



## Decision and Reasons for Decision

---

Application Numbers:	210949, 210950, 210951
Applicants:	BHP Queensland Coal Investments Pty Ltd QCT Resources Pty Ltd BHP Coal Pty Ltd QCT Mining Pty Ltd Mitsubishi Developments Pty Ltd QCT Investment Pty Ltd Umal Consolidated Pty Ltd
Respondent:	Department of Employment, Economic Development and Innovation
Third Party:	Cherwell Creek Coal Pty Ltd
Decision Date:	22 June 2011
Catchwords:	<p><b>FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER DISCLOSURE OF WHICH WOULD FOUND AN ACTION FOR BREACH OF CONFIDENCE – applicant seeking access to information lodged under coal exploration permit – whether parts of the information were communicated in confidence – whether the information is exempt under section 46(1)(a) of the <i>Freedom of Information Act 1992</i> (Qld)</b></p> <p><b>FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER RELATING TO TRADE SECRETS, BUSINESS AFFAIRS AND RESEARCH – applicant seeking access to information lodged under coal exploration permit – whether disclosure would disclose trade secrets of an agency or another person – whether the information is exempt under section 45(1)(a) of the <i>Freedom of Information Act 1992</i> (Qld)</b></p> <p><b>FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER RELATING TO TRADE SECRETS, BUSINESS AFFAIRS AND RESEARCH – applicant seeking access to information lodged under coal exploration permit – whether disclosure would disclose information that has a commercial value to an agency or another person – whether disclosure could reasonably be expected to destroy or diminish the commercial value of the information – whether the information is exempt under section 45(1)(b) of the <i>Freedom of Information Act 1992</i> (Qld)</b></p>

**FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER RELATING TO TRADE SECRETS, BUSINESS AFFAIRS AND RESEARCH – applicant seeking access to information lodged under coal exploration permit – whether disclosure would disclose information concerning the business, professional, commercial or financial affairs of an agency or another person – whether disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of such information to government – whether the information is exempt under section 45(1)(c) of the *Freedom of Information Act 1992 (Qld)***

**FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT MATTER - DOCUMENTS AVAILABLE UNDER ANOTHER ENACTMENT OR ARRANGEMENTS MADE BY AGENCY – whether applicant can access documents sought through disclosure process in court proceedings – whether access can be refused under section 22(a) of the *Freedom of Information Act 1992 (Qld)***

## Contents

Summary .....	3
Background.....	4
Decisions under review.....	4
Steps taken in the external review process .....	5
Evidence considered .....	6
Issues in this review.....	6
Effect of the Amendment Act.....	7
Section 46(1)(a) of the FOI Act.....	8
Progress Reports .....	9
Expenditure Statements.....	11
Expenditure Statements lodged under the QDEX Guidelines.....	11
Expenditure Statements lodged under the General Conditions .....	13
Section 45(1)(a) of the FOI Act.....	14
Submissions .....	15
Findings.....	16
Section 45(1)(b) of the FOI Act.....	16
Submissions .....	17
Findings.....	18
Section 45(1)(c) of the FOI Act.....	18
Submissions .....	19
Findings.....	20
Section 22 of the FOI Act.....	21
DECISION.....	22
APPENDIX - Significant procedural steps.....	23

## REASONS FOR DECISION

### Summary

1. The applicants made three applications<sup>1</sup> under the *Freedom of Information Act 1992* (Qld) (**FOI Act**) for access to the following documents held by the Department of Mines and Energy which subsequently became part of the Department of Employment, Economic Development and Innovation (which I will refer to collectively as the **Department**):<sup>2</sup>
  - documents identified as a result of electronic searches for the words ‘Cherwell Creek Coal Pty Ltd’, ‘QCoal Pty Ltd’, ‘Christopher Wallin’ or ‘Chris Wallin’ (except for those on the Department’s legal services files)<sup>3</sup>
  - specified types of documents related to Exploration Permit for Coal No. 545 (**EPC 545**), application for Mineral Development Licence No. 364 (**MDLA 364**) and Mineral Development Licence No. 366 (**MDLA 366**);<sup>4</sup> and
  - further documents related to EPC 545 and correspondence between the Department and either Cherwell Creek Coal Pty Ltd (**CCC**) or QCoal Pty Ltd.<sup>5</sup>
2. The Department granted access to various documents and refused access to others on the basis that:
  - the documents were subject to legal professional privilege;<sup>6</sup> or
  - their disclosure would disclose information of a commercial nature, the disclosure of which could reasonably be expected to have an adverse affect on the business affairs of CCC.<sup>7</sup>
3. The applicants sought internal review of the Department’s decisions. In its internal review decisions,<sup>8</sup> the Department granted access to further documents, but otherwise affirmed its initial decisions.
4. During the course of this review, the applicants accepted the preliminary view that documents which the Department claimed were subject to legal professional privilege were exempt on that basis, reducing the number of documents in issue.
5. The only remaining documents sought by the applicants comprise the following<sup>9</sup> which were lodged by CCC with the Department:
  - progress reports EN954: 53, 55; EN 955: 1-21, 23-44, 45-58, 59-73, 89-96 and EN958: 28 (**Progress Reports**)
  - expenditure statements EN954: 54, 56, 73, 119 and EN958: 29 (**Expenditure Statements**); and
  - miscellaneous documents EN954: 17-20, 29-30, 52, 76-78, 79-80, 81, 85-87, 104 (**Miscellaneous Documents**).

<sup>1</sup> All of which are dealt with in this decision.

<sup>2</sup> As a result of machinery of government changes after the State government election on 21 March 2009.

<sup>3</sup> In the application that resulted in external review application 210949.

<sup>4</sup> In the application that resulted in external review application 210950.

<sup>5</sup> In the application that resulted in external review application 210951.

<sup>6</sup> Thus qualifying for exemption under section 43(1) of the FOI Act.

<sup>7</sup> Thus qualifying for exemption under section 45(1)(c) of the FOI Act.

<sup>8</sup> Dated 21 and 24 August 2009.

<sup>9</sup> Adopting the numbering used by the Department in its decisions.

6. After carefully considering all of the information before me, I am satisfied that:
- the Expenditure Statements are exempt from disclosure under section 46(1)(a) of the FOI Act<sup>10</sup>
  - the Progress Reports are **not** exempt from disclosure under section 46(1)(a) of the FOI Act
  - the drilling data contained in the Progress Reports is **not** exempt from disclosure under section 45(1)(a) or 45(1)(b) of the FOI Act;<sup>11</sup> and
  - the Progress Reports and Miscellaneous Documents are **not** exempt from disclosure under section 45(1)(c) of the FOI Act.<sup>12</sup>

## Background

7. The unique circumstances of a tenure dispute between the applicants and CCC are relevant to this decision. Details of this dispute are set out in decisions of the Land Court.<sup>13</sup> Relevant aspects of the dispute are summarised below:
- The applicants were granted Special Lease 12/42239 (**SL12/42239**) in 1979 and Mining Lease 1775 (**ML 1775**) in 1984 (on which the Peak Downs Coal Mine is located).
  - CCC was initially granted EPC 545 in 1994. In 2003, that EPC was renewed for nine years from 1996 to 2005. In 2005 and 2007, further renewals were granted. In 2006, CCC applied for MDLA 364 and MDLA 366 over parts of EPC 545.
  - The applicants contend that EPC 545 was not validly granted and have disputed each of the renewals.
  - Part of CCC's EPC 545 overlapped part of the applicants' SL12/42239 on which the applicants' mining infrastructure for ML1775 is located.
  - The applicants proposed a major expansion of the Peak Downs Mine and investigated development of a new mine, with land held by CCC under EPC 545 regarded as the optimal location for the new mine's infrastructure.
  - The *Mineral Resources (Peak Downs Mine) Amendment Act 2008* (Qld) (**Amendment Act**) inserted Part 18A (sections 722A-722G) into the *Mineral Resources Act 1989* (Qld) (**MR Act**) to resolve the dispute. Part 18A renews EPC 545 up to 9 May 2008,<sup>14</sup> ends EPC 545 on that date, and rejects the applications for MDLA 364 and MDLA 366 from that date.
8. CCC has commenced proceedings against the applicants in the Land Court pursuant to section 722G of the MR Act for compensation for loss of its opportunity to commercialise the coal resource in the area subject to its application for MDLA 364. Those proceedings remain on foot.

