



Decision and Reasons for Decision

Citation: *Australian Conservation Foundation and Department of Environment and Science; Adani Mining Pty Ltd (Third Party) [2019] QICmr 54 (4 December 2019)*

Application Number: 314627

Applicant: Australian Conservation Foundation

Respondent: Department of Environment and Science

Third Party: Adani Mining Pty Ltd

Decision Date: 4 December 2019

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - BREACH OF CONFIDENCE – expert report commissioned by agency - whether disclosure of information would found an action for breach of confidence - whether exempt information to which access may be refused - sections 47(3)(a) and 48 and schedule 3, section 8 of the *Right to Information Act 2009* (Qld)

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

REASONS FOR DECISION

Summary

1. The applicant, Australian Conservation Foundation (**ACF**), applied¹ to the Department of Environment and Science (**DES**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to the *‘Review (final or latest draft) of Adani’s Black-Throated Finch Management Plan, as completed by the panel team led by Brendan Wintle’*.
2. DES did not make a decision in response to the application within the timeframe stipulated by the RTI Act, and was therefore deemed to have refused access to the requested information.²

¹ Application dated 5 March 2019.

² Deemed decision notice dated 24 May 2019.

3. ACF applied to the Office of the Information Commissioner (**OIC**) for external review of DES's deemed refusal of access.³
4. For the reasons explained below, I set aside DES's deemed refusal of access. In substitution, I find that there are no grounds for refusing access to the requested information under the RTI Act.

Background

5. The debate around the potential impact of Adani Mining Pty Ltd's (**Adani**) Carmichael coal mine on the Black-Throated Finch population is well-known. The mine's location hosts the largest and most significant known population of the finch in Australia.⁴
6. As part of the environmental approval conditions for the mine, Adani was required to prepare and submit to DES a 'Black-Throated Finch Management Plan' (**BTFMP**). Adani submitted the BTFMP in May 2017. It was re-submitted in November 2018. In January 2019, DES announced that it was *'seeking the best possible scientific advice on how the Carmichael coal mine may impact this species. Accordingly, DES engaged Brendan Wintle, Professor in Conservation Ecology at the University of Melbourne, to develop a panel to undertake an independent expert review of the ... BTFMP.'*⁵
7. A six member panel of conservation and wildlife science experts led by Professor Wintle was formed to undertake the review. The panel completed its review and prepared a report on the BTFMP dated 15 February 2019. On 2 May 2019, DES set out a series of commitments required of Adani in the BTFMP.⁶ Adani submitted a new version of the BTFMP on 28 May 2019. On 31 May 2019, DES approved the BTFMP. A copy of the final, approved BTFMP is available on Adani's website.⁷

Reviewable decision

8. The decision under review is DES's deemed refusal of access notice dated 24 May 2019.

Evidence considered

9. 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

10. The information in issue comprises the expert panel report dated 15 February 2019 (**the Report**).

³ Application dated 27 May 2019.

⁴ <www.des.qld.gov.au/mediareleases/2019-01-21-expert-review-black-throated-finch-mgmt-plan-adani.html> (accessed 28.11.19)

⁵ <www.des.qld.gov.au/mediareleases/2019-01-21-expert-review-black-throated-finch-mgmt-plan-adani.html> (accessed 28.11.19)

⁶ <www.des.qld.gov.au/our-department/news-media/mediareleases/2019-05-31-black-throated-finch-mp-approved> (accessed 28.11.19)

⁷ <https://www.adaniaustralia.com/-/media/Project/Australia/Our-Projects--Businesses/mine-environment-reporting/BTF-Management-Plan_v8a-FINAL-28May2019.pdf?la=en&hash=D4C8EBFB222B5FF28A61321F1A2078B> (accessed 28.11.19)

Issues for determination

11. The issues for determination are:

- whether the Report is exempt information under section 48 and schedule 3 to the RTI Act; and, if it is not,
- whether disclosure of the Report would, on balance, be contrary to the public interest under section 49 and schedule 4 to the RTI Act.

