Macrossan & Amiet and Queensland Health

(S 116/99, 27 February 2002, Deputy Commissioner Sorensen)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.- 3. These paragraphs deleted.

REASONS FOR DECISION

Background

4. The applicant seeks review of a decision by Queensland Health to refuse it access under the FOI Act to tender documents which were submitted to Queensland Health by various legal firms in response to an "Invitation for Offers" issued by Queensland Health for the provision of legal services to the Mackay Health Service District.

5. In 1998, for the first time, Queensland Health invited legal firms to respond to an invitation to tender to become part of a panel of solicitors providing legal services to Queensland Health and its various health service districts. The applicant submitted a tender for the provision of legal services to the Mackay Health Service District, but was unsuccessful. By letter dated 20 January 1999, the applicant applied to Queensland Health in the following terms:

> *Re: Freedom of Information Application*
> Tenders submitted for Invitation for Offers Numbered PL221/98 - Panel arrangements for the Provision of Legal Services to Queensland Health
>
> *We make application pursuant to the* Freedom of Information Act, *for copies of all tenders for the abovementioned invitation for offers submitted from legal firms for the provision of services to the Mackay Health Service District.*
>
> *This request relates to all tender information and related tender information submitted.*
> …

6. Mr Cameron Thomas, then Acting Senior Policy Officer at Queensland Health, advised the applicant that he had located a total of 1099 folios which he considered fell within the terms of the applicant's FOI access application. Those folios comprised the tender documents submitted to Queensland Health by the five legal service providers who were successful in being appointed to the panel to provide general legal services to the Mackay

Health Service District - Allen Allen & Hemsley (now Allens Arthur Robinson), Hunt & Hunt, Crown Law, Roberts Leu North (now Roberts Nehmer McKee) and Dunhill Madden Butler (now Deacons). (I will hereinafter refer to those firms collectively as "the tenderers"). Mr Thomas consulted with each of the tenderers under s.51 of the FOI Act regarding disclosure to the applicant of their tender documents. Each objected to disclosure, relying upon s.45(1) and/or s.46(1) of the FOI Act in support of their respective cases for exemption. By letter dated 26 March 2001, Mr Thomas advised the applicant that he had decided to refuse the applicant access to all of the documents in issue, on the basis that they comprised exempt matter under s.45(1)(b) or s.45(1)(c) of the FOI Act.

7. By letter dated 12 April 1999, the applicant applied for internal review of Mr Thomas' decision. The internal review was conducted by Dr John Youngman, General Manager (Health Services) of Queensland Health. By letter dated 30 April 1999, Dr Youngman advised the applicant that he had decided to affirm Mr Thomas' decision that all of the documents were exempt from disclosure under the FOI Act. The only variation between the decisions of Mr Thomas and Dr Youngman was that Dr Youngman decided that some of the information contained in the tender documents satisfied the requirements for exemption under s.45(1)(a) of the FOI Act.

8. By letter dated 26 May 1999, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Dr Youngman's decision.

External review process

9. Copies of the tender documents in issue were obtained and examined. The tenderers were informed of the review and invited to apply to be participants in the review, in accordance with s.78 of the FOI Act. Each applied for, and was granted, status as a participant in this review. Each also informed me of their continued objections to disclosure of their tender documents. (I note that, when consulted by Queensland Health regarding disclosure of its tender documents, Deacons advised that, while its position was that the documents were wholly exempt from disclosure, in the event that its claim in that regard was not upheld by Queensland Health, it would adopt an alternative position and consent to disclosure of some parts of its tender documents. Deacons provided Queensland Health with a copy of its tender documents, marked up so as to indicate those parts in respect of which it would consent to disclosure. However, given that Queensland Health has maintained its position during the course of this review that all of the documents in issue are wholly exempt from disclosure, and there has therefore been no prospect of giving the applicant access to any part of the documents in issue, it has not been necessary to give consideration to Deacons' alternative position.)

10. During the course of the review, a member of my staff confirmed with the applicant that the applicant was seeking access only to the tender documents submitted by those firms who were successful in tendering for appointment to the panel of legal advisers providing general legal services to the Mackay Health Service District. By way of clarification, I should explain that the Invitation for Offers issued by Queensland Health was in two

parts. The first part invited offers from firms wishing to be appointed to a panel providing general legal services to the various health service districts around Queensland. The tendering firms were asked to place a tick beside the particular health service district(s) for which they wished to tender. (The five tenderers whose documents are in issue in this review were successful in being appointed to the panel of legal advisers providing general legal services to the Mackay Health Service District (among others) and the relevant parts of their tender documents are therefore properly in issue in this review.) However, the second part of the Invitation for Offers invited offers from firms wishing to be appointed to a "litigation legal services panel", covering the whole of Queensland Health. Each of the five firms whose tender documents are in issue in this review also tendered for appointment to the litigation legal services panel, but only two were successful. In its decisions, Queensland Health made no distinction between those parts of the tender documents which related to the general legal services panel, and those that related to the litigation legal services panel. It is arguable that the latter do not fall within the terms of the applicant's FOI access application, as they do not relate specifically to the Mackay Health Service District; but in any event, the applicant has confirmed that it does not wish to pursue access to that material.

11. Accordingly, in these reasons for decision, I will deal only with those parts of the tenderers' tender documents which relate to the general legal services panel.

12. At an early stage of the review, given the bulk of documentation in issue, attempts were made to negotiate with the applicant to reduce the extent of the documents in issue, on the basis that each of the tenders basically followed the same format, consisting of responses to specific questions posed by Queensland Health. The applicant was asked to focus on the particular parts of the tender documents to which it wished to pursue access. However, the applicant declined to withdraw its application for access to any part of the documents in issue. The tenderers, in turn, refused to withdraw their objections to disclosure of any part of their tender documents. Once it was clear that none of the parties was prepared to make any concessions, it was necessary to take the procedural steps preparatory to a formal decision, i.e., the exchange of any written submissions and evidence which any of the participants wished to lodge in support of their respective cases, with the opportunity given for submissions in reply. Given the volume of documents in issue, together with the involvement of multiple third parties, all making varying claims for exemption, the finalisation of this review has taken a considerable amount of time and resources. In discharging my function of deciding (and giving reasons for decision in respect of) the validity of the exemption claims made for the large number of documents in issue, I have borne in mind the observation of Woodward J, sitting as a member of a Full Court of the Federal Court of Australia in *News Corporation Ltd & Ors v National Companies and Securities Commission* (1986) 57 ALR 550 at p.562, that: "… *if the Freedom of Information legislation is to remain workable, it must be open to a respondent, and to the AAT* [as the independent review tribunal]*, to deal with large numbers of documents with a degree of generalisation appropriate to the case."*

13. In making my decision, I have taken into account the following:

1. the contents of the documents in issue;
2. the applicant's FOI access application dated 20 January 1999; application for internal review dated 12 April 1999; and application for external review dated 26 May 1999;
3. Queensland Health's initial and internal review decisions, dated 26 March 1999 and 30 April 1999, respectively;
4. responses by the tenderers to Queensland Health's consultation letters issued under s.51 of the FOI Act;
5. letters from Allens Arthur Robinson dated 22 June 1999 and 26 October 2000;
6. letters from Deacons dated 6 July 1999 and 31 October 2000;
7. letters from Roberts Nehmer McKee dated 28 June 1999, 9 July 1999 and 19 October 2000;
8. letter from Hunt & Hunt dated 24 June 1999;
9. letters from Crown Law dated 15 September 1999 and 31 October 2000;
10. letter from Queensland Health dated 17 November 2000;
11. letters from the applicant dated 6 August 1999, 19 September 2000 and 19 October 2001.

Matter in issue

14. As I noted above, the tender documents in issue all broadly follow the same format, due to the structure of Queensland Health's Invitation for Offers. The Invitation for Offers, as it related to the provision of general legal services to the various health service districts, consisted of the following parts:

1. Part A - General Conditions of Offering;
2. Part B - Offer Specifications;
3. Part C - Standing Offer Conditions for the Provision of Legal Services to Queensland Health;
4. Part D - Additional Information;
5. Part E - Offer Submission.

15. Part E was comprised of a series of questions to which the tenderers were required to respond. Using those questions as a guide, the general type of information contained in the tender documents in relation to the provision of general legal services can be categorised as follows:

1. *Experience and expertise of the tenderer, including details of clients and work performed for those clients.*
2. *Identity, and experience/relevant areas of expertise, of the tenderers' staff members.*

3. *Method of costing proposed to be adopted by the tenderer.*
4. *General services - including topics such as arrangements for use of counsel; timeliness; communication and reporting arrangements; adopting a proactive approach; conflict of interest situations; quality assurance accreditation; and local economic impact;*
5. *Contact names and details of referees;*
6. *Miscellaneous documents.*

16. The above is merely intended to be a general summary (for ease of reference in this decision) of the main types of information contained in the tender documents. While the individual tender documents all follow the same general format, there is a significant degree of variation in the specific information which the tenderers chose to provide to Queensland Health in response to the various questions posed. In addition, some of the tenderers chose to provide a wide variety of additional documentation as appendices to their tenders and in general support of their proposals. It will be necessary to deal with some of that documentation separately in this decision, as it is not common to all tenders. However, wherever possible, and in the interests of simplicity and brevity, I will discuss the matter in issue in terms of the general categories of information identified above.

Exemption provisions relied upon by the participants

17. In his initial decision on behalf of Queensland Health, Mr Thomas decided that the matter in issue did not qualify for exemption under s.46(1) of the FOI Act, but was exempt from disclosure under s.45(1)(b) or s.45(1)(c) of the FOI Act. In his internal review decision, Dr Youngman decided that the matter in issue was exempt from disclosure under s.45(1)(a), s.45(1)(b) or s.45(1)(c) of the FOI Act.

18. In their submissions to this office, the tenderers variously relied upon the application of s.45(1)(a), s.45(1)(b), s.45(1)(c) and s.46(1) of the FOI Act. Having examined the matter in issue, I also consider that s.44(1) of the FOI Act is of relevance.

19. I will discuss, in turn, the application to the matter in issue of each of the relevant exemption provisions.

Application of s.44(1) of the FOI Act

20. Section 44(1) of the FOI Act provides:

> ***44.(1)*** *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

21. In applying s.44(1) of the FOI Act, the first issue is whether disclosure of the matter in issue would disclose information that is properly to be characterised as information concerning the personal affairs of an individual other than the applicant for access. If that requirement is satisfied, a *prima facie* public interest favouring non-disclosure is established, and the matter in issue will be exempt, unless there exist public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

22. In his reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, the Information Commissioner identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act (see pp.256-257, paragraphs 79-114, of *Re Stewart*). In particular, he said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well-accepted core meaning which includes:

1. family and marital relationships;
2. health or ill health;
3. relationships and emotional ties with other people; and
4. domestic responsibilities or financial obligations.

23. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the information in question.

24. While none of the participants has raised the application of s.44(1) of the FOI Act to any of the matter in issue, and it may seem unusual to find personal affairs information in documents of a commercial nature such as tender documents, my review of the matter in issue has nevertheless resulted in the identification of segments of information which I consider must properly be characterised as information concerning the personal affairs of identifiable individuals, and which is therefore *prima facie* exempt from disclosure under s.44(1) of the FOI Act.

25. For example, Roberts Nehmer McKee's tender documents include detailed resumes for that firm's professional staff. However, unlike similar material contained in the tender documents of the other tenderers, which focused only on the professional qualifications and work experience of the relevant staff, the Roberts Nehmer McKee tender (no doubt in an effort to emphasise to Queensland Health that firm's 'local flavour' and the long-standing connection of its staff with Townsville and the north Queensland community generally - I note in that regard that one of the evaluation criteria specified by Queensland Health in its Invitation for Offers is the economic benefit to the district covered by the panel to which the tenderer seeks appointment (see clause 3(viii) of

Schedule A)) contains information such as the date and place of birth of the staff member, the staff member's family connection with the local area (even to the extent of stating the occupations and place of residence of a staff member's parents and siblings), *et cetera*. Applying the principles established in *Re Stewart*, I find that information of that type falls within the core meaning of "personal affairs" in s.44(1) of the FOI Act, and is *prima facie* exempt from disclosure under s.44(1) of the FOI Act, subject to the application of the public interest balancing test which is incorporated in s.44(1).

26. Another category of personal affairs information contained in the tender documents comprises the signatures, home telephone numbers, home facsimile numbers and home e.mail addresses of some staff members of the tenderers. Again, applying the principles in *Re Stewart* (see, in particular, pp.259-264, paragraphs 86-102) and *Re Pearce and Queensland Rural Adjustment Authority and Others* (1999) 5 QAR 242 at p.256, paragraph 38, I am satisfied that such information is properly to be characterised as information concerning the personal affairs of the relevant staff members (rather than their employment affairs) and is *prima facie* exempt from disclosure under s.44(1) of the FOI Act, subject to the application of the public interest balancing test which is incorporated in s.44(1).

Public interest balancing test

27. Because of the way in which s.44(1) of the FOI Act is worded and structured, the mere finding that information concerns the personal affairs of a person other than the applicant for access must always tip the scales against disclosure of that information (to an extent that will vary from case to case according to the relative weight of the privacy interests attaching to the particular information in issue in the particular circumstances of any given case), and must decisively tip the scales if there are no public interest considerations which tell in favour of disclosure of the information in issue. It therefore becomes necessary to examine whether there exist public interest considerations favouring disclosure, which outweigh all identifiable public interest considerations favouring non-disclosure, such as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

28. I am unable to identify any public interest considerations favouring disclosure of the personal affairs matter which is contained in the tender documents (the general nature of which I have described above) which are sufficient to outweigh the public interest in protecting the privacy interests of the persons concerned. I acknowledge that there is a public interest in the accountability of Queensland Health regarding its conduct of the tender process and the decisions which it made regarding the award of the tender, but I do not consider that disclosure of the type of personal affairs information which I have identified above, would further that public interest consideration in any substantial way.

29. I therefore find that some information contained in the tender documents is exempt from disclosure under s.44(1) of the FOI Act. Given the fact that the information in question is scattered throughout the documents in issue, I will not attempt to identify each relevant segment of information here. Instead, I will arrange for a marked-up copy

of the tender documents (highlighting the exempt matter under s.44(1) of the FOI Act) to accompany the copy of these reasons for decision which I send to Queensland Health. (I will also provide each of the tenderers with a marked-up copy of their tender documents, highlighting the exempt matter.)

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

30. Section 46(1) of the FOI Act provides:

> ***46.(1)*** *Matter is exempt if—*
>
> *1. its disclosure would found an action for breach of confidence; or*
>
> *2. 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.*

31. The correct approach to the interpretation and application of s.46(1) of the FOI Act was explained in the Information Commissioner's decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279.

Section 46(1)(a)

32. The test for exemption under s.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 respondent agency not to disclose the information in issue. I am satisfied that each of the tenderers, as authors of the tender documents in issue, would have standing to enforce an obligation of confidence claimed to bind Queensland Health not to disclose the contents of the tender documents.

33. At paragraph 43 of *Re "B"*, the Information Commissioner said that an action for breach of confidence may be based on a contractual or an equitable obligation of confidence. At the time the matter in issue was communicated by the tenderers to Queensland Health, their relationship was of a pre-contractual nature. Although the Information Commissioner referred at paragraph 48 of *Re "B"* to an example of a case where a court had managed to construct an implied contract around a disclosure of confidential information between parties who did not stand in a subsisting contractual relationship, I consider that an action for breach of confidence in the circumstances of this case would be reliant on establishing a breach of an equitable obligation of confidence. In any event, it would seem to matter little in practical terms whether an equitable obligation of confidence or an implied contractual obligation of confidence is relied upon. As the Information Commissioner noted in *Re "B"* at pp.298-299,

paragraphs 49-52, there are cases in which the Courts have indicated that whether implied contract or equity is chosen is irrelevant because they are interchangeable, and the extent of the obligations under each is identical.

34. As the Information Commissioner explained in *Re "B"*, there are five cumulative requirements for protection in equity of allegedly confidential information:

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

2. the information in issue must have "the necessary quality of confidence"; i.e., 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 *Re "B"* at pp.304-310, paragraphs 64-75);

3. 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 *Re "B"* at pp.311-322, paragraphs 76-102);

4. disclosure to the applicant for access would constitute an unauthorised use of the confidential information (see *Re "B"* at pp.322-324, paragraphs 103-106); and

5. disclosure would be likely to cause detriment to the confider of the confidential information (see *Re "B"* at pp.325-330, paragraphs 107-118).

35. If I find that any one of the above criteria is not established in respect of the matter in issue, the matter in issue will not qualify for exemption under s.46(1)(a) of the FOI Act.

Requirement (a)

36. I am satisfied that the information claimed to be confidential can be specifically identified.

Requirement (b)

37. I am not satisfied that all of the information contained in the tender documents has a degree of secrecy sufficient for it to be the subject of an obligation of confidence. For example, at least some of the information in issue, e.g., information relating to the general structure of the tenderer (that is, such things as the number of partners and staff,

divisions of the firm and the staff who work in each division), details of the tenderers' employees and general information as to their qualifications and areas of specialty, annexures comprising client bulletins and newsletters *et cetera*, is information which generally can be considered to be in the public domain or publicly available. Law firms often publish or facilitate the circulation of general information about their staff and the services they can offer in order to promote themselves to prospective clients. For example, a number of the tenderers have websites on which is published general information of this type. Such information is also often contained in promotional brochures published by law firms, in newsletters and client bulletins, in law journals and magazines, and in brochures advertising seminars or conferences in which the particular law firm is involved (either in coordinating/sponsoring the seminar/conference, or having its employees present papers or workshops). Even as far as the identity of clients of a firm is concerned, the fact that a particular law firm has acted for a particular client in a court proceeding is usually a matter of public record. In addition, the fact that a particular firm acts for a particular commercial client is often well-known within the industry by lawyers, and by other commercial organisations with which that client competes or does business. In some cases which attract significant public interest, the fact that a particular firm has acted for a particular client can be widely reported in the media.

38. Accordingly, while I accept that some of the information contained in the tender documents is confidential in nature, it is clear that much is not. Given my findings below, however, it is not necessary for me to identify specifically those parts of the tender documents which I consider do or do not satisfy requirement (b) to found an action in equity for breach of confidence.

Requirement (c)

39. Determining whether or not an enforceable obligation of confidence exists (and, if so, construing its scope) requires an evaluation of the whole of the relevant circumstances including (but not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and the circumstances relating to its communication, such as those referred to by a Full Court of the Federal Court of Australia in *Smith Kline and French Laboratories (Australia) Limited v Secretary, Department of Community Services & Health* (1991) 28 FCR 291 at pp.302-3: see *Re "B"* at pp.314-316.

40. I note the following clauses contained in the Invitation for Offers:

> ***1. METHOD OF SUBMITTING OFFERS***
>
> *13.1 The Offer and any attachments shall be enclosed in a sealed envelope or carton prominently endorsed **"CONFIDENTIAL"** with the reference **"OFFER NO***

PL221/98 - PROVISION OF LEGAL SERVICES TO QUEENSLAND HEALTH" *marked on it and addressed to and lodged as follows: …*

…

2. OPENING OF OFFERS

14.1 …

14.2 Offers will be opened publicly. The names of all Offerers will be disclosed. No other information will be disclosed.

14.3 The name/s of the successful Offerer/s shall be subject to public disclosure upon acceptance of an Offer. Pricing details will not be released.

14.4 No other information contained in an Offer shall be publicly disclosed. It may however be subject to disclosure under the provisions of the Freedom of Information Act 1992 (Qld). (Refer to PART D "Additional Information").

…

PART D - ADDITIONAL INFORMATION
DISCLOSURE OF INFORMATION UNDER FREEDOM OF INFORMATION ACT 1992

1.Offerers are advised that information provided in Offer documents may be subject to disclosure resulting from an application made under the Freedom of Information Act 1992 (the FOI Act).

2. …

3.Where any information is provided by any Offerer on a confidential basis or relates to trade secrets and/or the business, professional, commercial or financial affairs of the Offerer, the Offerer should endorse the information accordingly.

…

7. When further information is provided on a confidential basis and endorsed as outlined above, the Department does not guarantee that the information will not be disclosed in response to applications received under the FOI Act. However, where it is considered that the FOI Act requires disclosure of the information, that information <u>will not</u> be disclosed until the views of the Offerer have been obtained and their application, if any, or review of any decision to disclose has been finalised in accordance with the FOI Act.