## Decisions under review

9. The decisions under review are the Department's three internal review decisions,<sup>15</sup> insofar as those decisions found that relevant documents were exempt from disclosure under section 45(1)(c) of the FOI Act.

<sup>10</sup> As their disclosure would found an action for breach of confidence.

<sup>11</sup> Additional grounds for exemption claimed by CCC in relation to some of the information.

<sup>12</sup> The basis for exemption claimed by the Department in its internal review decisions.

<sup>13</sup> See paragraphs 2-6 of *Cherwell Creek Coal Pty Ltd v BHP Queensland Coal Investments Pty Ltd & Ors* [2008] QLC 0216 and paragraphs 1-7 of *BHP Queensland Coal Investments Pty Ltd & Ors v Cherwell Creek Coal Pty Ltd* [2009] QLAC 0005.

<sup>14</sup> The date on which Part 18A commenced.

<sup>15</sup> One of which was made on 21 August 2009 and two of which were made on 24 August 2009.

## Steps taken in the external review process

10. Significant procedural steps are set out in the appendix to this decision. The following summary of steps taken during this external review is sufficient for the purposes of these reasons.
11. Having examined the relevant information and following the informal resolution of certain preliminary matters, I wrote to both the Department and solicitors for CCC<sup>16</sup> setting out the preliminary view that none of the remaining documents qualified for exemption under section 45(1)(c) of the FOI Act.
12. CCC advised that it did not accept the preliminary view and provided submissions in support of its case,<sup>17</sup> including its objection to disclosure of some information under sections 45(1)(a) and 45(1)(b) of the FOI Act. The Department advised that it accepted the preliminary view, thereby withdrawing any claim that the documents were exempt from disclosure under section 45(1)(c) of the FOI Act.
13. Submissions lodged by the Department<sup>18</sup> and the applicants<sup>19</sup> revealed the existence and operation of the 'Guidelines for the Submission of Digital Company Reports – QDEX – Queensland Digital Exploration Reports System' (**QDEX Guidelines**). The QDEX Guidelines:
  - regulate the lodgement of reports and documentation by tenement holders under the MR Act
  - include provisions as to the confidentiality of material lodged by tenement holders; and
  - set out the circumstances in which certain documents are placed on 'open file', that is, made publicly accessible.
14. A further review of the remaining information was undertaken by the OIC to establish whether some documents may have been submitted to the Department by CCC in accordance with the QDEX Guidelines and its provisions as to confidentiality, that is, in circumstances giving rise to a mutual understanding of confidence so as to found a claim for exemption under section 46(1)(a) of the FOI Act.
15. By letter dated 24 November 2010, I wrote to the applicants' solicitors advising the preliminary view that some of the information sought qualified for exemption from disclosure under section 46(1)(a) of the FOI Act as its disclosure would found an action for breach of confidence.<sup>20</sup>
16. By letter dated 10 December 2010, the applicants' solicitors advised that the applicants did not accept that preliminary view and provided submissions in support of their case.
17. Further inquiries were made with the Department.<sup>21</sup> As some of the documents were lodged with the Department prior to the commencement of the QDEX Guidelines, the Department was asked to:
  - identify any relevant policy or conditions which preceded the QDEX Guidelines (which, as I understand, came into force in 2004); and
  - clarify the operation of the QDEX Guidelines and their application to the documents relevant to this review.

---

<sup>16</sup> By letters dated 9 June 2010 and 5 July 2010.

<sup>17</sup> By letter dated 26 July 2010.

<sup>18</sup> Letter dated 23 December 2009.

<sup>19</sup> Letter dated 26 August 2010.

<sup>20</sup> I also provided solicitors for the applicants with a copy of the QDEX Guidelines.

<sup>21</sup> I refer to an email from OIC to the Department dated 9 March 2011 and a telephone conversation between a Departmental officer and an OIC officer on 30 March 2011.

18. The Department supplied further information including the reporting requirements and conditions which preceded the QDEX Guidelines (**General Conditions**).<sup>22</sup> Consideration of this additional information and the applicants' submissions dated 10 December 2010 caused me to further consider the application of section 46(1)(a) of the FOI Act to the information sought. By letter dated 4 May 2011, I wrote to both the Department and solicitors for CCC:
- reiterating the preliminary view that none of the relevant information qualified for exemption under section 45(1)(c) of the FOI Act; and
  - setting out the preliminary view that particular documents lodged in accordance with the QDEX Guidelines or the General Conditions did not qualify for exemption under section 46(1)(a) of the FOI Act.
19. The Department accepted the preliminary view in relation to the application of section 46(1)(a) of the FOI Act,<sup>23</sup> which, combined with its acceptance of the earlier preliminary view, means that the Department no longer claims that any of the remaining documents qualify for exemption under the FOI Act.
20. By letter dated 24 May 2011, CCC advised that the preliminary view regarding the application of section 46(1)(a) of the FOI Act was not accepted and lodged submissions in support of its case. By letter dated 26 May 2011, these submissions were provided to the applicants' solicitors and final submissions were received from the applicants by letter dated 1 June 2011.

### **Evidence considered**

21. In reaching this decision, I have taken the following matters into account:
- the applicants' access applications to the Department and applications for internal and external review
  - the Department's decisions
  - the applicants' submissions
  - CCC's submissions
  - information provided by the Department (including relevant reporting frameworks)
  - file notes of relevant telephone conversations between OIC staff and the parties
  - the remaining documents sought by the applicants; and
  - relevant provisions of the FOI Act, relevant case law and previous decisions of the Information Commissioner as identified.

### **Issues in this review**

22. In summary, CCC objects to the disclosure of:
- all Progress Reports and Expenditure Statements, on the basis that this information qualifies for exemption under section 46(1)(a) of the FOI Act
  - geological and drilling data contained within several nominated Progress Reports, on the basis that this information qualifies for exemption under section 45(1)(a) or, in the alternative, section 45(1)(b) of the FOI Act; and
  - all of the Progress Reports, Expenditure Statements and Miscellaneous Documents on the basis that this information qualifies for exemption under section 45(1)(c) of the FOI Act.

---

<sup>22</sup> Contained in a document entitled 'Schedule of General Exclusions and Conditions – Exploration Permits Coal', and relevant appendices to that document, 'Department of Minerals and Energy Queensland – Guidelines for Submission of Mineral and Coal Exploration Reports' and 'Appendix (Coal) – Specific Requirements for the Submission of Coal Exploration Reports to the Queensland Department of Minerals and Energy' (collectively, the 'General Conditions').

<sup>23</sup> By email dated 20 May 2011.

23. Accordingly, it is necessary for me to consider the application of:
- section 46(1)(a) of the FOI Act to the Progress Reports and Expenditure Statements<sup>24</sup>
  - section 45(1)(a) and 45(1)(b) of the FOI Act to parts of the Progress Reports; and
  - section 45(1)(c) of the FOI Act to all of the remaining documents.
24. I will examine the effect of the Amendment Act prior to considering the application of each exemption provision claimed by CCC.