Steps taken during the external review process

12. At the outset of the external review, DES advised that it did not object to disclosure of the Report.
13. On 12 August 2019, I wrote to Adani's lawyers to consult with Adani under section 37 of the RTI Act regarding disclosure of the Report. On the information then before me, I expressed the preliminary view that disclosure of the Report would not, on balance, be contrary to the public interest. In the event that Adani did not accept my preliminary view and objected to disclosure of the Report, I invited it to apply to participate in the review under section 89(2) of the RTI Act.
14. Adani's lawyers responded by advising that their client objected to disclosure of the Report, and that it wished to participate in the review.⁸
15. During the review, Adani and ACF each provided written submissions in support of their respective positions, which were exchanged with each other.⁹

Onus

16. Section 87 of the RTI Act provides that, on external review, the agency that made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.
17. In this case, DES gave a deemed refusal of access decision and therefore provided no reasons in support of that decision. As DES does not object to disclosure of the Report, Adani, as the only party objecting to disclosure, bears the practical onus of establishing that the Information Commissioner should give a decision adverse to the applicant.

Relevant law

Exempt information

18. The RTI Act gives a right of access to documents of government agencies.¹⁰ 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'.¹¹
19. Adani claims that the Report is exempt information under schedule 3, section 8(1) of the RTI Act – information is exempt information if its disclosure would found an action for breach of confidence.

⁸ Letter dated 30 August 2019.

⁹ Adani submissions dated 30 August 2019 and 16 October 2019; ACF submissions dated 23 September 2019 and 11 November 2019.

¹⁰ Section 23 of the RTI Act.

¹¹ Sections 47(3)(a) and 48 of the RTI Act.

Contrary to the public interest information

20. A further ground on which access to information may be refused under the RTI Act is where disclosure of the information would, on balance, be contrary to the public interest¹² within the meaning of section 47(3)(b) and section 49 of the RTI Act. Non-exhaustive lists of public interest factors weighing both for and against disclosure of information are contained in schedule 4 to the RTI Act.
21. The steps a decision-maker must take in considering the application of the public interest balancing test to particular information are as follows:¹³
- identify any irrelevant public interest factors and disregard them
 - identify relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors; and
 - decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.
22. Adani relies on the following nondisclosure factors in support of its argument that disclosure of the Report would, on balance, be contrary to the public interest:
- schedule 4, part 3, item 2 – disclosure could reasonably be expected to prejudice Adani's business or financial affairs
 - schedule 4, part 3, item 16 – disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information (**CI Prejudice Factor**); and
 - schedule 4, part 3, item 20 – disclosure could reasonably be expected to prejudice a deliberative process of government (**DP Prejudice Factor**).
23. Adani also relies on the following factors (**Harm Factors**) contained in schedule 4, part 4 of the RTI Act:
- schedule 4, part 4, section 4 – disclosure 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 (**DP Harm Factor**); and
 - schedule 4, part 4, section 8 – disclosure could reasonably be expected to cause a public interest harm if it consists of confidential information that was communicated in confidence and its disclosure could reasonably be expected to prejudice the future supply of information of this type (**CI Harm Factor**).

Exempt information – breach of confidence

Submissions of Adani

24. Adani claims that disclosure of the Report would give rise to an action in equity for breach of confidence.
25. In its submission dated 30 August 2019, Adani contended that the requirements to establish an equitable obligation of confidence were satisfied as follows:

¹² The words '*public interest*' refer to considerations affecting the good order and functioning of the community and government affairs for the wellbeing of citizens. This means that, in general, a public interest 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.

¹³ Section 49(3) of the RTI Act.

