OFFICE OF THE INFORMATION COMMISSIONER (QLD) **)** **)**

S 6 of 1995
(Decision No. 95019)

Participants:

CARDWELL PROPERTIES PTY LTD AND KEITH WILLIAMS
Applicants

- and -

DEPARTMENT OF THE PREMIER, ECONOMIC AND TRADE DEVELOPMENT
Respondent

- and -
NORTH QUEENSLAND CONSERVATION COUNCIL INC
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - "reverse-FOI" application - documents in issue comprising letters from the applicants to various agencies and ministers concerning permits and approvals required by the applicants in respect of a major coastal development project - whether the matter in issue is exempt under s.45(1)(c) of the *Freedom of Information Act 1992* Qld - whether disclosure of the matter in issue could reasonably be expected to have an adverse effect on the applicants' business, commercial or financial affairs or to prejudice the future supply of such information to government - whether disclosure of the matter in issue would, on balance, be in the public interest.

FREEDOM OF INFORMATION - whether matter in issue is exempt under s.46(1)(a) of the *Freedom of Information Act 1992* Qld - whether disclosure of the matter in issue would found an action for breach of confidence - consideration of the public interest exception to obligations of confidence which are claimed to apply to information about the affairs of public authorities.

FREEDOM OF INFORMATION - whether matter in issue is exempt under s.46(1)(b) of the *Freedom of Information Act 1992* Qld - whether disclosure of the matter in issue could reasonably be expected to prejudice the future supply of such information - whether disclosure of the matter in issue would, on balance, be in the public interest.

Freedom of Information Act 1992 Qld s.5(1), s.45(1)(c), s.46(1)(a), s.46(1)(b), s.51, s.78, s.81
Local Government Act 1936 Qld
Local Government (Planning and Environment) Act 1990 Qld
Queensland Heritage Act 1992 Qld
Wet Tropics World Heritage Protection and Management Act 1993 Qld

Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd (1987) 10 NSWLR 86; 75 ALR 353

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279

British Steel Corporation v Granada Television Ltd [1981] AC 1096

Cannon and Australian Quality Egg Farms Limited, Re (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported)

Commonwealth of Australia v John Fairfax & Sons Ltd & Ors (1981) 147 CLR 39; 55 ALJR 45

Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (1993) 1 QAR 60

Esso Australia Resources Ltd & Ors v Plowman (Minister for Energy and Minerals) & Ors (1995) 69 ALJR 404, 128 ALR 391

Jones v Dunkel (1959) 101 CLR 298; 32 ALJR 395

Lion Laboratories v Evans [1985] QB 526

Public Interest Advocacy Centre and Department of Community Services and Health and Schering Pty Ltd, Re (1991) 23 ALD 714

Smith Kline & French Laboratories (Aust) Limited and Ors v Secretary, Department of Community Services and Health (1991) 28 FCR 291; 99 ALR 679

DECISION

The decision under review (being the decision of Ms L Harris, on behalf of the respondent, dated 16 December 1994) is affirmed.

Date of Decision: 29 June 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. This is a "reverse-FOI" application. The applicants seek review of the respondent's decision to give the North Queensland Conservation Council Inc (the Conservation Council) access under the *Freedom of Information Act 1992* Qld (the FOI Act) to the respondent's copies of a number of documents sent by the applicants to Ministers of the Crown and officers of a number of government departments. The documents in issue are facsimile messages and letters despatched by the applicants between 4 July 1994 and 29 September 1994 in the course of negotiations over various permits and approvals which the applicants required in respect of a proposed tourist development, involving a marina and resort village, at Oyster Point near Cardwell in north Queensland. On 29 September 1994, a Deed of Agreement (which I shall refer to as the Tripartite Deed) was entered into between the State of Queensland, Cardwell Properties Pty Ltd and the Cardwell Shire Council, governing the relationship between the parties in respect of the development project. Paragraphs A-F of the Recitals to the Tripartite Deed record the permits and approvals for the development project already obtained by Cardwell Properties Pty Ltd, and the purpose of the Deed is conveyed in paragraphs G and H of the Recitals:

> *G.* *The State and the Council have considered further requests and applications by the Company for the purpose of the development.*
>
> *H.* *The State and the Council require as a condition of the granting of the said further permits and approvals that the Company comply with certain requirements of the Co-ordinator General, the Department* [of Environment and Heritage] *and the Council for the protection of the environment, for the proper planning of the development and to satisfy the statutory duties of the State and the Council in relation to the further permits and approvals.*

It is stated in the decision under review (being the internal review decision made on behalf of the respondent by Ms L Harris on 16 December 1994) that the Tripartite Deed was released into the public domain by the Office of the Premier on 11 November 1994.

2. By letter dated 27 September 1994, the Conservation Council made an FOI access application to the

Department of the Premier, Economic and Trade Development (the Premier's Department), seeking access to numerous documents relating to the Oyster Point development project. In accordance with s.51 of the FOI Act, Ms L Doblo, FOI and Judicial Review Co-ordinator of the Premier's Department, wrote to Mr Williams of Cardwell Properties Pty Ltd seeking his views on the possible grant of access to the documents now in issue, and one other document dated 6 July 1994 which is not in issue in this review. By letter dated 29 November 1994, Messrs Mortimore & Associates, Solicitors, acting on behalf of the applicants, responded by saying that the applicants objected to release of all documents referred to in Ms Doblo's letter on the following grounds:

> *Firstly, our clients consider that the correspondence contains matters communicated in confidence in accordance with Section 46(1)(a) and (b) of the Freedom of Information Act. In particular our clients were advised that any correspondence labelled "Private and Confidential" would not be subject to disclosure to third parties. Our clients reserve their contractual rights to damages in the event of disclosure of correspondence marked private and confidential.*
>
> *Secondly our clients rely upon Section 45(1)(c) of the Freedom of Information Act in that the disclosure of the said documents would disclose information concerning the business, professional and commercial or financial affairs of our client which could reasonably be expected to have an adverse effect on those affairs and further prejudice future supply of such information to the Government.*

3. Ms Doblo made her initial decision in relation to the Conservation Council's FOI access application on 29 November 1994. Her decision was to grant access to a large volume of documents (some 2,228 folios) including most of the documents in relation to which she had consulted the applicants. Of those documents in relation to which she had consulted the applicants, Ms Doblo determined that the document dated 6 July 1994 (referred to in paragraph 2 above) was wholly exempt and that two other documents (documents 8 and 15 described in paragraph 12 below) were exempt in part, in each instance under s.45(1)(c) of the FOI Act, but that the Conservation Council should be granted access to all other matter. The Conservation Council has not challenged the correctness of Ms Doblo's decision in relation to those documents or parts of documents found to be exempt, and they are not in issue in this review.

4. By letter dated 30 November 1994, the solicitor for the applicants was notified of Ms Doblo's decision. An application for internal review of that decision was made on behalf of the applicants by letter dated 9 December 1994. No grounds for review, or further elaboration of the applicants' position, was provided with that application for internal review.

5. Internal review was undertaken by Ms L Harris of the Premier's Department, who communicated her decision to the solicitor for the applicants by letter dated 16 December 1994. Ms Harris affirmed Ms Doblo's initial decision that no part of the matter in issue was exempt under s.45(1)(c), s.46(1)(a) or s.46(1)(b) of the FOI Act. I will refer further to the reasons for decision of Ms Harris as I deal with each of those exemptions below. By letter dated 5 January 1995, the applicants, through their solicitor, applied for review under Part 5 of the FOI Act in respect of Ms Harris's decision.

External Review Process

6. I wrote to the Conservation Council advising that an external review application had been lodged and advising of the terms of s.78 of the FOI Act, which provides that any person affected by a decision the subject of review may apply to become a participant in the review. The Conservation Council subsequently applied to become a participant in this review and I granted that application.