### Effect of the Amendment Act

25. On 9 May 2008, the Amendment Act was passed effecting amendments to the MR Act. Section 722B of the MR Act (as inserted by the Amendment Act) allowed for a renewal of EPC 545 for a further two years, however, that renewal was limited to land other than land subject to MDLA 364, MDLA 366 and the areas of land where there was an overlap between SL12/42239 and EPC 545 (**Excluded Land**).
26. Under the Amendment Act, the Excluded Land was:
- excluded by statute from CCC's renewed EPC 545 (with the effect that CCC lost the opportunity to commercialise the coal resource in that area); and
  - 'made available'<sup>25</sup> to the applicants to permit them to lodge an application for a mining lease.<sup>26</sup>
27. In other words, the practical effect of the Amendment Act was to grant CCC a renewal of EPC 545, but to substantially curtail the 'scope' of that tenement by excising the Excluded Land from it.
28. To assess the exemption claims raised by CCC, it is necessary to identify what information (if any) in the remaining documents relates to land:
- over which CCC continues to hold an interest (that is, land to which the 'truncated' EPC 545 continues to apply); and
  - excluded from EPC 545 by the passage of the Amendment Act (that is, information relating to the Excluded Land which has now been 'made available' to the applicants).
29. The applicants submit that the relevant documents lodged by CCC with the Department are likely to relate only to land that is no longer subject to EPC 545,<sup>27</sup> that is, to Excluded Land.
30. In support of this submission, the applicants refer to the second reading speech delivered by the then Minister for Natural Resources during debate on the Amendment Bill, in which he stated that:

*'...[a]s far as the Department is currently aware, [CCC] has only drilled in the area subject to the application for Mineral Development License 364.'*<sup>28</sup>

---

<sup>24</sup> I have only considered the application of section 46(1)(a) of the FOI Act to the Expenditure Statements and Progress Reports, and not the Miscellaneous Documents. As noted, the Department did not rely on section 46(1)(a) at all in exempting information from disclosure. Rather, as explained in paragraphs 13 and 14, the possible application of section 46(1)(a) arose as a consequence of consideration of the potential relevance of the QDEX Guidelines. There is nothing before me, however, to suggest the Miscellaneous Documents were supplied under the QDEX Guidelines or predecessor General Conditions and their conditions as to confidentiality. This was noted in my letter to the solicitors for CCC dated 4 May 2011. They did not, in subsequent correspondence, raise any claim for exemption under section 46(1)(a) regarding the Miscellaneous Documents (CCC's objections to disclosure of the Miscellaneous Documents have been consistently framed in the language of section 45(1)(c) of the FOI Act – eg. CCC letter dated 22 April 2010 and letter dated 26 July 2010).

<sup>25</sup> In the words of the then Minister for Natural Resources.

<sup>26</sup> Hansard, 15 April 2008, p. 960.

<sup>27</sup> For example, applicants' submissions dated 26 August 2010.

<sup>28</sup> Hansard, 15 April 2008, p 960.

31. CCC contends that the information sought by the applicants relates to land over which EPC 545 continues to apply.<sup>29</sup> In my letter to CCC dated 4 May 2011, I:
- invited CCC to clearly identify any information which relates to land still subject to EPC 545
  - pointed out that there was nothing before me to call into question the Minister's statement that CCC's relevant drilling only occurred in a particular area, apart from CCC's bare assertions to the contrary; and
  - explained that as the Department had withdrawn its claim for exemption, the practical onus for demonstrating a case for exemption fell to CCC.
32. I reiterated this view in a further letter to CCC dated 18 May 2011. Despite these requests, CCC has not identified any specific information in the remaining documents which relates to land still subject to EPC 545.
33. Accordingly, in the absence of any material contradicting the Minister's second reading speech, I have proceeded on the basis that:
- CCC's relevant drilling activity only occurred on Excluded Land (that is, on land excised from EPC 545 by the passage of the Amendment Act); and
  - none of the information contained in the Progress Reports, Expenditure Statements and Miscellaneous Documents relates to land which is still the subject of EPC 545.

#### **Section 46(1)(a) of the FOI Act**

34. Information is exempt if its disclosure would found an action for breach of confidence.<sup>30</sup>
35. To found an action for breach of confidence, each of the following requirements must be met:<sup>31</sup>
- a) the 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'
  - c) the circumstances of the communication must create an equitable obligation of confidence; and
  - d) disclosure to the applicant for access must constitute an unauthorised use of the confidential information.<sup>32</sup>
36. The issue for determination is whether the Progress Reports and Expenditure Statements qualify for exemption from disclosure under section 46(1)(a) of the FOI Act, given the context in which this information was supplied to the Department by CCC.
37. Progress Reports and Expenditure Statements comprise information that holders of mining tenements are required to submit to the Department.
38. The reporting frameworks which govern submission of this information to the Department are set out in:
- the General Conditions, which applied to EPC 545 from the time of grant up until 2004; and
  - the QDEX Guidelines, which came into effect in 2004 and have continued in effect since that time.<sup>33</sup>

<sup>29</sup> Paragraphs 8 and 22 of CCC's submissions dated 26 July 2010.

<sup>30</sup> Section 46(1)(a) of the FOI Act.

<sup>31</sup> *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (*Re "B"*).

<sup>32</sup> To establish exemption from disclosure under section 46(1)(a) of the FOI Act, it is also necessary to identify a hypothetical plaintiff to found an action for breach of confidence (*Re "B"* at 44). In this case, CCC would be the hypothetical plaintiff with necessary standing to enforce an obligation of confidence owed to it.

<sup>33</sup> Subject to periodic revision.



39. Each of these reporting frameworks requires tenement holders to submit information including periodic progress reports and expenditure statements to the Department. It was in accordance with these obligations that the Progress Reports and Expenditure Statements were supplied to the Department by CCC.<sup>34</sup>
40. Additionally, each reporting framework contains certain stipulations as to confidentiality of information supplied by tenement holders.
41. As the Progress Reports and Expenditure Statements are afforded differing levels of confidentiality under the reporting frameworks, I will consider each category of information separately.

### **Progress Reports**

42. First, I will consider whether the Progress Reports qualify for exemption from disclosure under section 46(1)(a) of the FOI Act.
43. The General Conditions relevantly provide that ‘... *Six-monthly [progress] reports remain confidential during the currency of the tenure...*’<sup>35</sup>
44. The QDEX Guidelines relevantly provide:

#### **1 Introduction**

*... From January 1<sup>st</sup> 2004, the Department of Mines and Energy has required all reports to be submitted in digital form.*

...

*... All reports become publicly available ... via QDEX once any specified period of confidentiality expires. This varies with the type of report and tenure, and whether or not there are subsequent tenures for the same area – see ... Confidentiality below.*

...

#### **2 Confidentiality**

*Reports and data are required in order that the Department can build up comprehensive databases of exploration data, and make those data bases available to the exploration industry. However, reports and data remain confidential under certain circumstances and these are as follows.*

##### **2.1 Mineral exploration reports**

*Reports remain confidential during the currency of the tenure for which they are submitted ... The confidentiality of reports is retained if subsequent tenure is granted ... and these reports remain confidential until this subsequent tenure is surrendered or expired.*

...

45. In applying the requirements to establish exemption,<sup>36</sup> it is often the third requirement (that is, whether the circumstances of communication created an equitable obligation of confidence) which is material to determining whether information qualifies for exemption under section 46(1)(a) of the FOI Act. Accordingly, I will consider this requirement first.

---

<sup>34</sup> The following Progress Reports and Expenditure Statements were lodged, as I understand under the General Conditions: Six Monthly Exploration Progress Report for Six Months ended 28 February 1996, dated July 1996 (folios EN955 89-96); Annual Reports for the Years ended 31 August 2001, 31 August 2001 and 31 August 2003 (folios EN958 28, EN954 55 and EN954 53 respectively); Expenditure Statements for the 12 months ending 31 August 2001, 2002 and 2003 – folios EN958 29, EN954 56 and EN954 54 respectively). Progress Reports and Expenditure Statements lodged under the QDEX Guidelines are as follows - Annual Report for the 12 Monthly Period ended 31 August 2004 (EN955 45-58); Annual Report for the 12 Monthly Period ended 31 August 2005 (EN955 59-73); Annual Report for the 12 Monthly Period ended 31 August 2006 (EN955 23-44); Annual Report for the 12 Monthly Period ended 31 August 2007 (EN955 1-21); Expenditure Statements for 12 months ending 30 August 2004 and 30 August 2005 (EN954 71 and 119 respectively).

<sup>35</sup> General Conditions, ‘Appendix (Coal)’ p.1.

<sup>36</sup> See paragraph 35 of this decision.

