OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 96011
Application S 91/94

Participants:

PETER JOHN McPHILLIMY
Applicant

QUEENSLAND TREASURY
Respondent

GOLD COAST MOTOR EVENTS CO
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - document in issue compares tender prices submitted by security firms tendering for the provision of security services at the 1992 Gold Coast Indy Car Grand Prix - document in issue concerns the business, commercial and financial affairs of the security firms which submitted tenders to the third party, and of the third party - security firms no longer object to disclosure of information concerning them - whether document in issue has a commercial value to an agency or another person - application of s.45(1)(b) of the *Freedom of Information Act 1992* Qld - whether disclosure could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the security firms - whether disclosure could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the third party - application of s.45(1)(c) of the *Freedom of Information Act 1992* Qld - matter in issue initially communicated in confidence by the respective firms to the third party - whether document in issue qualifies for exemption under s.46(1)(a) or s.46(1)(b) of the *Freedom of Information Act 1992* Qld in light of the consent to disclosure given by the respective security firms.

Freedom of Information Act 1992 Qld s.45(1)(b), s.45(1)(c), s.46(1)(a), s.46(1)(b), s.52, s.78, s.81
Indy Car Grand Prix Act 1990 Qld s.2.1

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491
Sexton Trading Company Pty Ltd and South Coast Regional Health Authority, Re (Information Commissioner Qld, Decision No. 95033, 18 December 1995, unreported)

DECISION

I set aside that part of the decision under review (being the decision made on behalf of the respondent by Mr M Lawrence on 10 May 1994) which concerns the document identified in the decision under review as document 22, and in substitution for it I decide that document 22 is not exempt from disclosure to the applicant under the *Freedom of Information Act 1992* Qld.

Date of decision: 28 June 1996

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access to most of the matter in a document which compares tenders submitted for the provision of security services for the 1992 Gold Coast Indy Car Grand Prix event.

2. Mr McPhillimy is the principal of a company that provides security services (Security Promotions Australia Pty Ltd), trading as SECPRO International. The Gold Coast Motor Events Co (the GCMEC) was the promoter appointed by the Governor in Council, pursuant to s.2.1 of the *Indy Car Grand Prix Act 1990* Qld, to conduct the Gold Coast Indy Car Grand Prix (the Grand Prix) in 1992 (and subsequent years).

3. SECPRO International was initially awarded the contract for the provision of security services for the 1992 Grand Prix; however, the GCMEC subsequently terminated the contract, and awarded it to another firm. Mr McPhillimy and his firm have been involved in litigation with the GCMEC concerning the termination of the contract.

4. Mr McPhillimy's FOI access application to Queensland Treasury sought access to a range of documents relating to the provision of security services at the 1992 and 1993 Grand Prix events. However, during the course of this review, Mr McPhillimy has stated that he is prepared to confine the scope of his application for review to the pursuit of one document (numbered by Queensland Treasury, for identification purposes, as document 22) being a document which records the names of tenderers for the award of a contract to provide security services at the 1992 Grand Prix event, and their respective tender prices. Accordingly, these reasons for decision deal only with that document, which is hereinafter referred to as document 22 or the document in issue.

5. In the initial decision made on behalf of Queensland Treasury by Ms Fiona Smith on 8 April 1994, document 22 was determined to be exempt under s.45(1)(c) of the *Freedom of Information Act 1992* Qld (the FOI Act). Mr McPhillimy applied for internal review in accordance with s.52 of the FOI Act. The internal review decision-maker, Mr Mervyn Lawrence, decided on 10 May 1994 to release that part of document 22 which referred to Mr McPhillimy's own tender for the provision of security services, but decided that the balance of document 22 was exempt under s.45(1)(c) of the FOI Act. By letter dated 16 May 1994, Mr McPhillimy applied to me for review, under Part 5 of the FOI Act, of Mr Lawrence's decision.

External review process

6. Shortly after the commencement of this external review, a member of my staff convened a conference with Mr McPhillimy and representatives of Queensland Treasury. During and subsequent to that conference, some issues concerning documents other than document 22 were resolved, and Queensland Treasury was asked to consult with the various security firms identified in document 22 in order to determine whether each security firm objected to the disclosure to Mr McPhillimy of the information which concerned it. Queensland Treasury also consulted with the GCMEC in relation to document 22 (and a number of other documents no longer in issue).

