



## **Decision and Reasons for Decision**

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**Application Number:** 210072

**Applicant:** Basil Bay Residents Association

**Respondent:** Department of Natural Resources and Water

**Third Party:** Keswick Island Pty Ltd

**Decision Date:** 29 October 2007

**Catchwords:** **FREEDOM OF INFORMATION - section 45(1)(c) of the *Freedom of Information Act 1992 (Qld)* - business professional, commercial or financial affairs - adverse effect - competitive harm - public interest balancing test**

**FREEDOM OF INFORMATION - section 46(1)(a) of the *Freedom of Information Act 1992 (Qld)* - matter communicated in confidence - whether disclosure would found an action for breach of confidence**

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## Reasons for Decision

### Background

1. By application dated 2 March 2006, Basil Bay Residents Association (Basil Bay) sought access to the following documents from the Department of Natural Resources and Water (Department):

*...correspondence and government department approvals relating to Keswick Island Pastoral Company Pty Ltd and/or Keswick Island Proprietary Ltd. In particular, the Committee requests a copy of the submission made by Keswick Island Proprietary Ltd in 2005 to alter the Head Lease between the State of Queensland and Keswick Island Pastoral Company Pty Ltd.*
2. In a conversation with Mr Peter Turner of the Department on 23 May 2006, Mr Rick White, President of Basil Bay, clarified the scope of Basil Bay's request for documents. In that discussion, it was agreed that Basil Bay sought access to documents relating to the negotiations preceding, and the reason for, the decision to remove the clause from the Head Lease between the State of Queensland and Keswick Island Pastoral Company Pty Ltd (KIPL) relating to the \$150 million worth of development to be undertaken by the Head Lessee by February 2006.
3. Prior to making an initial decision on Basil Bay's application, the Department engaged in consultation in accordance with section 51 of the *Freedom of Information Act 1992* (Qld) (FOI Act) with two third parties regarding certain documents which, the Department considered, if released, could reasonably be expected to be of substantial concern to those parties (Consultation Documents). In response to that consultation, those parties objected to the release of the Consultation Documents on the ground that they qualified for exemption under the FOI Act.
4. By letter dated 2 August 2006, Mr Rob Zubrinich, Manager, Administrative Review, informed Basil Bay of his initial decision to:
  - grant full access to 75 folios
  - grant partial access to 55 folios
  - refuse access to 99 folios.
5. Mr Zubrinich informed Basil Bay that the documents to which access was refused in part and in full contained matter which qualified for exemption under sections 43, 45 and 46 of the FOI Act.
6. By letter dated 28 August 2006, Basil Bay applied for internal review of Mr Zubrinich's decision. Neither of the third parties consulted under section 51 of the FOI Act sought internal review of Mr Zubrinich's decision.
7. By letter dated 18 September 2006, Mr Ken Davis, Director, Executive and Administrative Services, informed Basil Bay of his decision to affirm Mr Zubrinich's decision in its entirety.
8. In light of the fact that the third parties did not seek internal review, once their review rights under the FOI Act had expired, the Department released additional documents to Basil Bay on 21 September 2006 in accordance with Mr Zubrinich's decision.
9. By letter dated 10 October 2006, Basil Bay applied to this Office for external review of Mr Davis' decision.