7. The respondent has supplied me with copies of the documents in issue. After a preliminary examination of those documents, I wrote to the applicants' solicitor with the object of inviting the applicants to re-assess precisely which documents and parts of documents they claimed to be exempt, and to then provide evidence and/or written submissions in support of their claims for exemption. The relevant parts of my letter dated 30 January 1995 are as follows:

> *I note that in her internal review decision Ms Harris referred to two decisions made by me in 1994,* Re "B" and Brisbane North Regional Health Authority [(1994) 1 QAR 279] *and* Re Cannon and Australian Quality Egg Farm Limited *(Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported). I attach copies of both decisions for your consideration. I should also make it clear that I do not regard the presence of a small amount of exempt matter in a document as qualifying the whole document for exemption. If it is established that matter is exempt, this does not preclude the release of other matter in the document, or on the same page, which is not exempt.*
>
> *With regard to the claim that the documents are exempt under section 45(1)(c) of the* Freedom of Information Act 1992 *(the FOI Act), a preliminary appraisal of the documents suggests that while at least some of the information contained in them may concern the business, professional, commercial or financial affairs of your clients, there is little likelihood that release of the information would have an adverse effect on their affairs or would prejudice the future supply of such information to government.*
>
> *With respect to the claim that the matter is exempt under section 46(1) of the FOI Act, I note that many of the documents in question bear no specific reference to communication in confidence, which is a requirement of both paragraphs of section 46(1). While I accept that an obligation of confidence may be implied in certain circumstances, it seems clear from the documents in issue that Mr Williams is familiar with the idea of expressly stating a requirement of confidence when he considers that confidentiality is necessary. In these circumstances the absence of an express indication that Mr Williams required confidentiality would be a significant factor in my determination of whether the matter has been communicated in confidence.*
>
> *As a first step in the course of this application, I would ask that your clients reconsider their position in respect of each document and advise me whether there are any documents or parts of documents to the release of which they do not object. I attach a complete set of the documents in issue to facilitate discussion of possible release. I note that copies of documents identical to folios F3939-30 and loose folios 29, 30, 32 and 33 have already been released to the applicant or another person.*
>
> *In the circumstances of this application I consider that it is appropriate to proceed by way of written submissions and evidence rather than by proceeding to an oral hearing. To that end, I now invite you to provide evidence and/or any written submission you may care to make in relation to documents or parts of documents which you continue to claim are exempt under the FOI Act. Any evidence should be in the form of sworn affidavits or statutory declarations which annex as exhibits any relevant documentary evidence. Any written submission should set out the material facts and circumstances, and the legal arguments, on which you rely to contend that the documents (or parts of documents) in issue are exempt under the FOI Act.*

8. In that letter, I directed that the applicants provide any written submission or evidence no later than 6 March 1995. When no response had been received by that date, a member of my staff contacted the solicitor for the applicants who subsequently confirmed that his clients did not intend to make any further submissions, but still objected to the release of all the documents in issue.

9. By letters dated 24 March 1995, I provided the Premier's Department and the Conservation Council with the opportunity to lodge submissions and evidence in support of their respective positions. Mr Haigh, on behalf of the Conservation Council, indicated that in the circumstances he did not intend to make further submissions or lodge evidence. The Premier's Department responded by a letter dated 12 April 1995, providing a copy of the Tripartite Deed (which I had requested) and indicating that it relied on the reasons set out in the internal review decision of Ms Harris. My attention was also drawn to a file note dated 29 November 1994 (the terms of which are reproduced at paragraph 40 below) recording relevant information obtained by Ms Doblo from Ms J Bimrose of the Office of the Co-ordinator General (an organisational unit within the Premier's Department). Ms Bimrose was the officer who had the conduct of the project to co-ordinate the applicants' proposed development at Oyster Point. Her recorded statements contradicted the first contention made on behalf of the applicants in the passage quoted at paragraph 2 above.

10. By letter dated 3 May 1995, the applicants' solicitor was provided with a copy of that file note, and was invited to provide evidence and/or a written submission in reply to it, and to other material forwarded with my letter of 3 May 1995. A direction was given that any material in reply be lodged no later than 19 May 1995. No material has been lodged on behalf of the applicants.

11. Section 81 of the FOI Act provides that in a review under Part 5 of the FOI Act, the agency which made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant. While the formal onus in this case remains on the respondent to justify its decision that the documents in issue are not exempt documents under the FOI Act, it can discharge this onus by demonstrating that any one of the necessary elements which must be established, to attract the application of each of the exemption provisions relied on by the applicants, cannot be made out. Consequently, the applicants must fail if I am satisfied that an element necessary to found the application of each exemption provision which they rely upon, cannot be established. The applicant in a "reverse-FOI" case, while carrying no formal legal onus, should nevertheless, in practical terms, be careful to ensure that there is material before the Information Commissioner sufficient to enable the Information Commissioner to be satisfied that all elements of the exemption provisions relied upon are established. The applicants in this case, however, have declined to take advantage of the opportunity extended to them in this regard.

Documents in issue

12. The documents in issue were identified in the respondent's decision by rather complex codes (no doubt due to the large volume of documents which fell within the terms of the Conservation Council's FOI access application) as listed in the second column below (i.e. in parentheses). However, I have listed them below in chronological order and I will refer to them by the document number listed in the first column below. The documents, which are all communications from the applicants, are:

1.	(F3939X 162)	4/7/94	One page letter to the Minister for Tourism, Sport and Racing
2.	(F3939X 157-161)	4/7/94	Five page letter to the Minister for Tourism, Sport and Racing

3. (Loose folio 295)	4/7/94	Facsimile transmission advice to Ms J Bimrose, Office of the Co-ordinator General
4. (Loose folios 290-294)	4/7/94	Copy of document 2
5. (Loose folios 655-656)	7/7/94	Letter to the Premier
6. (F3939Y 15-16)	19/7/94	Letter to J Beumer, Department of Primary Industries
7. (F3939Y 18-19)	19/7/94	Letter to I Anders, Department of Lands
8. (F3939Y 38-41)	21/7/94	Letter to Mr J Down, Office of the Co-ordinator General
9. (Loose folios 14-15)	22/7/94	Letter to Mr J Down
10. (Loose folios 20, 21, 23)	25/7/94	Letter to Mr J Down
11. (Loose folios 29-33 F3939AA 107)	26/7/94	Letter to Mr J Down
12. (Loose folio 34)	27/7/94	Letter to the Premier
13. (F3939Z 43-44)	3/8/94	Letter to Mr J Down
14. (F3939Z 47-48) (Loose folio 59)	3/8/94	Letter to the Premier, including page 7 of a 12 page attachment
15. (Loose folios 342-3)	12/8/94	Letter to Mr J Down
16. (Loose folios 1034-1035)	20/9/94	Letter to the Minister for Housing, Local Government and Planning
17. (F3939 30)	29/9/94	Letter to Mr J Down

13. The information in issue is similar in character throughout the above documents. In general terms, it may be characterised as falling into these categories:

> details of the history of negotiations between the applicants and government agencies or officials relating to the proposed development at Oyster Point.
>
> reiteration of the applicants' position in relation to a number of draft clauses of the Tripartite Deed, and conditions proposed to be attached to various permits and approvals, the substance of which had been previously discussed with government agencies and officials.
>
> complaints by the applicants about delays in the approvals process and the approach taken by government agencies and officials to negotiations.
>
> requests for urgent action to resolve matters.
>
> Mr Williams' opinions as to the attitude of Cardwell residents to the development and to the delays in obtaining approval.

14. There is no information in the matter remaining in issue which I consider to be sensitive

commercial information, or financial details, concerning the business operations of the applicants. The applicants have not drawn to my attention any information which they may regard as particularly sensitive.