46. In assessing whether the third requirement is satisfied, it is necessary to look at all the relevant circumstances in which the information was received to determine whether the party receiving the information is bound by an obligation of confidence.
47. Relevant circumstances include:
- the nature of the relationship between the parties
  - the nature and sensitivity of the information; and
  - the circumstances of the communication.<sup>37</sup>
48. With respect to the reporting frameworks, I note that:
- the General Conditions provide that reports will remain confidential during the ‘currency’ of the underlying tenure; and
  - the QDEX Guidelines provide that reports will remain confidential, but only until such time as the underlying tenure is relinquished or expires.
49. After carefully considering all of the relevant information before me, I am satisfied that:
- The Progress Reports were lodged by CCC with the Department in accordance with either the QDEX Guidelines or the General Conditions and their obligations as to confidentiality.
  - These obligations were conditional – that is, the Progress Reports would only be held confidentially by the Department for the period during which CCC held the underlying tenure over relevant land.
  - Given the passage of the Amendment Act<sup>38</sup> and the limited renewal of EPC 545, it is no longer reasonable to expect that any confidentiality is maintained in the Progress Reports, given the condition upon which the Department’s obligation of confidence depended<sup>39</sup> is no longer met.
  - Given the effect of the Amendment Act and my earlier findings,<sup>40</sup> it would now be unreasonable to enforce an obligation of confidence against the Department which is charged with ensuring the efficient administration of the statutory regime for natural resource exploration and exploitation prescribed by the MR Act,<sup>41</sup> of which circulation of relevant information (subject to limited restrictions) is a key aspect.
50. CCC submits that the applicants seek access to the Progress Reports for the purpose of ‘*Land Court proceedings*’<sup>42</sup> and therefore, underlying public policy considerations comprise an ‘*irrelevant consideration in this case*’.<sup>43</sup> I do not accept this contention. It is well established that the motives of a particular applicant for seeking access to certain documents are to be disregarded in determining whether those documents can be disclosed or not.<sup>44</sup> Section 21 of the FOI Act confers a ‘legally enforceable right’ to

---

<sup>37</sup> Re “B” at pp.314-316, paragraph 82. See also paragraph 85 of Re “B” which relevantly extracts the following statement of Lord Denning MR in *Dunford & Elliott Ltd v Johnson & Firth Brown Ltd* [1978] FSR 143 at 148: “If the stipulation for confidence was unreasonable at the time of making it; or if it was reasonable at the beginning, but afterwards, in the course of subsequent happening, it becomes unreasonable that it should be enforced; then the courts will decline to enforce it ...”.

<sup>38</sup> The Amendment Act expressly provides for the part renewal only of EPC 545. Regardless of the language used (surrender, expiry, relinquishment), the practical effect of the Amendment Act was that CCC’s interest in the Excluded Land ended as a consequence of the limited renewal.

<sup>39</sup> CCC’s interest in relevant parts of EPC 545.

<sup>40</sup> As set out in paragraph 33 of this decision. In summary, that CCC’s relevant drilling activity only occurred on Excluded Land (that is, on land excised from EPC 545 by the passage of the Amendment Act) and therefore, none of the information sought by the applicants relates to land which is still the subject of EPC 545.

<sup>41</sup> See section 141(1)(f) of the MR Act.

<sup>42</sup> Presumably the compensation proceedings CCC have a statutory right to pursue.

<sup>43</sup> CCC submissions dated 24 May 2011.

<sup>44</sup> *State of Queensland v Albiez* [1996] 1 Qd R 215, at p.222.

be given access under the FOI Act to any document of an agency,<sup>45</sup> without requiring justification or explanation from an applicant.

51. Further, in determining whether the circumstances of communication created an equitable obligation of confidence, it is necessary to take into account all relevant circumstances. On the information available to me and for the reasons set out above, I am satisfied that the effect of the Amendment Act, the content of the QDEX Guidelines and General Conditions, and public policy underpinning these reporting frameworks, are relevant considerations in the circumstances of this case.

52. For the reasons set out above, I find that:

- the Department no longer owes an obligation of confidence in respect of the Progress Reports<sup>46</sup>
- requirement c) is not satisfied in the current circumstances; and
- as the requirements for exemption under section 46(1)(a) of the FOI Act are cumulative, the Progress Reports do not qualify for exemption from disclosure under section 46(1)(a) of the FOI Act as their disclosure would not found an action for breach of confidence.<sup>47</sup>

### **Expenditure Statements**

53. Next I will consider whether the Expenditure Statements qualify for exemption from disclosure under section 46(1)(a) of the FOI Act.

54. With respect to requirements a) and b) for exemption from disclosure, and after carefully reviewing all of the relevant information before me, I am satisfied that:

- the Expenditure Statements comprise specifically identifiable information and possess the 'necessary quality of confidence';<sup>48</sup> and
- requirements a) and b) are therefore made out in the current circumstances.

55. With respect to requirement c) for exemption from disclosure, I note that some of the Expenditure Statements were submitted to the Department under the General Conditions and others were lodged after the commencement of the QDEX Guidelines. Accordingly, I will examine the application of requirement c) to each category in turn, taking into account the different reporting frameworks.

### **Expenditure Statements lodged under the QDEX Guidelines**

56. Two Expenditure Statements (comprising folios EN954 71<sup>49</sup> and EN954 119<sup>50</sup>) were lodged after the commencement of the QDEX Guidelines.

57. Specifically with respect to expenditure statements, the QDEX Guidelines provide that:

*'[t]his statement will remain confidential and will not be stored in QDEX.'*<sup>51</sup>

---

<sup>45</sup> Except only to the extent the document is comprised of exempt matter under one of the exemption provisions in the FOI Act, or that it falls within another of the exceptions to the right of access provided for in the FOI Act.

<sup>46</sup> As CCC's underlying tenure in relation to the Excluded Land (excised from EPC 545) is no longer current and therefore, the information contained in the Progress Reports and Expenditure Statements does not relate to land which is still the subject of EPC 545.

<sup>47</sup> I have not canvassed the submissions of the parties on the application of section 46(1)(a) of the FOI Act to the Progress Reports. While the applicants' submissions (contained in letters from its solicitors dated 13 December 2010 and 1 June 2011) stressed the view that the Amendment Act had effected a 'relinquishment by statute', the essence of the reasoning was not informed to any significant degree by those submissions. CCC's submissions focussed on the application of section 46(1)(a) of the FOI Act to the Expenditure Statements.

<sup>48</sup> In accordance with the considerations identified by the Information Commissioner in *Re "B"*, at paragraph 71.

<sup>49</sup> Expenditure Statement for 12 months ending 30 August 2004.

<sup>50</sup> Expenditure Statement for 12 months ending 30 August 2005.

<sup>51</sup> See section 7.2 Expenditure Statement in the QDEX Guidelines.

58. The terms of the QDEX Guidelines are clear. The Department undertakes to hold expenditure statements in confidence for perpetuity. In my view, this is sufficient to:

- demonstrate a mutual understanding of ongoing confidence; and
- satisfy requirement c) for exemption from disclosure under section 46(1)(a) of the FOI Act.

59. However, I note that by email dated 23 March 2011, the Department advised<sup>52</sup> that:

*'It is the department's policy to maintain the confidentiality of these documents until such time as an exploration permit is relinquished. ...'*

60. If the Department's statement above were accepted, it would be arguable that any obligation of confidentiality that may have applied to the Expenditure Statements is no longer relevant, for reasons similar to those outlined above in relation to the Progress Reports.

61. In this respect, CCC submits<sup>53</sup> that the Department's email statement should not be accepted as a correct statement of policy or practice as:

- CCC's own experience with the Department is that expenditure statements are in practice held in absolute confidence – consistent with the QDEX Guidelines - and are not moved to 'open file'.
- The relevant statement from the Department is 'confusing and vague' and should be read as a general reference to Departmental practice in relation to Progress Reports, not as a specific comment on the treatment of QDEX Guidelines.
- The terms of the QDEX Guidelines are clear and unequivocal, form the express basis on which entities such as CCC submit information to the Department, and should be preferred in construing the circumstances of communication of expenditure statements, particularly considering that, were the Department actually moving expenditure statements to 'open file' as intimated, it would be in clear breach of its own policy.

