



Decision and Reasons for Decision

Application Number: 310868

Applicant: Mineralogy Pty Ltd

Respondent: North Queensland Bulk Ports Corporation Limited

Decision Date: 15 October 2012

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - applicant sought access to documents concerning applicant and related entities - whether disclosure could reasonably be expected to prejudice the competitive commercial activities of an agency - whether access to information may be refused under section 47(3)(b) of the *Right to Information Act 2009* (Qld) on the basis that disclosure would, on balance, be contrary to the public interest.

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - applicant sought access to documents concerning applicant and related entities - whether information would be privileged from production in a legal proceeding on the ground of legal professional privilege - sections 47(3)(a), 48 and schedule 3, section 7 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - applicant sought access to documents concerning applicant and related entities - applicant contended scope of access application should be interpreted to include all documents relating to the development of lands and port facilities at the port of Abbot Point - construction of scope of access application made under section 24 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to North Queensland Bulk Ports Corporation Ltd (**NQBP**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to:

[a]ll documents or correspondence relating to Waratah Coal Pty Ltd and/or China First Pty Ltd and/or Clive Frederick Palmer for 12 months ending 28 September 2011.
2. NQBP located 56 pages in response to the application. NQBP granted the applicant full access to 21 pages and partial access to 12 pages. NQBP decided to refuse access to the balance of those latter 12 pages, and a further 23 pages in full, on the basis:

- the information was out of scope; or
 - subject to legal professional privilege and therefore exempt; or
 - information the disclosure of which would, on balance, be contrary to the public interest.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of NQBP's decision.
4. For the reasons set out below, NQBP is largely entitled to refuse access to the information remaining in issue on the grounds identified in its decision. There are, however, several segments of information to which NQBP refused access as exempt information or information the disclosure of which would be contrary to the public interest, but which on external review have been identified as information not falling within the scope of the applicant's access application.
5. Accordingly, NQBP's decision is varied to accommodate these additional out of scope segments. The practical effect of this decision is nevertheless to refuse access to relevant information.

Background

6. Significant procedural steps relating to the application and external review are set out in the Appendix to these reasons.

Reviewable decision

7. The decision under review is NQBP's decision dated 11 November 2011.

Material considered

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

Information in issue

9. During this review NQBP agreed to disclose various segments of information to the access applicant, which has had the result of reducing the amount of information in issue.
10. The information remaining in issue in this external review therefore now comprises:
- information identifying and/or directly concerning third parties, comprising all information on pages 34, 36-38 and 40 and some information on pages 7, 13-16, 18-20, 32-33, 35 and 39 (**Category A information**);
 - email communications between NQBP and its legal advisers comprising pages 31 and 45-56 (**Category B information**); and
 - a segment of information comprising dollar figures appearing on page 7¹ (**Category C information**).

Relevant law

11. Under the RTI Act, a person has a right to be given access to documents of an agency.² However, this right is subject to other provisions of the RTI Act including grounds on which access may be refused.³ Relevantly, an agency may refuse access

¹ Relevantly, the segment appearing against the fifth dot point on this page.

² Section 23 of the RTI Act.

³ As set out in section 47 of the RTI Act.

to information under the RTI Act if the information is exempt information or if disclosing the information would, on balance, be contrary to the public interest.

Category A information – out of scope

12. The applicant relevantly requested information held by NQBP '*relating to Waratah Coal Pty Ltd and/or China First Pty Ltd and/or Clive Frederick Palmer*'.
13. NQBP refused access to some information⁴ on the basis that the information fell outside the scope of the applicant's access application.⁵ During the course of this review, OIC identified additional information appearing on pages 7,⁶ 19 and 20 as also falling outside the scope of the application.⁷
14. In general terms, the Category A information comprises particulars of other entities having dealings with NQBP, or information detailing monies paid to NQBP by third party entities, and is not information relating to '*Waratah Coal Pty Ltd*', '*China First Pty Ltd*' or '*Clive Frederick Palmer*'. By letters dated 14 March 2012,⁸ 18 April 2012,⁹ 18 July 2012 and 10 October 2012,¹⁰ I conveyed my preliminary view that this information fell outside the scope of the access application, and was therefore not in issue in this review.
15. The applicant has not accepted my preliminary view in this regard.¹¹ The applicant submits that any information relating to the proposed large scale and long-term developments of lands and port facilities at the port of Abbot Point is captured by the terms of the access application and the fact that documents do not directly refer to '*Waratah Coal*', '*China First*' or '*Clive Frederick Palmer*' is irrelevant.¹²
16. I do not accept these submissions. The terms of the applicant's access application are clear and unambiguous; they only request access to information concerning '*Clive Frederick Palmer*' and two specified entities. The access application in this case cannot on any reasonable construction be read as applying to additional information of the kind as contended by the applicant. Information concerning other entities clearly does not fall within the scope of the applicant's specifically-worded access application.
17. I am satisfied the Category A information falls outside the scope of the applicant's access application, and is not in issue in this review.

