Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***Redlands2030 Inc and Redland City Council; RIC Toondah Pty Ltd (Third Party); Minister for Economic Development Queensland (Fourth Party); Walker Group Holdings Pty Ltd (Fifth Party); Walker Toondah Harbour Pty Ltd (Sixth Party)*** **[2018] QICmr 46 (21 November 2018)**
Application Number:	**313573**
Applicant:	**Redlands2030 Inc**
Respondent:	**Redland City Council**
Third Party:	**RIC Toondah Pty Ltd**
Fourth Party:	**Minister for Economic Development Queensland**
Fifth Party:	**Walker Group Holdings Pty Ltd**
Sixth Party:	**Walker Toondah Harbour Pty Ltd**
Decision Date:	**21 November 2018**
Catchwords:	**ADMINISTRATIVE LAW - RIGHT TO INFORMATION - EXEMPT INFORMATION - BREACH OF CONFIDENCE - development agreement with confidentiality clause - whether disclosure would found an action for breach of confidence - whether information is exempt information under schedule 3, section 8 of the *Right to Information Act 2009* (Qld) - section 47(3)(a) of the *Right to Information Act 2009* (Qld)** **ADMINISTRATIVE LAW - RIGHT TO INFORMATION - CONTRARY TO PUBLIC INTEREST INFORMATION - development agreement with confidentiality clause - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)**

REASONS FOR DECISION

Summary

1. Toondah Harbour was declared a Priority Development Area (**PDA**) under the *Economic Development Act 2012* (Qld) on 21 June 2013. Following an expression of interest

process in late 2014, the Queensland Government decided it would proceed with a project to re-develop Toondah Harbour (**Project**), and work with Walker Group Holdings Pty Ltd (**Walker Group**) (the preferred development partner) and Redland City Council (**Council**) to formalise a development agreement.

2. Subsequently, a Development Agreement (**DA**) for the Toondah Harbour PDA was executed as a deed between Council, RIC Toondah Pty Ltd (**RIC Toondah**),[1] the Minister for Economic Development Queensland (**MEDQ**), Walker Toondah Harbour Pty Ltd (**Walker Toondah**) and Walker Group. Under the DA, the roles of these parties are:

   - Council, RIC Toondah and MEDQ are, collectively, the **Owners** of the lands and waters to be developed
   - Walker Toondah is a special purpose company established by Walker Group to act as developer for the Project; and
   - Walker Group is guarantor for Walker Toondah's performance.

3. The applicant applied[2] to Council under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to all agreements (including any subsequent amendments) with Walker Group[3] relating to proposed development in the Toondah Harbour PDA which include Council as a party.[4]

4. Council located 680 pages. It decided[5] to refuse access to 589 pages on the ground that they comprise exempt information under schedule 3, section 8 of the RTI Act; and the remaining 91 pages[6] on the ground that other access was available.

5. The applicant sought internal review of Council's decision,[7] and Council decided[8] to affirm its original decision.[9] The applicant then applied[10] to the Office of the Information Commissioner (**OIC**) for external review of Council's internal review decision to refuse access to 589 pages.

6. In the course of the external review, the applicant agreed not to pursue access to some information, which is therefore no longer in issue. The applicant continues to seek access to the balance of the information in issue, which comprises the remaining segments of the DA and a Deed of Variation to the DA (**DV**). RIC Toondah, MEDQ, Walker Group and Walker Toondah[11] were consulted and joined as participants.[12] Along with Council (collectively, the **Objecting Participants**), they contend that access to remaining information in issue should be refused.

7. Having considered the participants' submissions, I have decided to set aside Council's decision. I find that there are no grounds under the RTI Act on which access to the remaining information in issue may be refused.

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[1] Which is wholly owned by Redland Investment Corporation Pty Ltd, which in turn, is wholly owned by Council.
[2] On 4 July 2017.
[3] And/or Walker Corporation Pty Ltd.
[4] Timeframe: 1 January 2014 to 4 July 2017.
[5] Decision dated 1 September 2017.
[6] Comprising the Infrastructure Agreement which had been made available to the public.
[7] On 28 September 2017.
[8] On 24 October 2017.
[9] In its internal review decision, Council relied on both the exemption in schedule 3, section 8 of the RTI Act and public interest grounds to refuse access to 589 pages.
[10] On 25 October 2017,
[11] Walker Group and Walker Toondah rely on the same submissions made on their behalf by the same legal representative. Except where relevant, they are therefore referred to collectively as **Walker** in these reasons.
[12] Under section 89 of the RTI Act.

Background

8. Significant procedural steps taken during the external review are set out in the Appendix to this decision.

Reviewable decision

9. The decision under review is Council's decision dated 24 October 2017.

Evidence considered

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

Information which is no longer in issue

11. During the external review, the applicant confirmed that it did not wish to pursue access to the following types of information (**Excluded Information**):

    - information about Walker's financial return from the development
    - information about preliminary designs for the development
    - some information relating to community infrastructure works and costings[13]
    - emails attached to the DA about amendments handwritten on it; and
    - signatures.

Information in issue

12. The information in issue comprises the 589 pages that constitute the DA and DV, except for those parts of them that are the Excluded Information.[14]

Objections to disclosure

13. The Objecting Participants submit[15] that the information in issue may be refused on the grounds that:

    - it is exempt information because its disclosure would found an action for breach of confidence under schedule 3, section 8(1) of the RTI Act; and
    - its disclosure would, on balance, be contrary to the public interest.

14. Given the Objecting Participants' claims that the information in issue is exempt information and contrary to the public interest information, and given that I must not include information that is subject to such claims in a decision,[16] the level of detail that I can include in this decision is necessarily constrained. This has presented some difficulty in addressing aspects of the Objecting Participants' submissions, given they rely on a confidentiality clause in the DA, and raise other clauses—all of which fall within the information in issue that is the subject of the Objecting Participants' claims. While I have carefully considered the entirety of the Objecting Participants' submissions, the detail regarding them that I am able to provide in these reasons is limited, due to the constraint noted above. However, it also remains necessary to outline my analysis in a

[13] But not total costings.
[14] As it appears on pages 167, 169, 259-262, 274-275, 348-349, 362-385, 387, 388-391, 392, 393-406, 407, 408-409, 474-475, 477, 479, 481, 484-489, 546, 581-584, 585-586 and 588-589 of the 589 pages.
[15] Council's internal review decision dated 24 October 2017, further developed in Council's submissions dated 19 April 2018 which were relied on by RIC Toondah; MEDQ submissions dated 28 August 2018; and Walker submissions dated 21 September 2018.
[16] Section 108(3) of the RTI Act.

manner that is sufficient to fulfil my decision-making obligations. I have therefore referred to the clauses raised by the Objecting Participants—which I note are clauses regarding matters that it is reasonable to expect would be included in a DA regarding a development of the scale in question—but only in general terms, without inclusion of any specifics regarding their contents.

Exempt information – breach of confidence

15. The RTI Act gives a right to access documents of government agencies.[17] This right is subject to other provisions of the RTI Act, including grounds on which access may be refused. Access may be refused to information, to the extent the information comprises 'exempt information'.[18] 'Exempt information' includes information, the disclosure of which would found an action for breach of confidence.[19] The test for this exemption must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind Council not to disclose relevant information.[20]

16. The Objecting Participants contend that access to the information in issue may be refused on the basis that its disclosure would found an action for breach of confidence.[21] They do not dispute that the hypothetical plaintiff is the Walker group of companies—specifically, Walker Group and Walker Toondah.

Contractual term

17. There is a confidentiality clause in the DA. In broad terms, it provides that the parties to the DA must not disclose any confidential information, specifies exceptions to this general obligation, and sets out steps the parties are to take to protect confidentiality. The DA itself and, by extension, the DV are covered by the definition of confidential information. The Objecting Participants submit that the information in issue is subject to a *contractual* obligation of confidence pursuant to the confidentiality clause of the DA and, given this obligation, the information qualifies as exempt information under schedule 3, section 8(1) of the RTI Act.

Objecting Participants' submissions

18. In relation to the question of whether the phrase '*found an action for breach of confidence*' as it appears in schedule 3, section 8(1) of the RTI Act encompasses *contractual* or *equitable* obligations of confidence, Walker submitted that:[22]

    - The following statement by the Information Commissioner in *B and BNRHA*,[23] referring to the decision *Re Kamminga and Australian National University*,[24] correctly sets out the current state of the law in Queensland in relation to the meaning of this phrase:

[17] Section 23 of the RTI Act.
[18] Section 47(3)(a) of the RTI Act.
[19] Section 48 and schedule 3, section 8(1) of the RTI Act.
[20] *B and Brisbane North Regional Health Authority [1994] QICmr 1 (**B and BNRHA**)*, a decision of the Information Commissioner analysing the equivalent exemption in the repealed Freedom of Information Act 1992 (Qld) (**FOI Act**), at [44].
[21] During the review, I considered whether—if the exemption were satisfied—the information in issue would fall within the exception to the exemption at schedule 3, section 8(2) of the RTI Act in any event. However, the information in issue does not appear to have been created in the course of, or for the purposes of, the 'deliberative processes of government' as required by schedule 3, section 8(2).
[22] Submission dated 21 September 2018.
[23] At [43].
[24] (1992) 15 AAR 297.

> *…the better view is that the words "found an action for breach of confidence" in s.46(1)(a) of the Queensland FOI Act should be taken to refer to a legal action brought in respect of an alleged obligation of confidence in which reliance is placed on one or more of the following causes of action:*
>
> *(a) a cause of action for breach of a contractual obligation of confidence;*
> *(b) a cause of action for breach of an equitable duty of confidence;*
> *(c) a cause of action for breach of a fiduciary…duty of confidence and fidelity.*
>
> [Walker's emphasis]

- The decision of *B and BNRHA,* and the NSWADT decisions of *Public Service Association & Ors v Director-General, Premier's Department*,[25] *Fomiatti v University of Western Sydney (No 2)*[26] and *Watt v Forests NSW*[27] which all adopted the reasoning of *B and BNRHA*, should be accepted as setting the law in Queensland. These decisions should be preferred over *Callejo and Department of Immigration and Citizenship*[28] and *TSO08G and Department of Health*[29] for the following reasons:
  - the decision of *Callejo* was *'aberrant and wrong in law'* as:
    - the history of section 45(1) at [119]-[127] showed a lack of understanding of the differences between the judgements of Jenkinson J and Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) and Another*[30]
    - the reasons at [151]-[166] do not explain why the Deputy President decided not to follow the decisions of *B and BNRHA, PSA, Fomiatti* and *Watt*
    - the statement '*actions in contract…are not actions for breach of confidence known to the general law*' ignores the statement made by Gummow J in *Corrs Pavey*[31] that:

      > *… the case is to be approached in terms of the general law, not as a case of confidence protected by contract, but as one, if anything, of confidence protected in equity.*
      > *…*
      > *The conclusion I have reached upon these submissions are that … the term "breach of confidence" … is used in a technical sense so that a document is an exempt document only if its disclosure would be actionable at the general law.*
      >
      > [Walker's emphasis]

    - it is contrary to dicta of superior courts, to principle and to the greater weight of academic commentary which make clear that an action for breach of confidence relates to all actions to restrain breach of an obligation of confidence, whatever the source of the obligation[32]
    - the structure of the decision is incoherent—except for *Corrs Pavey*, decisions which do not accord with the Deputy President's preferred interpretation of

[25] [2002] NSWADT 277 (***PSA***).
[26] [2006] NSWADT 210 (***Fomiatti***).
[27] [2007] NSWADT197 (***Watt***).
[28] [2010] AATA 244 (***Callejo***).
[29] (Unreported, Queensland Information Commissioner, 13 December 2011) (***TSO08G***).
[30] (1987) 14 FCR 434 (***Corrs Pavey***).
[31] At [14] and [26].
[32] The submission referred to the High Court decision of *A v Hayden* (1984) 156 CLR 532. However, I note that this decision was not considering information access, rather, it was considering disclosure of a name of an employee or any act performed in the course of employment under a Commonwealth contract of employment, in circumstances where there was a suspicion that criminal offences were committed during the employment.

words are ignored, with no reason for distinguishing them offered, and the reasons provided for distinguishing *Corrs Pavey* are unconvincing; and

- the fundamental flaw is that the Deputy President did not accept that an action for the breach of a contractual obligation of confidence was equally an '*action for breach of confidence*' as an action for breach of an equitable obligation of confidence

- given the decision of *TSO08G* relies *Callejo* as authority for the position that the phrase *'found an action for breach of confidence'* in schedule 3, section 8(1) refers to an action based in equity for breach of an equitable obligation of confidence, *TSO08G* should also be disregarded.

19. Walker also observed that in both *Callejo* and *TSO08G*, there were no contracts between the parties, and therefore, to the extent these decisions dealt with the question of whether a breach of a contractual obligation of confidence could '*found an action for breach of confidence*', the remarks made were *obiter dicta*.

Analysis

20. I have carefully considered Walker's above submissions; however, I do not agree that the quoted passage from *B and BNRHA*[33] reflects the correct interpretation of schedule 3, section 8(1) of the RTI Act regarding *contractual* obligations of confidence,[34] for the following reasons:

- As in *Callejo* and *TSO08G*, no contractual obligations of confidence arose in *B and BNRHA* or *Corrs Pavey*. It is unclear why Walker considers that this renders the views about contractual obligations of confidence in *Callejo* and *TSO08G* to be *obiter dicta*, yet contends that *B and BNHRA* and *Corrs Pavey* should be followed.

- Gummow J's conclusion in *Corrs Pavey*—that *'the term "breach of confidence" … is used in a technical sense so that a document is an exempt document only if its disclosure would be actionable at the general law'*—is less significant in terms of contractual obligations of confidence than Walker suggests. This conclusion was reached upon consideration of submissions in relation to an equitable obligation of confidence only. Further, it related to a pre-amendment version of section 45(1) of the FOI Act (Cth), when the relevant phrase was *'if its disclosure would constitute a breach of confidence'*.

- The phrase '*if its disclosure would found an action for breach of confidence*', as used in schedule 3, section 8(1) of the RTI Act, appears to have originated in section 45(1) of the FOI Act (Cth), which was amended in 1991. The amendment followed a recommendation by the Senate Standing Committee on Legal and Constitutional Affairs '*to make clear that it provides exemption where, and only where, the person who provided the confidential information would be able to prevent disclosure under the general law relating to breach of confidence*.[35]

[33] And the other decisions raised by Walker—that is, *PSA*, *Fomiatti* and *Watt*.
[34] In terms of *equitable* obligations of confidence, however, *B and BNRHA* sets out the relevant applicable law—see paragraphs 23 to 25 below.
[35] Report on the Operation and Administration of the Freedom of Information Legislation 1987 at 14.34, page 209. Explanatory memorandum to the *Freedom of Information Amendment Act 1991*, at 61. The Explanatory Memorandum continued that: '*The amendment overcomes decisions by the Administrative Appeals Tribunal which have created uncertainty as to the scope of section 45 and which have expanded the exemption to protect some confidences that the general law does not protect*'.

- The proper interpretation of schedule 3, section 8(1) of the RTI Act is the intention that is expressed in the language used by Parliament in enacting it. In terms of this language, I note that:

  - the phrase *'found an action'* focuses attention on the legal basis for a legal claim
  - the phrase '*an action for breach of confidence'* in private law refers to an action in equity for breach of an equitable obligation of confidence;[36] and
  - combined, these phrases suggest an intention to limit the exemption to circumstances where an equitable action would be available.

