



Decision and Reasons for Decision

Application Number:	310147
Applicant:	Gordon Resources Limited
Respondent:	Department of Employment, Economic Development and Innovation
Third Party:	BHP-Billiton Mitsubishi Alliance Coal Operations Pty Ltd
Decision Date:	21 September 2011
Catchwords:	RIGHT TO INFORMATION – APPLICATION FOR ACCESS TO INFORMATION - REFUSAL OF ACCESS – applicant sought information about royalty returns lodged with the Department of Employment, Economic Development and Innovation – whether disclosure of the information would, on balance be contrary to the public interest - section 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)

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REASONS FOR DECISION

Summary

1. The applicant made an access application¹ under the *Right to Information Act 2009* (Qld) (**RTI Act**) to the Department of Employment, Economic Development and Innovation (**Department**) for:
 - 1) *Documents relating to the royalty return provided by BHP-Billiton/Mitsubishi Alliance (BMA) for the September 2008 quarter for the Gregory-Crinum coal mine. In particular information relating to the private royalty payable for the following land; Lot 8 on RP615390 and Lot 10 on RP615394 and Lot 12 on RP616394 in which Gordon Resources Ltd own a 50% interest.*
 - 2) *The assessment for the September 2008 Quarter of royalty payable made by the chief executive pursuant to regulation 44.*
2. The access application arises in the context of an alleged overpayment of private royalty to the applicant for the September 2008 quarter by BHP-Billiton Mitsubishi Alliance Coal Operations Pty Ltd (**BMA**). The applicant submits that its attempts to obtain information to verify the accuracy of BMA's assessment of the alleged overpayment have been unsuccessful, and therefore it has resorted to the RTI process.²
3. The Department identified ten pages responsive to part 1 of the access application (**Documents in Issue**) and, after consulting with a relevant third party, decided³ to refuse access to those pages on the basis that disclosure would, on balance, be contrary to the public interest. With regard to part 2 of the access application, the Department explained that no assessment had been undertaken for the relevant quarter and accordingly decided that no responsive documents existed.
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision.⁴
5. As a result of informal resolution processes, some parts of the Documents in Issue were eliminated from consideration in this review.⁵ In relation to the remaining parts of the Documents in Issue, having considered all submissions and information before me, I am satisfied that:
 - access to some information⁶ may be refused,⁷ on the basis that its disclosure would, on balance, be contrary to the public interest; and
 - the balance of information⁸ should be released to the applicant, as its disclosure would **not**, on balance, be contrary to the public interest.

Reviewable decision

6. The decision under review is the Department's decision dated 2 March 2010.

¹ On 21 December 2009.

² By submissions dated 4 March 2011.

³ By decision dated 2 March 2010.

⁴ On 16 March 2010.

⁵ See paragraph 7 below.

⁶ Parts of pages 5, 8 and 10 of the Documents in Issue.

⁷ Under sections 47(3)(b) and 49 of the RTI Act.

⁸ Parts of pages 8 and 10 of the Documents in Issue.

Information in Issue

7. During the course of the external review, the applicant:
 - accepted⁹ that the Department did not hold any documents responsive to part 2 of the access application
 - accepted¹⁰ OIC's preliminary view¹¹ that some information¹² in the Documents in Issue is irrelevant¹³ to the access application; and
 - confirmed¹⁴ that it did not wish to pursue access to the personal information of the BMA employee who signed the royalty return in the Documents in Issue.¹⁵
8. Further, the Department and BMA¹⁶ accepted¹⁷ OIC's preliminary view that some information should be released to the applicant.¹⁸ Accordingly, OIC asked the Department to provide this information to the applicant.¹⁹
9. The parts of the Documents in Issue that remain in issue for the purpose of this decision are parts of pages 5, 8 and 10. Specifically, this information comprises:
 - **BMA Information**²⁰—for example, tonnage, revenue, applicable royalty rates, deductions (including port charges) and rail freight; and
 - **Aggregate Private Royalty Information**²¹—figures regarding the total of royalties payable to all relevant private land holders presented as aggregate amounts.

Issues in this review

10. The applicant does not accept OIC's preliminary view²² that disclosure of the BMA Information would, on balance, be contrary to the public interest²³ and has provided submissions in support of its case.²⁴

⁹ By submissions dated 4 March 2011.

¹⁰ By submissions dated 14 June 2011.

¹¹ By telephone conversation between OIC staff and representatives of the applicant on 2 June 2011 and by letter to the applicant dated 7 June 2011, and confirmed by letter to the applicant dated 20 July 2011.

¹² That is, pages 1, 2, 3, 6 and 9, and parts of pages 4, 5, 7, 8 and 10 of the Documents in Issue.

¹³ The irrelevant information is irrelevant under section 73 of the RTI Act or does not fall within the scope of the applicant's application. It is comprised by information that has no bearing on private royalty payments (for example, information about royalty payments to the Crown and whether particular leases are producing or not (which provide no means of enabling calculation of private royalties), and information about mines other than the Gregory-Crinum mine or minerals other than coal.