### Steps taken in the external review process

10. Copies of the documents in issue were obtained from the Department and examined by this Office.
11. In a telephone consultation with a staff member of this Office on 12 October 2007, Basil Bay agreed to withdraw the parts of its application for external review which related to:
  - documents containing matter falling outside the scope of its freedom of information (FOI) access application
  - legally privileged documents which were subject to the Department's exemption claim under section 43(1) of the FOI Act.
12. In that consultation, it was also agreed that the remaining documents in issue in this review contained matter subject to the Department's exemption claims under section 45(1)(c) and/or section 46(1)(a) of the FOI Act.
13. By letter dated 13 April 2007, this Office asked the Department to provide submissions in support of its exemption claims under sections 45(1)(c) and 46(1)(a) of the FOI Act. The Department's submissions were received by this Office on 4 May 2007.
14. By letter dated 23 July 2007, I informed Keswick Island Pty Ltd (KIPL), a third party consulted under section 51 of the FOI Act by the Department, that the Information Commissioner was conducting an external review of Mr Davis' decision dated 18 September 2006 and invited it to apply to become a participant in this review. In that letter, I also requested that KIPL provide submissions on the matter remaining in issue in this review. On 27 July 2007, KIPL applied to become a participant in this review and on 6 August 2007, it provided submissions with respect to the matter remaining in issue in this review.
15. By letter dated 5 September 2007, I advised the Department that I had formed the preliminary view that:
  - the majority of the matter remaining in issue qualified for exemption under section 45(1)(c) of the FOI Act
  - certain matter in folios 346, 343, 341, 328, 325, 323 and 294 (Collection 1) did not qualify for exemption under section 45(1)(c) or section 46(1)(a) of the FOI Act
  - matter which had been released to Basil Bay by the Department in folios 345-336 and 329-319 did not qualify for exemption under the FOI Act where such matter appeared, in a similar format, in other folios in issue in this review.
16. By letter dated 9 September 2007, the Department:
  - acknowledged my preliminary view dated 5 September 2007
  - advised that it would not be making any further submissions in this review
  - stated that it would await my final decision and any remaining instructions to give effect to that decision.
17. By letters dated 24 September 2007, I:
  - conveyed my preliminary view on the matter remaining in issue in this review to KIPL and Basil Bay

- advised KIPL and Basil Bay that the Department did not intend to make any submissions in response to my preliminary view
  - requested KIPL and Basil Bay respond to my preliminary view by 8 October 2007.
18. On 8 October 2007, Basil Bay requested an extension of time within which to respond to my preliminary view. On 9 October 2007, I advised Basil Bay that I consented to its request for an extension of time and requested any submissions be provided to this Office by 18 October 2007.
19. By email dated 18 October 2007 Basil Bay:
- advised that it contested my preliminary view
  - provided submissions in response to my preliminary view.
20. KIPL provided no submissions in response to my preliminary view and is therefore, deemed to have accepted that view as set out in my letter dated 24 September 2007.
21. In making my decision, I have taken into account the following:
- Basil Bay's initial FOI access application dated 2 March 2006
  - consultation letters sent by the Department in accordance with section 51 of the FOI Act
  - consultation responses from third parties dated 14 July 2006 and 18 July 2006
  - initial decision of Mr Zubrinich to the third parties dated 2 August 2006
  - initial decision of Mr Zubrinich to Basil Bay dated 2 August 2006
  - Basil Bay's application for internal review dated 28 August 2006
  - internal review decision of Mr Ken Davis dated 18 September 2006
  - Basil Bay's external review application dated 10 October 2006
  - documents in issue
  - written correspondence exchanged between this Office and the Department, Basil Bay and KIPL during the course of this review
  - file notes of telephone conversations held between staff members of this Office and the Department, Basil Bay and KIPL during the course of this review
  - the Department's submissions dated 4 May 2007
  - Basil Bay's submissions dated 18 October 2007
  - relevant sections of the FOI Act and applicable case law.

### **Matter in issue**

22. In light of the negotiations between the applicant and this Office during the course of this review, the documents containing matter remaining in issue in this review are:
- folios 347-336, 329-319 and 294 in Collection 1
  - folios 343, 236 and 085 in Collection 2.

### **Findings**

23. I find that the matter remaining in issue in this review, except that listed in the Schedule attached to this decision, qualifies for exemption under section 45(1)(c) of the FOI Act.
24. I find that the matter listed in the Schedule does not qualify for exemption under section 45(1)(c) or section 46(1)(a) of the FOI Act.