- In considering the interpretation of the RTI Act's provisions, an interpretation which best achieves its express objects and purpose is to be preferred.[37] In this regard, I note that:

  - the approach under the RTI Act differs from that under the repealed FOI Act. The object of the FOI Act was to extend '*as far as possible*' the right of access to information held by government.[38] In contrast, the starting point for the RTI Act is that there is a 'right to information'[39] that is subject to certain provisions in that Act.

  - section 3(2) of the RTI Act makes clear that the RTI Act is to be interpreted in furtherance of the right of access, subject only to when it is not in the public interest to do so.

  - a narrow interpretation of the grounds that may be relied on to restrict access is expressly required.[40]

- While I accept that the view of the Deputy President in *Callejo* regarding contractual obligations of confidence was, like that of the Information Commissioner in *B and BNRHA*, *obiter dictum*, I prefer the Deputy President's approach as her:

  - analysis is consistent with the natural and ordinary meaning of the words, which are the same as those in schedule 3, section 8(1) of the RTI Act; and
  - interpretation is consistent with the purpose of the RTI Act, which is to establish a 'right to information' subject only to it being contrary to the public interest and best achieves the express objects of the RTI Act.

- I also note that:

  - In *B and BNRHA*, the Information Commissioner noted that:[41]

    > *If the Commonwealth AAT or the Federal Court should in a future case advance an explanation as to why the words "found an action for breach of confidence" in s.45(1) of the Commonwealth FOI Act should be construed as being confined to an action in equity for breach of confidence, I would be prepared to revisit this issue.*

[36] See for example, the phrase 'action for breach of confidence' being used to describe an equitable suit in *O'Brien and Komesaroff* (1982) 150 CLR 310 at 314 and 323 per Mason J; *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [33] per Gleeson CJ and at [115] per Gummow and Hayne JJ.
[37] Section 14A of the *Acts Interpretation Act 1954* (Qld) (**AI Act**).
[38] Section 4 of the FOI Act.
[39] Section 3 of the RTI Act.
[40] See section 47(2)(a) of the RTI Act.
[41] At [43].

- In *Callejo*, the Deputy President advanced such an explanation.[42] Following that decision, OIC revisited the issue—as the Information Commissioner indicated would occur in the abovementioned passage from *B and BNRHA*—in *TSO08G,* which confines the exemption in schedule 3, section 8(1) to actions in equity only.

21. For the reasons explained above, I prefer the interpretation set out in *Callejo* and, on this basis, consider that the phrase '*found an action for breach of confidence*' as it appears in schedule 3, section 8(1) of the RTI Act refers to *equitable* obligations of confidence.

22. Even if I am incorrect in my view in that regard, such that a breach of the confidentially clause in the DA is sufficient to found an action for breach of confidence under schedule 3, section 8 of the RTI Act, it is well-established that a public interest exception applies in respect of both contractual and equitable obligations of confidence.[43] For the reasons that I will explain below, I am satisfied that there are strong public interest considerations favouring the disclosure of the information in issue.

Equitable obligation of confidence

23. In cases concerning disclosure of information that is 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. Establishing whether disclosure would found an action for breach of confidence requires consideration of whether an equitable obligation of confidence exists. An equitable obligation of confidence will only be established when the following five cumulative criteria are satisfied:

    (a) the information must be capable of being specifically identifiable as information that is secret, rather than generally available
    (b) the information must have the necessary quality of confidence—ie, it must not be trivial or useless, and must have a degree of secrecy sufficient for it to be subject to an obligation of confidence
    (c) the information must have been communicated in such circumstances as to import an obligation of confidence
    (d) disclosure to the access applicant must constitute an unauthorised use of the confidential information; and
    (e) disclosure would result in detriment to the party claiming confidentiality.[44]

24. To establish criterion (c), a decision-maker is required to be satisfied that the information was communicated and received on the basis of a mutual understanding of confidence. The understanding must have existed at the time of the communication, and may be express or implied.[45]

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[42] Concluding, at [163]-[166], that where a contractual term requiring confidentiality exists, disclosure (or threatened disclosure) of information may, depending on the circumstances, only found an action for breach of contract.
[43] See *Seeney and Department of State Development; Berri Limited (Third Party)* (***Berri***) (2004) 6 QAR 354 at [199]-[200], citing *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 (***Hughes***) at 88-89. Walker submitted that, given that *Hughes* considered the dissemination of information by the Civil Aviation Authority to the responsible minister, Finn J *'was not adverting, in any sense, to a public interest in the disclosure of information under legislation that dealt with that topic'* when he stated that *'*[p]*arties who contract with government agencies must, in matters of confidentiality, be taken to have done so subject to such lawful rights of access to information in the agency's hands as our laws and system of government confer on others'*. Apart from considering the provision of information to a responsible minister, Finn J noted two other manifestations of accountability to the public—namely, being audited by the Auditor-General and reporting to a parliamentary committee. I do not consider that Finn J's abovementioned statement was intended to relate only to the provision of information to a minister, nor only to this and the two other accountability mechanisms noted by him. I remain satisfied that public interest exceptions to contractual obligations of confidence may (depending on the circumstances) arise in other contexts directed at government accountability, including right to information.
[44] *B and BNRHA,* at [57]-[58]. See also *Corrs Pavey* at 437, per Gummow J.
[45] *B and BNRHA* at [90].

25. Ascertaining whether this requirement is met requires an assessment of all relevant circumstances surrounding the communication of confidential information,[46] to determine whether the '*recipient should be fixed with an enforceable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it'*.[47] The relevant circumstances include (but are not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information and the circumstances relating to its communication.[48]

26. In an overview of potentially relevant circumstances that may need to be evaluated from case to case in *Orth and Medical Board of Queensland; Cooke (Third Party)*,[49] the Information Commissioner stated:

> *In evaluating the relevant circumstances, it should be borne in mind that the courts have recognised that special considerations may apply in determining whether a government agency owes an obligation of confidence in respect of information communicated to it by a person outside government:* Attorney-General (UK) v Heinemann Publishers *(1987) 75 ALR 353 at p.454; for example:*
>
> *…*
>
> - *public interest considerations (relating to the public's legitimate interest in obtaining information about the affairs of government) may affect the question of whether enforceable obligations of confidence should be imposed on government agencies in respect of information purportedly supplied in confidence by parties outside government: see* Esso Australia Resources Ltd v Plowman *(1995) 183 CLR 10* [***Esso***]*;* Commonwealth of Australia v Cockatoo Dockyard Pty Ltd *(1995) 36 NSWLR 662* [***Cockatoo Dockyard***]*;* Re Cardwell Properties Pty Ltd & Williams and Department of the Premier, Economic and Trade Development *(1995) 2 QAR 671 at pp.693-698, paragraphs 51-60* [***Cardwell***]*.*

27. As discussed further below, in this case, I consider that the public's legitimate interest in obtaining information about the nature of the agreement entered into between the Owners and Walker in relation to the Project is material to the relevant circumstances surrounding the communication.[50]

Objecting Participants' submissions

28. I have set out the submissions of the Objecting Participants in relation to criterion (c) below:

- Council submitted that:[51]
  - '*The requirement to keep information confidential may be implied from context, or may originate from an express undertaking to that effect … the parties expressly undertook to keep information confidential, including the terms of the Agreement …*'
  - '*When the clause is read as a whole, it is apparent that the circumstances of the communication of the information are such that the parties were to take all steps necessary to keep and maintain confidentiality in confidential information, and that Council and the State may release information if required by law to do so … the*

[46] *B and BNRHA* at [84].
[47] *B and BNRHA* at [76].
[48] *B and BNRHA* at [82] and [84], citing *Smith Kline and French Laboratories (Aust) Limited and Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at 302-304.
[49] (2003) 6 QAR 209 (***Orth***) at [34].
[50] These public interest considerations were also noted in *Swickers Kingaroy Bacon Factory Pty Ltd and Department of Primary Industries* (1998) 4 QAR 498 (***Swickers***) at [29] and *Berri* at [191], both of which also cited *Esso*, *Cockatoo Dockyard* and *Cardwell*.
[51] Submission dated 19 April 2018. RIC Toondah also relied on these submissions.

primary obligation of both parties was to maintain all confidential information … unless Council or the State are otherwise forced by law to disclose that information.'

- '*Despite the fact that the* [exception regarding disclosure required by law references right to information]*, the parties are entitled to expect that the information agreed to be kept confidential by the parties would not be disclosed unless the Act mandates this will occur*.'

- '*The mandatory language of* [the steps the parties are to take to protect confidentiality] *juxtaposed with the non-mandatory language* [of the exceptions identified in the confidentiality clause] *suggests that the circumstances of the communication imparted an obligation of confidence*.'

- *'… OIC should not confuse the circumstances of the communication of the information with the requirements of the Act. It is apparent that the circumstances of the disclosure of the information, and the express undertaking of the parties to maintain confidentiality* [and take certain steps to protect confidentiality]*, imparted an obligation of confidence on the parties which is not automatically eroded by the making of an application by an applicant for disclosure under the Act.*'

- '*… the State has an obligation to act commercially as set out in the Economic Development Act 2012* [**ED Act**] *… The State is therefore required in this instance to take a commercial approach to its functions. There is an expectation by a reasonable developer entering into a contract with the State in these circumstances that the State will act commercially, which would include avoiding any breaches of confidence in contract. The failure of the State to maintain confidence in confidential information and to act in a commercial manner in these circumstances may compromise the willingness of developers to enter into agreements with the State in future*.'

- Walker submitted that:[52]

  - '[The confidentiality clause] *imposes upon* [Council] *the clearest, unequivocal, contractual obligation not to disclose the DA and, by logical extension, any document that varied the DA, including the Deed of Variation.*'

  - '*The contention of OIC that* [the exceptions identified in the confidentiality clause] *of the DA derogate… from that unequivocal contractual obligation not to disclose the DA, is wrong and untenable. The plain words of the document contradict such a contention*.'

  - '*Parties to a contract, who expressly provide for the confidentiality of information or documents, patently have "a mutual understanding of confidence" that is "binding" on them.'*

  - '… *at the very beginning of their relationship* [MEDQ and Walker] *entered into a written Non-Disclosure Agreement in relation to information to be provided by the former to the latter.*'

  - The exception regarding disclosure required by law (including right to information) permits *'the Owners … to disclose information where such disclosure is <u>required</u> by law …, that is to say, when an Owner is legally <u>compelled</u> to do so. Far from*

[52] Submission dated 21 September 2018.

being provisions that derogate from the absolute obligations of confidence, they are words of limitation on the ability of the parties to disclose information. A party may only disclose information of the kinds specified if it is absolutely necessary to do so…'.

[Walker's emphasis]

- The parties entered into '*further express contractual obligations to "take steps" to protect the confidentiality that they had agreed to …*'.

- The relevance of '*public interest considerations* [is] *misconceived. At the very least, such "considerations" are irrelevant to the "circumstances of the communication" point, and it seems that the Queensland decisions that say otherwise are wrong'.*

- *'Of the cases cited* [in *Orth*] …, Esso *was a case about implied obligations of confidence in connection with an arbitration where one of the parties was a Minister of the Crown.* Cockatoo Dockyard *was a case concerning the power of an arbitrator to make procedural orders imposing an obligation of confidentiality on a Government litigant concerning its own documents. Further,* Cardwell*, while containing an interesting exposition of the Commissioner's views about some aspects of the law of confidential information, seems scarcely to support the proposition contended for. Moreover, the proposition itself is couched in terms of "information purportedly supplied in confidence by parties outside Government". That is not the present case; here the information was provided subject to express obligations of confidence'.*

- *'…once it is determined that a document contains information the disclosure of which would found an action for breach of confidence, the document, without more, becomes exempt from disclosure because the Act deems it to be* "contrary to the public interest" *to disclose it. OIC has no power to override the express intention of the legislature'*.

- '*It is entirely impermissible, in the context of considering "circumstances of communication" or "circumstances relating to communication" to advance matters of public interest. It is legally impermissible to undertake such an artificial process simply because there is "public interest" or, in reality, "interest of the public" in the subject-matter of the information. It is logically fallacious to contend that such interest, however formulated, is a "circumstance" of, or relating to, "communication" of the information itself. It must be accepted that the OIC is not permitted to examine the "public interest" in a document that contains exempt information within s.48 of the RTI Act. At the risk of repetition, the Queensland legislature has already done this…*'.

- MEDQ submitted that:[53]

  - '…*the principal* [sic] *purpose of the* [ED Act] *is to facilitate economic development, and development for community purposes, in the State…* [the] *ED Act establishes the MEDQ as a sole corporation that has an obligation to act commercially.*'

  - The DA provides that '…*each party must maintain in confidence all Confidential information and ensure that the Confidential information is kept confidential. Confidential information is clearly defined in … the DA*. … [all parties] *negotiated*

[53] Submission dated 28 August 2018.

and agreed to the terms of this agreement further supporting all parties agreed the material in question is confidential.'

- While the exception *'affords that a party <u>may</u> reveal* [c]*onfidential information in certain circumstances, … one must weigh up the public interest harm of disclosing such confidential commercial agreements …'*.

[MEDQ's emphasis]

Analysis

29. The submissions of the Objecting Participants all contend that the contractual clause in the DA is sufficient to prevent disclosure of the information in issue.

30. It is well settled law that parties to a contract cannot contractually renounce a statutory right conferred for the benefit of society.[54] The RTI Act confers on individuals a statutory right to government information.[55] Accordingly, Council may not, simply by entering into a contract such as the DA, deprive the public of this right.

31. The DA itself recognises this. The confidentiality clause identifies various exceptions to the contractual obligation of confidence where information defined as confidential information may be revealed. One such exception relates to the circumstance where disclosure is required by law (including right to information). Accordingly, the confidentiality clause specifically contemplates disclosure in accordance with the RTI Act as an exception to its obligation of confidentiality.[56]

The exception to the confidentiality clause

32. In contending that the confidentiality clause as a whole fixed the parties to the DA with an obligation of confidence, the Objecting Participants' submissions each contended this exception should be interpreted as less mandatory than other aspects of the clause.

33. In terms of interpretation of the exception itself, Council and Walker submitted that the disclosure under the RTI Act would not be required unless the RTI Act 'forced', 'mandated' or 'legally compelled' this to occur. Further, Council suggested that OIC was incorrectly of the understanding that the contractual undertaking regarding confidentiality was automatically eroded by the *making* of an access application. With respect to these submissions, it is relevant to note that, given the RTI Act's pro-disclosure bias,[57] the default position regarding an access application is disclosure. Parliament intended that, if an access application is made to an agency, the agency should disclose the documents *unless* doing so would be contrary to the public interest.[58] In line with Parliament's intention, the statutory right of access under the RTI Act is subject to various grounds of refusal.[59] Accordingly, the *making* of an application alone cannot entitle an applicant to all of the information they seek. It is also necessary that none of the grounds of refusal apply and, in doing so, displace the pro-disclosure bias. To frame this position in terms

[54] See *Davies v Davies* (1919) 26 CLR 348. In *B and BNRHA* at [99], the Information Commissioner referred to a statement made by the Full Court of the Federal Court of Australia in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163 at 180 that '*Prior to the coming into operation of the FOI Act, most communications to Commonwealth Departments were understood to be confidential because access to the material could be obtained only at the discretion of an appropriate officer. With the commencement of the FOI Act on 1 December 1982, not only could there be no understanding of absolute confidentiality, access became enforceable, subject to the provisions of the FOI Act. No officer could avoid the provisions of the FOI Act simply by agreeing to keep documents confidential. The FOI Act provided otherwise.'*

[55] Subject to other provisions of the RTI Act, including the grounds for refusing access in section 47(3) of the RTI Act.

[56] Given the constraint noted at paragraph 14, I cannot be more specific regarding the confidentiality clause or the relevant exception.

[57] Sections 39 and 44 of the RTI Act.