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

15. The applicants have claimed that the documents in issue are exempt under s.45(1)(c) of the FOI Act, but have provided no evidence or argument in support of this claim other than the assertion in the letter of 29 November 1994 to Ms Doblo (see paragraph 2 above).

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

> ***45.(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.*

17. The elements of s.45(1)(c) were analysed and explained at paragraphs 66-88 of my reasons for decision in *Re Cannon and Australian Quality Egg Farms Limited* (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported). Matter will be exempt from disclosure, by virtue of s.45(1)(c) of the FOI Act, if I am satisfied that:

(a) the matter in issue is properly to be characterised as information concerning the business, professional, commercial or financial affairs of an agency or another person (s.45(1)(c)(i)); and

(b) disclosure of the matter in issue could reasonably be expected to have either of the prejudicial effects contemplated by s.45(1)(c)(ii), namely:

(i) an adverse effect on those business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns; or

(ii) prejudice to the future supply of such information to government;

unless I am also satisfied that disclosure of the matter in issue would, on balance, be in the public interest.

18. In the decision under review, Ms Harris rejected the applicants' contentions that the matter in issue was exempt under s.45(1)(c) of the FOI Act for the following reasons:

> *... I consider that the information contained in the documents in issue is about the*

business, commercial, or financial affairs of the project proponent, Cardwell Properties Pty Ltd. This satisfies the first requirement under s.45(1)(c)(i) of the Act.

As to the second requirement in s.45(1)(c)(ii) of the Act, the Information Commissioner [has] *adopted the* [following] *meaning of the phrase* "could reasonably be expected to"*:*

> "...The words call for the decision maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural 'expectations') and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist."

The Information Commissioner observed in [Re Cannon] *that where the information in issue is already in the public domain, or is common knowledge in the relevant industry, it would be difficult to show that disclosure of information could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the "person" whom the information concerns. The Information Commissioner continued (at p.24):*

> "In most instances, the question of whether disclosure of information could reasonably be expected to have an adverse effect will turn on whether the information is capable of causing competitive harm to the relevant agency, corporation or person. Since the effects of disclosure of information under the FOI Act are, with few exceptions, to be evaluated as if disclosure were being made to any person, it is convenient to adopt the yardstick of evaluating the effects of disclosure to a competitor of the agency which, or person whom, the information in issue concerns."

I am strongly swayed by the facts that the necessary permits for allowing the development to commence have been issued, that the Tripartite Deed has been signed and released in the public domain and that the development scenario in this instance involves development of property already in the possession of the project proponent. I do not therefore consider that there are real and substantial grounds to expect that release of the documents in issue could have an adverse effect on the business, professional, commercial or financial affairs of the project proponent, Cardwell Properties Pty Ltd.

In relation to the second kind of prejudice contemplated by s.45(1)(c)(ii) of the Act, I have considered the fact that disclosure of the information could reasonably be expected to prejudice the future supply of such information to government. However, in view of the Information Commissioner's comments regarding prejudice to the future supply of information to government in both [Re "B" (for citation see paragraph 34 below) and Re Cannon], *I conclude that disclosure of such information would not prejudice the future supply of information.*

... [Ms Harris then referred to the principles set out in paragraph 85 of *Re Cannon* which is quoted at paragraph 21 below]

Although I do not consider that real and substantial grounds exist for either prejudice contemplated by s.45(1)(c)(ii) of the Act, I consider that public interest arguments in favour of disclosure are of sufficient weight to displace the public

interest in favour of non-disclosure in any event. As the documents in issue outline in part, the processes and negotiations involved with the finalisation of the Tripartite Deed and the granting of permits, I consider that the public interest would be advanced by informing the public as to the negotiations that have occurred between the Government and the project proponent.

In this case, I have placed some weight on a commercial project proponent's ability to communicate freely with government in respect of sensitive commercial negotiations, but I have placed more weight on the public interest consideration in favour of enhancing government's accountability by informing public debate on environmental and economic development issues. On balance, I conclude that disclosure of the documents in issue is in the public interest.

Accordingly, the documents in issue are not exempt under s.45(1)(c) of the Act except those partially exempt documents identified as F3939Y 38-39 and Loose Folio 342.

19. In essence, while finding that the requirements of s.45(1)(c)(i) were established, Ms Harris found that disclosure of the matter in issue could not reasonably be expected to have either of the prejudicial effects contemplated by s.45(1)(c)(ii), and that, even if it could, disclosure of the matter in issue would, on balance, be in the public interest. Having examined the matter in issue, I agree with and endorse Ms Harris' findings in respect of the application of s.45(1)(c)(ii) and the application of the public interest balancing test incorporated within s.45(1)(c).

20. As Ms Harris found, the fact that the necessary permits and approvals for the development to commence have been issued (at least so far as Queensland government agencies and the Cardwell Shire Council are concerned; the Federal Minister for the Environment has, however, taken action under Commonwealth legislation which impacts on some aspects of the proposed development), the fact that the Tripartite Deed has been signed and released into the public domain, and the fact that the property to be developed is already in the possession of the applicants, make it difficult to find any reasonable basis for an expectation that disclosure of the information in issue could have an adverse effect on those business, commercial or financial affairs of the applicants which the information in issue concerns. The applicants have no commercial competitor in respect of the development of the project site, and no competitive harm in respect of the process of developing the project site could reasonably be expected to follow from disclosure of the matter in issue. I cannot see, and the applicants have not taken the opportunity to draw my attention to, any adverse effects to the applicants' relevant business interests that could reasonably be expected to follow from disclosure of the matter in issue.

21. As to the second kind of prejudice contemplated by s.45(1)(c)(ii) of the FOI Act, I made the following remarks in *Re Cannon* at paragraphs 85-86:

> *85. The second kind of prejudice contemplated by s.45(1)(c)(ii) focuses not on the protection of the legitimate commercial interests of agencies and private sector business undertakings, but on protecting the continued supply to government of information (of the kind referred to in s.45(1)(c)(i)) which it is necessary for the government to have to undertake the functions expected and required of it in the public interest (including those functions identified in paragraph 28 above). The words "prejudice the future supply of such information" also appear in s.46(1)(b) of the FOI Act, and what I said about those words in Re "B" and Brisbane North Regional Health Authority (at paragraph 161) is also apposite in the context of s.45(1)(c)(ii):*

> Where persons are under an obligation to continue to supply such ... information (e.g. for government employees, as an incident of their employment; or where there is a statutory power to compel the disclosure of the information) or persons must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information) then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information. In my opinion, the test is not to be applied by reference to whether the particular [supplier] whose ... information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of the sources available or likely to be available to an agency.

86. I note in this regard the comments made by the Commonwealth AAT in Schering's case [Re Public Interest Advocacy Centre and Department of Community Services and Health and Schering Pty Ltd (1991) 23 ALD 714] *when applying s.43(1)(c)(ii) of the Commonwealth FOI Act (at p.726-7):*

> We are of the view in considering whether it is "reasonable" to expect that the future supply of information will be prejudiced, that a factor to be taken into account is the context in which such information is supplied, including whether it may be compulsorily required.
>
> ...
>
> ... This is not a situation where information is supplied to the Commonwealth in a purely voluntary fashion, for example by informants in the law enforcement area. Here companies themselves are seeking approval from the Commonwealth to market a particular product in Australia. As Dr Riisfeldt acknowledged in answer to a question by Dr Cashman, the company would go out of business if it was not prepared to submit information to the Department of Health. The information which is required to be submitted is set out in detail in NDF4. Thus we do not consider that prejudice to the future supply of information arises in these circumstances.

