



## Decision and Reasons for Decision

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**Application Number:** 311059

**Applicant:** Sibelco Australia Ltd

**Respondent:** Department of Natural Resources and Mines

**Decision Date:** 15 March 2013

**Catchwords:** ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – EXEMPT INFORMATION – application for information concerning certain leases to mine sand on North Stradbroke Island – whether public disclosure would, apart from this Act and any immunity of the Crown, be in contempt of court – sections 47(3)(a) and 48 and schedule 3 section 6(a) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST – application for information concerning certain leases to mine sand on North Stradbroke Island – whether disclosure of information would, on balance, be contrary to the public interest – sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW – RIGHT TO INFORMATION – DISCLOSURE DECISION – ONUS ON EXTERNAL REVIEW – whether objecting participant has established that decision not to disclose information is justified or that the Information Commissioner should give a decision adverse to the access applicant – section 87(2) of the *Right to Information Act 2009* (Qld)

## REASONS FOR DECISION

### Summary

1. The access applicant, an environmental conservation group, sought access<sup>1</sup> from the former Department of Employment, Economic Development and Innovation (**Department**),<sup>2</sup> under the *Right to Information Act 2009* (Qld) (**RTI Act**) to information concerning certain leases to mine sand on North Stradbroke Island.
2. After locating documents which responded to the access application, the Department consulted<sup>3</sup> with the external review applicant, Sibelco Australia Ltd (**Sibelco**).<sup>4</sup>
3. Contrary to Sibelco's views, the Department decided<sup>5</sup> to:
  - grant full access to 381 pages
  - grant partial access to 45 pages subject to the deletion of information the disclosure of which is, on balance, contrary to the public interest; and
  - refuse full access to 75 pages on the basis that the information is, on balance, contrary to the public interest.
4. The Department affirmed<sup>6</sup> its original decision following a request for internal review by Sibelco.<sup>7</sup>
5. Sibelco then applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's internal review decision.<sup>8</sup>
6. The Department is not entitled to refuse access to the information as it does not comprise exempt information, nor would its disclosure, on balance, be contrary to the public interest.

### Reviewable decision

7. The decision under review is the Department's internal review decision to Sibelco dated 23 April 2012.

### Relevant Information

8. During the course of the external review, 15 full pages<sup>9</sup> were identified as being outside the scope of the terms of the access application.<sup>10</sup> These pages are not considered in these reasons.

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<sup>1</sup> By application dated 27 September 2011 and received by the Department on 10 October 2011.

<sup>2</sup> Machinery of government changes in April 2012 transferred relevant responsibility from the Department of Employment, Economic Development and Innovation (**DEEDI**) to the Department of Natural Resources and Mines (**DNRM**). Accordingly, existing RTI applications and reviews involving certain applications made to DEEDI before the machinery of government changes now rest with DNRM, including this external review. For ease of reference, I will simply refer to 'the Department'.

<sup>3</sup> In accordance with section 37 of the RTI Act.

<sup>4</sup> Sibelco is the holder of the relevant leases, or mines on them under contract.

<sup>5</sup> By decision to Sibelco dated 23 February 2012.

<sup>6</sup> By internal review decision dated 23 April 2012.

<sup>7</sup> By letter dated 21 March 2012.

<sup>8</sup> By external review application dated 22 May 2012 and received by OIC on 23 May 2012.

<sup>9</sup> Comprising A-7, A-31, A-59, B-61, B-77, B-121, D-29, D-33, D-35, D-55, D-58, E-52, E-53, E-72, E-117.

<sup>10</sup> By telephone conversation with staff of OIC on 19 November 2012, the access applicant agreed to accept that these pages were outside the scope of the access application. Accordingly, these pages are not considered in these reasons.

