



Decision and Reasons for Decision

Application Number: 210511

Applicant: Electrical Trades Union (Simpson)

Respondent: Treasury Department

Third Party: Hay Group Pty Limited

Fourth Party: Energex Limited

Fifth Party: Tarong Energy Corporation Limited

Sixth Party: Stanwell Corporation Limited

Seventh Party: CS Energy Limited

Eighth Party: Ergon Energy Corporation Limited

Ninth Party: SunWater Limited

Decision Date: 24 August 2009

Catchwords: **ADMINISTRATIVE LAW - FREEDOM OF INFORMATION – QUEENSLAND – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER RELATING TO TRADE SECRETS, BUSINESS AFFAIRS AND RESEARCH – applicant sought access to a consultant’s report – whether disclosure of the consultant’s report would disclose trade secrets of an agency or another person – whether consultant’s report exempt under section 45(1)(a) of the *Freedom of Information Act 1992 (Qld)***

ADMINISTRATIVE LAW - FREEDOM OF INFORMATION – QUEENSLAND – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER RELATING TO TRADE SECRETS, BUSINESS AFFAIRS AND RESEARCH – applicant sought access to a consultant’s report – whether disclosure of the consultant’s report would disclose information concerning the business, professional, commercial or financial affairs of an agency or another person – whether disclosure of the consultant’s report could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of an agency or another person – whether disclosure of the consultant’s report would be in the public interest – whether the consultant’s

report was exempt under section 45(1)(c) of the *Freedom of Information Act 1992 (Qld)*

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REASONS FOR DECISION

Summary

1. For the reasons set out below, I am satisfied that the:
 - Category A Matter is exempt from disclosure under section 45(1)(a) of the *Freedom of Information Act 1992* (**FOI Act**)
 - Category B Matter is exempt from disclosure under section 45(1)(c) of the FOI Act
 - the matter in issue (comprising the Category A Matter and Category B Matter) is exempt from disclosure in its entirety.
2. The decision under review is varied.

Background

3. By letter dated 3 January 2008 (**FOI Application**), Mr Peter Simpson, Deputy Secretary, Electrical Trades Union (the **applicant**) applied to Treasury Department (**Treasury**) for documents relating to salary matters for senior executives in certain Government Owned Corporations (**GOC**). Following discussions with Treasury, by email dated 15 January 2008, the applicant confirmed that he was seeking a copy of the 'Hay Report'.
4. By letter dated 7 March 2008, Mr Gerry Cottle, Manager Freedom of Information, notified the applicant that access to the Hay Report was refused on the basis that the Hay Report was exempt from disclosure under sections 45(1)(a), 45(1)(c) and 46(1)(b) of the FOI Act (**Original Decision**). More specifically, Treasury claimed that:
 - the matter in issue concerning client lists and methodologies was exempt from disclosure under section 45(1)(a) of the FOI Act
 - the matter in issue concerns the business or financial affairs of Hay Group and electricity GOCs and was exempt from disclosure under section 45(1)(c) of the FOI Act
 - the matter in issue was exempt from disclosure under section 46(1)(b) of the FOI Act.
5. By facsimile dated 18 March 2008 (**Internal Review Application**), Hall Payne Lawyers (**Hall Payne**) acting for the applicant, applied for internal review of the Original Decision.
6. By facsimile dated 16 May 2008 (**External Review Application**), Hall Payne acting for the applicant, wrote to this Office:
 - stating that no response had been received from Treasury in relation to the Internal Review Application
 - applying for external review
 - providing arguments in support of the view that the Hay Report was not exempt from disclosure under the FOI Act.

Decision under review

7. Under section 52(6) of the FOI Act, if on internal review, an agency does not decide an application and notify the applicant of the decision within 28 days after receiving the

application, the agency's principal officer is taken to have made a decision at the end of the period affirming the original decision.

8. As no decision was made on the Internal Review Application, the decision under review is the decision of Treasury's principal officer deemed to have been made, affirming the Original Decision to refuse access to the Hay Report.

Applicable legislation

9. The FOI Act was repealed by the *Right to Information Act 2009 (RTI Act)*¹ which commenced on 1 July 2009.² However, because the FOI Application was made under the FOI Act and has not yet been finalised, for the purposes of this external review, I am required to consider the application of the FOI Act (and not the RTI Act) to the matter in issue.³

Steps taken in the external review process

10. This Office:
 - made preliminary inquiries under section 75 of the FOI Act
 - determined that it would conduct an external review of the decision of Treasury to refuse access to the Hay Report, and notified the parties on 16 June 2008.
11. A copy of the matter in issue and documents relating to third party consultation undertaken by Treasury in response to the FOI Application were received and reviewed.
12. A staff member of this Office telephoned Treasury on 21 November 2008 to request further documentation referred to in the third party consultation materials. Additional documentation was obtained from Treasury and considered.
13. A staff member of this Office contacted Treasury again on 16 January 2009 to:
 - request further information relating to the contractual arrangements between Treasury and Hay Group Pty Limited (**Hay Group**) relating to the Hay Report
 - obtain further information relating to the relationship between Treasury and the GOCs referred to in the Hay Report.
14. I confirmed this request in writing by email dated 20 January 2009.
15. By email dated 28 January 2009, Treasury provided a further explanation of the contractual arrangements between Treasury and Hay Group and the circumstances in which the Hay Report was commissioned, along with relevant documentation.
16. During a telephone conversation with Treasury on 17 March 2009, a staff member of this Office indicated that a written preliminary view would be issued to Treasury and that this Office would be consulting Hay Group in the course of the review.
17. During a telephone conversation on 18 March 2009, a staff member of this Office notified Blake Dawson (solicitors acting for Hay Group) that a written preliminary view

¹ Section 194 of the RTI Act.

² With the exception of sections 118 and 122 of the RTI Act.

³ Section 199 of the RTI Act.

would be issued, and Hay Group would be invited to provide submissions and/or become a participant in the review.

18. By letters dated 1 April 2009, I provided a written preliminary view to each of Treasury and Blake Dawson on behalf of Hay Group, regarding the application of exemption provisions of the FOI Act relied on in the Original Decision. I invited each of Treasury and Hay Group to provide submissions in respect of the preliminary view and also invited Hay Group to apply to become a participant in the external review.
19. By letter dated 1 April 2009, I advised Hall Payne that a preliminary view had been provided to each of Treasury and Hay Group.
20. By facsimile dated 9 April 2009, this Office received correspondence from Hall Payne requesting the following, as a matter of natural justice:
 - the preliminary view
 - a reasonable opportunity to provide submissions in response to the preliminary view
 - submissions provided by Treasury or any other party in response to the preliminary view
 - an opportunity to respond to those submissions.

Hall Payne also stated that should I fail to provide any of these materials or a reasonable opportunity to respond, they reserved their client's right to rely upon such failure as a ground for a review of my decision.

21. By letter dated 14 April 2009, this Office responded to that letter:
 - reiterating that a preliminary view is one of the processes used by this Office to afford procedural fairness by giving any party whose interests would be adversely affected by a decision of this Office an opportunity to respond to relevant issues in the review
 - advising the applicant that at this stage of the review, a preliminary view had been formed which was adverse to Treasury, specifically that on the basis of the information available at that time, the matter in issue was not exempt from disclosure under sections 45(1)(a), 45(1)(c), or 46(1)(b) of the FOI Act and that the preliminary view had been provided to Treasury to afford procedural fairness to Treasury by giving Treasury an opportunity to respond to issues in the review
 - indicating that:
 - having regard to this Office's obligations under the FOI Act (in relation to ensuring non-disclosure of exempt matter), this Office was unable to provide a copy of the preliminary view to Hall Payne
 - in any event, there was currently no basis on which their client would need to respond to issues raised by the preliminary view provided to Treasury because the preliminary view, at that stage, was not adverse to the applicant
 - assuring Hall Payne that should the preliminary view of this Office change as a result of further information or submissions provided by Treasury (or another party), so that the preliminary view was adverse to their client, their client would similarly have an opportunity to respond to a preliminary view, and any relevant submissions, at that time.

This Office also advised Hall Payne that Treasury had been granted an extension of time until 8 May 2009 in which to provide submissions in response to the preliminary view.