22. The kinds of information here in issue are characterised in broad terms at paragraph 13 above. For the most part, the information in issue comprises complaints about delays in the development approvals process, and objections to proposed clauses of the Tripartite Deed and to conditions in respect of other permits and approvals. There is nothing in the matter remaining in issue that touches on sensitive financial information. The business information contained in the matter in issue concerns negotiations in respect of the Tripartite Deed, which has now been executed and released into the public domain, and in respect of various permits and approvals, which have now been issued. I can see no reasonable basis for an expectation that any developer in a position

similar to the applicants would decline to provide government agencies with information of the kind in issue, if the matter now in issue were to be disclosed under the FOI Act. The position is akin to that of the company in *Schering's* case which would go out of business if it was not prepared to submit information to the relevant regulatory authority. Developers, particularly coastal developers, must obtain approvals from, and negotiate with, various regulatory authorities at state and local government level, and in some instances at federal government level.

23. The applicants believed that their opportunity to create a significant development was being hampered and perhaps jeopardised by delays in the government approvals process. They were also concerned that some conditions of the proposed Tripartite Deed involved unreasonable demands. I do not accept that a developer in such a position would fail to put a case in relation to such matters just as forcefully and in as much detail as the applicants have done, even if certain that the information would be disclosed. Of course, there may be cases where information needs to be placed before a government agency, in order to obtain approvals, which is sensitive commercial information which a developer would be reluctant to disclose if it might be released publicly. However, this is not such a case. I do not accept that developers in a similar position to the applicants will, in future, be dissuaded from negotiating with government regulatory authorities, or complaining about perceived problems in the approvals process, if the matter in issue is disclosed under the FOI Act (especially given that, in the present case, disclosure is to occur after the conclusion of negotiations and after relevant approvals have been issued).

24. Even if the requirements of s.45(1)(c)(ii) were satisfied in this case, I consider that disclosure of the matter in issue would, on balance, be in the public interest. The Oyster Point project is a significant development of substantial size. It will no doubt have major effects on the social, economic and physical environment of the Cardwell region. The changes that it makes to the region will be long-term and in some respects probably irreversible. There will no doubt be many benefits for sections of the Cardwell community, but it is just as likely that there will be some who will find negative aspects of the development.

25. The Queensland Parliament has for many years recognised that private owners of land should have restrictions placed on their development of that land in the public interest, e.g. *Local Government Act 1936*. The extent of those restrictions and the number of statutes imposing restrictions has increased dramatically in recent times, e.g. *Local Government (Planning and Environment) Act 1990, Queensland Heritage Act 1992, Wet Tropics World Heritage Protection and Management Act 1993*. Parliament has recognised that the effects of development are often not limited to the particular borders of private land owned by a developer and that there is a public interest in regulating land use.

26. In this particular case, the applicants have had to obtain approvals under legislation administered by the Department of Environment and Heritage, the Department of Housing, Local Government and Planning, the Department of Primary Industries and the Cardwell Shire Council. In addition, because part of the land on which the project is proposed to be built is Crown Land and is subject to special leases, the applicants have found it necessary to obtain approvals from the Department of Lands. The progress of the approvals process has been overseen by the Office of the Co-ordinator General. While Parliament has set down broad parameters for regulation of land use in Queensland, it is necessary that much of the detail of conditions to be placed on development, in the wider public interest, be settled on a case-by-case basis. The process of this case-by-case negotiation has been entrusted to State Ministers, relevant government departments and to local authorities.

27. It is important to remember that government agencies and officials act in the approvals process on behalf of the people of Queensland. In *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, I stated (at pp.73-74; paragraphs 37-39):

37. The information which public officials, both elected and appointed, acquire or generate in office is not acquired or generated for their own benefit, but for purposes related to the legitimate discharge of their duties of office, and ultimately for the service of the public for whose benefit the institutions of government exist, and who ultimately (through one kind of impost or another) fund the institutions of government and the salaries of officials.

38. These considerations are reflected in the Attorney-General's second reading speech to the Queensland Legislative Assembly on the introduction of the Freedom of Information Bill (Parliamentary Debates [Hansard], 5 December 1991, at p.3850):

> "In conclusion, this Bill will effect a major philosophical and cultural shift in the institutions of Government in this State. The assumption that information held by Government is secret unless there are reasons to the contrary is to be replaced by the assumption that information held by Government is available unless there are reasons to the contrary. The perception that Government is something remote from the citizen and entitled to keep its processes secret will be replaced by the perception that Government is merely the agent of its citizens, keeping no secrets other than those necessary to perform its functions as an agent. Information, which in a modern society is power, is being democratised. I commend the Bill to the House."

39. Thus notions of the public interest constitute the basic rationale for the enactment of, as well as the unifying thread running through the provisions of, the FOI Act. Section 21 of the FOI Act reverses the general legal position which (apart from the power of a court to order the disclosure of government-held information for use as relevant evidence in legal proceedings) accorded governments an unfettered discretion in the dissemination of information about its own actions and operations, merely informing the public of these as and when it felt the need to do so. The reversal of the general legal position is justified, inter alia, *by public interest factors of the kind given explicit recognition by Parliament in s.5(1) of the FOI Act.*

28. Section 5(1) of the FOI Act provides:

> ***5.(1)*** *Parliament recognises that, in a free and democratic society -*
>
> *(a) the public interest is served by promoting open discussion of public affairs and enhancing government's accountability; and*
>
> *(b) the community should be kept informed of government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community; and*
>
> *(c) members of the community should have access to information held by government in relation to their personal affairs and should be given the ways to ensure that information of that kind is accurate,*

complete, up-to-date and not misleading.

29. I consider that there is a significant public interest in enhancing the accountability of government agencies and officials in respect of the performance of their functions in dealing with a proposal for a large scale development which is likely to have substantial social, economic and environmental effects on the region surrounding the development, by providing access to documents relating to the development. I consider that the public interest in disclosure extends not only to reports of experts about the possible effects of such a development but also to the factors which may have influenced government agencies and officials in deciding whether to approve a particular land use and what conditions should apply to that land use. In my view this will usually extend to disclosure of communications from the developer to government agencies and officials. This will be necessary in order to fully appreciate the inputs on which government agencies and officials have based their decisions. The emphasis is therefore on the scrutiny of government agencies and officials in the performance of their functions on behalf of the people of Queensland, but there is also a public interest which lies in the community simply being able to obtain access to details of a development project of this scale, and information about its projected impacts on the surrounding region.

30. Much of the matter in issue comprises material voicing the applicants' criticism of the complexity of the development approvals process, which is said by them to pose such a formidable series of hurdles to coastal development that enterprise is being stifled. The applicants' views are doubtless shared by a significant sector of the Queensland public, and there is also a valid public interest in disclosure which enables scrutiny of how government agencies are serving the needs of the business community, and the interests of the Queensland public generally, in fostering appropriate economic development.

31. 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. Depending on the gravity of commercial harm that can be expected from disclosure of particular segments of information, the public interest considerations favouring disclosure may be outweighed and particular segments of information found to be exempt. (I note that where the respondent in the present case found that some segments of matter in the documents in issue satisfied the requirements of s.45(1)(c)(i) and (ii), the public interest in non-disclosure was considered sufficient to outweigh the competing public interest considerations favouring disclosure identified in Ms Harris' decision. As noted in paragraph 3 above, those segments are not in issue in this case.) In respect of the matter in issue before me, however, I consider that even if the requirements of s.45(1)(c)(ii) were satisfied, the public interest considerations favouring disclosure which I have outlined above are of such weight that disclosure would, on balance, be in the public interest.