9. The information remaining in dispute (**Information in Issue**) is located across 366 full pages and 45 part pages.
10. I am constrained in the extent to which I can discuss the Information in Issue in these reasons because Sibelco maintains that it comprises exempt information or information which would, on balance, be contrary to the public interest to be released.<sup>11</sup> However in general terms, the Information in Issue relates to the renewal of mining leases covering Sibelco's sand mining operations on North Stradbroke Island and includes the following types of documents:
  - applications for renewal of the relevant mining leases and related correspondence
  - copies of the relevant mining leases and special conditions and endorsements; and
  - assessments of applications for renewal (e.g., assessment checklists, decisions on applications for renewal).

### **Issues in this review**

11. The issues for determination in this external review are whether the Information in Issue comprises:
  - exempt information; or
  - information the disclosure of which would, on balance, be contrary to the public interest.

### **Significant procedural steps**

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

### **Evidence considered**

13. The evidence, submissions, legislation and other material I have considered in reaching my decision are disclosed in these reasons (including footnotes and appendix).

### **Relevant law**

#### ***Onus on external review***

14. Section 87(2) of the RTI Act provides that on external review, if the reviewable decision is a disclosure decision,<sup>12</sup> the participant in the external review who opposes the disclosure decision has the onus of establishing that a decision not to disclose the information is justified or that the Information Commissioner should give a decision adverse to the access applicant.
15. Therefore, Sibelco has the onus of establishing that access to the Information in Issue should not be granted.

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<sup>11</sup> Section 108(3) of the RTI Act.

<sup>12</sup> Disclosure decision is defined in section 87(3)(a) of the RTI Act as a decision to disclose a document or information contrary to the views of a relevant third party obtained under section 37 of the RTI Act.

### **Right to access information**

16. 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.

### **Findings**

#### **Does the Information in Issue comprise exempt information?**

17. No, for the reasons that follow.
18. An agency may refuse access to information to the extent that it comprises exempt information.<sup>13</sup> Information is exempt information if its public disclosure would, apart from the RTI Act and any immunity of the Crown, be in contempt of court.<sup>14</sup>
19. Sibelco submits that disclosure of the Information in Issue would be in contempt of court.
20. Sibelco has been charged with offences under the *Environmental Protection Act 1994* (Qld) (**EPA**), the *Forestry Act 1959* (Qld) (**Forestry Act**) and the *Integrated Planning Act 1997* (Qld) (**IPA**), relating to its activities under the relevant mining leases. Sibelco submits that the charge under the Forestry Act has been dismissed as an abuse of process however charges under the EPA and IPA are ongoing.<sup>15</sup>
21. The Department of Environment and Heritage Protection, which is responsible for the carriage of these proceedings against Sibelco, has confirmed<sup>16</sup> that:
- the charge under the Forestry Act has been permanently stayed
  - the charges under the EPA and IPA are proceeding to trial; and
  - the charges allege that Sibelco:
    - did carry out a level 1 chapter 4 activity not being a registered operator for the activity and not acting under a registration certificate for the activity in contravention of section 427(1) of the EPA; and
    - did carry out assessable development without an effective development permit for the development in contravention of section 4.3.1 of the IPA.
22. In its submissions, Sibelco refers to the *sub judice* rule.<sup>17</sup> The *sub judice* rule prescribes (subject to various exceptions) that it is a contempt of court to publish material relating to pending legal proceedings if the material has, 'as a matter of practical reality, a tendency to interfere with the due course of justice'.<sup>18</sup>
23. Sibelco submits that disclosure of information relating to the relevant mining leases and information about the mining operations on North Stradbroke Island generally, could prejudice Sibelco's right to a fair hearing and be in contempt of court, because of the

<sup>13</sup> Sections 47(3)(a) and 48 of the RTI Act.

<sup>14</sup> Sections 47(3)(a), 48 and schedule 3, section 6(a) of the RTI Act.

<sup>15</sup> By submission dated 12 October 2012 and during a telephone conversation with OIC staff on 14 November 2012.

<sup>16</sup> During a conversation with an officer of OIC on 12 February 2013.

<sup>17</sup> In its submission to the Department dated 20 January 2012.

