



## **Decision and Reasons for Decision**

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**Application Number:** 310405

**Applicant:** Kalinga Woolloowin Residents Association Inc

**Respondent:** Brisbane City Council

**Third Party:** City North Infrastructure Pty Ltd

**Fourth Party:** Treasury Department

**Decision Date:** 9 May 2012

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

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

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

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## REASONS FOR DECISION

### Summary

1. City North Infrastructure Pty Ltd (**CNI**) is 'a wholly State Government-owned company established to manage the procurement of Airport Link and Northern Busway (Windsor to Kedron) on the State's behalf.'<sup>1</sup> Mr Scott Stewart, an officer of the Brisbane City Council, served as a director of CNI.<sup>2</sup>
2. Kalinga Woolloowin Residents Association Inc. (**Applicant**) applied to the Brisbane City Council (**Council**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to:  
*All board minutes or shareholder monthly reports in the possession of Mr Scott Stewart, from the period of his tenure as the Brisbane City Council Representative on the Board of City North Infrastructure P/L.*
3. The Council refused<sup>3</sup> access to 1016 pages,<sup>4</sup> on the basis these documents comprised exempt information,<sup>5</sup> as information the disclosure of which would found an action for breach of confidence.<sup>6</sup>
4. The Applicant applied to the Information Commissioner for external review of the Council's decision.
5. Having carefully considered the Council's decision and submissions in this review, and objections to disclosure lodged by CNI and the Treasury Department (**Queensland Treasury**) during the review, I am satisfied that:
  - the documents are 'documents of an agency' within the meaning of section 12 of the RTI Act and subject to the Act,
  - there are no grounds on which access to those parts of the documents that the Applicant seeks to access may be refused,<sup>7</sup> and
  - the Applicant is entitled to access the information in issue in accordance with the right of access contained in section 23 of the RTI Act.

### Decision under review

6. The decision under review is that outlined in paragraph 3.

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<sup>1</sup> 'Who is CNI', <http://www.citynorthinfrastructure.com.au/who-is-cni.php>, accessed 13 March 2012.

<sup>2</sup> From CNI's incorporation in December 2006 until early March 2009 (per Treasury Department letter to me dated 9 December 2011).

<sup>3</sup> Internal review decision dated 22 September 2010. Council's internal review decision was issued prior to the decision of Deputy President Judge Kingham of the Queensland Civil and Administrative Tribunal in *City North Infrastructure Pty Ltd v Information Commissioner* [2010] QCATA 060 (**CNI v Information Commissioner**) that CNI is not an 'agency' for the purposes of the RTI Act. The Council's decision was premised on the understanding that CNI was not an 'agency' in this sense (and thus Council was not precluded by schedule 3 section 8(2) of the RTI Act from relying on the breach of confidence exemption). Anticipating the possibility the Deputy President may have found that CNI was an agency, Council raised an alternative basis for refusing access under section 47(3)(b) of the RTI Act, namely that disclosure of the information in issue would, on balance, be contrary to the public interest. I have for the sake of completeness considered all aspects of the Council's decision.

<sup>4</sup> Generally comprised of monthly minutes, confirmations of minutes, schedules of 'Action Items' and consolidated 'Project Monthly Reports' for the period January 2007 to February 2009. The January and February 2009 minutes do not include 'Project Monthly Reports'. The Council advised the Office of the Information Commissioner (**OIC**) by telephone on 19 March 2012 that CNI changed its reporting protocols and had stopped producing the relevant 'Reports' as a component of monthly minutes by this time.

<sup>5</sup> Within the meaning of sections 47(3)(a) and 48 of the RTI Act.

<sup>6</sup> Schedule 3, section 8(1) of the RTI Act.

<sup>7</sup> The documents identified by the Council contain various segments of information to which the Applicant does not seek access (and which is therefore not in issue in this review), including, for example third party personal information and information concerning third party resumption and compensation processes, potentially legally privileged information, certain third party funding and payment information and Cabinet and Executive Council information. The 1016 pages noted in paragraph 3, less these segments of information, comprise the **information in issue** in this review. The Office of the Information Commissioner (**OIC**) has prepared a copy of the information in issue, with relevant segments to which the Applicant does not seek access redacted, which will be forwarded to the Council with these reasons.

## Issues in the review

7. The Council's decision was, as noted, that access to the information in issue should be refused as the information comprises exempt information. The Council also contended in its decision that disclosure of the information would, on balance, be contrary to the public interest.<sup>8</sup>
8. CNI and Queensland Treasury, however, have each also contended that the documents containing the information in issue are not 'documents of an agency' subject to the RTI Act. CNI, in the alternative, objects to disclosure on the basis the information is exempt information, and/or that its disclosure would, on balance, be contrary to the public interest.
9. The issues to be determined in this review, therefore, are as follows:
  - are the documents containing the information in issue 'documents of an agency' within the meaning of section 12 of the RTI Act and subject to the Act?, and if so,
  - does the information in issue comprise exempt information, and/or information the disclosure of which would be contrary to the public interest?<sup>9</sup>

## Evidence considered

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

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

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

*In this Act, **document**, of an agency, means a document, other than a document to which this Act does not apply, in the possession, or under the control, of the agency whether brought into existence or received in the agency...*
13. I recently considered the meaning of the term 'possession' as used in section 12 of the RTI Act in *Kalinga Woolloowin Residents Association Inc. and Department of Employment, Economic Development and Innovation; City North Infrastructure Pty Ltd (Third Party) (Kalinga and DEEDI)*.<sup>10</sup> I found that the term requires nothing more than that relevant documents be in the physical possession of an agency.
14. I am satisfied that the authorities and principles discussed in *Kalinga and DEEDI* apply equally in this case. As the Information Commissioner has previously decided, 'mere physical possession of documents by an agency is sufficient to make them "documents of an agency"<sup>11</sup> for the purposes of the RTI Act.<sup>12</sup>

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<sup>8</sup> See note 3.

<sup>9</sup> In relation to which access may be refused under sections 47(3)(b) of the RTI Act.

<sup>10</sup> (Unreported, Queensland Information Commissioner, 21 December 2011).

<sup>11</sup> *Holt and Reeves and Education Queensland and Anor* (1998) 4 QAR 310 (**Holt and Reeves**) at paragraph 22.

<sup>12</sup> *Holt and Reeves* concerned section 7 of the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**). That provision was framed in substantially similar terms to section 12 of the RTI Act, and I am satisfied relevant principles apply equally to section 12.

15. There is no question the Council is an 'agency' subject to the RTI Act.<sup>13</sup> It is also in physical possession of the requested documents, as evidenced by its conduct in:
- processing the Applicant's RTI access application and locating and identifying the 1016 pages comprising the documents responsive to that application,
  - making both initial and internal review decisions dealing with those documents, including examining, assessing and applying relevant provisions of the RTI Act to each, and
  - producing copies of the documents to OIC for the purposes of this external review.

### **Submissions**

16. CNI and Queensland Treasury do not accept that the documents are 'documents of an agency'. In its submissions dated 19 December 2011, CNI questioned the Council's physical possession of the documents, and argued that, in any event, section 12 requires something more than physical possession:

*...the Information Commissioner's approach takes no account of the circumstances giving rise to the Council's possession of the documents, particularly whether that 'possession' may have been nothing more than possession of Mr Scott Stewart, an officer of the Council, in his purely personal capacity as a director of CNI.*

*In this instance, CNI submits that the documents were (and were required to remain) in the personal possession of Mr Stewart on the basis that Mr Stewart was not to disclose their content or release them to any person without the prior written consent of CNI. This prohibition extended to releasing the documents to [the Council]. There is no finding by the Information Commissioner that the Council itself actually came into 'physical possession' of the documents. But if it did, it could only have been through disclosure by Mr Stewart. If there was such disclosure, it was not consented to by CNI.*

...

*In summary CNI submits that it was never intended that Board documents provided to Mr Stewart as director of CNI should become documents in the possession or under the control of the Brisbane City Council.<sup>14</sup>*

17. CNI's initial submissions<sup>15</sup> on this issue perhaps best encapsulate its argument:

*The Board papers ought not to have come into the physical possession of the BCC...the documents were only ever authorised to be in the personal possession [of] Mr Stewart and because they were not in his possession in any official capacity, they were not in the physical possession of the BCC in the sense to which s. 12 of the RTI Act refers.*

18. Queensland Treasury similarly argues that 'the correct test is whether the documents are lawfully in the possession of the agency in the ordinary course of the agency's dealing with the documents'.<sup>16</sup>

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<sup>13</sup> Section 14(1)(b) of the RTI Act.

<sup>14</sup> CNI submission dated 19 December 2011.

<sup>15</sup> Dated 7 June 2011.