- the relevant information is specifically identifiable as information that is secret
 - the relevant information has the necessary quality of confidence
 - the information was received in such circumstances as to import an obligation of confidence
 - disclosure would constitute unauthorised use of the information
 - unauthorised use would cause detriment to the confider.¹⁴
26. Adani submitted that the Report *‘contains confidential and commercially sensitive information about the BTFMP, communicated in private between the review panel and the Department.... Adani submits that the sole purpose of the communication was to inform the Department and progress the Department’s internal processes. Under these circumstances, it could reasonably be expected that the communication would remain confidential’*.¹⁵
27. Adani submitted that it held *‘genuine concerns regarding both the independence of the review panel and the value of the Document itself’*. It contended that the findings and recommendations of the review panel were *‘flawed’* and went *‘well beyond’* the requirements of the Environmental Authority with which Adani was required to comply.¹⁶
28. If detriment to the confider is to be regarded as a requirement to establish an equitable obligation of confidence, Adani argued that disclosure *‘would reasonably be expected to cause the kind of detriment to the review panel (as private citizens) contemplated in Commonwealth of Australia v John Fairfax & Sons Ltd’*.¹⁷ It did not elaborate on this submission and I am uncertain of the argument it is intending to advance. I presume its argument is that disclosure of the Report may expose the Report and its authors to public discussion and criticism.
29. In its second submission dated 16 October 2019, Adani’s lawyers submitted that, while the communication in question did not directly involve Adani, they were instructed by Adani that the Report contained commercial information that was communicated by Adani to the Department and the Report’s authors in confidence and which did not form part of the final BTFMP, thereby remaining confidential. In a telephone conversation on 21 October 2019, an OIC officer asked Adani’s lawyers to specifically identify such information contained in the Report and to explain the circumstances of the communication. In an email on 25 October 2019, Adani’s lawyers advised that their client did not wish to make any further submissions.
30. Adani also submitted, relying on QCAT’s decision in *Ramsay* as regards the relevance of public interest considerations in determining whether information was communicated in confidence, that the public interest is just one factor and not the sole determining factor. *‘Adani submits that, when the matrix of factors is considered as a whole, the analysis favours nondisclosure’*.¹⁸ Again, Adani was invited to provide further information in support of this submission, specifically, to identify the other factors that it contended formed part of the matrix that I should take into account in making my decision. As noted above, Adani’s lawyers advised that their client declined the request to provide any further submissions in support of its position.

¹⁴ A recent decision of the Queensland Civil and Administrative Tribunal (QCAT) expresses doubt that detriment to the confider is a necessary requirement: *Ramsay Health Care v Information Commissioner & Anor* [2019] QCATA 66 (**Ramsay**).

¹⁵ Submission dated 30 August 2019.

¹⁶ Submission dated 30 August 2019.

¹⁷ (1980) 147 CLR 39 at [51]-[52].

¹⁸ Submission dated 16 October 2019.

Submissions of ACF

31. ACF argued that the Report reviewed and discussed a version of the BTFMP that Adani had submitted to DES for approval. The conditions of the Environmental Authority required Adani to publish the BTFMP on its website within 10 business days of its approval. On that basis, ACF argued that Adani could never have held a reasonable expectation that the information contained in the BTFMP would be kept confidential. It also contended that Adani had not identified how any of the information in the Report was commercial in nature.
32. ACF took issue with Adani's contention that the review panel was not independent and that its findings were flawed. It pointed out that the panel was selected by the National Director of the Threatened Species Recovery Hub, which is funded by the Australian Government's National Environmental Science Program. ACF also argued that, given that Adani's BTFMP had been approved, Adani had not shown how disclosure of the Report could cause any detriment.

Discussion

33. Adani does not argue that a contractual obligation of confidence exists between the Report's authors and DES. It bases its claim under schedule 3, section 8(1) of the RTI Act on the existence of an equitable obligation of confidence.
34. The test for exemption under schedule 3, section 8(1) must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence said to be owed to that plaintiff by an agency such as DES.¹⁹
35. As noted, DES does not object to disclosure of the Report. It therefore clearly does not consider itself to be under an equitable obligation to keep the Report confidential. There is also no evidence before me that the authors of the Report would seek to press a claim of confidentiality against DES regarding the Report. I note that after the BTFMP was approved by DES on 31 May 2019, the Report's authors published an article setting out why they considered the BTFMP that they had reviewed was inadequate.²⁰ Nor do I consider it would have been reasonable, in the circumstances of the communication of the Report, and taking account of the purpose for which the Report was prepared and submitted, for either DES or the Report's authors to have expected that the Report would be kept confidential. I will discuss this further below.
36. The basis for Adani's case must therefore rest on Adani, rather than the Report's authors, being the 'identifiable plaintiff' with standing to bring an action against DES restricting disclosure of certain information contained in the Report that Adani has declined to identify. The first difficulty with this argument is that, as has been submitted by ACF, at the time Adani submitted the November 2018 BTFMP to DES, it was done with the expectation that, once approved, the BTFMP would be required to be published. The second difficulty is that the bulk of the information contained in the Report that is extracted from the November 2018 BTFMP is also contained in the final, approved BTFMP that has been published on Adani's website. This information is therefore in the public domain and is no longer secret. As noted at paragraph 29 above, Adani argues that there is some information in the Report that is Adani's 'commercial-in-confidence' information and that '*was shared with the Department solely in circumstances importing*

¹⁹ *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (**B and BNRHA**).