[58] Section 3(1) of the RTI Act.

[59] That is, the grounds in Parts 4 and 5 of the RTI Act.

of the present application: if the claimed grounds of refusal do not apply, disclosure in accordance with the RTI Act is required.

34. Further, in terms of interpretation of the exception relative to the rest of the confidentiality clause, MEDQ emphasised that the language of the exception provided only that a party *may* disclose confidential information. Further, Council pointed to 'mandatory' language regarding the obligation of confidence and the steps to be taken by the parties to protect confidentiality, when compared with the 'non-mandatory' language of the exception, as evidence of an equitable obligation of confidence.[60] However, while the language regarding the exception arguably employs less mandatory language than the language regarding obligation and the steps to be taken, I consider this to be of little significance, given that Council would be aware that it is not possible to contractually renounce a statutory right such as that conferred by the RTI Act. Further, I consider that the text in question appears to employ standard wording and reflect standard drafting for confidentiality provisions in documents such as the DA.

35. The Objecting Participants' abovementioned submissions about the exception having relatively limited effect are directed at establishing that the contractual obligation (which, in this case, effectively embodies or records the circumstances of the communication between the parties) evidences a mutual understanding sufficient to establish an equitable obligation of confidence. I accept that the confidentiality clause, along with the relevant definition of confidential information, evidences the parties' agreement that each of them do everything possible to maintain the confidentiality of the DA,[61] and acknowledge this as evidence pointing towards communication in circumstances giving rise to an understanding that the information in issue would be treated confidentially (subject to the specified exceptions). However, for the reasons set out above, I am unable to conclude that the effect of the exception regarding disclosure under the RTI Act is limited in the manner the Objecting Participants suggest.

36. Walker's submissions also refer to a non-disclosure agreement entered into between MEDQ and Walker, in connection with the Project, in relation to information provided by MEDQ to Walker. This non-disclosure agreement was not provided to OIC during the external review, nor was it clear whether it covered the DA, the preferred developer process or both. In its submissions, Walker appears to suggest that the DA is covered by the non-disclosure agreement, however, it is not clear *how* the information protected under this agreement is relevant to the DA—which represents a final agreement between the Owners. Further, despite the non-disclosure agreement being in relation to information provided by MEDQ to Walker, MEDQ did not refer to or rely on this agreement in its submissions on external review.

Are public interest considerations relevant to the circumstances of the communication?

37. Regardless of the effect of the contractual exception,[62] I consider that other circumstances surrounding the communication of the confidential information are, in any event, relevant to the question of whether criterion (c) is met. Specifically, I consider that the public interest considerations related to the public's legitimate interest in scrutinising the affairs of government noted at paragraph 26 above are material. For the reasons explained below, I am not, when these considerations are taken into account, satisfied that equity would hold Council conscience-bound to keep confidential from the Queensland public information about the development of public land.

[60] Given the constraint noted at paragraph 14, I cannot be more specific regarding the language raised by MEDQ and Council.
[61] And by extension, the DV.
[62] Or the non-disclosure agreement referred to at paragraph 36.

38. Each of the Objecting Participants' contentions that the confidentiality clause is sufficient to establish an equitable obligation of confidence proceeded on the basis that there is no difference between obligations of confidence involving only private entities, and obligations of confidence sought to be reposed by persons outside government in government agencies. However, only Walker addressed the abovementioned public interest considerations regarding obligations of confidence sought to be reposed in government agencies, contending that these considerations were irrelevant to the circumstances of the communication between the parties to the DA.

39. In this regard, Walker submitted that, as the legislature has already considered the public interest in establishing the exemption in schedule 3, section 8(1) of the RTI Act, public interest considerations are not relevant to establishing criterion (c). It is correct to say that Parliament has declared that disclosure of 'exempt information'—relevantly, information the disclosure of which would found an action for breach of confidence—is contrary to the public interest. A finding that information is 'exempt information' precludes any consideration by an RTI decision maker of public interest balancing factors, and obviates the need to conduct a public interest balancing exercise.

40. 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 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. In this case, the Objecting Participants are relying on an exemption provision that effectively imports the requirements of the general law—which requirements include, as discussed above, a consideration of all relevant circumstances surrounding the communication of confidential information.

41. Walker also contended that the decisions referred to by OIC regarding such considerations are either wrong or can be distinguished. OIC's decisions which have noted that public interest considerations relating to the public's legitimate interest in obtaining information about the affairs of government may affect the question of whether enforceable obligations of confidence should be imposed on government agencies in respect of information purportedly supplied in confidence by parties outside government (*Orth*, *Berri* and *Swickers*) each cited *Esso*, *Cockatoo Dockyards* and *Cardwell*. *Cardwell* is another OIC decision which cites *Esso*. Consequently, *Esso* and *Cockatoo Dockyards* are of primary relevance when considering whether public interest considerations are relevant to the circumstances of the communication.

42. *Esso* involved agreements for the sale of natural gas by two private gas suppliers to two Victorian government agencies. When the private entities sought price increases under the agreements, the disputes about pricing were referred to arbitration. The High Court considered whether a term, providing that documents supplied by the private entities in the course of the arbitration were to be treated in confidence, should be implied into the contractual agreements between the parties. While Mason CJ found[63] that such a contractual term should not be implied, he considered that the documents were subject to implied undertakings as to confidentiality and, in this regard, noted:

> *… there may be circumstances, in which third parties and the public have a legitimate interest in knowing what has transpired in an arbitration, which would give rise to a "public interest" exception. The precise scope of this exception remains unclear.*

[63] At 30-33.

> *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* (***Fairfax***),[64] *the judiciary must view the disclosure of governmental information "through different spectacles". This involves a reversal of proof: the government must prove that the public interest demands non-disclosure.*
>
> *…*
>
> *… The approach outlined in John Fairfax should be adopted when the information relates to statutory authorities or public authorities because, as Professor Finn notes, in the public sector "the need is for compelled openness, not for burgeoning secrecy". The present case is striking illustration of this principle. Why should the consumers and the public of Victoria be denied knowledge of what happens in these arbitrations, the outcome of which will affect, in all probability, the prices chargeable to consumers by the public utilities?*
>
> *…*
>
> *… the obligation of confidence attaches only in relation to documents which are produced by a party compulsorily pursuant to a direction by the arbitrator. And the obligation is necessarily subject to the public's legitimate interest in obtaining information about the affairs of public authorities.*
>
> [footnotes omitted]

43. Dawson and McHugh JJ concurred with Mason CJ's judgment. While the judgments of Toohey and Brennan JJ differed somewhat,[65] McHugh J agreed[66] with Mason CJ that there is a "public interest" exception, and Brennan J noted:[67]

> [The public authorities] *have a duty - possibly a legal duty in the case of* [one of the public authorities] *but at least a moral duty in the case of both public authorities - to account to the public for the manner in which they perform their functions. Public authorities are not to be taken, prima facie, to have bound themselves to refrain from giving an account of their functions in an appropriate way: sometimes by giving information to the public directly, sometimes by giving information to a Minister, to a government department or to some other public authority.*
>
> [footnotes omitted]

44. *Cockatoo Dockyards* also considered whether documents relating to an arbitration were to be treated in confidence. The Commonwealth claimed that a private lessee had failed to maintain a Commonwealth dockyard in good repair, and the dispute was, in accordance with the lease agreement, referred to arbitration. The arbitrator made a procedural direction that documents, including documents provided by the private entity to the Commonwealth, were confidential.[68] In his reasons regarding the direction, the arbitrator noted an access application had been made under the *Freedom of Information Act 1992* (Cth) and commented that:[69]

> *The essential issue which I must confront in circumstances where one of the parties to this arbitration is subject to the* Freedom of Information Act *is whether or not I have power to give a direction as to what may, or may not, be done by the parties to this arbitration, during the currency of the arbitration, with documents, whether brought into existence solely for the purposes of the arbitration or not, but which constitute, or which might constitute, some part of the evidence in these proceedings.*

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[64] The *Fairfax* decision relates to criterion (e) and is considered when the hypothetical plaintiff is an entity owned and controlled by government. However, I consider that the principles enunciated by Mason CJ in relation to the public interest exception remain relevant in terms of criterion (c) in cases such as this which involve agreements entered into by government agencies.
[65] In that each found that a contractual term of confidentiality *could* be implied into the arbitration agreements—at 47 and 36 respectively.
[66] At 48.
[67] At 37-38.
[68] Directions were made and clarified on a number of occasions, and related to other types of documents as well (including documents supplied by the Commonwealth to the private entity, documents to prepared for the purposes of the arbitration and documents filed as evidence in it)—see 666 and 669.
[69] At 667.

45. Kirby P (then of the New South Wales Court of Appeal, Priestley JA in agreement) stated:[70]

> *… I find unacceptable the proposition that the Court is incapable of providing relief, and has lost its powers altogether, simply because parties have entered into a private contract by which they have submitted a dispute to arbitration. The proposition may be tested this way. Imagine that a government and a private company for their own purposes agreed to private arbitration and further agreed that information of profound importance to the community and of legitimate public interest were to be suppressed from public access. Can it seriously be suggested that their private agreement can, endorsed by a procedural direction of an arbitration, exclude from the public domain matters of legitimate public concern? …*
>
> *…*
>
> *… Effectively,* [the arbitrator's direction] *puts a lid on the direct or indirect use of material prepared for the arbitration, no matter how significant that material may be to the public at large. For all this Court knows, it is both significant and urgent that the material should be made available, for the protection of public health and the restoration of the environment, both to the State EPA and to other Federal and State agencies or even to the public generally. It is one thing, as Mason CJ pointed out in* Esso*, to protect with confidentiality documents which a party has been obliged by law to produce for inspection on discovery or for the purposes of proceedings. It is quite another to cast the net of confidentiality protection so wide that it embraces a party's own documents perhaps prepared for the purposes of the arbitration but having a wider public interest and utility. Were the law otherwise, a question would be raised as to how the Commonwealth, with its large constitutional and legal rights and duties could ever submit to a private arbitration the result of doing which might be to surrender its governmental rights and duties completely to procedural orders of an arbitrator which were effectively if not entirely unreviewable.*

46. *Esso* and *Cockatoo Dockyards* both considered whether documents supplied by private entities to government agencies in the course of arbitrations were to be treated in confidence by the government agencies. The present issue of whether information communicated by private entities to government agencies (in this instance, the DA and, by extension, the DV) should be treated as subject to an obligation of confidence by the government agencies is, in my opinion, sufficiently similar to support *Esso* and *Cockatoo Dockyards* constituting relevant authorities. Also, the principles discussed by the majority of the High Court, and subsequently adopted by the majority of the New South Wales Court of Appeal, are expressed in sufficiently broad terms to warrant this approach. Accordingly, as recorded in *Cardwell, Orth, Berri and Swickers*, OIC has proceeded on the basis that the principles regarding public interest considerations identified in *Esso* and *Cockatoo Dockyards* are applicable when considering criterion (c). I am unaware of any authority precluding my taking matters of a public interest nature into account in evaluating whether information has been communicated in circumstances that give rise to an equitable obligation of confidence. In the circumstances, I am content to follow *Esso* and *Cockatoo Dockyards* and the decisions of the Information Commissioner referred to in paragraph 26 above.

47. Accordingly, I consider that public interest considerations form part of the constellation of relevant circumstances that I am required to take account of in assessing whether criterion (c) is established in a breach of confidence claim for exemption under the RTI Act. I am satisfied that the community's legitimate interest in obtaining information about the actions of government, which are taken on the community's behalf, and which are funded by the community (for example, by the payment of public monies or the transfer of state land), may affect the question of whether an enforceable obligation of confidence should be imposed on government agencies in respect of information purportedly supplied in confidence by parties outside government.

[70] At 675 and 680.

The public interest considerations relevant to the information in issue

48. In the present circumstances, it is publicly known that Walker is responsible for designing, financing and constructing the Project on public land in the Toondah Harbour PDA.[71] The development's key features include:[72]

- a new port facility
- foreshore parklands and foreshore access
- recreational boating facilities including a 200 berth recreational marina, pontoon and sheltered boat ramp and trailer parking
- conservation park
- marina plaza with boutique retail and dining precinct
- hotel and convention facilities
- 3,600 dwellings; and
- 1,010 public car parking spaces for ferry users.

49. Walker advises that the Project's economic benefits are:[73]

- 1,000 construction-related jobs annually during the construction phase
- 500 jobs on site once operational
- $78.1 million additional retail expenditure in the Redlands
- $34.8 million contributed annually to Gross Regional Product
- $175 million investment in tourism enabling infrastructure; and
- a projected 50,000 additional visitors annually, generating a further 500 jobs in the region's tourism sector.

50. The Toondah Harbour PDA is on the southern shores of Moreton Bay, approximately one kilometre east of the Cleveland CBD. It covers a total area of approximately 67.4 hectares, including 17.9 hectares over land and 49.5 hectares over water within Moreton Bay. Of this area, 42 hectares are within the boundary of the Moreton Bay Ramsar Wetland, which is listed under *Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat* (**Ramsar Convention**), an international treaty for the conservation and sustainable use of wetlands to which Australia is a signatory.[74]

51. According to Walker's assessment of the Project in its **Referral** to the Commonwealth Department of Environment and Energy:[75]

- the current masterplan for the Project includes approximately 32 hectares of land that will be created as a result of reclamation works in Moreton Bay
- most of the reclamation works are to occur in the Moreton Bay Ramsar Wetland[76]
- the Project will have a significant impact on the Moreton Bay Ramsar Wetland;[77] and

[71] At <http://www.walkercorp.com.au/downloads/toondah-harbour/masterplan.pdf>.
[72] At <http://www.toondah-harbour.com.au/downloads/fact-sheet-project-overview.pdf>.
[73] At <http://www.toondah-harbour.com.au/downloads/fact-sheet-project-overview.pdf>.
[74] The Moreton Bay Ramsar Wetland has been protected since 1993 because of its biodiversity including many nationally threatened species—see <http://www.environment.gov.au/cgi-bin/wetlands/ramsardetails.pl?refcode=41>. Its total area is over 110,000 hectares—see <https://wetlandinfo.ehp.qld.gov.au/wetlands/facts-maps/ramsar-wetland-moreton-bay/>.
[75] That is, Walker's third Referral submitted under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) dated 30 May 2018, EPBC reference no. 2018/8225 at <http://epbcnotices.environment.gov.au/_entity/annotation/c5c75af9-7768-e811-817f-005056ba00a7/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1541048392558>.
[76] See *'2. Master Plan – Broad Land Uses'* by Saunders Havill Group dated 30 May 2018 at page 3 of attachment 8 to the Referral at <http://epbcnotices.environment.gov.au/_entity/annotation/8d039282-7868-e811-817f-005056ba00a7/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1541372253180>.
[77] Section 2.3 of the Referral.

- the Project is also likely to have a significant impact on 8 threatened species and 11 migratory species listed as vulnerable, endangered and critically endangered.[78]

52. Walker's Referral also notes that the PDA forms part of the claim area for a native title claim on behalf of Quandamooka people registered by the National Native Title Tribunal on 8 March 2017. Prior to the registration of this claim, in early November 2015, the State Government commenced notification of a proposed Indigenous Land Use Agreement (**ILUA**), and MEDQ now intends to negotiate an ILUA regarding relevant land.[79]

53. Further, in terms of other land tenure issues, Walker's Referral states:[80]

> [MEDQ] *expects to maintain continuous ownership of the State land, including the reclamation area, throughout the construction phase of the Project.*
>
> *The developed lots that are reclaimed land will eventually be transferred to private purchasers, with the exception of the ferry terminals and car parking which will be transferred to the ownership of Redland City Council and the foreshore park and road reserves which will be State reserves managed by the Council.*
>
> *The marina will be sold out of state ownership into private ownership either en globo or as a strata subdivision lot by lot.*

54. Accordingly, it is intended that the 200 berth marina and a substantial majority[81] of the 3,600 dwellings put forward by Walker in its financial proposal for the project[82] will be sold out of state ownership and become privately owned. New ferry terminals, car parking, a foreshore park and road reserves will remain publicly owned.