¹⁴ By submissions dated 25 July 2011.

¹⁵ That is, parts of pages 4 and 7 of the Documents in Issue.

¹⁶ Consulted under section 97(4) of the RTI Act, and joined as a participant in the external review under section 89(2) of the RTI Act.

¹⁷ By telephone conversation with OIC staff on 23 June 2011, the Department accepted OIC's preliminary view to it dated 17 June 2011 and 7 July 2011. By correspondence dated 24 June 2011 and 13 July 2011, BMA's submissions objecting to disclosure related only to the Aggregate Private Royalty Information, and BMA was therefore taken to accept OIC's preliminary view to it dated 17 June 2011 and 7 July 2011 that the BMA Information should be released to the applicant.

¹⁸ That is, parts of pages 4, 5, 7, 8 and 10 of the Documents in Issue.

¹⁹ As confirmed in correspondence to all parties dated 19 August 2011.

²⁰ Parts of pages 5, 8 and 10 of the Documents in Issue.

²¹ Parts of pages 8 and 10 of the Documents in Issue.

²² By telephone conversation between OIC staff and representatives of the applicant on 2 June 2011 and by letter to the applicant dated 7 June 2011, clarified in a telephone conversation between OIC staff and representatives of the applicant on 28 June 2011 (in which the applicant was advised of OIC's preliminary view that the Aggregate Private Royalty Information should be released to it), and confirmed by letter to the applicant dated 20 July 2011.

²³ Under sections 47(3)(b) and 49 of the RTI Act.

²⁴ Dated 4 March 2011, 14 June 2011 and 15 August 2011.

11. BMA does not accept OIC's preliminary view²⁵ that the Aggregate Private Royalty Information should be released to the applicant and has provided submissions in support of its case.²⁶
12. Therefore, the issues for determination are whether disclosure of the BMA Information and the Aggregate Private Royalty Information would, on balance, be contrary to the public interest.

Significant procedural steps

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

Evidence relied upon

14. In reaching this decision, I have taken the following into account:
 - the applicant's access application, application for external review and supporting material
 - the Department's decision
 - submissions provided by the applicant, the Department and BMA
 - file notes of telephone conversations between OIC staff and representatives of the applicant, OIC staff and Department staff, and OIC staff and BMA
 - file notes of a meeting between OIC staff and Department staff
 - the Documents in Issue
 - a KPMG Report dated 15 February 2010 (**KPMG Report**)²⁷
 - relevant provisions of the RTI Act and the *Mineral Resources Act 1989* (Qld) (**MR Act**)
 - 'Determination of Coal Royalty Min 140' Policy²⁸ issued by the Department of Mines and Energy²⁹ (**Policy 140**); and
 - previous decisions of the Information Commissioner of Queensland and other relevant case law as identified in this decision.

The law

15. Under section 23 of the RTI Act, a person has a right to be given access to documents of an agency. However, this right is subject to a number of exclusions and limitations, including grounds for refusal of access. These grounds are contained in section 47 of the RTI Act.
16. Relevantly, sections 47(3)(b) and 49 of the RTI Act provide a ground for refusal of access where disclosure of information would, on balance, be contrary to the public interest. In determining whether disclosure of the information sought would, on balance, be contrary to the public interest I must:³⁰

²⁵ By letters dated 17 June 2011 and 7 July 2011.

²⁶ Dated 24 June 2011, confirmed in telephone conversation with OIC staff on 28 June 2011 and by email dated 13 July 2011.

²⁷ Provided to the applicant by means other than the access application subject to this review and obtained by OIC from the applicant under section 103 of the RTI Act.

²⁸ 'Determination of Coal Royalty Min 140', Department of Mines and Energy http://www.dme.qld.gov.au/zone_files/royalties/policy_no_140.pdf, effective 1 July 2008.

²⁹ Now part of the Department as defined for the purpose of this decision.

³⁰ Section 49(3) of the RTI Act.

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

Findings

Irrelevant factors

17. The Department notes that disclosure of a small amount of the Aggregate Private Royalty Information³¹ could reasonably be expected to result in the applicant misinterpreting or misunderstanding the information, due to an error in the title for that information.³² This factor is irrelevant to my decision regarding whether disclosure of the Documents in Issue would, on balance, be contrary to the public interest.
18. No other irrelevant factors arise on the information before me.

Factors favouring disclosure of the information in issue

19. I have carefully considered the applicant's submissions³³ regarding public interest factors favouring disclosure of the BMA Information and Aggregate Private Royalty Information.

Open discussion and accountability

20. On the information before me, I am satisfied that disclosure of the BMA Information and the Aggregate Private Royalty Information could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability,³⁴ because the information enables consideration of the State's level of oversight regarding royalties payable to it and to private royalty recipients. This comprises a factor favouring disclosure of the BMA Information and the Aggregate Private Royalty Information.