<sup>16</sup> Queensland Treasury submission dated 9 December 2011.

## Analysis

19. The above submissions amount to an argument that the word 'possession' as it appears in section 12 of the RTI Act requires me to go beyond the relatively straightforward question of fact as to whether an agency has physical possession of relevant documents, and consider whether the agency also has a present legal entitlement to such possession, taking into account, if necessary, the circumstances by which an agency has come to physically possess relevant documents.
20. I do not accept these submissions. I am satisfied the correct interpretation of 'possession' is as I have stated in paragraph 14 above: mere physical possession by an agency is sufficient to render a document subject to the RTI Act. As I said in rejecting similar submissions in *Kalinga and DEEDI* (having canvassed relevant authorities):
18. *...these submissions...effectively contend that I should read in to section 12 qualifications that, on the plain language of the provision, are not open. As the Information Commissioner noted in Holt and Reeves, an interpretation that seeks to qualify or curtail the concept of 'possession' (by seeking to exclude, for example, documents in relation to which an agency may not have legal possession), cannot properly be reconciled with the express language of the section.*
19. *I consider the statements of relevant principles set out in paragraphs 14 and 15 reflect the correct interpretation of section 12 of the RTI Act. As the decisions cited in these paragraphs make clear, the term 'possession' as used in section 12 does not require formal legal possession. Nor is it concerned with the means by which the documents came into an agency's possession.*
21. The above observations apply equally in this case. How the Council came to be in the physical possession of the documents (a conclusion for which there exists sufficient evidence,<sup>17</sup> and which, crucially, the Council does not deny) is not relevant in considering whether the test for possession in section 12 is satisfied. Section 12 of the RTI Act simply requires physical possession by the Council of relevant documents.
22. Council also belatedly contended that, despite having identified, examined and made decisions refusing access to the documents, the documents were not 'documents of an agency', arguing that:<sup>18</sup>
- These documents were not received by Mr Stewart in his role as Executive Manager of Council's City Projects Office and therefore, cannot readily be classified as documents of the Council pursuant to section 12 of the RTI Act...*
- Council is not entitled to any special access to the documents of CNI which were provided to Mr Stewart in his role as a Director of CNI. Furthermore, the documents cannot be said to be under the control of Mr Stewart in Mr Stewart's official Council capacity.*
23. This submission overlooks the first and fundamental element of the test set out in section 12 – that of 'possession' by the agency. The capacity in which Mr Stewart received or held the documents is not relevant in this case.<sup>19</sup> The Council has come into and so far as I am aware remains in physical possession of the documents. In accordance with well-established principles applying to the interpretation of section 12, that alone is sufficient to render the documents 'documents of an agency' subject to the RTI Act.

<sup>17</sup> Canvassed in paragraph 15.

<sup>18</sup> Submission dated 7 December 2011.

<sup>19</sup> Queensland Treasury also raised a similar contention in its submissions dated 9 December 2011.

## Conclusion

24. I am satisfied the documents containing the information in issue are 'documents of an agency' within the meaning of section 12 of the RTI Act, because they are in the physical possession of the Council.
25. The documents are subject to the RTI Act.
26. I will now consider the Council's decision to refuse access to the information in issue, and CNI's<sup>20</sup> grounds for objection to disclosure, beginning with the claim that the information comprises information the disclosure of which would found an action for breach of confidence and is therefore exempt information.

## Exempt information – breach of confidence

27. Section 47(3)(a) of the RTI Act provides that an agency may refuse access to a document to the extent that the document comprises exempt information under section 48.
28. Section 48(2) of the RTI Act relevantly provides:
  - (1) *If an access application is made to an agency...for a document, the agency...must decide to give access to the document unless disclosure would, on balance, be contrary to the public interest.*
  - (2) *Schedule 3 sets out the types of information the disclosure of which Parliament has considered would, on balance, be contrary to the public interest.*
29. The relevant category of exempt information appearing in schedule 3 of the RTI Act is information the disclosure of which would found an action for breach of confidence.<sup>21</sup>
30. The substantive requirements for establishing the breach of confidence exemption consist of five cumulative criteria.<sup>22</sup> In the circumstances of this case it is the fifth criterion<sup>23</sup> that is relevant, that is, whether disclosure of the information would be likely to cause detriment to the confider of the confidential information.

## Detriment

31. In considering the detriment requirement in this case, the nature of the confider – CNI – makes it necessary to have regard to the 'Fairfax Doctrine'.<sup>24</sup> The *Fairfax Doctrine* essentially requires that public bodies claiming that information is confidential must demonstrate that disclosure of the information would be detrimental to the public

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<sup>20</sup> Queensland Treasury only sought to claim that relevant documents were not 'documents of an agency', advising me by letter dated 17 January 2012 that it 'declines to offer further submissions about this external review matter'.

<sup>21</sup> Section 8.

<sup>22</sup> See the Information Commissioner's analysis in *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (**B and BNRHA**), applying section 46(1)(a), the equivalent exemption under the repealed *Freedom of Information Act 1992* (Qld) (**FOI Act**). For a recent restatement of the five criteria in the context of the RTI Act, see Right to Information Commissioner Mead's decision in *TSO08G and Department of Health* (Unreported, Queensland Information Commissioner, 13 December 2011) (**TSO08G**). See also *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) and Anor* (1987) 14 FCR 434 at 437 per Gummow J, and *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 per Mason J at 51.

<sup>23</sup> In letters to CNI (20 April and 11 November 2011) and the Council (11 November 2011), I also queried whether significant portions of the information in issue such as monthly media clippings, references to matters in the public domain, and proposed publicity events could be said to comprise information possessing the 'necessary quality of confidence'. Ultimately, it is not necessary to make a finding on this issue, as I am satisfied the fifth cumulative criterion cannot be satisfied in relation to **any** of the information in issue.

<sup>24</sup> That is, the principles relating to claims of confidence by government actors as set out by Mason J in *John Fairfax and Esso Australia Resources Ltd & Ors v Plowman & Ors* (1995) 183 CLR 10.

interest in order to successfully establish such a claim. As Mason CJ summarised in *Plowman*:<sup>25</sup>

*The courts have consistently viewed governmental secrets differently from personal and commercial secrets.... As I stated in The Commonwealth of Australia v John Fairfax and Sons Ltd...the judiciary must view the disclosure of governmental information "through different spectacles". This involves a reversal of the onus of proof: the government must prove that the public interest demands non-disclosure.... (Citations omitted.)*

*... The approach outlined in John Fairfax should be adopted when the information relates to statutory authorities or public utilities because...in the public sector "(t)he need is for compelled openness, not for burgeoning secrecy".*

32. I discussed the *Fairfax* Doctrine in *Kalinga and DEEDI*, citing at some length and with approval the Administrative Appeals Tribunal (**AAT**) decision in *Sullivan v Department of Industry, Science and Technology and Australian Technology Group Pty Ltd*.<sup>26</sup> For present purposes, it is sufficient to note that, as in *Kalinga and DEEDI*, I am satisfied the *Fairfax* Doctrine applies in appropriate cases under the RTI Act. As in that review, I consider that this is such a case.
33. Applying the *Fairfax* Doctrine, the two questions to be answered in determining whether the necessary fifth criterion of detriment is satisfied are:
- is CNI a 'functional public sector body' so as to be affected by the *Fairfax* Doctrine?, and, if so,
  - does the public interest require non-disclosure of the information in issue?

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

34. Yes.
35. CNI is a proprietary company incorporated under the *Corporations Act 2001* (Cth). It is now settled that CNI is not a 'public authority' and thus not an 'agency' subject to the application of the RTI Act.<sup>27</sup> It may nevertheless still be regarded as a 'public sector body' for the purposes of the *Fairfax* Doctrine. As SM Bayne noted in *Sullivan*:

29. *There is very little guidance in the case-law as to what bodies may be regarded as sufficiently public in nature as to be affected by the Fairfax doctrine. What was said above by Mason CJ in Plowman indicates that the doctrine applies to "statutory authorities or public utilities". A body such as ATG, albeit that it is a public company almost wholly owned by the Commonwealth, might not in ordinary usage be regarded as a statutory authority or a public utility. But I do not take Mason CJ's reference to "statutory authorities or public utilities" as exhausting the range of bodies beyond government Departments which are affected by the Fairfax doctrine. The Chief Justice approved of the observation of Professor Finn that in the public sector "(t)he need is for compelled openness, not for burgeoning secrecy". In a functional sense, ATG is a public sector body.*  
(My emphasis.)

36. I adopted SM Bayne's criteria for determining whether a proprietary company is a 'functional public sector body'<sup>28</sup> in *KWRA and DEEDI*.<sup>29</sup> The relevant factors to be considered can be summarised as:

<sup>25</sup> At 31 and 32.