Category B information - legal professional privilege

18. Information will be exempt under schedule 3, section 7 of the RTI Act if it would be privileged from production in a legal proceeding on the ground of legal professional privilege (LPP).¹³ This exemption reflects the common law requirements for establishing LPP.¹⁴

⁴ All information on pages 34, 36-38 and 40 and some information on pages 13-16, 18, 32-33, 35 and 39.

⁵ In its decision dated 11 November 2011.

⁶ Relevantly, dollar figures appearing against the fourth dot point on this page.

⁷ OIC also identified various additional segments of information on page 20 considered to fall outside the scope of the application; NQBP nevertheless advised it was prepared to disclose this information – ie, the bulk of page 20 - to the applicant outside the framework of the RTI Act, an understanding I confirmed with NQBP in my letter dated 18 April 2012. There are therefore only three segments of information appearing on page 20 remaining in issue.

⁸ As regards the bulk of the Category A information.

⁹ As regards the segments appearing on page 20 and still remaining in issue.

¹⁰ As regards the segments appearing on pages 7 and 19.

¹¹ By letter dated 27 March 2012 the applicant advised it did not accept my preliminary view in relation to the bulk of the Category A; the applicant has not expressly rejected my preliminary view as concerns information appearing on pages 7 and 19, however for the sake of completeness I have considered all this information in this decision.

¹² Applicant's submissions dated 27 March 2012.

¹³ Section 47(3)(a) and 48 of the RTI Act.

¹⁴ See *Ozcare and Department of Justice and Attorney-General* (Unreported, Information Commissioner of Queensland, 13 May 2011) at paragraph 12.

19. LPP relevantly attaches to confidential communications between a legal adviser and client made for the dominant purpose of obtaining or providing legal advice.¹⁵ The privilege extends to copies of unprivileged documents made for the dominant purpose of obtaining legal advice.¹⁶
20. The Category B information generally comprises emails¹⁷ passing between NQBP and its legal advisors (including copies of emails received by NQBP from the applicant, subsequently forwarded to those legal advisors).
21. I am satisfied all of this information comprises confidential communications created for the dominant purpose of seeking or conveying legal advice. I acknowledge that an email seeking advice¹⁸ – which is addressed to various persons – appears to have been created for multiple purposes, including briefing NQBP management and seeking advice on non-legal issues. I am, however, satisfied from the structure of the email (which opens with a request for legal advice), the key addressees (internal and external legal advisors) and context in which it appears (discussions as to legal arrangements) that it was created for the dominant¹⁹ purpose of seeking legal advice.
22. I also note that while original emails from the applicant as received by NQBP may not of themselves attract legal professional privilege, the copies of the emails relevantly in issue are privileged, as copies made by NQBP for the dominant purpose of it seeking and obtaining legal advice on the issues raised in each.²⁰
23. The Category B information meets the requirements for LPP and is therefore exempt under schedule 3, section 7 of the RTI Act. Accordingly, I find that access to this information may be refused under section 47(3)(a) of the RTI Act.²¹

Category C information – contrary to public interest

24. NQBP contends disclosure of the Category C information – dollar figures, as noted, appearing against the fifth dot point on page 7 – would, on balance, be contrary to the public interest.
25. The RTI Act identifies various factors that may be relevant to deciding the balance of the public interest. It also explains the steps that a decision-maker must take in deciding the public interest. To decide whether disclosing the information in issue would be contrary to the public interest, it is necessary to:²²
 - identify any irrelevant factors and disregard them;
 - identify relevant public interest factors favouring disclosure and nondisclosure;
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosing the information would, on balance, be contrary to the public interest.

¹⁵ Paraphrasing the formulation of LPP given in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552.

¹⁶ *Australian Federal Police v Propend Finance Pty Ltd* (1997) 141 ALR 545.

¹⁷ Including a draft email of instructions comprising page 31.

