Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***Environmental Justice Australia and Department of Natural Resources and Mines*** **[2016] QICmr 49 (13 December 2016)**
Application Number:	**312777**
Applicant:	**Environmental Justice Australia**
Respondent:	**Department of Natural Resources and Mines**
Decision Date:	**13 December 2016**
Catchwords:	**ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – BREACH OF CONFIDENCE – bank guarantee - whether disclosure would found an action for breach of confidence – whether information is exempt under 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 - bank guarantee - affecting confidential communications - whether disclosure would, on balance, be contrary to the public interest under section 49 of the *Right to Information Act 2009* (Qld) - whether access to information may be refused under section 47(3)(b) of the *Right to Information Act 2009* (Qld)**

REASONS FOR DECISION

Summary

1. The applicant applied to the Department of Natural Resources and Mines (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to a bank guarantee given by a financial institution as security for environmental rehabilitation costs arising from specified mining operations. The guarantee was given pursuant to section 292 of the *Environmental Protection Act 1994 (Qld)* (**EP Act**).

2. The underwriting financial institution objects to disclosure of the bank guarantee, on the basis that disclosure '…*may be a breach of confidentiality*'.[1]

3. For the reasons explained below, I set aside the decision under review. I am not satisfied that the financial institution's objection establishes grounds for refusing access to the guarantee under the RTI Act.

[1] Letter from financial institution to this Office dated 5 September 2016. The institution's objection is set out in more detail in paragraph 16 below.

Background

4. The applicant originally applied[2] for access to documents concerning a large number of mine sites. The Department formed the view that work involved in processing the application in its original form would substantially and unreasonably divert Departmental resources, and therefore sought to refuse to deal with the application under section 41 of the RTI Act.

5. The Department did not, however, comply with all prerequisites[3] that must be satisfied before an agency can refuse to deal under section 41. The ultimate consequence of this noncompliance was that the Department's purported decision refusing to deal was of no effect and, as no other considered decision was made by the Department in the time allowed under the RTI Act, the Department was taken to have made a decision refusing access to all requested information (**Deemed Refusal**).[4]

6. The applicant applied to OIC for external review.[5] OIC subsequently negotiated with the applicant in an effort to reduce the quantity of potentially relevant documents. As a consequence of these negotiations, the applicant agreed to confine the scope of the original access application to documents concerning a single mining operation.[6]

7. The Department conducted necessary searches and located two guarantees, issued by two separate financial institutions on behalf of the relevant mine operator. OIC sought the views of each institution[7] as regards possible disclosure of the guarantee issued by it, and the mine operator as regards both guarantees.[8]

8. OIC received no objection to the disclosure of one of the guarantees from the relevant issuing institution, while the mine operator did not contest OIC's preliminary view that initial objections raised by the operator to the disclosure of the guarantees did not establish grounds for refusing access under the RTI Act.[9] The Department advised OIC that it did not contend that access to either guarantee should be refused.[10] Accordingly, the Department agreed to release the guarantee the disclosure of which was not the subject of objection, and it no longer remains in issue in this review.

9. The second of the two financial institutions consulted by OIC does, however, continue to object to the disclosure of the guarantee it had extended to the mine operator.[11] I therefore consider it appropriate to resolve the question of access to that guarantee by way of formal decision.

10. The objecting institution has not, despite invitation by OIC,[12] applied to participate in this review. For this reason, it is not a formal participant and is not identified as a third party in the headnote to these reasons.