<sup>26</sup> [1997] AATA 192, in which Senior Member Bayne considered whether information held by a Commonwealth department relating to a proprietary company largely owned by the Commonwealth could qualify for exemption under section 45 of the Commonwealth *Freedom of Information Act 1982*, the equivalent to schedule 3, section 8 of the RTI Act.

<sup>27</sup> *CNI v Information Commissioner*. See also *Davis v City North Infrastructure Pty Ltd* [2011] QSC 285 (**Davis v CNI**). The Applicant in its submissions dated 9 May 2011 (received 10 June 2011) argued CNI was an 'agency', although in a telephone conversation with an OIC officer on 14 October 2011 the Applicant's representative withdrew this submission.

<sup>28</sup> Paraphrasing SM Bayne's formulation.



- ownership,
- funding, and
- control.<sup>30</sup>

37. CNI's shares are presently held by Queensland Treasury Holdings Pty Ltd (itself an entity controlled by Queensland Treasury<sup>31</sup>) and Mr David Stewart,<sup>32</sup> on trust for the State of Queensland.<sup>33</sup> It is, in its own words, '*wholly owned by the State Government*'.<sup>34</sup> As its most recent Annual Report notes, it '*depends on financial support from the State of Queensland*'<sup>35</sup> – in other words, it is economically dependant on public monies. CNI is governed by a seven person board, four of whom are senior public servants.<sup>36</sup> It could, as I understand, be readily wound up by the State.

### Submissions

38. The Council disputes that CNI is a 'functional public sector body', pointing to Deputy President Kingham's decision in *City North Infrastructure v Information Commissioner*<sup>37</sup> that CNI is not a 'public authority' within the meaning of section 16 of the RTI Act.<sup>38</sup> The Council submits that, as consequence of this decision:

*it is appropriate for the OIC to consider and rely on the decision of QCAT and the Queensland Supreme Court holding that CNI is not a public body within the meaning of section 16(1)(a)(ii) and therefore, is not subject to the RTI Act.*

39. The Council's submission as extracted above is generally correct.<sup>39</sup> As I have already noted, it is now clear that CNI is not a 'public authority' directly subject to the RTI Act. CNI documents may, however, be subject to the application of the Act where such documents are in the possession or under the control of an agency.<sup>40</sup>

40. Additionally, I am not in this case considering whether CNI is an agency directly subject to the application of the RTI Act. The relevant question is whether it is a 'public sector body' in the 'functional sense' for the purposes of the *Fairfax Doctrine*. The fact that CNI is not a 'public authority' as defined in and subject to the RTI Act does not preclude

<sup>29</sup> At paragraph 45, adopting the considerations discussed at paragraphs 27 and 28 of *Sullivan* quoted at paragraph 41 of *Kalinga and DEEDI*.

<sup>30</sup> Including the composition of the board and whether the company can be wound up by government: *Sullivan*, paragraph 27.

<sup>31</sup> Queensland Treasury Annual Report 2010-11, 'Notes to and forming part of the Financial Statements 2010-11', note 38, p. 106.

<sup>32</sup> Australian Securities and Investments Commission Organisational Search dated 11 April 2012. Mr Stewart was formerly the Director-General of the Department of Transport and Main Roads.

<sup>33</sup> See CNI's annual reports for 2007-08, 2008-09 and 2009-10 (available at <http://www.deedi.qld.gov.au/cg/special-purpose-vehicle-annual-reports.html>), each of which notes shares held in trust for the Department/State – see for example the 2009/10 annual report, which relevantly notes '*...shareholders have been issued shares held in trust on behalf of...Department of Transport and Main Roads*' (p. 16) and '*...shares are held in trust on behalf of the State of Queensland and as a consequence is the beneficial owner of all the company's issued shares in the State of Queensland* (sic)' (p.38).

<sup>34</sup> CNI Annual Report 2010-11, p. 16, [http://www.citynorthinfrastructure.com.au/FileLibrary/cni1068\\_annual\\_report\\_online.pdf](http://www.citynorthinfrastructure.com.au/FileLibrary/cni1068_annual_report_online.pdf). (accessed 13 March 2012), and as distinct from the company considered by SM Bayne to comprise a 'public body' in *Sullivan*, which was merely majority government owned.

<sup>35</sup> CNI Annual Report 2010-11, note 23, 'Economic Dependence': '[CNI] *depends on financial support from the State of Queensland. The funding is provided in line with the amended and restated Project Management Agreement...dated 30 July 2008*'.

<sup>36</sup> CNI Annual Report 2010-11, p. 14, and see also clause 5(a) of the 'Second Amended and Restated Project Management Agreement' between the State and CNI dated 1 July 2009 mandating CNI board composition with the majority of directors to be state agency representatives. This is again in distinction from the board considered in *Sullivan*, which in contrast was primarily composed of external appointees.

<sup>37</sup> See note 3.

<sup>38</sup> And thus not an 'agency' for the purposes of section 14 of the RTI Act. The Council also noted the decision of Applegarth J in *Davis v CNI* dismissing an application for a declaration that CNI is a 'public authority' and an 'agency' under the RTI Act.

<sup>39</sup> The relevant decisions found that CNI is not a 'public authority' for the purposes of section 16 of the RTI Act – not that it was not a 'public sector body' (ie in the sense of that concept as explained in *Sullivan*).

<sup>40</sup> CNI documents not being identified in schedule 1 of the RTI Act as documents to which the Act does not apply.

35 above.<sup>41</sup>

41. I accept and endorse SM Bayne's reasoning. CNI is not a 'public authority' directly subject to the RTI Act. I am not making such a finding. On the other hand, CNI is wholly government owned, governed by a board consisting in the majority of senior public servants, and economically dependent on government – and thus public – monies. It is in this practical sense an instrument of government action and, viewed broadly, a custodian of government information.<sup>42</sup> I am satisfied that CNI is, in the 'functional sense' described by SM Bayne, very much a public sector body.

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

42. No.
43. As I noted in *Kalinga and DEEDI*,<sup>43</sup> the *Fairfax* Doctrine essentially requires me to consider whether disclosure of the information in issue would harm the public interest to a degree such as to require nondisclosure.
44. In the present case, I am unable to identify how disclosure of the information in issue would result in a specific and tangible harm to an identifiable public interest. As noted above, some of the information merely comprises collations of media reportage or summary notes of CNI's public awareness activities. Other information consists of routine administrative matter,<sup>44</sup> or broad 'dot point' summaries of CNI activity devoid of detail. I cannot see how disclosure of this type of information would harm the public interest.
45. The information in issue also includes information as to CNI's dealings with external entities such as potential bidders, the final construction consortia, and its own consultants and advisors (including monies paid and disbursed to such advisors), and provides a relatively detailed account of CNI's operations over a two year period. There is, however, nothing in the information in issue or the parties' submissions to suggest how disclosure of any of this information – which is now some three-to-five years old – would harm the public interest.
46. The Council merely asserted that '[t]he information will cause detriment to the commercial business affairs of CNI if disclosed...despite the passing of time, the information has not lost its "inherently confidential" nature'.<sup>45</sup> No attempt was made to substantiate these claims, however, or to establish how any such detriment, if it could be demonstrated, would comprise a detriment to the public (as opposed to CNI's) interest.
47. CNI did not offer any submissions on the issue of harm to the public interest.

<sup>41</sup> As I observed in *KWRA and DEEDI*, Deputy President Forgie of the AAT noted in *Callejo v Department of Immigration and Citizenship* [2010] AATA 244 (**Callejo**) that the *Fairfax* Doctrine will be relevant when considering a claim by an 'incorporated body in which the Commonwealth is a shareholder' for exemption based on the Commonwealth *Freedom of Information Act 1982* provision equivalent to schedule 3 section 8 of the RTI Act. The Deputy President further noted SM Bayne's application of the *Fairfax* Doctrine in *Sullivan: Callejo*, paragraphs 167-172.

<sup>42</sup> Noting in this context the comments of the Industry Commission as to the importance of transparency of performance by internal or external service providers, as canvassed by SM Bayne at paragraphs 30-33 of *Sullivan*, and the Senior Member's observations that '[t]he *Fairfax* doctrine rests upon the same premises as the *FOI Act*, and the Commission's analysis and views support a broad application of the *Fairfax* doctrine': *Sullivan*, paragraph 34.

<sup>43</sup> At paragraph 47.

<sup>44</sup> Such as meeting time and place details, by way of one example.

<sup>45</sup> Submission dated 7 December 2011.