62. After careful consideration of this point, I accept CCC's submissions on the following basis:

- The QDEX Guidelines unequivocally state that expenditure statements will not be moved to 'open file', that is, that they will be held by the Department in ongoing confidence, regardless of the status of the underlying tenure.
- The Department's apparently contradictory statement should at best be seen as a general statement of position about reporting generally (the substance of which, as I understand, is achieved through lodgement of Progress Reports), rather than expenditure statements specifically.
- The general statement by the Department is not a direct response to the question asked (that is, the rationale for the perpetual confidentiality afforded expenditure statements).
- A more direct response to this question from a particular Departmental officer followed the general statement, and was to the effect '*... that the confidentiality period for "expenditure" has been carried over from different documents and guidelines for years*'.<sup>54</sup>

---

<sup>52</sup> In response to an OIC enquiry about the rationale for this ongoing undertaking as to confidence.

<sup>53</sup> CCC Submissions dated 24 May 2011.

<sup>54</sup> Departmental email dated 23 March 2011.

63. In any event, even if the Department's general statement does refer to expenditure statements, I do not consider it can be sustained in view of the QDEX Guidelines. Entities such as CCC are entitled to rely upon the undertakings given in the QDEX Guidelines, and as there is no evidence before me to suggest that any of the expenditure statements have been moved to open file or otherwise made publicly accessible, I consider that these express stipulations as to confidentiality give rise to an ongoing equitable obligation of confidence binding the Department.
64. On this basis, I find that requirement c) for exemption from disclosure is satisfied in respect of the Expenditure Statements lodged under the QDEX Guidelines.

### **Expenditure Statements lodged under the General Conditions**

65. Three Expenditure Statements (comprising folios EN958 29, EN954 56 and EN954 54)<sup>55</sup> were lodged prior to the commencement of the QDEX Guidelines.<sup>56</sup> These documents are therefore subject to the General Conditions which required permit holders to lodge six monthly reports (including an expenditure statement) with the Department.
66. Relevantly, I note that the only express provision as to confidentiality in the General Conditions refers to Progress Reports as set out in paragraph 43 of this decision.
67. This earlier reporting framework is silent on the treatment of expenditure statements, which may arguably be interpreted to mean that these documents were bound up within the rubric of 'six monthly reporting' and subject to the same limited obligation of confidentiality as relevant Progress Reports. Certainly, when this possible interpretation was put to the Department,<sup>57</sup> its response was simply to accept the preliminary view based on this interpretation.<sup>58</sup>
68. CCC did not accept the view and made submissions<sup>59</sup> in support of its case including that:

...

*9. Under the General Conditions (which applied before QDEX), the position was no different.*

*10. Expenditure statements were not part of the main six-monthly report (see section 2.12 of the Guidelines and Appendix "Coal"). The Appendix "Coal" provides that "six monthly reports remain confidential during the currency of the tenure or consequent tenures", with no similar tenure limitation for Expenditure statements.*

*11. Again, our client's instructions are that the Department practice was not to release expenditure statements.*

...

69. After careful consideration of this point, I accept CCC's submissions on the following basis:
- The General Conditions distinguish between six-monthly reports and expenditure statements,<sup>60</sup> and it is only the six-monthly reports which are subject to limited obligations of confidence (consistent with the limited undertakings given in the QDEX Guidelines).

<sup>55</sup> Expenditure Statements ending 31 August 2001, 2002, 2003.

<sup>56</sup> The applicants originally contended that as these documents predated QDEX, there appeared to be no conditions as to confidentiality which could be said to cover them (applicants' submissions dated 13 December 2010). As noted, subsequent inquiries disclosed the existence of the General Conditions which were provided to the applicants' solicitors under cover of my letter dated 26 May 2011.

<sup>57</sup> By letter dated 4 May 2011.

<sup>58</sup> See Department's email dated 20 May 2011.

<sup>59</sup> Submissions dated 24 May 2011.

<sup>60</sup> Clause 2.12 of the General Conditions requires a '*statement of expenditure...in a separate document*'; the Appendix to the General Conditions (entitled '*Specific Requirements for Submission of Coal Exploration Reports to the Queensland Department of Minerals and Energy*') expressly provides that '*expenditure statements must not be incorporated in the body of the main report*'.

- I also note the advice of:
  - the Departmental officer to the effect that the confidentiality period for 'expenditure' has essentially been in effect 'for years'; and
  - another Departmental officer (with long-standing experience in the relevant area) who subsequently corroborated the earlier expenditure advice<sup>61</sup> by confirming that expenditure statements have never been placed on 'open file'.
- This advice from Departmental officers is consistent with CCC's uncontested statement as to its experience of the Department's practice under the General Conditions, that is, that expenditure statements are not made publicly accessible.
- This interpretation is also consistent with the General Conditions' caution that expenditure statements not be included with Progress Reports which would at some point in time enter the public domain, presumably to avoid the risk of expenditure information being made inadvertently publicly available.

70. On the basis of the matters set out above, I am satisfied that:

- the Expenditure Statements lodged under the General Conditions were submitted on the understanding they would be held confidentially in perpetuity, an understanding arising from long-standing Departmental practice (which has subsequently found explicit expression in the later QDEX Guidelines)<sup>62</sup>
- these Expenditure Statements were communicated in circumstances giving rise to an equitable obligation of confidence binding the Department to hold these documents confidentially; and
- requirement c) for exemption from disclosure is satisfied in respect of the Expenditure Statements lodged under the General Conditions.

71. With respect to requirement d) for exemption from disclosure, I am satisfied that:

- CCC clearly objects to disclosure of the Expenditure Statements
- disclosure would therefore constitute an unauthorised use of this information; and
- requirement d) for exemption from disclosure is satisfied in respect of the Expenditure Statements.

72. For the reasons set out above and as all requirements for exemption are satisfied, I find that the Expenditure Statements (lodged under the General Conditions or the QDEX Guidelines) qualify for exemption from disclosure under section 46(1)(a) of the FOI Act.

### **Section 45(1)(a) of the FOI Act**

73. CCC submits that the following parts of various Progress Reports (**Drilling Data**) comprise trade secrets and qualify for exemption from disclosure under section 45(1)(a) of the FOI Act:

---

<sup>61</sup> In a telephone conversation on 31 May 2011, the file note of which I have had regard.

<sup>62</sup> In making these findings, I am conscious of the Department's general acceptance of the earlier preliminary view that section 46(1) of the FOI Act may not apply to these documents. However, given the clear and specific statements from experienced Departmental officers as to the confidential treatment of expenditure statements by the Department, I consider it reasonable in the circumstances to prefer this specific evidence over a general statement. I also note that the applicants' submissions in this context do not contain anything to dissuade me from the view outlined above. Their original submissions highlighted the 'statutory relinquishment' effected by the Amendment Act, and were apposite in considering the conditional assurances of confidentiality afforded the Progress Reports. These submissions also queried whether documents lodged prior to the QDEX Guidelines enjoyed any confidentiality, a point which was subsequently addressed by the identification of the General Conditions. The applicants' final submissions also contained a general contention that as EPC 545 is 'no longer current...any documents remaining in issue cannot, on any view, now qualify for exemption under section 46(1) of the FOI Act.' As explained above, the currency of EPC 545 is relevant only in considering the confidentiality of the Progress Reports, subject as they were, to conditional assurances of confidentiality. The currency of a particular tenure has no bearing on the confidentiality afforded to expenditure statements, which is, and has been (for the relevant periods in question) unconditional and perpetual.

