in the course of TCC carrying out the statutory budgeting duties noted in paragraph 18. There is nothing else before me to suggest that this is the case and in the circumstances, I am not persuaded that a proposal of the kind reflected in the Term Sheet can be said to comprise information brought into existence in the course of a local government's budgetary processes.

21. I find that the Term Sheet is not exempt information under schedule 3, section 4B of the RTI Act.

Information disclosure of which would found an action for breach of confidence

22. Another category of exempt information to which access may be refused under the RTI Act is information disclosure of which would found an action for a breach of confidence (**Breach of Confidence Exemption**).[15] As noted, TCC, Adani and Wagners claim that the information is exempt on this basis.

23. The test for this 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.[16] In this case, either Adani, Wagners, or both may comprise such a plaintiff.

Basis for obligation – equitable or contractual?

24. There is no question that the Breach of Confidence Exemption will apply where an equitable obligation of confidence can be established, in accordance with the cumulative criteria discussed further below.[17] TCC, Adani and Wagners all contend that the latter two are owed obligations of confidence of this kind, by the former.

25. TCC and Adani also argue, however, that TCC owes Adani a contractual obligation of confidence, which is sufficient to 'found' the action necessary to enliven the Breach of Confidence Exemption.[18]

26. In *B and BNRHA*, the Information Commissioner considered whether section 46(1)(a) of the former FOI Act encompassed contractual obligations of confidence, or equitable obligations only. While concluding it may apply to both, the Commissioner noted that:[19]

> *If the Commonwealth AAT or the Federal Court should in a future case advance an explanation as to why the words "found an action for breach of confidence" in s.45(1) of the Commonwealth FOI Act should be construed as being confined to an action in equity for breach of confidence, I would be prepared to revisit this issue.*

27. Just such an explanation was forthcoming in *Callejo and Department of Immigration and Citizenship*,[20] in which Deputy President Forgie of the AAT stated that where a contractual term

[14] Dated 11 December 2018.
[15] Schedule 3, section 8(1) of the RTI Act.
[16] *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 ***(B and BNRHA)***, a decision of the Information Commissioner analysing the equivalent exemption in the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**), at [44].
[17] *B and BNRHA*, [43].
[18] As it is not a signatory to the agreement, Wagners' case for objecting to disclosure under the Breach of Confidence Exemption is wholly dependent on its being able to successfully establish that disclosure of that document by TCC would breach an equitable obligation of confidence owed to Wagners by TCC.
[19] At [43].
[20] [2010] AATA 244 (***Callejo***).

requiring confidentiality exists, disclosure (or threatened disclosure) of information may, in itself, only found an action for breach of contract; an action for breach of contract, and in equity for breach of confidence, being separate and distinct causes of action at general law.[21]

28. In the wake of *Callejo*, OIC revisited the issue – as the Information Commissioner indicated would occur in the passage from *B and BNRHA* extracted above – in *TSO08G and Department of Health.*[22] Right to Information Commissioner Mead adopted the reasoning in *Callejo* for the purposes of the Breach of Confidence Exemption, and the exemption in Queensland is now confined to equitable obligations of confidence only.

29. Both TCC and Adani argued that OIC's approach as stated above is incorrect. Given the express nature of the document in which any putative contractual obligation appears,[23] it is not necessary to dwell extensively on this issue. It is sufficient to note that I am content to adhere to the approach stated in *Callejo*, applied in Queensland in *TSO08G*, and consistently followed in this jurisdiction since.

30. In any event, there is in this case simply no basis on which a contractual obligation of confidence could exist. Unfortunately, the prohibition on disclosure of exempt or contrary to the public interest information imposed by section 108 of the RTI Act – and the absence, in the RTI Act, of any provision empowering me to withhold publication of my reasons – means that I am unable to explain my reasons in this regard in any detail, given that section 110(6) of the Act mandates their publication. It is sufficient to note that the finding expressed above is premised on an express and unambiguous provision in the Term Sheet, the nature and effect of which is explained in my letters to TCC dated 22 May and 14 August 2018, and to Adani dated 14 August and 22 October 2018.

31. Accordingly, even if the Breach of Confidence Exemption could operate by reference to contractual obligations of confidence, no such obligation exists in this case. The only basis, then, on which an obligation of confidence sufficient to establish the Breach of Confidence Exemption in Adani's favour is if it can be shown that TCC owes Adani an equitable obligation of confidence.

32. Even if I am incorrect in my view, such that there does exist a contractual obligation under the Term Sheet, and that obligation is sufficient to found an action for breach of confidence under the Breach of Confidence Exemption, it is well-established that public interest considerations may apply in respect of both contractual and equitable obligations of confidence.[24] For reasons explained below, I am satisfied such considerations warrant disclosure of the Term Sheet in this case.

33. I turn now to consider whether an equitable obligation of confidence exists.

Equitable obligation of confidence

34. The following five cumulative criteria must be established to give rise to an equitable obligation of confidence:[25]

    a) relevant information must be capable of being specifically identifiable as information that is secret, rather than generally available

[21] At [163]-[166].
[22] (Unreported, Queensland Information Commissioner, 13 December 2011) (***TSO08G***).
[23] A matter discussed further in the following paragraph.
[24] See *Seeney and Department of State Development; Berri Limited (Third Party)* (2004) 6 QAR 354 (***Seeney***) at [199]-[200], citing *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 (***Hughes***) at 88-89. See also *Queensland Nurses' Union and Sunshine Coast Hospital and Health Service; Ramsay Health Care (Third Party)* [2017] QICmr 6 (23 February 2017) (***Queensland Nurses' Union***) at [21].
[25] *B and BNRHA*, [57]-[58].

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 (in this case, Adani and/or Wagners).

35. In the case of the Term Sheet, the requirements most called into question are requirements (b) and (c).

Requirement (b) – necessary quality of confidence

36. The proposal the subject of the Term Sheet has been subject to a degree of media reportage and public discussion, and I am not satisfied some of the information contained in that document can be said to be sufficiently secret, so as to satisfy requirement (b) stated above. As noted in paragraph 30, I am constrained in the level of detail I can reveal in these reasons. It is sufficient to note that I am not persuaded that any information concerning Wagners can be said to meet this requirement.[26] Other non-secret information of this kind is specified in my letters to TCC and Adani dated 28 November 2018 and 22 October 2018 respectively.

37. As relevant information cannot satisfy the second of the five cumulative requirements set out above, it cannot be the subject of an equitable obligation of confidence, and cannot qualify for exemption under the Breach of Confidence Exemption.

Requirement (c) – circumstances of communication

38. Requirement (c) demands 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.[27] As the Information Commissioner has previously put it, the touchstone in assessing whether this requirement is satisfied '*lies in determining what conscionable conduct requires of an agency in its treatment of information claimed to have been communicated in confidence*'.[28]

39. In *B and BNRHA*,[29] the Information Commissioner said that requirement (c) must be considered on the basis of an evaluation of the whole of the relevant circumstances in which the information was imparted to the agency claiming to be bound (ie, TCC). 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.[30]

40. The Information Commissioner gave an overview of potentially relevant circumstances that may need to be evaluated from case to case in *Orth and Medical Board of Queensland; Cooke (Third Party)*:[31]

> *In evaluating the relevant circumstances, it should be borne in mind that the courts have recognised that special considerations may apply in determining whether a government agency owes an obligation of confidence in respect of information communicated to it by a person outside government:* Attorney-General (UK) v Heinemann Publishers *(1987) 75 ALR 353 at p.454; for example:*

[26] My letter to Wagners dated 22 October 2018 further describes the thrust of this information. See also note 91.
[27] *B and BNRHA*, [76]-[102].
[28] *Pearce and Qld Rural Adjustment Authority; Various Landholders (Third Parties)* (***Pearce***) (1999) 5 QAR 242 at [84].
[29] At [84].
[30] Of the kind referred to by a 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 302-3: see *B and BNRHA* at [82].
[31] (2003) 6 QAR 209, at [34] (***Orth***).

- *in* Smith Kline & French*, Gummow J refused to hold that the first respondent was bound by an equitable obligation not to use confidential information in a particular way because to do so would or might inhibit the first respondent's statutory functions.*

- *account must be taken of the uses to which the government agency must reasonably be expected to put information, purportedly communicated to it in confidence, in order to discharge its functions. The giving of information to a regulatory or law enforcement authority may mean an investigation must be started in which particulars of the information must be put to relevant witnesses, and the information may ultimately have to be exposed in a public report or perhaps in court or tribunal proceedings:* Re "B" *at p.319, paragraph 93.*

- *a government official, who is required to comply with common law principles of procedural fairness when making decisions, may be confronted with an apparently conflicting duty to respect a confidence, in circumstances where the official proposes to make a decision adverse to a person's rights or interests on the basis of confidential information obtained from a third party. Ordinarily, conscionable conduct on the part of a government agency would require compliance with a common law duty to accord procedural fairness, and equity would not enforce an obligation of confidence to the extent that it conflicted with a legal duty of that kind: see, for example,* Re Hamilton and Queensland Police Service *(1994) 2 QAR 182 at p.198, paragraph 52;* Re Coventry and Cairns City Council *(1996) 3 QAR 191 at pp.199-200, paragraphs 27-29, and pp.202-203, paragraphs 36-37;* Re Kupr and Department of Primary Industries *(1999) 5 QAR 140 at pp.156-157, paragraphs 42-45.*

- *public interest considerations (relating to the public's legitimate interest in obtaining information about the affairs of government) may affect the question of whether enforceable obligations of confidence should be imposed on government agencies in respect of information purportedly supplied in confidence by parties outside government: see* Esso Australia Resources Ltd v Plowman *(1995) 183 CLR 10;* Commonwealth of Australia v Cockatoo Dockyard Pty Ltd *(1995) 36 NSWLR 662;* Re Cardwell Properties Pty Ltd & Williams and Department of the Premier, Economic and Trade Development *(1995) 2 QAR 671 at pp.693-698, paragraphs 51-60.*

Discussion

41. In this case, I am not persuaded that requirement (c) can be satisfied as regards the Term Sheet.[32]

42. Firstly, it is worth noting my initial reservations[33] as to whether the information in the Term Sheet could actually be said to embody a communication from either of Adani or Wagners to TCC that might be the subject of an obligation of confidence binding TCC.