<sup>18</sup> *Attorney General (NSW) v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362.

“potential impact of damaging media coverage on Sibelco’s ability to establish a criminal defence”.<sup>19</sup> Sibelco refers to the “sensitive nature of the ongoing litigation, and the sentiment of some groups towards Sibelco’s operations”.<sup>20</sup> Specifically, Sibelco submits<sup>21</sup> that:

- if disclosed, the access applicant will not treat the Information in Issue as confidential
- there is a history of public opponents publishing material critical of Sibelco in an effort to influence public opinion<sup>22</sup>
- there are many groups that are “actively involved in opposing all forms of sand mining on North Stradbroke Island” and those groups regularly provide commentary on the current proceedings against Sibelco in various forms of local, regional and national newspapers and online media
- the Information in Issue will be used by these groups, to progress their public campaigns in such a way that will prejudice Sibelco’s right to a fair hearing.

24. I accept that the Information in Issue is about the relevant mining leases. I also accept that sand mining on North Stradbroke Island has been the topic of substantial media interest and public debate.

25. I note that the proceedings against Sibelco are being heard in the Magistrates Court. The matter will be heard before a single Magistrate who is sworn to hear all matters fairly and without bias. The matter will not be held before a jury.

26. Having considered all the evidence before me I am not satisfied that public disclosure of the Information in Issue would interfere with the due course of justice. This is because; the bulk of the Information in Issue merely concerns the renewal of the relevant mining leases; and, the nature of the proceedings are such that they will not be heard before a jury, therefore restricting the ability of the behaviour of any conservation groups to interfere with the due course of justice. Accordingly, I am satisfied that release of the Information in Issue does not have ‘as a matter of practical reality, a tendency to interfere with the due course of justice’.

27. Therefore the Information in Issue does not comprise exempt information under the RTI Act, the public disclosure of which would be in contempt of court.<sup>23</sup>

28. As I am satisfied that the Information in Issue is not exempt, I will consider Sibelco’s submissions on whether disclosure would, on balance, be contrary to the public interest.

***Does the Information in Issue comprise information the disclosure of which would, on balance, be contrary to the public interest?***

29. No, for the reasons that follow.

30. An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.<sup>24</sup>

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<sup>19</sup> At paragraph 2(h) of its submissions dated 12 October 2012.

<sup>20</sup> At paragraph 2(i) of its submissions dated 12 October 2012.

<sup>21</sup> At paragraphs 2(i)-(k) of its submissions dated 12 October 2012.

<sup>22</sup> The applicant also provided examples of relevant media coverage.

<sup>23</sup> Sections 47(3)(a), 48 and schedule 3, section 6(a) of the RTI Act.

<sup>24</sup> Sections 47(3)(b) and 49 of the RTI Act.

31. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests. However, there are some recognised public interest considerations that may apply for the benefit of an individual.
32. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest<sup>25</sup> and explains the steps that a decision-maker must take<sup>26</sup> in deciding the public interest as follows:
- identify any irrelevant factors and disregard them
  - identify relevant public interest factors favouring disclosure and nondisclosure
  - balance the relevant factors favouring disclosure and nondisclosure; and
  - decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.<sup>27</sup>

#### **Irrelevant factors**

33. No irrelevant factors arise on the information before me.

#### **Factors favouring disclosure**

34. After considering all of the information before me, I am satisfied that the RTI Act recognises the factors favouring disclosure of the Information in Issue include that disclosure could reasonably be expected to:
- promote open discussion of public affairs and enhance the Government's accountability<sup>28</sup>
  - contribute to positive and informed debate on important issues or matters of serious interest<sup>29</sup>
  - inform the community of the Government's operations;<sup>30</sup> and
  - reveal the reason for a government decision and any background or contextual information that informed the decision.<sup>31</sup>
35. Sand mining operations on Stradbroke Island have been a topic of substantial media interest and public debate. I am satisfied that releasing the Information in Issue would:
- enhance the accountability of the Department and inform the community of the Department's operations in relation to the renewal of mining leases covering sand mining operations on Stradbroke Island
  - contribute to positive and informed debate about these matters within the community; and

<sup>25</sup> Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant in a particular case.