55. In terms of the community infrastructure, Council has advised that:[83]

> *Of the $116 million in infrastructure to be delivered to the Redlands community, more than $56 million is through the Infrastructure Agreement* [to be] *paid for from the infrastructure charges, … collected by Council from Walker Group… in line with the Council Adopted Infrastructure Resolution.*
>
> *The remaining community infrastructure will be delivered through the Development Agreement, which will be paid for from the proceeds of the project.*

56. That is, approximately $56 million in community infrastructure is to be delivered through the Infrastructure Agreement, which is publicly available.[84] The remaining community infrastructure—worth about $60 million—is to be delivered through the DA.

57. The details regarding the Project at paragraphs 48 to 56 above clearly indicate that it will have significant social, economic and environmental impacts on the PDA and surrounding areas. Indeed, Walker has described the Project as its *'$1.4 billion investment in the environmental, cultural and economic future of the Redlands'*.[85] Given the significance of the Project, I consider it reasonable that the community has a legitimate interest in obtaining *information* about the actions of a local government and

[78] Sections 2.4 and 2.5 of the Referral.
[79] Section 3.10 of the Referral.
[80] Section 3.10 of the Referral.
[81] Which, based on a comparison of the masterplan at <http://www.toondah-harbour.com.au/downloads/2018-master-plan.pdf> and *'2. Master Plan – Broad Land Uses'* by Saunders Havill Group dated 30 May 2018 provided with the Referral (as noted at footnote 74 above), appear to be on land reclaimed from Moreton Bay.
[82] At <http://www.toondah-harbour.com.au/faq/>.
[83] At <https://www.redland.qld.gov.au/info/20271/priority_development_areas/850/toondah_harbour_infrastructure_agreement>.
[84] At <https://www.redland.qld.gov.au/download/downloads/id/2541/toondah_harbour_infrastructure_agreement.pdf>.
[85] At <http://www.toondah-harbour.com.au/downloads/fact-sheet-project-overview.pdf>.

a State development agency,[86] and possibly a local government investment vehicle,[87] involved in the Project.

58. In order to determine whether this legitimate interest in obtaining *information* includes the *information in issue*, the contents of the DA[88] must be considered. The DA represents a final agreement between government agencies and Walker in relation to the Project, setting out the terms on which Walker has been engaged to develop State land and waters[89] in a PDA, so as to provide infrastructure for the community (both local and more broadly) and for residential and commercial purposes. While I am precluded from revealing the contents of the information in issue within the DA (as noted at paragraph 14 above), I agree with Walker's comment that the information in issue may be described as setting out *'all manner of financial, procedural, technical and other matters'*.[90] These matters relate to all development product and community infrastructure (other than the community infrastructure addressed in the Infrastructure Agreement), and set out what may—in general terms—be described as what the Project will deliver and when. As may be expected in an agreement of this type, the parties' obligations and rights are identified. Specifically, the DA provides information regarding the commitments that the government agencies obtained from Walker in terms of design, financing and delivery of development product and about $60 million of community infrastructure; the extent to which the agencies secured the ability to contribute to ongoing decisions throughout the life of the Project; and the steps (including actions regarding State land and waters) that the agencies agreed to take in return.

59. Accordingly, the contents of the DA[91] comprise information about the actions of government agencies, taken on the community's behalf, regarding a development that will be indirectly funded by the community (via the transfer of State land) and yield significant social, economic and environmental impacts. In these circumstances, I consider that there is a legitimate public interest in disclosure of the information in issue, so as to allow scrutiny of the actions of the government agencies. Given this position, I do not accept that the communication between the parties (as recorded or embodied by the DA) occurred in such circumstances as to fix Council with an equitable obligation of conscience not to disclose the DA. Accordingly, I find that criterion (c) is not satisfied.

MEDQ's obligation to act commercially

60. Council and MEDQ both raised MEDQ's obligation to act commercially in the context of their submissions contending that the DA and DV are subject to an obligation of confidence. In this regard, I note that:

- section 15 of the ED Act provides that MEDQ '*must, to the extent practicable, carry out its functions mentioned in section 13(2)(a) and (b) on a commercial basis*'
  [my emphasis]

- section 13 of the ED Act provides that—

  (1) MEDQ's main function is to give effect to the main purpose of this Act.

[86] Both of which are government agencies under the RTI Act (see paragraph 107 below).
[87] Which may not constitute a government agency for the purpose of the RTI Act (see paragraph 107 below) but, as noted at footnote 1, is wholly owned by Redland Investment Corporation Pty Ltd, which in turn, is wholly owned by Council. Given my findings regarding Council and MEDQ, it is unnecessary for me to determine whether the legitimate interest extends to RIC Toondah.
[88] And, by extension, the DV.
[89] And a small amount of freehold.
[90] As noted by Walker in its submission dated 21 September 2018.
[91] And, by extension, the DV.

> *(2) MEDQ's other functions, for facilitating economic development and development for community purposes, include—*
> *(a) dealing in land or other property; and*
> *(b) coordinating the provision of, or providing, infrastructure and other services; and*
> *(c) planning for, and developing and managing land in or for, priority development areas; and*
> *(d) deciding PDA development applications under this Act.*

- section 3 of the ED Act provides that '[t]*he main purpose of this Act is to facilitate economic development, and development for community purposes, in the State*'.

61. The statutory obligation on MEDQ to act commercially is somewhat qualified by the words *'to the extent practicable'* in section 15 of the ED Act. Further, the requirement for MEDQ to act commercially applies to dealings in land and other property and coordinating infrastructure and other services generally,[92] but may not apply to MEDQ's involvement in PDAs specifically,[93] at least to the extent that such involvement relates to matters other than property dealings or service coordination by MEDQ.

62. I also note that, given the access application was made to Council, it is Council (not MEDQ) which is the relevant confidant and potential defendant to any action by the confider/hypothetical plaintiff (that is, Walker group of companies). Based on the material before me, neither Council nor RIC Toondah appear to be subject to obligations to act in a commercial manner akin to that which applies to MEDQ.[94] In these circumstances, it is unclear how a qualified statutory obligation for one party to act commercially in certain circumstances, which arguably may not include all of that party's activities regarding PDAs such as Toondah Harbour, is relevant to the issue of whether there is an equitable obligation of confidence between the parties. I have, however, considered this submission in the context of the public interest test (from paragraph 98 below).

Findings

63. I find that criterion (c) of the five cumulative criteria necessary to found an action in equity for breach of confidence is not established in respect of the information in issue. I find that the circumstances of the communication between the parties to the DA did not create an equitable obligation of confidence.

64. I therefore find that the information in issue is not exempt information under schedule 3, section 8 of the RTI Act. Accordingly, I find that the ground for refusing access in section 47(3)(a) of the RTI Act cannot apply.

Contrary to the public interest information

65. A further ground on which access to information may be refused under the RTI Act is that disclosure of the information would, on balance, be contrary to the public interest.[95]

66. It is Parliament's intention that the RTI Act should be administered with a pro-disclosure bias, meaning that an agency should decide to give access to information, unless giving

[92] Under section 13(2)(a) and (b) of the ED Act.
[93] Under section 13(2)(c) and (d) of the ED Act.
[94] Usually when entering contracts, Council is required to ensure that it has regard to "sound contracting principles", namely value for money; open and effective competition; the development of competitive local business and industry; environmental protection; and ethical behaviour and fair dealing—section 104 of the *Local Government Act 2009* (Qld).
[95] Section 47(3)(b) of the RTI Act.

access would, on balance, be contrary to the public interest.[96] The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest[97] and explains the steps that a decision-maker must take, as follows:[98]

- 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.

67. The Objecting Participants all contend that the information in issue may be refused on this ground. RIC Toondah adopted Council's submissions[99] regarding factors favouring disclosure and nondisclosure. Walker adopted Council's submissions regarding factors favouring nondisclosure, but made further submissions regarding some of those factors.

Preliminary issues

The public interest

68. In summary, Walker submitted that:

- The decisions of *Adani Mining Pty Ltd and Department of Natural Resources, Mines and Energy & Ors*,[100] *Abbot Point Bulkcoal Pty Ltd and Department of Environment and Science & Anor*[101] and *TerraCom Limited and Department of Natural Resources, Mines and Energy & Ors*[102] *'disclose a consistent position taken by OIC this year, that seemingly confidential documents, in relation to major projects in Queensland, do not attract "public interest" protection under the RTI Act, only because some members of the public may have personal reasons for wanting access to them, undoubtedly so that they can use them against the commencement, continuance or completion of such projects'.*

- Any non-Government entity contemplating engaging with the Queensland Government in commercial transactions may be reluctant to do so, because the application of this view of the public interest would ensure that *'every detail of each such transaction, however justifiably confidential, was made available to every self-interested group or individual to the disadvantage of the people of Queensland, the true "public" in the expression "public interest"*.'

- It is unclear whether *'the "public interest" in the disclosure of a particular document* [is] *to be determined objectively or subjectively'*.

69. The main purpose of the RTI Act is to give a right of access to government information in Queensland unless, on balance, giving access would be contrary to the public interest. In the above decisions, the term 'public interest' referred to:

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[96] This pro-disclosure bias is consistent with a report prepared by the Queensland Audit Office (**QAO**) (Report 8: Confidentiality and disclosure of government contracts) where QAO examined the use of confidentiality provisions in Queensland Government contracts. QAO explained that in keeping with the policy of open information and the RTI Act, parliament and members of the public should have access to government contract information unless there is a sound reason not to.
[97] Schedule 4 of the RTI Act lists such factors. The phrase *'including any factor mentioned in schedule 4 … '* in section 49(3)(a), (b) and (c) of the RTI Act indicates that the factors listed are not exhaustive.
[98] Section 49(3) of the RTI Act.
[99] Dated 19 April 2018.
[100] [2018] QICmr 20.
[101] [2018] QICmr 24.
[102] [2018] QICmr 31.

> *… considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that 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.*

70. To the extent that the above submissions suggest that, regardless of the circumstances, OIC finds that documents claimed to be confidential are not exempt nor contrary to the public interest under the RTI Act because of the applicant's (or some members of the public) personal reasons for seeking access—I disagree. An applicant's reasons for seeking access to information under the RTI Act are irrelevant to the public interest test,[103] and there is no information in the OIC decisions mentioned by Walker to suggest that such reasons were taken into account. Rather, each of these decisions evidences an *objective* evaluation of all relevant facts and circumstances by OIC, as is required when determining of whether disclosure under the RTI Act would, on balance, be contrary to the public interest.

The meaning of 'could reasonably be expected to'

71. The *objective* nature of the public interest test is indicated by many of the public interest factors favouring disclosure and nondisclosure identified in schedule 4 of the RTI Act, which require consideration of whether disclosure of the information in question *'could reasonably be expected to'* result in particular outcomes. The phrase *'could reasonably be expected to'* calls for a decision-maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible or merely speculative, and expectations that are reasonably based: that is, expectations for the occurrence of outcomes for which real and substantial grounds exist.[104]

72. Accordingly, in order for particular factors to apply, I must be satisfied that there is a reasonably based expectation (and not mere speculation or a mere possibility, or something that is irrational or absurd or ridiculous) that the consequences identified in the factor will follow as a result of the information in question being disclosed. Whether the expected consequence is reasonable requires an objective examination of the relevant evidence. Further, the expectation must arise as a result of disclosure of the information in issue, rather than from other circumstances.

Irrelevant factors

73. I have taken no irrelevant factors into account in making my decision, regarding the applicant's reasons for seeking access or otherwise.

Factors favouring nondisclosure

Prejudice to business affairs and competitive commercial activities

74. If disclosure of information:

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[103] In *State of Qld v Albietz, Information Commissioner (Qld) & Anor* [1996] 1 Qd R 215, de Jersey J noted at 222 '*… the Freedom of Information Act does not confer any discretion on the Information Commissioner, or the Supreme Court, to stop disclosure of information because of any particular motivation in the applicant*'.

[104] See *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 (***Cannon***) at [62]-[63]. See also *B and BNRHA* at [160]. Other authorities note that the words *'require a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous to expect a disclosure of the information could have the prescribed consequences relied upon*': *Smolenski v Commissioner of Police, NSW Police* [2015] NSWCATAD 21 at [34], citing *Commissioner of Police, NSW Police Force v Camilleri (GD)* [2012] NSWADTAP 19 at [28], *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [61] and *Attorney-General's Department v Cockroft* (1986) 10 FCR 180 at 190.

- could reasonably be expected to prejudice the private, business, commercial or financial affairs of an *entity*, or prejudice the competitive commercial activities of an *agency*, factors favouring nondisclosure apply;[105] and
- would disclose information (other than trade secrets of information that has a commercial value to an agency or another person) concerning the business, professional, commercial or financial affairs of that agency or other person, in circumstances where disclosure could reasonably be expected to have an adverse effect on those affairs, or prejudice the future supply of such information to government in future, a harm factor favouring nondisclosure applies.[106]

75. Section 36 and schedule 1 of the AI Act defines an *'entity'* to include *'a person and an unincorporated body';* 'person' to include *'an individual and a corporation'*; and 'individual' to mean *'a natural person'*. Section 14 of the RTI Act defines an *'agency'* to include a local government and a public authority; and section 16 of the RTI Act defines a 'public authority' to include *'an entity … established for a public purpose by an Act'*.

Submissions regarding the Council and the State

76. Council submitted that, of particular relevance to **Council and the State**, disclosure of the DA and DV could reasonably be expected to:

(a) increase the bargaining position of third parties relative to Council and the State, placing Council and the State at a disadvantage in undertaking commercial negotiations

(b) if the DA with Walker were to be terminated for the failure of a condition—prejudice the ability of Council and the State to negotiate with a future bidder to replace Walker, as disclosure would reveal commercially sensitive information which could diminish the bargaining power of Council and the State against future bidders

(c) discourage third parties (in this context, developers) from early and detailed collaboration with Council and the State in respect of projects and affect future supply of information to the government

(d) impact the amount of income received by Council and the State for the project if future negotiations are affected by the disclosure of the DA and DV; and

(e) erode public confidence in the ability of the State to act commercially under the ED Act and in future similar arrangements.[107]

Submissions regarding Walker

77. Council also submitted that, of particular reference to **Walker**:

(f) it operates in a competitive, commercial market which requires contractors to routinely bid for both government and private work

(g) the DA details the work to be undertaken by Walker and its financial return from the development, the disclosure of which is likely to prejudice Walker's future

[105] Schedule 4, part 3, items 2 and 17 of the RTI Act respectively.
[106] Schedule 4, part 4, item 7(1)(c) of the RTI Act.
[107] Walker made a submission in furtherance of submission (e), which is addressed in my consideration of this submission below.

tendering for government and private work, as its competitors will have access to information which reveals the basis upon which it bids for work; and

(h) disclosure of the DA will adversely affect the ability of Walker to negotiate with third parties for the purpose of undertaking development if those third parties are aware of the basis upon which Walker agreed to carry out the development and the remuneration which it is to receive for the development.

78. I will now consider submissions (a) to (h) in turn.

Submission (a) – diminish the bargaining power of the Owners relative to particular third parties

79. In relation to submission (a), Council referred to:

- particular **Third Parties,** with whom, under the DA, the Owners must reach agreements; and
- unnamed **External Parties** that oppose the Project.