43. In its 7 November 2018 submissions, Adani helpfully directed to me the decision of the UK Court of Appeal in *Murray v Yorkshire Fund Managers Ltd*,[34] which I take to be authority for the proposition that information developed jointly may be the subject of an equitable obligation of confidence restraining one of the '*co-owners*'[35] of the information from disclosing same in breach of obligations it may owe the others. I accept this as regards Adani; it would not, however, appear to assist Wagners in any way, given it is not a signatory to the Term Sheet and not a contributor to its development.

44. The difficulty for Adani, however, is the nature of the '*co-owner*' it would seek to restrain from disclosing the Term Sheet: a local government authority, accountable to the public for its disbursement of public funds and the terms on which it proposes to make such disbursements. As I explained to both Adani and TCC during the review, I consider that this accountability should reasonably be expected to include disclosure of the details of proposals such as that recorded in the Term Sheet, that is, proposals to award public monies for the benefit of private interests,

[32] Including information discussed at paragraphs 36-37, in the event the conclusion expressed there is incorrect.
[33] Expressed in my letters to TCC dated 22 May 2018, Adani dated 14 August 2018, and Wagners dated 22 October 2018.
[34] [1998] 1 WLR 951.
[35] Adopting the terminology used in that decision.

outside of TCC's territorial jurisdiction. As Brennan J put it in *Esso Australia Resources Ltd v Plowman* (***Esso***):[36]

> [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.* (My emphasis.)

45. I acknowledge the fact the Term Sheet is endorsed as confidential, contains terms as to confidentiality, and was considered by both local government signatories in closed session, reflective of shared intentions the information be kept confidential. Further, I accept, as broad statements of principle, that a recipient of information will carry a '*heavy burden*' should they seek to argue they are not bound to hold confidentially information given '*on a business-like basis and with some avowed common object in mind*',[37] and that courts and decision-making bodies should not, as Adani submitted, '*readily substitute their views of what is confidential for what the parties have already agreed to be confidential*';[38] noting, of course, that the authorities from which these principles derive concerned commercial disputes involving private, rather than public, actors.[39]

46. As stressed above, whether an obligation of confidence arises in a particular case depends on an assessment of all relevant circumstances. Having regard to the circumstances in this case, I am not satisfied that conscionable conduct would require TCC to keep the Term Sheet, embodying information jointly developed by it in conjunction with other participants, confidential from the community whose interests TCC represents and the local component of which, ultimately, will be required to fund any proposal, should it proceed. To paraphrase Mason CJ in *Esso,*[40] why should the ratepayers of TCC and RRC, and the public of Queensland, be denied knowledge of the terms on which these government agencies propose to disburse public resources, when it is the public who will bear the cost?

47. The above seems to me sufficient to dispose of any claim that requirement (c) is met in this case, irrespective of who is said to be owed any obligation of confidence, ie Adani, Wagners, or both. To the extent there may be any doubt, I simply adopt the Information Commissioner's reasoning and comments as expressed in *Orth*: the community would appear to have a genuinely legitimate interest in obtaining information describing arrangements by which local government authorities propose to fund construction of infrastructure in a separate local government area, for the use and ownership of a private company – an interest sufficient to forestall the establishment of an equitable obligation of confidence binding TCC to withhold from the public information which it, a representative of that public, is *'co-owner'*.[41]

Participant submissions

48. Both TCC and Adani dispute the reasoning and findings set out in the preceding paragraphs.[42]

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[36] (1995) 183 CLR 10, at 37-38.
[37] *Coco v AN Clark (Engineers) Ltd* (1968) 1a IPR 587, 591, cited in Adani's submissions dated 11 September 2018.
[38] Submissions dated 7 November 2018, citing *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317.
[39] Bearing in mind, in this regard, Mason CJ's observation in *Esso* that '[t]*he courts have consistently viewed governmental secrets differently from personal and commercial secrets*', at 31; as discussed further below at paragraph 64, I am satisfied that the terms on which two government entities propose to fund infrastructure for the benefit of commercial parties using public monies can be characterised as *'governmental'* information.
[40] At 32.
[41] *Murray v Yorkshire Fund Managers Ltd*, as discussed in paragraph 43.
[42] Wagners' 5 October 2018 submissions on the application of the Breach of Confidence Exemption simply submitted that the Term Sheet contained '*extremely sensitive information relating to Wagners*'. Although not a party to that document, Wagners went on to assert that '[t]*he parties, including Wagners, at all times proceeded with discussions on the matters referred to in the …Terms Sheet on the basis that it would be kept strictly confidential and would not be disclosed on an unauthorised basis*'. When given the opportunity to consider and respond to preliminary reasoning largely consonant with that at paragraphs 36-47 above (by letter from me dated 22 October 2018), however, it advised that it considered '*all relevant points have been raised*' and that it did '*not intend to submit further submissions*': email dated 21 November 2018.

49. A considerable proportion of TCC's submissions on the Breach of Confidence Exemption were directed toward resisting a preliminary view expressed by me that it did not owe RRC an obligation of confidence sufficient to ground the exemption. That preliminary view was based on the requirement clearly expressed by the High Court in *Commonwealth of Australia v John Fairfax & Sons Limited*,[43] that in cases where an equitable obligation of confidence is said to be owed to a government plaintiff, meeting the fifth requirement enumerated above – detriment – requires establishing detriment to the public interest.[44] As will be apparent from my reasoning elsewhere, I am not persuaded disclosure of the Term Sheet, revealing the details of a proposal to commit public funds to the benefit of private entities, and which has been the subject of public contention,[45] would be detrimental to the public interest. Indeed, my view is that it would actively serve the public interest.

50. Despite it being founded on long-standing and uncontroversial senior judicial authority, TCC resisted my preliminary view in these terms. It also insisted that I engage with its submissions on the point, even after their having become redundant on RRC advising it had no objection to the Term Sheet's disclosure. I do not propose to do so: even if TCC had at some point owed RRC an obligation of confidence, RRC has, through its lack of objection to disclosure, effectively waived or released TCC from that obligation. Disclosure by TCC, then, could not amount to an unauthorised disclosure – the fourth cumulative requirement, (d) – as against RRC.[46] A claim for exemption based on an obligation of confidence said to be owed to RRC must, therefore, necessarily fail.

51. Insofar as TCC's submissions remain relevant, they were largely directed toward disagreeing with OIC's confining the Breach of Confidence Exemption to equitable, rather than contractual obligations of confidence. I have dealt with these arguments above.

52. TCC, along with Adani, also challenged the Information Commissioner's longstanding recognition of, to borrow language used by Mason CJ in *Esso*,[47] a '*public interest exception*'; ie, our contemplation of the public's 'legitimate interest' in considering whether, in all of the relevant circumstances, information can be said to have been communicated in circumstances giving rise to an equitable obligation of confidence so as to satisfy requirement (c).[48]

53. In earlier submissions,[49] TCC argued that in the context of the law of confidence generally, matters of public interest should only be contemplated after an action is successfully founded (ie, the five requirements enumerated in paragraph 34 have been satisfied), in considering whether there may exist a defence to that successful action, and that authority[50] dealing with the Commonwealth analogue of the Breach of Confidence Exemption suggests considerations of this type and contemplation of defences are beyond the purview of an RTI decision-maker faced with a claim under that exemption.

54. Alternatively, as I understand its final submissions on the issue,[51] TCC disputes the relevance of its status as a public agency accountable to the community in assessing whether requirement

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[43] (1980) 147 CLR 39.
[44] A principle widely approved in Australia eg per Gummow J above, and per McHugh JA in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd and Anor* (1987) 75 ALR 353 at p 455 and in England (*Attorney-General v Guardian Newspapers (No. 2)* [1990] 1 AC 109 at 283).
[45] Discussed further below – see paragraph 72 and note 75.
[46] Noting that RRC's lack of objection has no bearing on the question as to whether TCC continues to owe Adani and/or Wagners enforceable obligations of confidence, a point raised in TCC's 11 December 2018 submissions and one with which I agree.
[47] At 31.
[48] That is, matters of a kind acknowledged as relevant in *Orth*, and a number of other OIC decisions including *Seeney* at [191], *Swickers Kingaroy Bacon Factory Pty Ltd and Department of Primary Industries; McNaught (Third Party)* (1998) 4 QAR 498 at [29], *Glass Media* at [50], and *Queensland Nurses' Union* at [25].
[49] Dated 28 August 2018.
[50] Principally, *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) and Another* (1987) 74 ALR 428 (***Corrs Pavey***), *Callejo* and *Re Lobo and Department of Immigration and Citizenship* [2011] AATA 705.
[51] Dated 11 December 2018.

(c) is met, and contends that insofar as public interest considerations may be relevant, they should be confined to a narrow range of cases; that:

> *…"public interest considerations" sufficient to negate a mutual obligation of confidence on the facts in a particular case are confined to those instances where the entity has a statutory power to compel production of the information; where it is performing regulatory functions - or where natural justice obligations owed to a particular person would require disclosure to that person.*

55. Adani also argues that it would suffer detriment if the Term Sheet were to be disclosed, citing the New Zealand High Court decision of *Earthquake Commission v Krieger*[52] in support of its position.[53]

56. Dealing initially with submissions disputing any reference to public interest considerations (or a 'public interest exception')[54] – firstly, the authority cited by TCC suggesting they may be irrelevant to an application of the Breach of Confidence Exemption – *Corrs Pavey* – both addressed a redundant version of section 45 of the Commonwealth FOI Act, materially different to the Breach of Confidence Exemption,[55] and was decided well in advance of the High Court's decision in *Esso*, and its recognition of the pertinence of public interest considerations, when the party said to be bound by an obligation of conscience is an agent of the public. *Corrs Pavey* is, in this regard, of limited to no assistance.