22. During a telephone conversation on 16 April 2009, Blake Dawson indicated that Hay Group did not intend to provide submissions in the external review.
23. By letter dated 27 April 2009, I wrote to Blake Dawson to confirm this position.
24. During a telephone conversation with Treasury on 5 May 2009, a staff member of this Office discussed procedural matters raised by Treasury by email dated 29 April 2009.
25. On 8 May 2009, this Office received the following in relation to this external review:
 - correspondence from Energex Limited (**Energex**) requesting to become a participant in the external review and providing submissions setting out its claims regarding the application of exemption provisions of the FOI Act to the matter in issue (**Energex Submissions**)
 - correspondence from Clayton Utz Lawyers (**Clayton Utz**) acting on behalf of Tarong Energy Corporation Limited, Stanwell Corporation Limited, CS Energy Limited and Ergon Energy Corporation Limited requesting to become participants in the external review and providing submissions setting out their claims regarding the application of exemption provisions of the FOI Act to the matter in issue (**Clayton Utz Submissions**)
 - correspondence from Treasury setting out submissions in response to the preliminary view (**Treasury Submissions**)
 - correspondence from Blake Dawson on behalf of Hay Group, advising that Hay Group now wished to become a participant in the review and requesting an extension of time in which to provide submissions in the external review.
26. By letter dated 11 May 2009, I advised Blake Dawson that I:
 - had decided to allow Hay Group to become a participant in the review
 - required any submissions be provided to me by 22 May 2009.
27. During a telephone conversation on 15 May 2009, a staff member of this Office advised Energex that:
 - I had decided to exercise my discretion, pursuant to section 78(3) of the FOI Act, to allow Energex to participate in this external review
 - the Energex Submissions would be considered in the course of this review.
28. During another telephone conversation on 15 May 2009, a staff member of this Office advised Clayton Utz that:
 - I had decided to exercise my discretion, pursuant to section 78(3) of the FOI Act, to allow its clients (noted in paragraph 25) to participate in this external review
 - the Clayton Utz Submissions would be considered in the course of this review.
29. I confirmed this in writing by letter to each of Energex and Clayton Utz on 19 May 2009.
30. By letter dated 21 May 2009, I received submissions from Blake Dawson on behalf of Hay Group setting out Hay Group's submissions regarding the application of exemption provisions of the FOI Act to the matter in issue. Hay Group also repeated and relied upon submissions contained in correspondence to Treasury dated 12 February 2008 and 11 April 2008. In this decision, I have referred to Hay Group's submissions of 12 February 2008, 11 April 2008 and 21 May 2009 collectively as the **Hay Group Submissions**.

31. By letter dated 22 May 2009, Clayton Utz advised that SunWater Limited wished to become a participant in the review, and adopt the submissions already provided by Clayton Utz.
32. By letter dated 25 May 2009, I advised Clayton Utz that I had exercised my discretion, pursuant to section 78(3) of the FOI Act to allow SunWater Limited to participate in this external review.
33. Following a request by a staff member of this Office during a telephone conversation on 25 May 2009, by email dated 26 May 2009, Treasury provided this Office with a copy of Hay Group's letter dated 11 April 2008, and information pertaining to Queensland Electricity Transmission Corporation Limited (**Powerlink Queensland**).
34. During a telephone conversation with a staff member of this Office on 26 May 2009, Powerlink Queensland indicated that at this stage, it did not intend to apply to become a participant or provide submissions in the review.
35. During a telephone conversation on 28 May 2009, a staff member of this Office advised Hall Payne that I:
 - was considering submissions received from Treasury and Hay Group
 - had received submissions from GOCs which would also be considered in the course of this review.
36. Having further reviewed the matter in issue and considered the submissions received in the course of the review, by letter dated 3 June 2009, I wrote to Hall Payne to provide a preliminary view that:
 - the Category A Matter was exempt from disclosure under section 45(1)(a) of the FOI Act
 - the Category B Matter was exempt from disclosure under section 45(1)(c) of the FOI Act.

Accordingly, I indicated to Hall Payne that in my preliminary view, the entire Report (consisting of the Category A Matter and Category B Matter) was exempt from disclosure under the FOI Act.

In that letter, I:

- set out the law and the submissions upon which my preliminary view was based
 - invited Hall Payne to provide written submissions and/or evidence to support its position
 - indicated that if I did not hear from Hall Payne to the contrary by 18 June 2009, I would proceed on the basis that the preliminary view was accepted, and that the review was finalised on that basis.
37. By facsimile dated 18 June 2009, Hall Payne wrote to this Office stating as follows:

As we foreshadowed in our correspondence dated 9 April 2009, we consider that your forming of a preliminary view in this matter, based on submissions provided by other parties but without first providing our client the opportunity to respond to those submissions, lacked procedural fairness. Indeed, the forming of a view in these circumstances gives rise to a reasonable apprehension of bias. We also note that our client has not been provided with the full text of all submissions that you have received,

together with any supporting material. We reserve our client's rights in relation to these matters, including our client's right to rely upon these matters as grounds for the review of your decision.

Whilst reserving its rights in relation to the above matters, for the purpose of responding to your letter dated 3 June 2009 our client repeats and relies upon the submissions already made by our client in this matter. For the reasons we have provided:

- 1. the document cannot properly be characterised as a 'trade secret';*
- 2. the 'adverse effects' exemption does not apply;*
- 3. the 'confidential information' exemption does not apply; and*
- 4. in any event, the public interest favours disclosure.*

38. In reaching a decision in this external review, I have taken the following into consideration:

- the FOI Application and Original Decision
- the Internal Review Application
- the External Review Application
- relevant parts of the Treasury Submissions referred to in this decision
- relevant parts of the Hay Group Submissions referred to in this decision
- relevant parts of the Energex Submissions and Clayton Utz Submissions referred to in this decision
- the letters from Hall Payne dated 9 April 2009 and 18 June 2009
- information contained on the Hay Group website www.haygroup.com/au/ regarding Hay Group's business
- the matter in issue
- provisions of the FOI Act and other legislation referred to in this decision
- 'guidelines' and 'policies' applying to GOCs referred to in this decision
- case law and decisions of this Office referred to in this decision.

Procedural matters raised by the applicant

39. The applicant has raised the following procedural matters in respect of this review:

- preliminary views were formed without the applicant having an opportunity to provide submissions in the review and this gives rise to a reasonable apprehension of bias
- the applicant was not provided with the full text of all submissions that were received together with any supporting material.

40. Hall Payne has also indicated that they reserve their client's rights in relation to these matters, including the right to rely upon these matters as grounds for the review of my decision.

41. I note that section 83 of the FOI Act sets out provisions relating to the conduct of reviews. In particular, subsection (3) provides:

83 Conduct of reviews

...

(3) *In conducting a review, the commissioner must -*

- (a) *adopt procedures that are fair, having regard to the obligations of the commissioner under this Act; and*

(b) ensure that each participant has an opportunity to present the participant's views to the commissioner;

but, subject to paragraph (a), it is not necessary for a participant to be given an opportunity to appear before the commissioner.

...

42. I will respond to each of the procedural issues raised by Hall Payne in turn.

Reasonable apprehension of bias

43. As noted above, in their letter of 18 June 2009, Hall Payne said:

As we foreshadowed in our correspondence dated 9 April 2009, we consider that your forming of a preliminary view in this matter, based on submissions provided by other parties but without first providing our client the opportunity to respond to those submissions, lacked procedural fairness. Indeed, the forming of a view in these circumstances gives rise to a reasonable apprehension of bias...

44. Details of Hall Payne's letter dated 9 April 2009, and the response of this Office dated 14 April 2009, are referred to in paragraphs 20 and 21 above.

45. I note that written 'preliminary views' have been provided at two stages in the course of this external review.

46. The first of these was a preliminary view to each of Treasury and Hay Group dated 1 April 2009 in which I communicated a preliminary view, on the basis of the information available to me at that time, that the matter in issue was not exempt from disclosure under sections 45(1)(a), 45(1)(c) or 46(1)(b) of the FOI Act. I indicated to both Treasury and Hay Group that the preliminary view had been prepared on the basis of the information which was available to me at the time. In the written preliminary view to Treasury, I expressly said:

I note that under section 81 of the FOI Act, the agency has the onus of establishing that the decision under review was justified or that I should give a decision which is adverse to the applicant. As I have noted in this preliminary view, there is currently insufficient evidence upon which to justify the decision under review.

47. The second of these was a preliminary view, provided to Hall Payne acting on behalf of the applicant, by letter dated 3 June 2009. I stated the following at page 1 of that letter:

The purpose of this letter is to advise you of my preliminary view regarding the matter in issue in this review. A preliminary view is one of the processes used by this Office to facilitate informal resolution of a matter and to afford the parties procedural fairness by giving the parties an opportunity to respond to relevant issues in the review.

My preliminary view is not a decision. It is a view that I have formed having taken an independent assessment of the matter in issue and relevant issues in this review on the basis of the information now available to me. In the event that you provide additional information or evidence that supports your case, I may change my view.

In the event that you do not accept my preliminary view I will invite you, at the conclusion of this letter, to provide any final submissions and/or evidence in support of your case.

48. I went on to say at page 5 of that letter to Hall Payne:

Preliminary view issued to Treasury and Hay Group

As noted in previous correspondence to your firm, by letter dated 1 April 2009, I advised each of Treasury and Hay Group that I had formed the preliminary view, on the basis of the information available to me at that time, that the matter in issue in this review was not exempt from disclosure under sections 45(1)(a), 45(1)(c), and 46(1)(b) of the FOI Act. In that preliminary view letter, I set out the basis for forming that view, and requested Treasury and Hay Group to provide submissions in respect of that preliminary view. I indicated to Treasury that on the basis of the information available to me, there was currently insufficient evidence upon which to justify the decision under review.