<sup>26</sup> Section 49(3) of the RTI Act.

<sup>27</sup> As to the correctness of this approach, see *Gordon Resources Pty Ltd v State of Queensland* [2012] QCATA 135.

<sup>28</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>29</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>30</sup> Schedule 4, part 2, item 3 of the RTI Act.

<sup>31</sup> Schedule 4, part 2, item 11 of the RTI Act.

- provide the community with any background or contextual information that informed the decision to renew the mining leases.
36. For these reasons, I afford the public interest factors in favour of disclosure moderate weight in the circumstances.

#### **Factors favouring nondisclosure**

37. Sibelco has submitted that disclosure of the Information in Issue could reasonably be expected to:
- prejudice the private, business, professional, commercial or financial affairs of entities<sup>32</sup>
  - impede the administration of justice generally or for a person<sup>33</sup>
  - prejudice trade secrets, business affairs or research of an agency or person<sup>34</sup>
  - prejudice a deliberative process of government;<sup>35</sup> and
  - cause public interest harm through disclosure of an opinion, advice, or recommendation that has been obtained, prepared or recorded; or a consultation or deliberation that has taken place, in the course of, or for the deliberative processes involved in the functions of government.<sup>36</sup>

#### ***Private, business, professional, commercial or financial affairs of entities; trade secrets, business affairs or research of an agency or person***

38. By way of example, Sibelco submits<sup>37</sup> that certain documents should not be disclosed as disclosure would disclose:
- the business affairs of Stradbroke Rutile Pty Ltd (**SRPL**) in relation to commercial intentions regarding:
    - developing of tracks and pipelines within its mining lease<sup>38</sup>
    - estimates of strategic sand resources<sup>39</sup>
    - additional purposes on its mining lease;<sup>40</sup> and
  - issues of cultural sensitivity and public liability, including photographs.<sup>41</sup>
39. I have considered the Department's decision on the pages that it has decided to release contrary to Sibelco's objections. It does not include information about expenditure details, financial undertakings or confidential business information; as the Department decided<sup>42</sup> that disclosure of this type of information would, on balance, be contrary to the public interest. The Department has therefore deleted this type of information from the pages it has decided to release.

<sup>32</sup> Schedule 4, part 3, item 2 of the RTI Act.

<sup>33</sup> Schedule 4, part 3, items 8 and 9 of the RTI Act.

<sup>34</sup> Schedule 4, part 3, item 15 of the RTI Act.

<sup>35</sup> Schedule 4, part 3, item 20 of the RTI Act.

<sup>36</sup> Schedule 4, part 4, item 4 of the RTI Act.

<sup>37</sup> Submission to OIC dated 13 September 2012 at pages 2-3.

<sup>38</sup> As detailed in pages A 40-42 of the Information in Issue.

<sup>39</sup> As detailed in pages B 19-60 of the Information in Issue. Only pages B 19-31 are proposed for release from this range.

<sup>40</sup> As detailed in pages C 15-43 of the Information in Issue.

<sup>41</sup> As detailed in pages D 24-26 of the Information in Issue.

<sup>42</sup> By decision to Sibelco dated 23 February 2012.