²⁰ Stephen Garnett, Brendan Wintle & David Lindenmayer et al, '*Adani's finch plan is approved, just weeks after being sent back to the drawing board*', The Conversation (online), 31 May 2019 <<https://theconversation.com/adanis-finch-plan-is-approved-just-weeks-after-being-sent-back-to-the-drawing-board-118114>> (accessed 28.11.19).

an obligation of confidence'.²¹ Adani argued that this information did not form part of the final BTFMP and remained confidential. However, when requested to identify this information, and to make submissions about the circumstances in which it was communicated, it declined to do so.

37. In the circumstances, I am not satisfied that there exists a clearly identifiable plaintiff, with appropriate standing to bring an action in equity to enforce an obligation of confidence said to be owed to that plaintiff by DES.
38. I will nevertheless set out additional reasons for finding that the Report is not exempt information under schedule 3, section 8(1) of the RTI Act.
39. The Information Commissioner has historically identified five cumulative criteria as being necessary to establish an equitable obligation of confidence, as follows:²²
 - (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 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.
40. The Information Commissioner explained the inclusion of the fifth criterion – detriment – in *Re B and BNRHA*, at [109] - [111] of that decision. There is, however, now doubt as to the necessity to establish detriment in cases such as the present, where the party said to be owed an obligation of confidence is a non-government actor.²³ It is not a matter I need to address, however, as I do not consider that any of the first three requirements for exemption are satisfied.
41. As to the first requirement, I do not consider that the information that is claimed to be confidential is specifically identifiable as secret. Despite being invited to do so, Adani has declined to identify specific information contained in the Report that it claims that it communicated in confidence to DES and that remains secret, as opposed to having been published as part of the approved BTFMP. I am not able to identify any such information. As such, in terms of the second requirement, I also am not satisfied on the information before me that information contained in the Report that was communicated by Adani retains a degree of secrecy sufficient for it to be subject to an obligation of confidence.
42. Requirement (c) requires that information must have been communicated in such circumstances as to fix the recipient with an equitable obligation not to use the confidential information in a way that is not authorised by the confider.²⁴
43. In *B and BNRHA*, the Information Commissioner stated that, when considering this requirement:²⁵

²¹ Submission dated 16 October 2019.

²² *B and BNRHA* at [57]-[58].

²³ *Ramsay* at [91]-[96].

²⁴ *B and BNRHA* at [76]-[102].

²⁵ At [82], citing the Full Court of the Federal Court of Australia in *Smith Kline and French Laboratories (Aust) Limited & Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at [302]-[304]. See also *Ramsay* at [79].

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

44. To put it another way, the touchstone in assessing whether requirement (c) is satisfied *'lies in determining what conscionable conduct requires of an agency in its treatment of information claimed to have been communicated in confidence'*.²⁶
45. There is nothing on the face of the Report to suggest that it was communicated subject to any agreed, mutual understanding of confidence. As I have noted, neither DES nor the Report's authors (as far as I am aware) makes any claim for confidential treatment. The authors have published an article explaining why they considered the BTFMP that they reviewed was inadequate. In addition, given the relationship between the parties and the circumstances of the Report's communication – that is, the authors were independent experts retained to review the BTFMP and to prepare a report to assist DES to discharge the regulatory decision-making role that it conducts on behalf of the Queensland public – I do not consider it would have been reasonable for either party to expect that DES would be obliged to keep the Report confidential from the public. Nor do I consider, given that the BTFMP has now been approved and much of the information that the Report discusses is contained in the published BTFMP, that the Report is of a secret and sensitive nature such as to justify a finding that DES ought to be bound by an equitable obligation of confidence.
46. The same can be observed about the relationship between Adani and DES. Adani was required to submit the BTFMP to DES as part of DES's role as a regulatory agency that is accountable to the public for the decisions it makes. I do not accept that a relationship of this nature could give rise to a reasonably-based mutual expectation that the information communicated by Adani would be kept confidential. Adani should reasonably have expected that DES would be required to account to the public for the decisions it made about the BTFMP and the information it took into account in making those decisions. I also take note of the fact that Adani was aware that its BTFMP was required to be published when approved.
47. In addition to these factors,²⁷ in considering whether information has been communicated in circumstances giving rise to an equitable obligation of confidence, an RTI decision-maker may, as I understand recent appeal decisions, have regard to public interest considerations:²⁸

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

48. As will be discussed further below, I consider there are strong public interest considerations favouring disclosure of the Report. These can be coupled with the public

²⁶ *Pearce and Qld Rural Adjustment Authority; Various Landholders (Third Parties)* (1999) 5 QAR 242 at [84].

