



Decision and Reasons for Decision

Application Number: 310542

Applicant: Kalinga Woolloowin Residents Association Inc

Respondent: Department of Employment, Economic Development and Innovation

Third Party: City North Infrastructure Pty Ltd

Decision Date: 19 December 2011

Catchwords: **ADMINISTRATIVE LAW – RIGHT TO INFORMATION – QUEENSLAND – JURISDICTION – whether requested documents ‘documents of an agency’ under section 12 of the *Right to Information Act 2009* (Qld) – whether documents subject to *Right to Information Act 2009* (Qld)**

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – EXEMPT INFORMATION – BREACH OF CONFIDENCE – whether disclosure of information would found an action for breach of confidence - whether information is exempt under schedule 3, section 8 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – whether disclosure of information would, on balance, be contrary to the public interest – section 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

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REASONS FOR DECISION

Summary

1. The applicant applied to the former Department of Infrastructure and Planning¹ for access under the RTI Act to documents relating to the appointment of Mr Shane McDowall² to the board of City North Infrastructure Pty Ltd (**CNI**).³
2. The Department relevantly withheld⁴ access to 10 pages⁵ on the basis the documents were not 'documents of an agency' within the meaning of section 12 of the RTI Act, and therefore not subject to the Act.
3. The applicant applied⁶ to the Information Commissioner for external review of the Department's decision.
4. The Department accepted⁷ my preliminary view⁸ that the documents were subject to the RTI Act. The Department further advised it was prepared to grant the applicant access to the documents.⁹
5. CNI, however, objected to disclosure of the information in issue,¹⁰ on the grounds:
 - the documents¹¹ are not 'documents of an agency',¹² and therefore not subject to the RTI Act or, alternatively,
 - if the documents are subject to the RTI Act, access should be refused as:
 - the documents comprise exempt information,¹³ as documents the disclosure of which would found an action for breach of confidence,¹⁴ and/or
 - the documents comprise information the disclosure of which would, on balance, be contrary to the public interest.¹⁵
6. For the reasons set out below, I am satisfied that the documents containing the information in issue are documents of an agency within the meaning of section 12 of the *Right to Information Act 2009* (Qld) (**RTI Act**). The RTI Act applies to the documents.

¹By application dated 3 November 2010. Machinery of government changes in February 2011 abolished the Department of Infrastructure and Planning (**DIP** - Administrative Arrangements Order No. 1 of 2011), transferring relevant functions to the Department of Employment, Economic Development and Innovation (**DEEDI**). However, DEEDI and the Department of Local Government and Planning (**DLGP** - which assumed some of the former responsibilities of DIP) apparently made administrative arrangements by which existing RTI applications and reviews involving the former DIP were to be managed to completion by DLGP, including this external review - I wrote to the original DIP decision maker by letter dated 18 May 2011 (see paragraph 4), and in a letter dated 20 May 2011 (discussed further in paragraph 4), an officer of the DLGP responded advising that she was now the 'authorized officer under the [RTI Act]'. In a telephone conversation with an OIC officer on 15 December 2011, the DLGP officer further confirmed that DLGP had essentially managed this review on DEEDI's behalf. For ease of reference, I will simply refer to "the Department".

² Formerly the Deputy Coordinator-General within DIP.

³ CNI was incorporated in December 2006 under the *Corporations Act 2001* (Cth) as a 'special purpose vehicle' to manage the development of several infrastructure projects on Brisbane's northside. It is 'wholly owned by the State Government': CNI Annual Report 2010-11, p. 16, http://www.citynorthinfrastructure.com.au/FileLibrary/cni1068_annual_report_online.pdf.

⁴ By internal review decision dated 25 January 2011, following an initial decision dated 20 December 2010 refusing access to various documents, and the applicant's consequent internal review application dated 10 January 2011: for relevant procedural steps see the appendix to this decision.

⁵ Numbered by the Department as 'RTI documents 39-48'.

⁶ On 1 February 2011.

⁷ By letter dated 20 May 2011.

⁸ Conveyed by letter dated 18 May 2011.

⁹ Apart from limited segments of information, to which the applicant does not seek access and which are not, therefore, in issue in this review. The documents less these segments of information comprise the 'information in issue' in this review.

¹⁰ By letters from its solicitors dated 15 June 2011 and 12 August 2011, responding to my consultation letter to CNI dated 30 May 2011.

¹¹ Containing the information in issue.

¹² Within the meaning of section 12 of the RTI Act.

¹³ Within the meaning of section 47(3)(a) and section 48 of the RTI Act.

¹⁴ Schedule 3 section 8 of the RTI Act.

¹⁵ Within the meaning of section 47(3)(b) of the RTI Act.

7. I am also satisfied that CNI has not established grounds¹⁶ on which access to the documents may be refused. The applicant is entitled to access the documents in accordance with section 23 of the RTI Act.

Decision under review

8. The decision under review is that outlined in paragraph 2.

Issues in this review

9. The Department accepts that the information in issue is subject to the RTI Act and is prepared to disclose it to the applicant. The issues to be determined in this review are therefore those raised by CNI and summarised in paragraph 5 above, that is:
- are relevant documents 'documents of an agency' and subject to the RTI Act?, and, if so
 - are these documents comprised of exempt information, and/or documents the disclosure of which would be contrary to the public interest?

Evidence considered

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

Are the documents containing the information in issue 'documents of an agency'?