80. Council contended that:

- If disclosed, *'conditions which could give rise to termination could … be adversely influenced by* [External Parties]*'*.

- Further, disclosure of such conditions could prejudice the bargaining position of the Owners as against the Third Parties, as it may result in Third Parties having access to commercially relevant and sensitive information.

- In terms of one particular type of Third Party, disclosure will reveal information that affects the ability of the Owners to negotiate with such Third Parties, thereby diminishing the bargaining power of the parties.

81. Given the constraint noted at paragraph 14, I cannot refer to the Third Parties raised by Council, nor the specifics of the clauses in the DA relevant to them. However, given the nature, scale and location of the Project, I can note that the Third Parties are, in my opinion, unsurprising. I can also state that it is unsurprising that a DA of this nature and scale includes some conditions precedent or subsequent which may give rise to a right to terminate. In general terms, if particular conditions in the DA regarding the Third Parties are not satisfied by the relevant Owners nor waived by certain dates (as specified in the DA), an option to terminate the DA arises. If these clauses have been satisfied or waived, any right to terminate has ceased; however, if these clauses have **not** been satisfied nor waived, the right to terminate crystallises on the passing of the relevant dates.

Third Parties

82. In relation to the Third Parties, it is my understanding that Council contends that, following disclosure, the Third Parties could reasonably be expected to employ delay as a tactic, in the hope that the Owners may agree to terms more favourable to them, so as to avoid any exercise of the right to terminate once it has crystallised.

83. My initial view[108] was that disclosure could reasonably be expected to enhance the Third Parties' bargaining power. Having given the matter, and all submissions now before me, further, careful consideration, I consider that the Third Parties may, if informed by the relevant terms in the information in issue that failure to reach agreement with them could give rise to termination of the DA, be prepared to use delay, and the prospect of the right to terminate being exercised, in order to advance their position when bargaining with the Owners. In this regard, I note that:

- Given the number and nature of the Third Parties, it appears unlikely that there would be any who were ambivalent to the Project.

- If the Third Parties considered the Project to be favourable to their commercial or economic interests, disclosure would not only inform them that delay was a potential tactic, it would also inform them that this tactic risked termination of the DA—that is, an outcome that was not in their interests. In these circumstances, I consider it reasonable to expect that the Owners would be, or would become, aware of the relevant Third Party's positive position regarding the Project, and could adjust their approach to any Third Party brinkmanship during negotiations accordingly.

- If any of the Third Parties did not view the Project as favourable to their interests, they would, in all likelihood, be less amenable to reaching an agreement with the Owners, and be relatively willing to employ tactics, including delay or obstruction during negotiations, in an attempt to achieve concessions suitable to them. In this circumstance, I consider that such Third Party conduct could reasonably be expected to occur regardless, rather than in response to disclosure of the information in issue. I acknowledge, however, that disclosure would confirm to the Third Party that their chosen course of conduct was perhaps more effective than they had anticipated.

84. For these reasons, I accept that disclosure of particular terms within the information in issue—namely, terms which indicate that failure to reach agreement with the Third Parties could give rise to termination—could reasonably be expected to diminish the bargaining power of the Owners relative to the Third Parties raised by Council, but only to a limited degree.

External Parties

85. As well as contending that disclosure of the information in issue could reasonably be expected to result in the Third Parties securing *more favourable terms in their agreements* with the Owners (as discussed at paragraphs 83 and 84 above), Council and Walker also contended that disclosure could reasonably be expected to result in the Third Parties being *unwilling to enter the same agreements* (due to the adverse influence of External Parties hoping to frustrate the DA and prompt one of the parties to it to exercise the right to terminate). In this regard, Council submitted that disclosure would mean that *'conditions which could give rise to termination could … be adversely influenced by* [External Parties]*'* and Walker submitted that disclosure would result in the Third Parties being *'lobbied, pressured or maliciously targeted to prevent them from entering into … agreements with* [the Owners]*, with a view to stopping the* [P]*roject'*.

86. My initial view[109] was that disclosure could reasonably be expected to enhance the External Parties' ability to intercede and adversely influence the Third Parties regarding the Project. However, having given the material before me further, careful consideration,

[108] Preliminary view dated 27 July 2018, responding to Council's submissions dated 19 April 2018, and relating only to the accrual of a right to terminate, rather than the exercise of that right as well.
[109] See above footnote.

I consider that Council and Walker's submissions are too speculative or conjectural to form reasonably based expectations. To accept these submissions, I would have to consider it reasonable to expect that:

- firstly, as a result of disclosure, External Parties attempted to influence Third Parties against the Project
- secondly, that these External Parties were successful—that is, their adverse influence on the Third Parties was such that the Third Parties were unwilling to enter agreements with the Owners; and
- thirdly, that a party to the DA decided to exercise its right to terminate because the agreement/s had not been reached.

87. Before considering the reasonableness of these three expectations, I note that neither Council nor Walker explicitly named any External Party—however, based on the context of this review and their submissions, it appears reasonable to assume that they include the applicant in this category. In terms of the three expectations, I consider that:

- Firstly, as noted at paragraph 81 above, given the nature, scale and location of the Project, the Third Parties referred to by Council are unsurprising. Therefore they could, in all likelihood, be identified by the applicant (or another External Party) as being entities worth lobbying in any event, independently of disclosure of the information in issue.

- Secondly, even if lobbying occurred as a result of disclosure, there is nothing before me to suggest that it would be effective, or more effective, because the applicant (or another External Party) was aware that reaching an agreement was a condition precedent. Further, there is nothing before me to support a conclusion that the lobbying would be of such influence that it would render any of the Third Parties unwilling to enter an agreement with the Owners.

- Thirdly, even if failure to reach an agreement with any of the Third Parties could be attributed to lobbying by the applicant (or another External Party), there is insufficient material before me to suggest that any particular party to the DA would exercise their right to terminate in such circumstances. In saying this, I recognise that the agreements between the Owners and the Third Parties are, in practical terms, integral to the Project proceedings—however, I also note that there is, under the DA, capacity to amend the Master Plan, as has already occurred during the Referral process.[110] On the material before me, it is unclear why significant amendments occurred during that process, yet Council and Walker suggest that termination of the DA, rather than amendments to appease the Third Parties, could be expected in the present circumstances.

88. For these reasons, I do not accept that disclosure could reasonably be expected to result in the applicant or another External Party adversely influencing any Third Party referred to by Council, such that they are unwilling to enter an agreement with the Owners, with the result that one of the parties to the DA exercised its right to terminate.

Submission (b) – diminish the bargaining position of the Owners relative to any future bidders

89. In terms of submission (b), Council contemplated that, if the DA were to be terminated, it would become necessary for the Owners to negotiate with future bidders to find a

[110] Mentioned at footnotes 75 and 81.

replacement for Walker. Council submitted that disclosure of the DA would reveal commercially sensitive information which could diminish the bargaining power of Council and the State against future bidders.

90. In this regard, the only information that Council identified as *commercially sensitive* in its submission was information about Walker's financial return from the development. However, the applicant agreed to exclude certain information from consideration on external review, including this information.[111]

91. In the absence of information about the agreed consideration for Walker's performance, the remaining information in issue in the DA could not reasonably be expected to reveal commercially sensitive information that could impact future negotiations in the manner that Council suggests. In these circumstances, there is no evidence before me that disclosure of the information in issue could reasonably be expected to prejudice or adversely affect the bargaining power or negotiation capacity of Council or the State relative to any future developers, should the opportunity to bid to assume Walker's role in the development arise.

Submission (c) – discourage early collaboration with government agencies

92. In relation to submission (c) about project collaboration and prejudice to the future supply of information to government, Council refers to information provided by Walker '*… for the purpose of facilitating negotiations leading to the Development Agreement*'. It is not clear what information was provided by Walker, nor whether this information was more than what was strictly required in order to facilitate the negotiations.

93. I accept that OIC has previously found that developers may be discouraged from communicating with agencies at an early stage in relation to infrastructure development projects if they believe that their correspondence may be subject to disclosure under the RTI Act.[112] However, the information in issue does not comprise information about the process which led to Walker's appointment as the preferred developer, or negotiations between the parties about the DA. Rather, it comprises the resulting *agreement* between the Owners and Walker. Given these circumstances, while I accept that Walker operates in a competitive and commercial market, it is unclear *how* disclosure of the information in issue could reasonably be expected to prejudice the future supply of information from developers wishing to *'communicate in an open and transparent way with government at an early stage of the development process'*.

94. In any event, I note that, in *Sexton Trading and South Coast Regional Health Authority*,[113] the Information Commissioner considered whether it was reasonable to expect that the future supply of information to government would be prejudiced in situations where entities are required to supply the information to receive some benefit. I do not consider that a significant number of businesses would refrain from expressing an interest or participating in development opportunities of government simply because information about their involvement in a project may become subject to disclosure under the RTI Act after they were selected as the successful tenderer or preferred developer for the project.

[111] As set out at paragraph 11 above.
[112] *Straker and Sunshine Coast Regional Council; NBN Co Limited (Third Party)* [2016] QICmr 44 (28 October 2016) at [90].
[113] (1995) 3 QAR 132 (***Sexton***) at [132]-[137]. This point was originally discussed in *B and BNRHA*.

Submission (d) – diminish the income received by the Owners

95. In relation to submission (d), Council submitted that *'disclosure … could reasonably be expected to impact the amount of income received by the Council and State for the* [P]*roject if future negotiations are affected'*. However, it is unclear whether this submission relates to future negotiations with the particular Third Parties referred to by Council in relation to the agreements that the DA requires be reached between those Third Parties and the Owners (as mentioned in relation to submission (a) above), or to future negotiations with other parties who will become involved in the development as it proceeds.

96. To the extent that this submission relates to the former, as noted at paragraph 84, I accept that the bargaining power of the Owners relative to the Third Parties raised by Council could reasonably be expected to diminish as a result of disclosure, but only to a limited degree. However, I also note the relationship between expenditure on works relevant to the Third Parties and project income, as defined and directed to be paid, under the DA.[114] Based on this material, I am unable to identify how disclosure could reasonably be expected to detrimentally *'impact the amount of income received by the Council and State for the* [P]*roject'*.

97. To the extent that the submission relates to future negotiations with other parties, I note that the applicant agreed to exclude certain information from consideration, including particular information relating to community infrastructure and costings.[115] There is no evidence before me as to how disclosure of any information within the information in issue could reasonably be expected to lead to less advantageous, more expensive outcomes for the Owners in their dealings with any such third parties. Accordingly, I am unable to identify how disclosure could reasonably be expected to detrimentally affect the Project income received by the Owners.

Submission (e) – erode confidence in MEDQ to act commercially

98. In relation to submission (e), that disclosure of the information in issue will erode public confidence in MEDQ's ability to act commercially, it is not apparent from Council's submission *how* Council expects that this would occur. It may be that Council is concerned about what the information in issue itself would reveal about MEDQ. However, it may also be that Council is concerned about how the very act of disclosure would reflect on MEDQ.

99. The information in issue itself does not in my opinion, include any information which could be construed as indicating that MEDQ has failed to fulfil its obligation under section 15 of the ED Act. Accordingly, I am unable to identify how the contents of the information in issue would, if disclosed, be likely to erode public confidence in MEDQ.

100. In terms of the act of disclosing the information in issue, I accept that a private landowner, acting commercially in circumstances involving a large scale development, would be unlikely to disclose the relevant development agreement to others. It is my understanding that Council equates acting commercially with acting in the same manner as a private entity who entered a DA of this nature. However, the statutory obligation for MEDQ to carry out its functions on a commercial basis is somewhat qualified in nature (given the phrase *'to the extent practicable'*) and may not apply to all of MEDQ's activities regarding PDAs such as Toondah Harbour.[116] Accordingly, I am unable to identify how

[114] Given the constraint noted at paragraph 14, I cannot provide more detail regarding these matters.
[115] As set out at paragraph 11 above. Given the constraint noted at paragraph 14, I cannot describe this information in any further detail.
[116] As noted at paragraph 61 above.

the act of disclosing the information in issue would be likely to erode public confidence in MEDQ to act in accordance with its statutory obligation in section 15 of the ED Act.

101. In furtherance of Council's submission, Walker submitted that '*in relation to MEDQ*, *confidentiality is an essential part of activities of a commercial nature and there is not…any public interest at all in impeding or prohibiting the engagement of Councils in commercial activities, even if those activities involve a necessary level of confidentiality'.* I am unable to identify how disclosure of the information in issue would impede or prohibit Council from engaging in future projects with MEDQ. In this regard, I consider that the observations of the Information Commissioner in *Sexton* (noted at paragraph 94 above) regarding private businesses are apposite—that is, I do not consider that a significant number of Councils would refrain from expressing an interest or participating in a development opportunity involving MEDQ simply because information about their involvement in the project may become subject to disclosure under the RTI Act.

102. For these reasons, on the information available to me, I am not satisfied that disclosure of the information in issue could reasonably be expected to erode public confidence in MEDQ to act commercially.

Submissions (f) and (g) – prejudice Walker's future bids for work

103. It is my understanding that the concern in submissions (f) and (g) is that disclosure of the information in issue could diminish the competitiveness of Walker in its future tendering for government and private work. However, it is unclear what information in the information in issue was provided by Walker which would reveal the basis on which it bids for government and private work.

104. Walker's involvement in the Project and the broad details of the work to be undertaken by it are, for the most part, public knowledge. Further, the information in issue was not information provided by Walker during a process for the selection of a preferred developer or a tender process;[117] rather it comprises the resulting, final, agreement between the Owners and Walker. As noted at paragraph 11, OIC has secured the applicant's agreement to exclude information about the financial return of Walker in relation to the development from consideration, and therefore information about this has been redacted from the information in issue. Even if information regarding Walker's financial return was not redacted, given the unique nature of the Project, I do not accept that Walker's competitors (when bidding for future work), nor future development partners (when Walker has been settled on as the preferred development partner), could rely on the DA as a type of benchmark for the work Walker would, in future, agree to undertake. Accordingly, I cannot identify how disclosure of the information in issue could assist Walker's competitors to outbid Walker in future bids, or assist Walker's future development partners to achieve more favourable terms in future negotiations. In these circumstances, while I accept that Walker operates in a competitive and commercial market, I am unable to identify how disclosure of the information in issue could reasonably be expected to prejudice Walker's future tendering for government and private work.

Submission (h) – increase the bargaining power of particular third parties relative to the Walker

105. Finally, in relation to submission (h), Council submitted that disclosure of the information in issue would adversely affect the ability of Walker to negotiate with third parties for the

[117] For example: descriptions of pricing information, profit margins, costs or information about the percentage of income it derives from undertaking the development.

purpose of undertaking the development. In this regard, I again note[118] that the broad details of the work to be undertaken by Walker are, for the most part, public knowledge. I also note that the only information that Council identified as *commercially sensitive* in its submission was information about Walker's financial return from the development, and particular information relating to community infrastructure works and costings. However, the applicant agreed to exclude this information from consideration on external review.[119]

106. Some requirements regarding the third parties in question remain in the information in issue—however, these requirements are relatively procedural and could not, in my opinion, reasonably be expected to have any bearing on the bargaining power of the third parties.[120] Accordingly, in the absence of any information about the agreed consideration for Walker's performance or certain information about the costings for community infrastructure works, I am unable to identify how disclosure of this information could reasonably be expected to prejudice or adversely affect the bargaining power or negotiation capacity of Walker.

