

Mr Monceaux

By email: foi+request-4042-b7294113@righttoknow.org.au

Dear Mr Monceaux,

Decision on your Freedom of Information request of 22 August 2017

I refer to your application under the *Freedom of Information Act 1982* (the FOI Act) to the Department of Industry, Innovation and Science (DIIS) dated Tuesday, 22 August 2017. Your request sought the following:

“electronic copies of the minutes of all meetings of the Northern Australia Infrastructure Facility (NAIF) Independent Statutory Board”

You were notified on Friday, 25 August 2017, that this request had been transferred to the NAIF, pursuant to s 16(1)(b) of the FOI Act.

This letter sets out my decision on your request for access.

I am an authorised officer under s 23 of the FOI Act.

TIMEFRAME FOR PROCESSING YOUR REQUEST

Your request was received by DIIS on Tuesday, 22 August 2017. The statutory period for processing your request expires on Thursday, 21 September 2017.

MATTERS RELEVANT TO MAKING MY DECISION

In making my decision on the release of the documents to which you have sought access, I have had regard to the following:

- the scope of your request,
- the FOI Act,
- the content of the documents relevant to your request,
- advice from members of the NAIF Board concerning the subject matter of your request,
- the *Northern Australia Infrastructure Facility Act 2016* (NAIF Act), and the *Northern Australia Infrastructure Facility Investment Mandate Direction 2016* (Investment Mandate).

DECISION AND REASONS FOR DECISION

I can confirm that there are six documents relevant to your request. The accompanying schedule of documents (**Attachment A**) is a list of the documents identified and my decision for each document. The schedule of documents should be read in conjunction with my findings and conclusions set out below.

I have taken your request to only include copies of the finalised Minutes of the NAIF Board. This does not include meetings of the Board Audit and Risk Committee (BARC), and does not include draft Board Minutes.

I have not considered Minutes of meetings of the BARC to be in scope, as this committee is made up of different members to the ordinary NAIF Board, and carries out very different functions to the NAIF Board proper. The NAIF website also clearly differentiates between the NAIF Board and the BARC,¹ with the NAIF Board and the BARC being subject to different charters.²

I also do not consider any draft Minutes of NAIF Board meetings to be in scope, as drafts have not yet been confirmed by the NAIF Board. This accords with the usual governance practices of any board – that Board Minutes are not final and authoritative until they are formally confirmed to be a true record of the previous meeting. The Minutes of NAIF board meetings are not prepared from a recording of what is said at each meeting, but are prepared from notes taken by the minute-taker. There are often changes made to draft Minutes before the final Minutes are later confirmed by each of the NAIF Board members to be a true and correct record of the meeting. Accordingly, the NAIF considers that any drafts of these documents cannot properly be characterised as “Minutes”.

Section 45 – Confidential information exemption

Section 45 provides, relevantly:

- (1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.

The Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines) explain at [5.159] the criteria for a successful claim under section 45 FOI Act:

¹ See <http://naif.gov.au/risk-management-framework/>

² See <http://www.naif.gov.au/about-us/naif-governance/>.

To found an action for breach of confidence (which means section 45 would apply), the following five criteria must be satisfied in relation to the information:

- it must be specifically identified
- it must have the necessary quality of confidentiality
- it must have been communicated and received on the basis of a mutual understanding of confidence
- it must have been disclosed or threatened to be disclosed, without authority
- unauthorised disclosure of the information has or will cause detriment.

The information over which this exemption is claimed can be specifically identified, and includes all information contained in Board minutes. Some of the information in those Board minutes relates to or concerns projects in NAIF's "Pipeline" (projects "in NAIF's Pipeline" are those at any stage of the process with NAIF, from an enquiry being made through to the formal Investment Decision stage).³

From the time NAIF commenced operations on 1 July 2016, it operated on the understanding that NAIF would treat business information received from a proponent at each stage of the process as confidential. This business information would be used and disclosed only as needed to progress a proponent's application and for related purposes, or to the extent that NAIF is required to disclose it such as in accordance with any legal obligations.