11. Yes.
12. Section 23 of the RTI creates a legally enforceable right for any person to access 'documents of an agency'. Section 12 of the RTI Act relevantly defines 'document of an agency' as follows:

*In this Act, **document**, of an agency, means a document, other than a document to which this Act does not apply, in the possession, or under the control, of the agency whether brought into existence or received in the agency...*

13. It is clear relevant documents are in the physical possession of the Department. The Department's initial decision notes that the Department maintains 'a copy of [the relevant] documents.' The Department's internal review decision, dated 20 December 2010, also concedes that the Department has possession of the documents.¹⁷ Further, in a telephone conversation with an OIC officer on 11 February 2011,¹⁸ a Departmental officer confirmed that the documents are in the Department's possession and have been 'scanned into the system'.
14. The term 'possession' as used in section 12 simply requires that relevant documents be in the physical possession of an agency. As the Information Commissioner stated in *Holt and Reeves and Education Queensland and Anor*:¹⁹

...I consider that an interpretation which excludes, from the ambit of the word "possession", documents of which an agency merely has custody, or physical possession without legal possession, is too difficult to reconcile with the presence in the relevant

¹⁶ Under section 47 of the RTI Act.

¹⁷ At page 3, the decision maker relevantly stating 'I acknowledge the Department has maintained a copy of these documents'.

¹⁸ A record of which I have reviewed.

¹⁹ (1998) 4 QAR 310 at paragraph 22. This decision concerned section 7 of the now repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**), framed in substantially similar terms.

*definition of the words "whether ... received in the agency"... In my view, **mere physical possession of documents by an agency** is sufficient to make them "documents of an agency" for the purposes of the FOI Act.*

(My emphasis.)

15. This interpretation was subsequently confirmed in *Price v Nominal Defendant*.²⁰

*...In Re Holt and Reeves and Education Queensland and Anor (Information Commissioner Qld, Decision No. 98004, 20 April 1998, unreported), I decided that the word "possession" in the above definition is properly to be construed as meaning physical possession rather than legal possession. **A document in the physical possession of an agency (or of an officer of an agency in the officer's official capacity), whether created²¹ or received in the agency, is a "document of the agency" for the purposes of the FOI Act.***

(My emphasis.)

16. CNI submits²² that, in construing the term 'possession' as used in section 12 of the RTI Act:

- the test of physical possession should not be an absolute one
- the relevant test is physical possession to which the agency is entitled
- the capacity in which the Department came into possession of the document must be taken into account
- weight must be given to the circumstances in which the agency obtained possession of the document and whether the agency has a present legal entitlement to possess the document.

17. CNI argues that:²³

...a construction of s.12 that leads to a conclusion that mere physical possession (however obtained) is sufficient to make a document even improperly or unintentionally obtained, a document of the agency that obtains it, leads to an unjust outcome and should not be preferred. ... to do so seriously defeats the ordinary rights of the party who has the true entitlement to the documents.

18. I do not accept these submissions, which effectively contend that I should read in to section 12 qualifications that, on the plain language of the provision, are not open. As the Information Commissioner noted in *Holt and Reeves*, an interpretation that seeks to qualify or curtail the concept of 'possession' (by seeking to exclude, for example, documents in relation to which an agency may not have legal possession), cannot properly be reconciled with the express language of the section.

19. I consider the statements of relevant principles set out in paragraphs 14 and 15 reflect the correct interpretation of section 12 of the RTI Act. As the decisions cited in these paragraphs make clear, the term 'possession' as used in section 12 does not require formal legal possession. Nor is it concerned with the means by which the documents came into an agency's possession.

²⁰ (1999) 5 QAR 80 at paragraph 18.

²¹ Section 12 of the RTI Act uses the words 'brought into existence', in the place of the word 'received' as appeared in the relevant definition used in the FOI Act. This shift in phrasing does not in my view detract from the relevant statement of principle.

²² CNI submissions dated 4 August 2010, and lodged by it in a separate external review in which the interpretation of section 12 of the RTI Act was also in issue. By its letter in this review dated 15 June 2011, CNI (through its solicitors) indicated that for the purposes of this review it wished to 'confirm' and 'repeat' relevant submissions lodged in that separate review, insofar as they concerned the interpretation of section 12 of the RTI Act.

²³ Submissions dated 31 May 2011 (also originally lodged in the separate external review noted above).

20. As for CNI's contention that an interpretation of this kind '*leads to an unjust result,*' on the basis it would '*seriously defeat the ordinary rights*' of a party who may have a '*true entitlement to a document*', the right of access in section 23 of the RTI Act is not intended to prejudice legitimate third party proprietary interests.²⁴
21. An agency may, in a particular case, be obliged to return a document to its legal owner (although the right of access would continue to apply to copies or duplicates that may have been made by an agency, including digital images and records stored in document management systems). However, as the Information Commissioner noted in considering analogous arguments in *Holt and Reeves*,²⁵ agencies must assess claims of this kind with rigour, rather than permit mere assertions of ownership or superior proprietary entitlement to defeat the statutory right of access conferred by section 23 of the RTI Act.
22. I am satisfied that the documents containing the information in issue are 'documents of an agency' within the meaning of section 12 of the RTI Act, because they are in the physical possession of the Department.
23. The documents are subject to the RTI Act.
24. I will now consider CNI's grounds for objection to disclosure as based on section 47 of the RTI Act, beginning with its claim that the documents comprise information the disclosure of which would found an action for breach of confidence, and therefore consist of 'exempt information'.

Exempt information - breach of confidence

25. Section 47(3)(a) of the RTI Act provides that an agency may refuse access to a document to the extent the document comprises exempt information under section 48.
26. Section 48(2) of the RTI Act relevantly states:
- (1) *If an access application is made to an agency...for a document, the agency...must decide to give access to the document unless disclosure would, on balance, be contrary to the public interest.*
- (2) *Schedule 3 sets out the types of information the disclosure of which Parliament has considered would, on balance, be contrary to the public interest.*
27. The relevant category of exempt information appearing in schedule 3 of the RTI Act is information the disclosure of which would found an action for breach of confidence.²⁶
28. The substantive requirements for establishing the breach of confidence exemption consist of five cumulative criteria.²⁷ Relevantly:
- the 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 of it,²⁸ and
 - disclosure must be likely to cause detriment to the confider of the confidential information.²⁹

²⁴ *Holt and Reeves*, at paragraph 25.