As indicated above, a preliminary view is not a decision. It is a view formed after an independent assessment of relevant documents and issues has been conducted on the basis of all the information that is currently available. If a party provides additional information or evidence that supports its case, the view may change.

As a result of the further submissions received in this external review, and further consideration of the matter in issue having regard to the submissions received, my view regarding the application of exemption provisions of the FOI Act has now changed.

49. The remainder of that letter to Hall Payne set out:

- the law relating to sections 45(1)(a) and 45(1)(c) of the FOI Act
- details of the submissions of other participants in the review
- my preliminary view regarding the application of the law to the matter in issue, based on the information which was then available to me.

50. On the final page of that letter (page 23) I invited Hall Payne on behalf of the applicant to lodge (by 18 June 2009) written submissions and/or evidence in support of their case, should they not accept the preliminary view discussed in my letter.

51. I note that procedural issues relating to the use by this Office of 'preliminary views' were considered by Helman J in *Community Care Inc v Taylor, Information Commissioner & Ors*⁴ (CCI). In that case, Community Care Inc sought a statutory order of review under section 21 of the *Judicial Review Act 1991* in relation to the conduct of an external review in progress with this Office, part of which related to a 'preliminary view' provided by an Assistant Commissioner of this Office in relation to one of the issues in the review. Having examined the relevant provisions of the FOI Act, and the essential steps required in an external review process, Helman J said:

It is clear that the second respondent was attempting at the outset to clarify or refine the issues on the external review, and to that end reached a preliminary view on one of the applicant's grounds based on the extensive argument already prepared by the applicant and set out in its solicitors' letter of 26 May 2006. Such a course was consistent with the requirement of s.72(1)(b) that an external review be conducted as expeditiously as the requirements of the Act and a proper consideration of the matters before the Commissioner permits ...

*The second respondent's reaching a preliminary view did not signify a mind closed to persuasion to a contrary view and provides no proper basis for an apprehension of bias.*⁵

52. In respect of procedural issues and the 'preliminary views' provided in the course of this review, I note the following:

⁴ [2007] QSC 148.

⁵ At paragraph 21.

- As part of the External Review Application, Hall Payne provided extensive arguments supporting their claim that the matter in issue was not exempt from disclosure under the FOI Act.
- I carefully considered those arguments:
 - in the course of forming the preliminary view issued to each of Treasury and Hay Group dated 1 April 2009; and
 - in the course of forming the preliminary view issued to Hall Payne dated 3 June 2009.
- Evidently, I was open to changing my view in the course of the review should further submissions and evidence be received, demonstrated by the fact that I did change my preliminary view on the basis of further information provided by participants in this review.
- Hall Payne claim that their client did not have an opportunity to provide submissions responding to the submissions of other parties prior to my forming and providing a written preliminary view, and state that the forming of a view in these circumstances gives rise to a reasonable apprehension of bias. In this regard, I note that:
 - the purpose of a preliminary view is to present relevant issues to a party to enable them to respond
 - I expressly invited the applicant to respond to my preliminary view and indicated that I was open to changing my preliminary view in the event I received further evidence and submissions from Hall Payne
 - forming a preliminary view does not suggest that I was not open to persuasion to a contrary view and is not reason to draw a conclusion of bias.⁶
- In their letter dated 18 June 2009, Hall Payne indicated '*... for the purpose of responding to your letter dated 3 June 2009 our client repeats and relies upon the submissions already made by our client in this matter*'. By this statement, the applicant expressly reiterates the arguments made in the External Review Application (and Internal Review Application, a copy of which was also provided to this Office and which contains arguments similar in character to the External Review Application). Apart from summarising those arguments as set out in paragraph 37, Hall Payne provided no new submissions to support their claims that the Report was (or parts of the Report were) not exempt from disclosure under the FOI Act. In my view, this suggests that:
 - the applicant has had sufficient opportunity to provide submissions in this external review
 - having made no new submissions, the submissions already provided in the External Review Application (and Internal Review Application) are those which the applicant wishes me to take into account in making a decision in this external review
- I have carefully considered those submissions in making this decision.

53. I also note that while Hall Payne on behalf of the applicant has raised the issue of a reasonable apprehension of bias, the applicant has not requested me to remove myself from being the decision-maker in this external review. Given the procedural issues raised by the applicant, I have in any event, considered whether this is necessary.

54. As a delegate of the Information Commissioner, I am required to conduct reviews and make decisions in accordance with the provisions of the FOI Act (including section 83(3) referred to in paragraph 41) and the principles of administrative law, including the requirements of procedural fairness.

⁶ CCI at paragraph 21.

55. In my view, I have conducted this review in a manner which has given the applicant an opportunity to provide submissions in support of his view that the Report is not exempt from disclosure under the FOI Act, and I have complied with the requirements of the FOI Act and the principles of procedural fairness. Accordingly, there is no basis on which I should remove myself from the decision making process in this external review.

Submissions and supporting material

56. In their letter dated 18 June 2009, Hall Payne stated that their client has not been provided with the full text of all submissions received by this Office in the course of this review, along with any supporting material.
57. In my letter to Hall Payne dated 3 June 2009, I drew Hall Payne's attention to the following:

In respect of the submissions received from the other participants to this review, I note the following matters:

- *I am advised that none of the GOCs have been provided with a copy of the Report.*
- *The other participants to the review have provided submissions relating to the application of a number of exemption provisions of the FOI Act to the matter in issue. Because the FOI Act requires that I make a finding whether matter in issue is exempt from disclosure under the FOI Act, if even one exemption applies, I am not required to consider the application of all exemption provisions which the participants have submitted apply. Accordingly, in the body of this letter, I have set out only the parts of those submissions that are relevant to the application of sections 45(1)(a) and 45(1)(c) of the FOI Act.*
- *I also note that I have an obligation, under section 87 of the FOI Act, to ensure non-disclosure of matter which is claimed to be exempt matter. Where necessary, the submissions of participants have been summarised having regard to this obligation.*

58. Section 87 of the FOI Act provides:

87 Commissioner to ensure non-disclosure of particular matter

- (1) *On a review, the commissioner may give the directions the commissioner considers necessary to avoid the disclosure to an access participant or an access participant's representative of -*
- (a) *matter that is claimed to be exempt matter; or*
 - (b) *information that is claimed to be information of the kind mentioned in section 35.*
- (2) *The commissioner may receive evidence, or hear argument, in the absence of an access participant or an access participant's representative if it is necessary to do so to prevent disclosure to that person of matter or information of that kind.*
- (3) *The commissioner must not, in a decision on a review or in reasons for a decision on review, include matter or information of a kind mentioned in subsection (1).*
- (4) *In this section –*
- access participant** *means a participant other than –*
- (a) *the agency or Minister who made the decision under review; or*

- (b) *a participant who created the document concerned or who provided the document concerned to the agency or Minister who made the decision under review.*

59. Further, in my letter to Hall Payne dated 3 June 2009 in relation to a discussion of section 45(1)(c) of the FOI Act, I noted the following:

Each of Treasury, Hay Group, GOC 1 and Clayton Utz make specific submissions relating to the adverse effect disclosure of the Report could reasonably be expected to have on the business, commercial and financial affairs of the GOCs.

Where those submissions tend to either reveal, suggest or imply the nature and/or content of the Category B Matter, so as not to reveal exempt matter, I have referred to those submissions as submissions relating to the conduct of human resource management.

60. I acknowledge Hall Payne's statement that their client has not been provided with the full text of submissions made by the other participants in the review. However, I also note the following:

- In an external review, I am obligated under section 87 of the FOI Act to ensure non-disclosure of matter claimed to be exempt matter, including taking procedural steps to avoid disclosure. Accordingly, having regard to this obligation:
 - copies of the full text of submissions were not provided to the applicant; and
 - where necessary, the submissions of the other participants have been summarised.
- As the applicant was advised in my letter dated 3 June 2009, in their submissions, the other participants variously claimed the matter in issue was exempt from disclosure under other provisions of the FOI Act. Having found, for the reasons set out below, that the matter in issue is exempt from disclosure under either sections 45(1)(a) or 45(1)(c) of the FOI Act, it has not been necessary for me to:
 - consider in detail the submissions relating to other exemption provisions;
 - provide those submissions to the applicant; or
 - give the applicant an opportunity to respond to those submissions.
- My letter to the applicant dated 3 June 2009:
 - set out the relevant law relating to the application of sections 45(1)(a) and 45(1)(c) of the FOI Act to the Report
 - detailed the relevant submissions of the other participants.

61. Accordingly, having regard to my obligations under section 83(3) of the FOI Act, I consider that the applicant:

- has been apprised of the relevant issues in this review and the relevant submissions of the other participants in the review
- has been given sufficient opportunity to respond to those relevant issues and submissions.

Matter in issue

62. The matter in issue in this review consists of a 50 page report prepared by Hay Group and provided to Treasury, which was referred to in the FOI Application as the Hay Report (**Report**). As noted in the Original Decision, Hay Group was contracted by Treasury to conduct a market pay comparison for the chief executive officers and senior managers in certain GOCs. In this decision, I have referred to the 'chief executive officers and senior managers' collectively as 'senior executives'.