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

25. The Department contended that all matter remaining in issue in this review qualified for exemption under section 45(1)(c) of the FOI Act. That section 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.*

**Application of section 45(1)(c) of the FOI Act**

26. In *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 (*Cannon*) at paragraphs 66-88, the Information Commissioner stated that matter qualifies for exemption under section 45(1)(c) of the FOI Act if:
- a) the matter in issue is information concerning the business, professional, commercial or financial affairs of a person (including a company or agency); and
  - b) disclosure of the matter in issue could reasonably be expected to have either of the following effects:
    - (i) an adverse effect on the business, professional, commercial or financial affairs of the person, which the information in issue concerns; or
    - (ii) prejudice to the future supply of such information to government,

27. If matter meets the requirements of (a) and (b), a public interest balancing test will then apply, ie. it must be determined whether disclosure of the matter in issue would, on balance, be in the public interest.

***Business, professional, commercial or financial affairs***

28. The Department, in its submissions dated 4 May 2007, contended that each segment of matter remaining in issue in this review qualified for exemption under section 45(1)(c) of the FOI Act because it fell into one or more of the categories listed in the table below:

<b>Category</b>	<b>Description of matter in issue</b>
A	Statements as to the lack of confidence lending institutions and other potential investors and/or business partners have in the development on the Island, and the subsequent difficulties KIPL has experienced in attracting investment to the island
B	The company's own evaluation of the possible financial viability of future developments on the island

C	The company's evaluation of the actual cost of developing existing infrastructure on the site
D	Details of the company's future plans and its own evaluation of the possible costs of those plans (both for developments, such as Krystal Beach Stage 2, and also for associated infrastructure)
E	The company's evaluation of the negative impact on the future development of the difficulties experienced in gaining planning approval

29. In submissions to this Office dated 6 August 2007, KIPL did not specifically address the parts of matter remaining in issue in this review but generally submitted that all documents contained '*commercially sensitive financial and other data*'.

30. Based on my analysis of the matter remaining in issue in this review, I am satisfied that the great majority of it falls into one or more of the five categories set out in Table 1 above. With the exception of the matter listed in the Schedule, I find that the matter remaining in issue in this review concerns the business, commercial or financial affairs of KIPL.

#### **Adverse effect**

31. In *Cannon*, the Information Commissioner stated as follows (at paragraph 84):

*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 ... 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 ...*

32. The Department contended, in its submissions dated 4 May 2007, that competitive harm to KIPL's business affairs would result if the matter remaining in issue was disclosed. Specifically, the Department submitted that:

- a competitor could use the Category A, B and E matter to undermine KIPL's negotiations with potential partners or investors, cut KIPL's margin of profitability and/or force KIPL out of the market
- disclosure of the Category C and D matter would enhance a competitor's ability to take actions adverse to KIPL's business affairs.

33. In submissions to this Office dated 6 August 2007, KIPL did not address specific parts of matter remaining in issue but submitted generally in respect of all documents remaining in issue that their disclosure would '*significantly damage the operation*' of KIPL.

34. I have examined the matter remaining in issue in this review and with the exception of the matter listed in the Schedule, I am satisfied that its disclosure:

- could reasonably be expected to cause competitive harm to KIPL
- could reasonably be expected to have an adverse effect on the business, commercial and financial affairs of KIPL