²⁵ As above.

²⁶ Schedule 3, section 8 of the RTI Act.

²⁷ *B*, at paragraphs 57-58 ff. and *Callejo v Department of Immigration and Citizenship* [2010] AATA 244—paragraphs 163-171 and 176.

²⁸ 'Requirement (c)', *B*, paragraphs 76 – 102.

²⁹ 'Requirement (e)', *B*, paragraphs 107 – 118. Deputy President Forgie's decision in *Callejo* raises some uncertainty as to whether this element must ordinarily be established; the decision does, however, state '*consideration would need to be given to the fifth element of detriment*' in cases where the hypothetical plaintiff claiming confidentiality is (as in this review) an incorporated entity in which government is a shareholder, consistently with the principles enunciated by Mason J in

Communicated in confidence

29. The information in issue, in general terms, consists of a letter from CNI to Mr McDowall,³⁰ and what I understand were various enclosures to that letter forwarded for the purposes of enabling his appointment to the CNI board, and informing him of the duties and obligations attached to the role.
30. CNI argues that the information was communicated subject to an obligation of confidence purportedly imposed by a board charter comprising one of the documents in issue.³¹ As CNI claims this document is comprised of exempt information, I am constrained in the extent to which I can discuss it in these reasons.³² It is sufficient to note, however, that the document provides for confidentiality of board proceedings.
31. I have, as I explained in my letter to CNI dated 28 September 2011, significant doubts that any of the documents in issue can be characterised as board proceedings falling within the obligation of confidence the board charter purports to impose. The documents in issue were forwarded to Mr McDowall in advance of his appointment to the board, several³³ for the purpose of finalising that appointment. They are by their very nature documents communicated prior to Mr McDowall's commencement on and participation in board proceedings.
32. CNI contended in response that the charter should be interpreted broadly, and that:
- ... [i]t is not...that documents that are concerned with finalising an appointment to the Board cannot be concerned with proceedings of the Board just because the incoming director is not yet a member of the Board. The recruitment of a director is a matter that has a clear connection with the affairs and proceedings of the Board.*
33. CNI also argues that, apart from the board charter, the 'very nature and tone of the communications gave rise to a reasonable expectation that 'the parties were communicating in commercial confidence', and that as the communications concerned appointment to a 'fiduciary position', this evidences the existence of an obligation of confidence.
34. I do not accept these submissions. As to CNI's arguments regarding the proper construction of the board charter, at its simplest, the charter purports to impose confidentiality obligations on individuals who are members of the board. From the point they become CNI directors and board members, and accept the terms of the charter, they may arguably be bound to keep confidential material received in their capacity as directors. I do not, however, consider that even on the broad reading argued by CNI, the charter can be said to operate to bind individuals who are yet to become directors.
35. Additionally, while recruitment of a director may well have a 'clear connection' with proceedings of the board, that does not mean that procedural correspondence and documents effecting that recruitment actually **are** such proceedings for the purposes of the board charter.
36. As to the general circumstances surrounding the communication, I note that there is nothing before me to suggest confidentiality was sought or offered. The covering letter, for example, contains no assertions as to the confidentiality of its contents or the balance of the documents enclosed with it.

Commonwealth of Australia v John Fairfax and Sons Ltd (1980) 147 CLR 39: *Callejo*, paragraphs 168 and 170, and see note 38 below.

³⁰ Document 40.

³¹ Relevantly numbered 'RTI documents 43-48'.

³² Section 108(3) of the RTI Act.

³³ Such as the procedural forms comprising documents 39 and 42.

37. Further, despite CNI's assertions, there is nothing in the material itself of any particular peculiarity or sensitivity to suggest the existence of an implicit understanding of confidence. The mere fact information concerns a commercial matter – such as, here, a routine appointment of a senior public servant to a corporate directorship on the board of a wholly-government owned entity – does not of itself give rise to an automatic presumption of confidence.
38. For these reasons, I am not satisfied that the documents were communicated in circumstances giving rise to an equitable obligation of confidence. Therefore, I am not satisfied that the first requirement necessary to establish the breach of confidence exemption is made out.

Detriment

39. In any case, even if I am incorrect in the above finding, I consider that the fifth cumulative requirement necessary to establish the breach of confidence exemption in this particular case³⁴ – detriment – is not satisfied.
40. I consider that the 'Fairfax Doctrine' applies in the circumstances of this case.³⁵ The *Fairfax Doctrine* requires that public bodies claiming that information is subject to an equitable obligation of confidence must demonstrate disclosure of the information would be detrimental to the public interest in order to successfully establish such a claim.
41. The doctrine was relevantly explained and applied by Senior Member (**SM**) Bayne of the Administrative Appeals Tribunal (**AAT**) in *Sullivan v Department of Industry, Science and Technology and Australian Technology Group Pty Ltd*.³⁶ SM Bayne considered whether disclosure by a Commonwealth department of information relating to a proprietary company largely owned by the Commonwealth could qualify for exemption.³⁷ The Senior Member noted as follows:

25. ... I turn now to consider another basis upon which I might find that disclosure under the Act by the first Respondent could not found an action for breach of confidence by ATG against the first Respondent. In *Plowman*, Mason CJ indicated that in respect of matter provided in and for the purposes of arbitration to which an obligation of confidence attaches

there may be circumstances, in which third parties and the public have a legitimate interest in knowing what has transpired in an arbitration, which would give rise to a "public interest" exception. The precise scope of this exception remains unclear.

The courts have consistently viewed governmental secrets differently from personal and commercial secrets [*A-G v Jonathan Cape Ltd* (1976) QB 752; *The Commonwealth of Australia v John Fairfax and Sons Ltd* (1980) 147 CLR 39, *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109]. As I stated in *The Commonwealth of Australia v John Fairfax and Sons Ltd* [(1980) 147 CLR at 51], **the judiciary must view the disclosure of governmental information "through different spectacles". This involves a reversal of the onus of proof: the government must prove that the public interest demands non-disclosure** [ibid at 52].