48. In the absence of relevant submissions and evidence, I am not satisfied disclosing information that is now considerably aged would cause harm to the public interest at all, let alone to a degree sufficient to justify nondisclosure.
49. My finding in this regard is sufficient to dispose of a claim for exemption under the breach of confidence exemption. The Council and CNI have not demonstrated disclosure of the information in issue would be contrary to the public interest<sup>46</sup>. The fifth requirement of detriment is not established, and thus nor are the requirements for the breach of confidence exemption.
50. Even if the Council and/or CNI could identify considerations showing detriment to the public interest, there are significant countervailing public interest considerations favouring disclosure in this case outweighing any public interest harms.<sup>47</sup> As I said in *Kalinga and DEEDI*:
54. *There is a manifest public interest in the community having access to information concerning the operations of 'special purpose vehicles' such as CNI: entities which are entirely government-owned, taxpayer-funded, and charged with carrying out duties which would otherwise fall to be performed by public authorities or agencies subject to the operation of accountability mechanisms such as the RTI Act. (Citation omitted.)*
55. *The public interest in the proper accountability and transparency of government actors – whether those actors are mainstream administrative units such as the Department, statutory authorities, or State-owned corporate entities such as CNI – warrants disclosure of information of the kind in issue. ...Disclosure of this information...will serve to further the accountability of both:*
- *CNI, for the manner in which it governs itself and discharges its functions in delivering significant public infrastructure*
  - *the Government, for having elected to establish CNI as an appropriate vehicle for delivery of such infrastructure.*
51. By allowing access to the workings, deliberations and decisions of CNI and its board, disclosure of the information in issue in this case will:
- enhance the transparency of CNI's operations, an entity wholly-owned and controlled by the State and funded by public monies,
  - permit better public scrutiny of the performance of CNI as a vehicle for government action, and of the government actors with an interest in CNI,
  - allow the community to assess whether the 'special purpose vehicle' model – a model that has not been without criticism<sup>48</sup> – delivers better outcomes and value for money as against public infrastructure development by mainstream government agencies,
  - reveal background and contextual information that has informed various government decisions on significant infrastructure projects,
  - advance the public interest in ensuring CNI is accountable for the manner in which CNI discharges its functions in delivering public infrastructure, including

<sup>46</sup> Bearing in mind the formal onus borne by the Council to justify its decision as imposed by section 87(1) of the RTI Act, and the practical onus on CNI as a third party objector to ensure that there is sufficient material before me from which I can be satisfied that each element of the grounds for refusal it relies upon are established: see *Pope and Queensland Health* (1994) 1 QAR 616, paragraph 17 for relevant principles in this regard.

<sup>47</sup> Noting that in considering detriment to the public interest '[i]t is also relevant to have regard to the public interest in disclosure of the documents': *Sullivan*, at paragraph 37.

<sup>48</sup> See the concerns expressed in 'Brokering Balance: A Public Interest Map for Queensland Government Bodies – An Independent Review of Queensland Government Boards, Committees and Statutory Authorities Part B Report by the Independent Reviewers: Ms Simone Webbe and Professor Patrick Weller AO', March 2009, where the authors stated that they had 'not been persuaded of a public interest case that justifies the creation of [CNI] to undertake these Queensland Government activities' and recommended that its functions be transferred to a suitable departmental form (Recommendation 103). This recommendation was not supported by the Government: 'Government Response to the Report', <http://www.premiers.qld.gov.au/government/assets/government-response-to-part-b-report.pdf>.

the disbursement and expenditure by CNI of significant amounts of taxpayer monies.

52. Such disclosure will permit better public scrutiny of the operations of government and CNI – an entity that is ultimately an instrument of government, and thus, public, action. This will in turn foster increased community participation in and discussion of public affairs.

### Submissions

53. I conveyed the substance of my reasoning as set out in paragraphs 31-37 and 43-52 above in letters to the Council and CNI.<sup>49</sup> The thrust of submissions in response can be summarised as follows:
- the *Fairfax* Doctrine cannot apply in the context of the RTI Act generally,<sup>50</sup> or, alternatively,
  - the Doctrine cannot apply in a situation where, as here, information is governed by a ‘direct promise of non-disclosure’ arising from a contractual, rather than equitable, obligation of confidence,<sup>51</sup> Mr Stewart having given express undertakings to keep all proceedings of the board (including the documents containing the information in issue) confidential.<sup>52</sup>

### The Fairfax Doctrine and the RTI Act

54. CNI submits:<sup>53</sup>

*...the Sullivan decision carries little weight in the present context as it is not a decision made under the provisions of the RTI disclosure regime in Queensland, and is distinguishable on that basis. In the context of the classification of ‘exempt information’ the RTI Act is quite different to earlier freedom of information provisions in the manner in which it prescribes where the balance of the public interest lies.*

55. I rejected substantially similar arguments in *Kalinga and DEEDI*:

58. *CNI’s submissions in this regard misapprehend the nature of the Fairfax Doctrine, and its application in this review. It is correct to say that Parliament has declared disclosure of ‘exempt information’ – relevantly, information the disclosure of which would found an action for breach of confidence – is presumed to be contrary to the public interest. A finding that information is ‘exempt information’ thus precludes any consideration by an RTI decision maker of public interest balancing factors, and obviates the need to conduct a public interest balancing exercise. Access to such information may legitimately be refused.*
59. *Crucially, however, the relevant information must first meet the requirements for the particular exemption claimed, that is, it must be shown to be ‘exempt information’. Only once the relevant elements of a particular exemption are established can the information then be said to comprise ‘exempt information’, the disclosure of which is presumed to be contrary to the public interest and on which basis an agency may refuse access.*
60. *In this case, CNI has relied upon the breach of confidence exemption. The requirements for that exemption are to be found by reference to the general law. As the survey of authorities set out in SM Bayne’s decision in Sullivan demonstrates, the general law requires that to successfully found an action for breach of confidence in a case involving a ‘functional public body’ of the kind I am satisfied*

<sup>49</sup> Dated 11 November 2011.

<sup>50</sup> CNI submissions dated 19 December 2011.

<sup>51</sup> As above.

<sup>52</sup> As above, and Council submissions dated 7 December 2011.

<sup>53</sup> Submissions dated 19 December 2011.

*CNI comprises, it must be demonstrated that disclosure of relevant information would be detrimental or contrary to the public interest. (Footnotes omitted.)*

56. There is nothing in CNI's present submissions to dissuade me of the above analysis. The breach of confidence exemption imports the general law requirements for an action of this kind.<sup>54</sup> Each of those requirements must be satisfied in order to establish that relevant information is exempt information. In this case one of those requirements is that disclosure would be detrimental or contrary to the public interest. That requirement has not been satisfied.
57. The information does not therefore comprise exempt information in accordance with the relevant provision,<sup>55</sup> and accordingly does not attract the presumption that its disclosure would, on balance, be contrary to the public interest.

### ***Contractual obligation of confidence***

58. Both CNI and the Council point to various undertakings<sup>56</sup> given by Mr Stewart to keep 'proceedings of the board' confidential during his board tenure. CNI argues that:

*...a direct promise of non-disclosure, even if it is made to a public body, is clearly distinguishable from the type of equitable duty of conscience claim dealt with in the Fairfax case.*

...

*...Fairfax is not inconsistent with a proposition that a public body has the same right to enforce a direct promise of non-disclosure as any other person. That right does not turn upon whether the body is able to establish an injury to the public interest because of the disclosure. Rather it is a straightforward matter of contractual principle.<sup>57</sup>*

59. CNI contends that, consequently, the 'material is exempt information on its face because its disclosure would be a direct breach of Mr Stewart's promise of non-disclosure.'<sup>58</sup>
60. I understand these submissions to be that Mr Stewart was contractually bound to keep information confidential, and that this contractual relationship is all that is relevant in considering whether the breach of confidence exemption is established – that it excludes public interest considerations raised by the *Fairfax* Doctrine.
61. I do not accept this argument, for three reasons.
62. Firstly, none of the undertakings on which CNI relies establish a contractual obligation of confidence. Only the Deed appears directly enforceable against Mr Stewart in a contractual sense, and the relevant confidentiality clause in that document<sup>59</sup> is not triggered in the present circumstances – the clause only binds Mr Stewart where relevant information has been accessed by him in accordance with an access

<sup>54</sup> See *B and BNRHA*, at paragraph 23, where in considering the breach of confidence exemption as it appeared in an identically worded formulation in section 46(1)(a) of the FOI Act, the Information Commissioner noted that 'the ground of exemption...operates by calling for the application of legal tests to be derived from the general law relating to actions for breach of confidence.'

<sup>55</sup> Schedule 3, section 8 of the RTI Act.

<sup>56</sup> Appearing in various documents such as CNI 'Code of Conduct Directors and Senior Executives' dated 14 May 2007, CNI Board Charter dated 14 May 2007, 'Declaration of Independence and Confidentiality' signed by Mr Stewart and dated 25 February 2008 and 'Deed of Indemnity, Insurance and Access' dated 13 July 2007.