41. In his decision dated 26 March 2001, Mr Thomas of Queensland Health said:

3. *… I have considered the provisions of the Invitation for Offers document issued by Queensland Health in respect of Offer No. PL221/98. At PART D - ADDITIONAL INFORMATION (page 44), Disclosure of Information under the Act is dealt with, and the following clause appears:*

> *"3. Where any information is provided by an Offerer on a confidential basis or relates to trade secrets and/or the business, professional, commercial or financial affairs of the Offerer, the Offerer should endorse the information accordingly."*

My examination of the material submitted in response to the Invitation for Offers indicates that no such endorsement appeared upon the documentation or in any correspondence or communication accompanying the submission of documentation. This was the case even though Part D (in paragraph 3) clearly indicated that Offerers should indicate where information was provided on a confidential basis.

…

5. *I have also taken into account the fact that under Clause 2.1 of the General Conditions of Offering, Offerers are deemed to have knowledge of a number of documents including the Disclosure of Information document. Since clause 2.1 is binding upon the Offerers, a failure to respond in the terms required by clause 3 of the Disclosure of Information page, leads to the conclusion, in my finding, that … there has been no obligation of confidence created in equity which is binding upon Queensland Health in the circumstances of the submission of the documents. …*

42. In his internal review decision, Dr Youngman of Queensland Health stated:

> *In my judgment, the initial decision was correct in its findings under s.46 of the FOI Act. I concur in the view that the circumstances of communication and transmission of the tender materials were such as to negative a suggestion that an obligation of confidence was created when the information was received by the Department. I accordingly confirm the decision that both paragraphs (a) and (b) of s.46(1) of the FOI Act have not been satisfied and I would therefore not exempt any matter under that section.*

43. Of the tenderers, only Allens Arthur Robinson ("Allens") and Hunt & Hunt rely upon s.46(1) in support of their objections to disclosure. Hunt & Hunt has lodged no detailed submissions in support of its objection. Its only substantive response to the issues for determination in this review is contained in its letter to Queensland Health dated 5 March 1999 wherein it simply identified the sections contained in its tender documents and

stated that each section qualified for exemption "under ss 45 and 46". No submissions in support of the application of those exemption provisions to the particular matter in issue were provided.

44. Allens has sought to rely upon the fact that it delivered its tender documents to Queensland Health in boxes marked "Private & Confidential". (I note also that the cover page of the tender submitted by Roberts Nehmer McKee is marked "Confidential Offer No. PL221/98", although that firm has made no submissions in support of the application of s.46(1)(a) of the FOI Act to its tender documents.) Allens contends that this marking on its boxes amounted to an express request for confidential treatment of its tender documents:

> *Despite the conclusions to the contrary, we consider that, in addition to s.45 exemptions applying to our tender documentation, s.46 is also applicable. In our view, the failure to endorse material in accordance with paragraph 3, Part D of the Invitation for Offers (No. PL221/98), is a procedural matter, which is not determinative of the substantive issues of whether there is a duty of confidence (which is likely to be breached if the material is disclosed) or whether the information was of a confidential nature that was communicated in confidence.*
>
> *Therefore, we consider that s.46 is applicable on the basis that we brought to the attention of Queensland Health, when submitting the tender documentation, the fact that the documentation was supplied in commercial confidence. …*
>
> (Allens' letter dated 22 June 1999)

45. Queensland Health has made inquiries of its staff who were responsible for handling and assessing the tender documents, and has reviewed the paper work associated with the tender process. Queensland Health has advised that there is no evidence arising from those avenues of inquiry to suggest that Allens, or any of the other tenderers, made an express request for confidential treatment of any part of their tender documents. None of the tenderers supplied covering letters containing a request for confidential treatment, and there is no evidence of an express oral request for confidentiality. Moreover, as regards Part D of the Invitation for Offers and the stipulation by Queensland Health that, having regard to the potential application of the FOI Act, tenderers should specifically endorse information which they claimed might warrant exemption under s.45(1) or s.46(1) of the FOI Act (see paragraph 40 above), it is clear from my examination of the contents of the tender documents themselves, that none of the tenderers so endorsed any of the information contained in their tender documents.

46. I do not consider that clause 14 of the Invitation for Offers (reproduced at paragraph 40 above), when properly construed in the light of the whole of the document (and

especially the segments of Part D that are also reproduced at paragraph 40 above), amounts to or involves any assurance of confidential treatment by Queensland Health of tenders submitted. Clause 14 must be understood in light of the customary practice in Queensland (in both state and local government) of publicly announcing, at the opening of offers, the name of each tenderer and the overall tender price submitted. Clause 14 indicates a departure from customary practice in terms of what information Queensland Health would publicly disclose, at the opening of offers, and upon acceptance of an offer. Only the names of those who submitted tenders, and the names of the successful tenderers, would be publicly (and voluntarily) disclosed, and not any pricing details. (In this case, there was no overall tender price submitted by tenderers as they were not tendering to undertake a specific job, but to be part of a panel of legal advisers who would provide advice and other legal services to Queensland Health as and when needed. Accordingly, each of the tenderers explained in their tender documents the different bases upon which they proposed charging Queensland Health for their services, depending on the type of work involved.)

47. I do not consider that clause 14 can be relied on as any support for a contention that information in the tender documents was communicated to Queensland Health in confidence, even in respect of pricing details. Clause 14 is directed only to making clear what information Queensland Health would, and would not, publicly and voluntarily disclose at the opening of offers. I consider that the segments of Part D quoted at paragraph 40 above are the only parts of the Invitation for Offers that have particular relevance to the issue of whether information in the tenders was communicated to Queensland Health in confidence.

48. As to Allens' argument regarding the marking of the boxes in which it delivered its tender documents to Queensland Health, while Allens may now contend (in the face of the applicant's FOI access application) that it intended such a marking to amount to an express request for confidential treatment of the contents of the boxes, it is necessary for me to examine objectively the relevant circumstances that existed at the time. As the Information Commissioner observed in *Re "B"* at pp.318-319 (paragraph 91):

> *… the confider's conduct cannot unilaterally and conclusively impose an obligation of confidence. It has already been noted above (at paragraph 71(h)) that 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. In respect of the third element of the equitable action for breach of confidence, labelling of this kind (assuming it reflects the confider's genuine consideration of the nature of the information and of the need for restrictions on its use by the confidant, and is not simply routine rubber-stamping without genuine consideration) will ordinarily constitute a relevant factor to be evaluated, in the light of all the relevant circumstances, in determining whether an enforceable*

> *obligation of confidence is imposed, but it will not frequently, of itself, be conclusive of the issue. Indeed, properly construed according to its context, a "confidential" marking on a letter or other document may not have been intended at all by the author to relate to the imposition of enforceable obligations of confidence: it may merely indicate, as was found by the Commonwealth AAT to be the case in* Re Wolsley and Department of Immigration *(1985) 7 ALD 270 at 274, that the author of the document wished it to reach its addressee without being opened by an intermediary.*

49. As noted above, clause 13 of the Invitation for Offers specified that all tenderers should, when delivering their tenders to Queensland Health, prominently mark their sealed envelopes or boxes "Confidential". I consider that in making that stipulation, Queensland Health was not intending that such a marking operate as an obligation upon it to accord the tender documents confidential treatment. Rather, I consider that such a marking was intended to safeguard the handling of the documents within Queensland Health, so as to ensure that if they were somehow misdirected, those receiving them would be alerted to their significance and the fact that they were submitted in response to an Invitation for Offers that was yet to be evaluated. That safeguard was made all the more important by the fact that the Invitation for Offers provided that the tender documents could be posted to Queensland Health, perhaps increasing the possibility that the tender documents could go astray, or at least initially not be received by the correct officer within Queensland Health. In addition, the request for such a marking by Queensland Health may also have been intended to remind those officers within Queensland Health who handled the documents during the evaluation process, that the documents were at that stage to be treated confidentially, and their contents not to be publicly disclosed, in accordance with clause 14 of the Invitation for Offers.

50. I do not consider that any greater significance can properly be attributed to the "Private & Confidential" marking on the boxes in which Allens delivered its tender documents to Queensland Health. Clause 14.4 and Part D of the Invitation for Offers (quoted at paragraph 40 above) disclose that Queensland Health specifically drew to the attention of the tenderers, the operation of the FOI Act and the possibility of disclosure of the contents of the tender documents. It stipulated the need for the tenderers, if they desired confidential treatment of any of the contents of the tender documents, to make a specific request in that regard. (As I have noted, none of the tenderers did so.) Given the operation of those parts of the Invitation for Offers, I do not think that it is reasonable to expect that Queensland Health would have intended or understood that a marking of "Private and Confidential" on a box or envelope, should give rise to a binding obligation of confidence in respect of all tender documents contained therein.

51. Accordingly, I do not accept the contention by Allens that the marking of "Private & Confidential" on the boxes in which it submitted its tender documents was sufficient to

impose an obligation of confidence on Queensland Health in respect of all the information contained in the boxes.

52. I also have some difficulty with the contention by Allens that the failure to endorse material in accordance with paragraph 3, Part D of the Invitation for Offers (see paragraph 40 above) is merely a procedural matter, which is not determinative of the substantive issue of whether there is a duty of confidence. It is true that the following observations by the Information Commissioner in *Re "B"* (at p.318, paragraphs 89-90) afford support for the contention put by Allens:

> *89. The Federal Court in* Smith Kline & French *accepted that equity may impose an obligation of confidence upon a defendant having regard not only to what the defendant actually knew, but to what the defendant ought to have known in all the relevant circumstances. In cases decided under s.45(1) of the Commonwealth FOI Act (prior to its 1991 amendment) the Federal Court had consistently held that the determination of whether information was provided in circumstances importing an obligation of confidence is essentially a question of fact, which depends upon an analysis of all the relevant circumstances, and it is not necessary for there to have been an express undertaking not to disclose information; such an obligation can be inferred from the circumstances: see* Department of Health v Jephcott *(1985) 9 ALD 35; 62 ALR 421 at 425;* Wiseman v Commonwealth of Australia *(Unreported decision, Sheppard, Beaumont and Pincus JJ, No. G167 of 1989, 24 October 1989);* Joint Coal Board v Cameron *(1989) 19 ALD 329, at p.339.*
>
> *90. It is not necessary therefore that there be any express consensus between confider and confidant as to preserving the confidentiality of the information imparted. In fact, though one looks to determine whether there must or ought to have been a common implicit understanding, actual consensus is not necessary: a confidant who honestly believes that no confidence was intended may still be fixed with an enforceable obligation of confidence if that is what equity requires following an objective evaluation of all the circumstances relevant to the receipt by the confidant of the confidential information.*

53. However, when one undertakes an objective evaluation of all the relevant circumstances, I do not accept that the fact that Allens (and, indeed, all of the tenderers) did not endorse any information in their tender documents in the manner stipulated in paragraph 3 of Part D of the Invitation for Offers, can be dismissed so lightly. Queensland Health was not in this instance dealing with, say, clerical officers in transport firms, or in material supply firms. Its Invitation for Offers was addressed to practising lawyers, and:

1. drew specific attention to the potential for disclosure of information under the FOI Act; and

2. made a specific stipulation as to how lawyers responding to the Invitation for Offers should draw to the attention of Queensland Health any request for confidential treatment of any information contained in their tender documents.