²⁷ Being the relationship between the parties, the sensitivity of the information, and the circumstances of the relevant communications.

²⁸ *Ramsay* at [82].

interest in informing the community of DES's operations, and the general public interest in promoting access to information in government possession or control. I communicated this view to Adani in my letters dated 12 August 2019 and 25 September 2019. In response, as noted above at paragraph 30 above, Adani argued that the public interest was just one factor (and not the sole determining factor) to be considered in the matrix of factors in determining whether information is held under an obligation of confidence. I accept this, and I have discussed above in paragraphs 45 and 46, the other factors that I consider are relevant. When Adani was asked to identify any other factors that it contended should be taken into account, it declined to do so.²⁹

49. With these considerations in mind, I am satisfied that, having regard to *'the mix of all the relevant circumstances'*,³⁰ conscientious conduct would not require DES, as a government agency with a duty to account to the community, to keep confidential from the Queensland public, an expert report that it commissioned, at public expense, to assist it to discharge important environmental regulatory functions on behalf of the community.

Finding

50. For the reasons explained, I find that the Report is not exempt information under schedule 3, section 8(1) of the RTI Act.

Contrary to the public interest information

Factors favouring nondisclosure

51. Adani alternatively argues that disclosure of the information in issue would, on balance, be contrary to the public interest. This comprises a further ground on which access to information may be refused.
52. The nondisclosure factors relied upon by Adani are set out at paragraphs 22 and 23 above. The factors for deciding the public interest itemised in schedule 4 to the RTI Act generally require that the particular outcome each seeks to promote or protect against *'could reasonably be expected'* to result from disclosure. In assessing whether an event *'could reasonably be expected'* to occur, the Information Commissioner has said:³¹

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.

53. Other authorities note that the words *'could reasonably be expected'*:³²

... 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.

²⁹ Letter dated 25 October 2019.

³⁰ *Ramsay* at [82], quoted in full above at paragraph 47.

³¹ *B and BNRHA* at [154]-[160].

³² *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].

Prejudice to business/financial affairs

54. Adani claims that the Report contains information about the business affairs of Adani, *'being information about the development of the BTFMP and review of the BTFMP by the review panel. ... Specifically, release of the Document could reasonably be expected to result in third parties seeking to actively interfere with – and as a result delay – Adani's commencement of the next stage of the Project'*.³³
55. Adani made reference to the history of third party interference with the mine project and submitted that it was reasonable to *'expect interference with the Project will occur as a direct result of release of the Document'*.³⁴
56. ACF disputed Adani's submission,³⁵ arguing that even if interference with the project could reasonably be expected as a result of disclosure (which it did not accept), the RTI Act specifically provided that potential mischievous conduct by an applicant is an irrelevant consideration that cannot be taken into account by a decision-maker when balancing the public interest.³⁶
57. ACF also submitted that Adani had failed to explain how release of the Report could delay the next stage of the project and cause detriment to Adani, given that the BTFMP had been approved by DES.
58. In its second submission,³⁷ Adani continued to argue that it was reasonable to expect that release of the report would *'trigger further action from Activist Groups'* and that, given the past behaviour of these groups, this expectation was reasonably-based and not merely speculative.
59. Taking account of the fact that the final BTFMP has been approved by DES, and published on Adani's website, together with the fact that the Report's authors have previously published a summary of their concerns about the BTFMP that they reviewed,³⁸ I do not accept that there are reasonable grounds for expecting that disclosure of the Report would result in an adverse effect on Adani's business or financial affairs by activists somehow taking action to delay the mine project.
60. Beyond making the general assertion that activist groups will *'actively interfere with the project'*, Adani has not established how disclosure of the particular information contained in the Report could reasonably be expected to have the adverse effect contended for, given what is already in the public domain about the BTFMP and the findings of the Report. I also accept that whether or not 'mischievous' conduct by an applicant will result from disclosure of information is an irrelevant factor to deciding the public interest.
61. In the interest of completeness, I should note that Adani does not seek to rely on the substantially similar nondisclosure factor in schedule 4, part 3, item 15 of the RTI Act, nor the business affairs harm factor in schedule 4, part 4, section 7(1)(c) of the RTI Act.
62. For the reasons explained, I find that none of schedule 4, part 3, items 2 or 15, or schedule 4, part 4, section 7(1)(c) of the RTI Act applies in favour of nondisclosure of the Report.