The relevant information claimed to be exempt under section 45 was communicated and received on the basis of a mutual understanding of confidence. The NAIF has made clear it will treat this information confidentially, and holds out this position in a range of places, including on its website.⁴ In the initial stages of engagement with the NAIF, the NAIF gives specific assurances of confidentiality to the proponent, and agrees with them the extent to which NAIF will make public comment about the approach the proponent has made. While the NAIF's Investment Mandate provides for the public disclosure of certain information after an Investment Decision is made (the decision to offer or not offer a Financing Mechanism),⁵ that obligation is still subject to commercial confidentiality.⁶ As at the decision date, no projects have progressed to the Investment Decision stage, therefore that obligation has not yet been activated.

³ For more information, see <http://naif.gov.au/application-process/application-and-approval-procedure/> ; <http://naif.gov.au/application-process/pipeline-information/> .

⁴ See, for example, <http://www.naif.gov.au/application-process/>.

⁵ See Investment Mandate, cl 4.

⁶ Investment Mandate, cl 17(2).

The information over which this exemption is claimed has the necessary quality of confidence. Where information has entered the public domain, this exemption is not claimed over that material (although another exemption may be applicable). Subject to the specific confidentiality arrangements entered into with each proponent, the mere fact a proponent has engaged with NAIF and that it is or was in the NAIF Pipeline is, in almost all cases, confidential in and of itself. The fact that a company has approached NAIF to enquire about funding for a particular project is itself highly commercially sensitive, since market knowledge of that fact can have numerous commercial consequences for the company and the project concerned (addressed further in relation to section 47(1)(b) below).

To the extent that this exemption is claimed over the documents in issue, NAIF is not authorised by the proponents to whom these documents relate to disclose the material that they contain.

Section 47(1)(b) – Commercially valuable information exemption

Section 47(1)(b) provides that a document is an exempt document if its disclosure under the FOI Act would disclose any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed. It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value, and can include information relating to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved.⁷

The purpose of the NAIF is to provide financial assistance to proponents in connection with Northern Australia infrastructure.⁸ Under the NAIF Investment Mandate, the default vehicle for providing financial assistance is to be by way of a loan.⁹ The circumstances where an application is made to the NAIF is conceptually comparable to the making of a loan application to a bank or other lender.

Commercial value to the proponent or its competitors

Whether an entity has approached the NAIF with a proposal is commercially valuable information about that entity concerning its commercial affairs. Proponents are likely to be commercial entities for whom the proposed project represents a substantial dimension of their commercial activities.

⁷ The FOI Guidelines, [5.203].

⁸ NAIF Act, s 3(1).

⁹ Investment Mandate, cl 10(1).

If documents were released confirming certain projects were in the NAIF's Pipeline, then that information could be used by other commercial entities to make decisions relevant to that project or related projects. The commercial value of that information to the relevant proponent or other commercial entity would be adversely affected as a consequence because a) it would become known to potential competitors who could use it to the disadvantage of the proponent and b) it would interfere with the proponent's ability to strategically deploy that information in the context of its business interests (such as through attracting other investors to the project).

The information provided by proponents during the Process is inherently commercially valuable because of the signals it sends to the market about the proposal. Schedule 1 of the Investment Mandate outlines mandatory criteria for obtaining NAIF assistance. Mandatory criterion 3 is 'the proposed Project is unlikely to proceed, or will only proceed at a much later date, or with a limited scope, without financial assistance.' Releasing details of a proposal, and especially how it meets this criterion, has value to the entity because its disclosure could substantially affect market perception of the viability of the project in question – particularly if NAIF funding is not provided, or not provided to the level sought. Mandatory criterion 5 in Schedule 1 of the Investment Mandate is 'Facility's loan monies are not the majority source of debt funding.' If detail on the projects as outlined in some of the documents in issue was released and signalled to the market before actual agreement on financing and other terms was finalised, and in a manner which the entity is unable to control, it could harm the prospects of the proponent utilising the information to attract additional private sector sources of funding for the project. That in turn diminishes the entity's prospects of obtaining NAIF funding. Thus the value of the information is diminished both in terms of attracting additional sources of funding and also in securing NAIF funding.