32. I therefore find that the matter in issue is not exempt matter under s.45(1)(c) of the FOI Act.

Section 46 of the FOI Act

33. The applicants have also claimed reliance on s.46(1)(a) and s.46(1)(b) of the FOI Act. Section 46 of the FOI Act provides:

> ***46.(1)*** *Matter is exempt if -*
>
> *(a) its disclosure would found an action for breach of confidence; or*
>
> *(b) it consists of information of a confidential nature that was*

> *communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*
>
> ***(2)*** *Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless its disclosure would found an action for breach of confidence owed to a person or body other than -*
>
> *(a) a person in the capacity of -*
>
> *(i) a Minister; or*
>
> *(ii) a member of the staff of, or a consultant to, a Minister; or*
>
> *(iii) an officer of an agency; or*
>
> *(b) the State or an agency.*

Section 46(1)(a)

34. In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(a) of the FOI Act. The test of exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency or Minister faced with an application, under s.25 of the FOI Act, for access to the information in issue (see *Re "B"* at pp.296-297; paragraph 44). I am satisfied that, in the circumstances of this case, there are identifiable plaintiffs (the applicants) who would have standing to bring an action for breach of confidence.

35. The only arguments which have been advanced on behalf of the applicants in support of a claim for exemption under s.46(1)(a) are those contained in the first paragraph of the extract from the letter to Ms Doblo which is set out at paragraph 2 above. The final sentence of that paragraph refers to contractual rights to damages in the event of disclosure of correspondence marked private and confidential. However, there is no evidence to support the existence of a relevant contractual obligation of confidence. I explain below at paragraphs 41-42 my findings in respect of representations claimed to have been made to the applicants as to the labelling of correspondence as "Private and Confidential". Those representations could not, in my opinion, have been relied upon as founding any contractual obligation of confidence. At the time the applicants forwarded the documents in issue to various agencies and Ministers of the Queensland government, the applicants were not in an existing contractual relationship with the State of Queensland or any agency thereof, *vis-à-vis* the Oyster Point development project. My point is that there was no existing contractual relationship which imposed express obligations of confidence, or in respect of which a contractual obligation of confidence could be implied. Moreover, the information in issue did not comprise anything in the nature of trade secrets or otherwise commercially valuable information of a kind that has sometimes justified a court in constructing an implied contract around a confidential disclosure between parties who did not stand in a subsisting contractual relationship (see *Re "B"* at p.298, paragraph 48, and the cases there cited).

36. I can see no basis in the present case for a suggestion of the existence of a contractual obligation of confidence arising in the circumstances of the communication of the information in issue from the applicants to the various recipients of it. Therefore, the test for exemption under s.46(1)(a) must be

evaluated in terms of the requirements for an action in equity for breach of confidence, there being five criteria which must be established:

(a) it must be possible to specifically identify the information in issue, in order to establish that it is secret, rather than generally available information (see *Re "B"* at pp.303-304; paragraphs 60-63);

(b) the information in issue must possess "the necessary quality of confidence"; i.e. the information must not be trivial or useless information, and it must possess a degree of secrecy sufficient for it to be the subject of an obligation of conscience, arising from the circumstances in or through which the information was communicated or obtained (see *Re "B"* at pp.304-310; paragraphs 64-75);

(c) the information in issue must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322; paragraphs 76-102);

(d) it must be established that disclosure to the applicant for access under the FOI Act would constitute a misuse, or unauthorised use, of the confidential information in issue (see *Re "B"* at pp.322-324; paragraphs 103-106); and

(e) it must be established that detriment is likely to be occasioned to the original confider of the confidential information in issue if that information were to be disclosed (see *Re "B"* at pp.325-330; paragraphs 107-118).

37. As explained at paragraph 11 above, the respondent can discharge its onus under s.81 of the FOI Act by satisfying me that at least one of the elements which must be established to found exemption under s.46(1)(a) cannot be made out. In her internal review decision, Ms Harris stated her reasons for finding that s.46(1)(a) did not apply to the matter in issue, as follows:

> *In light of the Information Commissioner's detailed decision in* [Re "B"], *I am not satisfied that the information claimed to be confidential can be identified with specificity nor has it the requisite degree of secrecy to invest it with the "necessary quality of confidence". For example, much of the information contained in the documents in issue (such as details of the draft Tripartite Deed) is likely to be common knowledge or publicly available information.*
>
> *Any quality of confidence attached to the documents in issue may also have been lost with the passage of time and the subsequent occurrence of events. In this case, the commercial-in-confidence character of the information is diminished by the fact that the Tripartite Deed has been finalised and signed and is now in the public domain and the necessary permits to proceed with the development have been granted.*
>
> *Furthermore, it is only arguable that receipt of the documents in issue imported an obligation of confidence and that detriment would be occasioned if the documents in issue were released.*
>
> *I do not consider that disclosure of the documents in issue would found a legal cause of action for breach of an equitable duty of confidence.*
>
> *It is not suggested that the Department owes an express contractual obligation of*

confidence to Cardwell Properties Pty Ltd in respect of communication of the documents in issue nor a duty of confidence as a fiduciary. In particular, I draw your attention to the Information Commissioner's comments in [Re "B"] *(at p.35:)*

> "...merely labelling information as "confidential" will not confer it with the necessary quality of confidence, if it in fact lacks the requisite degree of secrecy or inaccessibility."

For information to be the subject of an implied contractual obligation of confidence, it must also possess the requisite degree of secrecy or inaccessibility as required in equity. As I do not consider that the documents in issue possess such degree of secrecy or inaccessibility, I must conclude that disclosure of the documents in issue would not constitute a breach of a contractual obligation of confidence.

In consideration of all the facts and circumstances available to me in conjunction with the Information Commissioner's decision in [Re "B"], *I am not satisfied that disclosure of the documents in issue would found a legal action for breach of confidence. Accordingly, I do not find that the documents in issue qualify for exemption under s.46(1)(a) of the Act.*

38. Ms Harris was mainly concerned that the first and second elements identified in paragraph 36 above were not satisfied. She also doubted that the third and fifth elements were established. Ms Harris is correct when she says that the applicants have failed to identify with specificity the information claimed to be confidential. The applicants insist that all of the matter in issue is exempt, but I think Ms Harris is correct (for the reasons which she gives) when she says that much of the information in issue does not have the necessary quality of confidence. Moreover, large segments of the matter in issue merely recount factual details (typically, steps or events or problems which have previously occurred in the process of obtaining approvals), usually as a prelude to a plea by the applicants for expedition. This factual material was already well known to relevant officers of the respondent, with no apparent restriction on its dissemination. I do not think that an obligation of confidence can be imposed on the respondent by the applicants' recounting such information in letters marked confidential (see R. Dean, The Law of Trade Secrets, Law Book Co, 1990 at pp.171-172, and the cases there cited).

39. I will confine my observations, however, to the third element identified in paragraph 36 above, which I am satisfied cannot be established in respect of the matter in issue. This will give me the opportunity to address a significant development in the general law relating to breach of confidence which has occurred since my detailed consideration of the subject in *Re "B"* (see paragraphs 51-60 below).