¹⁸ Page 45.

¹⁹ That is, the 'the ruling, prevailing, paramount or most influential purpose': *AWB v Cole* (2005) 152 FCR 382 at 411.

²⁰ I should also note the original emails are not otherwise in issue, the applicant having, as I understand, agreed with NQBP not to pursue access to correspondence between itself and NQBP: see email NQBP to OIC dated 13 December 2011.

²¹ The substance of my reasoning in this regard was conveyed to the applicant by way of my preliminary view letter dated 14 March 2012. The applicant did not accept my preliminary view, arguing that insufficient information had been provided to allow it to be satisfied the Category B documents attracted legal professional privilege. As I pointed out to the applicant by letter dated 18 April 2012, section 108 of the RTI Act prevents me from disclosing information claimed to be exempt, and I am therefore unable to describe these documents further, beyond the general descriptions given in these reasons. In a review of a refusal of access decision, an access applicant is necessarily disadvantaged in the extent to which meaningful submissions can be made about the exempt status of information in issue, by a lack of precise knowledge as to the nature of the information in issue. This is an unavoidable consequence of the nature of the review process: see *EST and Department of Family Services and Aboriginal and Islander Affairs* (1995) 2 QAR 645, at paragraph 11.

²² Section 49(3) of the RTI Act.

26. I have examined the irrelevant factors in schedule 4 of the RTI Act and am satisfied I have not taken into account any irrelevant factors in reaching my decision.
27. I have discussed factors favouring disclosure and nondisclosure below.

Factors favouring disclosure - government accountability and transparency

28. The applicant contends²³ that it is in the public interest that the Category C information²⁴

be released to facilitate open discussion, accountability, positive and informed debate. Disclosure is expected to advance fair treatment of entities, reveal reasons for decisions, including background and contextual information supporting the decision and ensure information is not unfairly out of date, subjective or irrelevant.

29. I am, in general terms, prepared to accept the applicant's contentions in this regard, which largely echo various 'prodisclosure' factors prescribed in the RTI Act.²⁵ It is sufficient to note that I recognise a general public interest in disclosing information held by government agencies, and in enhancing the transparency and accountability of agencies such as NQBP.

Factors favouring nondisclosure – prejudice to competitive commercial activities

30. NQBP contends disclosure of relevant information could reasonably be expected to prejudice its competitive commercial activities.²⁶
31. NQBP operates on a commercial basis, and its Abbott Point operations – to which the information relates - compete with a private facility. As NQBP has explained:

Abbot Point access seekers like the T4-T9 proponents such as Waratah, have the option to pursue development of coal terminal capacity at Abbot Point or seek coal terminal capacity being offered by, for example, the private sector entity Dudgeon Point Project Management Pty Ltd...at Hay Point.

32. I am satisfied that NQBP therefore undertakes the 'commercially competitive activities' required to enliven this factor.
33. Further, I am satisfied that disclosure of the information could reasonably be expected²⁷ to prejudice²⁸ those activities. As I explained to the applicant in my preliminary view letter dated 18 July 2012, NQBP is a provider of port facilities and services, and evaluating the development and possible expansion of those facilities is therefore an intrinsic aspect of its commercial activities.
34. The Category C information essentially reveals, as I understand, a possible cost base for part of any future Abbott Point expansion process, that is, an amount on which

²³ Application for external review dated 9 December 2011 and submissions dated 27 March 2012.

²⁴ The Category A information being outside the scope of the applicant's application and thus not in issue in this review (nor, obviously, subject to public interest considerations), and the Category B information comprising exempt information, a finding which precludes my taking into account public interest considerations, on the basis Parliament has presumed disclosure of such information to be contrary to the public interest: section 48(2) and schedule 3 of the RTI Act.

²⁵ Schedule 4, part 2, items 1, 2, 10 and 11 of the RTI Act. There is nothing before me to suggest the Category C information is 'out of date, subjective or irrelevant' (as arguably required to enliven the factor at item 12), although I am prepared to take the applicant's submission in this regard as a submission disclosure would allow objective verification this is not the case, particularly as the applicant has not expressly cited 'prodisclosure' factors and the list of items prescribed in schedule 4 part 2 is not exhaustive. This essentially amounts to a transparency and accountability argument favouring disclosure of the Category C information, a factor which, as noted, I acknowledge.

²⁶ A nondisclosure factor set out in schedule 4, part 3, item 17 of the RTI Act.