63. The Report is comprised of the following categories of information:

- Category A Matter, being that matter referred to in the Original Decision as client lists, methodology and analysis
- Category B Matter, being matter which concerns the 'money resources' of the GOCs.

64. The following table indicates where each category of information appears in the Report:

Category	Pages
Category A Matter	Pages 1 – 4, 6, 31 - 35
Category A Matter and Category B Matter	Pages 5, 7 – 30, 36 - 50

Findings

65. Pursuant to section 21 of the FOI Act, a person has a legally enforceable right to be given access under the FOI Act to documents of an agency and official documents of a Minister. This right of access is subject to other provisions of the FOI Act, in particular, section 28 of the FOI Act, which provides that an agency may refuse access to exempt matter or an exempt document, and the provisions of Part 3, Division 2 of the FOI Act, which set out those exemption provisions.

66. The participants in the review who object to disclosure of the Report claim the Report is exempt from disclosure under various sections of the FOI Act. Because I have decided, for the reasons set out below, that the Report is exempt in its entirety from disclosure under the FOI Act (parts of the Report being exempt under section 45(1)(a) of the FOI Act, and parts being exempt under section 45(1)(c) of the FOI Act), it has not been necessary for me to consider whether those other exemption provisions apply.

67. However, I do note that each of Energex, Clayton Utz and Hay Group submitted that section 11A of the FOI Act operates to exclude the Report (or parts of the Report) from the operation of the FOI Act. Accordingly, because it relates to jurisdictional matters, as a preliminary matter, I have considered the application of section 11A of the FOI Act to the Report.

Section 11A of the FOI Act

68. Section 11A of the FOI Act provides as follows:

11A Application of Act to GOCs

This Act does not apply to documents received, or brought into existence, in carrying out activities of a GOC mentioned in schedule 2 to the extent provided under the application provision mentioned for the GOC in the schedule.

69. Relevantly, the application provision for entities referred to as a 'State electricity entity' is section 256 of the *Electricity Act 1994*, subsection 3 of which provided:⁷

256 Application of Freedom of Information Act and Judicial Review Act

(3) *The Freedom of Information Act 1992 does not apply to a document received or brought into existence by a State electricity entity in carrying out its excluded activities.*

⁷ Prior to being repealed on 1 July 2009 by Schedule 5 of the RTI Act.

70. Likewise, the application provision for the GOC that was the commercialised business unit known as State Water Projects in the Department of Natural Resources is section 998 of the *Water Act* 2000, subsections 2 and 3 of which provided:⁸

998 Exemption from application of Freedom of Information Act 1992

- (2) *The Freedom of Information Act 1992 does not apply to a document received or brought into existence by the GOC in carrying out its excluded activities.*
- (3) *In this section -*

...

the GOC means the GOC that was the commercialised business unit known as State Water Projects in the department.

71. 'Excluded activities' are also defined in those respective sections. Accordingly, the FOI Act does not apply to documents received or brought into existence by a State electricity entity, or the GOC referred to in s998 of the *Water Act* 2000 in carrying out activities conducted on a commercial basis or community service obligations prescribed under the regulations.

Submission of participants

Hay Group Submissions

72. Hay Group submit that the Report was brought into existence from information supplied by the GOCs in carrying out their activities and the Report is therefore not subject to the FOI Act.

Energex Submissions

73. Energex submit:

- it is Energex's understanding that:
 - the Report was commissioned to facilitate commercial discussions between the Shareholding Ministers and the GOCs regarding remuneration
 - the Report contains market pay comparisons
- the human resources market to obtain the services of senior executives is competitive, in particular:

The human resources market from which ENERGEX and other GOCs obtain the services of its Senior Executives is a commercial competitive market. ENERGEX must compete to recruit and retain senior executives with other organisations, including GOCs and other participants in the industry. In this competitive market, ENERGEX must make commercial decisions in relation to the human resources management of its senior executives, including commercial decisions as to the remuneration of its senior executives

- the Report was received or brought into existence in relation to the GOCs carrying out their commercial activities and therefore due to section 11A of the FOI Act, the FOI Act does not apply to the Report.

⁸ Prior to being repealed on 1 July 2009 by Schedule 5 of the RTI Act.

Clayton Utz Submissions

74. Clayton Utz submit:

- the Report (or parts of the Report) is excluded from production under section 11A of the FOI Act (or alternatively, the Report contains exempt matter within the meaning of various provisions of the FOI Act)
- to the extent the Report 'reproduces' information provided by individual GOCs (**GOC Information**), as the GOC Information was received or brought into existence by each GOC when carrying out its commercial activities, it is outside the scope of the FOI Act
- the key issue is the character of the activity being carried out when the GOC Information was either received or brought in existence,
- the GOC Information can be said to have been created by each GOC when carrying out its commercial activities
- the GOC Information was provided (voluntarily, and in confidence) by each GOC to Hay Group
- the components of the Report which reproduce the GOC Information are excluded from the operation of the FOI Act by section 11A of the FOI Act.

Findings of fact and application of the law to the matter in issue

75. I have examined the Report having regard to the submissions raised in relation to section 11A of the FOI Act in each of the Energex Submissions, Clayton Utz Submissions and the Hay Group Submissions.

76. I note that:

- I am advised (by Treasury and Clayton Utz) that the GOCs have not received a copy of the Report⁹
- whereas the GOCs referred to in the Report may have provided the GOC Information to Hay Group as part of the consultation process, the GOC Information is not readily identifiable in the body of the Report and in my view, can not be said to have been 'reproduced'
- in any event, section 11A of the FOI Act is concerned with the manner in which 'documents' are received or brought into existence
- the document in issue in this review (being the Report) was brought into existence by Hay Group as part of the consultation it was commissioned by Treasury to undertake

77. Accordingly, I am satisfied that the Report is not a document received, or brought into existence by any of the GOCs. It is therefore unnecessary for me to consider whether any of the GOCs were carrying out their 'excluded activities' when the Report was brought into existence.

78. Accordingly, I find that the Report (or parts of the Report) can not be excluded from the operation of the FOI Act on the basis of section 11A of the FOI Act. It is therefore necessary for me to consider whether any exemption provisions may apply.

⁹ Clayton Utz specifically notes elsewhere in its submissions that the Clayton Utz Submissions have been made with that limitation.

Section 45(1)(a) of the FOI Act

Relevant Law

79. Section 45(1)(a) of the FOI Act provides:

45 Matter relating to trade secrets, business affairs and research

(1) *Matter is exempt matter if -*

(a) *its disclosure would disclose trade secrets of an agency or another person; or*

...

80. The Information Commissioner examined the meaning of 'trade secrets' in detail in paragraphs 42 – 49 of *Cannon and Australian Quality Egg Farms Limited (Cannon)*.¹⁰

81. In *Searle Australia Pty Ltd v Public Interest Advocacy Centre (Searle)*,¹¹ the court said:

The determination of what is a trade secret is primarily a question of fact for the administrative decision-maker. Nevertheless, it is an error of law for a decision-maker to define a statutory criterion in terms which are not reasonably open.

82. Having regard to these comments in *Searle*, generally speaking, the following principles are applicable to an analysis of the meaning of a trade secret:

- A trade secret has been referred to as 'any formula, pattern or device or compilation of information which gives an advantage over competitors who do not know or use it'.¹²
- The following indicia have largely been accepted as elements of a trade secret:
 - the extent to which the information is known outside of the business
 - the extent to which it is known by employees and others involved in the business
 - the extent of measures taken by the business to guard the secrecy of the information
 - the value of the information to the business and its competitors
 - the amount of effort or money expended in developing the information
 - the ease or difficulty with which the information could be properly acquired or duplicated by others.¹³
- There is no requirement that information which is a trade secret be of a technical nature.¹⁴

¹⁰ (1994) 1 QAR 491.

¹¹ (1992) 108 ALR 163, Davies, Wilcox and Einfeld JJ at page 172.

¹² See *Cannon* at paragraph 43, citing the American *Restatement of the Law of Torts* (1939, Volume 4 para 757) which was referred to by Gowans J in *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37 (**Ansell Rubber**).

¹³ *Restatement of the Law of Torts* (1939, Volume 4) referred to by Gowan J at page 50 of *Ansell Rubber*.

¹⁴ *Searle*, page 172 – 173.

- In *Cannon*,¹⁵ the Information Commissioner noted the other factors which received emphasis in the Full Court's judgment in *Searle* including:
 - the necessity for secrecy, including the taking of appropriate steps to confine dissemination of the relevant information to those who need to know for the purposes of the business, or to persons pledged to observe confidentiality
 - that information, originally secret, may lose its secret character with the passage of time
 - that the relevant information be used in, or useable in, a trade or business;
 - that the relevant information would be to the advantage of trade rivals to obtain;
 - that trade secrets can include not only secret formulae for the manufacture of products, but also information concerning customers and their needs.
- Having regard to the wording of section 45(1)(a) of the FOI Act, there is no need to prove or describe the harm that would be occasioned to business interests due to disclosure of a 'trade secret'.¹⁶ It is sufficient that disclosure of the matter would disclose trade secrets of any agency or other person.