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[2] Application dated 18 January 2016.
[3] Set out in section 42 of the RTI Act.
[4] Section 46(1)(a) of the RTI Act. The Deemed Refusal was taken to have been made on 23 February 2016. This was explained to the Department by OIC by letter dated 3 June 2016 (which letter inadvertently referred to the date of the Deemed Refusal taking effect as '23 March 2016' – an error of no consequence).
[5] Application dated 8 March 2016, accepted by OIC on 22 March 2016.
[6] Email dated 27 July 2016, in reply to OIC's letter of the same date.
[7] Letters dated 23 August 2016.
[8] Letter dated 8 September 2016.
[9] The mine operator's initial objections were set out in correspondence dated 21 September 2016. OIC's preliminary view in reply was conveyed by letter dated 6 October 2016. That letter advised the mine operator that if no reply was received by 20 October 2016, OIC would ask the Department to release the guarantees. No reply was received. On 8 November 2016, OIC again wrote to the mine operator, advising that OIC was proceeding on the basis the operator did not seek to contest OIC's preliminary view. Nothing further has been received from the mine operator.
[10] Email dated 14 November 2016.
[11] Letter dated 5 September 2016, reaffirmed in letters dated 10 October 2016 and 7 November 2016.
[12] Letters dated 23 August 2016 and 25 October 2016.

Information in issue

11. The information in issue is a 4-page bank guarantee, less two signatures to which the applicant is not pursuing access.[13]

Reviewable decision

12. The decision under review is the Deemed Refusal the Department is taken to have made under section 46(1)(a) of the RTI Act, refusing access to the bank guarantee described in the preceding paragraph.

Evidence considered

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

Relevant law

Onus

14. The Department bears the formal onus of establishing that a decision not to disclose the guarantee is justified.[14] As noted above, however, the Department does not seek to argue that access to the guarantee should be refused, and is prepared to disclose it to the applicant. In these circumstances, there is a practical onus on the financial institution to ensure there is sufficient material before me from which I can be satisfied that a ground for refusing access under the RTI Act has been established.[15]

Right to access information

15. The RTI Act gives people a right to access documents of government agencies.[16] The Act is to be administered with a pro-disclosure bias and requires that access should, generally, be given to a document unless giving access would, on balance, be contrary to the public interest.[17] The RTI Act also sets out certain grounds on which access to information may be refused, including, relevantly, to the extent information comprises exempt information.[18] Parliament has declared, however, that these grounds are to be interpreted narrowly.[19]

Objection to disclosure

16. The financial institution objects to disclosure of the bank guarantee, on the basis the supply of the guarantee '*was a contractual arrangement privy only to…*[the financial institution], *the Department and the Customer* [ie, the mine operator]*, and release of the document to any other party may be a breach of confidentiality*'.[20]

17. The financial institution has not adduced any evidence in support of its objection, nor sought to bolster it with any supporting submissions. Nor has it pointed to any particular

[13] As confirmed by the applicant's representative in a telephone conversation with OIC on 1 December 2016.
[14] Section 87 of the RTI Act.
[15] Where an agency agrees to release of information but a third party objects, there is a practical onus on the third party to establish that access to the information can be refused under the RTI Act: *Sunshine Coast Environment Council Inc and Department of National Parks, Sport and Racing; Springborg MP (Third Party)* [2016] QICmr 10 (4 March 2016), citing *Queensland Newspapers Pty Ltd and Queensland Police Service; Third Parties* [2014] QICmr 27 (12 June 2014), *Brisbane City Council v Albietz* [2001] QSC 160 (17 May 2001) and *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663.
[16] Section 23 of the RTI Act.
[17] Section 44(1) of the RTI Act.
[18] Section 47(3)(a) of the RTI Act.
[19] Section 47(2)(a) of the RTI Act.
[20] Letter dated 5 September 2016.

ground for refusal in the RTI Act on which a decision to refuse access might be based. Given the reference to 'confidentiality', I have considered whether:

- the guarantee could be said to comprise exempt information to which access may be refused,[21] as information the disclosure of which would found an action for a breach of confidence;[22] or
- disclosure of the guarantee would, on balance, be contrary to the public interest,[23] on the basis the guarantee is a confidential communication or information, disclosure of which would enliven a factor favouring nondisclosure[24] and give rise to a public interest harm.[25]

18. I will consider each of these grounds in turn.

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

19. Access may be refused to information requested under the RTI Act to the extent the information comprises exempt information. Exempt information to which access may be refused includes information the disclosure would found an action for breach of confidence (**Breach of Confidence Exemption**).[26]