³³ Submission dated 30 August 2019.

³⁴ Submission dated 30 August 2019.

³⁵ Submission dated 23 September 2019.

³⁶ Schedule 4, part 1, item 3 of the RTI Act.

³⁷ Submission dated 16 October 2019.

³⁸ See paragraph 35 above.

CI Prejudice Factor and CI Harm Factor

63. The CI Harm Factor will only arise if:
- the 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.
64. The associated CI Prejudice Factor requires only that disclosure could reasonably be expected to prejudice an agency's 'ability to obtain confidential information'.
65. For the reasons discussed above when considering the application to the Report of schedule 3, section 8(1) of the RTI Act, I am not satisfied that the Report contains information of a confidential nature that was communicated in confidence. While Adani claims that there is information in the Report that it communicated separately to the BTFMP and that remains confidential, it has not identified that information or made submissions about the circumstances of the communication so as to allow me to make an assessment of this submission. There is no evidence before me of the existence of a mutual understanding of confidence, either between DES and the Report's authors, or between DES and Adani.
66. In its submission dated 30 August 2019, Adani submitted that *'it is reasonably possible that the availability and quality of future similar reports may be affected if the authors are aware that such reports – produced for internal purposes – are likely to be released'*. ACF refuted this claim, arguing that the possibility of public disclosure should improve, rather than reduce, the quality of such reports, and also pointing to the fact that the Report's authors had published an article about their review, and had participated in media interviews, leading to the reasonable conclusion that they were aware that the Report was likely to be released to the public and that they were not concerned by this.³⁹
67. In my letter to Adani dated 25 September 2019, I referred to previous decisions of the Information Commissioner regarding whether it is reasonable to expect that future supply of information to government will be prejudiced in situations where entities must supply the information under contractual arrangements or regulatory requirements if they are to receive some benefit from government:
- 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.⁴⁰*
68. Adani responded⁴¹ by arguing that its situation was different because some information in the Report was supplied voluntarily to the Department and the Report's authors during the review process, in addition to the information in the BTFMP.

³⁹ Submission dated 23 September 2019.

⁴⁰ *B and BNRHA* at [161].

⁴¹ Submission dated 16 October 2019.

69. Again, I note the difficulty presented in assessing this submission when Adani has declined to identify the information in question or to explain the circumstances of the communication.
70. Based on the information before me, even if I were to be satisfied that the Report comprised confidential information, I am not satisfied, firstly, that there are reasonable grounds for expecting that a substantial number of experts available to DES would refuse to provide similar information to DES in the future, particularly when they receive payment for their work. There is no evidence before me to support this assertion. Whether or not the quality of the information provided would suffer through disclosure is irrelevant to a consideration of the CI Prejudice Factor. But I would record my view in any event that there is no reasonable basis for Adani's submission in this regard.
71. Secondly, I am not satisfied that any reasonable grounds exist for expecting that a substantial number of private entities in the position of Adani, i.e., entities that are required to submit information to government in order to receive a benefit from government in the form of regulatory approval of a significant project, would not provide information of the highest detail and quality so as to ensure the best possible chance of receiving approval. While Adani submits that information contained in the Report was provided voluntarily and would not be provided in future without an assurance of confidentiality, it has not identified that information. I do not accept the submission in any event. Adani no doubt submitted such information in order to strengthen its case for approval of the project. I am not satisfied that a substantial number of entities in a similar position to Adani would refuse to do the same as a result of disclosure of the Report.
72. Accordingly, I am not satisfied that disclosure of the Report could reasonably be expected to:
- prejudice DES's ability to obtain confidential information; or
 - prejudice the future supply to DES of information of this type.
73. I find that the CI Prejudice Factor and the CI Harm Factor do not apply in favour of nondisclosure of the Report.