7. Under cover of a letter dated 23 September 1994, Queensland Treasury provided me with the records of its consultation process. With two exceptions, each of the security firms informed Queensland Treasury that it had no objection to the disclosure to Mr McPhillimy of the information naming it and disclosing its tender price, as set out in document 22. Two of the security firms named in document 22 objected to the disclosure of the information concerning them, when contacted by Queensland Treasury in September 1994.

8. When consulted by Queensland Treasury, the GCMEC objected to the disclosure of any further part of document 22. After taking all the objections into account, Queensland Treasury informed me that it was prepared to give Mr McPhillimy access to document 22, subject to the deletion of information concerning the two firms which raised an objection to disclosure when contacted in September 1994.

9. The GCMEC applied for, and was granted, status as a participant in this review, in accordance with s.78 of the FOI Act. It maintained that the balance of document 22 was exempt from disclosure under the FOI Act.

10. Directions were then given to the participants for lodging evidence and submissions in support of their respective cases in this external review. The evidence and submissions lodged by the participants are listed below:

    On behalf of the GCMEC

    - Statutory Declaration of Glen Ernest Jones (then Chief Executive of the GCMEC), dated 6 December 1994
    - Written submissions of the GCMEC, dated 19 December 1994
    - Points of reply, dated 20 March 1995, in response to the evidence and submissions lodged by Mr McPhillimy in respect of document 22
    - Brief additional points of reply, dated 2 February 1996 (in relation to additional consultation undertaken by my office, referred to in paragraph 11 below)

On behalf of Mr McPhillimy

- Statutory Declaration of Mr McPhillimy, dated 30 January 1995
- A written submission described as "Summary of Statutory Declaration and Documents Submitted", dated 17 January 1995
- Points of reply, dated 27 March 1995, to the reply lodged by the GCMEC

On behalf of Queensland Treasury

- Written submissions, dated 23 September 1994 (Queensland Treasury declined the opportunity to reply to evidence and submissions subsequently lodged on behalf of the other participants).

11. In December 1995, my office contacted the general manager of each of the two security firms which, when contacted by Queensland Treasury in September 1994, had objected to the disclosure to Mr McPhillimy of information from document 22 concerning them. On this occasion, the respective general managers clearly stated that their firms no longer had any objection to the disclosure to Mr McPhillimy of the information from document 22 concerning their respective firms. Both Queensland Treasury and the GCMEC were given the opportunity to respond to this fresh information. Queensland Treasury indicated that it had nothing else to add concerning the matter. The GCMEC indicated that, despite consent to disclosure now having been given by all of the security firms named in document 22 as having tendered for the provision of security services at the 1992 Grand Prix, the GCMEC maintained that the matter in document 22 which did not concern Mr McPhillimy's firm was exempt from disclosure to Mr McPhillimy under the FOI Act.

Application of s.45(1)(b) and s.45(1)(c) of the FOI Act

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

45.(1) *Matter is exempt matter if—*

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

(b) its disclosure—

(i) would disclose information (other than trade secrets) that has a commercial value to an agency or another person; and

(ii) could reasonably be expected to destroy or diminish the commercial value of the information; or

(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.*

My views on the correct approach to the interpretation and application of s.45(1) of the FOI Act are explained in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491.

Application of s.45(1)(b)

13. It is clear from its submission dated 23 September 1994 that the only basis on which Queensland Treasury claimed exemption under s.45(1)(b), for some of the matter in document 22, was because two of the security firms named in document 22 had at that time objected to release of information which concerned them. As indicated in paragraph 11 above, those two security firms no longer object to disclosure of the relevant information. Queensland Treasury, however, has not formally withdrawn its claim for exemption under s.45(1)(b), although I note that the claim was not expounded in any detail in the submission dated 23 September 1994.

14. Queensland Treasury, which carries the onus under s.81 of the FOI Act of establishing its case for exemption, has not put forward evidence of the kind I referred to in *Re Cannon* at p.516 (paragraph 65) as being necessary to establish exemption under s.45(1)(b) of the Act. Having regard to the principles which I explained in *Re Cannon* at p.513 (paragraphs 54-56), I am not satisfied that the information contained in document 22 ever did have a commercial value to an agency or another person; but I am certainly satisfied, given the lapse of time since document 22 was prepared, that the pricing information contained in it is so out-of-date that it can have no present commercial value. This is confirmed by the fact that the security firms named in document 22 as having tendered for the provision of security services at the 1992 Grand Prix, no longer object to disclosure of the information concerning them.