57. Secondly, the Information Commissioner's approach to public interest considerations when assessing whether a claim under the Breach of Confidence Exemption has been made out is not to consider whether such matters might give rise to a 'defence' to an action for breach of confidence that has otherwise been established, but much earlier in the process, as matters bearing on whether such an action can be successfully founded in the first place – whether the third cumulative requirement, requirement (c), is fulfilled. I am satisfied that this is a defensible approach. As TCC's own submissions concede, '*the matter* [as to where public interest considerations may be relevant, ie in considering whether an action is founded, or only afterward, in assessing potential defences to such an action] *has not been conclusively settled*';[56] indeed, to the contrary, the principles discussed by the majority of the High Court in *Esso*[57] are expressed with sufficient breadth to support their application in this context.

58. In summary, I consider that public interest considerations – the relevance of which have been impliedly accepted in this state by a Supreme Court Justice[58] – comprise part of the matrix of relevant circumstances to be taken into account in assessing whether information has been communicated in circumstances giving rise to an equitable obligation of confidence, as requirement (c) demands.

59. I am also satisfied that, where the recipient – indeed, joint author – of information claimed to be confidential is a public agency, then relevant public interest considerations may, as stated in *Orth*, extend beyond the narrow range of matters cited by TCC in the submission quoted in paragraph 54, to issues of the kind I have canvassed above: that a proper consideration of all relevant circumstances will extend to the public's legitimate interest in accessing subject information, particularly where, as here, that information has a direct bearing on the potential

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[52] [2014] 2 NZLR 547.
[53] Submission dated 11 September 2018.
[54] TCC's 11 December 2018 submissions take issue with my use of the phrases *'public interest considerations'* and *'public interest exception'*, for reasons I am not entirely clear; I have used the terms interchangeably.
[55] At the time *Corrs Pavey* was decided, section 45 of the Commonwealth FOI Act did not require establishing or founding a legal action for breach of confidence, but simply provided that a '*document is an exempt document if its disclosure under this Act would constitute a breach of confidence*'. The Information Commissioner discussed the difference between this formulation and the wording used in schedule 3, section 8(1) of the RTI Act in *B and BNRHA*, at [27] and [30].
[56] Submissions dated 28 August 2018.
[57] Subsequently adopted by the majority of the New South Wales Court of Appeal in *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662 (***Cockatoo Dockyard***).
[58] Specifically, Hoeben J, in *Carmody v Information Commissioner & Ors* [2018] QCATA 14 (2 March 2018), at [118] ff. While His Honour set aside OIC's finding as to where, in that case, the public interest lay, he nevertheless dealt with such considerations as relevant for the purposes of ascertaining the requirements for establishing the Breach of Confidence Exemption were met.

disbursement of public resources, and the measures intended to safeguard that disbursement.[59] Again, the 'touchstone' in this case is what conscionable conduct requires of TCC. I cannot accept that such conduct would require it to withhold from the community it represents information of the kind contained in the Term Sheet, aspects of which I have touched on above and are again summarised below.[60]

60. Additionally, it is not correct to claim, as TCC does in its 12 December 2018 submissions, that in having regard to public interest considerations, I am *'displacing'* the Breach of Confidence Exemption – where, as here, the public's legitimate interest in accessing information is sufficient, then this will, as I have noted at paragraph 47, forestall or preclude the establishment of an equitable obligation of confidence. This is not a *'displacement'* of the exemption – the requirements for enlivening and applying the exemption will simply not be met. In other cases, where no such 'legitimate interest' exists, then provided all other requirements are met, there will be ample scope for the exemption's operation.[61]

61. In a similar vein, I reject any suggestion[62] that the structure of the RTI Act itself precludes contemplation of a public interest exception to the Breach of Confidence Exemption. It is true that Parliament has declared that disclosure of 'exempt information'— relevantly, information the disclosure of which would found an action for breach of confidence — is contrary to the public interest, and a finding that information is 'exempt information' obviates the need to conduct a statutory public interest balancing exercise.[63]

62. However, to attract the conclusive presumption stated in section 48 of the RTI Act, relevant information must first meet the requirements for the particular exemption claimed, that is, it must be shown to actually *be '*exempt information': only once the elements of a particular exemption are established can the information then be said to comprise 'exempt information', the disclosure of which is presumed to be contrary to the public interest and on which basis an agency may refuse access.

63. TCC and the third parties in this case are relying on an exemption provision that effectively imports the requirements of the general law—which requirements include, as discussed above, a consideration of all relevant circumstances surrounding the communication of confidential information, including public interest considerations.

64. I also reject TCC and Adani's[64] complementary submission to the effect that, even if the 'public's legitimate interest' in obtaining information about the affairs of government is accepted as relevant in evaluating whether requirement (c) is satisfied, the Term Sheet is simply not information of this kind, but rather 'commercial information' to which such an interest does not apply. A document describing the mechanics by which two local councils propose to contribute public funding toward the construction of an airstrip, such facility to be used, and ultimately owned,[65] by private entities, in an area outside of each contributing council's local government area, and in the expectation benefits will flow to the community governed by each, is in my view information squarely about the affairs of government, ie, TCC and RRC.

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[59] I would also note that I do not accept that principles concerning public interest considerations discussed in either *Esso* or *Cockatoo Dockyard* are confined to arbitration cases, as I understand TCC to be contending in its 15 June 2018 submissions. As the Information Commissioner has previously found in cases such as *Orth* and *Seeney*, the principles are of general application: the public has as much a *'legitimate interest'* in knowing the terms on which its representatives propose to offer its resources, as it does in how those representatives may have conducted themselves in arbitration.

[60] Paragraph 64.

[61] Indeed, that the scope of the public interest exception to the Breach of Confidence Exemption is not without limits was, as TCC correctly notes in its 15 June 2018 submissions, expressly recognised by the Information Commissioner in *Seeney*, the Commissioner noting (at [201]) that '…*a government agency's duty to convey information to the public in an appropriate way to give an account of its functions, is unlikely to require the revelation of every document or piece of information communicated to the agency in confidence*…'. As should be apparent from elsewhere in these reasons, I am, however, satisfied that TCC's duty to the public in this case ***does*** oblige it to disclose the specific document in issue, ie, the Term Sheet to which it is signatory.

[62] Raised particularly by TCC – see especially submissions dated 15 June 2018.

[63] As required under section 47(3)(b), in accordance with section 49 of the RTI Act.

[64] Submissions dated 11 September 2018.

[65] See https://www.theguardian.com/business/2018/jan/17/queensland-councils-say-they-wont-own-adani-airport-despite-paying-34m.

65. Addressing then Adani's concern that it will suffer detriment if the Term Sheet is disclosed, detriment is, as noted above, a discrete requirement; the fifth – and final – of those necessary to establish exemption under the Breach of Confidence Exemption. Those requirements are, also noted above, cumulative, and given my findings that preceding requirements cannot be met, it is therefore not necessary to address this criterion.

66. As for Adani's reliance on *Krieger*, the principles discussed and applied in that case concern the position where the plaintiff seeking to enforce an obligation of confidence is a government actor, not a private entity such as Adani, and generally relate to the higher standard such a government plaintiff must meet in satisfying the fifth cumulative requirement, detriment. In this case, it is not, as I have noted above, necessary to consider questions of detriment. Additionally, any such 'plaintiff' of the kind contemplated in *Krieger* could only have been RRC. That agency is, as noted, not objecting to disclosure of the Term Sheet, and thus not contending that it is owed any obligation of confidence. Accordingly, *Krieger* is of no relevance or assistance in assessing Adani's position vis a vis the Breach of Confidence Exemption.[66]

Breach of Confidence Exemption - Conclusion

67. For the reasons explained above, the Term Sheet is not exempt information under the Breach of Confidence Exemption.

Contrary to public interest information

68. As noted, TCC, Adani and Wagners also argue that disclosure of the Term Sheet would, on balance, be contrary to the public interest.[67] This comprises a further ground on which access to information may be refused under the RTI Act.[68]

69. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest[69] and explains the steps that a decision-maker must take, as follows:[70]

- 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.

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

71. TCC identified several public interest factors favouring disclosure, deciding that disclosure of the Term Sheet could reasonably be expected to:

- promote open discussion of public affairs and enhance the Government's accountability[71]
- contribute to positive and informed debate on important issues or matters of serious interest; and[72]
- ensure effective oversight of expenditure of public funds.[73]

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[66] I also note that *Krieger* appears to have been heavily premised on the 'distance' of the public plaintiff from executive government, and the fact subject information was private information about individual citizens (at [73] and [80]). TCC is, in the local context, a central organ of governance, and the information in the Term Sheet in no way comprises personal or private information. Finally, and while not strictly relevant, I am, as recorded elsewhere, quite satisfied that, contrary to Adani's submissions, a document detailing a proposal by two local governments to fund infrastructure is *'information relating to government'* (*Krieger*, at [74]).
[67] 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.
[68] Section 47(3)(b) of the RTI Act.
[69] Schedule 4 of the RTI Act – non-exhaustive lists of potentially relevant considerations.
[70] Section 49(3) of the RTI Act.
[71] Schedule 4, part 2, item 1 of the RTI Act.
[72] Schedule 4, part 2, item 2 of the RTI Act.
[73] Schedule 4, part 2, item 4 of the RTI Act.