20. The test for exemption under the Breach of Confidence Exemption must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the Department not to disclose relevant information.[27]

21. Establishing the exemption requires consideration of whether an equitable obligation of confidence exists.[28] The following five cumulative criteria must be met in order to give rise to an equitable obligation of confidence:

a) relevant information must be capable of being specifically identifiable as information that is secret, rather than generally available,
b) the information must have the necessary quality of confidence – ie, it must not be trivial or useless, and must have a degree of secrecy sufficient for it to be subject to an obligation of conscience,
c) the information must have been communicated in such circumstances as to import an 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.[29]

22. In this case, I am not satisfied that requirement (b) is met as regards most of the guarantee, and do not consider (c) can be satisfied at all.

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[21] Under sections 47(3)(a) and 48 of the RTI Act.
[22] Schedule 3, section 8 of the RTI Act.
[23] Section 47(3)(b) of the RTI Act.
[24] Schedule 4, part 3, item 16 of the RTI Act.
[25] Schedule 4, part 4, item 8 of the RTI Act.
[26] Sections 47(3)(a) and 48 and schedule 3, section 8 of the RTI Act.
[27] *B and Brisbane North Regional Health Authority* [1994] QICmr 1 (***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 paragraph 44.
[28] In cases concerning disclosure of information that is claimed to be confidential, the facts may give rise to both an action for breach of contract and in equity, for breach of confidence. At general law, these are separate and distinct causes of action. An action for breach of confidence will only be established where particular requirements (enumerated in this and the preceding paragraph) are met. However, where a contractual term requiring confidentiality exists, disclosure (or threatened disclosure) of information may, in itself, only found an action for breach of contract: *Callejo and Department of Immigration and Citizenship* [2010] AATA 244 (***Callejo***) at paragraphs 163-166. See also *TSO08G and Department of Health* (Unreported, Queensland Information Commissioner, 13 December 2011).
[29] *B and BNRHA, at* paragraphs 57-58. See also *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) and Another* (1987) 14 FCR 434 at 437, per Gummow J.

Requirement (b) – necessary quality of confidence

23. Firstly, I am not persuaded that the bulk of bank guarantee has a degree of secrecy sufficient for it to be subject of an obligation of confidence. Most of the document merely replicates, as I understand, the terms of a publicly-accessible pro-forma template published by the Department of Environment and Heritage Protection. Accordingly, criteria (b) is, as regards this information at least, not satisfied.

Requirement (c) – communicated in confidence

24. Further and in any event, my view is that the third cumulative requirement for establishing the Breach of Confidence Exemption – requirement (c) – cannot be met as regards any part of the bank guarantee in issue.

25. Determining whether or not an enforceable obligation of confidence exists requires an evaluation of the whole of the relevant circumstances including (but not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and the circumstances relating to its communication.[30] Establishing this criteria requires a decision-maker to be satisfied that, on an evaluation of all relevant circumstances, the '*recipient should be fixed with an enforceable obligation of conscience not to use the confidential information in a way that is not authorised by the confider…*'.[31]

26. The financial institution claims that the bank guarantee was supplied as a consequence of a 'contractual arrangement' between it, the Department and the mine operator. A contractual term imposing obligations of confidence is insufficient to found a claim for exemption under the Breach of Confidence Exemption.[32] Nevertheless, it may evidence a shared understanding that information was to be given and received in confidence, sufficient to establish an equitable obligation of confidence.

27. The financial institution has, however, put no evidence before me of any such 'contractual arrangement', let alone that it imposed obligations of confidence on the Department. To the contrary, the guarantee was, as I understand, communicated not as a result of contractual dealings to which the Department was a party, but in compliance with an obligation imposed by law – that is, the statutory condition prescribed in section 292 of the EP Act. The financial institution's unsubstantiated assertion as to a 'contractual arrangement' goes no way, then, to establishing that the guarantee was communicated in circumstances sufficient to fix the Department with an enforceable obligation of confidence.