³⁴ See note 29.

³⁵ That is, the principles relating to claims of confidence by government actors as set out by Mason J in *John Fairfax and Esso Australia Resources Ltd & Ors v Plowman & Ors* (1995) 183 CLR 10.

³⁶ [1997] AATA 192.

³⁷ Under section 45 of the *Freedom of Information Act 1982* (Cth) (**Commonwealth FOI Act**), the breach of confidence exemption equivalent to schedule 3, section 8 of the RTI Act.

This approach was not adopted by the majority of the House of Lords in *British Steel Corporation v. Granada Television Ltd* [[1981] AC 1096], where the confidential documents in question revealed the internal mismanagement of a statutory authority. In passing, the majority attributed to the public interest exception a very narrow scope, stating that, although disclosure was of public interest, it was not in the public interest [ibid at 1168-1169]. I would not accept this view. **The approach outlined in *John Fairfax* should be adopted when the information relates to statutory authorities or public utilities because, as Professor [sic] Finn notes**, [Finn, "Confidentiality and the 'Public Interest'", (1984) 58 Australian Law Journal 497 at 505] **in the public sector "(t)he need is for compelled openness, not for burgeoning secrecy"**. The present case is a striking illustration of this principle. Why should the consumers and the public of Victoria be denied knowledge of what happens in these arbitrations, the outcome of which will affect, in all probability, the prices chargeable to consumers by the public utilities?

The Chief Justice further observed that in British Steel Corporation v. Granada Television Ltd [1981] AC 1096 at 1185:

Lord Salmon, in a strong dissent, highlighted the sharp distinction between a statutory authority and a private company: "there are no shareholders, and (the authority's) losses are borne by the public which does not have anything like the same safeguards as shareholders". His Lordship concluded that the public was "morally entitled" to know why the statutory authority was in such a parlous condition.

26. ***Thus, if ATG is a public body for the purposes of the Fairfax doctrine, the question will be whether I am satisfied that the public interest requires that any matter in document 1(i) which otherwise would found an action for breach of confidence should not be disclosed.***
27. *I turn first to whether ATG should be regarded as a public body for the purposes of the Fairfax doctrine. A number of matters are relevant in this respect. In his oral evidence...Mr Harbour deposed that ATG is "99% plus" owned by the Commonwealth, and that the Commonwealth has been the sole source of shareholder funds for the ATG. He conceded that the Commonwealth could wind up ATG without any difficulty. Mr Harbour said that the ATG's auditor is the Commonwealth Auditor-General. This by itself is some indication of the public status of ATG. Furthermore, the "Statement" at annexure B to Dr Read's affidavit included documents called "Draft ATG Guidelines" and "Public Interest Safeguards", and the latter in particular indicates the extent of Commonwealth control over ATG's activities.*
28. *On the other hand, the Respondent pointed to evidence from Mr Harbour that while a public servant and a Senator were directors of this company incorporated under the Corporations Law, the Commonwealth had appointed a majority of the directors from the private sector. Other than through the two non-private sector directors, the Commonwealth had not sought to influence decisions made by the Board of ATG.*
29. *There is very little guidance in the case-law as to what bodies may be regarded as sufficiently public in nature as to be affected by the Fairfax doctrine. What was said above by Mason CJ in *Plowman* indicates that the doctrine applies to "statutory authorities or public utilities". **A body such as ATG, albeit that it is a public company almost wholly owned by the Commonwealth, might not in ordinary usage be regarded as a statutory authority or a public utility. But I do not take Mason CJ's reference to "statutory authorities or public utilities" as exhausting the range of bodies beyond government Departments which are affected by the Fairfax doctrine.** The Chief Justice approved of the observation of Professor Finn that in the public sector "(t)he need is for compelled openness, not for burgeoning secrecy". **In a functional sense, ATG is a public sector body.***

(My emphasis.)

42. I consider the *Fairfax Doctrine*³⁸ is equally applicable in appropriate cases arising under the RTI Act.³⁹ This is such a case.
43. The two questions to be answered in determining whether detriment is established are, therefore, as follows:
- is CNI a 'public body'?, and, if so
 - does the public interest require non-disclosure of the information in issue?

Is CNI a 'public body' for the purposes of the Fairfax Doctrine?

44. Yes.
45. I am satisfied CNI is a 'public body' in the 'functional sense' described by SM Bayne. It is fully owned⁴⁰ and funded⁴¹ by the State, could as I understand be readily wound up by the State,⁴² and is governed by a board the clear majority of who are senior public servants.⁴³

Does the public interest require non-disclosure of the information in issue?

46. No.
47. Essentially, the *Fairfax Doctrine* requires me to consider whether disclosure of the information in issue would harm the public interest to a degree such as to require nondisclosure. Given the type of documents in issue in this review, I am not satisfied disclosure would result in **any** harm to the public interest.
48. Much of the information in issue is, as I explained in my letter to CNI dated 28 September 2011, routine, generic and largely innocuous in nature. I cannot see how, for example, disclosure of administrative correspondence⁴⁴ or routine procedural forms⁴⁵ would cause any harm to the public interest, let alone harm sufficient to warrant exemption from disclosure.
49. Even the more substantial corporate governance documents in issue⁴⁶ appear to be comprised of standard or relatively generic provisions I understand are common to documents of this kind, and examples of which are regularly published by various bodies corporate.⁴⁷

³⁸ SM Bayne's approach to and application of the *Fairfax Doctrine* in the context of section 45 of the Commonwealth FOI Act was canvassed by Deputy President Forgie of the AAT in *Callejo*, at paragraphs 167-172. As noted (see note 29), the Deputy President stated that the 'detriment' criterion will be relevant where considering a claim for exemption based on breach of confidence by an 'incorporated body in which the Commonwealth is a shareholder'. The Deputy President further observed the relevance of the *Fairfax Doctrine* in considering this criterion of detriment (paragraph 170).