Submissions of participants

Applicant's submissions

83. In the External Review Application, Hall Payne argued that:

- client lists and methodologies are not trade secrets within the meaning of the term for the purposes of section 45 of the FOI Act
- if the 'trade secrets' exemption does apply, it does not prevent partial release of the document
- the information referred to is not of such a special and secret nature as to give rise to this high degree of confidentiality and Hay Group does not guard this information sufficiently highly to fall within the scope of the term 'trade secret'
- disclosure would not cause significant harm to Hay Group
- in particular:
 - Hay Group is open about its clients and publishes information regarding the identity of clients and the nature of the work done for clients on its website (website address for Queensland Health example provided)
 - Hay Group's methodologies for job evaluation are well known, used internationally and information about these methodologies is published on the internet (website addresses provided)
 - even if modified or specific versions of the methodologies are used in the Report, this information is not so secret or commercially guarded to give rise to the trade secrets exemption.

84. In its letter dated 18 June 2009, Hall Payne Lawyers stated:

... for the purpose of responding to your letter dated 3 June 2009 our client repeats and relies upon the submissions already made by our client in this matter. For the reasons we have provided:

1. *the document cannot properly be characterised as a 'trade secret' ...*

¹⁵ At paragraph 49.

¹⁶ *Cannon* at paragraph 36.

Treasury's submissions

85. Treasury argues that the 'client lists' and 'methodologies' contained in the Hay Report are exempt from disclosure under section 45(1)(a) of the FOI Act: The Original Decision states that:

The report by the Hay Group contains lists of their clients in respect of this document and the methodologies used in determining their analysis of the data provided in the report and although there has been an effluxion of time, I consider that given the nature of the methodologies used would still be 'trade secrets' within the meaning of paragraph 45(1)(a) of the Act and be exempt from release.

86. In the Treasury Submissions, Treasury referred to those submissions made by Hay Group in Hay Group's letter to Treasury dated 11 April 2008. These are referred to below.
87. Treasury also provided submissions regarding which specific parts of the Report were exempt under section 45(1)(a) of the FOI Act.

Hay Group Submissions

88. Hay Group argue that the following elements of the Report are Hay Group's trade secrets:
- the method of analysis of pay comparison
 - the identity of each organisation within the 'organisation group' used to conduct the pay comparison and the data provided by those organisations (both of which are highly confidential and exclusive to Hay Group)
 - the fact that a particular 'organisation group' has been used to conduct the pay comparison
 - the confidential analysis and advice given
 - the specific 'measure' allocated to particular roles within each GOC.
89. In respect of the applicant's submissions that Hay Group is open about its clients and publishes information regarding the identity of clients and the nature of the work done for clients on its website, Hay Group submits:
- only a small proportion of Hay Group's clients are referred to on their website (of those referred to on the website, only a proportion appear in the relevant 'organisation group')
 - of the four case studies mentioned on the website,¹⁷ two refer to clients by name (including Queensland Health) and neither of the clients are 'remuneration clients' (ie. clients from whom Hay Group has gathered information about remuneration for various positions) identified in the Report
 - Hay Group does not publish on its website all organisation names, nor does the website identify the particular 'organisation group' used in preparation of the Report.
90. In respect of its methodology, Hay Group:
- acknowledges that Hay Group's methodology is understood at a high level across a wide number of people

¹⁷ At the time the 11 April 2008 letter was written.

- submits that it is the application of the methodology that represents Hay Group's intellectual capital
- the specific 'measure' allocated to particular roles is ordinarily released only to particular persons within client organisations and Hay Group does not release this type of information between organisations.

91. Hay Group also submits that while Hay Group's website contains a provision for registration which enables registrants to obtain further information, that information is by way of access to 'white papers' which provide an overview of Hay Group's work in various fields (including job evaluations). Hay Group submit that while that information provides additional information regarding Hay job evaluation methodology, it is not enough detail to allow individuals to complete evaluations, nor does it identify particular 'measures' given to particular jobs in organisations.

92. Hay Group also make the following submissions which are relevant to the application of section 45(1)(a) of the FOI Act:

- Hay Group and its clients have contractual obligations of confidence in relation to the consultancies undertaken by Hay Group
- current and future clients would perceive a breach of confidentiality in disclosure of the Report
- revealing the 'measures' attributed to particular roles in organisations would effectively allow a competitor to take the information and build their own database.

Other participants

93. Neither Energex nor Clayton Utz provided submissions in respect of the application of section 45(1)(a) of the FOI Act to the Report, or parts of the Report.

Findings of fact and application of the law to the Category A Matter

94. I have considered the application of section 45(1)(a) of the FOI Act to the matter in issue having regard to the submissions referred to above.

95. In relation to the Category A Matter, I find the following:

- Hay Group's business involves the provision of a wide range of consultancy services including job evaluation, performance management, capability assessment, and reward management services (including executive reward services)
- to conduct its core business in relation to job evaluation, Hay Group necessarily collects information from clients (under contractual arrangements which include confidentiality obligations) and collates that information applying its methodology
- Hay Group has established and maintains a 'remuneration database' (including data as to the level of remuneration for various roles) used by Hay Group in performing its consultancies
- the matter referred to in the Original Decision as a 'client list' (and references to, and use of, it throughout the Report) is more correctly described as the 'organisation group' which Hay Group determined as the appropriate group against which a market pay comparison was to be conducted
- Hay Group's compilation of entities into that 'organisation group' is not published on its website
- references by Hay Group to 'remuneration clients' and the 'remuneration database' are references to those client organisations who have provided data which has

- contributed to the collection of data (remuneration database) held by Hay Group about remuneration in various roles within those client organisations
- Queensland Health (which was referenced on Hay Group's website at the time the relevant submissions were made) is not one of the clients in the 'organisation group'
 - the 'organisation group' represents '*the product of work done by its compiler which assembles the names ... in a way which is not otherwise available*'¹⁸
 - the 'organisation group' represents Hay Group's assessment of:
 - which entities should correctly form part of that 'organisation group'
 - how the market pay comparison should be conducted
 - the application of Hay Group's methodology in the circumstances of this consultation discloses a 'formula' or 'compilation of information' developed and utilised by Hay Group, and the results of the application of that methodology
 - Hay Group, and the organisations from whom it collects information, and provides services, are subject to obligations of confidentiality with respect to information obtained and disseminated in the course of consultancies
 - the nature of the Category A Matter is such that it continues to have current value, notwithstanding likely changes in the market since the Report was prepared.
96. I also specifically note that section 45(1)(a) of the FOI Act does not require the document *itself* to be a trade secret. As was identified by Hall Payne, the 'trade secrets' exemption, if it applies to part of the Report, would not in itself prevent disclosure of the remainder of the Report.
97. I consider that the following factors establish that the Category A Matter is Hay Group's trade secrets:
- Hay Group takes appropriate steps to confine dissemination of the relevant information (including requiring clients to observe requirements of confidentiality)
 - while the Report was prepared during what was arguably a different market for employment services (having regard to the current economic climate), the Category A Matter has not lost either its 'secret character' or value to Hay Group's business
 - the relevant information would be advantageous for trade rivals to obtain
 - the monetary resources used by Hay Group to develop the Category A Matter
 - the skill and intellectual process employed by Hay Group in developing the Category A Matter.
98. Therefore, I am satisfied that the Category A Matter comprises Hay Group's trade secrets, and includes:
- the method of, and analysis of, pay comparison
 - the identity of the 'organisation group' used to conduct the pay comparison and the entities which form part of the organisation group
 - the fact of that particular 'organisation group' being used to conduct the pay comparison
 - the application of Hay Group's job evaluation methodology in the specific circumstances of this consultation (including the collective data of the 'organisation group' and the results obtained).
99. Accordingly, I find that the Category A Matter is exempt from disclosure under section 45(1)(a) of the FOI Act.

¹⁸ Gurry (1984) 'Breach of Confidence' Oxford University Press, at page 96.

Section 45(1)(c) of the FOI Act

Relevant Law

100. Section 45(1)(c) of the FOI Act provides:

45 Matter relating to trade secrets, business affairs and research

(1) *Matter is exempt matter if -*

...

(c) *its disclosure –*

- (i) *would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and*
- (ii) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;*

unless its disclosure would, on balance, be in the public interest.

101. The Information Commissioner considered the application of section 45(1)(c) of the FOI Act in *Cannon*.¹⁹ In summary, matter will be exempt under section 45(1)(c) of the FOI Act if it satisfies the following three cumulative requirements:

- the information concerns the business, professional, commercial or financial affairs of an agency or person, including a company (other than trade secrets or information mentioned in section 45(1)(b) of the FOI Act) (**Requirement 1**)
- disclosure of the relevant information could reasonably be expected to have either of the following effects:
 - an adverse effect on the business, professional, commercial or financial affairs of the agency or person, which the relevant information concerns; or
 - prejudice to the future supply of such information to government(**Requirement 2**)
- the weight of all identifiable public interest considerations against disclosure equals or outweighs that of all of the identifiable public interest considerations favouring disclosure (**Requirement 3**).