*Public interest*

35. In its submissions dated 4 May 2007, the Department contended that the circumstances surrounding Keswick Island and the relationship between KIPL and Basil Bay are relevant considerations in the public interest balancing test. The Department submitted that the following considerations favour disclosure of the matter in issue:
- the sub-lessees obtaining access to information that indicates the reason for amending the Head Lease and the efforts made to develop the Island in accordance with that lease
  - there are numerous individuals (the sub-lessees) who potentially have an interest in the information over and above that of the general community
  - the overwhelming majority of sub-lessees would seek to protect the commercial information if it was released.
36. The Department acknowledged that the public interest arguments in favour of disclosure were significant but submitted that they were marginally outweighed by those considerations in favour of non-disclosure, including:
- the principle that release under the FOI Act constitutes release to the world at large and an agency can place no restrictions on the use to which information can be used once it has been released
  - the matter in issue could come to the attention of a competitor of KIPL who may use the information that may adversely effect KIPL's business affairs, eg. forfeiture of the Head Lease
  - potential for the investments by KIPL and sub-lessees in Keswick Island to be undermined by a competitor
  - the information currently in the public domain is sufficient to constitute a general explanation for the decision to amend the Head Lease
  - documents in the public domain indicate that the apparent rationale for considering amendment to the head lease has already been communicated to the Basil Bay community, ie. KIPL's difficulty in securing the finance necessary to meet the developmental requirements in the lease.
37. In its submissions dated 18 October 2007, Basil Bay contended as follows:
- The Association believe some of the submissions made by Keswick Island Pty Ltd to the Dept of Natural Resources and Water, which resulted in changes to the head lease, were misleading or false. The changes made to the head lease are contrary to the conditions that prompted most, if not all, sublessees to purchase subleases. The Association questions the transparency of the government's decision making where it is unclear that the decisions were made in the public interest.*
38. KIPL did not make any submissions with respect to the public interest during the course of this review.
39. I recognise that there is a public interest in ensuring transparency in government decision making as identified by Basil Bay in its submissions. I also acknowledge that there is a strong public interest in terms of the sub-lessees obtaining access to information which discloses the full reasons for amending the Head Lease and the efforts made to develop the Island in accordance with the terms of that lease. However, those considerations must be balanced against the public interest arguments which favour non-disclosure of the matter remaining in issue. Specifically, the principle that release under the FOI Act constitutes release to the world at large and the

potential for the matter in issue to be used by a competitor to undermine the investments of KIPL and the sub-lessees are significant considerations in favour of non-disclosure.

40. Having considered the public interest arguments raised by the Department and Basil Bay in this review, (see paragraphs 35-37 of this decision), I am satisfied that the public interest considerations favouring disclosure of the matter remaining in issue in this review, with the exception of that matter listed in the Schedule, are marginally outweighed by the public interest considerations favouring non-disclosure.
41. Accordingly, I am satisfied, with respect to the majority of matter remaining in issue in this review, ie. all matter except that listed in the Schedule, that:
  - it concerns the business, commercial or financial affairs of KIPL
  - its disclosure could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of KIPL
  - its disclosure would not, on balance, be in the public interest
  - it qualifies for exemption under section 45(1)(c) of the FOI Act.

***Matter which does not qualify for exemption under section 45(1)(c) of the FOI Act***

42. In respect of the matter listed in the Schedule, I am not satisfied that the exemption set out in section 45(1)(c) of the FOI Act applies. In my preliminary view to the Department and KIPL, I provided detailed reasons as to why that exemption provision does not apply.
43. In light of the fact that this decision is being provided to all parties who may wish to exercise appeal rights, I am unable to express those detailed reasons in this decision. In the event that appeal rights are not exercised, the Department will proceed to release the documents remaining in issue in accordance with my preliminary view dated 5 September 2007 to the applicant.

***Section 46(1)(a) of the FOI Act***

44. The Department has also contended that certain matter remaining in issue in this review qualifies for exemption under section 46(1)(a) of the FOI Act. As I have found that the matter listed in the Schedule does not qualify for exemption under section 45(1)(c) of the FOI Act, it is necessary for me to consider the application of section 46(1)(a) of the FOI Act to that matter.
45. Section 46(1)(a) of the FOI Act provides:

**46 *Matter communicated in confidence***

(1) *Matter is exempt if—*

(a) *its disclosure would found an action for breach of confidence ...*

***Application of section 46(1)(a) of the FOI Act***

46. The test for exemption under section 46(1)(a) must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the agency not to disclose the information in issue. In my view, there is an identifiable plaintiff, KIPL, who would have standing to bring such an action for breach of confidence.