³⁹ Noting also the comments of the Industry Commission as to the importance of transparency of performance by internal or external service providers canvassed by SM Bayne at paragraphs 30-33 of *Sullivan*, and the Senior Member's observations that '[t]he *Fairfax doctrine* rests upon the same premises as the FOI Act, and the Commission's analysis and views support a broad application of the *Fairfax doctrine*' (at paragraph 34).

⁴⁰ As opposed to the entity in *Sullivan*, which was merely majority government owned (see note 3).

⁴¹ CNI Annual Report 2010-11, note 23, 'Economic Dependence': '[CNI] depends on financial support from the State of Queensland. The funding is provided in line with the amended and restated Project Management Agreement...dated 30 July 2008'. http://www.citynorthinfrastructure.com.au/FileLibrary/cni1068_annual_report_online.pdf.

⁴² On a voluntary winding up; *Sullivan*, paragraph 27.

⁴³ Noting that the relevant board in *Sullivan* was comprised in the main of external appointees.

⁴⁴ Document 40.

⁴⁵ Documents 39 and 42.

⁴⁶ Documents 43-48.

⁴⁷ See, for example, the board charters of Qantas Ltd and BHP Billiton Ltd, and the director's code of conduct for NRMA, all of which are freely available online: <http://www.qantas.com.au/infodetail/about/corporateGovernance/BoardCharter.pdf> ; <http://www.bhpbilliton.com/home/aboutus/ourcompany/Documents/Board%20Governance%20Document.pdf>; <http://www.mynrma.com.au/about/code-of-conduct.htm>

50. There is nothing in the information in issue to suggest that disclosure would, as the *Fairfax* Doctrine demands, be contrary to the public interest (such as, for example, by materially compromising CNI's operations or preventing it from carrying out the responsibilities with which the Government has entrusted it).
51. The absence of any identifiable adverse public interest considerations is sufficient to preclude CNI from:
- satisfying the public interest test imposed by the *Fairfax* Doctrine
 - meeting the fifth cumulative requirement of detriment, and thus
 - establishing the breach of confidence exemption under the RTI Act.⁴⁸
52. However, even if CNI could identify detrimental public interest considerations, there are significant countervailing public interest considerations in this case which would outweigh any such adverse factors.
53. In considering whether the public interest requires nondisclosure of particular documents, it is, as SM Bayne noted in *Sullivan*, '*also relevant to have regard to the public interest in disclosure of the documents*'.⁴⁹
54. There is a manifest public interest in the community having access to information concerning the operations of 'special purpose vehicles' such as CNI: entities which are entirely government-owned, taxpayer-funded,⁵⁰ and charged with carrying out duties which would otherwise fall to be performed by public authorities or agencies subject to the operation of accountability mechanisms such as the RTI Act.
55. The public interest in the proper accountability and transparency of government actors – whether those actors are mainstream administrative units such as the Department, statutory authorities, or State-owned corporate entities such as CNI – warrants disclosure of information of the kind in issue. Disclosure of this information – including the corporate governance architecture contained in the information in issue – will serve to further the accountability of both:
- CNI, for the manner in which it governs itself and discharges its functions in delivering significant public infrastructure
 - the Government, for having elected to establish CNI as an appropriate vehicle for delivery of such infrastructure.
56. Disclosure will also significantly advance the transparency of both the Department's and CNI's operations, by revealing information concerning CNI's internal management and governance and its dealings with government units such as the Department. Such disclosure will permit better public scrutiny of the operations of the Department and CNI – an entity that is ultimately an instrument of government, and thus, public, action. This will in turn foster increased community discussion of public affairs.
57. I conveyed the substance of my reasoning as set out in paragraphs 39 to 56 to CNI in my letter dated 28 September 2011. In response, CNI did not seek to contest that it was a 'public body', nor argue that any detriment to the public interest would arise from disclosure of the documents. CNI instead contended that the *Fairfax* Doctrine had no application in the context of this case:

(b) If the information [requested under an RTI access application] is of a type mentioned in Schedule 3, then it is by that factor alone information the disclosure of which

⁴⁸ Assuming, of course, that the information in issue otherwise met all the requirements for founding an action for breach of confidence as set out in *B* and canvassed in *Callejo*.

⁴⁹ At paragraph 37.

⁵⁰ See note 35.

Parliament has considered would, on balance, be contrary to the public interest (as stated by s.48(2) of the RTI Act);

- (c) *This means that the test that was applied in Sullivan...adapted from Fairfax...is distinguishable. The test in Sullivan's case was applied in the context of a statutory procedure that did not pre-determine where the balance of the public interest may have rested. So it was necessary to analyse the impact of disclosure in the context of a broader public interest assessment in order to determine whether the public interest required non-disclosure of matter the disclosure of which would otherwise found an action for breach of confidence.*
- (d) *However it is not necessary to reverse the process of analysis of the balance of the public interest under the applicable provisions of the RTI Act with respect to Schedule 3 exempt matter. It is sufficient that there is, under the statute, a declaration by Parliament that determines that balance. If the information is of a type the disclosure of which would found an action for breach of confidence then Parliament has considered that disclosure would, on balance, be contrary to the public interest. Further consideration of the detriment that might be occasioned by disclosure in order to determine whether there is a public interest in non-disclosure is rendered redundant in circumstances where Parliament has already declared where the balance of the public interest is taken to lie.*