Submissions of Participants

102. Having regard to my obligations under the FOI Act, where the submissions of participants tend to either reveal, suggest or imply the nature and/or content of the Category B Matter, so as not to reveal exempt matter, I have referred to those submissions as submissions relating to the conduct of human resource management.

Applicant's submissions

103. In the External Review Application, the applicant argues that:

- the Original Decision broadly states that the matter in issue concerns the business, professional, commercial or financial affairs of Hay Group and the electricity GOCs

¹⁹ See paragraphs 67 – 88.

- no basis was given for the finding that disclosure could reasonably be expected to have an adverse effect on the business or financial affairs of any electricity GOC
- disclosure of the information could not reasonably be expected to have an adverse effect of the affairs of Hay Group
- Treasury's argument that disclosure would cause pecuniary loss is in conflict with Hay Group publishing information relating to its methodologies on the internet
- there is no evidence that commercial value in the information would diminish and the adverse effect is therefore not made out
- even if the exemption does apply:
 - the public interest favours disclosure of the matter in issue on the basis of accountability in the use of taxpayer funds
 - it would not prevent partial release of the matter in issue.

104. In its letter dated 18 June 2009, Hall Payne stated:

... for the purpose of responding to your letter dated 3 June 2009 our client repeats and relies upon the submissions already made by our client in this matter. For the reasons we have provided:

1. ...
2. *the 'adverse effects' exemption does not apply;*
3. ...
4. *in any event, the public interest favours disclosure.*

105. The applicant's 'public interest' submissions are referred to at paragraph 138.

Treasury's submissions

106. In respect of section 45(1)(c) of the FOI Act, Treasury submitted in the Original Decision that:

- disclosure of the matter in issue would disclose information concerning the business or financial affairs of Hay Group and the electricity GOCs and could reasonably be expected to have an adverse effect on those affairs
- in respect of Hay Group:
 - disclosure of information concerning methodologies and strategies adopted by Hay Group in Queensland could diminish any advantage that may be enjoyed, which could equate to a direct pecuniary loss
 - disclosure of information would be tantamount to disclosing strategy to a competitor, and the dissemination of such information to a competitor has the potential to cause significant pecuniary harm.
- there is a real and present expectation that the commercial value of the information would be destroyed or diminished by disclosure, and a reasonable basis for that expectation exists.

107. Treasury's 'public interest' submissions are referred to at paragraph 139.

108. In the Treasury Submissions, Treasury submitted the following in respect of the application of section 45(1)(c) of the FOI Act to the GOCs:

Disclosure of the Report could reasonably be expected to have an adverse effect on the business affairs of GOCs. ... Notwithstanding that GOCs often provide salary information in their annual reports this has little to do with market pay comparisons and analysis in the detail as provided in the report ...

The salaries of GOC Executives are paid from revenue made by the Corporations. They are not 'funded by Queensland taxpayers' as asserted by Hall Payne.

Government Owned Corporations (GOCs) are not assets in themselves of the Queensland Government, but the Government, through the shareholding ministers owns shares in these Corporations. When the GOCs were originally created any public money held by the former statutory authorities was exchanged for shares in the Corporations. Therefore, any monies generated by them is not provided from the public purse, but the Government as shareholders, receive substantial dividends, as would any shareholder, each year. GOCs are not funded by Queensland taxpayers at all except where a Community Service Obligation is required and there are strict rules in the Government Owned Corporations Act 1993 that provide for this.

Further, GOCs are not government agencies, but the government, through the shareholding ministers, own shares in these corporations. These corporations, unlike government agencies, do carry out a function of supplying goods and services on a commercial basis.

There is a distinct difference between data included in a GOCs Annual Report and that included in the Hay Report. The data was supplied to Hay Group by the GOCs as they knew that Treasury would be the ultimate recipient and would not have supplied otherwise. It is a standard arrangement where any data provided by the GOCs to Hay Group for any work they do is done so on a confidential basis as its release would affect their business affairs ...

Hay Group Submissions

109. In summary, Hay Group argue the following matter concerns its business and commercial affairs:
 - the method of analysis of pay comparison
 - the identity of the 'organisation group' used to conduct the pay comparison and the data provided by those organisations
 - the fact that that particular 'organisation group' has been used to conduct the pay comparison
 - the confidential analysis and advice given
 - the specific 'measure' allocated to particular roles within each GOC.

110. Hay Group submit that disclosure of that matter in issue would:
 - cause competitive harm to Hay Group
 - affect Hay Group's reputation in the industry
 - cause current and future clients to perceive a breach of confidentiality in the disclosure of the Report and result in clients not dealing with Hay Group and/or not furnishing the information required to Hay Group to maintain its remuneration database
 - cause it to lose business if organisations refuse to deal with it
 - effectively allow a competitor to take the information to build their own database
 - lead to pecuniary loss on the part of Hay Group.

111. Hay Group also submitted that it may also refuse to provide information to Government if the confidentiality of the information it provides is not preserved.

112. In respect of the GOCs, Hay Group also made submissions relating to the effect of disclosure of the Report on the conduct of human resource management by the GOCs.

113. Hay Group's public interest submissions are referred to at paragraph 140.

Energex Submissions

114. The Energex Submissions argue:

- release of the Report would disclose information relating to the commercial and financial affairs of Energex and individual members of the Energex senior executive (and the matter in issue concerns information about the 'money resources' of both)
- release of the Report may have an adverse effect on Energex because it could impact its conduct of human resource management with respect to senior staff
- Energex already meets its obligations by publishing executive salary information in the annual report.

115. Energex's 'public interest' submissions are referred to at paragraph 141.

Clayton Utz Submissions

116. The Clayton Utz Submissions

- submit that the relevant matter is information of a business, commercial and financial nature which is 'about' or 'regarding' any one of the GOCs referred to in the Report
- provides submissions relating to the effect of disclosure of the Report on the conduct of human resource management by the GOCs.

117. I also note that Clayton Utz makes submissions relating to the specific nature of GOCs. In summary, they submit:

- the GOCs have a charter from the State to operate in a commercial manner in a competitive environment²⁰ and to apply competitive management practices²¹
- the requirement that GOCs operate commercially and competitively and also adopt competitive management practices means that the GOCs have different accountability frameworks and requirements compared with core public sector agencies such as departments
- in respect of the accountability frameworks relating to GOC senior executive appointments and remuneration levels, for instance:
 - while the GOCs acknowledge in their statements of corporate intent that they will comply with the Remuneration Guidelines for Directors and Senior Executives in Government Owned Corporations Policy (**Remuneration Guidelines**), that policy does not set specific remuneration levels and only requires consistency at a broad level with public sector practices
 - whilst the remuneration levels for all senior executive officers in departments of State are publicly available, similar information is not available for all senior executives in the GOC sector
 - the requirement of GOCs to disclose the remuneration of the GOCs five highest earning senior executives is reflective of standard private sector corporate governance practices (see the disclosure requirements for listed corporations)²² that are applied to the GOCs

²⁰ Citing section 13 of the *Government Owned Corporations Act 1993 (GOC Act)*

²¹ Which Clayton Utz submit is acknowledged in the Remuneration Guidelines for Directors and Senior Executives in Government Owned Corporations Policy.

²² Citing section 300A of the *Corporations Act 2001 (Cth)*.

- to apply the same accountability framework to GOCs as could apply to the departments would place the GOCs at a distinct disadvantage and would be contrary to the State Government policy on competitive neutrality issues
- the operation of section 11A of the FOI Act demonstrates Government's recognition of the GOCs different accountability requirements, and the harm to their competitive interests which could occur should certain information be disclosed under the FOI Act²³
- the operation of other Acts in relation to the GOCs also reflects this position²⁴
- the State Government also has in place a policy of competitive neutrality which applies to the GOCs, meaning that GOCs are not to be advantaged or disadvantaged by virtue of their ownership by the State Government²⁵
- fiduciary duties of a special nature can arise between the relevant directors and the GOC officers, the GOC and the Shareholding Ministers.²⁶ Significantly, these fiduciary duties can sometimes carry with them an inherent duty of confidentiality. In the current circumstances, the matters communicated are confidential.

118. Clayton Utz's 'public interest' submissions are referred to at paragraph 142.

Findings of fact and application of the law to the Category B Matter relating to the GOCs

Requirement 1

119. For information to 'concern' the business, professional, commercial or financial affairs of a person or agency, it must be information 'about' or 'regarding' those affairs.²⁷

120. As noted in *Readymix Holdings Pty Ltd and Port of Brisbane Corporation; Brisbane Mini Mix Pty Ltd (Third Party)*,²⁸

It is not enough that the matter in issue has some connection with a business, or has been provided to an agency by a business, or will be used by a business in the course of undertaking business operations. The matter in issue must itself be information about business, commercial or financial affairs, in order to satisfy this requirement.