15. I find that document 22 contains no matter which is exempt matter under s.45(1)(b) of the FOI Act.

Application of s.45(1)(c)

16. According to the principles which I explained at paragraphs 66-88 of *Re Cannon*, 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 the 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.

17. The GCMEC contends that the matter in issue in document 22 is exempt under s.45(1)(c) because:

(a) it contains information concerning the business, commercial or financial affairs of the GCMEC and its disclosure would have an adverse effect on those affairs; and

(b) it contains information which also concerns the business, commercial or financial affairs of the security firms named in document 22, and that its disclosure would have an adverse effect on the business, commercial or financial affairs of those firms.

18. I am satisfied (from my examination of it) that document 22 comprises information concerning the business or commercial affairs of the GCMEC, and that individual segments of information in document 22, concerning particular firms which tendered for the provision of security services at the 1992 Grand Prix, comprise information concerning the business, commercial or financial affairs of the respective firms.

Adverse effect on the relevant affairs of the security firms

19. The correct approach to the application of the phrase "could reasonably be expected to" in s.45(1)(c)(ii) of the FOI Act is explained in *Re Cannon* at p.515 (paragraphs 62-63). Those 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.

20. The GCMEC's written submission addressed this issue as follows:

> *Document 22 contains pricing information and possibly information on margins. If this were disclosed to other firms, it may allow those firms to compete unfairly on price. By release of that information they may receive an advantage which they would not otherwise have.*

21. The evidence in the statutory declaration dated 6 December 1994 by Mr Jones, the then Chief Executive of the GCMEC, addressed this issue as follows:

> *9. In my opinion, the release of the document may also prejudice the firms mentioned in the document, who may wish to tender for the present* [i.e. the contract for security services for the 1995 Grand Prix] *(or a future) contract. It contains details of the tender of each firm which the new tenderers may use to competitively frame their own tenders.*
>
> *10. I am informed that Queensland Treasury contacted the firms mentioned in the document to ascertain whether they objected to the release of the information so far as it pertained to them. Several of*

> *the firms did not object. At the time that the firms were contacted, the current tender* [i.e. for the 1995 Grand prix] *had not been announced. These firms may not appreciate the consequences described in the previous paragraph.*

22. All of the security firms named in document 22 as having tendered for the provision of security services for the 1992 Grand Prix have now consented to the disclosure to Mr McPhillimy of the information that concerns them. I do not accept that disclosure of document 22 could reasonably be expected to have an adverse effect on the relevant affairs of the security firms referred to in document 22. With due respect to Mr Jones, I consider that the individual firms, which gave their consent to disclosure, were well aware of the possibility that they may wish to tender for the provision of security services at future Grand Prix events, and were in a better position than Mr Jones to judge whether disclosure, to a known competitor, of the tender prices they submitted prior to the 1992 Grand Prix, might have an adverse effect on their business, commercial or financial affairs. I find that the information in document 22 concerning the business, commercial or financial affairs of individual security firms is so out-of-date that it cannot have any continuing commercial sensitivity, and that its disclosure could not reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the relevant firms.

Adverse effect on the relevant affairs of the GCMEC

23. The GCMEC's written submission addressed this issue as follows:

> *..., information of the kind set out in document 22 will affect the position of GCMEC in future tenders for security services. GCMEC maintains the confidentiality of this type of information in order to preserve the advantage it receives from the tendering process. Obviously, it will lose this advantage if the information is released.*
>
> *As to the nature of this advantage and the effect the release of the document will have, reference is made to paragraphs 4, 5 and 8 of the statutory declaration of Mr Jones.*

24. The relevant parts of Mr Jones' statutory declaration are as follows:

> *4. The tendering process encourages competition to the benefit of the GCMEC. Each firm is unaware of details of other tenders, and will attempt to offer the best services at the most competitive price. If a firm knows the prices of the other tenders (though it may be a tender for an earlier event), it may alter its own tender to the detriment of GCMEC (and the other firms). For example, it will be unlikely to pitch its tender much lower than the prices set out in the previous tender. It may also reduce the quality of its services offered in a tender so as to be able to compete on price alone.*
>
> *5. For the same reason, GCMEC does not disclose details of tenders after the security contract has been finalised. The contract is renewed from time to time, when further tenders and negotiations may take place. Knowledge of tenders in previous years will advantage security firms in their current tenders and negotiations with GCMEC. This is*