40. The applicants have declined to take advantage of the opportunity to provide evidence and/or written submissions to me. The only material from the applicants which I have available to me is the bare assertion made in the letter from the applicants' solicitors dated 29 November 1994 (see paragraph 2 above). The terms of that letter single out correspondence labelled "Private and Confidential", claiming that the applicants were advised that any correspondence so labelled would not be subject to disclosure to third parties. (Documents 3, 6, 7, 9-12, 15 and 17 are not labelled with any express reference to confidentiality, but the applicants' solicitor has stated to my staff during the course of this review that his clients object to disclosure of all of the matter in issue). This claim on behalf of the applicants prompted Ms Doblo to make inquiries of Ms J Bimrose of the Office of the Co-ordinator General (see paragraph 9 above). Ms Doblo's record of those inquiries states:

> *Given the assertion in the Mortimore and Associates fax of today's date that Mr Williams was advised any correspondence labelled "Private and Confidential" would not be disclosed to third parties, I phoned Jan Bimrose to check if this was the case with documents given to the OCG. She said she had told Mr Williams to use a Private and Confidential stamp to help OCG focus on any sensitive material. She also told him she would try to protect from disclosure any commercial-in-confidence information, such as details about his finances. However, she gave no agreement to "keeping confidential" information that was simply labelled as Private and Confidential or Commercial-in-Confidence.*

41. As noted at paragraph 10 above, a copy of this file note was provided to the applicants' solicitor, who was afforded the opportunity to lodge evidence and submissions in reply. Given the fact that the applicants have not replied, I consider that I am entitled to infer that there is no evidence which the applicants wish to provide to me that would be any more favourable to their case than Ms Bimrose's account of the advice given to the applicants concerning the labelling of correspondence as "Private and Confidential" or "Commercial-in-Confidence" (*cf. Jones v Dunkel* (1959) 101 CLR 298; Cross on Evidence, (4th Aust. Ed. 1991), at p.37, para.1215). Accordingly, I am not satisfied that there was any agreement on the part of the respondent to "keep confidential" correspondence labelled as "Private and Confidential" or "Commercial-in-Confidence", but rather there was an indication that such labels should be used by the applicants to alert the respondent to any material which the applicants considered to be sensitive. There was also an indication that the respondent would try to protect from disclosure any commercially sensitive confidential information, such as details about the applicants' finances.

42. Having regard to the nature of the exercise in which the Office of the Co-ordinator General was engaged, I consider the logical inference to be that labelling of the kind referred to above was intended to be a means for the applicants to flag letters considered to contain some commercially sensitive information, so as to differentiate them from other letters which the recipients must have been expected to disclose to a range of people in the course of communications relating to the development approvals process and the negotiation of the Tripartite Deed. This position accords with common sense. Given that the Oyster Point development project was one obviously likely to engender public debate and controversy, it was hardly likely that the government would (or should) agree to any restrictions on its ability to discuss, and account to the public for, its performance of its regulatory role in respect of the development project (except perhaps in respect of information that had a genuine commercial sensitivity to the applicants, beyond the conclusion of negotiations, such that disclosure might do them competitive harm or damage their financial position). I note that the government considered it appropriate to disclose to the public the terms of the Tripartite Deed, many of which bear on the regulatory roles of the Queensland government and the Cardwell Shire Council in respect of the development project.

43. As indicated in the third and fourth paragraphs of the extract from my letter dated 30 January 1995 to the applicants' solicitors which is set out at paragraph 7 above, I considered at one stage that there was probably a pattern to the applicants' practice of marking some letters "Private and Confidential" or "Commercial-in-Confidence", but not others. I considered that the applicants were probably familiar with the idea of expressly stating a requirement of confidence only when confidentiality was considered necessary. However, after a close examination of the documents in issue, I can see no semblance of a pattern to the applicants' use of such markings. Large segments of identical (or substantially identical) material appear in documents that are marked "Confidential" and in documents with no such markings. Document 5, for instance, is marked "Strictly Confidential" and "Commercial-in-Confidence", but it consists largely of a recitation of facts already known to the Minister's relevant Departmental officers and a plea for assistance and fair treatment from the government. It contains no information of a commercially sensitive nature, the disclosure of which might cause competitive harm, or damage the applicants' financial position. In

my opinion, this is now true of all the matter in issue (the small amount of matter that might be thought to fall into the categories mentioned in the previous sentence has been found exempt under s.45(1)(c) and that decision is not in issue before me). I use the words "now true" because some of the matter in issue may have been considered commercially sensitive during the course of negotiations over conditions that might be attached to some permits or approvals, and over terms of the Tripartite Deed. However, I consider that, in general terms, any expectation or understanding of confidentiality that may have existed in relation to information supplied by the applicants concerning negotiation of the Tripartite Deed and conditions to be attached to permits and approvals they required, could not have survived beyond, and would not be enforced as an equitable obligation of confidence following, the public disclosure of the Tripartite Deed, and the obtaining by the applicants of the permits and approvals required for their project.

44. Document 1 is slightly different in character to the other documents in issue. Document 1 is a covering letter (described in its first paragraph as a "personal note") forwarded to the Minister for Tourism, Sport and Racing with document 2. The first paragraph of document 1 indicates that, whereas the accompanying letter (document 2) may be subject to "Freedom of Information", "this personal note can be destroyed". There is also an indication by Mr Williams, in a postscript to the letter, that he will not retain a copy of it. There are certainly strong indications on the face of the letter that its author intended it to be confidential as between himself and the Minister, even suggesting that the Minister may wish to destroy it. The Minister obviously did not destroy the letter. Since three of its five short paragraphs relate to the Minister's official duties, it was, in my opinion, proper to have regarded it as an official document of the Minister rather than a personal note, and in due course a copy was conveyed to the Office of the Co-ordinator General, along with document 2.

45. Having examined the document in the context of all the documents in issue, the emphasis by Mr Williams on secrecy for this document is somewhat baffling. The probable explanation may be that, at the time it was written, this was one of the first occasions on which Mr Williams voiced some criticism of parties to the approvals process, and voiced his need for urgent action. The same concerns, however, were later expressed (in more forthright terms) to several other parties, with no explicit suggestion of a requirement of confidentiality.

46. The first paragraph of document 1 is merely introductory and the second paragraph is merely an exchange of pleasantries, containing nothing of any significance. Those two paragraphs comprise material too trivial in nature to qualify for protection in equity as confidential information (see *Re "B"* at p.305; paragraphs 67-69). In my opinion, the third, fourth and fifth paragraphs of document 1, which relate to the approvals process for the Oyster Point development project, fall into the same category as the other documents in issue and should be treated accordingly. I am satisfied that document 1, like the other documents in issue, does not qualify for exemption under s.46(1)(a) of the FOI Act.

47. A further aspect of this case which deserves emphasis is the special position (in the context of the imposition of enforceable obligations of confidence) of information relating to the discharge by government agencies of functions intended to be performed in the wider public interest. In *Re "B"* at p.316, I made the following comments about the third criterion identified in paragraph 36 above:

> *84. What the judgments in* Smith Kline & French *primarily emphasise is that the fundamental inquiry is aimed at determining, on an evaluation of the <u>whole of the relevant circumstances</u> in which confidential information was imparted to the defendant, whether the defendant's conscience ought to be bound with an equitable obligation of confidence. The relevant circumstances will include (but are not limited to) the nature of the relationship between the parties, the nature and sensitivity of the*

> *information, and circumstances relating to its communication of the kind referred to in the third paragraph in the passage from the judgment of the Full Court in* Smith Kline & French *which is set out at paragraph 82 above.*

The last-mentioned reference is to the following passage from the judgment of the Full Court of the Federal Court of Australia in *Smith Kline & French Laboratories (Aust) Limited and Ors v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at pp.302-303:

> *To determine the existence of confidentiality and its scope, it may be relevant to consider whether the information was supplied gratuitously or for a consideration; whether there is any past practice of such a kind as to give rise to an understanding; how sensitive the information is; whether the confider has any interest in the purpose for which the information is to be used; whether the confider expressly warned the confidee against a particular disclosure or use of the information - and, no doubt, many other matters. ...*

48. It is also worth repeating the following comments of the Full Court in *Smith Kline and French* (at p.304):

> *... In considering these problems, and indeed the whole question, it is necessary not to lose sight of the basis of the obligation to respect confidences:*
>
> > "It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained."
>
> *This is quoted from* Moorgate Tobacco Co Ltd v Phillip Morris Ltd *(No 2) (1984) 156 CLR 414 at 438, per Deane J, with whom the other members of the court agreed ... .*
>
> ...
>
> *Similar expressions recur in other cases: see* Seager v Copydex Ltd *[1967] RPC 349 at 368:*
>
> > "The law on this subject ... depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it."
>
> *To avoid taking unfair advantage of information does not necessarily mean that the confidee must not use it except for the confider's limited purpose. Whether one adopts the 'reasonable man' test suggested by Megarry J or some other, there can be no breach of the equitable obligation unless the court concludes that a confidence reposed has been abused, that unconscientious use had been made of the information. ...*
>
> ...
>
> *We would add that, in our opinion, courts exercising equitable jurisdiction should not be too ready to import an equitable obligation of confidence in a marginal case. There is the distinction between use of confidential information in a way of which many people might disapprove, on the one hand, and illegal use on the other. Not only the administration of business and government, but ordinary communication*

between people, might be unduly obstructed by use of too narrow a test, such as that which the appellants put forward here.