A further basis for the application of this exemption under section 47(1)(b) to this information, is that if NAIF were to have any other projects in the NAIF Pipeline which are competing with the projects detailed in these documents, releasing commercially sensitive information on these projects and on the status of NAIF's dealings with these projects could cause the destruction of commercial value to one project or the other, or indeed create value (based on a false premise).

Section 47G – Business affairs public interest conditional exemption

I have not specifically applied the exemption under section 47G (Business affairs conditional exemption), because I consider that section 47(1)(b) is the relevant exemption. However, if there is a reason why section 47(1)(b) is not applicable, I consider that section 47G(1)(a) is applicable in the alternative. The unreasonable adverse effect is as described immediately above. The relevant public interest factors are as set out further below in these reasons (see pages 9-11).

Section 47C – Deliberative processes public interest conditional exemption

Section 47C provides that a document is conditionally exempt if its disclosure under the FOI Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency. Deliberative matter does not include operational information or purely factual material: section 47C(2). I consider that the documents in issue are conditionally exempt under section 47C in their entirety.

Do the documents contain deliberative matter?

The FOI Guidelines provide that a deliberative process involves the exercise of judgement in developing and making a selection from different options. In particular, the Guidelines state that:

... The action of deliberating, in commons understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes-the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.¹⁰

A deliberative process may include the recording or exchange of opinions, advice and/or recommendations, as well as interim decisions or deliberations: FOI Guidelines [6.64].

The deliberative process must relate to the functions of the agency. The NAIF's objectives and functions are in summary to:

- a) provide loans (or other financial assistance) for the construction of infrastructure that provides a basis for economic or population growth to benefit Northern Australia;¹¹ and
- b) have regard to the necessity of the investment to encourage private sector participation in financing a project and the potential effect of its loan on the Australian infrastructure financing market (referred to as 'crowding in' private sector finance).¹²

¹⁰ FOI Guidelines [6.58] citing *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67 at [58].

¹¹ See NAIF Act, ss 3(1), 7(1)(a).

¹² Investment Mandate cl 7(3)(d),(e) require the NAIF Board to have regard to these factors in making an Investment Decision.

One relevant ‘deliberative process’ these documents relate to, concerns the NAIF Board’s functions in considering the relevant projects, and making decisions on said projects. The specific deliberations could involve discussions and evaluations of various factors including about the nature of the relevant projects and whether they should continue through the NAIF Pipeline, whether the projects are likely to eventually fulfil the Mandatory and Non-Mandatory Investment Criteria, and considerations regarding appropriate terms of or conditions of any financing for the projects.¹³

The independent NAIF Board has resolved to treat as confidential and maintain the confidentiality of its deliberations relating to progression of projects through the NAIF Pipeline, from any initial contact by the proponent through to (and beyond) the time the formal Investment Decision is made.¹⁴ The information as recorded in the documents in issue is clearly for the purposes of the thinking processes connected to NAIF’s functions.

These documents also related to the NAIF Board’s deliberative processes concerning the exercise of other relevant functions under the NAIF Act, including (but not limited to) setting the strategies and policies to be followed by the NAIF.¹⁵

Information over which this exemption is claimed is not operational information or purely factual material.¹⁶ To the extent that there is non-deliberative material within the conditionally exempt sections, I am satisfied that the deliberative and non-deliberative matter is inextricably intermingled, and cannot be disclosed without revealing the contents of the deliberative material.¹⁷

Section 47E(d) – Operations of agencies public interest conditional exemption

Section 47E(d) provides that a document is conditionally exempt if its disclosure under the FOI Act would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the agency. The FOI Guidelines state that the predicted effect of disclosure must bear on the agency’s ‘proper and efficient’ operations, that is, the agency undertaking its expected activities in an expected manner.¹⁸

¹³ See Investment Mandate, Schedule 1 and Schedule 2.

¹⁴ This resolution is also specifically stated on the NAIF website, at: <http://naif.gov.au/application-process/application-and-approval-procedure/>.

¹⁵ See NAIF Act, s 14(1); Investment Mandate, cl 17(1).

¹⁶ See FOI Guidelines, [6.66], [6.70]-[6.74].