...information as to:

- (a) the amount, type and location of exploration drilling within EPC545;
- (b) the geology of the coal resource within EPC545 including:
  - 1. the type of coal resource, including its qualities (such as ash levels and specific energy);
  - 2. the amount, location and dimensions of the coal resource.<sup>63</sup>

74. Information is exempt if its disclosure would disclose trade secrets of an agency or another person.<sup>64</sup>

75. I note that a trade secret has been said to comprise 'any formula, pattern or device or compilation of information which gives an advantage over competitors who do not know or use it'.<sup>65</sup>

76. Matters which may be relevant to the determination of this point include:<sup>66</sup>

- the extent to which the information is known outside of the relevant business
- the extent to which it is known by employees and others involved in the business
- the extent of measures taken by the business to guard the secrecy of the information
- the value of the information to the business and its competitors
- the amount of effort or money expended in developing the information
- the ease or difficulty with which the information could be properly acquired or duplicated by others
- the necessity for secrecy, including the taking of appropriate steps to confine dissemination of the relevant information to those who need to know for the purposes of the business, or to persons pledged to observe confidentiality
- some information, originally secret, may lose its secret character with the passage of time
- whether relevant information is used in, or useable in, a trade or business and would be to the advantage of trade rivals to obtain; and
- trade secrets can include not only secret formulae for the manufacture of products, but also information concerning customers and their needs.

### **Submissions**

77. CCC submits that:

- the Drilling Data is confidential and is not known outside CCC, other than within the Department to whom it was provided in accordance with mandatory reporting obligations
- the relevant information is kept secret by CCC and the passage of time has not diminished its secrecy
- the information is of value to CCC
- CCC incurred significant expense and expended considerable effort in acquiring the information; and
- the information is technical in nature, and cannot be easily acquired or duplicated by third parties, who would benefit were the information to be disclosed under the FOI Act.

---

<sup>63</sup> Submissions dated 26 July 2010.

<sup>64</sup> Section 45(1)(a) of the FOI Act.

<sup>65</sup> See *Cannon and Australian Quality Egg Farms Limited (Cannon)* (1994) 1 QAR 491 (**Cannon**) at paragraph 43, citing the *American Restatement of the Law of Torts* (1939, Volume 4 para 757) which was referred to by Gowan J in *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37.

<sup>66</sup> See *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163, Davies, Wilcox and Einfeld JJ at page 172, and *Cannon* at paragraphs 42-49.

## Findings

78. After careful consideration of the matters set out above and the content of the Drilling Data, I do not accept CCC's submissions on the following basis:

- The Drilling Data comprises information about drilling outcomes and the geological composition of coal deposits within land which CCC is, as a consequence of the Amendment Act, no longer entitled to work.<sup>67</sup> Therefore, the Drilling Data does not comprise a '*formula, pattern, device or compilation*' of a kind that could be said to give CCC an advantage over competitors (and which, for example, could be transferred by CCC to another exploration area for application in fresh exploration efforts).
- While it may be arguable that the Drilling Data is the result of the *application* of such '*formulae, patterns or compilations*' (for example, innovative exploration or drilling techniques), I am not satisfied that the information itself can be said to comprise a trade secret within the meaning of section 45(1)(a) of the FOI Act.
- In any event, while CCC may have expended '*significant expense*' in acquiring the Drilling Data, and it may not be easily duplicated by third parties, it has now lost its secret character<sup>68</sup> given that the condition upon which the Department owed an obligation of confidentiality in respect of the Progress Reports (containing the Drilling Data), is no longer met.<sup>69</sup>

79. For the reasons set out above, I find that the Drilling Data:

- cannot be regarded as a trade secret; and
- does not qualify for exemption from disclosure under section 45(1)(a) of the FOI Act.

## Section 45(1)(b) of the FOI Act

80. In the alternative to its claim under section 45(1)(a) of the FOI Act,<sup>70</sup> CCC contends that the Drilling Data qualifies for exemption from disclosure under section 45(1)(b) of the FOI Act.

81. Information is exempt if its disclosure would disclose information<sup>71</sup> that has a commercial value to an agency or another person and could reasonably be expected to destroy or diminish the commercial value of that information.<sup>72</sup>

82. The following matters may be relevant to the determination of this point:<sup>73</sup>

- There are two possible interpretations of 'commercial value' in this context:
  - Information has commercial value if it is valuable for the purposes of carrying on the commercial activity in which an agency or business is engaged, because it is important or essential to the profitability or viability of a continuing business operation, or a pending, one-off, commercial transaction.
  - Information has commercial value if a genuine arms-length buyer is prepared to pay to obtain that information from the agency or person, such that the

<sup>67</sup> Noting my discussion of and findings as to the effect of the Amendment Act at paragraphs 25-33.

<sup>68</sup> And may now be placed on open file by the Department (which I understand means to make information publicly accessible) in accordance with the QDEX Guidelines and the General Conditions.

<sup>69</sup> See the detailed discussions of the Effect of the Amendment Act at paragraphs 25-33 and the Progress Reports at paragraphs 42-52 of this decision.

<sup>70</sup> It should be noted that sections 45(1)(a), 45(1)(b) and 45(1)(c) of the FOI Act comprise three discrete exemption provisions, and that information cannot ordinarily be exempt under more than one of the section 45(1) exemptions: *Cannon*, at paragraph 66.

<sup>71</sup> Other than trade secrets.

<sup>72</sup> Section 45(1)(b) of the FOI Act.

<sup>73</sup> See *Cannon* at paragraphs 51-60.



market value of the information would be destroyed or diminished if it could be obtained from a government agency under the FOI Act.

- The information must have a current commercial value at the time a decision is made as information which was once valuable may become aged or out-of-date such that it has no remaining commercial value.
- The fact that resources have been expended in producing information, or money has been expended in acquiring it, are factors that may be relevant to take into account in determining whether information has a commercial value for current purposes.
- There must be a reasonable basis, not just speculation, for expecting the commercial value of the information to be diminished by its disclosure. This could not be shown if the information was public knowledge or common knowledge among competitors in the relevant industry.

83. The phrase *'could reasonably be expected to'* as it appears in this context requires consideration as to whether the expectation that disclosure of the matter in issue could destroy or diminish the commercial value of the information is reasonably based.<sup>74</sup>

84. Accordingly, the issues for determination are whether:

- the Drilling Data has commercial value within the meaning of section 45(1)(b) of the FOI Act, and if so,
- there exist grounds to support a reasonably based expectation that disclosure of the Drilling Data could destroy or diminish that value.

### **Submissions**

85. CCC submits<sup>75</sup> that:

- ...
21. *The commercial value in the information is that it contains geological data, in particular information as to the coal resource in respect [of] the land within EPC545. The commercial value is inherent in the information and it is not dependant upon CCC's ability (or otherwise) to commercialise the coal resource in the land which was the subject of MDLA364.*
22. *The geological information extends to the areas within EPC545 just beyond MDLA364 and MDLA366. It is wrong to say...that the only exploration drilling conducted was within the land contained in MDLA364 and/or MDLA366.*
- ...
24. *If the documents were released, the commercial value in the information would be destroyed, or at least significantly diminished, because parties would be unlikely to purchase or take a licence of the drilling data from CCC if that information is freely available at no charge.*
25. *In that case, the value of CCC's investment in the time, money, and effort expended in the obtaining and collating of drilling data will be destroyed or at least substantially diminished upon its disclosure.*
26. *...Potential third party acquirers would include third parties that may hold mining tenements over the land compromised in EPC545 or the owners of mining tenements that adjoin EPC 545 or other exploration companies.*
27. *The information is and remains valuable due to the fact that:*

<sup>74</sup> Applying the observations of Bowen CJ and Beaumont J in *Attorney-General v Cockroft* (1986) 64 ALR 97, in interpreting section 43(1)(c)(ii) (business affairs exemption) contained in the Commonwealth *Freedom of Information Act 1982* (at 106).

<sup>75</sup> In its letter dated 26 July 2010.

(a) *considerable cost and effort is required to produce the data and such costs and efforts may be avoided by acquiring the information from CCC; and*

(b) *third parties have limited opportunity, by reason of the licensing requirements of the Mineral Resources Act 1989, to conduct their own exploration on the land within EPC545.*

...