<sup>57</sup> Submissions dated 19 December 2011.

<sup>58</sup> As above. CNI's submissions dated 7 June 2011 also canvassed authorities and principles regarding a director's general duties as regards company information. I have not discussed these in my reasons as it is not Mr Stewart's conduct or handling of information as a director but the Council's possible disclosure of information under the RTI Act that falls for my consideration in this review.

<sup>59</sup> Clause 5.6, cited by CNI in paragraph 10(e) of its submissions dated 7 June 2011.

mechanism specified in the Deed (and not, as here, where the information was obtained in the ordinary course of his directorial duties). This leaves a claim founded in equity with its attendant demands – including, in this case, *Fairfax* Doctrine requirements – as the only cause of action open to CNI.

63. Secondly, even if Mr Stewart was bound by a contractual obligation of confidence, the Council is not a party to promises in the Deed or any other undertakings given by him to CNI.<sup>60</sup> Accordingly, the **only** means by which CNI could thus restrain the Council from disclosing information – as a third party not subject to any direct restriction purportedly binding Mr Stewart – is by way of an equitable action.<sup>61</sup>
64. Finally, even if a valid contractual obligation of confidence existed which could also be said to bind the Council, CNI and the Council would still be required to satisfy all of the criteria for founding an equitable action for breach of confidence. This is because, as the AAT decision in *Callejo* has clarified, the phrasing of exemptions such as schedule 3, section 8 of the RTI Act refers to an action based in equity for breach of an equitable obligation of confidence.<sup>62</sup>
65. The various confidentiality undertakings on which CNI relies would therefore merely serve as evidence establishing that the information in issue was communicated in circumstances giving rise to an equitable obligation of confidence.<sup>63</sup> The fifth cumulative requirement – detriment – would still fall to be satisfied, in accordance with the public interest test imposed by the *Fairfax* Doctrine. As discussed above, neither Council nor CNI have met this requirement.

## Conclusion

66. Neither the Council nor CNI have established that disclosing the information in issue would found an action for breach of confidence in accordance with the principles applying under the general law as required by schedule 3, section 8 of the RTI Act.
67. As a consequence, the information in issue is not ‘exempt information’ within the meaning of section 48 of the RTI Act. The presumption set out in section 48(2) of the RTI Act that disclosure would be contrary to the public interest is not enlivened and the ground for refusal of access under section 47(3)(a) not established.

## Contrary to public interest information

68. The Council and CNI also contend that disclosure of the information in issue would, on balance, be contrary to the public interest within the meaning of section 47(b) and section 49 of the RTI Act.
69. In determining whether disclosure of information would, on balance, be contrary to the public interest, I must:<sup>64</sup>

<sup>60</sup> CNI’s own submissions (on the application of section 12 of the RTI Act) stress that Mr Stewart obtained documents in a ‘[p]urely personal capacity’: submissions dated 19 December 2011.

<sup>61</sup> F Gurry, *Breach of Confidence*, cited in *B and BNRHA* at paragraphs 40 and 97.

<sup>62</sup> In cases concerning disclosure of information claimed to be confidential, the facts may give rise to both an action for breach of contract and in equity, for breach of confidence. At general law, these are separate and distinct causes of action. An action for breach of confidence will only be established where the five cumulative criteria are satisfied. However, where a contractual term requiring confidentiality exists, disclosure (or threatened disclosure) of information may, in itself, only found an action for breach of contract. See *Callejo* at paragraphs 163-166. The extent or scope of the breach of confidence exemption was considered by the Information Commissioner in *B and BNRHA* to extend to contractual actions, although the Commissioner noted that if the Commonwealth AAT or the Federal Court should confine the formulation ‘found an action for breach of confidence’ solely to an action in equity for breach of confidence, the issue would need to be reconsidered (at paragraph 43). *Callejo* has now so confined the exemption. See also Right to Information Commissioner Mead’s decision in *TSO08G*.

<sup>63</sup> ‘Requirement (c)’: *B and BNRHA*, paragraphs 76–102.

<sup>64</sup> In accordance with section 49 of the RTI Act.

- identify any irrelevant factors that apply in relation to the information in issue and disregard them
- identify public interest factors favouring disclosure and nondisclosure that apply in relation to the information in issue
- balance the relevant factors favouring disclosure and nondisclosure
- decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

### ***Irrelevant factors and factors favouring disclosure***

70. I have not taken into account any irrelevant factors in making this decision. Factors favouring disclosure are those as identified at paragraphs 50 to 52 above, in the context of my discussion of the *Fairfax Doctrine*.

### ***Factors favouring nondisclosure***

71. The Council and/or CNI claim disclosure of the information in issue would:
- prejudice the business, financial etc. affairs of CNI,<sup>65</sup>
  - have an adverse effect on business affairs,<sup>66</sup>
  - disclose information that has a commercial value,<sup>67</sup>
  - affect confidential communications,<sup>68</sup>
  - affect financial or property interests of the State or an agency,<sup>69</sup>
  - disclose information disclosure of which is prohibited by an Act.<sup>70</sup>

### **General comments**

72. I am not satisfied that any of the claimed nondisclosure and public interest harm factors arise for consideration in this case.
73. Common to all but two<sup>71</sup> of these factors is the requirement that the particular prejudice, harm or adverse effect each seeks to guard against could reasonably be expected to flow from disclosure. This phrase requires an expectation that is reasonably based, ie. neither absurd, irrational or ridiculous.<sup>72</sup> It is not enough to simply assert that disclosure will result in some kind of adverse consequence.<sup>73</sup>
74. Generally speaking, however, the Council's and CNI's submissions consist of broad assertions of this kind. Neither has put before me sufficient information or evidence in relation to any of the relevant nondisclosure/harm factors each claims apply to consider whether there arises an expectation that is reasonably based.
75. As I pointed out to the Council,<sup>74</sup> the decision under review does not properly discharge the public interest balancing exercise prescribed in section 49 of the RTI Act, but simply couples a recitation of particular factors with an unsubstantiated assertion as

<sup>65</sup> Schedule 4, part 3 items 2 and 15 of the RTI Act, the former cited in CNI's submissions dated 7 June 2011 and both relied on by the Council in the decision under review.

<sup>66</sup> Schedule 4, part 4, item 7(1)(c) of the RTI Act, cited in CNI's submissions dated 7 June 2011 and relied on by the Council in the decision under review.

<sup>67</sup> Schedule 4, part 4, item 7(1)(b) of the RTI Act, relied on by the Council in the decision under review.

<sup>68</sup> Schedule 4, part 4, item 8 of the RTI Act, as above.

<sup>69</sup> Schedule 4, part 4, item 10 of the RTI Act, as above.

<sup>70</sup> Schedule 4, part 3, item 22 of the RTI Act, arguably raised by Council's submissions dated 7 December 2011.

<sup>71</sup> Schedule 4, part 3 item 22 and schedule 4, part 4, item 10 of the RTI Act.

<sup>72</sup> See *Channel Seven and Redland City Council* (Unreported, Queensland Information Commissioner, 30 June 2011) at paragraph 20 for a contemporary restatement of principles applying to the interpretation of this phrase as it used throughout the RTI Act.

<sup>73</sup> Nor, as CNI did in its submissions dated 19 December 2011, that it holds 'reasonably based expectations': the very nature of the test is objective.

<sup>74</sup> By letter dated 11 November 2011.

to their application. The Council did not attempt to identify any public interest factors favouring disclosure of the information, nor assess the relative weight to be accorded competing public interest factors.<sup>75</sup> On this basis alone, Council has not established relevant harm and nondisclosure factors,<sup>76</sup> and has therefore not demonstrated that disclosure of the information in issue would, on balance, be contrary to the public interest.