Information regarding royalty payments not otherwise available

21. The applicant's submissions³⁵ include the following background information:
 - the applicant holds a 50% interest in three properties on which the Gregory-Crinum Coal mine (**Mine**) is situated
 - the Mine is owned and operated by BMA
 - the applicant has a private mineral royalty right in minerals extracted from the Mine, as each of the three properties in which it has a 50% interest comprise freehold land granted prior to May 1910
 - BMA is responsible for lodging royalty returns with the State under section 320(4) of the MR Act.

³¹ That is, the first line item on page 8 of the Documents in Issue.

³² The line item appears to relate to the applicant only—however, both the Department and BMA advise that the figures in the line are aggregate figures for all relevant private royalty holders, not just the applicant.

³³ Dated 4 March 2011 and 14 June 2011.

³⁴ Schedule 4, part 2, item 1 of the RTI Act.

³⁵ Dated 4 March 2010.

22. The applicant advises that it made the access application that is the subject of this external review because its other attempts to obtain information to verify the accuracy of an alleged overpayment for the September 2008 quarter have been unsuccessful.
23. While Policy 140 provides a prescribed formula and valuation methodology for royalty payments, without specific data it provides no assistance to the applicant in assessing the private royalty payable for a particular quarter. The applicant submits, and the Department has confirmed,³⁶ that:
 - the applicant cannot compel the relevant Minister to exercise his discretion to conduct an audit of a royalty return
 - there are no statutory obligations on BMA to provide specific data or information used to calculate royalties payable to private royalty recipients;³⁷ and
 - there is no contractual arrangement between the applicant and BMA that provides the applicant with rights to verify the accuracy of royalty information provided to the State, and no incentive for BMA to enter such an arrangement.
24. The applicant advises that an informal arrangement exists between it and BMA, where KPMG verifies the accuracy of the private royalty returns each quarter and provides a letter of assurance to the applicant. The KPMG Report states that private land holders were overpaid in the September 2008 quarter because of an incorrect split between private/government tonnage used in the royalty calculations, and errors in the calculation of allowable deductions.³⁸ However, the information provided under this arrangement has not satisfied the applicant's concerns about the alleged overpayment for the September 2008 quarter.
25. In summary, the applicant submits that there is no apparent method for a private royalty recipient to obtain information to verify an alleged overpayment, and therefore justify offsets against subsequent quarters' royalties, under the current statutory and policy framework.
26. On the information before me, I am satisfied that there is a public interest factor favouring disclosure of the Aggregate Private Royalty Information and the BMA Information because disclosure would respectively provide a private royalty recipient with further information regarding aggregate private royalty payment amounts assessed as being payable, and figures used in calculations leading to such amounts, in circumstances where there is no other mechanism enabling a private royalty recipient to obtain such information.
27. In this regard, I note that if the BMA Information and the Aggregate Private Royalty Information were released, the applicant could check the internal accuracy of the mathematics applied to figures in various line items to calculate figures in other relevant line items.
28. I also note that the Aggregate Private Royalty Information in particular would enable the applicant to cross-check that information against figures in the KPMG report, and the initial amount it actually received from BMA (which was offset over subsequent quarters).

³⁶ On 31 May 2011.

³⁷ I note this is in contrast to the obligations imposed on BMA as holder of a mining tenure to provide certain information to the State under Part 9 of the MR Act.

³⁸ Pages 2 and 3 of the section of the KPMG Report regarding the September 2008 quarter.

Administration of justice

29. The applicant seeks to verify the accuracy of the alleged overpayment in dispute. In this regard, I am satisfied that disclosure of the BMA Information and the Aggregate Private Royalty Information could reasonably be expected to contribute to the administration of justice generally,³⁹ by avoiding unnecessary litigation in circumstances where a commercial dispute has the potential to be resolved between the relevant parties. There is a public interest in disclosure of information that may avoid placing unnecessary burden on the court system and its related public resources.

Comments regarding the applicant's submissions

30. It is relevant to explain the basis upon which I do not consider a number of public interest factors identified by the applicant apply in this review. The applicant submits that disclosure of the BMA Information and the Aggregate Private Royalty Information:
- may allow a private royalty recipient to assess the accuracy of its royalty payments, and that there is no other mechanism enabling a private royalty recipient to do so
 - could reasonably be expected to reveal that the information is incorrect⁴⁰
 - further a public interest in ensuring that information provided by commercial entities to government is accurate, especially when such information affects the statutory entitlements of third parties; and
 - could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.⁴¹
31. The BMA Information and the Aggregate Private Royalty Information are comprised by various figures. Given the content of the KPMG Report, it appears likely that the BMA Information or the KPMG Report include inaccuracies, possibly regarding tonnage and allowable deductions.
32. On careful examination of the BMA Information, I am satisfied that the various figures that comprise it:
- do not indicate the data or methodology on which they are based that would enable assessment of their accuracy; and
 - do not include revised figures, data or methodology subsequently identified as accurate that would enable identification and examination of the inaccurate figures.
33. Further, I note that the applicant does not have possession or control of revised figures, data or methodology that would provide a point of comparison and enable identification and examination of the inaccurate figures.⁴²
34. Therefore, while it appears possible to examine the internal accuracy of the figures that comprise the BMA Information and the Aggregate Private Royalty Information,⁴³ I am satisfied that doing so would not enable identification and examination of which figures in which line items were inaccurate, to what extent they were inaccurate, or to what