28. There is no other evidence before me that the Department expressly agreed to receive[33] the bank guarantee in confidence, there being nothing to suggest that any assurance as to confidentiality was sought or offered. Indeed, the fact the Department has stated that it has no objection to the release of the guarantee in issue, tends strongly to negate any suggestion it received the guarantee subject to an express understanding the document would be treated confidentially.

29. Nor is there anything before me to suggest that the guarantee is of a sensitivity so as to support an implied obligation of confidence. I again note that much of the document

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[30] *B and BNRHA*, at paragraph 84.
[31] *B and BNRHA*, at paragraph 76.
[32] See note 28.
[33] From, I am assuming, the financial institution. In this regard, exactly who communicated the guarantee to the Department – the financial institution or the mine operator – has not been made clear. It is not, however, a matter that is ultimately necessary to resolve; for the reasons given in this decision, I am satisfied that claims as to confidentiality whether based on the Breach of Confidence Exemption or the public interest harm factor prescribed in schedule 4, part 4, section 8 of the RTI Act and discussed further below cannot succeed, regardless of the identity of the communicating party.

merely repeats information already in the public domain, while the total amount of financial assurance required of the mine operator – of which the amount secured by the bank guarantee forms a part – appears in the 'Plan of Operations' pertaining to relevant mining operations required to be submitted by the mine operator under the EP Act,[34] public access to which is available on request.[35]

30. I also consider it relevant to note that under the EP Act as it presently stands, documents given under a condition of an environmental authority – such as guarantees akin to the document in issue – are now required to be kept on a publicly-accessible register, open to public inspection on request.[36] While the EP Act did not expressly require keeping of documents such as the bank guarantee in issue on a public register at the time that document was supplied to the Department, the fact that this legislation now does so indicates that Parliament is satisfied that information of the kind contained in the guarantee is not possessed of commercial sensitivity, and can be made openly accessible, without occasioning any commercial or operational prejudice or detriment. This, together with the fact the Department has released one of the two guarantees requested, militates strongly against any suggestion that information of the type recorded in the bank guarantee in issue is so inherently sensitive that an obligation of confidence binding the Department not to disclose it ought to be implied in this case.

31. Finally, assessing whether requirement (c) is made out requires me to evaluate all relevant circumstances. These include public interest considerations relating to the community's legitimate interest in obtaining information about the affairs of government, which 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.[37] As the Information Commissioner has previously noted:[38]

> *…in an action for breach of confidence concerning information supplied to government, it has been established that Australian law will recognise a public interest exception, on the basis that an obligation of confidence claimed to apply in respect of information supplied to government will necessarily be subject to the public's legitimate interest in obtaining information about the affairs of government: see* Esso Australia Resources Ltd & Ors v Plowman & Ors *(1995) 183 CLR 10,* Commonwealth of Australia v Cockatoo Dockyard Pty Ltd *(1995) 36 NSWLR 662, and Commissioner Albietz's comments in* 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).*

32. The bank guarantee reflects the quantum of monies held by the State as security for performance of rehabilitation obligations, which may otherwise need to be met by the public. The information contained in the guarantee is, in my view, therefore very much information concerning the 'affairs of government', to which that public has a legitimate interest in obtaining access.[39]

33. Taking all relevant circumstances into account, I do not consider that the guarantee satisfies requirement (c) of the Breach of Confidence Exemption.

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[34] Section 287 of the EP Act. Plans of operations include the mine operator's proposed amount of financial assurance – ie, the monies to be offered to cover future environmental rehabilitation obligations.
[35] Sections 540 and 542 of the EP Act. The applicant has obtained access to the relevant Plan of Operations, a copy of which was supplied to OIC by the applicant under cover of an email dated 22 September 2016.
[36] See sections 292, 540(1)(eb)(i) and 542 of the EP Act.
[37] *Orth and Medical Board of Queensland; Cooke (Third Party)* (2003) 6 QAR 209, at [34].
[38] *Seeney, MP and Department of State Development; Berri Limited (Third Party)* (2004) 6 QAR 354, at [191].
[39] An interest the Parliament appears to have recognised, by mandating that documents such as the guarantee must now, as noted, be made publicly available by way of a register kept under the EP Act.