54. I consider that Queensland Health was entitled to expect that a firm of lawyers that wished to submit a tender would read the Invitation for Offers carefully, and would be capable of appreciating the legal significance of the paragraphs from Part D that are reproduced at paragraph 40 above. On my analysis of the relevant facts and circumstances attending the communication of the matter in issue, I consider that the fact that none of the tenderers endorsed any part of their tender documents in accordance with paragraph 3 of Part D of the Invitation for Offers, is the most significant factor affecting the question of whether or not Queensland Health ought to have known that confidential treatment of the tender documents was required, and whether or not equity would treat Queensland Health as conscience-bound to deal with the tender documents in confidence. I am inclined to agree with the analysis by Mr Thomas and Dr Youngman in their respective decisions on behalf of Queensland Health (see paragraphs 41 and 42 above) which treated this factor as determinative in finding that Queensland Health was not subject to an obligation of confidence. It seems to me unlikely that equity would impose an obligation of confidence on Queensland Health in circumstances where Queensland Health was entitled to believe that none of the tenderers wished to seek confidential treatment in respect of any of the material they submitted.

55. It remains possible *(cf.* paragraph 90 of *Re "B"*; quoted at paragraph 52 above) that a tenderer could have communicated information to Queensland Health that, on its face, was information of such commercial sensitivity to the tenderer that equity would hold that Queensland Health ought to have known that confidential treatment was required, despite the omission of the tenderer to draw attention to that specific information and request confidential treatment. It will be sufficient for the purposes of this case if I record that I am satisfied from my examination of the matter in issue that, apart from the information which I have found below has sufficient commercial sensitivity to qualify for exemption under s.45(1)(c) of the FOI Act, there is no information contained in the tender documents submitted by Allens or by Hunt & Hunt (or, indeed, by any of the other tenderers) that might attract an equitable obligation of confidence on the basis indicated in the preceding sentence.

56. It is unnecessary for me to consider whether the matter in issue which I have found below qualifies for exemption under s.45(1)(c) of the FOI Act would also qualify for exemption under s.46(1)(a) of the FOI Act. However, I find that none of the other matter remaining in issue satisfies requirement (c) to found an action in equity for breach of confidence, and hence it does not qualify for exemption under s.46(1)(a) of the FOI Act.

57. I should add that, even if any of the tenderers had stipulated that they sought confidential treatment for specified information, it would not necessarily follow that Queensland Health thereby automatically became subject to an obligation of confidence in respect of that specified information. The language of paragraph 7 of Part D of the Invitation for Offers (see paragraph 40 above) makes it clear that Queensland Health was not promising confidential treatment of such specified information, only that it would give special attention to whether or not confidential treatment was required. That is consistent with the legal obligations of a government agency. The High Court of Australia has held that public interest considerations (relating to the public's legitimate interest in obtaining information about the affairs of government) 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, that has purportedly been supplied in confidence by parties outside government: see *Esso Australia Resources Ltd & Ors v Plowman & Ors* (1995) 183 CLR 10; *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662; *Re Cardwell Properties Pty Ltd & Williams v Department of the Premier, Economic and Trade Development* (1995) 2 QAR 671 at pp.693-698, paragraphs 51-60.

58. Government agencies are accountable to the public regarding the decisions they make to award tenders for the performance of work that is to be paid for from public funds. Agencies must be able to demonstrate that tender processes have been carried out fairly and equitably, and that the successful firms were the best candidates, in terms of efficiency, effectiveness and economy in the delivery of services to be paid for from public funds. Such considerations would have to be weighed against the adverse consequences for a tenderer of disclosure of commercially sensitive information, in deciding precisely what information could or could not be disclosed by Queensland Health, consistent with conscionable conduct on its part.

Section 46(1)(b)

59. Matter will be exempt under s.46(1)(b) if:

1. it consists of information of a confidential nature;

2. it was communicated in confidence;
3. its disclosure could reasonably be expected to prejudice the future supply of such information; and

4. the weight of the public interest considerations favouring non-disclosure equals or outweighs that of the public interest considerations favouring disclosure.

(See *Re "B"* at pp.337-341; paragraphs 144-161.)

60. The first two requirements for exemption under s.46(1)(b) are similar in nature to requirements (b) and (c) to found an action in equity for breach of confidence. I note that some of the matter in issue is not information of a confidential nature, for the reasons explained at paragraph 37 above. As to the second requirement for exemption under s.46(1)(b), the Information Commissioner explained the meaning of the phrase "communicated in confidence", at paragraph 152 of *Re "B"*, as follows:

> *I consider that the phrase "communicated in confidence" is used in this context to convey a requirement that there be mutual expectations that the information is to be treated in confidence. One is looking then for evidence of any express consensus between the confider and confidant as to preserving the confidentiality of the information imparted; or alternatively for evidence to be found in an analysis of all the relevant circumstances that would justify a finding that there was a common implicit understanding as to preserving the confidentiality of the information imparted.*

61. The test inherent in the phrase "communicated in confidence" in s.46(1)(b) requires an authorised decision-maker under the FOI Act to be satisfied that a communication of confidential information has occurred in such a manner, and/or in such circumstances, that a need or desire, on the part of the supplier of the information, for confidential treatment (of the supplier's identity, or information supplied, or both) has been expressly or implicitly conveyed (or otherwise must have been apparent to the recipient) and has been understood and accepted by the recipient, thereby giving rise to an express or implicit mutual understanding that the relevant information would be treated in confidence (see *Re McCann and Queensland Police Service* (1997) 4 QAR 30 at paragraph 34).

62. Unlike the position under s.46(1)(a) where equity might, in the circumstances of a particular case, impose an obligation of confidence even where the recipient of information honestly believed that no confidence was intended, s.46(1)(b) operates by reference to mutual understandings. In the present case, as explained at paragraphs 41-42 and 50-54 above, there is no basis for a finding that Queensland Health understood and accepted that any of the tenderers sought confidential treatment of any information contained in their tender documents. I am not satisfied, therefore, that the second requirement for exemption under s.46(1)(b) is established. On that basis, I find that none of the matter in issue qualifies for exemption under s.46(1)(b).

63. Although not strictly necessary, I will record some observations in respect of requirement (c) for exemption under s.46(1)(b). I note the Information Commissioner's comments in *Re "B"* at paragraph 161:

> *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.*
>
> (my underlining)

64. I do not consider that it is reasonable to expect that a substantial number of organisations would refrain from tendering for the award of government contracts, simply because some of the information they submit in support of their successful offers may become subject to disclosure under the FOI Act subsequent to the award of the tender (particularly when such organisations are warned of the possibility of disclosure and advised how to take steps to request protection for information of particular sensitivity). It is possible that some sensitive commercial information would not be volunteered if it could not be safeguarded from disclosure to competitors. However, if the information was required for evaluation of the tender proposals, a tenderer would either have to withdraw from the process, or seek agreement on a contractual obligation not to disclose the information that was of particular commercial sensitivity. I have found below that some information in the tender documents has sufficient commercial sensitivity to qualify for exemption under s.45(1)(c) of the FOI Act. However, nearly all of that information had to be supplied for the purpose of evaluation of the tenders, and I doubt that disclosure even of that information could reasonably be expected to prejudice the future supply of like information. It will be sufficient for present purposes if I record a finding that, aside from the matter in issue which I have found below is exempt matter under s.45(1)(c), I am not satisfied that disclosure of the balance of the matter in issue could reasonably be expected to prejudice the future supply of such information.

65. I note that Allens simply asserted that disclosure of their tender documents would prejudice the future supply of similar information by that firm to Queensland Health. As I have noted above, whether or not Allens would refrain from participating in government tender processes in the future is not the relevant test. The issue is whether it is reasonable to expect that a substantial number of organisations would so refrain. For the reasons I have outlined, I do not accept that that is a reasonable expectation.

66. Given my findings above, it is not necessary for me to address the public interest balancing test which is incorporated in s.46(1)(b).

Application of s.45(1) of the FOI Act

67. 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.*

68. The Information Commissioner considered the application of s.45(1) of the FOI Act in some detail in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491. He stated that s.45(1) is the primary vehicle for reconciling the main objects of the FOI Act (i.e., promoting open and accountable government administration, and fostering informed public participation in the processes of government) with legitimate concerns for the protection from disclosure of commercially sensitive information. Its basic object is to provide a means whereby the general right of access to documents in the possession or control of government agencies can be prevented from causing unwarranted commercial disadvantage to:

> (i) persons carrying on commercial activity who supply information to government, or about whom government collects information; or

(ii) agencies which carry on commercial activities.

69. In *Re Cannon* (at p.516, paragraph 66), the Information Commissioner discussed the relationship between s.45(1)(a), s.45(1)(b) and s.45(1)(c):

> *Just as the words of s.45(1)(b) exclude trade secrets from its sphere of operation, the s.45(1)(c) exemption is so worded (see paragraph 25 above) that it applies only to information other than trade secrets or information mentioned in s.45(1)(b). This means that particular information cannot ordinarily be exempt under more than one of the s.45(1)(a), s.45(1)(b) or s.45(1)(c) exemptions. (However, an agency or other participant may wish to argue on a review under Part 5 of the FOI Act that information is exempt under one of those provisions, and put arguments in the alternative as to which is applicable). Whereas both s.45(1)(a) and (b) require that the information in issue must have an intrinsic commercial value to be eligible for exemption, information need not be valuable in itself to qualify for exemption under s.45(1)(c). Thus, where information about a business has no commercial value in itself, but would, if disclosed, damage that business, s.45(1)(c) is the only one of the exemptions in s.45(1) that might be applicable. For information to be exempt under s.45(1)(c) it must satisfy the cumulative requirements of s.45(1)(c)(i) and s.45(1)(c)(ii), and it must then survive the application of the public interest balancing test incorporated within s.45(1)(c).*

70. The requirements for exemption under both s.45(1)(b) and s.45(1)(c) turn in large measure on the test imported by the phrase "*could reasonably be expected to*". In his reasons for decision in *Re "B"* (at pp.339-341, paragraphs 154-160), the Information Commissioner analysed the meaning of that phrase by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the *Freedom of Information Act 1982* Cth. Those observations are also relevant here. In particular, the Information Commissioner said in *Re "B"* (at pp.340-341, paragraph 160):

> *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.*

71. The ordinary meaning of the word "expect" which is appropriate to its context in the phrase "could reasonably be expected to" accords with these dictionary meanings: "to regard as probable or likely" (Collins English Dictionary, Third Aust. ed); "regard as likely

to happen; anticipate the occurrence ... of" (Macquarie Dictionary, 2nd ed); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).