72. I agree with TCC's decision in this regard. Contrary to Wagners' submission[74] that '[t]*here are no reasons that can be identified that would, on balance, justify public disclosure*', I consider that it is more than reasonable to expect that disclosure of the Term Sheet would advance each of the public interest considerations enumerated by TCC. Allowing the community full access to the particulars of an arrangement of the type proposed in the Term Sheet will plainly enhance the accountability of each of TCC and RRC for the role each is expected to play, promote transparent and open discussion of that role and the mooted transaction, contribute to an informed debate on the merits of the transaction,[75] and by permitting public scrutiny of the terms and mechanisms by which it is proposed to allocate public resources, help to ensure effective oversight of expenditure of public funds. Each of the above factors favours disclosure of the Term Sheet.

73. TCC afforded the first and third factors listed in paragraph 71 significant weight, and moderate weight to the second. In this regard, I fully agree with and adopt TCC's weightings, ***aside*** from the weight afforded the second factor — contributing to positive and informed debate on important issues or matters of serious interest. This, too, is in my view deserving of significant weighting. As noted, the deal detailed in the Term Sheet has been the subject of considerable community discussion, discussion which could only be enhanced by making available access to a document enlightening the community as to that detail.

74. TCC, Adani and Wagners submit that there are a number of considerations favouring nondisclosure in this case. In the decision under review, TCC found that disclosure of the Term Sheet could reasonably be expected to:

- cause a public interest harm through disclosure of deliberative process information
- prejudice a deliberative process
- prejudice business, commercial or financial affairs[76]
- 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 TCC's ability to obtain confidential information;[77] and
- disclose information considered in a Closed Council meeting, inconsistently with section 275 of the *Local Government Regulation 2012* (Qld) (**LG Regulation**).

75. On external review, TCC also contended that disclosure would prejudice its competitive commercial activities,[78] and give rise to a public interest harm, because disclosure could have a substantial adverse effect on the financial or property interests of the State or an agency.[79]

76. Adani initially made relatively detailed submissions as to factors favouring nondisclosure of the Term Sheet, positing that disclosure could reasonably be expected to prejudice its business affairs, by giving rise to a number of commercially undesirable outcomes.[80] In its final submissions,[81] however, it narrowed these claims, noting that in view of developments

[74] Submissions dated 5 October 2018.
[75] An important issue, and one which media coverage indicates is a matter of serious interest – see, for example, http://www.news.com.au/finance/business/mining/townsville-council-redundancies-fund-185-million-contribution-towards-an-airstrip-for-adanis-carmichael-coal-mine/news-story/9e76a61f59714797c6c620d7e7bce863; https://www.townsvillebulletin.com.au/news/mayor-defends-decision-despite-social-media-backlash/news-story/1705b19ad4e797ef6ca0ed4b31ce3e97; http://www.abc.net.au/news/2018-01-10/adani-$18m-private-airstrip-asked-to-be-investigated-ccc/9318742; https://www.theguardian.com/business/2018/jan/17/queensland-councils-say-they-wont-own-adani-airport-despite-paying-34m.
[76] Schedule 4, part 3, items 2 and 15 of the RTI Act, the former raised in the decision under review, the latter in TCC's 11 December 2018 submissions. These factors respectively operate to favour nondisclosure where disclosure could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities (item 2), and prejudice trade secrets, business affairs or research of an agency or person (item 15). There is nothing before me to suggest private or professional affairs, or trade secrets or research would be prejudiced by disclosure (and no participant has sought to argue same), and I have therefore confined my consideration of each to the extent they encompass business, commercial or financial affairs.
[77] Schedule 4, part 3, item 16 of the RTI Act.
[78] Schedule 4, part 3, item 17 of the RTI Act.
[79] Schedule 4, part 4, item 10 of the RTI Act.
[80] Submissions dated 11 September 2018.
[81] Dated 7 November 2018.

concerning the airstrip, '*certain of our previous submissions as to detriment to Adani's business, commercial, financial etc affairs no longer apply.*'

77. Adani did continue to press a case that disclosure of the Term Sheet could reasonably be expected to negatively impact its business affairs, but only to the extent that it would *'adversely affect'* its ability to negotiate with other regional councils in the future.[82] It also continued to maintain that disclosure could reasonably be expected to give rise to the CCHF, and supported TCC's claim that disclosure would be inconsistent with section 275 of the LG Regulation.

78. Wagners asserted that disclosure of the Term Sheet '*would undoubtedly disclose extremely commercially sensitive information and therefore could reasonably be expected to prejudice the business, commercial and financial affairs of Wagners*'.[83] Wagners specifically identified the nondisclosure factor stated in schedule 4, part 3, item 2 of the RTI Act as applying in this case; in the interests of completeness, I have also had regard as to whether several related but distinct considerations might apply, namely:

- the very similar prejudice factor in schedule 4, part 3, item 15[84]
- the *'commercial value'* harm factor in schedule 4, part 4, section 7(1)(b);[85] and
- the *'business affairs'* harm factor in schedule 4, part 4, section 7(1)(c) of the RTI Act.[86]

79. I have addressed each of TCC's, Adani's and Wagner's public interest arguments below.

'Could reasonably be expected'

80. Common to the bulk of the factors relied on by TCC, Adani and Wagners is the requirement that the particular prejudice, harm or adverse effect each seeks to guard against could reasonably be expected to flow from disclosure. In assessing whether an event '*could reasonably be expected*' to occur, the Information Commissioner has said:[87]

> *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.*

81. Other authorities note that the words *'could reasonably be expected'*:[88]

> *… "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.*

82. Establishing a reasonable expectation requires more than asserting that disclosure of information may result in a prejudice or adverse consequence. There must be some evidentiary basis from which it may be inferred that disclosure of relevant information could reasonably be expected to result in such prejudice or adverse effect.

83. I turn now to the participants' specific public interest arguments, beginning with Wagners'.

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[82] As above. Adani's submission in this regard is set out in full at paragraph 117.
[83] Submission dated 5 October 2018.
[84] I will refer to this and schedule 4, part 3, item 2 together as the '**Business Affairs Prejudice Factors**'.
[85] (**Commercial Value Harm Factor**).
[86] (**Business Affairs Harm Factor**).
[87] *B and BNRHA* at [154]-[160].
[88] *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.

Wagners' public interest case

Commercial Value Harm Factor

84. Wagners' principal submission is the assertion that the Term Sheet contains '*sensitive commercial information that is of value to Wagners*'.[89] The RTI Act presumes that a public interest harm telling against disclosure of information will arise, where that information has a commercial value which would be diminished by disclosure. Information will have a commercial value if:[90]

- it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged (i.e. because it is important or essential to the profitability or viability of a continuing business operation, or a pending *'one-off'* commercial transaction); or
- a genuine arms-length buyer is prepared to pay to obtain that information from that agency or person, such that the market value of the information would be destroyed or diminished if it could be obtained from a government agency which has possession of it.

85. As regards Wagners, the Term Sheet appears to disclose little more than what is publicly known.[91]

86. I cannot see that information the substance of which is already publicly known – nor any other of the relatively cursory references to Wagners appearing in the Term Sheet – could be said to be essential to Wagners' involvement in the proposed airstrip project, nor that there exists any genuine arms-length buyer prepared to pay for such information.

Business Affairs Prejudice and Harm Factors

87. As for the Business Affairs Prejudice Factors and Business Affairs Harm Factor, in most instances, the question of whether disclosure of information could reasonably be expected to cause the necessary prejudice[92] or have the requisite adverse effect will turn on whether disclosure of the information is capable of causing competitive harm to a person or entity.[93]

88. As noted, as regards Wagners the Term Sheet tends to do little more than record matters already in the public domain. There is nothing in the Term Sheet that I can identify the disclosure of which could reasonably be expected to cause Wagners competitive commercial disadvantage or confer upon its competitors a commercial advantage to the detriment or prejudice of Wagners' business etc affairs.

89. The substance of the above reasoning was conveyed to Wagners by letter dated 22 October 2018, with Wagners offered the opportunity to provide further submissions in reply.

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[89] Submissions dated 5 October 2018.
[90] *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491(***Cannon***), at [54]-[55], considering section 45(1)(b) of the FOI Act, a similar exemption to the Commercial Value Harm Factor. The information must have a commercial value at the time that the decision is made; information which was once valuable may become aged or out-of-date such that it has no remaining commercial value: [56].
[91] The thrust of which was stated in my letter to Wagners dated 22 October 2018. Wagners' potential involvement in the proposal the subject of the Term Sheet has been the subject of both various media reports: see, for example, https://www.thechronicle.com.au/news/wagners-wins-contract-adani-airport-construction/3308837/, and a statement by its holding company to the Australia Stock Exchange dated 11 January 2018, in which it noted, among other things, that matters the subject of the Term Sheet were not matters '*involving Wagners*': https://www.asx.com.au/asxpdf/20180111/pdf/43qrv3wnxxqyby.pdf.
[92] Adopting the ordinary meaning of the term *'prejudice'*: *Daw and Queensland Rail* (Unreported, Queensland Information Commissioner, 24 November 2010) at [16].
[93] *Cannon*, at [84], the Information Commissioner noting that it is '*convenient to adopt the yardstick of evaluating the effects of disclosure to a competitor of the…person whom, the information in issue concerns*'. See also *Kalinga Wooloowin Residents Association Inc and Brisbane City Council; City North Infrastructure Pty Ltd (Third Party); Treasury Department (Fourth Party)* (Unreported, Queensland Information Commissioner, 9 May 2012), at [89], as regards the Business Affairs Prejudice Factors. I note that Wagners has not sought to argue that disclosure of the Term Sheet could reasonably be expected to prejudice future supply of information of the type in issue to government (the second of the two negative public interest consequences prescribed in schedule 4, part 4, section 7(1)(c)(ii)), and there is nothing before me to suggest that this might be the case. Wagners stands to derive a financial benefit from the proposed project, and in these circumstances is not reasonable to expect that a substantial number of entities in a similar position to Wagners would in the future refrain from communicating information to government, given the disadvantage they would incur were they to do so. I have therefore restricted my consideration to an assessment as to whether disclosure could reasonably be expected to adversely affect Wagners' business, etc affairs.