Breach of confidence exemption - conclusion

34. The thrust of the above reasoning was put to the financial institution by letter dated 25 October 2016. While maintaining its objection to disclosure,[40] the institution offered no evidence or submissions in support of its position.

35. There is no other material before me to substantiate a claim for exemption under the Breach of Confidence Exemption. In all the circumstances, I do not consider that equity would regard disclosure by the Department of the guarantee as an unconscionable use of that information. Hence disclosure would not found an action in equity for breach of confidence. The bank guarantee does not comprise exempt information under the Breach of Confidence Exemption, and access may not be refused on this basis.

Disclosure contrary to public interest

36. In addition to raising the Breach of Confidence Exemption, the financial institution's objection could, as noted, arguably be construed as a contention that disclosure of the guarantee could give rise to the public interest harm factor set out in schedule 4, part 4, item 8 of the RTI Act (**Confidential Communications Harm Factor**) and the factor favouring nondisclosure set out in schedule 4, part 3, item 16 of the RTI Act. Those provisions respectively state (as far as relevant):

> ***8 Affecting confidential communications***
>
> *(1) Disclosure of the information could reasonably be expected to cause a public interest harm if—*
>
> *(a) the information consists of information of a confidential nature that was communicated in confidence; and*
>
> *(b) disclosure of the information could reasonably be expected to prejudice the future supply of information of this type.*
>
> *16 Disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information.*

37. Access may be refused to information if its disclosure would, on balance, be contrary to the public interest.[41] Accordingly, if the above harm/nondisclosure factors could be said to apply to the guarantee – and were of sufficient weight, when balanced against considerations favouring disclosure,[42] to justify a finding that disclosure would not be in the public interest – then this would give rise to an alternative ground for refusing access to the document.

38. In this case, however, I am not satisfied that the requirements necessary to enliven the Confidential Communications Harm Factor or the substantially similar nondisclosure factor contained in schedule 4, part 3, item 16 are satisfied. Enlivening the harm factor entails establishing that:

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[40] Letter dated 7 November 2016.

[41] Section 47(3)(b). 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.

[42] Section 49(3) of the RTI Act sets out the steps to be taken in balancing the public interest, as follows:

- identify any irrelevant factors and disregard them;
- identify relevant public interest factors favouring disclosure and nondisclosure (non-exhaustive lists of which appear in schedule 4 to the RTI Act);
- 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.

I should note that I have taken into account no irrelevant factors in making this decision.

- information consists of information of a confidential nature; and
- the information was communicated in confidence; and
- its disclosure could reasonably be expected[43] to prejudice the future supply of information of this type.

39. The wording of the nondisclosure factor is such that for it to apply to the information in issue in this review, the first and third requirements above at least must be satisfied.

40. The first two requirements set out in paragraph 38 are similar in nature to requirements (b) and (c) of the Breach of Confidence Exemption discussed earlier in these reasons. As noted, much of the guarantee merely replicates information in the public domain, such that it cannot be said to comprise confidential information for the purposes of the first requirement of the Confidential Communications Harm Factor or the associated nondisclosure factor.

41. As to the second requirement, the phrase 'communicated in confidence':

> *…is used in this context to convey a requirement that there be mutual expectations that the information is to be treated in confidence. One is looking then for evidence of any express consensus between the confider and confidant as to preserving the confidentiality of the information imparted; or alternatively for evidence to be found in an analysis of all the relevant circumstances that would justify a finding that there was a common implicit understanding as to preserving the confidentiality of the information imparted.*[44]

42. The Confidential Communications Harm Factor operates by reference to mutual understandings of confidentiality. Outside of the financial institution's equivocal and unsubstantiated assertion, there is, as noted above, nothing before me to suggest that any party sought or offered any assurance that the bank guarantee would be kept confidential. Meanwhile, the considerations discussed at paragraph 29 above lead me to the view that the circumstances surrounding the creation and communication of the guarantee are not such as to give rise to an implicit mutual understanding of confidentiality.