Application of s.45(1)(a) of the FOI Act to the matter in issue

72. In his internal review decision, Dr Youngman stated that he was of the view that some of the information contained in the tender documents satisfied the requirements for exemption under s.45(1)(a):

> *I consider that some information contained in the matter does have the quality of a "trade secret". The names and contact details of individuals who provided instructions on behalf of clients to the solicitors is, in my view, a matter which can properly be characterised as a trade secret. I would not accept the proposition that the mere identities of clients of a legal firm would be regarded as a trade secret for the purposes of paragraph (a). However, I do accept that individual client contact details is information which gives an advantage to a firm of solicitors over its competitors who do not have the information and therefore cannot use it. It would be one thing simply to attempt to obtain business by contacting the client of another solicitor; it would however be a different and much easier task to contact an individual within a client organisation who was responsible for giving instructions to solicitors and the identity of that person would, in my view, be regarded as a sufficient advantage in the course of trade so as to amount to a trade secret.*

73. In their letter dated 6 July 1999, Deacons stated that they "adopted" the observations of Dr Youngman in respect of the application of s.45(1)(a) of the FOI Act to individual client contact details. In their letter dated 22 June 1999, Allens cited reliance upon s.45(1)(a) of the FOI Act, although they provided no information in support. None of the other tenderers raised the application of s.45(1)(a) of the FOI Act.

74. In *Re Cannon*, the Information Commissioner discussed the meaning of "trade secrets" at pp.507-511 (paragraphs 42-49):

> *43. In the* Ansell Rubber *case, Gowans J found assistance in the American* Restatement of the Law of Torts *(1939; Volume 4, paragraph 757) which refers to a trade secret as* "any formula, pattern or device or compilation of information which gives an advantage over competitors who do not know or use it". *Gowans J referred to the following passage from the* Restatement of the Law of Torts*:*

> Secrecy. *The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret. Substantially, a trade secret is known only in the particular business in which it is used. It is not requisite that only the proprietor of the business know it.*
>
> *He may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy. Others may also know of it independently, as, for example, when they have discovered the formula by independent invention and are keeping it secret. Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information. An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.*

…

49. *The net result of the Full Court's discussion* [in *Searle Australia v Public Interest Advocacy Centre* (1992) 108 ALR 163] *of the meaning of "trade secrets" appears to be that the term should be given its usual meaning in Australian law, which appears to correspond very closely to the passage (set out at paragraph 43 above) from the 1939 American* "Restatement of the Law of Torts", *as referred to by Gowans J in the* Ansell Rubber *case and subsequently applied by the Supreme Court of Victoria in* Mense v Milenkovic *[1973] VR 784. Certainly the Full Court accepted that the six indicia set out in that passage are appropriate for use as guides. As to the seventh added by the Tribunal in* Re Organon, *the Full Court emphasised that technicality is not a requirement, although the more technical the information is, the more likely it is that, as a matter of fact, the information will be classed as a trade secret. The other factors that received emphasis in the Full Court's judgment in* Searle *(nearly all of which are covered in the passage from the American* "Restatement of the Law of Torts" *which is set out at paragraph 43 above) are:*

- *the necessity for secrecy, including the taking of appropriate steps to confine dissemination of the relevant information to those who need to know for the purposes of the business, or to persons pledged to observe confidentiality;*
- *that information, originally secret, may lose its secret character with the passage of time;*
- *that the relevant information be used in, or useable in, a trade or business;*
- *that the relevant information would be to the advantage of trade rivals to obtain;*
- *that trade secrets can include not only secret formulae for the manufacture of products, but also information concerning customers and their needs.*

75. As I noted above at paragraph 45, clause 3 of Part D of the Invitation for Offers specifically stated that where any information provided by a tenderer was claimed to relate to a trade secret, it should be endorsed accordingly. Again, none of the tenderers endorsed any of the information contained in their tenders with a claim that it constituted a trade secret. The question of whether or not certain information is properly characterised as a trade secret is essentially a question of fact, but, as stated in the passages quoted above, the extent of the measures taken to guard the secrecy of the information is a relevant indicator. The fact that none of the tenderers made a specific request to Queensland Health for confidential treatment of any segment of information in their tenders, or sought an assurance of confidential treatment in respect of information asserted to comprise a trade secret, tends to confirm the view I have formed, on the basis of my inspection of the matter in issue, that none of the information in issue has the qualities which would justify it being characterised as a trade secret.

76. While the passages quoted above indicate that, in an appropriate case, information concerning the customers of a business and their particular needs may amount to a trade secret of the business, I am not satisfied that the names of the tenderers' clients as disclosed in the tender documents (or the name and contact details of the primary contact person within client organisations), can properly be characterised as a trade secret. I am not satisfied that the required element of secrecy exists with respect to such information. I consider that it is relatively well-known within the legal profession, particularly amongst the larger law firms (and even, in more general terms, within the business community at large), which law firms act for particular clients, at least in respect of major clients. Indeed, law firms often take every opportunity to publicise the fact that they act for certain major clients (presumably with the client's express or implicit consent) as it is regarded as a matter of prestige and a way of attracting other clients to the business. The provision of many, if not most, legal services, involves law firms interacting (on their client's behalf) with other law firms, businesses and members of the public, without there ordinarily being any confidentiality about the fact that a particular law firm is acting for a particular client, and the fact of these solicitor-client relationships tends to become common knowledge in the legal services industry, and between businesses engaged in competition (or in providing

services for each other) in a particular business sector. While it is open to a law firm to take steps to try to preserve confidentiality for the fact that it is acting for a particular client (and clients sometimes have strategic reasons for wishing to do so), law firms do not ordinarily take any stringent measures to safeguard the secrecy of their clients' identities. I do not consider that knowledge of the mere fact that a particular law firm acts for a particular client (without details of, for example, the particular needs of the client and the type of work that is performed for them) is likely (apart from an exceptional case) to be information of value to other law firms.

77. As to the identity of the particular person within a client organisation who is the primary contact for giving instructions to law firms, I am not satisfied that that is secret information which would have value to competitors, or that it would not be relatively easy for competitors to obtain (since it is not information which a client organisation would ordinarily wish to keep secret). I am not satisfied that it is information which could give a competitor any particular advantage, even if the competitor were minded to attempt to seek the chance to perform some of that client organisation's legal work in preference to, or in addition to, a legal firm already retained by the client.

78. I am not satisfied that any of the information contained in the tender documents in issue can properly be characterised as a trade secret, and I find that none of the matter in issue qualifies for exemption under s.45(1)(a) of the FOI Act.

Application of s.45(1)(b) of the FOI Act to the matter in issue

79. The Information Commissioner explained the correct approach to the interpretation and application of s.45(1)(b) of the FOI Act at pp.511-516 (paragraphs 50-65) of *Re Cannon*, of which the following paragraphs are relevant for present purposes:

> *54. It seems to me that there are two possible interpretations of the phrase "commercial value" which are not only supportable on the plain meaning of those words, but also apposite in the context of s.45(1)(b) of the FOI Act. The first (and what I think is the meaning that was primarily intended) is that information has commercial value to an agency or another person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged. The information may be valuable because it is important or essential to the profitability or viability of a continuing business operation, or a pending, "one-off" commercial transaction. According to the Collins English Dictionary (Aust. Ed.) the word "commercial" means "of, connected with or engaged in commerce; mercantile", and the word "commerce" means "the activity embracing all forms of the purchase and sale of goods and services".*
>
> *55. The second interpretation of "commercial value" which is reasonably open is that information has commercial value to an agency or another person if a genuine, arms-length buyer is prepared to pay to obtain that information from that agency or person. It would follow that the market value of that information would be destroyed or diminished if it could be obtained from a*

government agency that has come into possession of it, through disclosure under the FOI Act. The fact that there is a genuine market for information used by an agency or another person in carrying on commercial activity could also be regarded as a strong indication that the information is valuable for the purpose of carrying on that commercial activity; i.e. that the primary meaning referred to above is satisfied. I do consider, however, that information can be capable of having a commercial value to an agency or another person even though it could not be demonstrated that an arms-length buyer would be prepared to pay to obtain that information. The difficulties of proof of the material facts which would bring information within the ambit of the second meaning of "commercial value" to which I have referred will probably mean that it is not relied upon on many occasions.

56. *The information in issue must have commercial value to an agency or another person at the time that an FOI decision-maker comes to apply s.45(1)(b) to the information in issue. This proposition is illustrated by observations in reported cases of the Commonwealth AAT to the effect that:*

- *information which is aged or out-of-date has no remaining commercial value (see for example* Re Brown and Minister for Administrative Services *(1990) 21 ALD 526 at p.533, paragraph 22; and it may be that the value of information relating to a major, "one-off" commercial transaction, such as the sale of a government property, is spent once the transaction is consummated: for the American approach in these circumstances see* Tennessean Newspaper Inc v Federal Housing Administration *464 F.2d 657 (6th Cir 1972);* Benson v General Service Administration *289 F.Supp 590 (DC Wa 1968)); and*

- *information which is publicly available has no commercial value which can be destroyed or diminished by disclosure under freedom of information legislation (see* Re Public Interest Advocacy Centre and Department of Community Services and Health and Schering Pty Ltd *(1991) 23 ALD 714 at p.724, paragraphs 44 and 46).*

…

61. *Establishing that the matter in issue comprises information which itself has a commercial value to an agency or another person is merely the first hurdle. It must then be established that disclosure of the information in issue could reasonably be expected to destroy or diminish its commercial value. Much information which is valuable for the purpose of carrying on commercial activity will remain valuable even though it is fairly widely disseminated, for example, the trade or professional knowledge commonly*

referred to as "know-how", which characteristically is generally known among competitors in a particular industry.