58. CNI's submissions in this regard misapprehend the nature of the *Fairfax* Doctrine, and its application in this review. It is correct to say that Parliament has declared disclosure of 'exempt information' – relevantly, information the disclosure of which would found an action for breach of confidence – is presumed to be contrary to the public interest.⁵¹ A finding that information is 'exempt information' thus precludes any consideration by an RTI decision maker of public interest balancing factors, and obviates the need to conduct a public interest balancing exercise. Access to such information may legitimately be refused.⁵²
59. Crucially, however, the relevant information must first meet the requirements for the particular exemption claimed, that is, it must be shown to **be** 'exempt information'. Only once the relevant 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.
60. In this case, CNI has relied upon the breach of confidence exemption. The requirements for that exemption are to be found by reference to the general law.⁵³ As the survey of authorities set out in SM Bayne's decision in *Sullivan* demonstrates,⁵⁴ the general law requires that to successfully found an action for breach of confidence in a case involving a 'functional public body' of the kind I am satisfied CNI comprises, it must be demonstrated that disclosure of relevant information would be detrimental or contrary to the public interest.
61. In other words, in cases of this kind the *Fairfax* Doctrine essentially imports a form of public interest 'test' into the requirements for the breach of confidence exemption. It is, to quote CNI's submissions, '*necessary to analyse the impact of disclosure in the context of a broader public interest assessment*' simply because that is what the general law requires.

⁵¹ Section 48(2) of the RTI Act.

⁵² Section 47(3)(a) of the RTI Act.

⁵³ *B*, at paragraph 23, where in considering the breach of confidence exemption as it appeared in an identically worded formulation in section 46(1)(a) of the FOI Act, the Information Commissioner noted that '*the ground of exemption...operates by calling for the application of legal tests to be derived from the general law relating to actions for breach of confidence.*'

⁵⁴ And the observations of Deputy President Forgie in *Callejo*, at paragraphs 167-172.

62. As noted in paragraph 42 above, I am satisfied the *Fairfax Doctrine* has application in the circumstances of this case, as it did in *Sullivan*; contrary to CNI's submission, the exercise conducted by SM Bayne in that case was conceptually indistinct from the assessment I am required to conduct in this review. The breach of confidence exemption appearing in the Commonwealth FOI Act is worded in a substantially similar fashion to schedule 3, item 8 of the RTI Act,⁵⁵ and is not subject to an express public interest balancing test: once the elements of the exemption are satisfied, no further or additional assessment of the balance of the public interest is required – access to documents may be refused.
63. CNI has not put before me any material to suggest that disclosure of the documents in issue would be contrary to the public interest. There is nothing on the face of the documents to suggest that that would be the case, and certainly nothing to outweigh the considerable public interest factors favouring disclosure I have identified and discussed above.
64. Accordingly, as a consequence, CNI has not established that disclosing the information in issue would found an action for breach of confidence in accordance with the principles applying under the general law. As a consequence, the information is not 'exempt information' within the meaning of section 48 of the RTI Act. The presumption set out in section 48(2) of the RTI Act that disclosure would be contrary to the public interest is not, therefore, enlivened.
65. I find that the information in issue does not qualify for exemption under the RTI Act.

Contrary to public interest information

66. CNI also contends that disclosure of the information in issue would, on balance, be contrary to the public interest within the meaning of section 47(b) and section 49 of the RTI Act.
67. In determining whether disclosure of information would, on balance, be contrary to the public interest, I must:⁵⁶
- identify any irrelevant factors that apply in relation to the information in issue and disregard them
 - identify public interest factors favouring disclosure and nondisclosure that apply in relation to the information in issue
 - balance the relevant factors favouring disclosure and nondisclosure
 - decide whether disclosure of the Information in Issue, on balance, would be contrary to the public interest.

Irrelevant factors and factors favouring disclosure

68. I have not taken into account any irrelevant factors in making this decision. Factors favouring disclosure are those as identified at paragraphs 54 to 56 above, in the context of my discussion of the *Fairfax Doctrine*.

Factors favouring nondisclosure

Public interest harm - adverse effect on business affairs

⁵⁵ At the time of the decision in *Sullivan*, section 45(1) of the Commonwealth FOI Act relevantly provided that '[a] document is an exempt document if its disclosure under this Act would found an action, by a person other than the Commonwealth, for breach of confidence.' The provision has been subject to minor amendment since *Sullivan*, however the 'found an action...for breach of confidence' formulation remains undisturbed.

⁵⁶ In accordance with section 49 of the RTI Act.

69. CNI argues that '[d]iminition of the rights of CNI in the specific content of its corporate governance material is an effect adverse to the business affairs of CNI', and that '[c]onsequently CNI submits that the public interest favours non-disclosure of the documents in accordance with the provisions of Item 7 of Schedule 4 of the RTI Act'.
70. Item 7 Schedule 4(1) of the RTI Act contains three discrete, mutually exclusive⁵⁷ factors. Given CNI's express reference to adverse effect on business affairs, I have proceeded on the basis that it seeks to rely on the business affairs factor set out in schedule 4, item 7(1)(c) of the RTI Act. As noted below, however, certain of CNI's submissions are somewhat imprecise, and appear to conflate this limb with the distinct 'commercial value' factor contained in schedule 4, item 7(1)(b). I have therefore also briefly considered the 'commercial value' factor below.
71. For the 'business affairs' public interest harm factor to arise, I must be satisfied that the information:
- concerns the business, professional, commercial or financial affairs of an agency or another person; and
 - disclosure could reasonably be expected⁵⁸ to have an adverse effect on those affairs.⁵⁹
72. Essentially, I must then be satisfied that the consequent public interest harm would be of such gravity so as to outweigh any public interest factors favouring disclosure of the information.⁶⁰
73. The Information Commissioner has previously noted the required adverse effect will almost invariably be pecuniary in nature, and that in most instances the question of whether disclosure of information could reasonably be expected to have an adverse effect will turn on whether the information is capable of causing competitive harm to the relevant entity – ie., CNI.⁶¹
74. CNI is a monopoly provider of project management functions to government, functions that would otherwise fall to mainstream government agencies to discharge. Accordingly, it cannot be said to operate in a commercially competitive environment, nor be susceptible to competitive harm.
75. In any case, neither CNI's submissions nor the documents themselves contain anything to substantiate a claim that disclosure of the information in issue could be expected to result in detriment to CNI or its affairs, whether business, financial or otherwise.
76. As noted, the bulk of the information is routine, innocuous and largely generic in nature. I cannot identify any evidence of a '*significant commercial and intellectual investment*' in, for example, a blank procedural form⁶² or the routine letter to Mr McDowall, nor identify how disclosure of **any** of these documents could have the required adverse effect.