Conclusion

107. The Information Commissioner has previously found that *'an **agency** will have **business or commercial** affairs if, and only to the extent that, it is engaged in a business undertaking being carried on in an organised way for the purpose of generating income or profits…'* (my emphasis).[121] In the present circumstances, noting the definition of project income and the directions regarding its payment in the DA,[122] I accept that each of the Owners has business etc. affairs. I also note that Council and MEDQ are both agencies under the RTI Act,[123] however RIC Toondah appears unlikely to be an agency for the purpose of the RTI Act.[124]

108. As set out above, having carefully considered submissions (a) to (h), I find that all but one of the types of prejudice regarding business etc. affairs and competitive commercial activities raised by Council and Walker could not reasonably be expected to arise as a result of the information in issue being disclosed. I accept that the remaining type of prejudice—that is, diminished bargaining power of the Owners relative to the Third Parties raised by Council—could reasonably be expected to arise as a result of disclosure of certain parts of in the information in issue, namely terms which indicate that failure to reach agreement with the Third Parties raised by Council could give rise to termination of the DA.

109. Given my finding regarding the diminished bargaining power of the Owners relative to the Third Parties raised by Council, and noting the status of the Objecting Participants under the RTI Act set out in paragraph 107 above, I am satisfied that the factor favouring nondisclosure regarding prejudice to the business etc. affairs of an entity[125] applies in relation to each of the Objecting Participants,[126] as does the public harm factor favouring nondisclosure regarding information concerning the business etc. affairs of an agency or another person in circumstances where disclosure could reasonably be expected to have

[118] As noted in the preceding paragraph.
[119] As set out at paragraph 11 above.
[120] Given the constraint noted at paragraph 14, I cannot describe the nature of these requirements.
[121] *Johnson and Queensland Transport* (2004) 6 QAR 307 at [51], cited in *Berri* at [49].
[122] Given the constraint noted at paragraph 14, I cannot provide more detail regarding these matters.
[123] Council is an agency under section 14(1)(b) of the RTI Act, while MEDQ, being established under section 8(1) of the ED Act, is an agency under section 14(1)(c) and section 16(1)(a)(i) of the RTI Act.
[124] Noting that RIC Toondah was established under the *Corporations Act 2001* (Cth), and given Applegarth J's finding in *Davis v City North Infrastructure* [2011] QSC 285 that an entity established in this manner was not a 'public authority', and therefore not an 'agency' under the RTI Act.
[125] Schedule 4, part 3, item 2 of the RTI Act.
[126] Each of whom fall within the definition of 'entity'—see paragraph 75 above.

an adverse effect on those affairs.[127] Further, I find that the factor regarding prejudice to the competitive commercial affairs of an agency[128] applies with respect to Council and MEDQ. However, I consider that these factors only apply regarding a small amount of the information in issue (namely, the terms which indicate that failure to reach agreement with the Third Parties could give rise to termination). Further, given the limited extent to which I consider that the bargaining power of the Owners relative to the Third Parties could reasonably be expected to diminish as a result of disclosure of those terms, I consider that these factors warrant low weight.

Diminish the commercial value of information

110. A harm factor favouring nondisclosure will arise where disclosure of information would disclose information (other than trade secrets) that has a commercial value to an agency or another person and could reasonably be expected to destroy or diminish the commercial value of that information.[129]

111. Information will have a commercial value if:[130]

- it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged (i.e. because it is important or essential to the profitability or viability of a continuing business operation, or a pending "one-off" commercial transaction); or
- a genuine arms-length buyer is prepared to pay to obtain that information from that agency or person, such that the market value of the information would be destroyed or diminished if it could be obtained from a government agency which has possession of it.

112. If it can be demonstrated that the information has the requisite commercial value, it must then be shown that its disclosure could reasonably be expected to destroy or diminish that value.

Submissions

113. Council submitted that the information in issue has commercial value as it relates to a current development that is subject to ongoing negotiations. Further, Council submitted that disclosure could reasonably be expected to destroy or diminish the commercial value of the information in issue as:

(a) the DA remains conditional and if it is terminated, a future bidder could use the information in issue to strengthen its bargaining position against Council and the State; and

(b) the DA remains subject to negotiations with third parties, and a third party could use the information in issue to strengthen its bargaining position against Council and the State; and

(c) there is information contained in the information in issue which is not otherwise in the public domain or common knowledge within the industry.

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[127] Schedule 4, part 4, item 7(1)(c) of the RTI Act.
[128] Schedule 4, part 3, item 17 of the RTI Act respectively.
[129] Schedule 4, part 4, item 7(1)(b) of the RTI Act.
[130] *Cannon* at [54]-[55], considering the substantially similar predecessor of schedule 4, part 4, item 7(1)(b) of the RTI Act at section 45(1)(b) of the repeated FOI Act. The information must have a commercial value at the time that the decision is made; information which was once valuable may become aged or out-of-date such that it has no remaining commercial value—*Cannon* at [56].

Would disclosure diminish the commercial value of the information in issue?

114. Schedule 4, part 4, item 7(1) of the RTI Act contains three discrete, mutually exclusive[131] harm factors favouring nondisclosure. Given Council and Walker's relatively lengthy submissions regarding the business etc. affairs harm factor set out in schedule 4, part 4, item 7(1)(c) of the RTI Act, I have proceeded on the basis that those parties wish to rely on that harm factor, and have therefore considered it at paragraphs 74 to 109 above. However, both Council and Walker have also made briefer submissions regarding the commercial value harm factor set out in schedule 4, part 4, item 7(1)(b) of the RTI Act.

115. I conveyed a view to Council[132] that the commercial value harm factor did not apply.[133] Having given the material before me further, careful consideration, I remain of this opinion. As mentioned at paragraph 109, I consider that the business etc. affairs harm factor applies and warrants low weight. Given the mutually exclusive nature of this harm factor and the commercial affairs harm factor, it follows that the commercial value harm factor cannot apply. However, in the event that I am wrong in this regard, I will address each of Council's submissions in turn.

116. In terms of submission (a), which suggests that a future bidder could use the information in issue to strengthen its bargaining position against Council and the State, I refer to paragraphs 90 and 91 above. Consistent with this reasoning, I consider that, in the absence of any information about the agreed consideration for Walker's performance under the DA, there is no evidence before me to support a finding that disclosure would destroy or diminish the value of any of the terms of the DA, should future bidders seek to assume Walker's role in the development.

117. In relation to submission (b), which refers to a third party's use of the information in issue to strengthen its bargaining position against Council and the State:

- This submission relates to the terms which provide that failure to reach agreement with the Third Parties could give rise to termination, rather than the information in its entirety. I am not satisfied that these terms are as important or essential to the profitability or viability of a continuing business operation, or a pending "one-off" commercial transaction, as Council and Walker suggest. In this regard, as mentioned at paragraph 83, I consider that the brinkmanship of Third Parties with a positive view of the Project could be recognised and managed during negotiations, while obstructive conduct of any Third Parties who may not view the Project as favourable to their interests could reasonably be expected to occur regardless. I also note the capacity to amend the Master Plan, as has already occurred during the Referral process.[134] Further, I note that there is nothing before me to suggest the existence of a genuine arms-length buyer prepared to pay to obtain the terms in question. Nevertheless, *if* the commercial affairs harm factor, rather than the business etc. affairs harm factor, were considered applicable with respect to these terms, I refer to paragraphs 83 and 84 above. Consistent with this reasoning, I am satisfied that the commercial affairs harm factor would warrant low weight.

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[131] *Cannon* at [66], noting that the 'commercial value' and 'business affairs' limbs of the relevant harm factor cannot both operate in relation to the same information. While made in the context of section 45(1) of the repealed FOI Act, these comments provide useful guidance on the interpretation of schedule 4, part 4, item 7(1) of the RTI Act.
[132] Preliminary view dated 27 July 2018, responding to Council's submissions dated 19 April 2018, and relating only to the accrual of a right to terminate, rather than the exercise of that right as well.
[133] Noting that the information of commercial value had been redacted, in accordance with the applicant's agreement to exclude certain information from further consideration (as mentioned at paragraph 11 above).
[134] See footnotes 75 and 81.

- I also refer to paragraph 97 above, where I have noted that there is no evidence before me to support a finding that disclosure of the information in issue could reasonably be expected to diminish the bargaining power of the Owners relative to third parties other than the Third Parties raised by Council. Accordingly, I do not consider that disclosure would destroy or diminish the value of any of the terms of the DA in this regard.

118. Finally, in submission (c), Council has asserted that there is information contained in the information in issue which is not otherwise in the public domain or common knowledge within the industry, and disclosure would destroy or diminish the value of this information. However, neither Council nor any other party identified any such information in their submissions. In these circumstances, there is insufficient evidence before me to make a finding that disclosure of any particular terms within the information in issue could reasonably be expected to destroy or diminish their value.

119. In summary, I do not consider that the commercial value harm factor applies—however, if I am wrong in this regard, I consider that it would apply in the same manner as the business etc. harm factor, instead of that factor. That is, it would apply to a small amount of the information in issue (namely, the terms which indicate that failure to reach agreement with the Third Parties could give rise to termination) and warrant low weight.

Prejudice to the supply of confidential information

120. If disclosure of information could reasonably be expected to prejudice an agency's ability to obtain confidential information, a factor favouring nondisclosure arises.[135]

121. Further, if information is information of a confidential nature and was communicated in confidence, and its disclosure could reasonably be expected to prejudice the future supply of information of this type, a harm factor favouring nondisclosure applies.[136]

Submissions

122. Council submitted that:

- disclosure of information which is given under strict confidence pursuant to a clause which requires Council and the State to take all necessary steps to maintain the confidence in the information could reasonably be expected to inhibit the ability of government agencies to obtain confidential information;[137] and
- there is a public interest in agencies being able to obtain confidential information and, given the confidentiality clause, disclosure could only serve to erode public confidence in the government's ability to maintain confidential information.

123. Walker expanded on Council's submission, submitting that:

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[135] Schedule 4, part 3, item 16 of the RTI Act.
[136] Schedule 4, part 4, item 8 of the RTI Act.
[137] Walker furthered this point in its submission, stating that:
- '*The need for confidentiality is equally critical for every party to a major project development agreement. Contractual certainty and the absence of attempted interferences with contractual arrangements are the natural corollaries of confidentiality of the detailed terms of such agreements, which is not merely desirable but essential to the orderly conduct of the business of major project development.*'
- '*The situation ought to be no different in the cases of major contracts entered into by Governments or Local Government bodies with developers; such Governments and bodies should not be disadvantaged in the market-place only because small groups … assert greater rights of access to the important contractual and other documents that come into existence for the purpose of a project…*'
- '*It is unnecessary for Governments and Local Government bodies to be deprived of the rights of confidentiality of complex details of projects which are so obviously necessary, and without which developers will not engage with them, to the disadvantage of the people of the State or city or other Local Government area*.'

- *'It is inconceivable that a Government Department or Statutory Corporation, with purposes, functions and activities such as* [MEDQ's]*, should be thought to be precluded from entering into complex contractual arrangements with Local Government bodies and the development industry that must, in every particular, be available for public scrutiny.'*

- *'Nothing in the RTI Act can rationally be taken to require any such thing; if such a constant exposure of commercial decisions and documents was seriously required, organisations such as MEDQ would be paralysed by the process and would soon cease to function.'*

- *'In establishing MEDQ, the Parliament specifically recognised, in the [ED Act], that MEDQ would be unable to achieve its main purpose, namely "to facilitate economic development, and development for community purposes, in the State" (ED Act, s.3), unless it carried out its function, to the extent practicable, "on a commercial basis" (ED Act, s.15), those functions including "functions for facilitating economic development and development for community purposes" including "dealing in land or other property", "coordinating the provision for, or providing, infrastructure and other services" and "planning for, and developing and managing land in or for priority development areas" (ED Act, s.13). Confidentiality is one of the cornerstones of acting "on a commercial basis".'*

124. MEDQ submitted that:[138]

- *'OIC has taken a narrow interpretation of the provision and … must consider the capacity in which MEDQ operates within government to appreciate the harm of the disclosure…'*

- *'To facilitate economic development for community purposes MEDQ must do* [sic] *in a way that fosters honest and robust debates for the benefit of the State… agreed confidential negotiations such as the material in question, between MEDQ, current and future stakeholders must not be dismissed, as it is reasonably likely that in the future the discussions and exchanges will be less robust and frank which ultimately may be of detriment to the progression of large scale projects being promoted by the State… there needs to be a functioning business relationship between MEDQ and current and future stakeholders for the benefit of the State.'*

- *'… disclosure… could reasonably be expected to have a detrimental impact on MEDQ,* [RIC Toondah]*,* [Council]*,* [Walker Toondah] *and* [Walker Group's] *ability to continue to consider their options and engage in open and frank commercial negotiations on this project which is currently in its foundation stage.'*

- *'MEDQ do not dispute the fact there is a public interest in the project in fact MEDQ and the other interested parties have made a great deal of information publicly available to the community. However, one must weigh up the public interest harm of disclosing such confidential commercial agreements and how the disclosure is likely to impact on business affairs and continued negotiations…'.*

- *'… it must also be contemplated … how such a decision to disclose material of this type may have* [an adverse effect] *on future commercial negotiations with other stakeholders on large commercial ventures with the State. And how that may affect the economy* [sic]*, financial or property interests of the State.'*

[138] Submission dated 28 August 2018.

Would disclosure prejudice the supply of confidential information?

125. The factor favouring disclosure and harm factor both require, in effect, a finding that disclosure of the information in issue could reasonably be expected to prejudice the future supply of confidential information to an agency. The harm factor additionally requires that both the information in issue and the future information be confidential in nature and communicated in confidence. Given my below findings regarding the first-mentioned requirement—regarding prejudice to the future supply of confidential information—it is unnecessary for me to make findings regarding the additional requirements of the harm factor.

126. It is not apparent from Council, Walker nor MEDQ's submissions *how* disclosure of the information in issue could inhibit the ability of government agencies to obtain confidential information in future. On the material before me, I do not consider there is any reasonable basis for this to occur.

127. In this regard, I have carefully considered the parties' submissions and note as follows:

- Disclosure under right to information is something that was specifically contemplated by the exception to the confidentiality clause in the DA, which was signed by all parties.

- In terms of the submissions by Council and Walker that disclosure will inhibit the ability of agencies to enter a similar agreement in the future, disadvantage them in the market-place, preclude them from entering into complex contractual arrangements and cause developers not to engage with them, I again refer to the decision of *Sexton*,[139] in which the Information Commissioner considered the issue of whether it was reasonable to expect that the future supply of information to government would be prejudiced by disclosure of similar information. I do not consider it reasonable to expect that a significant number of businesses would refrain from expressing an interest or participating in development opportunities of government simply because information about their involvement in a project may become subject to disclosure under the RTI Act after they were selected as the successful tenderer or preferred developer for the project.

- In terms of Council's submission about disclosure eroding public confidence in the government's ability to maintain confidential information, I accept a narrower version of this proposition: namely, that disclosure may erode agency and developer expectations that information about developments will not be disclosed. However, for the reasons outlined above, I do not consider that this will prejudice the willingness of a significant number of businesses to participate in future developments, and to reach agreements such as the DA with government entities when doing so.

- In terms of MEDQ's submissions that disclosure would result in future negotiations between the parties to the DA, and future negotiations, discussions and exchanges with stakeholders regarding future large scale projects in being less honest, open, robust and frank, I note that the information in issue does not comprise information about the process which led to Walker's appointment as the preferred developer, nor negotiations between the parties about the DA. Rather, it comprises the resulting *agreement* between the Owners and Walker. Given this position, it is unclear *how*

[139] As mentioned at paragraph 94.

disclosure of the information in issue could reasonably be expected to prejudice the manner in which present and future stakeholders' engage in negotiations in future.