Submissions of the participants

80. The basic thrust of the submissions lodged by those participants who relied upon s.45(1)(b) in support of their cases for exemption can be summarised by the following extracts:

(a) We submit that the response to the Invitation for Offers as a whole is a document which has a commercial value …. By its very nature, as a document created in the course of the activity carried out by this firm, it is a document of value for the purposes of carrying on the activity in which this firm is engaged. … The documents … admittedly contain some information which is publicly available. However, they also contain information which is not in the public domain such as client identifying material, and material relating to the charge out rates to be employed in relation to work under the tender. …

(Deacons' letter to Queensland Health dated 3 March 1999)

(b) The tender document contains information important to the profitability of the firm. Of particular concern is the information concerning specific pricing details, details of work performed for various clients and terms on which we are prepared to act for Queensland Health.

(Allens' letter to Queensland Health dated 25 February 1999)

(c) Taking the tender submission as a whole, I consider that the entirety of the submission is a document which consists of information that would have a commercial value to the firm compiling the tender. …I consider that the entirety of the document is of commercial value in that the document itself is valuable for the ongoing business operations of the firm.

… I see little difficulty in concluding that information contained in the document and the very structure of the document would be of ongoing value for other legal tenders, in particular in circumstances where the document has been produced for what is, in effect, the first such tender within Queensland Health, and as far as I am aware, within the Queensland Government generally. I consider that the tender would have ongoing value, at this moment in time at least, and could be used for similar tenders in the future. …

I consider further that a tender for legal services of the kind presently under consideration has characteristics which readily distinguish it from a tender, for example, for a standardised … product. … with respect to legal services,

an important element in the delivery of those services will be the service strategies and quality assurance systems put in place by a firm in order to achieve an optimum and successful delivery of services. The ultimate delivery of those services …could be arrived at in many different ways and by different processes, and the end result may well be determined by those processes. The recording of those processes within the tender materials, therefore, in my view, is itself of commercial value.

In addition, I consider that the very detail and manner of presentation of the tender, as well as aspects of the compilation and packaging of the tender materials is itself a matter which would have a commercial value.

… I consider that it is a real likelihood that a genuine arms-length buyer would be prepared to pay an amount of commercial substance if that person could obtain, in return, the entire tender documentation. I consider that this follows, in part, from the fact that the information in the tender was obviously prepared with attention to detail and at some considerable expenditure of time and money. There is no reason to believe that a person would not pay a commercial sum to obtain documentation which would in turn save that person at least some reasonable proportion of that time and money, even though that person could not obviously reproduce the tender in its entirety. …

(Queensland Health's initial decision dated 26 March 1999)

81. In support of its case for disclosure, the applicant submitted that:

(a) the Invitation for Offers closed on 25 September 1998 and, as such, any information contained in the tender has aged or become sufficiently out of date such that it has no remaining commercial value;

(b) the disclosure of costs and specific pricing will not destroy or diminish the commercial value of the information as it will not give rise to an advantage to the applicant due to the very significant differences between the firms in various business areas including business structure, size, available capital, human resource assets, past experience and geographical location;

(c) the professional quali

(Applicant's letter dated 19 September 2000)

Analysis

82. Dealing first with the proposition that the tender documents considered as a whole have a current commercial value within the meaning of s.45(1)(b), I have difficulty

accepting that the overall tender documents satisfy either of the meanings of "commercial value" discussed at paragraph 79 above.

83. Dealing first with the secondary meaning of "commercial value", I am not satisfied that there is a market for the purchase of these tender documents which are now three years old. There is no evidence before me from any of the tenderers, or from Queensland Health, of the existence of genuine, arms-length buyers prepared to pay the tenderers to obtain copies of their tender documents. I consider it improbable that such a market exists, and the suggestion that it does is too speculative to form the basis for a finding, in the absence of reliable supportive evidence.

84. There is, likewise, no evidence before me to explain the precise nature of the commercial value which the information (or specific segments of it) in the respective tender documents is said to have for the respective tenderers, for the purposes of their on-going commercial activities, or to explain how the value of the information would be diminished by its disclosure. (Most submissions were directed towards the application to the tender documents of s.45(1)(c), an exemption which does not require the information in issue to have intrinsic commercial value.) Much of the information in the documents in issue is specific to the kinds of legal services which the tenderers understood would be required by Queensland Health, as the prospective client. To the extent that it is more generic information, which might be used from tender to tender (e.g., details of experience and expertise of particular staff members, details of Quality Assurance accreditation, *et cetera*), I am not satisfied that its disclosure could reasonably be expected to diminish any value it has to the respective tenderers. Other information specific to this tender could be used by the tenderer for its precedent value, and adapted for use in future tenders. However, its disclosure could not reasonably be expected to diminish any value it has for a tenderer for such ongoing commercial purposes, except perhaps in the case of any information having a degree of innovation or novelty which gave the tenderer a competitive advantage over other law firms, that could be diminished by disclosure of the information. From my examination of the matter in issue, however, I have not been able to discern any information of that kind. In general, the kinds of competitive advantage asserted in the tender documents relate to the quality and expertise of the tenderers' professional staff, their dedication to client service, and the extent of resources and established systems which larger legal firms are able to call upon for client education, risk management *et cetera* (and which would be beyond the resources of most smaller firms, even if they were minded to attempt to compete).

85. I do not accept the finding of Queensland Health that the overall structure of the tender documents gives them a commercial value within the meaning of s.45(1)(b) of the FOI Act. The structure of the tender documents was governed by the structure of the Invitation for Offers issued by Queensland Health and the fact that it required responses to a series of questions. I can see no particular innovation by any of the tenderers in the way in which they have formatted or presented their tender documents. There is no evidence before me to suggest, for example, that the particular style or presentation of

any of the tender documents were significant factors which influenced Queensland's Health decision regarding the award of the contract.

86. I am not satisfied that any of the information contained in the tender documents in issue has a commercial value to any of the respective tenderers that could reasonably be expected to be diminished by its disclosure, and I find that none of the matter in issue qualifies for exemption under s.45(1)(b) of the FOI Act.

Application of s.45(1)(c) of the FOI Act to the matter in issue

87. The correct approach to the interpretation and application of s.45(1)(c) is explained in *Re Cannon* at pp.516-523 (paragraphs 66-88). In summary, matter will be exempt under s.45(1)(c) of the FOI Act if:

(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 disclosure of the matter in issue would, on balance, be in the public interest.

Section 45(1)(c)(i) - Information concerning business, professional, commercial or financial affairs

88. The correct approach to the characterisation test required by s.45(1)(c)(i) of the FOI Act is explained in *Re Cannon* at pp.516-520 (paragraphs 67-76). I am satisfied that the matter in issue concerns the business, professional, commercial or financial affairs of the tenderers.

First limb of s.45(1)(c)(ii) - Adverse effect

89. The common link between the words "business, professional, commercial or financial" in s.45(1)(c) is to activities carried on for the purpose of generating income or profits. Thus, an adverse effect under s.45(1)(c) will almost invariably be pecuniary in nature, whether directly or indirectly (see p.520, paragraphs 81-82, of *Re Cannon*). At p.521, paragraph 84, of *Re Cannon*, the Information Commissioner said:

> *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, 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. (This yardstick is also appropriate when considering the application of s.45(1)(b).) A relevant factor in this regard would be whether the agency or other person enjoys a monopoly position for the supply of particular goods or services in the relevant market (in which case it may be difficult to show that an adverse effect on the relevant business, commercial or financial affairs could reasonably be expected), or whether it operates in a commercially competitive environment in the relevant market.*

90. There is no doubt in this case that the applicant and all of the tenderers (including Crown Law) operate in a highly competitive market for the provision of legal services.

Submissions of the participants

91. The submissions of the tenderers in support of their respective cases that disclosure of the tender documents could reasonably be expected to have an adverse effect on their business, professional, commercial or financial affairs can be summarised by way of the following extracts:

(a) *Crown Law presently operates on a user-pays basis and participated in a competitive tender process with other legal firms across the State for the provision of legal services to Queensland Health.*
I note that it is intended that Queensland Health conduct another tender process for the provision of its legal services in three years time. If other legal firms were to be given access to the information contained in the Crown Law tender document, this would cause competitive harm to Crown Law in future tender processes. Access to the information contained in the document would clearly place other legal firms who

were not successful in the recent tender process in an advantageous position in future tender processes.
The document contains details of current charge-out rates and other costings associated with Crown Law's bid to provide legal services to Queensland Health.
Further, the document details the experience and expertise of Crown Law and contains the profiles of professional staff. Access to such information by Crown Law's competitors could potentially lead to "poaching" of staff by private legal firms.

(Crown Law's letter to Queensland Health dated 4 March 1999)

(b) *The prices quoted in the tender document are given in unit rates, using basic unit measurements, that is, time costings, at which a business is liable to measure its basic costs of service. In* Dalrymple's *case, the Information Commissioner was prepared to accept that that type of* [information] *could be* [of] *considerable commercial sensitivity. …*
In addition, we have already noted that contained in a number of the documents is a summary of the work carried out for particular clients and the identity of particular client agencies of this firm. …
… We are of the view that disclosure of this information to the market competitors of this firm would provide our competitors with a survey of our expertise in this particular area, therefore allowing them to more effectively formulate future tenders and develop strategies for the attraction of clients away from this firm. Disclosure of that information would reveal information about the state of the commercial relationship between this firm and its clients. …

(Deacons' letter to Queensland Health dated 3 March 1999)

(c) *… The adverse effect would be of a pecuniary nature … in the sense to which I have referred when assessing commercial value. The tender information is not in the public domain, it is not common knowledge in the industry (even though individual details such as names of clients may be known in the legal services industry), it has been prepared with the expenditure of much time and effort and in my view its disclosure could reasonably be expected to adversely impact* [on] *the business of the firm in a pecuniary sense by conferring potential benefits of a relative kind upon competitors, permitting them to compete more effectively for future work of this kind. The legal firms, in my finding, operate not only in a commercially competitive environment in the legal services market generally … but may reasonably be expected to continue to operate in a competitive environment with respect to tenders in the governmental sphere, and I would consider, also in the private sphere where it appears that tendering for legal services has become much more common than it was in the past.*

(Queensland Health's initial decision dated 26 March 1999)

92. In its submission dated 19 September 2000, the applicant simply submitted that disclosure of the tender documents would not cause an unfair detriment to the tenderer in any future government tender because the information contained in the documents is out-of-date; the costing information contained in the documents is of little value to other firms because of the differences between firms operating in different business areas (such as structure, size, available capital, human resource assets and geographical location); and the professional qualifications and experience of members of staff of law firms is information which is publicly available in brochures and freely published on the internet.