It declined to do so.[94]

90. In the absence of submissions from Wagners clearly articulating how the Term Sheet could be said to be possessed of commercial value, or identifying how its disclosure could reasonably be expected to cause it commercial prejudice or have an adverse effect on its business affairs, I am not persuaded that its submissions establish that any of the Commercial Value Harm Factor, or Business Affairs Prejudice or Harm Factors operate to tell in favour of nondisclosure of the Term Sheet.

TCC's and Adani's public interest case

91. TCC's case that disclosure would, on balance, be contrary to the public interest, is as largely framed in the decision under review, although it did, as noted above, cite a further factor favouring nondisclosure[95] and a public interest harm factor[96] in support of its position against release during the review.

92. Adani, as noted, simplified its public interest case during the course of the review, ultimately only contending that disclosure of the Term Sheet could reasonably be expected to have the adverse consequence stated in paragraph 77; essentially, impede future negotiations with other councils. Given this, it is not necessary to expand these already lengthy reasons by addressing public interest arguments initially relied on by Adani but subsequently withdrawn.[97]

93. Turning then to the submissions of each, it is convenient to deal firstly with those factors or considerations on which TCC and Adani jointly rely, beginning with the CCHF set out in schedule 4, part 4, section 8 of the RTI Act, and the related nondisclosure factor.[98]

Affecting confidential communications

94. The CCHF will only arise to be taken into account in balancing the public interest 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.

95. The associated nondisclosure factor is not quite as stringent, requiring only that disclosure could reasonably be expected to prejudice an agency's '*ability to obtain confidential information*'.

96. As discussed above,[99] it is clear that considerable parts of the Term Sheet are common knowledge, and thus not information of a confidential nature that may be the subject of the CCHF.

97. It is not necessary, however, to particularise this publicly-known information, nor to descend into an analysis of the second requirement noted above. This is because I am satisfied that the third cannot be met in this case: any information genuinely communicated to TCC by Adani was supplied in order that the latter may obtain a benefit from TCC, ie potential contribution by TCC of substantial monies toward the cost of constructing infrastructure to be used (and owned) by

[94] Email dated 21 November 2018, canvassed at note 42.
[95] Schedule 4, part 3, item 17 of the RTI Act.
[96] Schedule 4, part 4, section 10 of the RTI Act.
[97] For the sake of completeness, and to avoid any later suggestion that I have failed to take into account a relevant consideration, it should be noted that I did provide Adani with the benefit of comprehensive preliminary views engaging with its case as originally framed, and which rejected any suggestion that case gave rise to considerations favouring nondisclosure of the Term Sheet. Were it necessary to do so, I would adopt those preliminary views – which is set out in my letters dated 14 August and 22 October 2018 – on a final, determinative basis, for the purposes of this decision.
[98] Schedule 4, part 3, item 16 of the RTI Act.
[99] Paragraph 36.

Adani in pursuit of private commercial activity. As the Information Commissioner has previously noted:[100]

> *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.* [emphasis added]

98. It is not reasonable to expect that disclosure of any information in the Term Sheet that may have been communicated to TCC by Adani would cause a substantial number of prospective mine operators – standing to benefit in the manner Adani is – from communicating similar information to the agencies proposing to extend such benefit in the future.[101] Nor, by extension, do I consider disclosure in these circumstances could reasonably be expected to prejudice TCC or any other agency's ability to obtain any such confidential information.

99. Accordingly, I am not satisfied that disclosure of the Term Sheet could reasonably be expected to prejudice either:

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

100. These factors do not, therefore, apply, to favour nondisclosure of the Term Sheet.

101. Neither TCC nor Adani accepted a preliminary view expressed by me in materially similar terms to the reasoning set out in paragraphs 94 to 100 above.

102. Many of TCC's submissions in reply raised semantic matters, or contentions that I had misunderstood or mischaracterised the nature of the proposal recorded in the Term Sheet.[102] I need not engage with those submissions in detail; it is sufficient to note that I recognise the Term Sheet comprises an 'agreement to agree', reflecting a shared intention to proceed with negotiations to develop transport infrastructure, and does not itself impose binding obligations in this regard. It remains the case, however, that the transaction proposed in the Term Sheet entails the commitment of significant public funds for the benefit of private entities, a fact telling in favour of more, rather than less, transparency.

103. TCC's key submissions on the application of the CCHF and the related nondisclosure factor were set out in its letter dated 15 June 2018, where it asserted:

> *6.5 Contrary to the Preliminary View, it can reasonably be expected that if the…*[Term Sheet] *is disclosed to the world at large, project proponents considering approaching government to establish mutually beneficial arrangements for projects with significant benefits to the local community and the State, will be reluctant to provide all information necessary for…government to properly consider and make such arrangements.*

[100] *B and BNRHA* at [161].
[101] In this regard, I do not understand TCC to be arguing RRC would refrain from communicating with TCC in future, and see no basis on which this might be claimed. Wagners, meanwhile, did not seek to rely on these factors, although even if it had, I cannot see that either could apply, for the same reasons as explained in this paragraph as regards Adani (and stated in my letter to Wagners dated 22 October 2018, note 12): it, too, stands to benefit financially from the project proposed in the Term Sheet. See also note 93.
[102] See, for example, submissions dated 28 August 2018.

> *6.6 In that regard, it should also be recognised that project proponents are not limited to certain jurisdictions or projects and make investment decisions based on a range of factors, including the ease of doing business in a particular jurisdiction. It can reasonably be expected that disclosure of confidential information relating to the early stages of negotiation involving transaction documents would adversely affect the perceived ease of doing business in…* [TCC] *and…*[RRC] *areas, and make potential project proponents less likely to be willing to provide such confidential information in future.*
>
> *6.7 Additionally,…*[TCC] *notes that the OIC appears to place significant weight on the fact that Adani will 'pursue private profit' as a result of the infrastructure contemplated by the…*[Term Sheet]*. Again, it is difficult for…*[TCC] *to understand why the pursuit of private profit…is at all relevant to this factor favouring non-disclosure. It is also difficult to understand why the OIC has expressly mentioned that aspect of the…*[Term Sheet]… *without equally referring to other aspects, such as the benefits to local business and the local community that arise from the development of infrastructure and creation of jobs.*

104. As regards TCC's *'ease of doing business'* arguments, it again seems salient that RRC appears to harbour no concerns that disclosure of the Term Sheet will impede its capacity to pursue commercial opportunities with private businesses in the future, given its total lack of objection to release.

105. Additionally and in any event, the flip side of this submission[103] is the fact that both TCC and RRC are, as local government authorities, duty bound to ensure they steward public monies prudently, transparently and accountably. Sophisticated commercial entities such as Adani and other similar proponents seeking potential public assistance would (or ought), in my view, appreciate that government entities such as TCC are accountable to the public regarding the decisions they make to allocate or disburse funds raised by imposts on the public. Such proponents would (or should) anticipate an appropriate level of scrutiny of their dealings with government as something which 'goes with the territory'.[104]

106. On this basis, I do not accept that entities in a similar position to the third parties would in the future refuse to communicate information to local government concerning the particulars of a proposed infrastructure development to be significantly funded by the public – and therefore forego the commercial advantage of such an arrangement – simply because those parameters might be disclosed to that public. This is not, in my view, an outcome to be reasonably expected of any for-profit venture, when the alternative would appear to be calling on their own reserves, or raising necessary funding via the commercial debt and/or capital markets.

107. As can be seen from the submissions extracted above, TCC also questioned the relevance of the fact that a potential beneficiary of public funds – Adani – is a for-profit entity, in assessing the likelihood as to whether similar private entities would refrain from communicating to government information necessary to access like funding from government in the future.

108. That fact is relevant, as the availability of such public funding is likely to mean that the entity, business or enterprise standing to benefit from same can conserve its own resources, as it does not have to draw on its own funds (or commercial funding markets), enhancing the potential for the generation of private profit.

109. It may well be the case, as TCC submits, that the provision of such public funding also enhances the potential for generation of public benefits as stated by TCC; this has, however, no bearing on an assessment as to whether disclosure of given information is likely to cause a substantial

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[103] The force of which would also appear to be somewhat diminished by the fact that the relevant project concerns extraction of mineral resources deposited in a fixed geographic location, in relation to which TCC enjoys relative proximity.

[104] Paraphrasing the Deputy Information Commissioner in *Wanless Wastecorp Pty Ltd and Caboolture Shire Council; JJ Richards & Sons Pty Ltd (Third Party)* (2003) 6 QAR 242 at [145], comments made in the analogous context of entities seeking the benefit of local government contracts. See also Finn J's comments in *Hughes*: '*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*' (page 89).

number of businesses similar to Adani to refrain from communicating similar information to government in the future, where doing so would cause those businesses to relinquish the possibility of access to public funds and the consequent opportunity of enhancing the potential for profit.

110. In its substantive submissions on the application or otherwise of these nondisclosure factors, Adani rejected '*the underlying assumption* [underpinning much of my reasoning as set out at paragraphs 106-109 above]*…that public funding is provided on more favourable terms than commercial debt or capital markets*'.[105]

111. As I advised Adani by letter dated 22 October 2018, I do not consider it unreasonable to infer that the funding proposed in the Term Sheet comes with some commercial advantage to Adani, if only due to the attendant accountability and public transparency obligations that *'come with the territory'* of such an arrangement, with which it would obviously not have to deal if sourcing finance privately.