¹⁷ See *Dreyfus and Secretary Attorney-General's Department* [2015] AATA 962, [123].

¹⁸ FOI Guidelines, [6.112].

I consider that the documents in issue are conditionally exempt under section 47E(d) in their entirety.

The NAIF's internal operations include engaging with proponents, conducting consultations with relevant stakeholders and providing support to the NAIF Board, as well as the carrying out of ordinary governmental and administrative processes and requirements. The functions of the NAIF Board include (but are not limited to) deliberating on and determining whether resources should be dedicated to further investigating proposals (where proponents have engaged with the NAIF), whether or not financial assistance should be provided and on what terms, as well as the making of Investment Decisions.¹⁹

The purpose of the NAIF is set out above (see pages 4, 6 of these reasons).²⁰ In order to perform these functions properly and efficiently, the NAIF is dependent upon proponents a) coming forward to seek financial assistance and b) providing sufficient information to NAIF to enable it to make sound decisions.

The NAIF has no compulsory information gathering powers and relies solely on the goodwill of proponents and other financiers and investors and stakeholders to supply the detailed and confidential information it needs to properly assess information provided by proponents. In order to facilitate an open dialogue between NAIF and proponents, the NAIF has agreed to receive and treat information received from proponents in the strictest confidence possible. Without some guarantee of confidentiality, proponents could reasonably be expected to be discouraged from approaching the NAIF at all, or discouraged from providing the fullest cooperation and information to the NAIF if doing so would potentially expose commercially sensitive information to the risk of public release. Even the mere fact that an entity had – or had not – applied for financial assistance is likely to have commercial ramifications. An inability to protect the confidentiality of its dealings could reasonably be expected to adversely affect a proponent led process. Although proponents will be incentivised to be cooperative with the NAIF, the flow of information will be more assured if the NAIF can protect the confidentiality of its dealings.

The NAIF Board has resolved that the Board's deliberations and the NAIF Board Minutes are to remain confidential.²¹ The NAIF Board considers that release of information prior to the formal publication of information following an Investment Decision, would be detrimental to the activities of the NAIF, because the NAIF operates on the understanding

¹⁹ See NAIF Act ss 7, 14 and Investment Mandate cl 6(1).

²⁰ See also NAIF Act, s 3.

²¹ See cl 17(2).

that engagement occurs on a strictly confidential basis, and information is provided to the NAIF on that basis.

Likewise, with respect to the balance of the Board's deliberations (such as in relation to corporate governance matters), disclosure is likely to undermine the Board's expectation of confidentiality with respect to its deliberations. This, in turn, is likely to have a chilling effect on the Board's willingness to openly debate and deliberate on issues, substantially interfering with its ability to operate as the peak decision-making organ of NAIF.

I am therefore satisfied that release of this information would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the NAIF.

Is giving access to the documents contrary to the public interest?

Section 11A(5) provides that, if a document is conditionally exempt, it must be disclosed unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Section 11B(3) of the FOI Act lists (non-exhaustively) factors that favour access when applying the public interest test. Three of those factors are particularly applicable to the conditionally exempt documents:

- promoting the objects of the FOI Act
- informing debate on a matter of public importance
- promoting effective oversight of public expenditure.

The NAIF is a public authority charged with investing very significant amounts of public funds (\$5 billion). It is in the public interest for there to be accountability with respect to the decision-making around NAIF's activities, and how the NAIF Board's functions are being exercised. There has also been significant media and general public interest in the NAIF, their policies and NAIF's consideration of funding for certain projects, and these factors all weigh in favour of disclosure of the conditionally exempt information.

Against these factors must be balanced factors against disclosure. The FOI Act does not specify any factors against disclosure, but the Guidelines provide a non-exhaustive list of such factors, including relevantly where disclosure:

- Could reasonably be expected to prejudice an agency's ability to obtain confidential information
- Could reasonably be expected to prejudice an agency's ability to obtain similar information in the future
- Could reasonably be expected to prejudice the management function of an agency.