³⁹ See Schedule 4, part 2, item 16 of the RTI Act.

⁴⁰ Schedule 4, part 2, item 12(a) of the RTI Act.

⁴¹ Schedule 4, part 2, item 11 of the RTI Act.

⁴² In this regard, I note the applicant's advice in its submissions dated 4 March 2011 that it made the application that is the subject of this external review because its other attempts to obtain relevant information were unsuccessful.

⁴³ As noted at paragraph 27 above.

extent they caused other figures based on them, including the Aggregate Private Royalty Information, to also be inaccurate.

35. Accordingly, I am not satisfied that disclosure of the BMA Information or the Aggregate Private Royalty Information may allow a private royalty recipient to assess the accuracy of the royalty payments. For the same reasons, I am not satisfied that disclosure could reasonably be expected to⁴⁴ reveal that any of the information is incorrect. Given these conclusions, I am also not satisfied that disclosure would further a public interest in ensuring that information provided by commercial entities to government is accurate.
36. Finally, on careful consideration of the BMA Information and the Aggregate Private Royalty Information, I do not consider that this information could reasonably be expected to provide any background or contextual information that informed a government decision. This is because the information was provided by BMA to the Department and there is no apparent connection between that information and a government decision.
37. In summary, I am satisfied that the following factors favour disclosure of the BMA Information and the Aggregate Private Royalty Information:
 - disclosure could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability; and
 - disclosure may provide a private royalty recipient with further information regarding aggregate private royalty payment amounts assessed as being payable, and figures used in calculations leading to such amounts, in circumstances where there is no other mechanism enabling a private royalty recipient to obtain such information.

Factors favouring nondisclosure of the information in issue

38. I have also carefully considered the public interest factors favouring nondisclosure of the BMA Information and the Aggregate Private Royalty Information.

Disclosure is prohibited by section 334 of the MR Act

39. Mineral Royalty Returns are required to be lodged under section 320 of the MR Act. They are subject to section 334 of the MR Act, which provides:

334 Confidentiality of information

- (1) *Except as provided in this section, an officer shall not disclose information or publish a record obtained by that officer or another person in connection with the administration of this part, unless the disclosure or publication is made—*
 - (a) *with the consent (express or implied) of the person to whose affairs the information or record relates; or*
 - (b) *in connection with the administration of this Act; or*
 - (c) *for the purpose of any legal proceeding (including any report thereon) arising out of this Act; or*

⁴⁴ The term 'could reasonably be expected to' requires that the relevant expectation is reasonably based; that it is neither irrational, absurd or ridiculous, nor merely a possibility. It is not necessary for a decision-maker 'to be satisfied upon a balance of probabilities' that disclosing the document will produce the anticipated result. Whether the expected consequence is reasonable requires an objective examination of the relevant evidence. Importantly, the expectation must arise as a result of disclosure, rather than in other circumstances—see *Attorney-General v Cockcroft* (1986) 64 ALR 97 at 106; *Murphy and Treasury Department* (1995) 2 QAR 744; *Sheridan and South Burnett Regional Council (and Others)* (Unreported, Queensland Information Commissioner, 9 April 2009); and *Murphy and Treasury Department* (1995) 2 QAR 744 at paragraphs 45-47 and 54.

(d) *with the consent of the Minister ...*

40. On the information before me, I am satisfied that disclosure of Mineral Royalty Returns is prohibited by section 334 of the MR Act, except in certain specified circumstances. Disclosure under the RTI Act in response to an access application is not one of the exceptions.
41. Accordingly, I am satisfied that a public interest factor favouring non-disclosure of the BMA Information and the Aggregate Private Royalty Information is that disclosure of that information is prohibited by an Act,⁴⁵ namely section 334 of the MR Act.