112. In any event, even if the 'deal' proposed in the Term Sheet is on terms equivalent to those that might be obtained via private avenues, it nevertheless remains a potential financing option, and one which any prudent entity in Adani's position would, in my view, wish to keep open. Given this, and the various other considerations explained above, it is not reasonable to expect that a substantial number of similar entities would refrain from communicating such information to local governments in future. As stated at paragraph 100, I do not consider that either the CCHF or the nondisclosure factor in schedule 4, part 3, item 16 of the RTI Act apply in the circumstances of this case.

Business Affairs Prejudice and Harm Factors

113. As noted above in the course of dealing with Wagners' case for nondisclosure on public interest grounds, factors favouring nondisclosure of information will arise for balancing where disclosure of that information could reasonably be expected to, in summary terms, prejudice the business, commercial or financial affairs of entities,[106] or agencies or persons.[107] One of these factors was relied on by TCC in the decision under review, and the second cited by TCC in the course of this external review. Adani did not specify either, and neither it nor TCC sought to rely on the related harm factor set out in schedule 4, part 4, section 7(1)(c) of the RTI Act, although in view of Adani's reference to *'adverse effect'* in its final submissions, I have taken into it into account in making my decision.[108]

114. Insofar as TCC relies on these public interest nondisclosure considerations, I do not understand it to be arguing that disclosure of the Term Sheet would prejudice or adversely affect its business affairs, but rather those of the commercial participants, Wagners and Adani. While it did make generalised assertions as to the '*significant adverse impact*' disclosure would have on local government's capacity to conduct negotiations on a '*commercial and competitive basis going forward'* in submissions dated 28 August 2018, I have read those as submissions supporting its claim that disclosure of the Term Sheet could reasonably be expected to prejudice competitive commercial activities, discussed below. If I am mistaken in this regard, then I should make it clear that, consistently with earlier decisions of the Information Commissioner, I do not consider that contemplation of provision of infrastructure assistance can be characterised as a business or commercial activity – the activity of each local government in advancing proposed

[105] Submissions dated 11 September 2018.
[106] Schedule 4, part 3, item 2 of the RTI Act.
[107] Schedule 4, part 3, item 15 of the RTI Act.
[108] To the extent, only, that this harm factor seeks to safeguard against adverse effect on relevant affairs – as noted at note 93, the factor may also be enlivened where disclosure of information could reasonably be expected to prejudice the future supply of relevant information to government, a consequence equivalent to that which the CCHF is intended to avoid and which, for reasons explained in considering the CCHF, I do not consider reasonably likely to result from disclosure in this case.

infrastructure incentives, in an effort to attract economic activity, is fundamentally governmental, rather than commercial in nature.[109]

115. I would also note that my findings at 136-139 below – dealing as they do with claims of competitive detriment, the essence of the prejudice against which the Business Affairs Harm and Prejudice Factors seek to safeguard – adequately address any claim that disclosure of the Term Sheet could reasonably be expected to prejudice TCC's business affairs, should the conclusions in the preceding paragraph be incorrect.

116. With the above in mind, while I have had regard to TCC's various submissions as to the application of these factors,[110] the case as to whether they apply to favour nondisclosure of the Term Sheet is best put by the business entities whose interests or business, commercial or financial affairs might stand to be prejudiced by disclosure; Wagners and Adani.

117. I have dealt with Wagners' case in this respect above. As for Adani, its final submissions[111] as regards prejudice to its business, etc affairs were that disclosure of the Term Sheet could:

> *operate to negatively impact Adani's business and financial affairs by adversely affecting its ability to negotiate with other regional councils in future, including because of the advantage these councils would gain in negotiations by having access to the commercial provisions negotiated by Adani with TCC and RRC, as well because of concerns these councils could reasonably have regarding such confidential arrangements made public under the RTI Act.*

118. This submission is premised largely on conjecture and assertion – there is no evidence before me to suggest that Adani is engaged in similar negotiations with other councils, nor that any are contemplating assistance of the kind proposed in the Term Sheet, access to the particulars of which might enable them to *'*apply leverage*'* so as to bargain Adani down, to its commercial disadvantage.[112] Nor, in the absence of cogent evidence to the contrary, is it reasonable to expect that other councils would refrain from offering Adani assistance by dint of having to observe their accountability and transparency obligations.

119. Indeed, the best – and only – available evidence on the point seems to be what might reasonably be extrapolated from the attitudes of each of the local government authorities who ***have*** been actively proposing such assistance, ie, the signatories to the Term Sheet, TCC and RRC.

120. TCC has stepped back somewhat from the proposed arrangement, although this hesitancy – made public in June 2018[113] – has obviously occurred quite independently of any disclosure under the RTI Act, and TCC has not at any stage suggested that such disclosure has or may be a matter influencing its appetite for the proposal.[114]

121. RRC, meanwhile, has no objection to the disclosure of the Term Sheet, whilst remaining publicly committed to the funding arrangement, should it advance.[115]

122. In the circumstances, I do not think there is evidence or other information sufficient to permit a reasonable inference or conclusion that disclosure of the specific information in issue in this review would either operate to weaken Adani's position in future negotiations for similar public assistance, nor 'frighten off' other local governments from contemplating provision of assistance to Adani, so as to prejudice and/or have any adverse effect upon that entity's business, etc,

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[109] *Glass Media* at [108]-[111], citing and applying *Seeney*.
[110] Including as put, for example, in correspondence to OIC dated 22 August 2018.
[111] Dated 7 November 2018.
[112] Which, given that any councils would ultimately be bargaining with public monies, would in any event seem to serve the public interest as much as harm it.
[113] See note 142.
[114] Indeed, it is reported as remaining prepared to *'revisit'* the proposal – see below, note 144.
[115] See note 144

affairs. There are, in other words, no 'real and substantial grounds'[116] for expecting that such consequences are reasonably likely to follow disclosure.

Deliberative processes

123. TCC decided that disclosure of the Term Sheet could reasonably be expected to:

- cause a public interest harm through disclosure of deliberative process information;[117] (**DP Harm Factor**) and
- prejudice a deliberative process[118] (**DP Prejudice Factor**).

124. 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.

125. The DP Harm Factor cannot apply to purely factual material.[119] 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.*'[120]

126. The executed Term Sheet does not fall within the terms of the DP Harm Factor, as it is not information answering the description of *'opinion'*, *'advice'* or *'recommendation'*, or *'consultation'* or *'deliberation'*. It is a finalised, not *'pre-decisional'*, document, embodying a concluded *'agreement to agree'*. In other words, while the Term Sheet might be the *product* of opinions, advices, consultations or deliberations undertaken as part of a pre-decisional deliberative process, the document cannot in my view itself be said to comprise an *'opinion, advice or recommendation'*, or a *'consultation or deliberation'* within the meaning of the DP Harm Factor. The DP Harm Factor does not, therefore, arise for consideration in balancing the public interest.

127. As for prejudice to a deliberative process, in correspondence to TCC during the review I expressed the preliminary view that the key deliberative process that might stand to be prejudiced – negotiating the terms of a proposed deal with Adani – could be said to have been concluded, as is evidenced by the very existence of the executed Term Sheet. In these circumstances, disclosure could not cause any prejudice to this finalised deliberative process.

128. I acknowledge that there may still be further deliberative processes required to reach a final agreement binding on all parties, and it would be open to argue that premature disclosure of information concerning these additional deliberations – ie, deliberations intended to move forward or perhaps away from agreed deal points stated in the Term Sheet – may prejudice those deliberations. As I reasoned in my letter to TCC dated 22 May 2018, it is, however, arguable that these are discrete deliberative processes, and that disclosure of a document setting out a settled 'agreement to agree' could not reasonably be expected to prejudice any such future deliberations.

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[116] See paragraph 80.
[117] Schedule 4, part 4, section 4(1) of the RTI Act.
[118] Schedule 4, part 3, item 20 of the RTI Act.
[119] Schedule 4, part 4 section 4(3)(b) of the RTI Act.
[120] *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.

129. TCC resisted this view,[121] submitting that the Term Sheet forms part of an ongoing deliberative process, which might stand to be prejudiced through its disclosure. While I see the merit in this submission, what I am unable to clearly identify is how disclosure of a settled document setting out the general terms of a possible TCC contribution to a proposed infrastructure development, aspects of which are in the public domain, could reasonably be expected to prejudice that deliberative process – to impair any future deliberations TCC may undertake as to the final terms of any contribution.

130. TCC made no submissions that might assist me in this regard.[122] Having regard to all relevant circumstances, I am unable to be satisfied that real and substantial grounds exist for expecting that disclosure of the Term Sheet could cause the relevant prejudice. In reaching this conclusion, I consider that, for the purposes of assessing the likelihood or otherwise of disclosure prejudicing TCC's deliberative processes, it is reasonable and relevant to note that its local government co-signatory, RRC, which is in an equivalent position, appears to apprehend no such prejudice to its own deliberations.

131. I acknowledge that disclosure of parts of the Term Sheet – such as those detailing the proposed rebate mechanism intended to safeguard TCC's investment of public funds – may give rise to public discussion as to the merits or adequacies of that mechanism and the proposal generally. Fostering public discussion of and participation in government decision-making are, however, key objects of the RTI Act, and I question as to whether furthering the very aims of this legislation, by allowing the community access to information concerning novel proposals to allocate its resources, could amount to a *'prejudice'* within the meaning of the DP Prejudice Factor.[123]

132. Neither the DP Harm Factor nor DP Prejudice Factor apply in favour of nondisclosure in this case.

Competitive commercial activities and affecting financial or property interests of State or agency

133. A factor favouring nondisclosure of information will apply for the purposes of balancing the public interest where disclosure could reasonably be expected to prejudice the competitive commercial activities of an agency.[124]

134. TCC only specifically cited this factor in its final submissions,[125] although as noted earlier and discussed further below, in its 28 August 2018 letter it did make generalised assertions as to the '*significant adverse impact*' on it and RRC's capacity to conduct negotiations on a '*commercial and competitive basis going forward*'.