28. *In summary, to release the review documents to BHP would result in BHP obtaining for free information they would otherwise need to pay for...thereby subverting CCC's right to commercialise it.*

86. CCC also submits that '*...CCC has a statutory right of compensation...which would include compensation for the value of its drilling data*'.<sup>76</sup>

### **Findings**

87. After careful consideration of the matters set out above including the content of the relevant information, I am not satisfied that the Drilling Data (contained in the Progress Reports) has a current commercial value given that:

- it relates to land which is no longer subject to EPC 545<sup>77</sup> and is no longer subject to an ongoing obligation of confidentiality; and
- it may now be placed on open-file<sup>78</sup> by the Department (in accordance with relevant parts of the QDEX Guidelines and the General Conditions).<sup>79</sup>

88. On this basis, I am not satisfied that the Drilling Data has a current commercial value to CCC for the purposes of carrying on its commercial activity, nor that a genuine arms-length buyer would be prepared to pay for information that is publicly accessible via QDEX.

89. Given this finding, it is unnecessary to determine the effect of disclosure upon commercial value. However, I note CCC's submission (which I accept) that it has a statutory right to seek compensation<sup>80</sup> for the loss of any relevant commercial opportunity (including compensation for the value of its drilling data), which is currently the subject of proceedings in the Land Court.<sup>81</sup>

90. For the reasons set out above, I find that the Drilling Data:

- has no current commercial value within the meaning of section 45(1)(b) of the FOI Act as it is no longer subject to an obligation of confidentiality and may now be placed on open file by the Department (which I understand means to make information publicly accessible) in accordance with the QDEX Guidelines and the General Conditions; and
- does not qualify for exemption from disclosure under section 45(1)(b) of the FOI Act.

### **Section 45(1)(c) of the FOI Act**

91. As noted earlier in this decision, the Department originally withheld the information sought by the applicants on the basis that it qualified for exemption under section 45(1)(c) of the FOI Act. The Department has since withdrawn that claim. However,

---

<sup>76</sup> Submissions dated 26 July 2010.

<sup>77</sup> Given the passage and effect of the Amendment Act which excised the Excluded Land from EPC 545.

<sup>78</sup> Which I understand means to make information publicly accessible.

<sup>79</sup> See paragraphs 25-33 and 42-52 of this decision.

<sup>80</sup> As enshrined in the MR Act.

<sup>81</sup> See paragraph 8 of this decision.

CCC does not accept that the information does not qualify for exemption from disclosure on this basis.

92. Accordingly, it is necessary to consider the application of this provision to the Progress Reports and Miscellaneous Documents (in their entirety) given my earlier finding that the Expenditure Reports qualify for exemption from disclosure.<sup>82</sup>
93. Information is exempt if its disclosure would disclose information concerning the business, professional, commercial or financial affairs of an agency or another person and could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government – unless its disclosure would, on balance, be in the public interest.<sup>83</sup>
94. To found exemption on this basis, each of the following requirements must be met:<sup>84</sup>
- a) the information must concern the business, professional, commercial or financial affairs of an agency or person, including a company
  - b) disclosure of the information could reasonably be expected to have either of the following effects:
    - i. an adverse effect on the business, professional, commercial or financial affairs of the agency or person, which the relevant information concerns; or
    - ii. prejudice the future supply of such information to government; and
  - c) the weight of all identifiable public interest considerations against disclosure equals or outweighs that of all of all of the identifiable public interest considerations favouring disclosure.

### **Submissions**

95. In summary, the applicants submit that:
- the relevant information relates only to land which was formerly the subject of MDLA 364 and MDLA 366
  - as a consequence of the Amendment Act, CCC has no continuing rights or entitlements to this land; and
  - the information is therefore no longer of commercial value to CCC and cannot qualify for exemption under section 45(1)(c) of the FOI Act.<sup>85</sup>
96. CCC submits that:
30. [the relevant information includes] ... *information relating to the drilling programs to be undertaken in each period and the money to be expended by CCC in undertaking that drilling.*
31. *This financial information, although historical, could be used by BHP or another third party buyer to value the drilling data and other geological information contained in the review documents.*
32. *The disclosure of this financial information is therefore still of commercial value to CCC and therefore exempt under section 45(1) of the Act because the release of these documents would adversely affect CCC's financial affairs by reducing its ability to commercialise the drilling data by negotiating a market price based on the data's replacement costs (because the buyer would know the data's historical cost to CCC).<sup>86</sup>*

---

<sup>82</sup> Under section 46(1)(a) of the FOI Act.

<sup>83</sup> Section 45(1)(c) of the FOI Act.

<sup>84</sup> See paragraphs 67–88 of *Cannon*.

<sup>85</sup> Submissions dated 3 June 2010.

<sup>86</sup> Submissions dated 26 July 2010.

## Findings

97. For information to ‘concern’ business, professional, commercial or financial affairs, it must be information ‘about’ those affairs – essentially, information about activities carried on for the purpose of generating income or profits.<sup>87</sup>
98. The Progress Reports and Miscellaneous Documents principally comprise information about CCC’s activities under EPC 545,<sup>88</sup> including details of drilling work undertaken, the specific Drilling Data discussed above, monies expended and proposals for future work and expenditure. There is also some information regarding CCC’s financial status at particular points in time.
99. On the basis of the matters set out above, I am satisfied that:
- the information contained in the Progress Reports and Miscellaneous Documents concerns CCC’s business, professional, commercial or financial affairs; and
  - the first requirement for exemption from disclosure is therefore satisfied.
100. With respect to the second requirement for exemption, the phrase ‘adverse effect’ usually refers to the relevant entity being exposed to commercial disadvantage or competitive harm.<sup>89</sup>
101. As set out above, the Progress Reports and Miscellaneous Documents contain information principally relating to activity (undertaken or proposed) in respect of land in which CCC no longer holds an interest given the passage and effect of the Amendment Act. There is also a limited amount of additional information (largely contained in the Miscellaneous Documents) which:
- concerns CCC’s general financial capability at given points in time; and
  - comprises some routine covering correspondence.
102. Having carefully considered the content of the Progress Reports and Miscellaneous Documents, the parties’ submissions and the matters set out above, I am unable to identify any commercial disadvantage or competitive harm that could reasonably be expected to flow to CCC from disclosure of the Progress Reports and Miscellaneous Documents, for the following reasons:
- The effect of the Amendment Act was to remove the Excluded Land from CCC’s renewed EPC 545<sup>90</sup> and make this land available<sup>91</sup> to the applicants to permit them to lodge an application for a mining lease.<sup>92</sup>
  - The only parties who may now exploit or who otherwise stand to benefit from the information in the Progress Reports and Miscellaneous Documents are the applicants, who:
    - will gain access to the Progress Reports once the Department places them on open file in accordance with its reporting frameworks (as the condition upon which the relevant obligation of confidentiality was based is no longer met, given the passage and effect of the Amendment Act); and
    - are liable to compensate CCC in accordance with the statutory right conferred by the MR Act (for the loss of any relevant, quantified commercial opportunity) which is currently the subject of proceedings in the Land Court.<sup>93</sup>

<sup>87</sup> See paragraph 67 of *Cannon*.

<sup>88</sup> Which was an exploration permit granted to CCC to enable it to attempt to locate economic deposits of coal.

<sup>89</sup> See generally *Cannon*, at paragraphs 82-84.

<sup>90</sup> With the effect that CCC lost the opportunity to commercialise any coal resource in that area.

<sup>91</sup> In the words of the then Minister for Natural Resources.

<sup>92</sup> Hansard, 15 April 2008, p. 960.

<sup>93</sup> See paragraph 8 of this decision.