43. Nor do I accept that it was reasonable for the financial institution (or any other communicating entity) to have expected that a guarantee supplied to government in fulfilment of a statutory obligation and to secure obligations that would otherwise need to be met by the public purse would be kept confidential, for the reasons given at paragraphs 31-32.

44. Further, there is no basis apparent to me on which it might be argued that disclosure of the guarantee could reasonably be expected to prejudice future supply of equivalent guarantees, or to prejudice an agency's ability to obtain those guarantees. The supply of the guarantee was required by the State under the EP Act, as a condition of an environmental authority. As the Information Commissioner has previously stated:[45]

> [w]*here persons are under an obligation to continue to supply…confidential information…or persons must disclose information if they wish to obtain some benefit from the government (or*

[43] The words 'could reasonably be expected' as used throughout the RTI Act '*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.*: *B and BNRHA*, at [160]. Other authorities note that the words '*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.*': *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.

[44] *B and BNRHA*, at paragraph 152, the Information Commissioner there discussing section 46(1)(b) of the repealed *Freedom of Information Act 1992* (Qld), worded in near-identical terms.

[45] *B and BNRHA*, at paragraph 161.

> *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.*

45. As noted, there existed a statutory obligation to supply the guarantee to the State. Failure to meet this obligation would have resulted, on my understanding, in noncompliance with the underlying environmental authority the performance of which is secured by the guarantee and would presumably have prejudiced exploitation of the mining asset to which that authority relates. In the circumstances, it is not reasonable to expect that disclosure of the guarantee would result in prejudice to the future supply of[46] similar documents, which would seemingly only hinder the production endeavours of mine operators and deprive financial institutions of a line of custom.

46. Neither the Confidential Communications Harm Factor nor the associated nondisclosure factor apply as regards the bank guarantee. They do not, therefore, weigh in favour of nondisclosure of the document.

47. The financial institution has put nothing before me contesting the above analysis.[47] Nor has it suggested that any other factors or considerations favouring nondisclosure of the guarantee arise for assessment, and I can identify none. Accordingly, there are no factors or public interest considerations weighing against disclosure of the bank guarantee. In view of the RTI Act's pro-disclosure bias,[48] this is sufficient to tip the balance of the public interest in favour of disclosure.

48. Yet even if there were factors favouring nondisclosure of the guarantee, I am satisfied that there are public interest considerations favouring disclosure in this case sufficient to merit release of the document.

49. The bank guarantee discloses the amount of monies government agencies have determined to be sufficient to meet possible future environmental rehabilitation expenses at the relevant site. Disclosure of the guarantee will allow the public to apprise itself of this amount, and assess the adequacy of same – an important public interest, given that any shortfall would, as noted, ultimately fall to be met by that public.

50. Release of the bank guarantee will also serve to ensure the accountability of relevant agencies for their financial assurance determinations and decisions,[49] to enhance the transparency of agency operations in this regard, and to contribute to informed community debate on the sufficiency of financial assurance.[50] These are compelling public interest considerations,[51] sufficient to tip the balance of the public interest in favour of disclosure in this case.

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[46] Or an agency's ability to obtain, in the words of schedule 4, part 3, item 16.
[47] The thrust of which was conveyed to it by way of letter dated 10 November 2016.
[48] Section 44 of the RTI Act.
[49] Schedule 4, part 2, item 1 of the RTI Act.
[50] Schedule 4, part 2, item 2 of the RTI Act.
[51] Again noting that these are interests the Parliament appears to have recognised, by mandating the keeping of guarantees on a public register as discussed above.

DECISION

51. I set aside the decision the Department was deemed to have made refusing access to the bank guarantee under section 46(1)(a) of the RTI Act. In substitution, I find that no grounds for refusing access to the guarantee under the RTI Act have been established. The applicant is therefore entitled to access the bank guarantee.

JS Mead
Acting Information Commissioner

Date: 13 December 2016