49. In *Re "B"* at p.316 (paragraph 83), I remarked that the Full Court in *Smith Kline and French* had drawn attention to important considerations that arise in, and may be peculiar to, the situation where persons outside government seek to repose confidences in a government agency - which are the kind of confidences to the protection of which s.46(1) of the FOI Act is primarily directed. At p.319 of *Re "B"*, I went on to say:

> *92. Another principle of importance for government agencies was the Federal Court's acceptance in* Smith Kline & French *that it is a relevant factor in determining whether a duty of confidence should be imposed that the imposition of a duty of confidence would inhibit or interfere with a government agency's discharge of functions carried on for the benefit of the public. The Full Court in effect held that the restraint sought by the applicants on the Department's use of the applicant's confidential information would go well beyond any obligation which ought to be imposed on the Department, because it would amount to a substantial interference with vital functions of government in protecting the health and safety of the community. (This finding could also have followed from an application of Lord Denning's statement of principle set out at paragraph 85 above).*
>
> *93. Thus, when a confider purports to impart confidential information to a government agency, account must be taken of the uses to which the government agency must reasonably be expected to put that information, in order to discharge its functions. ...*

50. In *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, McHugh JA also suggested that special considerations apply where persons outside government seek to repose confidences in a government agency, but did not explore the issue further because it did not arise on the facts of the particular case before him. McHugh JA said (at pp.190-191):

> *... when ... a question arises as to whether a government or one of its departments or agencies owes an obligation of confidentiality to a citizen or employee, the equitable rules worked out in cases concerned with private relationships must be used with caution. ...*
>
> *... governments act, or at all events are constitutionally required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest.*

51. The recent decision of the High Court of Australia in *Esso Australia Resources Ltd & Ors v Plowman (Minister for Energy and Minerals) & Ors* (1995) 69 ALJR 404, 128 ALR 391 marks a significant development in this aspect of the law of breach of confidence. It has been well understood since the decision of Mason J of the High Court of Australia in *Commonwealth of Australia v John Fairfax & Sons Ltd & Ors* (1980) 147 CLR 39 that, where a government is the plaintiff in an equitable action for breach of confidence seeking to protect government information, it must establish that disclosure of the allegedly confidential information would be detrimental to the public interest. (In an equitable action for breach of confidence by a non-government plaintiff, detriment to the plaintiff, rather than to the public interest, is generally accepted as an element to be established: see *Re "B"* at pp.325-327; paragraphs 107-112.) The *Esso* case establishes that public interest considerations may affect the question of whether enforceable obligations of confidence

should be imposed on government agencies, in respect of information relevant to the performance of their functions, at the suit of parties outside government who have purported to disclose the information to government agencies in confidence.

52. The *Esso* case related to an arbitration between the appellants and two Victorian statutory authorities (the Gas and Fuel Corporation of Victoria and the State Electricity Commission of Victoria) over the pricing of gas supplied to them by the appellants. The issue was whether a term was to be implied in the contractual agreements between the parties to the effect that documents disclosed by the appellants for the purpose of the arbitration were to be treated in confidence as between the parties to the arbitration. Mason CJ referred to evidence given on behalf of the appellants as to the kind of information they were concerned to protect from disclosure (at 69 ALJR p.408):

> [Mr Bloking, on behalf of the appellants] *says, without being exact, the following categories of information are likely to be revealed:*
>
> > *"Cost information relating to the production of all petroleum products. Price, volume and revenue information relating to the sale of all petroleum products.*
> >
> > *Accounting and financial information relating to [Esso/BHP's] accounts of the Bass Strait operations.*
> >
> > *Technical operating information relating to [Esso/BHP's] gas producing operations.*
> >
> > *Reserves information relating to gas supplies in Bass Strait hydrocarbon reservoirs.*
> >
> > *Marketing information relating to contract negotiations and settlements concerning [Esso/BHP] and their customers."*
>
> *Mr Bloking also claims that each of these categories contains numerous sub-categories, many of which contain information of a private, confidential or commercially sensitive nature. Other categories, he says, include proprietary technical information relating to operations of the Bass Strait Project. Further, it is claimed that the compilation of this information in meaningful form, at the cost of time, money and employment of expertise, has provided the producers with "a significant competitive advantage" which would be lost if it were disclosed publicly because comparable information on competitors would not be available to the producers.*

53. There were differences in the approaches taken by Mason CJ (with whom Dawson J and McHugh J agreed), Brennan J and Toohey J to the question of whether an obligation of confidence with respect to documents disclosed for the purpose of the arbitration was to be implied in the contractual agreements between the parties. Mason CJ found (at p.412) that the appellants' case for an implied term must be rejected because there was no basis for the implication of such a term as a matter of necessity. His Honour did accept (at pp.413-414) that documents disclosed by a party for the purpose of an arbitration were subject to implied undertakings as to confidentiality of a like kind to those which apply in respect of documents disclosed following discovery between parties in litigation before the courts. However, Mason CJ stipulated (at p.414) that "*the obligation is necessarily subject to the public's legitimate interest in obtaining information about the affairs of public authorities*".

54. Mason CJ had earlier explained his views in this regard (at p.413):

> *The courts have consistently viewed governmental secrets differently from personal and commercial secrets. As I stated in* The Commonwealth v John Fairfax & Sons Ltd*, the judiciary must view the disclosure of governmental information "through different spectacles". This involves a reversal of the onus of proof: the government must prove that the public interest demands non-disclosure.*
>
> *This approach was not adopted by the majority of the House of Lords in* British Steel Corporation v Granada Television Ltd*, where the confidential documents in question revealed the internal mismanagement of a statutory authority. In passing, the majority attributed to the public interest exception a very narrow scope, stating that, although disclosure was* of *public interest, it was not* in *the public interest. I would not accept this view. The approach outlined in* John Fairfax *should be adopted when the information relates to statutory authorities or public utilities because, as Professor Finn notes, in the public sector "[t]he need is for compelled openness, not for burgeoning secrecy". The present case is a striking illustration of this principle. Why should the consumers and the public of Victoria be denied knowledge of what happens in these arbitrations, the outcome of which will affect, in all probability, the prices chargeable to consumers by the public utilities?*
> [In a footnote to his reference to the *British Steel Corporation* case, Mason CJ referred to Lord Salmon's dissent with implicit approval: *Lord Salmon, in a strong dissent, highlighted the sharp distinction between a statutory authority and a private company: "there are no shareholders, and [the authority's] losses are borne by the public which does not have anything like the same safeguards as shareholders" (at 1185). His Lordship concluded that the public was "morally entitled" to know why the statutory authority was in such a parlous condition.*]