Impact on BMA's business, commercial or financial affairs

42. The BMA Information comprises information about the Mine's tonnage, revenue, applicable royalty rates,⁴⁶ deductions (including port charges) and rail freight for the September 2008 quarter. Some of the information concerning the Mine is interwoven with information about other mines owned or operated by BMA, which are outside the scope of the access application.⁴⁷
43. After careful consideration, I am satisfied that disclosure of the BMA Information may have a detrimental effect on BMA's business, commercial or financial affairs or place BMA at a disadvantage in relation to those affairs because disclosure would reveal sensitive commercial, business or financial information not otherwise available about:
- the amount of coal mined and prices paid for that coal
 - financial arrangements with and obligations to third party goods and service providers; and
 - the success or otherwise of mines owned or operated by BMA,

and doing so could, in the circumstances, reasonably be expected to:

- affect BMA's dealings with other parties involved in trade with or investment in its mines
 - cause third party goods and service providers to lose confidence in the confidentiality of their private agreements with BMA; and
 - put BMA at a competitive disadvantage.
44. On this basis, I am satisfied that disclosure of the BMA Information could reasonably be expected to:
- prejudice⁴⁸ the business, commercial or financial affairs of an entity,⁴⁹ namely BMA; and
 - cause a public interest harm⁵⁰ because it would disclose information concerning⁵¹ the business, commercial or financial affairs of a person, namely

⁴⁵ Schedule 4, part 3, item 22 of the RTI Act.

⁴⁶ Royalty rates vary depending on the average price per tonne of coal sold, disposed of or used in the relevant quarterly period—'Determination of Coal Royalty Min 140', Department of Mines and Energy http://www.dme.qld.gov.au/zone_files/royalties/policy_no_140.pdf, effective 1 July 2008.

⁴⁷ On page 10 of the Documents in Issue.

⁴⁸ The word '*prejudice*' is not defined in the RTI Act or the *Acts Interpretation Act 1954* (Qld). Therefore, it is appropriate to consider the ordinary meaning of the word. The Macquarie Dictionary contains a number of definitions for the word '*prejudice*', the most relevant being '*resulting injury or detriment*' and '*to affect disadvantageously or detrimentally*'.

⁴⁹ Schedule 4, part 3, item 2 of the RTI Act.

⁵⁰ Schedule 4, part 4, item 7(1)(c) of the RTI Act.

⁵¹ 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—see *Cannon and Australian*

BMA, and could reasonably be expected to have an adverse effect⁵² on those affairs.⁵³

45. On the other hand, after careful consideration of the Aggregate Private Royalty Information, I am satisfied that its disclosure would reveal sensitive commercial, business or financial information about aggregate royalties payable by BMA to private royalty recipients. However, I also note that BMA's submissions objecting to disclosure of this information⁵⁴ related only to the ability of the applicant to calculate royalties paid to other private royalty recipients. Given BMA's submissions, and on the information before me, I am satisfied that disclosure of the Aggregate Private Royalty Information would not prejudice BMA's business, commercial or financial affairs or cause a public interest harm to those affairs.

Impact on other private land holders' business, commercial or financial affairs

46. The Department and BMA have raised concerns that disclosure of the Aggregate Private Royalty Information would necessarily disclose to the applicant royalties payable to other private royalty recipients.⁵⁵ It has not been possible to consult with the other private royalty recipients, as doing so would necessarily disclose to them information of the exact same nature regarding the applicant.
47. On the information before me, I am satisfied that the Aggregate Private Royalty Information concerns the private, business, commercial or financial affairs of the other private royalty recipients, as it is information about their private royalty interests, and therefore about the activities they are involved in for the purpose of generating income or profits.
48. Further, I am satisfied that if the Aggregate Private Royalty Information is disclosed, the applicant may use its knowledge of the other private royalty recipients' relative interests in the land on which the Mine operates (known to the applicant through information contained in the KPMG Report and also publicly available through land title searches) to determine the initial amount of royalties paid to each private land owner for the September 2008 quarter, prior to BMA's revision of those amounts.
49. However, on the information before me, I am unable to identify a detrimental effect of disadvantage to the other private royalty recipients' business, commercial or financial affairs resulting from disclosure of the Aggregate Private Royalty Information. In this regard, I note that information of this nature is already available to the applicant, through its knowledge of the other private royalty recipients' relative interests in the land on which the Mine operates and the initial amount that it actually received from BMA for the September 2008 quarter (which was offset over subsequent quarters). Accordingly, I am not satisfied that disclosure of Aggregate Private Royalty Information

Quality Egg Farms Limited (1994) 1 QAR 491 (**Cannon**) at paragraph 67, which considered the now repealed *Freedom of Information Act 1992* (Qld) exemption upon which this public interest factor was modelled.

⁵² The phrase 'adverse effect' usually refers to the relevant entity being exposed to commercial disadvantage or competitive harm—see generally *Cannon*, at paragraphs 82-84.

⁵³ Prior to making its decision on 2 March 2010, the Department consulted with a relevant third party whose submissions included the comment that disclosure would act as a disincentive to full and frank disclosure of financial information in future royalty returns, raising the alternative basis for the public interest harm listed in schedule 4, part 4, item 7(1)(c) of the RTI Act that disclosure could reasonably be expected to prejudice the future supply of information of this type to government. However, I am not satisfied that disclosure of the BMA Information could cause a public interest harm on this basis, given that provision of such information is required under section 334 of the MR Act.