135. I am not persuaded that TCC is, in proposing the financial assistance envisaged in the Term Sheet, engaged in any *'*competitive commercial' process or activity. Firstly, I do not, as noted, consider that TCC's actions in proposing infrastructure incentives, in an effort to stimulate the local economy, can be properly characterised as *'*commercial*'* – rather than fundamentally governmental – activity, and TCC has not pointed out any other commercial activity in which it

[121] Submissions dated 15 June 2018.
[122] Asserting only that I had placed *'low weight'* on '*potential adverse impact o*[n] *deliberative processes*' (submissions dated 11 December 2018). To be clear, I have placed ***no*** weight on such impact, for the reason that I am not, as explained in this and surrounding paragraphs, persuaded disclosure could reasonably be expected to cause any impact, prejudice or consequence of this kind. The relevant nondisclosure factor simply does not, therefore, arise to be considered in balancing the public interest.
[123]Noting that if it did, I am satisfied that the presumed prejudice would be displaced by considerations favouring disclosure, discussed further below. In a similar vein, and for analogous reasons, if I am incorrect in my findings that the Term Sheet cannot properly be characterised as an *'opinion, advice or recommendation'*, or a *'consultation or deliberation'* within the meaning of the DP Harm Factor, and that factor does apply, then I would regard the public interest harm presumed to arise to be relatively modest, and more than offset by considerations favouring disclosure.
[124] Schedule 4, part 3, item 17 of the RTI Act.
[125] Dated 11 December 2018.

might be engaged that would stand to be prejudiced by disclosure of the Term Sheet. On this basis alone, I am not satisfied the relevant nondisclosure factor has any application in this case.

136. Yet even if the proposal was regarded as a *'*competitive commercial activity*'* within the meaning of this nondisclosure factor, TCC has put nothing before me to suggest how disclosure of the Term Sheet could reasonably be expected to prejudice that activity. As I pointed out in my 28 November 2018 letter to TCC, there is no evidence that any other jurisdiction is proposing a competing[126] offer of the kind proposed by TCC in the Term Sheet, access to which might then permit that jurisdiction to 'outbid' TCC.

137. As canvassed above, in its 28 August 2018 submissions TCC stated that disclosure of *'two Local Governments"* – it and RRC's – '*actual approaches towards negotiating commercial agreements*' as reflected in the Term Sheet would have a '*significant adverse impact*' on each government's capacity to conduct negotiations on a '*commercial and competitive basis going forward*' with '*other private sector entities*' with whom it or RRC was seeking to conduct or '*already conducting commercial negotiations'.* It did not, however, substantiate these assertions with any evidence, nor point out how disclosure of information concerning a proposal to contribute to development of fixed infrastructure in a given geographical location could reasonably be expected to adversely impact either authority's ability to conduct '*commercial negotiations*' generally.

138. Certainly, insofar as these submissions purport to speak for RRC, they do not appear to reflect concerns shared by that agency, in view of its lack of objection to disclosure. Additionally, and while not determinative, the fact that TCC's local government partner in the proposed project – one, indeed, that remains publicly committed to that project – does not object to release of the Term Sheet tends to militate against any finding that negative public interest consequences of the kind posited by TCC could be reasonably expected to follow disclosure.

139. TCC bears the onus in this case,[127] and in view of the considerations canvassed in the preceding paragraphs, I am not prepared to conclude that disclosure of the Term Sheet could reasonably be expected to prejudice any competitive commercial activity in which it may be engaged.

140. As for disclosure having a substantial adverse effect on the financial or property interests of the State or either local government signatory, TCC's case for the relevance of this harm factor comprised a brief assertion as to its application, at the end of the submissions paraphrased in paragraph 137 above.[128] The concerns expressed by me in relation to those submissions as canvassed at paragraphs 137-139 can be fairly extended to any argument that schedule 4, part 4, section 10 of the RTI Act may operate to favour nondisclosure of the Term Sheet. There is nothing before me indicating disclosure of the Term Sheet will prejudice the proposal it details, or any anticipated financial returns, and in the absence of specific, credible evidence and submissions – or, as regards RRC, any objection whatsoever – there is insufficient information before me to allow me to be satisfied that disclosure of the Term Sheet could have any adverse effect on the State or either local government's financial or property interests, let alone *'substantial' – 'grave, weighty, significant or serious*'[129] consequences of the kind necessary to enliven this public interest harm factor.

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[126] RRC's offer obviously being complementary, rather than competing.
[127] Section 87 of the RTI Act.
[128] The relevant submission states TCC's concern that disclosure of the Term Sheet would have '*future financial impacts as contemplated by Item 10, Schedule 4 of the RTI Act.*' Schedule 4 contains a number of sections and items, grouped by parts – from Part 1, irrelevant considerations – to Part 4, public interest harms. In view of the context in which this submission appears, and the language with which it is framed, I take this to be a reference to the public interest harm factor prescribed in schedule 4, part 4, section 10 of the RTI Act – *'affecting financial or property interests of State or agency'*, as the only other 'Item 10s' in schedule 4 are an item favouring disclosure (Part 2) (which this submission is plainly not pressing), or an item favouring nondisclosure in the public interest, where disclosure could reasonably be expected to prejudice the security or good order of a corrective services facility (Part 3).
[129] The meaning to be given to the word *'substantial'* in this context: *Cairns Port Authority and Department of Lands* (1994) 1 QAR 663, at [148]-[150].

Information considered in confidential Council session

141. TCC also argues that the fact matters the subject of the Term Sheet were considered by it and RRC in confidential closed session under section 275 of the LG Regulation is a consideration telling against disclosure.

142. This fact does not, of itself, give rise to one of the public interest factors expressly recognised in the RTI Act. While there is a factor favouring nondisclosure of information, where disclosure is prohibited by an Act,[130] section 275 of the LG Regulation only applies to the conduct of council meetings, and does not prohibit the disclosure of information recorded in a document.[131] The Term Sheet is not a document disclosure of which is prohibited by an Act, and therefore the relevant nondisclosure factor has no application.[132]

143. At the same time, I do recognise that the lists of factors for considering the public interest prescribed in schedule 4 of the RTI Act are not exhaustive, and that considerations that are not there listed may nevertheless weigh for or against disclosure of a specific document in a given case. In this case, I accept, as both TCC and Adani submitted, that Parliament has given local government the power to hold certain sessions in confidence. I also accept that matters recorded in the Term Sheet may have been considered by TCC and RRC in closed sessions of this kind. The fact of RRC's closed meeting would now appear to be irrelevant, in view of its lack of objection to disclosure. I am, however, prepared to acknowledge TCC's closed meeting as a consideration favouring nondisclosure of the Term Sheet.

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,[133] 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.

145. Having carefully considered participant submissions and the lists of factors favouring nondisclosure and pubic interest harm factors in schedule 4, parts 3 and 4 of the RTI Act, I can identify no other considerations that might be argued to favour nondisclosure of the Term Sheet. I turn now to balancing competing public interest factors.

Balancing the public interest

146. As explained above, I consider that:

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[130] Schedule 4, part 3, item 22 of the RTI Act.
[131] A fact previously noted by OIC: *2LFF0D and Lockyer Valley Regional Council* [2017] QICmr 10 (22 March 2017), [61].
[132] Nor does the exemption set out in schedule 3, section 12 of the RTI Act, which provides for refusal of access to information disclosure of which is prohibited by several specified statutory provisions. Section 275 of the LG Regulation is not one of these.
[133] Not merely *'government information'*, as stated at 6.10(a) of TCC's 15 June 2018 submissions: section 3 of the RTI Act. I would also note that, as discussed earlier, I am quite satisfied that information of the kind in issue comprises a species of *'government information'*, however that might ultimately be defined and for whatever it is worth.

- all factors identified by TCC favouring disclosure of the Term Sheet apply, and each warrants substantial weight; and
- only one consideration – that matters concerning the Term Sheet were discussed in closed meeting by TCC – applies to favour nondisclosure, which consideration merits only modest weight.

147. Balancing these considerations against one another, my view is that disclosure of the Term Sheet would not, on balance, be contrary to the public interest. Possible decisions by government agencies to transfer public wealth for the benefit of private interests – as is proposed in this case – should, as the Information Commissioner has consistently determined, be attended by the highest possible levels of transparency and accountability, whether those interests are engaged in beverage manufacturing,[134] feature film production,[135] or, as here, resource extraction. This is necessary, in order that the community might be satisfied that not only such decisions are made with appropriate levels of probity, but that they represent a worthwhile investment of the community's scarce resources.[136]

148. In reaching this conclusion, I have taken into account the fact[137] that information concerning the proposal has been released into the public domain. What remains in issue, however, comprises important information concerning the proposed transaction, including information going to the very heart of the merits of that proposal, and the mechanisms by which the public's investment will be protected. I do not think it unreasonable to anticipate that disclosure of the Term Sheet will better permit objective assessment of the merits of the proposal it records, and contribute to informed public debate as to whether it ultimately represents value for money for ratepayers in both TCC and RRC's local government areas, and the Queensland community generally; helping, thereby, to:

- ensure effective oversight of expenditure of public funds,
- enhance levels of probity and propriety, and
- foster public trust and confidence in the proposed transaction, and each council's participation in same. [138]

149. To put it another way, any proposal by a local government body to contribute funding for the construction of transport infrastructure in the territory of another local government, for use and benefit of private entities, and in circumstances where the benefitting entity will, as noted, ultimately take ownership of the infrastructure, merits high levels of transparency and accountability. These public interests warrant disclosure beyond that of, say, the potential dollar amounts involved,[139] but information as to the very structure and mechanics of the proposed deal, such as is contained in the Term Sheet.