55. Brennan J's approach was to imply an obligation of qualified confidentiality in the agreements between the parties, which "*substantially equates the contractual obligation of a party under an arbitration agreement with the obligation of a party who impliedly gives an undertaking of confidentiality to the court when obtaining an order for discovery in an action*". Of importance for present purposes is one of the qualifications to the implied obligation of confidence that was stipulated by Brennan J. At p.415, His Honour said: "*Nor could a party be taken to have intended that it would keep confidential documents or information when the party has an obligation, albeit not a legal obligation, to satisfy a public interest - more than mere curiosity - in knowing what is contained in the documents or information."* Brennan J expanded on these comments at pp.416-417:

> *Further, the Gas and Fuel Corporation of Victoria (GFC) and* [the State Electricity Commission of Victoria] *SECV are public authorities. They are engaged in the supply of energy in the State of Victoria. The award to be made in the respective arbitrations will affect the price of the energy supplied by the appellants to GFC and SECV and by them to the public. The public generally has a real interest in the outcome, and perhaps in the progress, of each arbitration which the relevant public authority has a duty to satisfy. GFC and SECV have a duty - possibly a legal duty in the case of SECV but at least a moral duty in the case of both public authorities - to account to the public for the manner in which they perform their functions. Public authorities are not to be taken, prima facie, to have bound themselves to refrain from giving an account of their functions in an appropriate way: sometimes by giving information to the public directly, sometimes by giving information to a Minister, to a government department or to some other public authority.*

> *The duty to convey information to the public may not operate uniformly upon each document or piece of information which is given to GFC or SECV for the purpose of the particular arbitration. Performance of the duty to the public is unlikely to require the revelation of every document or piece of information. It may be possible to respect the commercial sensitivity of information contained in particular documents while discharging the duty to the public and, where that is possible, the general obligation of confidentiality must be respected.*

56. Toohey J held (at p.422) that: "*There must be an underlying principle ... that a party to an arbitration is under a duty not to disclose to a third party documents and information obtained by reason of the arbitration*". However, Toohey J stated briefly, at p.422, that he agreed with Mason CJ that there is a "public interest" exception to the principle.

57. Thus, Dawson J and McHugh J have endorsed Mason CJ's view that the approach outlined in *Commonwealth of Australia v John Fairfax* should be applied when persons outside government bring an action to enforce obligations of confidence in respect of information which relates to statutory authorities or public utilities, and presumably, by logical extension, to any public sector agency or official performing functions which affect a significant segment of the public or affect the wider public interest. The quoted passages from Brennan J's judgment substantially accord with Mason CJ's approach, and Toohey J accepted in principle the existence of a "public interest exception".

58. The approach outlined by Mason J in *John Fairfax* (when considering an equitable action for breach of confidence by a government as plaintiff) was this (at CLR pp.51-52):

> *The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles.*
>
> *... It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.*
>
> ...
>
> *The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality*.

59. Unfortunately (for the interests of conceptual clarity), Mason CJ did not explain in the *Esso* case

precisely where the so-called public interest exception fits among the elements of an action for breach of confidence. Is it a defence to an action for breach of confidence, or an exception that forestalls recognition by the courts of an enforceable obligation of confidence? The possibilities seem to me to be as follows:

(a) public interest considerations relating to public scrutiny and accountability of government are to be taken into account in considering a public interest defence to an action (whether in equity or contract) for breach of confidence. (Mason CJ's reference to the English case of *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 suggests a possible acceptance in Australia of the principle accepted in English law that there is a defence to an action for breach of confidence of "just cause or excuse" for using or disclosing confidential information, where it is in the public interest to use or disclose the information in that way: see *Lion Laboratories v Evans* [1985] QB 526; and *Re "B"* at pp.331-332; paragraphs 123-125. It would be unwise to presume this, however, as no clear indication has been given. I also note that this English line of authority has been criticised by Gummow J: see *Re "B"* at pp.330-331; paragraphs 120-121.)

(b) a non-government plaintiff, in an action in equity to restrain disclosure of information relating to the performance by a public sector agency of its functions, also now has to establish that disclosure of the allegedly confidential information would be detrimental to the public interest; or

(c) public interest considerations relating to public scrutiny and accountability of government affect the court's assessment of -

(i) whether an obligation of confidence should be implied in an existing contractual relationship, and if so, the nature of any qualifications to the obligation (*cf.* Brennan J's approach in the *Esso* case); or

(ii) (in an equitable action for breach of confidence) what conscionable behaviour demands of government agencies or officials, as defendants, in the use they may make of allegedly confidential information.

60. Clarification may come through further judicial decisions. In the case under consideration, I do not think that the application of any of the possibilities canvassed above would make any difference to the outcome. The public interest considerations discussed at paragraphs 24-31 above are also relevant in this context. The agencies which have regulatory functions to perform in respect of the applicants' development project at Oyster Point (and the Office of the Co-ordinator General whose function it is to guide and co-ordinate major economic development projects in terms of necessary government inputs and approvals) have a duty to perform their functions in a manner which serves the public interest, and a duty to account to the public for the manner in which they have performed their functions. This duty can be reconciled with the protection of commercially sensitive information supplied by the applicants, but as I have stated above, I do not consider that the information remaining in issue has any continuing commercial sensitivity. Certainly, there is nothing of comparable sensitivity to the kinds of confidential information in issue in the *Esso* case, described at paragraph 52 above, which the High Court contemplated that the public may have a legitimate interest in knowing.

61. In all the circumstances, I consider that equity would not regard disclosure by the respondent of the matter in issue as an unconscionable use of the information, and hence disclosure would not found an action in equity for breach of confidence.

62. I find that the matter in issue is not exempt matter under s.46(1)(a) of the FOI Act.

Section 46(1)(b)

63. At paragraph 146 of my decision in *Re "B"*, I indicated that, in order to establish the *prima facie* ground of exemption under s.46(1)(b) of the FOI Act, three cumulative requirements must be satisfied:

(a) the matter in issue must consist of information of a confidential nature;

(b) that was communicated in confidence;

(c) the disclosure of which could reasonably be expected to prejudice the future supply of such information.

If the *prima facie* ground of exemption is established, it must then be determined whether the *prima facie* ground is displaced by the weight of identifiable public interest considerations which favour the disclosure of the particular information in issue.

64. After referring in her internal review decision to the three requirements set out above, Ms Harris stated:

> *The first requirement calls for consideration of the same matters as required in equity, that is whether the documents in issue have the requisite degree of relative secrecy or inaccessibility. Consistent with my reasoning in respect of s.46(1)(a) and s.45(1)(c) above, I do not consider that the documents in issue are invested with the necessary quality of confidence nor do I accept that disclosure of the documents could reasonably be expected to prejudice the future supply of such information.*
>
> *Further, the Information Commissioner suggested* [in Re "B"] *in respect of the second requirement that consideration of whether the information was communicated in confidence may involve an assessment as to whether the information would have been disclosed* but for *the existence of a confidential relationship.*
>
> *Finally, even assuming* prima facie *exemption under s.46(1)(b) of the Act, I refer to my analysis of public interest considerations as stated under s.45(1)(c) above and conclude, on balance, that disclosure of the documents in issue would be in the public interest.*

65. I can see no error in the manner in which Ms Harris has applied s.46(1)(b) of the FOI Act to the matter in issue. For the same reasons given in paragraphs 22-23 above, I am satisfied that disclosure of the information in issue could not reasonably be expected to prejudice the future supply of such information. This is sufficient in itself to negative the application of s.46(1)(b). Furthermore, for the reasons outlined in paragraphs 24-31 above, the same public interest considerations discussed in relation to s.45(1)(c) satisfy me that disclosure of the information in issue would, on balance, be in the public interest.

66. I therefore find that the matter in issue is not exempt matter under s.46(1)(b) of the FOI Act.

Conclusion

67. For the foregoing reasons, I affirm the decision under review.

F N ALBIETZ
INFORMATION COMMISSIONER