76. Similarly, CNI's submissions are largely comprised of generalised statements and unsubstantiated assertions as to the apparent self-evidence of the various prejudices or harms CNI contends will flow from disclosure, noting, for example, that claimed prejudices '*must be obvious to the Information Commissioner...*'.<sup>77</sup>
77. These submissions appear to rest on an assumption that because CNI is a company, or because information in issue concerns commercial matters, or appears in corporate documents, the information is imbued with a special sensitivity demanding nondisclosure.<sup>78</sup>
78. I acknowledge that CNI operates on a corporate footing and has actively participated in the complex market for infrastructure construction and development.
79. The mere fact, however, that information discusses commercial issues, or appears in board papers, minutes and agenda of the kind comprising the documents containing the information in issue does not of itself lead to an automatic presumption disclosure under the RTI Act would, on balance, be contrary to the public interest.
80. An agency seeking to refuse access, or a third party objecting to disclosure, must demonstrate that there is a legitimate ground recognised in the RTI Act on which access to specific information may be refused – that, in this context, disclosure of the information would, on balance, be contrary to the public interest. This, in turn, requires an agency or third party to:
- identify nondisclosure factors,
  - clearly specify the information to which such factors are said to apply,
  - establish the elements particular to a given factor so as to enliven that factor for consideration, and
  - demonstrate that the factor or factors are of sufficient weight so as to outweigh those favouring disclosure.
81. I do not consider that either the Council or CNI have met these requirements in this case.
82. There is a considerable amount of information in issue that is innocuous, such as routine administrative information, and/or information in the public domain.<sup>79</sup> It is

<sup>75</sup> The Council's submissions in the review dated 7 December 2011 do not address section 47(3)(b) contrary to public interest matters at all, focussing entirely on the question as to whether the information in issue is exempt information as information the disclosure of which would found an action for breach of confidence.

<sup>76</sup> Bearing in mind the onus Council bears to justify its decision: section 87(1) of the RTI Act and note 46 above.

<sup>77</sup> CNI submissions dated 19 December 2011.

<sup>78</sup> The Council's submissions dated 7 December 2011, in the context of claiming the information in issue is exempt information, directly assert as much, contending that '*...the High Court has held business or commercial information is inherently confidential.*' The Council cited the judgment of Mason J in *O'Brien v Komesaroff* (1982) 150 CLR 310 in support of this contention, however on my reading His Honour's judgment is in no way authority for such a blanket statement: indeed, to the contrary, Mason J in that case found that the plaintiff had failed to establish that relevant information – documentation relating to a private company – could '*constitute confidential information.*' (At 326).

<sup>79</sup> On this point it is also worth noting that the projects for which CNI is responsible have been the subject of considerable media reportage (some examples of which are collated on a 'Wikipedia' entry dedicated to Airport Link, [http://en.wikipedia.org/wiki/Airport\\_Link,\\_Brisbane](http://en.wikipedia.org/wiki/Airport_Link,_Brisbane) (accessed 15 March 2012)) and regulatory publication (aspects of Airport Link having formed the subject of a detailed Ombudsman's report: <http://www.ombudsman.qld.gov.au/PublicationsandReports/InvestigativeReports/AirportLinkProjectReport/tabid/420/Default.aspx>). Further, the entity responsible for the project is a listed entity with extensive disclosure and reporting obligations and has together with the construction contractors maintained a dedicated website publishing information about itself (including financial



difficult, if not impossible, to see how disclosure of information of this kind could reasonably be expected to result in prejudice or harm of any kind, and nor, consequently, to be contrary to the public interest.

83. As to the balance of the information in issue, I am unable – in the absence of clear and credible submissions to the contrary – to see how disclosure of information that is now three to five years old could be reasonably expected to give rise to the various prejudices cited by the Council and CNI, and certainly not to the degree sufficient to displace the various public interest factors favouring disclosure.
84. I will now consider each of the relevant nondisclosure and harm factors cited by the Council and CNI.

### **Prejudice to or adverse effect on business, financial etc. affairs**

85. CNI and/or the Council claim that disclosure of the information in issue could reasonably be expected to:
- prejudice the private, business, professional, commercial or financial affairs of CNI,<sup>80</sup> and
  - cause a public interest harm, by disclosing information concerning business, commercial or financial affairs that could reasonably be expected to have an adverse effect on those affairs or prejudice future supply of like information to government.<sup>81</sup>
86. As noted above, Council's decision simply cites relevant factors and asserts their application to the information in issue. Council has not discharged the onus incumbent upon it in relation to any of the relevant nondisclosure factors, and its decision and submissions go no way to establishing these factors for consideration in this case.
87. CNI relevantly contends that disclosure of the information would:
- reveal '*methods and tactics*' used by CNI to '*maintain a competitive tension*' in conducting the tender processes for delivery of the relevant infrastructure projects, and to therefore '*deprive CNI of the utility of its sensitive and confidential commercial and business methods...by diminishing CNI's capacities to conduct future projects using these strategies and approaches*', and
  - inhibit '*future frank and fearless internal disclosures*' to the CNI board, by revealing the '*financial performance of CNI*' and its '*internal management affairs*'.<sup>82</sup>
88. In its submissions dated 19 December 2011, CNI argued:

*The CNI board does not operate in public. It makes commercial decisions in the context of managing a major tender process and subsequent contract as a significant commercial business. The commercial interests of CNI and those of tenderers and the ultimate*

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reports and ASX statements) and the projects (including minutes of community reference group meetings): see generally [www.brisconnections.com.au](http://www.brisconnections.com.au) (accessed 14 March 2012). Finally, relatively substantial amounts of information concerning the projects, the participants, third parties affected and CNI's formation and activities have been released pursuant to previous RTI access applications: in this regard see for example DEEDI's Disclosure Log: [http://www.deedi.qld.gov.au/documents/RTI/016\\_10-D-Log-Web-Versoim.pdf](http://www.deedi.qld.gov.au/documents/RTI/016_10-D-Log-Web-Versoim.pdf) (accessed 15 March 2012).

<sup>80</sup> Schedule 4, part 3, item 2 and the substantially similar item 15 of the RTI Act, which provides for a factor favouring nondisclosure where disclosure could reasonably be expected to prejudice 'trade secrets, business affairs or research of an agency or person'. Neither Council nor CNI have sought to claim disclosure would prejudice 'private' or 'professional' affairs or 'trade secrets' or 'research', and there is nothing on the face of the information to suggest it concerns any of these interests nor that disclosure would prejudice same. In accordance with the nature of the information, and the tenor of participant submissions, I have considered relevant factors in terms of prejudice to business, financial and/or commercial affairs.

<sup>81</sup> Schedule 4, part 4, item 7(1)(c) of the RTI Act. Neither the Council nor CNI contends that disclosure would prejudice the future supply of like information to government, which would in this context appear to require an argument CNI would desist from briefing and reporting to its members.

<sup>82</sup> Submissions dated 19 December 2011.

*contractor can become directly opposed. The Board is entitled to be confident in its ability to conduct its business within the Board room robustly and with the utmost candour in the knowledge that its briefings and deliberations are confidential. The value of the material that informs and records the deliberative process of the Board is seriously diminished if it was to be available to tenderers and the contractor throughout the progress of the project. It should not be necessary for CNI to have to substantiate further such a fundamentally obvious and compelling proposition.*

89. The adverse effect required by the business affairs harm provision will almost invariably be financial in nature, whether directly or indirectly (for example, an adverse effect on an entity's '*business reputation or goodwill ... is feared ultimately for its potential to result in loss of income or profits, through loss of customers*').<sup>83</sup> In most instances the question of whether disclosure of information could reasonably be expected to have an adverse effect will turn on whether the information is capable of causing competitive harm to the relevant entity – ie., CNI.<sup>84</sup> Although safeguarding against 'prejudice'<sup>85</sup> to' rather than 'adverse effect on', I consider the two nondisclosure factors cited by the Council and CNI require a reasonable expectation of similar harm.
90. In my letters to CNI and the Council dated 11 November 2011, I queried whether CNI could be said to be liable to competitive harm, given that it appears to be an instrument of government action operating in an effective monopoly. CNI refuted this characterisation, pointing to the existence of private infrastructure project management firms and arguing that the fact that CNI has only one client – the State – does not make it a monopolist.
91. As noted above, I acknowledge CNI renders services to the government in the complex field of infrastructure development. I also note, however, that CNI is an entity created and owned by government, controlled by a board of senior public servants, undertakes '*Queensland Government activities*'<sup>86</sup> and is economically dependant on government.
92. In this context, it seems that the agencies with a CNI shareholding and/or supplying CNI's funding would be the entities most exposed to any adverse effects or prejudices that might conceivably flow from disclosure of the information in issue, rather than CNI itself. They, therefore, would appear to be the entities best positioned to make submissions as to any prejudice to or adverse effect on business, commercial or financial affairs. Despite invitation, these agencies have declined to make any such submissions.
93. In any case, even assuming CNI is itself directly possessed of relevant business etc, interests susceptible to prejudice or adverse effect, its broad assertions as to the application of the relevant harm and nondisclosure factors does not provide a sufficient basis for me to form a reasonably based view that disclosure would result in the required harms or prejudices. As noted, much of the information is innocuous – disclosure of information revealing routine administrative information such as the time and date of board meetings, 'snippets' of press reports, or publicity events cannot be said to reveal sensitive 'strategies and approaches'. Similarly, considerable amounts of information on CNI's internal financial affairs appear in its publicly available annual reports.