Analysis

93. I am not satisfied that disclosure of the tender documents as a whole could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the respective tenderers. As already noted in paragraph 85 above, I do not consider that there is anything innovative or special, or otherwise liable to confer a competitive advantage, in the presentation, format, *et cetera*, of the respective tenders. Similarly, I have already observed that there is a considerable amount of information in the tender documents that is effectively public domain information so far as the legal services industry is concerned, and other information is specific to the relevant tenderer (given its structure, areas of specialty, staff and other resources, *et cetera*) such that it could not reasonably be expected to confer any competitive advantage on another firm (or corresponding competitive disadvantage to the relevant tenderer) in future competition for clients.

94. However, particular categories of information contained in the tender documents (which I will address by reference to the categories identified at paragraph 15 above) warrant more careful consideration in terms of whether or not disclosure could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the respective tenderers.

1.Experience and expertise of the tenderer, including details of clients and work performed for those clients.

95. The first part of Queensland's Health Invitation for Offers asked a series of questions about the offerer's experience or expertise in relation to handling health-related legal issues, legal issues unique to government departments, and legal services generally. With the exception of Hunt & Hunt, all of the tenderers responded to these questions by providing (with varying levels of detail) information about their clients and the particular types of work performed for those clients. (In the relevant part of its tender documents in which it gave examples of the type of work it had performed, Hunt & Hunt stated that *"For reasons of client confidentiality, we have not identified non-*

Queensland Health clients".)Some of the information provided is very specific and detailed in terms of the particular type of work which the tenderer has performed (or is continuing to perform) for the relevant client.

96. While I have explained at paragraph 37 above, that the fact that certain law firms act for certain major clients is generally common knowledge in the legal services industry, the same cannot be said in respect of the detailed information about work performed for particular clients, and the specific legal services needs of particular clients, that appear in most of the tender documents in issue. In the highly competitive market which exists today for the provision of legal services, to both government and private sector clients, I consider that there are reasonable grounds for expecting that a competitor with knowledge of not just the identity of another legal firm's client, but details of the specific legal services needs of that client, could obtain a competitive advantage (to the detriment of the firm presently retained by the client) in attempting to win business from that client. I consider that it is reasonable to expect that a firm motivated enough to win new business in its established areas of practice (or even to develop new areas of expertise), and armed with the type of specific client information which is contained in the first category of information in the tender documents, could gain assistance in marketing itself to another firm's clients by demonstrating an awareness of the client's specific legal services needs, and its ability to service those needs. I do not regard this scenario as merely speculative, given the highly competitive market in which providers of legal services operate, leading to a consistent focus on the attraction of new business and new clients.

97. I find that disclosure of those segments of information contained in category 1 of the tender documents which disclose details of work performed by the respective tenderers for identifiable clients, and information about the specific legal services needs of identifiable clients (and, indeed, any information of the same character that appears elsewhere in the tender documents) could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the respective tenderers, and hence that those segments of information are *prima facie* exempt from disclosure under s.45(1)(c) of the FOI Act, subject to the application of the public interest balancing test which is incorporated in s.45(1)(c).

2.Identity, and experience and relevant areas of expertise of the tenderers' staff members.

98. The second set of questions posed by Queensland Health in its Invitation for Offers related to the identity of those of the tenderer's employees who would be responsible for providing the required general legal services, and the individual experience and expertise of those persons.

99. In response to these questions, all of the tenderers identified their relevant staff members, their positions within the firm, and described, usually in the form of attached resumes, the experience and expertise of those persons. Some also provided organisational charts which illustrated the structure of the relevant groups within the

firm and the proposed structure of the team of staff who would be responsible for servicing Queensland Health's needs, were the relevant offer to be successful.

100. The adverse effect asserted in respect of this type of information was that disclosure would enable competitors to poach key employees of the respective tenderers. In response to the applicant's contention that information about a firm's staff members and their areas of expertise is publicised by firms, and is publicly available in the form of the firm's website, or in various brochures, Allens argued that the staff profiles contained in its tender documents were specifically prepared to respond to the needs of Queensland Health.

101. I think it must be accepted as correct that details about the staff of law firms, their qualifications, their areas of practice, and their general (and sometimes specific) areas of expertise, is information which effectively is in the public domain, so far as the legal services industry is concerned. I have noted at paragraph 37 above that profiles of staff can appear on a firm's website (see, for example, the websites of Allens and Deacons), in brochures publicising the firm's areas of practice, in client newsletters and bulletins, in material advertising seminars and conferences hosted by the particular firm, or at which staff of the firm will be presenting papers or conducting workshops, and in such publications as *Legal Profiles*. Similarly, general information about the firm's structure and its business operations, in terms of identifying its work groups and the staff of those work groups, can often be found in such material.

102. The fact that this type of information is relatively easy to obtain from publicly available sources makes it difficult to maintain that disclosure of the same type of information under the FOI Act could have an adverse effect on the relevant affairs of the tenderers. While I accept that that information may be available publicly in varying degrees of detail, having reviewed the staff profiles which are in issue in this review, I am not satisfied (with the exception of those segments of the profiles which contain details of particular work performed for identifiable clients) that disclosure of this type of information in the tender documents could reasonably be expected to have an adverse effect on any of the tenderers through poaching of key employees. I am unable to identify any other adverse effect which could reasonably be expected to follow from disclosure of this type of general information.

103. For the same reasons given at paragraphs 96 - 97 above, I find that references contained in staff profiles to specific work performed for identifiable clients, satisfy the requirements for exemption under s.45(1)(c)(i) and (ii) of the FOI Act. However, with respect to the remainder of the second category of information contained in the tender documents, I am not satisfied that its disclosure could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of any of the tenderers, and I find that it does not qualify for exemption under s.45(1)(c) of the FOI Act.

3. Method of costing proposed to be adopted by the tenderer.

104. The third set of questions posed by Queensland Health related to the proposed method of costing to be adopted by the tenderers in providing general legal services to Queensland Health. If time costing was proposed, the tenderers were asked to specify the hourly rates to be charged by the relevant staff members. Other questions were asked about the ability of the tenderers to give fixed rates, the cost of providing training programs to Queensland Health staff, the circumstances in which a premium would be charged, *et cetera*.

105. Also relevant to this area of costing is Form 6, which the tenderers were asked to complete regarding the circumstances in which they proposed to increase or otherwise vary their fees. Some of the tenderers also provided a schedule of rates which they proposed to charge for disbursements.

106. This is the most commercially sensitive category of information in issue, and although it is now more than three years old, and predates the introduction of the Goods and Services Tax (a costing factor which I consider is relatively easy to make allowance for), I do not consider that prices in the legal services market have moved to such an extent in the past three years as to substantially diminish the commercial sensitivity of this information. Moreover, it should be noted that only a small part of the costing information in issue refers to tangible figures in the form of specific hourly charge-out rates for particular staff of the respective tenderers, or specific charges for disbursements *et cetera.* Much of the information comprises proposals by the tenderers for areas where, say, they would be prepared to apply a discount to the standard hourly rates, or where a fixed rate could be appropriately charged, or where a discount could be applied to travel costs. As regards the area of variation of fees, I note that some of the tenderers proposed that a specific formula should apply to such variations. I consider that that type of information would be extremely useful to a competitor in formulating future tenders, or in competing in the market place generally, to the commercial disadvantage of the tenderers.

107. I am not convinced by the applicant's argument that the costing information in issue would be of little use or relevance to another firm because of differences in, for example, firm size, business operations, resources or geographical location. I consider that the very manner in which the tenderers proposed to approach the whole costing issue, regardless of the specific rates quoted, would be of use and interest to competitors. I also note that, despite the fact that there are clearly differences between the five tenderers in terms of size, available resources *et cetera*, those differences were not always reflected in the costing methodology proposed by the tenderers. That suggests that the applicant's argument about the impact of such differences on pricing strategies is not supported in practice.

108. I consider that disclosure of the costing information contained in the documents in issue could reasonably be expected to assist a competitor to compete more effectively with the tenderers not only in future tender processes, but also in the legal services market generally.

109. Moreover, I consider that there is an additional adverse effect about which the tenderers could properly be apprehensive. That is the prospect of disclosure of details of their costing proposals to existing clients or potential clients, who might be moved to agitate for a costing arrangement at least as beneficial as that offered to Queensland Health, and thereby have an adverse effect on the ability of the respective tenderers to negotiate individually with other clients to obtain the optimal commercial price for their legal services.

110. I therefore am satisfied that disclosure of the costing information contained in the tender documents in issue could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the tenderers, and I find that the requirements of both s.45(1)(c)(i) and (ii) are satisfied in respect of this category of information.

4.General services - including topics such as arrangements for use of counsel; timeliness; communication and reporting arrangements; adopting a proactive approach; conflict of interest situations; quality assurance accreditation; and local economic impact.

111. This part of the tender documents discusses a variety of topics in response to a series of questions posed by Queensland Health, such as - "how does your firm propose to utilise services of Counsel in providing general legal services?"; "how will your firm ensure that relevant deadlines are met?"; "what approach will your firm adopt to ensure that the general legal services that are provided are communicated effectively to Queensland Health?"; and "what physical means of reporting would your firm be capable of providing?" *et cetera.*

112. No adverse consequences could reasonably be apprehended from disclosure of some of this information, e.g., details of quality assurance accreditation. While, in theory, innovative responses to some of these questions could have given individual tenderers a competitive advantage (that might have been diminished by disclosure), having reviewed the information actually provided by the tenderers in response to these questions, I am not satisfied that any of it has any particular commercial sensitivity, such that its disclosure could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the tenderers. It appears to me that much of the information provided is commonsense in nature, and factually based, depending on the particular firm's resources and organisational structure. I do not consider that any of it is novel or innovative, either in content or presentation. While another firm may find such information interesting in terms of seeing how a successful tenderer framed its responses to the questions (much of it could not be adopted by a competitor because it simply would not be applicable to a competitor's operations), I am not satisfied that its disclosure could reasonably be expected to cause commercial disadvantage to the tenderers in future tender processes (even assuming that the same or similar questions were asked in other Invitations for Offers) or in the marketplace generally.

113. I therefore am not satisfied that the information contained within category 4 of the tender documents meets the requirements for exemption under s.45(1)(c)(ii) of the FOI Act.