121. In paragraph 73 of *Cannon*, the Information Commissioner said that as none of the words business, professional, commercial or financial affairs were defined in the FOI Act, they are to be given their ordinary meaning, or whichever of their accepted

²³ Section 11A of the FOI Act is referred to in paragraph 68 above. Clayton Utz also refers to the recent review of the FOI Act by the FOI Independent Review Panel which noted that the competitive commercial interests of GOCs should be protected and submits that this position was then reflected by the State Government in initial draft of s.24 of the *Right to Information Bill 2009*.

²⁴ Clayton Utz provides the following examples: the *Financial Administration and Audit Act 1977* (Qld) has limited application to GOCs; public sector employment practices (GOC employees are not employed under the *Public Service Act 2008* (Qld) (section 145 of the GOC Act); the *Crime and Misconduct Act 2001* (Qld) does not apply to GOCs (section 156 of the GOC Act); and the jurisdiction of the Ombudsman does not extend to GOCs under s.157 of the GOC Act.

²⁵ Citing section 16(d) of the GOC Act.

²⁶ Submitting that in circumstances where a company has only a limited number of shareholders, a special fiduciary duty can, in limited circumstances arise, such that fiduciary duty owed by the directors and officers of a company will apply directly to the company but also to the shareholders. See for example *St George Soccer Football Association Inc v Soccer NSW Ltd* [2005] NSWSC 1288 at [51], *Coleman v Myers* [1977] 2 NSWLR 255, *Brunninghausen v Galvanics* (1999) 46 NSWLR 538 and *Peskin v Anderson* [2001] BCLC 372.

²⁷ See paragraph 67 of *Cannon*.

²⁸ (2003) 6 QAR 294 at paragraph 41.

meanings is most appropriate to the statutory context. The meaning of each of 'business, professional, commercial and financial affairs' has been considered in previous decisions of this Office.²⁹

122. Having examined the contents of the Report, I am satisfied that the Category B Matter concerns the 'money resources' of the GOCs.³⁰ I note that in *Cannon*, the Information Commissioner said:

*The ordinary meaning of 'financial' comprehends information about the finances (ie. money resources) of an agency or another person, and in particular the management of money resources, including credit. In the context of s.45(1)(c), the term 'financial affairs' of an agency is broad enough to cover the finances of government agencies which do not carry on a function of supplying goods and services on a commercial basis. Such agencies, however, are less likely to be able to establish a reasonable expectation of an adverse effect on their financial affairs through the disclosure of information concerning their financial affairs, than are agencies which operate in a competitive market environment.*³¹

123. I am also satisfied that the Category B Matter concerns matters relating to business or commercial affairs, because in the context of the Report, it concerns the management of human resources within the GOCs in respect of the commercially competitive market for senior executives.
124. Accordingly, the Category B Matter concerns the business, commercial and/or financial affairs of the GOCs referred to in the Report.

Requirement 2

125. The second requirement is that disclosure of the relevant information could reasonably be expected to have either of the following effects:
- an adverse effect on the business, professional, commercial or financial affairs of the agency or person, which the relevant information concerns; or
 - prejudice to the future supply of such information to government.

'could reasonably be expected to'

126. In *Attorney-General v Cockcroft (Cockcroft)*³² which dealt with the interpretation of the phrase 'could reasonably be expected to prejudice the future supply of information' in the context of the section 43(1)(c)(ii) (business affairs) exemption contained in the Commonwealth FOI Act, Bowen CJ and Beaumont J said:³³

In our opinion, in the present context, the words "could reasonably be expected to prejudice the future supply of information" were intended to receive their ordinary meaning. That is to say, they require a judgment 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 that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act. It is undesirable to attempt any paraphrase of these words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like. To construe s.43(1)(c)(ii) as depending in its

²⁹ For instance, see *Cannon*.

³⁰ See *Cannon* at paragraph 76.

³¹ At paragraph 76.

³² (1986) 10 FCR 180

³³ *Cockcroft*, at 190.

application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based (see Kioa v Minister for Immigration and Ethnic Affairs (1985) 62 ALR 321 per Gibbs CJ and Mason J).

127. The Justices' interpretation of the phrase '*could reasonably be expected to*' and the proposed line of inquiry, while made in the context of the business affairs exemption contained in Commonwealth FOI legislation, is relevant in the context of the exemption contained in section 45(1)(c) of the FOI Act.
128. Accordingly, the phrase '*could reasonably be expected to*' in this context requires a consideration of whether the expectation that disclosure of the Category B Matter could have an adverse effect on the business, commercial or financial affairs (with which section 45(1)(c)(i) of the FOI Act relates) or prejudice the future supply of such information to government, is reasonably based.
129. However, it is not necessary for a decision-maker '*to be satisfied upon a balance of probabilities*' that disclosing the document will produce the adverse effect.³⁴

Adverse Effect

130. In paragraphs 80 – 84 of *Cannon*, the Information Commissioner made the following points relating to the 'adverse effect' requirement:

... The adverse effect contemplated by s.45(1)(c)(ii) must be an adverse effect on the business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns ...

The common link is to activities carried on for the purpose of generating income or profits ...

... an adverse effect under s.45(1)(c) will almost invariably be pecuniary in nature, whether directly or indirectly. For example, an adverse effect on a corporation's business reputation or goodwill (the term 'goodwill' is commonly defined by the courts as 'the attractive force which brings in custom') is feared ultimately for its potential to result in loss of income or profits, through loss of customers. No requirement can be drawn from the terms of s.45(1)(c), however, that the adverse effect must be pecuniary in nature.

... if information is already in the public domain, or is common knowledge in the relevant industry, it will ordinarily be difficult to show that disclosure of that information under the FOI Act could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the agency which, or person whom, the information concerns.

131. I note that while the adverse effect on the business, professional, commercial or financial affairs of an agency or another person will ordinarily be pecuniary in nature, there is no requirement that it must be pecuniary in nature.
132. I have carefully considered the Category B Matter and the submissions provided by each of the participants, and I make the following findings:
- given Treasury's description of the Report in the Original Decision, it is evident to the parties that the Report contains market pay comparisons and accordingly,

³⁴ Having regard to the comments of Shepherd J in *Cockroft*, at 196.

places each of the GOCs within (what Hay Group considers to be) the relevant market for senior executive remuneration

- the Category B Matter concerns the financial, commercial and/or business affairs of the GOCs, specifically 'money resources' and the management of human resources within the competitive commercial environment for senior executives
- providing any further detail about the content of the Report or the adverse effect would disclose exempt matter
- disclosure of the Category B Matter in the context of the Report could reasonably be expected to have the adverse effects set out in paragraph 133 below.

133. I am satisfied, having regard to the law and the character of the Category B Matter that disclosure of the Category B Matter in the context of the Report could reasonably be expected to have an effect on the 'money resources', and management of human resources, of each GOC, which in turn, could reasonably be expected to impact adversely on the operating costs of each individual GOC and the conduct of their business.

134. Having regard to all of the relevant information, I am satisfied that disclosure of the Category B Matter could reasonably be expected to have an adverse effect on the business, commercial or financial affairs that the information concerns.

135. Accordingly, it is not necessary for me to consider whether disclosure of the Category B Matter could reasonably be expected to prejudice the future supply of such information to government.

Requirement 3

136. The third requirement for matter to be exempt under section 45(1)(c) of the FOI Act is that the weight of all identifiable public interest considerations against disclosure must equal or outweigh that of all of the identifiable public interest considerations favouring disclosure.

137. The 'public interest' refers to considerations affecting the good order and functioning of community and governmental affairs, for the well-being of citizens. In general, a public interest consideration is one which is common to all members of the community, or a substantial segment of them, and for their benefit. The public interest is usually treated as distinct from matters of purely private or personal interest. However, some recognised public interest considerations may apply for the benefit of individuals in a particular case.

Submissions of participants

Applicant's submissions

138. The applicant submits:

- citing *Pope and Queensland Health*,³⁵ a clear object of the FOI Act is enhancing government's accountability, including enhancing the accountability of government employees for the performance of their duties in the public interest
- the Report contains information regarding salaries of senior managers which are funded by Queensland taxpayers

³⁵ (1994) 1 QAR 616.

- there are public interest considerations of general transparency, accountability, public awareness, and scrutiny and participation in government administration
- Treasury substantially over stated the possible commercial harm to Hay Group
- the incorrect weighting was applied to public interest considerations.

Treasury's submissions

139. In the Original Decision, Treasury identified:

- the underlying public interest considerations which favour disclosure can be broadly identified as general transparency, accountability, public awareness, scrutiny and participation in the agency's administration
- the balance of public interest requires the release of 'sufficient information' but not 'commercially sensitive' information the release of which can be reasonably expected to cause serious commercial harm to the agency³⁶
- disclosure would significantly impede Hay Group in the efficient and effective conduct of its proper functions
- the public interest does not favour release of the otherwise exempt material.