⁵⁴ Dated 24 June 2011 and 13 July 2011.

⁵⁵ The Department raised these concerns in a meeting on 31 May 2011 and BMA raised them in its submissions dated 24 June 2011 and 13 July 2011.

could reasonably be expected to prejudice⁵⁶ or have an adverse effect⁵⁷ on the business, commercial or financial affairs of the other private royalty recipients.

50. In summary, I am satisfied that the following public interest factors favour nondisclosure of the information:

- disclosure of the BMA Information and Aggregate Private Royalty Information is prohibited by an Act,⁵⁸ namely section 334 of the MR Act
- disclosure of the BMA Information could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of an entity;⁵⁹ and
- disclosure of the BMA Information could reasonably be expected to cause a public interest harm because it would disclose information concerning the business, professional, commercial or financial affairs of an agency or another person and its disclosure could reasonably be expected to have an adverse effect on those affairs.⁶⁰

Balancing factors favouring disclosure and nondisclosure in the public interest

BMA Information

51. I note the importance of open discussion of public affairs and the accountability of government. However, given the nature of the BMA Information, I am not satisfied that its disclosure would further the public interest in open discussion or government accountability to any great extent.
52. I consider that the public interest in providing a private royalty recipient with further information regarding figures used in calculations leading to aggregate private royalty payment amounts is significant—particularly as there is apparently no other mechanism for a private royalty recipient to obtain such information.
53. The public interest in contributing to the administration of justice generally by disclosure of information that may avoid unnecessary litigation is significant here.
54. On the other hand, I note that disclosure of the BMA Information is prohibited by section 334 of the MR Act. However, I also note that the information is not exempt from disclosure under the RTI Act by virtue of the fact that its disclosure is prohibited by section 334 of the MR Act. The prohibition is simply one of a number of public interest factors to be considered.⁶¹
55. The applicant submits that this public interest factor should be given little or no weight, on the basis that:

As the RTI Act is a latter Act, it has the effect of “trumping” the MR [Act] and specifically in an RTI Act context will trump the confidentiality provision in s.334 of the MR [Act]. This position is expressly confirmed by s.6 of the RTI Act which clearly overrides any confidentiality provision in an Act which is not specifically listed in s.12 of Schedule 3 of

⁵⁶ Schedule 4, part 3, item 2 of the RTI Act.

⁵⁷ Schedule 4, part 4, item 7(1)(c) of the RTI Act.

⁵⁸ Schedule 4, part 3, item 22 of the RTI Act.

⁵⁹ Schedule 4, part 3, item 2 of the RTI Act.

⁶⁰ Schedule 4, part 4, item 7(1)(c) of the RTI Act.

⁶¹ In contrast, for those types of information covered by the provisions listed in schedule 3, section 12 of the RTI Act, Parliament has determined that disclosure of would, on balance, be contrary to the public interest in all instances, and has therefore designated such information as exempt information—see section 48(2) of the RTI Act.

*the RTI Act. [In footnote:] The Information Commissioner's decision in Moon and the Department of Health ... confirms this position.*⁶²

56. Section 6 of the RTI Act provides:

6 Relationship with other Acts prohibiting disclosure of information

This Act overrides the provisions of other Acts prohibiting the disclosure of information (however described).

57. In relation to section 6 of the RTI Act, OIC commented as follows in *Moon and Department of Health (Moon)*.⁶³

25. *The policy objective behind section 6 is to provide a deliberate override of secrecy provisions in other legislation such as section 62A of the Health Services Act 1991 (Qld) to ensure that the RTI Act can operate unhindered by them. The Parliament considered those secrecy provisions that should not be overridden by the RTI Act and provision is made for them in Schedule 3, section 3 of the RTI Act. The confidentiality provisions in the Health Services Act 1991 (Qld) do not appear in the Schedule.*

26. *The effect of section 6 is that the Department can participate in the early resolution processes of the Office provided for in the RTI Act and it can agree to release information that might otherwise be subject to section 62A of the Health Services Act 1991 (Qld) in that process.*

58. In my view, the comments in *Moon* confirm that when the disclosure of information is prohibited by a provision in an Act that is not listed in schedule 3, section 12 of the RTI Act, the RTI Act overrides that provision. However, this does not mean that the information should simply be disclosed. At the external review stage, it means that parties may engage in informal resolution processes and, if those processes prove unsuccessful, OIC is required to decide whether the information is exempt information of a type listed in schedule 3 (other than section 12) or information, the disclosure of which would, on balance, be contrary to the public interest (through application of the public interest test).

59. Section 6 must be understood in the context of the whole Act. Section 49(2) of the RTI Act states that schedule 4 sets out the factors the Parliament considers appropriate for deciding where the public interest lies. Section 49(3) requires me to identify such a factor as Item 22, Part 3 of Schedule 4 and consider it.