40. In relation to the documents outlining SRPL's commercial intentions, I consider that some commercial value would attach to the information in these documents. This may be lessened if the information becomes publicly known. However, I am unconvinced that any significant prejudice would flow from the disclosure of this information, as the pages identified by Sibelco:
- date back to between 2005 and 2008
  - provide clarification by the Environmental Protection Agency as to whether a track or pipeline can be developed through a particular area of a mining lease
  - comprise an application for renewal of a mining lease; and
  - relate to a proposal for additional purposes on SRPL's mining lease which was rejected by the Department<sup>43</sup> and the concept of extracting waste sand from silica sand mining operations on Stradbroke Island for use in the construction industry, as outlined in the proposal, has now been publicly aired.<sup>44</sup>
41. In relation to the pages containing information of cultural sensitivity and public liability, they are a Departmental memo and attached photographs regarding a renewal inspection dating back to June 2003 which is favourable to SRPL. Given the age and content, I am unconvinced that any prejudice would flow from disclosure of this information.
42. I have also considered the remainder of the documents in light of the public interest factors relating to prejudice to business affairs. Although I agree that many of the documents do disclose matter that might be defined as Sibelco's business affairs, I do not consider that the information is such that its release would prejudice those affairs. I am satisfied that, based on the information and submissions before me, the release of the Information in Issue cannot reasonably be expected to prejudice Sibelco's financial or business affairs.
43. I therefore find that the public interest factors in schedule 4, part 3, items 2 and 15 of the RTI Act should be afforded minimal weight in the circumstances of this review.

***Impede the administration of justice***

44. Sibelco submits that disclosure of the Information in Issue would impede the administration of justice because it is:
- ...currently defending criminal proceedings commenced by the State of Queensland in relation to activities on the mining leases discussed in the information the subject of this review....these proceedings are at a critical point. As such, the information should not be released in order not to impede the administration of justice.*<sup>45</sup>
45. Sibelco made similar submissions when arguing that disclosure of the Information in Issue would be in contempt of court.
46. In addition, Sibelco has provided as part of its submission<sup>46</sup> a copy of a complaint to the Crime and Misconduct Commission from an environmental conservation group about alleged illegal activities by Sibelco which attaches publicly available reports providing details of the relevant leases.

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<sup>43</sup> As advised to OIC by the Department via telephone, 6 August 2012.

<sup>44</sup> For example, in *Unimin Australia Limited v State of Queensland* [2010] QCA 169.

<sup>45</sup> Submission from Sibelco dated 20 January 2012.

<sup>46</sup> Submission dated 12 October 2012.

47. For the same reasons as in contempt of court, set out at paragraphs 20 to 26, I am satisfied that disclosure of the Information in Issue could not reasonably be expected to impede the administration of justice generally or for a person.
48. I therefore find that the public interest factors in schedule 4, part 3, items 8 and 9 of the RTI Act should be afforded no weight in the circumstances of this review.

***Deliberative process***

49. Sibelco has submitted<sup>47</sup> that disclosure of some of the Information in Issue would prejudice a deliberative process by disclosing whether or not an application for renewal of a mining lease meets all statutory and administrative requirements prior to a public consultation period commencing.
50. The Department does not consider that any of the Information in Issue comprises deliberative process material. Specifically, the Department states:<sup>48</sup>

*The information in question does not contain opinions, advice or recommendations... rather, it contains procedural and administrative processes of the agency...*

51. Having reviewed the Information in Issue, I agree with this characterisation. Furthermore, there is no material before me that demonstrates that the disclosure of the Information in Issue could reasonably be expected to prejudice a deliberative process of Government.<sup>49</sup>
52. For these reasons, I am satisfied that disclosure of the Information in Issue could not reasonably be expected to prejudice a deliberative process of government or cause public interest harm through disclosure of an opinion, advice, or recommendation that has been obtained, prepared or recorded; or a consultation or deliberation that has taken place, in the course of, or for the deliberative processes involved in the functions of government.
53. I therefore find that the public interest factor in schedule 4, part 3, item 15 of the RTI Act and the public interest harm factor in schedule 4, part 4, item 4 of the RTI Act should be afforded no weight in the circumstances of this review.

**Is disclosure of the Information in Issue, on balance, contrary to the public interest?**

54. I am satisfied that there are a number of public interest considerations favouring disclosure of the Information in Issue which, for the reasons discussed above, are deserving of moderate weight. These factors favouring disclosure outweigh the factors favouring nondisclosure which, for the reasons discussed above, are deserving of either no or minimal weight in the circumstances of this review.
55. Accordingly, I consider disclosure of the Information in Issue would not, on balance, be contrary to the public interest.