Hay Group Submissions

140. Hay Group makes the following public interest arguments:

- it is in the public interest that persons not be unduly inhibited from providing information that Hay Group needs to perform its work
- any action that might persuade Hay Group's participants to be less open, frank and co-operative could reasonably be expected to hinder Hay Group's business and affect its reputation in the market within which it operates
- it is not in the public interest to disclose the Report to the applicant because of the impact on Hay Group's business, and the impact on the conduct of human resource management within the GOCs.

Energex Submissions

141. Energex submits:

- Energex already meets its obligations by publishing executive salary information in annual reports
- disclosure of the further detailed information it believes is contained in the Report would not be in the public interest
- any public interest is outweighed by the adverse effect disclosure would have on Energex.

Clayton Utz Submissions

142. Clayton Utz makes the following public interest arguments:

- there is a public interest in commercially sensitive information of the GOCs not being released where the release of the information is reasonably likely to cause serious commercial harm to the relevant agency³⁷

³⁶ citing *Cardwell Properties Pty Ltd and Williams and Department of the Premier, Economic and Trade Development; North Queensland Conservation Council Inc* (1995) 2 QAR 671 (**Cardwell**).

³⁷ See *Cardwell*.

- *'disclosure of the Report would be contrary to the Government's policy of competitive neutrality as it affects each Government Owned Corporation. Specifically, the GOCs will each be placed at a competitive disadvantage in comparison to similar private sector competitors by virtue of their Government ownership if commercially sensitive information ... is required to be disclosed under the FOI Act. A private sector entity would not be subject to these requirements and as such, would not be disadvantaged by the disclosure of commercially sensitive information'*
- the public interest considerations favouring disclosure on the grounds of the facilitation of transparency, accountability, public awareness, scrutiny and participation in administration, while acknowledged, ought to have lesser weight in the current circumstances. Unlike the core government agencies, GOCs have been established to compete with private sector entities. The GOCs submit that public interest considerations supporting the disclosure of remuneration details on the ground of improving accountability and transparency should be considered in the context of the accountability requirements that specifically apply to the GOCs
- these public interest considerations should be of limited weight when applied to an entity such as a Government Owned Corporation which operates in a competitive environment where the disclosure of information regarding senior executive remuneration levels is likely to impact the GOCs commercially
- on balance, the public interest, favours non disclosure of the Report.

Public interest considerations

143. I note that the wording of section 45(1)(c) of the FOI Act contains an inherent public interest against disclosure of the matter in issue where disclosure could reasonably be expected to have an adverse effect on the business, commercial or financial affairs about which the matter in issue concerns.

144. In particular, in *Cannon*, the Information Commissioner said:³⁸

If the elements of s.45(1)(c)(i) and (ii) are established, the information in issue is prima facie exempt. However, the public interest balancing test which is incorporated within s.45(1)(c), must then be applied. This means in effect that Parliament has adjudged that, if information satisfies the test stipulated in s.45(1)(c)(i) and (ii), there will exist a public interest consideration favouring non-disclosure of that information ...

145. I also note comments referred to in *Cardwell* by Treasury and Clayton Utz. The relevant part of that decision reads as follows:³⁹

Of course, where the requirements of s.45(1)(c)(i) and (ii) have been satisfied, the legitimate public interest in commercial organisations being able to protect commercially sensitive information must be taken into account in the balancing process. Often, sufficient information to serve the public interest in scrutiny and accountability of government can be disclosed while accommodating legitimate interests in the protection of commercially sensitive information ...

146. In the Original Decision, Treasury broadly identified the public interest considerations of general transparency, accountability, public awareness, scrutiny and participation in the agency's administration.

147. In respect of these public interest considerations, I note the following:

³⁸ At paragraph 87.

³⁹ At paragraph 31.

- there will ordinarily be a general public interest in the accountability of government for the performance of its functions⁴⁰
- there is an interest in the public having access to sufficient information to enable scrutiny of expenditure by the government, which extends to scrutiny of whether the public is obtaining value for money from performance of the duties of particular positions, particularly in the case of senior officers who have responsibility for devising and/or implementing strategic and operational plans, and delivering key performance outcomes⁴¹
- the Remuneration Guidelines emphasise that while GOCs have a charter to operate in a commercial manner and remuneration policies should be designed to enhance ability to attract and retain high calibre staff, the government is subject to high levels of public accountability in the performance of all of its functions (including, by way of ownership, in relation to the GOCs)
- some information relating to senior executive remuneration in GOCs is already available in the public domain (for instance, in annual reports and statements of corporate intent which are tabled in Parliament).

148. However, I also note the submissions of Clayton Utz which suggest that the public interest in accountability in respect of matter concerning the business, commercial or financial affairs of the GOCs should be considered in light of the commercial basis on which the GOCs have been established to operate. I consider there is merit in this argument.

149. The GOCs are themselves, subject to mechanisms to ensure they are accountable for their performance (including in relation to remuneration arrangements). For instance, these mechanisms include:

- the *Government Owned Corporations Act 1993*
- the *Corporations Act 2001 (Cth)*
- annual and financial reporting requirements, and statements of corporate intent
- the *Corporate Governance Guidelines for Government Owned Corporations*
- the *Guidelines for the Preparation of Statements of Corporate Intent and Corporate Plans for Government Owned Corporations*
- the *Remuneration Guidelines*
- the *Guidelines for the Development of Employment and Industrial Relations Plans in Government Owned Corporations*.

150. Further, in June 2009, Treasury released a document titled the '*Minimum disclosure requirements for directors and chief and senior executives of government owned corporations*' (**Minimum Disclosure Requirements**), which applies to the GOCs, and is stated to apply to all annual reporting periods ending on or after 30 June 2006. The Minimum Disclosure Requirements set out the disclosure requirements for key management personnel.

151. I am also cognisant that the:

- GOCs operate as commercial entities in a competitive environment
- market for senior executive staff in public companies is competitive.

⁴⁰ For instance, see paragraph 70 of *Pearce and Queensland Rural Adjustment Authority; Various Landholders (Third parties)* (1999) 5 QAR 242.

⁴¹ *Lower Burdekin Newspaper Company Pty Ltd and Burdekin Shire Council; Hansen, Covolo and Cross (Third parties)* (2004) 6 QAR 328 at paragraph 27.

152. I also note the comments of the Information Commissioner in *Cannon* that:⁴²

Drawing the line between disclosure of information which promotes an appropriate level of accountability and public scrutiny of a government agency operating in a competitive commercial environment, and disclosure which unduly impedes the effective pursuit of that agency's operations, will often involve fine questions of judgment.

153. Having regard to all of the factors identified in paragraphs 149 - 152, I consider the public interest considerations of general transparency, accountability, public awareness, scrutiny and participation in administration would not be significantly advanced by disclosure of the Category B Matter and thus, those public interests in this particular case, carry little weight.

154. I also note that in the context of the Report:

- the Category B Matter concerns information which is beyond the disclosure requirements referred to in paragraphs 149 - 150, and disclosure of such information could reasonably be expected to have the adverse effects discussed at paragraphs 130 - 134 above; and
- disclosure of the Category B Matter would also necessarily disclose parts of the Category A Matter.

155. I also consider that there is a public interest in protecting the 'financial interests' of the State, which favours non-disclosure of the Category B Matter. That is, it is in the public interest that the ability of the GOCs to operate in a commercially competitive environment is not adversely affected, given that the GOCs are a source of revenue for the State by virtue of their 'public ownership'. Having concluded that disclosure of the Category B Matter could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the GOCs (as discussed above), I consider that this public interest consideration favouring non-disclosure should be given considerable weight.

156. I am satisfied that the public interest considerations favouring non-disclosure of the Category B Matter continue to outweigh the public interest considerations favouring disclosure of the Category B Matter.

Summary

157. I am satisfied that each of the requirements of section 45(1)(c) of the FOI Act is met in relation to the Category B Matter, specifically:

- the Category B Matter concerns the business, commercial and financial affairs of the GOCs
- disclosure of the Category B Matter could reasonably be expected to have an adverse effect on those affairs
- the public interest considerations favouring non-disclosure of the Category B Matter outweigh those public interest considerations favouring disclosure the Category B Matter.

158. Accordingly, it is not necessary for me to consider whether the Category B Matter concerns the business, professional, commercial or financial affairs of either Treasury or Hay Group, or make any findings to that effect.

⁴² At paragraph 110.

159. I find that the Category B Matter is exempt from disclosure under section 45(1)(c) of the FOI Act.

DECISION

160. I vary the decision under review by finding that:

- the Category A Matter is exempt from disclosure under section 45(1)(a) of the FOI Act
- the Category B Matter is exempt from disclosure under section 45(1)(c) of the FOI Act.

161. Accordingly, I find that the entire Report (consisting of the Category A Matter and Category B Matter) is exempt from disclosure under the *Freedom of Information Act 1992* (Qld).

162. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

V Corby
Assistant Commissioner

Date: 24 August 2009