60. Therefore, in relation to the applicant's submission that:

*... Item 22, Part 3 of Schedule 4 of the RTI Act... should be given little or no weight in the context of applying the Public Interest Exemption Test. To do otherwise would defeat the clear and obvious purpose of and amount to an administrative overriding of s.6 of the RTI Act which cannot be what Parliament intended.*⁶⁴

it is my view that section 6 does not require that I give little or no weight to the public interest factor favouring nondisclosure, that disclosure is prohibited by an Act. Section 6 only goes so far as to provide that the RTI Act overrides section 334 of the MR Act, and therefore provisions in the RTI Act—including provisions that require determination of whether disclosure of the relevant information would, on balance, be in the public

⁶² Submissions dated 15 August 2011.

⁶³ *Moon and Department of Health* (Unreported, Queensland Information Commissioner, 12 August 2010).

⁶⁴ Submissions dated 15 August 2011.

interest—apply, notwithstanding that disclosure of the information is generally prohibited by section 334 of the MR Act.

61. The applicant's submissions⁶⁵ also raised the following in support of giving very limited weight to the public interest factor that disclosure of the BMA Information is prohibited by an Act, namely section 334 of the MR Act:
 - the RTI Act is to be applied and interpreted to further its primary object⁶⁶
 - the RTI Act should be administered with a pro-disclosure bias;⁶⁷ and
 - the grounds on which access may be refused are to be interpreted narrowly.⁶⁸
62. I agree these are the requirements of the legislation.
63. On careful consideration of the information before me, it is my view that public interest in nondisclosure of the BMA Information is significant, given that that disclosure of it is prohibited under section 334 of the MR Act, but that this significance is reduced, given that there is no mechanism for a private royalty recipient to obtain information regarding royalties payable to them.
64. Given the nature of the BMA Information, I consider the prejudice and adverse affect to the business, commercial or financial affairs of BMA is of relatively great weight, given the potential impact that its release could reasonably be expected to have on the interests of BMA.
65. On careful consideration of these factors, I am satisfied that the weight of the factors favouring nondisclosure, particularly the relatively great weight of the factor identified at paragraph 64 above, outweigh the public interest factors favouring disclosure of the BMA Information. Accordingly, I am satisfied that disclosure of this information would not, on balance, be in the public interest.

Aggregate Private Royalty Information

66. I am not satisfied that disclosure of the Aggregate Private Royalty Information would further the public interest in open discussion or government accountability to any great extent.
67. However, I am satisfied that the public interest in providing a private royalty recipient with further information regarding aggregate private royalty payment amounts assessed as being payable is significant—particularly as there is apparently no other mechanism for a private royalty recipient to obtain such information. In this regard, I note that the Aggregate Private Royalty Information relates expressly and directly to private royalty payments.
68. The public interest in contributing to the administration of justice generally by assisting the fair settlement of commercial disputes and avoiding unnecessary litigation is significant and here, I consider that disclosure of the Aggregate Private Royalty Information could influence the settlement of the payment issue between the parties.
69. For reasons outlined above, I consider the only factor favouring nondisclosure to be given any weight in regards to this information is that its disclosure is prohibited by section 334 of the MR Act.⁶⁹

⁶⁵ Dated 14 June 2011.

⁶⁶ Referring to section 3(2) of the RTI Act.

⁶⁷ Referring to section 44(4) of the RTI Act.

⁶⁸ Referring to section 47(2)(a) of the RTI Act.

70. I am satisfied that less weight should attach to this factor with respect to the Aggregate Private Royalty Information than the BMA Information. This is because information of a similar nature to the Aggregate Private Royalty Information is, in effect, available to the applicant and relevant private land holders each quarter, including the relevant quarter, through their knowledge of other private land holders' relative interests in the relevant land (publicly available through land title searches) and the amount of royalties actually received by them.
71. In these circumstances, I am satisfied that the factors favouring disclosure of the Aggregate Private Royalty Information outweigh the factor favouring nondisclosure, and that disclosure of this information would, on balance, be in the public interest.

DECISION

72. I vary the Department's decision to refuse access to the Documents in Issue under section 47(3)(b) and 49 of the RTI Act and find that:
- access to the BMA information may be refused under sections 47(3)(b) and 49 of the RTI Act on the basis that its disclosure would, on balance, be contrary to the public interest; and
 - the Aggregate Private Royalty Information should be released to the applicant, as its disclosure would not, on balance, be contrary to the public interest.

Julie Kinross
Information Commissioner

Date: 21 September 2011

⁶⁹ Schedule 4, Part 3, item 22 of the RTI Act. I note that schedule 3, section 12 of the RTI Act does not recognise information prohibited from disclosure under section 334 of the MRA as exempt information and emphasise that this merely one public interest factor favouring nondisclosure of the Information in Issue.