²⁷ The phrase 'could reasonably be expected to' requires an expectation that is reasonably based, ie. neither absurd, irrational or ridiculous: *Channel Seven and Redland City Council* (Unreported, Queensland Information Commissioner, 30 June 2011), paragraph 20.

²⁸ Adopting the ordinary meaning of the term 'prejudice': see *Daw and Queensland Rail* (220020, 24 November 2010) at paragraph 17 for an explanation of the meaning of 'prejudice' as used throughout the RTI Act.

future development tender fees may be based.²⁹ NQBP contends that disclosure of this information would:³⁰

- undermine NQBP's position in negotiating fees with potential 'preferred developers' of expanded Abbott Point facilities; and/or
- undermine NQBP's position in future 'participation charge' negotiations with prospective developers.

35. I accept that the adverse effects raised by NQBP could reasonably be expected to occur should the Category C information be disclosed. I am also satisfied that, accordingly, this nondisclosure factor therefore applies to that information.³¹
36. Disclosure of the relevant information would reveal to prospective development interests relevant cost base information, 'tipping the hand' of NQBP and therefore prejudicing its ability to set and negotiate any future port development charging regime. This would, in turn, hinder NQBP's ability to both set a commercially viable tender fee and actually achieve the development of port facilities which lie at the heart its competitive commercial activities.
37. I conveyed the substance of my reasoning as set out in paragraphs 28-36 to the applicant by letter dated 18 July 2012.³²
38. The applicant's submissions in response³³ essentially stress that the government has abandoned the port expansion process to which the Category C information relates, and that any figures concerning that process must now necessarily be redundant, such that their disclosure could not reasonably be expected to cause the prejudice claimed by NQBP.
39. I acknowledge that the Abbott Point expansion process as originally envisaged is not now proceeding (a fact which has been the subject of media attention, and was noted in my preliminary view letter to the applicant dated 18 July 2012). However, NQBP has advised,³⁴ and I accept, that there remains the prospect of some form of future expansion process, in relation to which the dollar figures in issue have an ongoing relevance and currency.³⁵

Balancing the public interest

40. I recognise the public interest in ensuring that government owned corporations (**GOCs**) operate transparently and accountably, and in furthering public access to government-held information. In this regard, I acknowledge the applicant's submissions³⁶ pointing out that GOCs such as NQBP are subject to the government's 'Government Owned Corporations – Release of Information Arrangements',³⁷ which, in general terms,

²⁹ My understanding in this regard is based on the decision under review, NQBP submissions dated 11 April 2012 and 25 June 2012, and a telephone conversation between an NQBP officer and OIC officer on 4 July 2012.

³⁰ NQBP submissions dated 25 June 2012.

³¹ NQBP's submissions also arguably give rise to nondisclosure factors contained in schedule 4, part 3, items 2 and 15, and the public interest harm factor contained in schedule 4, part 4, item 7(1)(c) of the RTI Act. I have not considered these in detail, as I am satisfied that the 'commercially competitive activities' nondisclosure factor is sufficient to tip the balance of the public interest in favour of nondisclosure.

³² A copy of this letter was also forwarded to NQBP under cover of letter of the same date.

³³ Dated 24 July 2012.

³⁴ Telephone conversation between NQBP officer and OIC officer on 4 July 2012.

³⁵ Indeed, correspondence supplied by the applicant in support of its case for access – comprising a letter from NQBP to the applicant advising of the termination of the relevant process – nevertheless advises of the development of options for possible future 'incremental development': applicant's submissions dated 24 July 2012.

³⁶ External review application dated 9 December 2011 and submissions dated 27 March 2012. The applicant in its application for external review also relevantly pointed to clauses 6.3 and 6.4 of a 'Request for Expressions of Interest' for development of 'Port of Abbott Point Terminals 4-7' to which much of the information in issue relates. In my view, however, those clauses do no more than, relevantly, advise responding parties of NQBP's obligations under the RTI Act, including that information 'may be subject to the disclosure requirements of [the RTI Act]', ie that access will be assessed in accordance with balance of public interest considerations. In any event, information lodged by entities responding to this 'EOI', to which these clauses would apply, would not fall within the scope of the applicant's access application, for the reasons explained at paragraphs 12-17.