> *particularly so as firms will be aware of which firms were successful in previous years. GCMEC will lose the negotiating advantage which it would otherwise possess.*
>
> ...
>
> *8. Most significantly, GCMEC is currently finalising the review of tenders for the security contract for the 1995 Event. The release of Document 22 could jeopardise the negotiating position of GCMEC. It will arm the security firms with information which will enable them to judge what the price range of tenders is likely to be, based on tenders for a previous year. They can then ensure that they do not quote significantly below that range. This allows them to maximise their profit at the expense of GCMEC.*

25. I do not accept that the adverse effects claimed in the GCMEC's written submissions, and in the evidence of Mr Jones, are reasonably based.

26. I have reservations about whether the adverse effects claimed by Mr Jones were reasonably based even at the time they were made (i.e., shortly before the 1995 Grand Prix). In essence, Mr Jones claims that knowledge of previous years' tender prices will enable a firm to make an informed judgment of the likely price range in a forthcoming tender so as to ensure that it does not quote significantly below that range. However, in my view, provided the market for the supply of security services to the Grand Prix event remains a competitive market, in which security firms do not know the details of their competitors' forthcoming tenders (i.e., provided there is no collusion in the market), one firm cannot with any certainty predict the behaviour of its competitors who have knowledge even of a previous year's tender prices. (I note that the GCMEC has not presented any evidence to suggest that such a competitive market does not exist, and further note that security firms not based at the Gold Coast have in the past been willing to tender for the provision of security services to the Grand Prix). One firm cannot exclude the possibility that one or more competitors may be prepared to cut profit margins drastically and attempt to significantly undercut the previous year's range of tender prices in a bid to win such a high profile contract.

27. I note that many government agencies let tenders for the provision of goods and services, and indeed major projects, on the basis that the total price submitted by each tenderer will be open to disclosure, or that the total price submitted by the successful tenderer will be disclosed to unsuccessful tenderers on request (see *Re Sexton Trading Company Pty Ltd and South Coast Regional Health Authority* (Information Commissioner Qld, Decision No. 95033, 18 December 1995, unreported) at paragraphs 17-18). This is not considered to be likely to reduce the benefits for government agencies of price competition encouraged by the competitive tender process.

28. In any event, I am not satisfied that disclosure, at this time, of the information in document 22 could reasonably be expected to prejudice the benefit to the GCMEC of competition encouraged through the use of a competitive tendering process, or otherwise to have any adverse effect on the business, commercial or financial affairs of the GCMEC. Even accepting the basic thrust of the hypothesis put in paragraphs 4, 5 and 8 of Mr Jones' statutory declaration, disclosure of the information in document 22 could no longer afford any worthwhile guidance to a security firm wishing to make an informed judgment of the

likely range of tender prices to be submitted by security firms who tender for the provision of security services at the 1997 Grand Prix event.

29. I find that disclosure of the matter in issue in document 22 could not reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the GCMEC.

30. I note that the GCMEC has not argued a case based on the second prejudicial effect recognised in s.45(1)(c)(ii) of the FOI Act, i.e., prejudice to the future supply of such information to government. In any event, my observations in paragraph 38 below would also apply so as to negate the establishment of the second prejudicial effect recognised in s.45(1)(c)(ii) of the FOI Act.

31. I find that the requirements of s.45(1)(c)(ii) of the FOI Act have not been established and that document 22 does not qualify for exemption under s.45(1)(c) of the FOI Act. It is not necessary for me to consider the application of the public interest balancing test incorporated in s.45(1)(c).