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<sup>47</sup> Sibelco's response to consultation dated 20 January 2012.

<sup>48</sup> Decision to Sibelco dated 23 February 2012.

<sup>49</sup> Schedule 4, part 3, item 20 of the RTI Act.

## **DECISION**

56. I affirm the Department's decision to grant access to 366 full pages and 45 part pages by finding that the information:
- does not comprise exempt information under sections 47(3)(a) and 48 of the RTI Act; and
  - would not, on balance, be contrary to the public interest to be disclosed under sections 47(3)(b) and 49 of the RTI Act.
57. I have made this decision as a delegate of the Acting Information Commissioner, under section 145 of the RTI Act.

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Jenny Mead  
**Right to Information Commissioner**

**Date: 15 March 2013**

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
10 October 2011	The Department receives the access application.
5 January 2012	The Department writes to Sibelco seeking its views on disclosure of information which may be of concern to Sibelco.
20 January 2012	Sibelco objects to disclosure of all of the information provided for consultation and provides a submission in support of its case.
23 February 2012	Contrary to Sibelco's views, the Department decides to: <ul style="list-style-type: none"> <li>• grant full access to 381 pages</li> <li>• grant partial access to 45 pages subject to the deletion of information the disclosure of which is, on balance, contrary to the public interest; and</li> <li>• refuse full access to 75 pages on the basis that the information is, on balance, contrary to the public interest.</li> </ul>
12 March 2012	Sibelco writes to the Department submitting that the Department's decision dated 23 February 2012 does not comply with the RTI Act.
13 March 2012	The Department writes to Sibelco addressing Sibelco's submission that the decision dated 23 February 2012 does not comply with the RTI Act.
21 March 2012	The applicant seeks internal review of the Department's decision dated 23 February 2012.
23 April 2012	Contrary to Sibelco's views, the Department affirms its initial decision to grant access to 381 full pages and 45 part pages.
23 May 2012	OIC receives Sibelco's request for external review of the Department's internal review decision dated 23 April 2012.
5 June 2012	OIC informs Sibelco and the Department that the application for external review has been accepted.
13 June 2012	The Department provides to OIC copies of the pages it has decided to release contrary to the views of Sibelco.
20 June 2012	OIC writes to Sibelco asking it to provide: <ul style="list-style-type: none"> <li>• a statement indicating which of the documents proposed for release by the Department should not, in Sibelco's view, be disclosed</li> <li>• a submission in support of this position; and</li> <li>• any other information Sibelco wishes OIC to consider prior to making a decision in this external review.</li> </ul>
5 July 2012	Sibelco provides a submission in response to OIC's request dated 20 June 2012.
6 August 2012	The Department confirms that it refused access to all of the information which Sibelco had specifically objected to the release of

	with the exception of some information within identified page ranges as the information identified did not disclose financial affairs information or figures which are commercially sensitive.
28 August 2012	OIC conveys a view to Sibelco that, with the exception of 15 pages which contain information outside the scope of the access application, the Information in Issue is neither exempt from disclosure nor would its disclosure be, on balance, contrary to the public interest. If it does not agree with this view, Sibelco is invited to provide further submissions by 13 September 2012.
13 September 2012	Sibelco advises OIC that it does not accept OIC's view and provides further submissions in support of its position.
27 September 2012	OIC writes to Sibelco requesting further information to support the submission that disclosure of the Information in Issue would be in contempt of court or could reasonably be expected to impede the administration of justice.
12 October 2012	Sibelco provides a further submission.
14 November 2012	Sibelco provides clarification about the status of legal proceedings against it.
16 November 2012	OIC conveys a view to the access applicant's solicitor that 15 pages are outside the scope of the access application.
19 November 2012	The access applicant's solicitor confirms that the access applicant accepts the view that 15 pages are outside the scope of the access application.