47. KIPL and the Department submitted that the matter in issue was communicated and received in confidence and therefore, the criteria required to establish an equitable obligation of confidence are met. To support that submission, the Department and KIPL have sought to rely on the fact that certain documents were marked 'commercial in confidence'.
48. In *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (*B and Brisbane North*), the Information Commissioner identified five requirements, all of which must be established, to obtain protection in equity of allegedly confidential information as follows:
- (a) it must be possible to specifically identify the information, in order to establish that it is secret, rather than generally available information (see *B and Brisbane North* at pp.303-304, paragraphs 60-63)
  - (b) the information in issue must have 'the necessary quality of confidence'; ie, the information must not be trivial or useless information, and it must have a degree of secrecy sufficient for it to be the subject of an obligation of conscience (see *B and Brisbane North* at paragraphs 64-75)
  - (c) the information 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 *B and Brisbane North* at paragraphs 76-102)
  - (d) disclosure to the applicant for access would constitute an unauthorised use of the confidential information (see *B and Brisbane North* at paragraphs 103-106)
  - (e) disclosure would be likely to cause detriment to the confider of the confidential information (see *B and Brisbane North* at paragraphs 107-118).
49. As set out in paragraph 4 of this decision, the Department released parts of the documents remaining in issue to Basil Bay during the course of the FOI process. Significantly, parts of folios 347-336 and 329-319 which were marked 'commercial in confidence' were released to Basil Bay. In light of the partial release of those folios, I am satisfied that:
- the Department's partial release of the matter remaining in issue is inconsistent with its submission that that matter was communicated and received in confidence
  - the requirements set down in *B and Brisbane North* are not fulfilled as the relevant information no longer possesses the necessary degree of secrecy
  - the matter which I have found does not qualify for exemption under section 45(1)(c) of the FOI Act, also does not qualify for exemption under section 46(1)(a) of the FOI Act.

## Conclusion

50. Based on the information available to me in this review, I am satisfied that:
- all matter remaining in issue in this review, except that listed in the attached Schedule, qualifies for exemption under section 45(1)(c) of the FOI Act
  - the matter listed in the attached Schedule does not qualify for exemption under section 45(1)(c) or section 46(1)(a) of the FOI Act.

51. With respect to the matter which I have found is not exempt under the FOI Act, detailed reasons for my findings are set out in my preliminary view letters to the Department and KIPL, dated 5 September 2007 and 24 September 2007, respectively.

## **Decision**

52. I vary the decision under review (being the internal review decision of Mr Davis dated 18 September 2006) and find as follows:
- all matter in issue in this review, except that listed in the attached Schedule, qualifies for exemption under section 45(1)(c) of the FOI Act
  - the matter listed in the attached Schedule does not qualify for exemption under section 45(1)(c) or section 46(1)(a) of the FOI Act.
53. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

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**F Henry**  
**Assistant Commissioner**

**Date: 29 October 2007**

## Schedule

<b>Matter not exempt under section 45(1)(c) or section 46(1)(a) of the FOI Act</b>	
<b>Folio No.</b>	<b>Location of matter in issue</b>
346	First paragraph, part of first sentence
343	Whole second paragraph Parts of first and second columns in table at end of page
342	Matter appearing in fourth row, second column Parts of the Estimated Development Schedule in first and second columns
341	Part of first paragraph
338	Part of second last line in fifth paragraph Part of second line in seventh paragraph
337	Parts of third paragraph
328	Part of second sentence and whole of third and fourth sentences, second paragraph
327	Part of last sentence, third last paragraph
326	Whole of last sentence, third last paragraph
325	Whole third paragraph
323	Parts of first and second sentences in first paragraph under heading "Constraints"
321	Part of first sentence, fourth paragraph
320	Part of third and fourth sentences, third paragraph Part of third sentence, sixth paragraph
319	Part of last sentence, second paragraph Part of second sentence, fourth paragraph
294	Part of sentence commencing " <i>In your letter of 19 May 2003...</i> "