<sup>83</sup> *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 (**Cannon**), at paragraph 82. These comments were made in the context of section 45(1)(c) of the FOI Act but provide useful guidance on the interpretation of schedule 4, part 4, item 7(1)(c) of the RTI Act, drafted in substantially similar form.

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

<sup>85</sup> Adopting the ordinary meaning of the term 'prejudice': see *Daw and Queensland Rail* (Unreported, Queensland Information Commissioner, 24 November 2010) at paragraph 16 for a succinct exposition of the meaning of 'prejudice' as used throughout the RTI Act.

<sup>86</sup> To quote Professor Weller and Ms Webbe: see note 48.

94. As to information describing dealings with external third parties such as consultants, tenderers and final contractors, I acknowledge that commercial interests may from time to time be opposed in a given transactional context. I also note again, however, that the information in issue is now considerably aged, the tender processes to which much of it relates concluded some time ago and indeed the relevant projects themselves are now complete or within weeks of completion.<sup>87</sup> None of the information appears to reveal any sensitive or novel business practices or strategies, and it is not apparent to me how disclosure of what is essentially historical information concerning relatively early stages of specific infrastructure development processes could now undermine unspecified 'commercial interests'.
95. In the absence of clear and credible submissions identifying specific information and demonstrating how disclosure of that information could at the present time subvert CNI's position so as to occasion an adverse or prejudicial effect within the meaning of the relevant nondisclosure factors, I am not satisfied these effects could reasonably be expected to occur.
96. As to CNI's claims that disclosure of the information in issue would inhibit the 'internal' flow of information to the board (so as to adversely affect or prejudice its business etc. affairs, assuming, for present purposes, that these can be said to exist), I note that, apart from the fact there is no probative evidence before me to support this claim, failure of relevant officers to advise and inform the board (and for the board to discuss such advice) would<sup>88</sup> seemingly expose those officers to sanction and/or liability for breach of duty under the *Corporations Act 2001*<sup>89</sup> and the general law, so as to render any inhibition of reporting unlikely.<sup>90</sup>
97. CNI contends that '*it is for the very purpose of allowing the Board to perform [these] duties robustly and without inhibition that the deliberations of the Board are undertaken in strictest confidence*'.<sup>91</sup> Officers cannot, however, elect whether to observe applicable duties and obligations, depending on whether particular board proceedings may or may not be kept confidential. Relevantly duties must be observed.
98. In any event, CNI has not tendered any evidence suggesting the internal 'flow' of information would be inhibited as alleged. Given the fact that many of CNI's officers are public servants, I think it reasonable to assume that these individuals would no doubt recognise they are performing an important public function within CNI involving significant amounts of public money and concerning the delivery of critical public infrastructure. I find it difficult to believe that these officers would have refrained, or would in future refrain, from frankly discussing issues of such public significance, merely because minutes of their discussions might at some stage be made public.
99. The RTI Act contains safeguards to ensure the protection of genuinely sensitive commercial information and interests in appropriate cases. In this case, however, I am not satisfied the requirements of the relevant 'business affairs' public interest harm and nondisclosure factors are satisfied. Accordingly, they do not arise to be considered in assessing the balance of the public interest.

<sup>87</sup> CNI's website notes the Northern Busway reached 'practical completion' on 30 April 2012, with Airport Link to be complete by 20 August: 'Planning for completion', <http://www.citynorthinfrastructure.com.au/> (accessed 9 May 2012).

<sup>88</sup> As I explained in my letter to CNI dated 11 November 2011.

<sup>89</sup> Such as the general obligation of care and diligence imposed by section 180(1) of the *Corporations Act 2001*.

<sup>90</sup> Noting that a prejudice to a future supply of information cannot reasonably be expected where individuals are under an obligation or may be compelled to continue such supply, or where such persons would incur disadvantage if they failed to provide information (such as legal penalty or sanction): *B and BNRHA*, at paragraph 161. The Information Commissioner was discussing prejudice to future supply to government, a specific prejudice which appeared in exemption provisions in the FOI Act and is repeated in the RTI Act, including schedule 4, item 7(1)(c). As noted above (note 81), neither CNI nor the Council has raised that specific prejudice as it appears in the relevant harm factor in this case, however the Information Commissioner's observations in *B and BNRHA* are equally applicable in the present context.

<sup>91</sup> Submissions dated 19 December 2011.

### **Disclose information of a commercial value**

100. Disclosure of information is also presumed to cause a public interest harm where disclosure:
- would disclose information that has a commercial value, and
  - could reasonably be expected to destroy or diminish that commercial value.<sup>92</sup>
101. This 'commercial value' harm factor was cited in Council's decision and although not expressly claimed by CNI to apply, is arguably raised by various references in its submissions to the commercial value of the information.
102. I am not satisfied the information in issue possesses any inherent commercial value<sup>93</sup> within the meaning of this provision. I cannot see how matter comprising summaries of press reports, stakeholder engagements and the internal administrative affairs of CNI could be said to possess a commercial value of any kind. Further, all of the information is now so aged such that, in the absence of cogent evidence to the contrary, it is my view that any commercial value in the balance of the information, if it ever did exist, would no longer do so. Nor can I identify any independent third party purchaser – a genuine 'arm's-length' buyer<sup>94</sup> – who would be prepared to pay for access to aged information concerning tendering processes long concluded or projects now either complete or about to be completed.
103. I do not consider the information in issue has a commercial value that could reasonably be expected to be diminished by disclosure. The 'commercial value' harm factor does not arise for consideration in this case.

### **Matter affecting confidential communications**

104. The RTI Act recognises that disclosure of information could reasonably be expected to cause a public interest harm if:<sup>95</sup>
- the information consists of information of a confidential nature that was communicated in confidence; and
  - disclosure of the information could reasonably be expected to prejudice the future supply of information of this type.
105. I have noted above in discussing the breach of confidence exemption my view that considerable segments of the information in issue could not be said to comprise 'information of a confidential nature' as required by this factor. The factor cannot apply to information of this kind.
106. In any event, I do not consider that disclosure of any of the information in issue – confidential or otherwise – could reasonably be expected to prejudice future supply of like information.
107. As with other harm and nondisclosure factors it raised,<sup>96</sup> the Council did not attempt to satisfy the elements of this provision nor explain how it might apply to the information in issue.<sup>97</sup> In the present context, a contention that disclosure would prejudice future supply essentially amounts to an argument that CNI would refuse to supply those

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<sup>92</sup> Schedule 4, part 4, item 7(1)(b) of the RTI Act.

<sup>93</sup> Within the meaning of that phrase as used in the RTI Act, explained in *Cannon* at paragraphs 51-60.

<sup>94</sup> The second possible interpretation of the phrase 'commercial value' as used in this provision: *Cannon*, at paragraphs 51-60.

<sup>95</sup> Schedule 4, part 4, item 8 of the RTI Act.

<sup>96</sup> CNI did not rely upon this provision.

<sup>97</sup> In either its decision, or submissions in response to my letter dated 11 November 2011, which expressly pointed out the deficiencies in that decision as summarised generally in paragraph 75 above and specifically in this and paragraph 105.

directors who are also public officers<sup>98</sup> with the very tools – meeting agendas, minutes and board papers – required to permit directors to effectively govern CNI and meet their duties as company officers of a publicly-funded company. Action of this kind would prejudice CNI's operations and affairs to a far greater extent than would disclosure of the information in issue, such that it cannot be regarded as reasonably likely to occur.

### **Affecting financial or property interests**

108. The RTI Act presumes a public interest harm where disclosure could have a substantial adverse effect on the financial or property interests of the State or an agency.<sup>99</sup> As the Council itself has pointed out, CNI is not an 'agency'.<sup>100</sup> Thus even if it could be demonstrated that CNI was both possessed of financial and property interests and that disclosure could substantially adversely affect those interests, the factor could not apply. The factor can only apply where there is evidence that disclosure could reasonably be expected to have a substantial adverse effect on the financial interests of the State or a recognised government agency.
109. The Council submitted no evidence in this regard. Nor did any of the departments who hold or held a material interest in CNI and who would conceivably comprise the relevant administrative units of the State and/or 'agencies' possessed of the interests susceptible to the harm against which the provision seeks to safeguard.
110. There is nothing before me to suggest that disclosure of information that is now three to five years old could reasonably be expected to have the required substantial adverse effect.<sup>101</sup> In the circumstances, I do not consider the factor arises for consideration in balancing the public interest in this case.