- In terms of Walker's submission that constant exposure of commercial decisions and documents will render MEDQ paralysed, it is my understanding that this submission is directed at suggesting that disclosure of the information in issue will make MEDQ's exercise of its functions so difficult that it will not be in a position to receive confidential information from future stakeholders (either because it is paralysed or ceases to exist). I place relatively little weight on this contention, given MEDQ is better placed to make such a submission, but did not do so; and also given that, in referring to "constant exposure", Walker appears to be contemplating disclosure of documents and decisions on an ongoing basis, whereas here we are considering one significant document regarding one development. Noting that Walker's submissions regarding this harm factor refer to the desirability of *'the absence of attempted interferences with contractual arrangements'*, I consider it possible that Walker's concern regarding paralysis of MEDQ relates to the terms within the information in issue which indicate that failure to reach agreement with the Third Parties could give rise to termination. That is, Walker may consider that disclosure of such terms would enable External Parties to exert influence sufficient to result in MEDQ's paralysis. However, for the reasons set out at paragraphs 86 to 88 above, I do not accept that disclosure of these terms could reasonably be expected to result in this outcome.

- Further, as set out at paragraph 61 above, in relation to Walker's submissions about MEDQ's requirement to act commercially, I note that this statutory obligation is somewhat qualified in nature (given the phrase '*to the extent practicable*') and further, that it arguably may not apply to all of MEDQ's activities regarding PDAs such as Toondah Harbour.

128. Given these considerations, I am not satisfied that these factors apply to the information in issue. Even if these factors were applicable, I consider that they would, for the reasons outlined above, warrant low weight.

Prejudice the economy, or financial interests or property interests of the State

129. If disclosure of information could reasonably be expected to prejudice the economy of the State, a factor favouring nondisclosure arises.[140] If disclosure of information could have a substantial adverse effect on the ability of the government to manage the economy, a harm factor favouring nondisclosure applies.[141]

130. A further harm factor favouring nondisclosure will arise where disclosure of information could have a substantial adverse effect on the financial or property interests of the State or an agency.[142]

Submissions

131. MEDQ made a general submission that *'… it must also be contemplated … how such a decision to disclose material of this type may have* [an adverse effect] *on future commercial negotiations with other stakeholders on large commercial ventures with the State. And how that may affect the economy* [sic]*, financial or property interests of the State.'*

[140] Schedule 4, part 3, item 12 of the RTI Act.
[141] Schedule 4, part 4, item 9(1) of the RTI Act. While Council and Walker did not refer to this harm factor in their submission, for sake of completeness, I will address it.
[142] Schedule 4, part 4, item 10(1) of the RTI Act.

132. Council submitted, more specifically, that disclosure of the DA and DV could reasonably be expected to adversely affect:

- the financial interests of Council and the State if the development did not proceed due to impacts resulting from disclosure
- the ability of Council and the State to negotiate competitive commercial terms with entities for major projects from which the State (and agencies) generate income and which concern the property interests of the State (or an agency); and
- the bargaining position of Council and the State in subsequent negotiations which will follow the DA if the development proceeds.

133. Further, Council submitted that:

- there must be adequate protection to enable government agencies to protect commercial interests so as not to substantially affect the economy of the State and to allow agencies to maintain equal standing with the private sector in respect of its bargaining power; and
- were it commonplace to release information such as the DA and DV, Council and the State would be disadvantaged when negotiating competitively with entities to achieve value for money and the best commercial result for the government and economy.

134. In support of its submission, Council referred to the decision of *North Queensland Conservation Inc and Queensland Treasury.*[143] The nature of the information in issue in this decision is significantly different to the information in issue in this review, in that it comprised financial, commercial and economic advice and assessments made available to the State in relation to the Adani projects. The State was considering the various investment options available to it and the likely returns and risks of those investments. The negotiations also remained ongoing between the State and Adani regarding infrastructure investment options. In this decision, it was determined that:

- the State should have the capacity to obtain internal commercial and investment advice in relation to the risks and benefits of its investment options without the general disclosure of this advice; and
- if this type of information were to be routinely disclosed under the RTI Act, the State would be at a disadvantage in competitively negotiating with third parties to arrive at the best commercial result for the State, its constituents and the broader economy.

135. In the present matter, the information in issue comprises a final DA and DV. While I note Council's submission that these documents are *conditional*, I also note that their conditional nature relates to the extent that they are subject to the performance of agreed steps specified *within* them, and to agreed termination clauses specified *within* them that may be relied on should performance not occur. In other words, the conditional nature of the documents rests on the parties' performance of agreed terms regarding the development, not the parties' future agreement to these terms. In these circumstances, it is unclear how *North Queensland Conservation Inc* supports a finding that disclosure of the information in issue in the present matter would have a substantial adverse impact on the financial interests of Council and the State.

136. Council submitted that the substantial adverse impact on the financial interests of Council and the State would arise if the development was unable to proceed due to the '*impacts resulting from the disclosure of the documents*'. However, this submission does not explain the nature of the impacts, nor why the development could not proceed. To accept

[143] [2016] QICmr 21 (10 June 2016) (***North Queensland Conservation Inc***) at [61].

this submission, I would have to consider it reasonable to expect that firstly, as a result of disclosure, an unidentified impact occurred; and secondly, that this impact resulted in the development being unable to proceed. This submission is too imprecise and speculative to form a reasonably based expectation. Having said that, if Council's concern about the Project not proceeding relates to External Parties exerting influence on Third Parties sufficient to result in a party exercising the right to terminate the DA, I again refer to paragraphs 86 to 88 above. Consistent with this reasoning, I do not accept that External Party influence could reasonably be expected to result in the development being unable to proceed.

137. Similarly, in relation to Council's submission about the bargaining position of Council and the State in subsequent negotiations if the development proceeds, it is my understanding that this submission relates to the enhancement of the bargaining power of the third parties. In terms of negotiations with third parties other than the Third Parties raised by Council, I refer to paragraph 97 above. As set out in that paragraph, I consider that there is no evidence before me as to how disclosure of any information within the information in issue could reasonably be expected to lead to less advantageous, more expensive outcomes for the Owners in their dealings with such third parties. Accordingly, I cannot identify any prejudice to the State's economy, financial or property interests in this regard.

138. In terms of negotiations with the Third Parties raised by Council, I refer to my reasoning at paragraphs 83 and 84 above. As set out at paragraph 84, I accept that disclosure of particular terms within the information in issue—namely, terms which indicate that failure to reach agreement with the Third Parties could give rise to termination—could reasonably be expected to diminish the bargaining power of the Owners relative to the Third Parties raised by Council to a limited degree. However, I do not accept that the Owners' diminished bargaining power would be sufficient to constitute a substantial adverse effect on the ability of the government to manage the State's economy. There is insufficient information before me to allow me to be satisfied that the diminished bargaining power would be 'substantial'–that is, grave, weighty, significant or serious.[144] Nor do I accept that any agreements reached with the Owners' diminished bargaining power would be so disadvantageous, relative to the agreements reached if the information in issue is not disclosed, that there would be a reasonably based expectation of prejudice to the State's economy, or substantial adverse effect on any of the Owners' financial or property interests.

139. In relation to Council's submission that disclosure of the information in issue would adversely affect the ability of Council and the State to negotiate competitive terms with entities for major projects from which the State (and agencies) generate income, as stated above, and noted in Council's submission, there were negotiations between the parties regarding the terms of the DA, following which the parties signed the DA which reflected their agreement regarding the terms on which Walker had been engaged by Council and the State for the development of Toondah Harbour. While the DA and DV were created to formalise the terms of the agreement that had been reached by the parties during their negotiations, I am unable to see how disclosure of this information could adversely affect the ability of Council and the State to negotiate competitive commercial terms with entities, in circumstances such as these where the negotiations were finalised prior to the formation of the DA and DV. To the extent this submission was made with reference to future development opportunities unrelated to the Project, as noted at paragraphs 94 and 127 above, I do not consider that a substantial number of businesses would preclude themselves from expressing an interest or participating in

[144] See *Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 at [148]-[150].

such development simply because information about their involvement in a project may become subject to disclosure under the RTI Act.

140. Finally, while I acknowledge that it is important to protect the commercial interests of government agencies by ensuring that they are on equal footing with the private sector when considering large scale projects, as outlined above, on the available information, I am not satisfied that disclosure of the information in issue, which represents a final agreement between the respective parties, would adversely impact Council or the State when negotiating competitively in the future.

141. Accordingly, I am not satisfied that these nondisclosure and harm factors apply to the information in issue. Even if these factors were applicable, they would, for the reasons outlined above, warrant low weight.

Other factors favouring nondisclosure

Factors raised by Walker

142. Walker submitted that disclosure of the information in issue could reasonably be expected to prejudice:

- *'… MEDQ, in carrying out its statutory functions on a commercial basis as it is required to do, to be able to enter into commercial agreements in the course of, and to facilitate, the carrying out of such functions, to include in such agreements, proper confidentiality provisions precluding the disclosure of commercial details of such agreements'*;[145] and
- *'… Local Government bodies, such as [Council], in entering into commercial agreements with others for the carrying out of major projects in their respective areas for the benefit of such body and its residents, to include in such agreements, proper confidentiality provisions precluding the disclosure of commercial details of such agreements'*.[146]

143. I have carefully reviewed these additional factors favouring nondisclosure proposed by Walker, and the "critical facts" regarding MEDQ and Council in Walker's submissions. I am satisfied that these submissions do not raise any further matters which have not already been considered and addressed in the *Factors favouring nondisclosure* section at paragraphs 74 to 141 of this decision.

Other factors

144. Prior to turning to the factors favouring disclosure, I confirm that, in addition to the factors favouring nondisclosure and harm factors canvassed above, I have also given careful consideration to the balance of factors set out in schedule 4, parts 3 and 4 of the RTI Act. I do not propose to list and analyse every one of these factors individually, which would make this decision extremely cumbersome and unnecessarily complex in circumstances where none have been raised by the Objecting Participants in their submissions and many if not most are patently inapplicable. It is sufficient to record that, having scrutinised schedule 4, parts 3 and 4, I can identify no other factors telling in favour of nondisclosure of the information in issue, beyond those identified above.

[145] Submission dated 21 September 2018 at paragraphs 90 to 95.
[146] Submission dated 21 September 2018 at paragraphs 97 to 101.

Factors favouring disclosure

145. Council recognised the following public interest factors favouring disclosure:[147]

- disclosure could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability;[148]
- disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest[149]
- disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision;[150] and
- disclosure could reasonably be expected to ensure effective oversight of expenditure of public funds[151]

but submitted that these factors should be afforded minimal weight as:

- the information in issue primarily contains conditions for a commercial arrangement between the parties to develop Toondah Harbour
- any public concerns about environment or planning issues will be addressed through the statutory processes that operate outside the agreement, which generally require public consultation; and
- the State is required to act commercially and applying significant weight to factors which deal largely with governmental matters may erode public confidence in the State's ability to act commercially in its dealings with respect to PDAs under the ED Act.

146. Walker did not identify any public interest factors favouring disclosure.[152] It submitted that:

> [T]*here is not one "factor", either provided for in Schedule 4, or otherwise constructed, that favours disclosure. That ought to be the end of the balancing process, since there is nothing to counter-balance the factors favouring non-disclosure, and OIC must necessarily conclude that the release of the* [information in issue] *would be contrary to the public interest.*

147. The following is a summary of the matters raised in Walker's submission:

- In terms of public discussion and debate:
  - *'MEDQ and* [Council] *formulated a plan for the relevant redevelopment; there was more than ample opportunity for public comment and some people objected; MEDQ and* [Council] *decided to proceed with it; Walker was awarded the contract as the result of a public tender process; a contract, the DA, was entered into'.*
  - The information in issue is *'binding on the parties and, except in accordance with their terms, cannot be undone. There is no occasion for anyone to engage in discussion about the terms'*.

[147] Council's submissions in respect of the factors favouring disclosure and nondisclosure were adopted by RIC Toondah. MEDQ did not identify any public interest factors favouring disclosure.
[148] Schedule 4, part 2, item 1 of the RTI Act.
[149] Schedule 4, part 2, item 2 of the RTI Act.
[150] Schedule 4, part 2, item 11 of the RTI Act.
[151] Schedule 4, part 2, item 4 of the RTI Act.
[152] Submission dated 21 September 2018.

- The information in issue does *'not raise any "important issues" or "matters of serious interest": they record a negotiated, complex, commercial agreement between the Government, a Local Government authority and private companies. The "important issues" both preceded the agreement, and are yet to arise. The first category includes the decision to make Toondah Harbour a PDA, the decision to embark upon the project and its evolution, the decision to put the project out to tender, the conduct of the tender process, and the awarding of the tender to Walker… The second category will include the environmental assessment of the project and the planning processes, which will provide ample scope for debate, submissions and discussion. These are not matters that are dealt with in any material sense in the* [information in issue]*, and none of the contents of those documents will inform such debate'.*

- By reference to the 'true evaluation of the public interest', it would not be in the public interest to disclose the information in issue to the applicant because:

  - *'from what is publicly known about Redlands2030, its members are only interested in opposing the Toondah Harbour project and not debating it'*
  - *'there are no relevant "important issues" or "matters of serious interest" that remain to be debated about the project'*

- In terms of the background and context to government decisions:

  - *'The reasons for any past decision of the Government have been explained by the Government at the time the decision was made, and there is nothing left to "reveal"'*.

  - *'*[A] *cursory examination of* [the information in issue] *discloses that there is not one word in them that deals, even remotely, with the reasons for past decisions of the Government'.*

- In terms of effective oversight of public funds:[153]

  - *'*[I]*t is almost impossible to imagine a Project Agreement which could be more fair to MEDQ and* [Council]*, and which … confers upon MEDQ and* [Council] *substantial financial benefits'*.

  - There are no "significant benefits" that Walker will receive from the Project.

- In terms of accountability, and how it is already served:

  - *'The ratepayers and residents of any Council area have ample opportunity to consider and examine the activities of their Council, and to express their agreement with what the* [Council] *has done, is doing, or plans to do. The most powerful is the ballot box, when elections are held every four years. But there are other ways in which such views may be expressed, including participation in the development process by making submissions regarding individual developments, corresponding with the Councillors, attending public rallies and meetings, and signing petitions to be presented to Parliament'*.

  - *'A very substantial amount of information was made, and remains available about the new Redland City Plan, which comes into effect on 8 October 2018, in the*

[153] Given the constraint noted at paragraph 14, I have not set out these submissions in their entirety.

formulation of which ratepayers and residents had detailed information about the proposals, and very considerable opportunity to express their views'.

- MEDQ engaged in an accountable process by *'formulating the proposal [for the PDA], encouraging and permitting public comments, finalising the proposal, and engaging in a public tender process before awarding the contract to Walker. What part of Government accountability remains to be enhanced in any way by the disclosure of the* [information in issue]*?'*

- *'The first category includes the decision to make Toondah Harbour a PDA, the decision to embark upon the project and its evolution, the decision to put the project out to tender, the conduct of the tender process, and the awarding of the tender to Walker… The second category will include the environmental assessment of the project and the planning processes, which will provide ample scope for debate, submissions and discussion. These are not matters that are dealt with in any material sense in the* [information in issue]*, and none of the contents of those documents will inform such debate*

- Since 2014, Council *'has published an enormous amount of material about Toondah Harbour on its web-site, disclosing all manner of information and seeking to answer, in advance, questions that those interested might have about the project. An objective assessment of this material discloses a very high level of transparency on the part of* [Council] *and Walker, so much that few people, within or outside Redland City, could seriously claim to be underinformed about the project…'.*

- It is not open to argue that the *'activities of the MEDQ are not open to public scrutiny as a matter of course. First, by s.172 of the ED Act, MEDQ is obliged to keep registers containing all manner of information about its activities, which registers, by s.173, are open for public inspection and available for copying. Secondly, by s.174, MEDQ's chief executive must ensure that its annual report, under the Financial Accountability Act 2009, contains information about various matters, including the performance of MEDQ's functions. Further, the ED Act was enacted three years after the RTI Act, and no provision of the ED Act makes anything in that Act subject to the provisions of the RTI Act. It must be assumed that the legislature, in imposing upon MEDQ a statutory obligation to act commercially, was not concerned that the provisions of the RTI Act would interfere with the MEDQ's commercial activities, otherwise it would have made appropriate provision…'*.