Further factors against disclosure, include that disclosure would be likely to adversely affect NAIF's relationship with proponents and would discourage industry engagement with the NAIF. It would also be likely to cause a reduction in the detail or quality of proposals and any other information provided to the NAIF by proponents as well as other relevant parties and stakeholders. This would undermine NAIF's objectives, which is contrary to the public interest in the development of Northern Australia infrastructure.

Disclosure of this material could reasonably be expected to prejudice the NAIF's ability to comprehensively consider and weigh up information provided regarding projects progressing through the NAIF Pipeline, and adversely affect the quality of internal deliberations by the NAIF Board regarding these projects and also their deliberations about internal NAIF strategies and policies. NAIF has a large sum of money available to be provided by way of concessional loans, and it is in the public interest that the \$5 billion available to NAIF is invested appropriately, and that the NAIF Board operate at optimum efficiency.

It is also relevant to consider the public interest in avoiding interference with the economy and the market. Disclosing preliminary information about what projects may or may not be funded could encourage private sector players to make decisions about the future of particular regions (in a positive or negative way). It is contrary to the public interest for particular regions, and particular private sector investors, to be disadvantaged because of a belief that a particular project will or will not succeed in obtaining funding where the eventual outcome of the decision-making process differs from what was initially believed. It is contrary to the public interest for the release of preliminary information to have this effect – i.e. by fuelling predictions that are misconceived and may ultimately be wrong.

A further relevant factor is that once any Investment Decision is made, NAIF is legally obligated to publish certain information, as set out in the Investment Mandate, although that obligation is still 'subject to commercial confidentiality'.²² Consequently information on successful proposals will be released, at the appropriate time (being 30 days after the Investment Decision is made) but it is against the public interest for release to occur prior to an Investment Decision being made and the publication of the relevant information. NAIF has also published on its website some de-identified information about projects currently in the NAIF Pipeline.²³

²² Investment Mandate, cl 17(2).

²³ See <http://naif.gov.au/application-process/pipeline-information/> .

In balancing the above factors for and against disclosure, I give greater weight to the factors against disclosure, and find that giving access to this material would, on balance, be contrary to the public interest.

In balancing the factors for and against disclosure, I have also taken care not to consider irrelevant factors as identified in s 11B(4) of the FOI Act.

REVIEW RIGHTS

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision.

Internal Review

Under section 54 of the FOI Act, you may apply for an internal review of the decision. The internal review application must be made within 30 days of you receiving this notice.

An internal review will be conducted by a different officer from the original decision-maker. No particular form is required to apply for review although it will assist your case to set out in the application the grounds on which you believe that the original decision should be overturned. An application for a review of the decision should be sent in writing:

Email: naif@naif.gov.au

Post: Northern Australia Infrastructure Facility
PO Box 4896
Cairns QLD 4870

If you choose to seek an internal review, you will subsequently have a right to apply to the Australian Information Commissioner for a review of the internal review decision.

Review by the Australian Information Commissioner

Under section 54L of the FOI Act, you may seek review of this decision by the Australian Information Commissioner. Your application must be made within 60 days of you receiving this notice.

The Australian Information Commissioner is an independent office holder who may review decisions of agencies and Ministers under the FOI Act. More information is available on the Australian Information Commissioner's website www.oaic.gov.au.

You can contact the Information Commissioner to request a review of a decision online or by writing to the Information Commission at:

GPO Box 2518
Sydney NSW 2001

Complaints to Ombudsman or Australian Information Commissioner

You may complain to either the Commonwealth Ombudsman or the Australian Information Commissioner about action taken by the NAIF in relation to your request. The Ombudsman will consult with the Australian Information Commissioner before investigating a complaint about the handling of an FOI request.

Your enquiries to the Ombudsman can be directed to:

Phone 1300 362 072 (local call charge)
Email ombudsman@ombudsman.gov.au

Your enquiries to the Australian Information Commissioner can be directed to:

Phone 1300 363 992 (local call charge)
Email enquiries@oaic.gov.au

There is no particular form required to make a complaint to the Ombudsman or the Australian Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify the NAIF as the relevant agency.

Yours sincerely



Carol Bellettini

Chief of Staff

Northern Australia Infrastructure Facility

21 September 2017