DP Prejudice Factor and DP Harm Factor

74. DES does not claim that any harm to its deliberative processes would result from disclosure of the Report. However, Adani claims that disclosure could reasonably be expected to:
- cause a public interest harm through disclosure of deliberative process information; and
 - prejudice a deliberative process.
75. In its submission dated 30 August 2019, Adani submitted:

The Document is opinion/advice obtained by the Department in the course of a specific deliberative process, being the decision whether to approve the BTFMP. As such ... its disclosure can reasonably be expected to cause public interest harm. Further, disclosure of the Document is contrary to the public interest, because disclosure of this deliberative process information could reasonably be expected to:

- (a) *result in active interference by third parties with the next stage of the Project;*
- (b) *as a result, delay the delivery of the Project's benefits to the community, as well as harming the interests of Adani shareholders and employees; and*

(c) cause impacts of a kind contemplated in *Johnston and Brisbane City Council*.⁴²

76. In response,⁴³ ACF argued that the relevant deliberative process has been completed and therefore cannot be prejudiced by disclosure of the Report. It also contended that Adani had failed to establish how disclosure of the Report would result in delay to the project, given that the thrust of the Report and the authors' concerns about the BTFMP that they reviewed have been publicised. It rejected Adani's reliance on the relevant extract from the Information Commissioner's decision in *Johnston and Brisbane City Council*, pointing out that, unlike the present situation, the relevant deliberative process in that case had not been completed.
77. In my letter to Adani's lawyers dated 25 September 2019, I explained that I was of the preliminary view that the DP Prejudice Factor did not apply because the relevant deliberative process had been completed. I also advised that the Information Commissioner has found that, when applying the DP Harm Factor in a situation where the deliberation has finished, there can be a significant reduction of the harm that could result from disclosure, and it has often been afforded no to low weight when balancing the public interest.
78. In response, Adani submitted⁴⁴ that its submission focused on the DP Harm Factor rather than the DP Prejudice Factor, and reiterated its earlier submissions.
79. Although it seems that Adani no longer relies on the DP Prejudice Factor, I record for completeness my finding that this factor does not apply to the Report because DES's deliberations have been completed and disclosure of the Report therefore could not reasonably be expected to prejudice a deliberative process of government.
80. In respect of the DP Harm Factor, I accept that the Report is deliberative process information and that a public interest harm is therefore presumed to arise from its disclosure.
81. The three harms identified by Adani are set out at paragraph 75 above. I do not accept that the third harm has any application as it relates to a situation where the relevant deliberative process is ongoing. As to the first two harms, I have set out above my views about Adani's arguments that there are reasonable grounds for expecting that disclosure of the Report, in circumstances where the BTFMP has been finalised, approved and published, and the Report's authors have previously publicly discussed the concerns they held about the BTFMP that they reviewed, could reasonably be expected to result in delay to the project through the actions of activists.
82. I find that any harm to the public interest would be slight, and I afford the DP Harm Factor low weight in the public interest balancing test.

Factors favouring disclosure

83. Adani did not identify any public interest factors favouring disclosure that it conceded would apply to the Report.
84. In my letter to Adani's lawyers dated 12 August 2019, I identified four public interest factors that I considered weighed in favour of disclosure:

⁴² Unreported, Queensland Information Commissioner, 6 December 2013 at [39] (*Johnston and Brisbane City Council*). The impacts discussed were a 'large amount of disruptive public debate. This could reasonably be expected to prejudice Council's ability to objectively consider the options available and reach a considered decision... '.

⁴³ Submission dated 23 September 2019.

⁴⁴ Submission dated 16 October 2019.

- (a) schedule 4, part 2, item 1 of the RTI Act – disclosure could reasonably be expected to promote open discussion of public affairs and enhance the Government’s accountability
 - (b) schedule 4, part 2, item 2 of the RTI Act – disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest
 - (c) schedule 4, part 2, item 3 of the RTI Act – disclosure could reasonably be expected to inform the community of the Government’s operations; and
 - (d) schedule 4, part 2, item 11 of the RTI Act – disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.
85. In addition to the public interest factors favouring disclosure identified above, ACF raised the application of the following factors:⁴⁵
- (e) schedule 4, part 2, item 5 of the RTI Act – disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official; and
 - (f) schedule 4, part 2, item 13 of the RTI Act – disclosure could reasonably be expected to contribute to the protection of the environment.
86. ACF also made general observations about the RTI Act’s pro-disclosure bias, and the unprecedented public interest in the Carmichael coal mine and its potential impact on the Black-Throated Finch population.
87. DES commissioned the Report in order to obtain ‘*the best possible scientific advice*’ on the potential impact of the Carmichael coal mine on the Black-Throated Finch population.⁴⁶ DES discharges, on behalf of the public of Queensland, an important regulatory function aimed at protecting the environment from harm. It sought expert advice, which was funded by public monies, to assist it to make a significant decision about whether or not to approve Adani’s BTFMP. That decision, and all decisions and actions that DES has taken in respect of the approval process for the Carmichael coal mine, are taken on behalf of the community. As such, a high level of scrutiny and need for accountability attaches to any such decisions, which must be as transparent as possible. The public is entitled to obtain access to information that will enable it to understand the relevant issues, the decision-making process, the information upon which the decision was based, and the reasons for the decision.
88. The high level of public interest in the Carmichael coal mine is clear, both from supporters and opponents of the project. For the past several years, it has received unprecedented media coverage and has been the subject of extensive public debate and discussion. The approval of the BTFMP was a significant step in the approval process for the project and I accept that some regard it as controversial.
89. I consider that disclosure of the Report could reasonably be expected to promote and enhance the accountability of DES in its decision-making process by informing the public of information that DES gathered and considered when making its decision to approve Adani’s BTFMP. I consider there is a strong public interest in disclosing to the community on behalf of whom DES acts, information that informed or was relevant to the decision so as to allow the community to meaningfully assess the reasonableness or otherwise of the decision.