150. As noted above, TCC itself recognises that the assistance proposed in the Term Sheet is not a matter coming within the ordinary course of council business; that it '*does not…relate to Council's core statutory or regulatory functions*'.[140] Given this, it should, in my view, be attended with a level of transparency beyond the ordinary. This will serve to ensure that the community can:

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[134] *Seeney.*
[135] *Glass Media*.
[136] A point made abundantly clear by the Queensland Competition Authority (**QCA**), in its 2015 report on industry assistance in Queensland: *Industry Assistance in Queensland: Final Report (July 2015)* (**Industry Assistance Report**), pages 59 and 63, available at http://www.qca.org.au/Other-Sectors/Productivity/Completed-Reviews/Industry-Assistance/Final-Report/Industry-Assistance-Inquiry#finalpos. As I advised TCC in my 14 August 2018 letter, the arrangement proposed in the Term Sheet appears to be an exact example of one of several kinds of industry assistance recognised by the QCA as being provided by local governments in Queensland – development of infrastructure – and, despite TCC's contentions to the contrary, the QCA's observations are in my view quite apposite in this case.
[137] Stressed by TCC particularly during the course of the review – see especially its 11 December 2018 submissions.
[138] Noting, on this latter point, Professor Gary Banks observations, *'if there is widespread public support for the provision of assistance to industry* [of which I am satisfied the proposal recorded in the Term Sheet comprises an example]*, then this can only be enhanced by the provision of reliable information'*: quoted in Industry Assistance Report, page 63.
[139] An example of information concerning the proposal already in the public domain.
[140] Submissions dated 15 June 2018.

- scrutinise and appraise any potential deal,
- satisfy itself that TCC is negotiating on its behalf competently and judiciously,
- assess whether the potential benefits TCC expects to accrue from its expenditure represent a worthwhile investment of public monies; and
- participate to the fullest in public debate on the issue – an important point, given the proposal has been the subject of apparently vigorous community discussion.[141]

151. I have also taken into account the fact that the proposal particularised in the Term Sheet may have gone 'off the boil' somewhat, noting, for example, TCC's re-direction of earmarked funds to other priorities,[142] and Adani's reported comments suggesting the project may not be critical to its intentions.[143] As I understand matters, however, all parties remain prepared to pursue the proposal in the future,[144] such that I do not think any current lull in negotiations diminishes the weight to be afforded each of the public interest considerations favouring disclosure discussed above. Additionally, even if the proposal had been completely abandoned, there still remains considerable public interest, in my view, in allowing the community access to the details of what appears to be a relatively unique arrangement.

Submissions

152. To the extent participant submissions deal with public interest considerations, they have largely been addressed above. Adani did, however, seek also to rely on discussion in *Krieger*, insofar as that decision canvasses the public interest (in the context of assessing a claim for breach of confidence), and stressed the *'obligation'* TCC and RRC owe their constituents to negotiate in a *'commercial'* and *'fiscally sound'* manner.

153. Observations and comments made in *Krieger* – concerning information held by an agency charged with insuring against natural risk in a foreign jurisdiction, which was proposed to be published by an unauthorised third party – are of limited assistance in determining public interest balancing questions arising from a valid application made in exercise of a statutory right of access to information under law enacted by the Queensland Parliament.[145] Of far greater relevance are determinations made under that legislation – the RTI Act and its FOI predecessor – pertinent examples of which stress the paramountcy of transparency of accountability when considering arrangements of the kind proposed in the Term Sheet.[146]

154. As for Adani's second submission, I also agree that TCC and RRC have an obligation to their constituents to negotiate in a commercial manner. At the risk of repeating myself, however, both agencies also have an overarching obligation to conduct themselves transparently, and to account to those constituents for the manner in which they propose to allocate or disburse the monies of the latter, in order that constituents and the community generally may be satisfied that each agency is negotiating satisfactorily, and with a view to achieving the best possible return on public funds. Indeed, it does not seem unreasonable to expect that the prospects of *'fiscally sound'* outcomes would only be enhanced by allowing community scrutiny, analysis and discussion of funding proposals, in advance of their conclusion.

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[141] See note 75.
[142] https://www.townsville.qld.gov.au/about-council/news-and-publications/media-releases/2018/june/18.5-million-proposed-for-carmichael-airstrip-will-be-used-for-shovel-ready-projects.
[143]https://www.townsvillebulletin.com.au/news/adani-says-airstrip-for-carmichael-mine-is-not-immediately-necessary/news-story/3e0860bc55d5811d60d12e40142c7758.
[144] Certainly, that is the impression obtained from TCC's 28 August 2018 submissions, which note the *'potential ongoing nature of the deliberations and negotiations'* as a matter telling against disclosure. I also note that RRC remains publicly committed to the proposed transaction (https://www.themorningbulletin.com.au/news/mayor-says-rocky-wont-pull-their-funds-for-adanis-/3444153/), while Adani is reported as stating the proposal will be the subject of *'future discussions'*, and TCC as being prepared to *'revisit the arrangement should Adani secure finance'*: https://www.townsvillebulletin.com.au/news/adani-says-airstrip-for-carmichael-mine-is-not-immediately-necessary/news-story/3e0860bc55d5811d60d12e40142c7758.
[145] As noted above, I reject any suggestion that either council was or is acting in a *'commercial, as opposed to governmental, capacity'*, the activity of each in contemplating public infrastructure assistance being a fundamentally governmental activity: see paragraphs 114 and 135.
[146] For example, each of *Seeney* and *Glass Media*.

155. TCC, meanwhile, invoked other decisions of the Information Commissioner, where findings were made that grounds existed under the RTI Act for refusing access to information concerning Adani projects.[147]

156. As I advised TCC by letter dated 28 November 2018, every external review application is to be decided on its merits, on a case by case basis. Having regard both to the particular and specific circumstances of this case – involving a relatively innovative and novel proposal by local government agencies to publicly-fund private infrastructure, outside of either agency's local government areas – and earlier decisions of the Information Commissioner dealing with information generated in an analogous context, noted in paragraph 153 – my view is that disclosure of the specific information in issue before me would not, on balance, be contrary to the public interest.

157. Finally, I note submissions by both Adani and TCC to the effect that the '*ultimate signing of agreements referred to in the Term Sheet will be subject to scrutiny and accountability through a number of mechanisms, before any "public monies" change hands.*' Parallel or analogous accountability measures in no way diminish the weight and import of public interest considerations favouring disclosure of information under the RTI Act. As the Information Commissioner has previously observed:[148]

> *I do not accept that the existence of other accountability mechanisms can be used as a basis for any significant diminution of the public interest in disclosure of information under the FOI Act in order to promote the accountability of government agencies.*
>
> *The FOI Act was intended to enhance the accountability of government (among other key objects) by allowing any interested member of the community to obtain access to information held by government (subject to the exceptions and exemptions provided for in the FOI Act itself). The FOI Act was not introduced to act as an accountability measure of last resort, when other avenues of accountability are inadequate. The FOI Act gives a right to members of the community which is in addition to, and not an alternative for, other existing rights. …*

158. The Information Commissioner's comments are equally applicable to applications for access to information under the RTI Act,[149] and I adopt them for the purposes of these reasons.

159. Disclosure of the Term Sheet would not, on balance, be contrary to the public interest.

DECISION

160. I set aside the decision under review. No grounds for refusing access to the Term Sheet have been established. The applicant is therefore entitled to access the Term Sheet, in accordance with the right of access prescribed in section 23 of the RTI Act.

161. I have made this decision under section 110 of the RTI Act, as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Louisa Lynch
Right to Information Commissioner

Date: 12 March 2019

[147] Specifically, *North Queensland Conservation Council Incorporated and Queensland Treasury* [2016] QICmr 9 (29 February 2016) and *Tager and Queensland Treasury Corporation* [2016] QICmr 45 (4 November 2016).
[148] *Director-General, Department of Families, Youth and Community Care and Department of Education; Perriman (Third party)* (1997) 3 QAR 459 at [19(a)]. See also *Pearce*, at [70].
[149] *Glass Media*, [175].

APPENDIX

Significant procedural steps

Date	Event
2 March 2018	OIC received the external review application.
6 March 2018	OIC notified the applicant and Townsville City Council (**TCC**) that the application had been received and asked TCC to provide the relevant procedural documents.
14 March 2018	OIC received the requested procedural documents from TCC.
19 March 2018	OIC notified the applicant and TCC that the external review application had been accepted. OIC asked TCC to provide copies of the documents located in response to the application.
26 March 2018	OIC received the requested information from TCC.
22 May 2018	OIC conveyed a preliminary view to TCC and requested submissions in reply.
15 June 2018	OIC received submissions from TCC.
14 August 2018	OIC wrote to Rockhampton Regional Council (**RRC**) and Adani Mining Pty Ltd (**Adani**), informing each of the external review and requesting submissions as to whether they objected to disclosure of the information in issue. OIC also wrote to TCC, conveying a further preliminary view and inviting submissions in reply.
28 August 2018	TCC provided OIC with additional submissions in relation to the review. RRC advised OIC it had no objections to disclosure of the information in issue.
11 September 2018	Wagners Industrial Services Pty Ltd (**Wagners**) applied to OIC to participate in the review. Adani provided OIC with additional submissions in relation to the review.
14 September 2018	OIC accepted Wagners' application to participate in the review, and invited submissions in support of its objections to disclosure of the information in issue.
5 October 2018	Wagners provided OIC with submissions in relation to the review.
15 October 2018	Adani applied to OIC to participate in the external review.
22 October 2018	OIC wrote to Wagners and Adani, conveying preliminary views on the issues in the review and inviting submissions in reply.
7 November 2018	Adani provided OIC with further submissions in support of its objections to disclosure.
21 November 2018	Wagners notified OIC that it did not intend to lodge any further submissions.
28 November 2018	OIC wrote to TCC, conveying the positions of Adani and Wagners in the review, addressing TCC's 28 August 2018 submissions, and inviting final submissions.
11 December 2018	TCC provided OIC with final submissions.