### **Disclosure of information prohibited by an Act**

111. The Council submitted that Mr Stewart was bound to keep confidential the information in issue by application of section 183 of the *Corporations Act 2001*. Section 183 of that Act provides that persons who obtain information because they are or have been a director of a corporation must not improperly use that information to gain an advantage for themselves or someone else or to cause detriment to the corporation.
112. The RTI Act recognises a nondisclosure factor where disclosure of information is prohibited by an Act.<sup>102</sup> Crucially, section 183 is only breached by an 'improper use' that is undertaken in order to secure advantage or cause detriment.<sup>103</sup> Accepting that disclosure of the information in issue in this case comprises a 'use', it will be a use made for the purpose not of securing advantage nor causing detriment, but for discharging obligations imposed by the Parliament of Queensland through the RTI Act.
113. The 'use' of the information in these circumstances can hardly be cast as 'improper', and, in any event, will as noted be undertaken purely for the purposes of satisfying a legislative obligation. Such statutorily mandated disclosure does not in my view constitute an improper use for a purpose proscribed by section 183. I do not consider

<sup>98</sup> Noting the Information Commissioner's observations in *B and BNRHA* that the aim of this provision is directed at '*minimising any prejudice to the future supply to government agencies of needed confidential information*' (commenting on section 46(1)(b) of the repealed FOI Act, the material equivalent, as far as is relevant, of this harm factor).

<sup>99</sup> Schedule 4, part 4, item 10 of the RTI Act.

<sup>100</sup> *City North Infrastructure v Information Commissioner*.

<sup>101</sup> The adjective 'substantial' in the phrase 'substantial adverse effect' means grave, weighty, significant or having a serious effect: *Cairns Port Authority and Department of Lands* (1994) 1 QAR 663, at paragraphs 148-150.

<sup>102</sup> Council did not expressly cite this factor, but the relevant submission arguably gives rise to a contention as to its application.

<sup>103</sup> *Chew v The Queen* (1992) 173 CLR 626 at 633.

the section is in any way engaged, and nor that this nondisclosure factor arises to be considered in evaluating the balance of the public interest.

### ***Balancing the public interest***

114. Even if the requirements for one or more of the various public interest harm and nondisclosure factors discussed above were satisfied so as to require me to take them into account in balancing the public interest, I am satisfied that any or all of them would be outweighed by a number of public interest considerations favouring disclosure of the information in issue, each of which merit substantial weight.
115. I discussed the public interest factors favouring disclosure in some detail in the context of my consideration of the *Fairfax Doctrine*.<sup>104</sup> For present purposes it is sufficient to record that I consider there to be a significant public interest in allowing the public access to information of the kind in issue, so as to permit community access to information concerning the delivery – through somewhat novel and not uncontentious means<sup>105</sup> – of key public infrastructure. Disclosure will enhance the transparency of government and CNI operations and the special purpose vehicle model generally, heighten the accountability of government and CNI for their disbursement, administration and expenditure of considerable amounts of public monies, and foster public knowledge and discussion of the relative costs and benefits of the special purpose vehicle model.
116. CNI was, in its own words, '*established to represent the State and communities of Queensland on major infrastructure projects.*'<sup>106</sup> Disclosure of the information in issue will allow those communities to assess and evaluate the nature and quality of that representation. There is a clear public interest in facilitating this community engagement.
117. Accordingly, taking into account:
- the various factors favouring disclosure of the information in issue identified above, each of which warrant substantial weight, and
  - the absence of any identifiable factors favouring nondisclosure (which, even if any or all were established, would be outweighed by the factors favouring disclosure),

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

### **Legal professional privilege**

118. In its submissions dated 7 June 2011 CNI asserted that the information in issue contains legally privileged reports and references throughout to legal services and legal advice. The RTI Act recognises legally privileged information as a category of exempt information.<sup>107</sup>
119. In my letter dated 11 November 2011 I advised CNI that if it wished to maintain this claim, it would need to clearly identify relevant information. CNI did not do so, and provided no further submissions or evidence on the issue.
120. There are segments of information appearing in the documents that on their face arguably comprise legally privileged advice obtained by CNI in the course of its

<sup>104</sup> See paragraphs 51-52.

<sup>105</sup> See note 48.

<sup>106</sup> CNI homepage: [www.citynorthinfrastructure.com.au](http://www.citynorthinfrastructure.com.au) (accessed 23 February 2012).

<sup>107</sup> Schedule 3, section 7 of the RTI Act.

operations. As noted, the Applicant does not seek access to information of this kind, and it is not in issue.

121. Without CNI's assistance, however, there is insufficient evidence before me to allow me to assess whether the exemption may apply to any other information. Accordingly, I cannot find that any of the information in issue comprises exempt information on this basis.

### **Substantial and unreasonable diversion of resources**

122. In its original submissions<sup>108</sup> CNI also argued that the Council 'should have refused to deal with the application' under section 41(2) of the RTI Act, on the basis that to do so comprises a substantial and unreasonable diversion of the Council's and CNI's resources.
123. In my letter dated 11 November 2011, I advised CNI of my preliminary view that it was not open for a third party in CNI's position to invoke this provision. CNI has not pressed this claim. Neither, however, has it expressly abandoned the original submission.
124. Accordingly, for the sake of completeness, I record my finding that this claim is misconceived. Section 41(2) is not a basis for objection to disclosure by a third party. The discretion conferred by the section is only open to be exercised, relevantly, by an agency.
125. The Council did not, appropriately in my view, seek to invoke section 41(2), but processed the application in accordance with the requirements of the RTI Act. It is not open for CNI to seek to rely on the provision.

### **DECISION**

126. I set aside the decision under review and in substitution find that the information in issue is not exempt information and that its disclosure would not, on balance, be contrary to the public interest.
127. There being no grounds established on which access to the information in issue may be refused under section 47 of the RTI Act, the Applicant is therefore entitled to access the information in accordance with the right of access contained in section 23 of the RTI Act.

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**Julie Kinross**  
**Information Commissioner**

**Date: 9 May 2012**

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<sup>108</sup> Dated 7 June 2011.

## APPENDIX

### Significant procedural steps

Date	Event
21 June 2010	The Applicant applied to the Council under the RTI Act for access to 'All board minutes or shareholder monthly reports in the possession of Mr Scott Stewart, from the period of his tenure as the Brisbane City Council Representative on the Board of City North Infrastructure P/L.' (CNI).
26 July 2010	The Council refused access to the documents on the basis that they comprised exempt information under section 48 of the RTI Act.
24 August 2010	The Applicant applied to the Council for internal review of the decision.
22 September 2010	The Council affirmed its initial decision on internal review and found alternatively, that access could be refused under section 47(3)(b) of the RTI Act.
13 October 2010	The Applicant applied to OIC for an external review.
13 October 2010	OIC notified the Applicant and the Council that the external review application had been received.
29 October 2010	OIC notified the Applicant and the Council that the external review application had been accepted and asked the Council to provide copies of the documents relevant to the review.
12 November 2010	OIC received the relevant documents from the Council.
20 April 2011	OIC requested further information from the Council and invited CNI to participate in the external review.
10 May 2011	OIC received further information from the Council.
6 June 2011	OIC received submissions from the Applicant.
14 June 2011	OIC received submissions from CNI objecting to disclosure dated 7 June 2011.
4 July 2011	OIC requested further information and documentation from CNI concerning its objections to disclosure.
18 July 2011	OIC received further information from CNI.
14 October 2011	The Applicant advised OIC the Applicant did not seek access to segments of information appearing throughout documents containing information in issue and withdrawing reliance on 6 June 2011 submissions.
11 November 2011	OIC conveyed a preliminary view to the Council, CNI and the Applicant that the documents were subject to the RTI Act, the information in issue did not meet the requirements for exemption under schedule 3 section 8 of the RTI Act, and disclosure of the information would not, on balance, be contrary to the public interest. OIC invited participants to provide submissions.
23 November 2011	OIC wrote to Department of Transport and Main Roads, Department of Employment, Economic Development and Innovation and Queensland Treasury conveying preliminary view on issues, and inviting each agency to make submissions and to participate in the external review.



5 December 2011	Department of Transport and Main Roads advised OIC it did not intend to make any submissions nor apply to participate in the external review.
7 December 2011	The Council advised OIC it did not accept OIC's preliminary view and provided submissions in support of its case.
14 December 2011	OIC received submissions from Queensland Treasury dated 9 December 2011 contending documents in issue were not subject to the RTI Act and applying to participate in the external review.
19 December 2011	CNI advised OIC it did not accept OIC's preliminary view and provided submissions in support of its case.
19 December 2011	OIC conveyed its preliminary view to Queensland Treasury that the documents in issue are subject to the RTI Act.
20 January 2012	OIC received notification from Queensland Treasury that it affirmed its earlier submissions but did not intend to make any further submissions in the external review.
19 January 2012	Department of Employment, Economic Development and Innovation advised OIC it did not intend to participate in the external review.
20 March 2012	The Applicant advised OIC the Applicant did not seek access to further segments of information appearing throughout documents containing information in issue.