⁵⁷ *Cannon*, at paragraph 66, noting that the 'commercial value' and 'business affairs' limbs of the relevant harm factor cannot both operate in relation to the same information. These comments were made in the context of section 45(1) of the FOI Act but provide useful guidance on the interpretation of schedule 4, part 4, item 7(1) of the RTI Act.

⁵⁸ The phrase 'could reasonably be expected to' requires an expectation that is reasonably based, ie. neither absurd, irrational or ridiculous: see *Channel Seven and Redland City Council* (Unreported, Queensland Information Commissioner, 30 June 2011) at paragraph 20 for a contemporary restatement of principles applying to the interpretation of this phrase as it used throughout the RTI Act.

⁵⁹ Noting that CNI does not contend disclosure would prejudice the future supply of like information to government, ie. to provide public servants required to sit on the company's board with the material necessary to confirm their engagement as directors.

⁶⁰ In accordance with the steps prescribed in section 49 of the RTI Act.

⁶¹ *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 at paragraphs 82 – 84, analysing section 45(1)(c) of the FOI Act, materially reproduced in schedule 4, part 4, item 7(1) of the RTI Act.

⁶² Comprising document 42.

77. As I pointed out to CNI in my letter dated 28 September 2011, even the more substantial corporate governance documents⁶³ appear to consist of obligations and requirements that are relatively standard in corporate governance documents of this kind, and it is difficult to ascertain how their disclosure could negatively affect CNI's business, commercial etc. affairs as required by the relevant nondisclosure factor. The fact that substantial private companies publish to the internet similar materials undermines any argument that disclosure of relevant documents in this case could reasonably be expected to adversely affect any business, commercial or financial affairs CNI might be said to possess in the sense as required by this provision.
78. The reasoning set out in paragraphs 71 to 77 was put to CNI in my letter dated 28 September 2011. In response, CNI submitted as follows:

Adverse Effect on Business Affairs

CNI submits that it is incorrect to reason that because the Board documents might be seen as 'routine, innocuous and largely generic in nature', that they lack commercial value.

The fact that the Information Commissioner has reached a view that the documents appear to record obligations and requirements that are relatively standard in corporate governance documents and mirror in part obligations imposed by the Corporations Act and general law, is not a valid basis upon which to reason that the document may nevertheless lack commercial value.

Experience in corporate governance generally tends to suggest to CNI and its advisers that the corporate world at large does not necessarily possess the level of expertise and understanding that would warrant the classification of these documents as valueless. The fact that examples of corporate governance documents of 'significant private sector actors' may be available on the internet is wholly beside the point.

CNI incurred substantial cost in having this suite of documentation prepared and settled by its legal advisers in order to engender an appropriate corporate governance culture within the Board of CNI. The documents are tailored to cater to its particular corporate arrangements. The view of the Information Commissioner that the documents restate the law does not detract from their high commercial value to CNI. CNI directors need to understand their legal and corporate responsibility. CNI submits that it has exclusive rights regarding the reproduction of the particular material that it has caused to be created and those rights are diminished by the Department distributing reproductions of the material into the public domain without the consent of CNI.

79. It is not entirely clear what CNI is attempting to argue in the above submissions, other than, at its simplest, a considerable amount of (public)⁶⁴ money was expended in generating the information in issue. As I have stated above, and as was clearly put to CNI in my 28 September 2011 letter, for the relevant public interest harm factor to arise for consideration, it must, as noted above, be shown that disclosure of the information in issue would have an adverse effect on CNI's business affairs: essentially, that disclosure would impair CNI's commercial activity.
80. CNI has, however, provided neither evidence nor submissions to demonstrate how it could be said to operate in a commercially competitive environment, or how disclosure of the information in issue would detrimentally affect those operations or otherwise adversely affect its business, commercial or financial affairs. Instead, it has merely responded to my reasoning with denials and assertions, in part based on 'experience' which neither it nor its advisors have in the above submissions seen fit to convey.

⁶³ Documents 43-46.

⁶⁴ See note 41.

81. As previously stated, CNI is an entity entirely owned and funded by government, and cannot be said to operate in a commercially competitive environment. With this in mind, the fact that entities that are operating in fiercely competitive environments publish corporate governance documents similar to those in issue without any apparent harm to their business affairs undermines CNI's unsubstantiated assertion that disclosure of similar documents in this case would have the required adverse effect on its own.
82. As to the claim that '*CNI incurred substantial cost*'⁶⁵ in having the information in issue prepared, this does not of itself mean that its disclosure will adversely affect CNI's business or financial affairs. I am not satisfied that disclosure of relevant documents could reasonably be expected to have such an adverse effect. Accordingly, I do not, as noted, consider the public interest harm factor raised by CNI arises for consideration in this case. I have not taken it into account in balancing the public interest in this case.

Public interest harm - destroy/diminish commercial value

83. CNI's repeated assertions as to the 'commercial value' of the documents in issue arguably give rise to a submission the documents have an inherent commercial value the disclosure of which could reasonably be expected to destroy or diminish that value.
84. Commercial value is, as noted above, a discrete interest protected by a distinct limb of the public interest harm set out in schedule 4, item 7 of the RTI Act, and not by the 'business affairs' provision cited by CNI in its submissions.
85. I do not consider the commercial value harm factor arises for consideration.
86. Given the nature of the documents in issue (as discussed at paragraphs 48-49 above), and in the absence of cogent evidence to the contrary, I am not satisfied the documents could be said to possess any intrinsic commercial value to CNI for the purposes of any on-going commercial activities it carries out. The expense CNI says it incurred in having the documents produced does not of itself imbue the information contained in those documents with commercial value in the sense required by this provision. Nor can I identify any independent third party purchaser – a genuine 'arm's-length' buyer⁶⁶ – who would be prepared to pay for access to what is largely innocuous and/or generic information.⁶⁷
87. I am not satisfied any of the information in issue has a commercial value that could reasonably be expected to be diminished by disclosure. I can identify no other factors favouring nondisclosure.