⁴⁵ Submission dated 23 September 2019.

⁴⁶ See paragraph 6 above.

90. For these reasons, I afford significant weight to each of the factors (a) to (d) set out at paragraph 84 above.
91. As regards the additional factors relied upon by ACF in paragraph 85, I am not satisfied that disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official. While ACF argues that this expectation is not merely speculative given the '*highly political nature of the post-election approval*',⁴⁷ I am not satisfied that disclosure of the Report itself would give rise to reasonably-based grounds for the relevant expectation.
92. However, I do accept ACF's submission that disclosure could reasonably be expected to contribute to the protection of the environment. I accept that disclosure of the Report, which was prepared by recognised experts in their respective fields, would inform the public about the Black-Throated Finch population and assist the public to better understand the issues and obstacles facing the survival of this species and ways in which the population can be protected. As such, I am satisfied that disclosure of the Report could reasonably be expected to contribute to protection of the environment. I afford this factor moderate weight in the public interest balancing test.

Balancing the public interest

93. I have taken no irrelevant factors into account in considering the public interest.
94. I afford low weight to the DP Harm Factor, which is the only public interest factor favouring nondisclosure that I am satisfied applies to the Report.
95. I afford significant weight to the public interest factors favouring disclosure of the Report identified at paragraph 84(a) to (d) above, and moderate weight to the factor identified at paragraph 85(f). I find that the factor at paragraph 85(e) does not apply.
96. After balancing the public interest, I am satisfied that disclosure of the Report would not, on balance, be contrary to the public interest.

DECISION

97. For the reasons explained, I set aside the deemed refusal decision of DES dated 24 May 2019. In substitution for that decision, I find that the Report is not exempt information under the RTI Act, and nor would its disclosure, on balance, be contrary to the public interest. As such, there are no grounds under the RTI Act to refuse access to it.
98. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Louisa Lynch
Right to Information Commissioner

Date: 4 December 2019

⁴⁷ Submission dated 23 September 2019.

APPENDIX

Significant procedural steps

Date	Event
27 May 2019	OIC received the application for external review. OIC requested that DES provide procedural documents.
10 June 2019	DES provided procedural documents.
3 July 2019	OIC advised the applicant and DES that the application for external review had been accepted. OIC requested that DES provide copies of the Report in issue. OIC confirmed with DES its verbal advice that it did not object to disclosure of the Report.
31 July 2019	DES provided a copy of the Report.
12 August 2019	OIC consulted with the third party.
26 August 2019	The third party's lawyers requested that the identity of the applicant be disclosed. The applicant advised that it was agreeable to its identity being disclosed to the third party.
30 August 2019	The third party provided a written submission.
2 September 2019	The third party's submission was provided to the applicant.
23 September 2019	The applicant provided a written submission.
25 September 2019	The applicant's submission was provided to the third party and OIC communicated a preliminary view to the third party.
16 October 2019	The third party provided a written submission.
21 October 2019	OIC invited the third party to provide additional information in support of its submission.
25 October 2019	The third party advised that it did not wish to provide any further submissions in support of its position.
28 October 2019	The third party's submission was provided to the applicant.
11 November 2019	The applicant provided its final submission.
12 November 2019	The applicant's submission was provided to the third party.