



Our ref. 16007728

9 August 2017

Ms Carol Bellettini  
Chief of Staff  
Northern Australia Infrastructure Facility

**Australian Government Solicitor**  
4 National Circuit, Barton ACT 2600  
Locked Bag 35, Kingston ACT 2604  
T 02 6253 7000 DX 5678 Canberra  
www.ags.gov.au

Canberra  
Sydney  
Melbourne  
Brisbane  
Perth  
Adelaide  
Hobart  
Darwin

**BY EMAIL**

Dear Ms Bellettini

### **Board deliberations and conflicts of interest**

1. You have asked us to provide feedback on the approach of the Northern Australia Infrastructure Facility (NAIF) to managing the confidentiality of Board deliberations and conflict of interest recusal decisions. Specifically, you ask whether NAIF's approach is consistent with what comparable Australian government agencies are doing.
2. The short answer is that NAIF's approach is consistent with our experience of other agencies with comparable functions.

### **Board deliberations**

3. NAIF is a corporate Commonwealth entity governed by a Board.<sup>1</sup> You instruct as follows:

NAIF has a confidentiality protocol, which it applies in the public interest.

The NAIF Board has resolved that their deliberations at all stages of NAIF's Application and Approval Procedure in respect to enquiry information, information regarding a proponent's proposals, applications, expressions of interest or strategic assessments are confidential.

It means that Board deliberations, key credit decisioning governance documents (e.g. Risk Appetite Statement) and information regarding proponents for NAIF loans or assistance are not publicly disclosed.

4. It is not unusual for agencies to maintain confidentiality over decision-making processes which relate to the granting of government funds. Most agencies which have comparable lending or business development functions have the benefit of secrecy provisions in their enabling legislation which prohibit disclosure of information about those functions. Examples include:

- Export Finance and Insurance Corporation<sup>2</sup>

---

<sup>1</sup> Northern Australia Infrastructure Facility Act 2016 ss 6, 13, 14.

<sup>2</sup> Export Finance and Insurance Corporation Act 1991 s 87.

- Australian Trade and Investment Commission<sup>3</sup>
  - Indigenous Business Australia<sup>4</sup>
  - Reserve Bank of Australia.<sup>5</sup>
5. These bodies also have exemptions from the *Freedom of Information Act 1982* (Cth) (FOI Act). Many other agencies with what might be described as commercial activities functions are exempt from the FOI Act to the extent of those commercial activities, eg the Commonwealth Scientific and Industrial Research Organisation. The National Health and Medical Research Council is exempt from the FOI Act in so far as documents are in the possession of Council members who are not employed under the *Public Service Act 1999* (Cth).<sup>6</sup>
  6. We are aware that other agencies with major grants or funding functions resist disclosing information relating to the process of awarding those grants or funding. Past examples include the National Health and Medical Research Council<sup>7</sup>, the Australian Research Council,<sup>8</sup> the Department of Education, Employment and Workplace Relations<sup>9</sup> and the Department of Health.<sup>10</sup> Many agencies also seek to protect from disclosure information that reveals the methodology by which evaluation of tenders is undertaken.<sup>11</sup>
  7. There are a number of other corporate Commonwealth entities with governing boards or councils that have decision-making functions around the allocation of Commonwealth spending. We are aware of a number of examples where such agencies have sought to maintain confidentiality over the deliberations of those organs relating to spending decisions. Often this is explained by reference to the need to preserve the efficacy of the decision-making process, or to safeguard the proper expenditure of Commonwealth money.
  8. More broadly, courts recognise that the proper working of government relies on ministers and other senior servants of the Crown being able to engage in policy

<sup>3</sup> *Australian Trade and Investment Commission Act 1985* s 94.

<sup>4</sup> *Aboriginal and Torres Strait Islander Act 2005* s 191.

<sup>5</sup> *Reserve Bank Act 1959* (Cth) s79A.

<sup>6</sup> FOI Act Schedule 2 Part II.

<sup>7</sup> 'GO' and *National Health and Medical Research Council* [2015] AICmr 56.

<sup>8</sup> *Andrews and Australian Research Council* [2007] AATA 1026.

<sup>9</sup> *Dreamsafe Recycling Pty Ltd and Department of Education, Employment and Workplace Relations* [2013] AICmr 34.

<sup>10</sup> *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494. This FOI matter related to a review of funding arrangements, rather than their initial establishment.

<sup>11</sup> For example, *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development Training Centre Pty Ltd* (2001) 114 FCR 301; *Marshall and Department of Defence* [2011] AATA 566.

development and decision-making on the basis that their deliberations are kept confidential.<sup>12</sup>

9. Finally, where information is obtained on the understanding that it will be held confidentially, the recipient entity is entitled to assert public interest immunity from the production of that information in the course of legal proceedings, by reason of the way that information was obtained.<sup>13</sup>

### **Conflict of interest declarations**

10. You instruct as follows:

Information as to what declarations individual Board members make are not disclosed as they are made as part of Board deliberations which are confidential (see rationale above), NAIF has obligations under the Privacy Act to comply with and because disclosure could reveal commercial in confidence information relating to projects in relation to which the declaration is made.

NAIF has a published Conflicts of Interest Policy.

11. We understand NAIF's concerns to be twofold. First, NAIF is concerned to protect the privacy of Board members. We agree that information about which Board members recuse themselves from which deliberations is personal information which must be managed consistently with the *Privacy Act 1988* (Cth), to which NAIF is subject. We are not aware of any legal obligation or general practice in the Commonwealth to publish the details of recusal decisions made by Boards (or similar organs). On that basis, NAIF's general approach appears to be consistent with standard practice for corporate Commonwealth entities.
12. Secondly, NAIF wishes to avoid disclosing by implication commercially sensitive information about investment proposals or enquiries that the Board is deliberating upon. We agree this is a risk. For example, if it is public knowledge that a Board member has an interest in a particular infrastructure venture, and it is public knowledge that they recused themselves from a particular Board meeting or agenda item, it would be reasonably open for people to infer that the venture has made an investment proposal or enquiry that the Board has deliberated upon. In

---

<sup>12</sup> *Matthews v SPI Electricity Pty Ltd & Ors* (No 11) [2014] VSC 65, [24].

<sup>13</sup> *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners* (No 2) [1974] AC 405, applied recently in *AS v Minister for Immigration and Border Protection & Ors* (public interest immunity ruling) [2017] VSC 162. In *Australian Statistician and Leighton Contractors Pty Ltd* [2008] WASCA 34; (2008) 36 WAR 83 the confidentiality of data provided to the Australian Bureau of Statistics was preserved by public interest immunity claims, on the grounds that disclosure would damage the national economy by interfering with the Australian Government's management of the economy.

circumstances where we understand NAIF promises confidentiality to proponents,<sup>14</sup> this would seem an inappropriate outcome.

Yours sincerely

A handwritten signature in blue ink, consisting of a stylized 'J' and 'D'.

**Justin Davidson**  
Senior Executive Lawyer  
T 02 6253 7240  
justin.davidson@ags.gov.au

---

<sup>14</sup> <https://naif-gov-au.industry.slicedtech.com.au/wp-content/uploads/2017/04/NAIF-Confidentiality-Policy.pdf>.