APPENDIX

Significant procedural steps

Date	Event
21 December 2009	Applicant applied to Department for documents about private royalties payable by BMA regarding three properties for the September 2008 quarter
February 2010	Department consulted with a relevant third party
26 February 2010	Third party objected to disclosure of the Documents in Issue
2 March 2010	Department decided to refuse access to the Documents in Issue on the basis that disclosure would, on balance, be contrary to the public interest, and advised that it did not hold any documents responsive to part 2 of the access application
16 March 2010	Applicant applied to OIC for a review of Department's decision
4 March 2011	Applicant made submissions regarding access to the Documents in Issue and advised that it accepted that the Department did not hold any documents responsive to part 2 of the access application
30 May 2011	Applicant provided the KPMG report to OIC
31 May 2011	OIC staff met with Department staff (from the Royalties and Rent unit and RTI/Privacy unit) who confirmed their view that disclosure of the Documents in Issue would, on balance, be to contrary to the public interest
2 June 2011	In a telephone conversation between OIC staff and representatives of applicant on 2 June 2011, OIC advised the applicant of its preliminary view that some of the information on the Documents in Issue was irrelevant, and disclosure of the remaining information would, on balance, be to contrary to the public interest
7 June 2011	By correspondence, OIC confirmed to applicant its preliminary view conveyed on 2 June 2011
14 June 2011	Applicant made submissions in which it accepted OIC's preliminary view that some information was irrelevant, but did not accept OIC's preliminary view that disclosure of the remaining information would, on balance, be to contrary to the public interest
17 June 2011	By correspondence, OIC advised the Department of its preliminary view that a the Aggregate Private Royalty Information should be released to the applicant, disclosure of the BMA Information would, on balance, be to contrary to the public interest and the remaining information on the Documents in Issue was irrelevant
17 June 2011	By correspondence, OIC consulted with BMA (as a concerned party under section 97(4) of the RTI Act) and conveyed OIC's preliminary view (as per that conveyed to Department on same date)
23 June 2011	In a telephone conversation between OIC staff and Department staff, the Department accepted OIC's preliminary view
24 June 2011	By correspondence, BMA advised that it did not accept OIC's preliminary view that the Aggregate Private Royalty Information should be released to the applicant
28 June 2011	In a telephone conversation between OIC staff and representatives of applicant, applicant was advised of OIC's preliminary view the Aggregate Private Royalty Information should be released to it and confirmed

reliance on its earlier submissions

- 28 June 2011 *In a telephone conversation between OIC staff and representatives of BMA, BMA confirmed its grounds for not accepting OIC's preliminary view regarding the Aggregate Private Royalty Information*
- 5 July 2011 *In a telephone conversation between OIC staff and representatives of BMA, BMA confirmed its participation in the external review under section 89(2) of the RTI Act*
- 7 July 2011 *By correspondence, OIC confirmed information to be redacted and information to be released with the Department and BMA. Correspondence was hand delivered to BMA and the contents of the correspondence verbally confirmed with BMA legal staff.*
- 11 July 2011 *In a telephone conversation between OIC staff and representatives of applicant, the applicant proposed negotiations under section 90(3) of the RTI Act*
- 13 July 2011 *By correspondence, BMA confirmed its grounds for not accepting OIC's preliminary view regarding the Aggregate Private Royalty Information*
- 20 July 2011 *By correspondence, OIC advised applicant of informal resolution steps taken in the review and requested that applicant confirm whether it wished to suspend the review in order to negotiate with other parties to the review. OIC also queried whether applicant wished to pursue access to personal information of the BMA employee who signed the royalty return*
- 25 July 2011 *In a telephone conversation between OIC staff and representatives of applicant, applicant advised that it did not wish to conduct negotiations under section 90(3) of RTI Act*
- 25 July 2011 *By correspondence, applicant confirmed that it did not wish to conduct negotiations under section 90(3) of RTI Act and did not wish to pursue access to personal information of the BMA employee who signed the royalty return. Applicant raised procedural fairness concerns and requested that it be given opportunity to respond to any adverse submissions by other parties*
- 8 August 2011 *By correspondence, OIC addressed applicant's concerns regarding procedural fairness and noted that applicant had already made relevant submissions, or was not required to do so (because OIC's view was not adverse to applicant)*
- 15 August 2011 *By correspondence, applicant made further submissions in response to OIC's correspondence regarding procedural fairness*
- 19 August 2011 *By correspondence, OIC advised parties that, given that the applicant did not wish to pursue personal information of the BMA employee who signed the royalty return, that the Department accepted OIC's preliminary view, and that BMA's non-acceptance of OIC's preliminary view related to the Aggregate Private Royalty Information only, the Department could release redacted versions of pages 4, 5, 7, 8 and 10 (excluding the BMA Information and the Aggregate Private Royalty Information).*