Balancing the public interest

88. Even if the requirements for consideration of one or other of the limbs of the public interest harm factor discussed above were established, I am satisfied that there are a number of public interest considerations favouring disclosure of the information in issue which, for the reasons discussed above in the context of my consideration of the *Fairfax Doctrine*,⁶⁸ are deserving of substantial weight. These factors favouring

⁶⁵ And noting that costs incurred by CNI are ultimately borne by the taxpayer – see note 41.

⁶⁶ The second possible interpretation of the phrase 'commercial value' as used in this provision: *Cannon*, at paragraphs 51-60.

⁶⁷ Noting, for example, that templates for Directors' codes of conduct in a substantially similar form appear to be readily available free of charge online:

http://www.boardconnect.com.au/Code_of_Conduct_Template.pdf, www.bhpbilliton.com/home/aboutus/ourcompany/Documents/Board%20Governance%20Document.pdf

⁶⁸ See paragraphs 54-56.

disclosure would outweigh either the 'business affairs' factor or the alternative 'commercial value' factor.

89. Accordingly, taking into account:
- the various factors favouring disclosure of the information in issue, each of which are deserving of substantial weight, and
 - the absence of any identifiable factors favouring nondisclosure (and which, were any established, would in my view be outweighed by the factors favouring disclosure),

I consider disclosure of the information in issue would not, on balance, be contrary to the public interest.

Copyright

90. Finally, CNI's submission that '*it has exclusive rights regarding the reproduction of the particular material that it has caused to be created and those rights are diminished by the Department distributing reproductions*' arguably gives rise to a claim of copyright in relevant documents.
91. A claim of copyright does not, of itself, afford a ground of exemption under the RTI Act, or a ground for withholding access.⁶⁹ Instead, the RTI Act provides that,⁷⁰ where an agency accepts a valid copyright claim exists, it can decide to give access to the documents in a form that would not infringe copyright (eg, by way of inspection). Agency decisions of this kind are not reviewable by the Information Commissioner.⁷¹

DECISION

92. I set aside the decision under review and in substitution find that the documents containing the information in issue are documents of an agency within the meaning of section 12 of the RTI Act, and are therefore subject to the RTI Act.
93. There being no grounds established on which access may be refused, the applicant is therefore entitled to access the information in issue in accordance with the right of access contained in section 23 of the RTI Act.

Julie Kinross
Information Commissioner

Date: 19 December 2011

⁶⁹ *Higgins and Education Queensland* (S 200/98, 31 March 1999, Information Commissioner), paragraphs 32-34.

⁷⁰ Section 68(4)(c) of the RTI Act.

⁷¹ The definition of 'reviewable decision' in schedule 6 to the RTI Act includes '*decisions to give access to documents in a form different to that applied for by the applicant, **unless** access in the form applied for would involve an infringement of the copyright of a person other than the State*' (my emphasis).

APPENDIX

Significant procedural steps

Date ⁷²	Event
3 November 2010	Access applicant applied to the Department for ' <i>All material relating to the selection, approval and assignment of Shane McDowall to the Chair of the Board of Directors City North Infrastructure on 8 September 2008</i> '.
20 December 2010	Department decided to release various documents to applicant; withheld access to relevant documents containing information in issue on basis documents not 'documents of an agency' within meaning of section 12 of the RTI Act.
10 January 2011	Access applicant applied to Department for internal review of the Department's initial decision.
25 January 2011	Department affirmed initial decision refusing access to information in issue on basis not 'documents of an agency'.
1 February 2011	Applicant applied to Information Commissioner for external review.
11 February 2011	Departmental officer advised OIC officer Department has documents containing information in issue in its possession. OIC wrote to applicant and Department advising application accepted for external review.
18 May 2011	OIC wrote to Department conveying preliminary view documents are 'documents of an agency' within the meaning of section 12 of the RTI Act and subject to the Act.
20 May 2011	Department wrote to OIC and advised Department accepted preliminary view that documents are subject to the RTI Act. Department further advised preparedness to disclose documents to access applicant (apart from limited segments of information).
30 May 2011	Access applicant advised OIC officer access applicant did not seek access to limited segments of information which Department was not prepared to disclose.
1 June 2011	OIC wrote to City North Infrastructure Pty Ltd (CNI) seeking views on possible disclosure of documents containing information in issue and inviting CNI to participate in external review.
15 June 2011	Solicitors for CNI advised OIC CNI wishes to participate in external review and objects to disclosure of information in issue.
29 July 2011	OIC wrote to solicitors for CNI seeking additional submissions in support of CNI's objections to disclosure and accepting CNI's request to participate in external review.
12 August 2011	Solicitors for CNI lodge further submissions in support of CNI's objections to disclosure.
28 September 2011	OIC wrote to solicitors for CNI conveying preliminary view no basis on which access to information in issue may be refused. OIC advised Department of preliminary view issued to CNI.
4 October 2011	OIC advised access applicant of preliminary view issued to CNI.
26 October 2011	Solicitors for CNI wrote to OIC advising CNI did not accept preliminary view, and set out further submissions in support of CNI's case.
22 November 2011	OIC forwarded to solicitors for CNI letter to Department dated 18 May 2011, invited any further submissions by 6 December 2011.
6 December 2011	Solicitors for CNI advised OIC no further submission proposed.

⁷² Of correspondence or relevant communication unless otherwise stated.