³⁷ Version 3, January 2010, <http://www.ogoc.qld.gov.au/goc-policies/gocreleaseofinformationarrangments.pdf> (accessed 24 August 2012).

relevantly oblige GOCs to develop 'Publication Schemes.' Through these, GOCs should, as the applicant notes, seek to aspire to a:

*level of disclosure...similar, to the types of information that private sector public companies that compete in commercial competitive markets, for example Australian Securities Exchange (ASX) listed companies, publish on their website or make available to shareholders.*³⁸

41. I do not, however, consider that anything in these disclosure arrangements requires GOCs to actively release commercially sensitive information (any more than relevant disclosure rules or accepted corporate practice oblige publicly listed entities to do so).
42. Further, it is also relevant to note that NQBP's status as a GOC requires it to report annually to its shareholding Ministers. In this context, I do not consider disclosure of the limited segment of Category C information would materially advance the public interest factors favouring disclosure noted above. In the circumstances, I have accorded these factors marginal weight.
43. Conversely, the factor favouring nondisclosure in this case warrants considerable weight, of a degree sufficient to displace any public interest factors favouring disclosure.
44. The Abbott Point facility is a public asset, management of which has been entrusted to NQBP on a commercial basis, essentially with the aim of maximising return to the Queensland community. By prejudicing NQBP's ability to set and negotiate an appropriate charging regime and to thus conduct any future port expansion on a commercially viable basis, disclosure of the information would impair NQBP's competitive commercial activities, and therefore hinder its ability to extract optimum value for the Queensland community from what, as noted, is an important public asset.
45. I am satisfied disclosure of the Category C information would, on balance, be contrary to the public interest. Access may therefore be refused to this information, under section 47(3)(b) of the RTI Act.

DECISION

46. I vary NQBP's decision by finding:
 - the Category A information falls outside the scope of the applicant's access application, and is not in issue in this review;
 - the Category B information attracts legal professional privilege, and therefore comprises exempt information to which access may be refused under schedule 3, section 7, section 48 and section 47(3)(a) of the RTI Act; and
 - disclosure of the Category C information would, on balance, be contrary to the public interest, and access to this information may therefore be refused under section 47(3)(b) of the RTI Act.

Jenny Mead
Acting Information Commissioner

Date: 15 October 2012

³⁸ Application for external review dated 9 December 2011.

APPENDIX**Significant procedural steps**

Date	Event
6 October 2011	The applicant applied to North Queensland Bulk Ports Corporation (NQBP) for access to all documents and correspondence relating to Waratah Coal Pty Ltd and/or China First Pty Ltd and/or Clive Frederick Palmer for the 12 months ending 28 September 2011.
11 November 2011	NQBP issued a notice of decision to the applicant.
9 December 2011	The applicant applied to the Office of the Information Commissioner (OIC) for external review of NQBP's decision.
20 December 2011	OIC informed the applicant and NQBP that the applicant's external review application had been accepted.
14 March 2012	OIC conveyed a preliminary view to the applicant and NQBP and invited each to provide submissions supporting their case by 28 March 2012 if they did not accept the preliminary view.
27 March 2012	NQBP requested an extension of time to provide submissions in response to OIC's preliminary view.
27 March 2012	OIC granted NQBP an extension of time until 11 April 2012 to provide submissions in response to OIC's preliminary view.
27 March 2012	OIC received submissions from the applicant.
11 April 2012	OIC received submissions from NQBP.
18 April 2012	OIC requested further submissions from NQBP by 2 May 2012 and confirmed that NQBP was willing to disclose some additional information to the applicant outside the statutory framework of the RTI Act.
18 April 2012	OIC informed the applicant that NQBP prepared to disclose some additional information and invited further submissions.
30 May 2012	OIC requested NQBP provide further submissions by 6 June 2012.
25 June 2012	OIC received submissions from NQBP.
28 June 2012	OIC asked NQBP if it was prepared to disclose additional information in issue.
6 July 2012	NQBP advised OIC it was prepared to disclose relevant information in issue.
18 July 2012	OIC confirmed with NQBP that it was prepared to disclose additional information in issue to the applicant.
18 July 2012	OIC conveyed a preliminary view to the applicant on the remaining information in issue and invited it to provide submissions in response by 1 August 2012.
24 July 2012	OIC received final submissions from the applicant.
18 September 2012	NQBP advised OIC it was prepared to release further segments of information.
19 September 2012	OIC clarified and confirmed with NQBP further segments of information to be disclosed.
10 October 2012	OIC informed the applicant of further information to be disclosed; clarified information remaining in issue.