Application of s.46(1) of the FOI Act

32. The GCMEC claims that the parts of document 22 which have not been released to Mr McPhillimy are exempt under s.46(1)(a) and s.46(1)(b) of the FOI Act. Section 46(1) 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.*

33. 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) or s.46(1)(b) of the FOI Act. I do not think it is necessary to rehearse those principles for the purposes of this case. It is well settled that an obligation of confidence may be released by the express or implied consent of the person to whom it is owed: see *Re "B"* at pp.323-324 (paragraphs 105-106). This has been acknowledged by the GCMEC which, in its written submission, made this concession:

> *If a security firm has consented to release of the information into the public domain, then obviously the firm cannot maintain any action for breach of confidence in relation to that information and s.46(1)(a) will not be satisfied so far as that part of the document is concerned.*

34. Since each of the security firms named in document 22 as having tendered for the provision of security services at the 1992 Grand Prix has now consented to the disclosure to Mr McPhillimy of the information that concerns them, I find that the matter in issue in document 22 is not exempt from disclosure to Mr McPhillimy under s.46(1)(a) of the FOI Act.

35. The GCMEC has nevertheless pressed a case for exemption under s.46(1)(b), arguing in its written submission as follows:

> *... The information is of a sensitive and confidential nature. Firms would want to keep secret any details of pricing and hourly rates which it has offered to GCMEC.*
>
> *... The information was communicated in circumstances of confidence, being a private tender. Refer to paragraphs 3 and 5 of the statutory declaration of Mr Jones.*
>
> *Prejudice to future supply of information*
>
> *...*
>
> *If businesses cannot be assured that this information will be kept confidential by GCMEC, they will be careful what information they provide in future tenders, if they decide to tender at all. This will operate to the disadvantage of GCMEC in receiving quality tenders for the security contract.*
>
> *The public interest considerations are dealt with above. In addition, there is a public interest in firms being able to tender fully and honestly in the knowledge that the details of their tender will remain confidential, and in GCMEC for example, being able to receive the benefit of a series of comprehensive tenders from which to choose.*
>
> *Consent to release*
>
> *No inference regarding future supply of information should be drawn from the responses of the security firms consulted. The public interest in maintaining confidence in the secrecy of the tendering process extends beyond merely those firms. It extends to future tenders both in relation to the security contract and to other contracts which GCMEC may put to tender.*

36. The relevant part of Mr Jones' evidence in relation to the claim for exemption under s.46(1)(b) is as follows:

> *3. The tendering process is private. GCMEC accepts tenders on a confidential basis, and does not make any details of the tenders (whether successful or not) public at any stage. The confidential nature of the tenders is well understood by GCMEC and the firms who submitted tenders.*

37. The GCMEC's submission on the application of the second and third elements of s.46(1)(b) is, in my opinion, misconceived. In *Re "B"*, I described (at pp.338-339; paragraphs 150-152) what was necessary to satisfy the requirement imposed by the words "communicated in confidence" in s.46(1)(b). I then went on to observe (at p.339; paragraph 153) that my earlier comments (i.e., those at pp.323-324, paragraphs 105-106, of *Re "B")* about a confider authorising (by express or implicit release/waiver of the obligation or understanding of confidence) the disclosure of information previously communicated in confidence, were also relevant to the application of s.46(1)(b). There is no logical reason why information,

having once been communicated under an express or implied understanding between the confider and the confidant that the confidant was to treat the information in confidence, should continue to be treated in confidence once the confider has indicated that it no longer requires that the information be treated in confidence. A confidant who continues to seek protection for such information in those circumstances, must be seeking to protect some interest of the confidant (or perhaps a third party) in non-disclosure of the relevant information, but any such interest is not one that s.46(1) of the FOI Act was intended, or designed, to protect.
For the reasons given at paragraphs 33-34 above, I am satisfied that the matter in issue in document 22 no longer qualifies for exemption under s.46(1)(b) of the FOI Act.

38. Moreover, in respect of the third element of s.46(1)(b), I do not accept that disclosure under the FOI Act of once confidential information, with the consent of the confider, could reasonably be expected to prejudice the future supply of such information. The various firms mentioned in document 22 have decided that the information concerning them no longer requires protection from disclosure, and in these circumstances there is simply no foundation for a reasonable expectation of the prejudice required to establish the third element of s.46(1)(b).

39. I find that document 22 does not qualify for exemption under s.46(1)(b) of the FOI Act. It is unnecessary for me to consider the application of the public interest balancing test incorporated in s.46(1)(b).

Conclusion

40. For the foregoing reasons, I set aside that part of Mr Lawrence's decision dated 10 May 1994 which concerns document 22, and in substitution for it, I decide that document 22 is not exempt from disclosure to the applicant under the FOI Act.

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F N ALBIETZ
INFORMATION COMMISSIONER