- As for the limited material relating to CCC's general financial capability and covering correspondence (contained in the Miscellaneous Documents), I can identify nothing in this information that could reasonably be expected to adversely impact upon CCC's ongoing business, professional, commercial or financial affairs. The information regarding CCC's general financial capability is now relatively dated, and merely comprises a positive third party opinion as to CCC's financial capacity, while the covering correspondence is entirely innocuous.
- CCC does not suggest, and I do not accept that disclosure of the Progress Reports and Miscellaneous Documents could reasonably be expected to prejudice the future supply of such information to government, given that CCC was, as a permit holder under the MR Act, either under statutory obligation to supply the information, or required to do so if it wished to maintain that permit.<sup>94</sup>

103. For the reasons set out above, I find that:

- disclosure of the Progress Reports and Miscellaneous Documents could not reasonably be expected to have an adverse effect on CCC's business, professional, commercial or financial affairs nor would it prejudice the future supply of such information to government
- the second requirement for exemption is therefore not made out in the circumstances; and
- the Progress Reports and Miscellaneous Documents are not exempt from disclosure under section 45(1)(c) of the FOI Act.<sup>95</sup>

## Section 22 of the FOI Act

104. CCC also submits that access to the relevant information should be refused under section 22(a) of the FOI Act as the applicants will gain access to this information by way of disclosure in other proceedings currently on foot. I note that the Department did not invoke the discretion under section 22(a) of the FOI Act in any of its relevant decisions.

105. Section 22(a) of the FOI Act is not an exemption provision. Rather, it confers a discretion on an agency to refuse access to a document under the FOI Act, where an applicant can reasonably obtain access under another enactment.<sup>96</sup>

106. I am not in a position to assess the accuracy of CCC's contention but note the applicants' submission that the use of documents obtained through disclosure are '*subject to various limitations, including implied certain undertakings.*'<sup>97</sup>

107. Taking into account all of the relevant information before me (including relevant comments of the Information Commissioner<sup>98</sup>) and where the Department did not invoke the discretion in its decisions, I decline to exercise the discretion conferred by section 22(a) of the FOI Act in the circumstances of this case.

---

<sup>94</sup> In this regard, I note the Information Commissioner's observations that '[w]here persons are under an obligation to continue to supply such ... information (e.g. ... 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. (Cannon, at paragraph 85, citing earlier comments in *Re "B"* regarding the application of section 46(1)(b) of the FOI Act.)

<sup>95</sup> As the requirements are cumulative, it is unnecessary in the current circumstances to consider the third requirement.

<sup>96</sup> Whether or not the access is subject to a fee or charge. I note that the discretion conferred on an agency by section 22 is able to be exercised by the Information Commissioner (or delegate) in a review under Part 5 of the FOI Act, by virtue of s.88(1)(b) of the FOI Act.

<sup>97</sup> Submissions dated 26 August 2010.

<sup>98</sup> Including in "*J*" and *Queensland Police Service* (1995) 2 QAR 516, paragraphs 26-27. This case considered an earlier formulation of section 22(a), however the Information Commissioner's comments remain relevant.

## **DECISION**

108. I set aside the decisions under review and find that:

- the Expenditure Statements are exempt from disclosure under section 46(1)(a) of the FOI Act
- the Progress Reports are not exempt from disclosure under section 46(1)(a) of the FOI Act
- the Drilling Data contained in the Progress Reports is not exempt from disclosure under sections 45(1)(a) or 45(1)(b) of the FOI Act; and
- the Progress Reports and Miscellaneous Documents are not exempt from disclosure under section 45(1)(c) of the FOI Act.

109. I have made this decision as a delegate of the Information Commissioner under section 90 of the FOI Act.

---

**Assistant Commissioner Henry**

**Date: 22 June 2011**

**APPENDIX - SIGNIFICANT PROCEDURAL STEPS**

Date	Event
23 February 2009	Applicants apply under the FOI Act to the Department for access to documents regarding the third party's activities under EPC 545.
26 & 29 June 2009	Department refuses access to various documents under sections 43(1) and 45(1)(c) of the FOI Act.
24 July 2009	Applicants apply for internal review of Department's initial decisions.
21 August 2009	Department's internal review decisions grant access to additional documents, otherwise affirm initial decisions refusing access to some documents under sections 43(1) and 45(1)(c) of the FOI Act.
11 September 2009	Applicants apply for external review of Department's decisions.
1 October 2009	OIC informs Department and applicants the external review applications have been accepted for review.
19 October 2009	Department supplies copies of documents to OIC.
30 November 2009	OIC requests submissions and further information from Department regarding application of sections 43(1) and 45(1)(c) of the FOI Act.
23 December 2009	Department provides further submissions and agrees to disclose various documents to applicants.
24 February 2010	OIC informs applicants of preliminary view that certain documents attract legal professional privilege and are therefore exempt under section 43(1) of the FOI Act. OIC expresses early view information relating to land still subject of EPC 545 as renewed by the <i>Mineral Resources (Peak Downs Mine) Amendment Act 2008</i> (Qld) may qualify for exemption under section 45(1)(c) of the FOI Act.
8 March 2010	Applicants accept OIC early view and advise not pursuing information relating to land which is still the subject of EPC 545.
15 March 2010	OIC asks Department to clarify some legal professional privilege claims and clearly identify information said to relate to land still the subject of EPC 545.
29 March 2010	Department provides further information regarding legal professional privilege claims and agrees to disclose further documents. Department provides further information regarding claims for exemption under section 45(1)(c) of the FOI Act.
12 April 2010	OIC informs applicants of further preliminary view regarding application of section 43(1) of the FOI Act to relevant documents. OIC informs third party of preliminary view that certain documents do not qualify for exemption under the FOI Act.
14 April 2010	OIC informs applicants of further preliminary view that certain documents may qualify for exemption under section 45(1)(c) of the FOI Act. Applicants accept view regarding section 43(1) of the FOI Act.
22 April 2010	Third party informs OIC it does not accept preliminary view dated 12 April 2010 and objects to disclosure of relevant documents.
6 May 2010	Applicants provide further submissions.
17 May 2010	OIC officers meet with applicants' representatives to further clarify issues relevant to FOI access applications.
3 June 2010	Applicants provide further submissions in support of case for access.
9 June 2010	OIC forwards applicants' 3 June 2010 submissions to Department, advises preliminary view that information no longer the subject of EPC 545 is not exempt under section 45(1)(c) of the FOI Act.
23 June 2010	Department accepts OIC preliminary view dated 9 June 2010.

5 July 2010	OIC forwards applicants' submissions dated 3 June 2010 and OIC letter to Department dated 9 June 2010 to third party. OIC informs third party of preliminary view that information does not qualify for exemption under section 45(1)(c) of the FOI Act
26 July 2010	Third party informs OIC it does not accept preliminary view dated 5 July 2010 and provides submissions in support of objections to disclosure under sections 45(1)(a), 45(1)(b) and 45(1)(c) of FOI Act.
4 August 2010	OIC forwards third party's submissions dated 26 July 2010 to applicants, invites further submissions.
26 August 2010	Applicants provide further submissions in support of case for access.
6 October 2010	OIC asks Department for additional information related to QDEX Guidelines.
20 October 2010	Department provides further information and copy of QDEX Guidelines.
24 November 2010	OIC informs applicants of preliminary view that some information may qualify for exemption under section 46(1)(a) of the FOI Act.
13 December 2010	Applicants advise OIC they do not accept preliminary view as to the application of section 46(1)(a) of the FOI Act, provide submissions in support of case for access.
9 March 2011	OIC requests further information from Department regarding operation of QDEX Guidelines and its application.
23 March 2011	Department provides further information regarding operation of QDEX Guidelines.
30 March 2011	Departmental officer provides further information regarding dates of operation of QDEX Guidelines and predecessor 'General Conditions' in telephone conversation with OIC officer.
7 April 2011	Department provides copy of General Conditions.
4 May 2011	OIC informs Department and third party of preliminary view that relevant information does not qualify for exemption under section 46(1)(a) of the FOI Act.
17 May 2011	Third party requests extension of time to respond, seeks additional information and clarification of certain issues raised in OIC letter dated 4 May 2011.
18 May 2011	OIC grants extension of time, provides further information.
20 May 2011	Department advises accepts preliminary view dated 4 May 2011.
24 May 2011	Third party advises does not accept preliminary view dated 4 May 2011, provides further information in support of case.
25 May 2011	OIC forwards third party submissions dated 24 May 2011 to applicants, invites final submissions.
31 May 2011	Departmental officer provides further information regarding confidentiality of Expenditure Statements in telephone conversation with OIC officer.
1 June 2011	Applicants provide final submissions in support of case for access.