148. For the reasons explained in the following paragraphs, I do not accept:

- Walker's submission that the factors favouring disclosure of the information in issue do not arise or are irrelevant to the issues for consideration; and
- Council's submission that these factors should only be afforded minimal weight.

149. I am satisfied that the Project will have significant social, economic and environmental impacts on the PDA and surrounding areas. In this regard, I repeat and rely on the details regarding the Project noted at paragraphs 48 to 56.

150. In summary, I note that the Project represents a benefit to a private entity, Walker, to develop significant area of coastal publicly owned land and waters (most of which are protected under the Ramsar Convention) for commercial gain. In terms of the community benefit from the Project, there is $116 million of infrastructure to be delivered, with $56

million under the Infrastructure Agreement and the remainder to be delivered under the DA. Given these circumstances, it is unsurprising that the Project has been, and remains, the subject of public attention and debate—for example, in terms of environmental impacts, native title issues and the sale of public land.

151. I consider it is vital for there to be accountability and transparency in decisions that are made by government which involve the development and sale of public land and protected waters. In terms of Walker's submissions regarding how accountability has already been served, I do not accept that Walker's submission regarding voting furthers the accountability and transparency of Council in respect of its decision-making; regardless, it is a democratic right offered to Australian citizens who are 18 years or older. Also, in relation to Walker's submission regarding the Redland City Plan, it is unclear to me how this Plan evidences accountability regarding the Project. While the planning scheme sets out Council's intention for the future development in the planning scheme area, Toondah Harbour is a designated PDA and is therefore not subject to this planning scheme.

152. Further, in relation to Walker's submission that it is not open to argue that the activities of MEDQ are not open to public scrutiny, while I accept that MEDQ is required to keep registers of information about its activities and performance of its functions available to the public, I do not accept that:

- the ED Act is not subject to the RTI Act, simply because it was enacted three years after the RTI Act; and
- there is no provision in the ED Act that makes anything in that Act subject to the provisions of the RTI Act.

153. The RTI Act has not been amended to specifically exclude documents related to the ED Act.[154] I am satisfied that documents generated in relation to MEDQ's functions under the ED Act are clearly documents to which the RTI Act applies.

154. I acknowledge, as submitted by Walker, that a large amount of information about the Project is available on Council and Walker's websites, and that this constitutes a high level of transparency. However, I also consider that there is a strong public interest in scrutinising the decisions made by government regarding the Project that are not apparent from the material on these websites.

155. In terms of Walker's submission that '[t]*he reasons for any past decision of the Government have been explained by the Government at the time the decision was made, and there is nothing left to "reveal"*' and that *'there is not one word in* [the DA and DV] *that deals, even remotely, with the reasons for past decisions of the Government'*, I note that the DA includes information regarding the commitments that the Owners obtained from Walker in terms of design, financing and delivery of development product and about $60 million of community infrastructure; and the steps (including actions regarding the sale of State land and waters) that the Owners agreed to take in return. This information provides detail regarding government decisions about the Project that is not, to my knowledge, available on Council or Walker's websites. This detail was not settled at the time of the first category of important issues referred to by Walker (being *'the decision to make Toondah Harbour a PDA, the decision to embark upon the project and its evolution, the decision to put the project out to tender, the conduct of the tender process, and the awarding of the tender to Walker'*). In terms of the second category of important issues identified by Walker (*'the environmental assessment of the project and the planning processes'*), I acknowledge that the planning process is likely to include consideration of

[154] Section 11 of the RTI Act.

community infrastructure, but consider it unclear whether the detail in the DA will be revealed at that stage. I also note that detail of this type was not disclosed during the Referral process, and appears unlikely to be disclosed in the environmental impact statement that is to form the next stage of the Commonwealth's assessment process,[155] given that the focus of this process is primarily on environmental issues.

156. I am satisfied that disclosing the information in issue would enhance accountability to a significant extent. In setting out the terms on which Walker has been engaged to develop State land and waters[156] in a PDA, so as to provide infrastructure for the community (both local and more broadly) and for residential and commercial purposes, the information in issue would show, in particular, the infrastructure that is to be delivered under the DA, so that the public could fully understand the nature and extent of the infrastructure investment that is being made in relation to the Project; and, more broadly, the obligations of the parties under the DA, and the standards and conditions that govern the development of the Project.

157. I also consider in circumstances such as these where Walker has made large donations to both political parties[157] that this significantly furthers the requirement for transparency and accountability in respect of decisions made by government, which involve private entities, such as Walker.

158. In relation to the submission about the public interest and the reference to Redlands2030 as '*only interested in opposing the Toondah Harbour and not debating it*', from reviewing their website and Facebook page, I note that Redlands2030 is a community run, not for profit organisation, which provides a forum for people concerned about local government and planning in Redland City. Redlands2030 discuss issues which affect the community and appear to be widely followed and supported by the community with 5,394 individuals following and 5,467 people liking the Facebook page. While the views of Redlands2030 and its members (or "followers") may not represent the entire community's views about the Project, a public interest consideration is one which is common to all members of or a substantial segment of, the community. The relevant considerations in deciding whether disclosure would, on balance, be contrary to the public interest are set out at paragraph 58.

159. In relation to Council's submission about the information in issue primarily containing conditions for a commercial arrangement between the parties to develop Toondah Harbour, while I accept that a commercial agreement was entered into, I consider that in contracting with Government to redevelop the harbour, Walker should reasonably have expected a legitimate public interest in scrutinising its actions and those of Council and the State. The use of public land and protected waters for development projects, and in particular, for Walker projects—which are of a significant scale and have, on one occasion to my knowledge, produced an outcome different to that projected for the government partner[158]—is a matter of significant public interest, and I am satisfied that release of this information would significantly contribute to informed public debate.

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[155] See decision dated 23 July 2018, EPBC reference no. 2018/8225 at <http://epbcnotices.environment.gov.au/_entity/annotation/aa313a19-dc8e-e811-95dc-005056ba00a8/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1542244880868>.

[156] And a small amount of freehold.

[157] See gifts disclosed by Walker to the Electoral Commission of Queensland at <https://www.ecq.qld.gov.au/candidates-and-parties/funding-and-disclosure/disclosure-returns>.

[158] See media report regarding Walker's Kew Cottages development at <https://www.theage.com.au/national/victoria/hundreds-of-millions-unaccounted-for-from-kew-cottages-20170317-gv0ljn.html>.

160. In relation to the submission about the cost of the Project, I note that the redevelopment of Toondah Harbour is estimated to cost $1.39 billion dollars.[159] It is publicly known that the general intention is that:

- the areas that contain or are intended to contain community infrastructure, will be retained by Council or its delegate to own, operate and maintain; and
- those areas that are intended to be developed for private works, are to be developed and sold, not retained.

161. In respect of the benefits to Walker as a result of its involvement in this Project, my initial view[160] noted that *'Walker Toondah … will be a significant beneficiary of the … Project…'*.[161] In response, Walker submitted that it is an *'erroneous characterisation …, as if Walker was making some extraordinary windfall profit from the* [P]*roject…'*.[162] Given the constraint noted at paragraph 14, I am restricted as to the level of detail I can relay about the financial incentive to Walker from this Project. However, I can note that:

- Walker is Australia's largest private, diversified property development company that has delivered over 1000 projects nationally and internationally and currently has a project pipeline of $25 billion dollars of work to complete in the next 15 years; and
- Walker is investing $1.39 billion dollars in to the Project,

and, taking into account:

- the value of the public land to be developed within Toondah Harbour
- that Walker has secured the rights to develop this land and is responsible for designing, financing and constructing all development and associated infrastructure
- ferry terminals and car parking will be transferred to Council and the foreshore park and road reserves will be State reserves and managed by Council
- 3,600 dwellings and a marina will be transferred into private ownership; and
- the advertised value of the Toondah Outlook residential apartments currently selling in Redlands (which may provide some point of comparison) is between $599,000 and $1,550,000.00,

I consider it is reasonable to expect that there would be a benefit to Walker in developing the Toondah Harbour PDA.

162. As noted at paragraph 11, OIC has secured the applicant's agreement to exclude information about the financial return of Walker in relation to the development from consideration, and therefore information about this has been redacted from the information in issue. Accordingly, information regarding the benefit of the Project to Walker, whether substantial or not, is not in issue per se. However, information regarding the broader issue of how the development, including the community infrastructure, is to be funded has not been excluded from considerations.

163. The community infrastructure that is delivered through the Infrastructure Agreement is to be paid for from the infrastructure charges collected by Council from Walker in line with Council's Adopted Infrastructure Resolution. The remaining community infrastructure is to be delivered through the DA, from the proceeds of the Project.[163]

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[159] Including $116 million dollars in infrastructure costs.
[160] Preliminary view dated 31 July 2018.
[161] Given the constraint noted at paragraph 14, I have not set out the rest of this view.
[162] Given the constraint noted at paragraph 14, I have not set out the rest of this submission.
[163] At < https://www.redland.qld.gov.au/info/20271/priority_development_areas/850/toondah_harbour_infrastructure_agreement>

164. The Government will be expending public money from the proceeds of the Project, which involves the development and sale of public land, on infrastructure that is to be delivered under the DA. That is, while the cost may not be direct to the ratepayers, for example, through an increase in rates and/or public utilities charges, the cost to the ratepayers is through the sale of public land.

165. Further, while I accept that the information in issue comprises a commercial arrangement and that public consultation had occurred in 2013 prior to the selection of Walker as the preferred development partner, and will occur as the development approval process progresses, I do not consider that this diminishes the public interest factors favouring disclosure. As the Information Commissioner has previously observed:[164]

> *I do not accept that the existence of other accountability mechanisms can be used as a basis for any significant diminution of the public interest in disclosure of information under the FOI Act in order to promote the accountability of government agencies. The FOI Act was intended to enhance the accountability of government (among other key objects) by allowing any interested member of the community to obtain access to information held by government (subject to the exceptions and exemptions provided for in the FOI Act itself). The FOI Act was not introduced to act as an accountability measure of last resort, when other avenues of accountability are inadequate. The FOI Act gives a right to members of the community which is in addition to, and not an alternative for, other existing rights. …*

166. I am satisfied that these comments are equally applicable to the RTI Act. Accordingly, I am satisfied that the above factors favouring disclosure arise. In relation to the matters raised by Council, I am not satisfied that these reduce the weight to be afforded to the factors favouring disclosure to any significant degree, and, for the reasons explained above, I have afforded each of these factors favouring disclosure significant weight. I consider that the weight is particularly significant with respect to those portions of the DA that relate to community infrastructure, and that evidence how the development, including the community infrastructure, is to be funded.

Balancing the public interest

167. I have taken into account the pro-disclosure bias which is to be applied when deciding access to documents.[165] In this case, I also consider there are significant public interest factors in favour of disclosure of the information in issue, particularly those portions of the DA that relate to community infrastructure, and that evidence how the development, including the community infrastructure, is to be funded. On the other hand, I consider that the business etc. affairs factors apply, but only regarding a small amount of the information in issue (namely, the terms which indicate that failure to reach agreement with the Third Parties could give rise to termination). I consider that these factors should be afforded low weight with respect to this small amount of information, given the limited extent to which I consider that the bargaining power of the Owners relative to the Third Parties could reasonably be expected to diminish as a result of disclosure of the terms. If the business etc. harm factor does not apply, I consider that the commercial value harm factor does, in the same manner to the same small amount of information.

168. Even if my reasoning rejecting the balance of the Objecting Participants' public interest arguments is incorrect, and some or all of the other nondisclosure and harm factors that are relied on by these participants do arise for consideration in this case, it is

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[164] *Director-General, Department of Families, Youth and Community Care and Department of Education and Ors* (1997) 3 QAR 459 at [19(a)]. See also *Pearce and Queensland Rural Adjustment Authority; Third Parties* (Unreported, Queensland Information Commissioner, 4 November 1999) at [70].
[165] Section 44 of the RTI Act.

nevertheless my view that the balance of the public interest favours disclosure in this case.

169. Decisions made by government about the development and sale of public land to private entities, should, in my view, be attended by the highest possible levels of transparency and accountability. This is necessary, in order that the community might be satisfied that not only are such decisions made with appropriate levels of probity, but that they represent a worthwhile investment of the community's resources. On this basis alone, it is my view that considerations meriting disclosure are, in this case, of significant weight, sufficient to displace any factors that might be argued in favour of nondisclosure.

170. In conclusion, after balancing the abovementioned factors, I find that disclosure of the information in issue would, on balance, be in the public interest. Accordingly, I find that the ground for refusing access in section 47(3)(b) of the RTI Act cannot apply.

DECISION

171. I set aside the decision under review. In substitution for it, I decide that there are no grounds upon which access to the information in issue may be refused under the RTI Act.

172. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act

A Rickard
Assistant Information Commissioner

Date: 21 November 2018

APPENDIX

Significant procedural steps

Date	Event
25 October 2017	OIC received an application for external review from the applicant.
1 November 2017	Council provided relevant processing documents and correspondence.
23 November 2017	OIC requested a copy of the information in issue from Council.
29 November 2017	OIC received the requested information from Council.
6 February 2018	OIC requested an executed copy of the documents comprising the information in issue.
7 February 2018	OIC received the requested information from Council.
20 March 2018	OIC conveyed a written preliminary view to Council regarding disclosure of the information in issue.
3 April 2018	Council requested an extension to provide a response to OIC's preliminary view. OIC granted an extension until 19 April 2018.
19 April 2018	Council provided submissions in response to OIC's preliminary view.
20 April 2018	OIC engaged in informal resolution discussions with the applicant.
27 July 2018	OIC conveyed a second preliminary view to Council.
31 July 2018	OIC conveyed a preliminary view to RIC Toondah, MEDQ, Walker Group and Walker Toondah.
6 August 2018	MEDQ requested an extension to provide a response to OIC's preliminary view. OIC granted an extension until 28 August 2018.
6 August 2018	Walker requested an extension to provide a response to OIC's preliminary view. OIC granted an extension until 5 September 2018.
9 August 2018	RIC Toondah requested an extension to provide a response to OIC's preliminary view. OIC granted an extension until 31 August 2018.
28 August 2018	MEDQ provided submissions to OIC.
30 August 2018	Walker requested a second extension to provide a response to OIC's preliminary view. OIC granted an extension until 19 September 2018.
13 September 2018	Walker requested a third extension to provide a response to OIC's preliminary view. OIC granted an extension until 21 September 2018.
14 September 2018	RIC Toondah provided submissions to OIC.
21 September 2018	Walker provided submissions to OIC.

Date	**Event**
27 September 2018	Council provided a response to OIC's second preliminary view to it, confirming that it relied on its earlier submissions of 19 April 2018.[166]
8 November 2018	Walker confirmed to OIC that its assertion that its submissions were confidential was directed at ensuring that a formal decision did not reveal the information in issue and render any appeal nugatory. OIC confirmed that the RTI Act required OIC to make and publish a formal decision, however the RTI Act also required that the decision not reveal information in issue.

[166] This response was received by OIC on 27 September 2018, but dated 8 August 2018.