5. Contact names and details of referees.

114. Queensland Health required each of the tenderers to supply the names and contact details of at least two referees for whom legal services of a similar nature to those required by Queensland Health had been provided by the tenderer.

115. I found at paragraph 77 above, that the name and contact details of the primary contact within client organisations did not qualify for exemption under s.45(1)(a) of the FOI Act. As I have explained, I am not satisfied that the mere identification of a firm's clients (including the relevant individual contact within the client organisation), without disclosure of specific details about the client's needs, and the legal services provided for those clients, would be information of value to other law firms. I do not accept that disclosure of that information alone could reasonably be expected to assist a competitor to poach a client. However, many of the tenderers included, when identifying a client as a nominated referee, a description of the type of work performed for that client. For the reasons explained at paragraphs 96 - 97 above, I am satisfied that disclosure of that information (if read in conjunction with the identity of the client) could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the respective tenderers. Accordingly, I find that the information contained in this category which identifies the type of work performed for the client, satisfies the requirements for exemption under s.45(1)(c)(i) and (ii) of the FOI Act. I am not, however, satisfied that mere disclosure of the identity of the client or of the individual contact within the client organisation, could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the respective tenderers.

6. Miscellaneous documents

116. As I noted at the outset, most of the tenderers provided a variety of documentation as appendices to their tender documents and in general support of their offers. The bulk of this documentation, such as client alerts and bulletins, newsletters, general guides to particular areas of the law (designed for clients), seminar programs, firm brochures advertising services offered by the firm, and certificates of registration and quality assurance must be regarded as effectively in the public domain, so far as the legal services industry is concerned. Others are internal documents of the relevant firm (see, for example, the various appendices to Deacons' tender documents which comprise such items as style guides and examples of plain English writing; lists of preferred suppliers (such as preferred Counsel, town agents, collection agencies and process servers); a technology capability statement; internal telephone list; and "Family Friendly Policy")

and, while not in the public domain, are of such a nature that I am unable to identify any adverse effect that could be reasonably be expected to follow from their disclosure.

117. Accordingly, in respect of the miscellaneous documents which comprise part of the tender documents in issue and which do not otherwise fall within the general categories of information identified at paragraph 15 above, I find that disclosure of those documents could not reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the tenderers, and that they therefore do not qualify for exemption under s.45(1)(c) of the FOI Act.

Second limb of s.45(1)(c)(ii) - Prejudice to future supply of information

118. Matter which answers the description in s.45(1)(c)(i) may also qualify for *prima facie* exemption under s.45(1)(c) if its disclosure could reasonably be expected to prejudice the future supply of such information to government. My observations and findings at paragraphs 63 - 65 above are equally applicable here. I can see no reasonable basis for expecting that law firms who wish to tender for government work would not supply all information required for evaluation of the competing tenders, plus any additional information which a firm considered might assist its case. I am not satisfied that disclosure of any of the information in issue (and certainly none of the information which I have found does not satisfy the first limb of s.45(1)(c)(ii), i.e., reasonable apprehension of an adverse effect on the business, professional, commercial or financial affairs of the tenderer) could reasonably be expected to prejudice the future supply of such information to government.

Public interest balancing test

119. The matter which I have found satisfies the requirements of both s.45(1)(c)(i) and s.45(1)(c)(ii) (i.e., the costing information, and information which discloses details of work performed for identifiable clients, or the specific legal services needs of identifiable clients) is *prima facie* exempt, subject to the application of the public interest balancing test incorporated in s.45(1)(c) of the FOI Act. I must therefore consider whether there are public interest considerations favouring disclosure of that information which outweigh the public interest in protecting the business, professional, commercial or financial affairs of the tenderers from a reasonably apprehended adverse effect, so as to warrant a finding that disclosure of that information would, on balance, be in the public interest.

Submissions of the participants

120. The submissions lodged by the participants which addressed the application of the public interest balancing test can be summarised by the following extracts:

(a) … *There is no doubt that in many cases there may be a public interest in persons having access to information for the purposes of considering the application by agencies of particular laws, policies and practices. On many occasions, such public interest may be very high indeed. Accountability with respect to the use of public funds is, in general*

terms, always a relevant public interest, the strength of which may vary from case to case. In my view, those public interests, important as they are, do not have a central or large significance in the present case, although as a matter of general principle, they would obviously be relevant to the tender process. … Nor has there been any suggestion of wrongdoing on the part of any Offerer or any other person. The entire process was thoroughly examined by a probity auditor from the Auditor-General's Office and a certificate was issued by the Auditor-General himself confirming his satisfaction as to the fairness and equity of the process. … I therefore do not consider, on the facts of this case, that any public interest of the kind to which I have referred, which comprehends a general public interest in the accountability of government, is of sufficient weight to overcome the prima facie *basis for exemption under paragraph 45(1)(c). …*

(Queensland Health's initial decision dated 26 March 1999)

(b) *We would concede that in relation to the issue of accountability of Queensland Health in awarding the particular contract, there is a public interest in the disclosure of information which will enhance the accountability of Queensland Health for its selection of contractors for (and monitoring their performance on) projects on which public funds are expended. The Information Commissioner noted in* Sexton's *case, that that interest can extend to disclosure of the total price tendered by the successful tenderer. However, the pricing information contained in the relevant document in this case differs in nature. There is nothing in the nature of a total price, but pricing based on a number of rates. Presumably, the accountability public interest could be met by disclosing documents which revealed, for example, the total expenditure on legal services within the government agency. It is difficult to see how the release of the specific charge out rates proposed by this firm would provide the public with any information which* [would] *usefully enhance the accountability of the government agency in the awarding of the contract.*

Of even less relevance in this respect would be the information relating to this firm's client base. …

(Deacons' letter to Queensland Health dated 3 March 1999)

(c) *It is acknowledged that there is a public interest in the disclosure of information which will enhance the accountability of Queensland Health in its selection process for a panel for the provision of legal services on which public funds are expended. However, it is submitted that it is not in the public interest for commercially sensitive information to be disclosed. The disclosure of the Crown Law tender document would*

cause unwarranted commercial disadvantage to Crown Law and harm Crown Law in competing in future tender processes.

(Crown Law's letter to Queensland Health dated 4 March 1999)

121. In its letter dated 19 September 2000, the applicant submitted:

Additionally there is the objective of public interest in the information's disclosure to ensure open and accountable government administration. There should be informed participation in the department's tendering process to ensure its fairness, particularly in view of the government's stated intention to "buy locally" wherever possible, which in the instance of the Mackay area appointment of legal service providers has not occurred. Clearly if information is not disclosed then on this basis doubt may, unfortunately, be cast upon the process both as to the information provided by firms and how it was considered. It is reasonable to an objective reader that if a party does not want any of the information disclosed they have something to hide. Is it the case that some of the information contained in the tenders is something they do not wish known because it was possibly incorrect, misleading, or "stretching the truth"? We are not suggesting this is the case with such reputable firms but the question remains relevant until the information is fully and freely disclosed as this is the only way any doubt can be erased.

Analysis

122. As I noted at paragraphs 28 and 58 above, I accept that government agencies such as Queensland Health are accountable to the public regarding the decisions they make to award tenders for the performance of services to be paid for from public funds. I consider that the Western Australian Information Commissioner succinctly summarised the competing public interest considerations in her decision in *Re Maddock Lonie and Chisholm (a firm) and Department of State Services* [1995] WAICmr 15 (2 June 1995) where she said, at paragraph 50:

I recognise a public interest in members of the private sector being able to enter into business and commercial enterprises with government agencies. I also recognise a public interest in maintaining the confidentiality of sensitive commercial and business information about third parties which is in the hands of government agencies, including information submitted within a tender offer to an agency. Against these interests must be balanced the public interest in the accountability of government agencies for the decisions they make.

123. As to the general accountability of Queensland Health, I note Queensland Health's assertion in its initial decision, as quoted above, that there has been no suggestion that the tender process did not comply with the State Purchasing Policy and that the entire tender process was audited, with the Auditor-General issuing a certificate confirming his satisfaction with the fairness and equity of the process.

124. In a report by the Industry Commission on *Competitive Tendering and Contracting by Public Sector Agencies* (Report No.48, 24 January 1996, AGPS, Melbourne) the Commission considered questions of accountability at pp.81-103 and stated at p.95:

> *For individuals to be able to hold elected representatives and their agents (the contracting agencies) accountable, information is required on how well they have performed in relation to their delegated responsibilities. For a contracting agency to be held accountable therefore, information is required on the type of service it has decided should be delivered, the choice of the service provider and how well the chosen service provider has performed.*

125. The Industry Commission went on to state in its report:

> *In this context the Commission notes that in 1993 the NSW Public Accounts Committee (PAC)* "Report into the Management of Infrastructure Projects" *argued for the release, to the public and the Parliament, of a wide range of information, including the price payable by the public, the basis for changes in the price payable by the public, details on significant guarantees and undertakings, details of the transfer of assets and the result of cost-benefit analyses. The type of information it did not consider suitable for disclosure included the private sector's internal cost structure or profit margins, matters having an intellectual property characteristic, and any other matters where disclosure would pose a commercial disadvantage to the contracting firm.*

(my underlining)

126. The Information Commissioner found in *Re Sexton Trading Company Pty Ltd and South Coast Regional* Health *Authority* (1995) 3 QAR 132 that the public interest in accountability may extend to disclosure of the total price tendered by the successful tenderer. He noted in *Re McPhillimy and Queensland Treasury* (1996) 3 QAR 376 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. However, in this case, as noted at paragraph 46 above, there was no total price submitted by the tenderers as they were not tendering for a specific piece of work. The costing information contained in the documents in issue is based on a number of different scenarios, with a number of different variables, depending on the type of work involved.

127. The respective tenderers are not accountable to the public for the contents of their tenders. (Rather, it is simply a consequence of the terms of s.21 of the FOI Act that the fact that those documents are in the possession of Queensland Health means that any person has a right to obtain access to them under the FOI Act, except to the extent that they contain matter which qualifies for exemption under the FOI Act.) The documents generated by Queensland Health in evaluating the respective tenders are the kind of documents most relevant to furthering accountability for its decision to appoint particular firms to its panels for the provision of legal services. However, those documents do not fall within the terms of the applicant's FOI access application. (Even if they did, there would still be an issue as to whether the public interest in accountability could be adequately serviced by the disclosure of edited documents, from which information of particular commercial sensitivity to the respective tenderers had been deleted.)

128. The difficulty I have with the applicant's case on the application of the public interest balancing test in s.45(1)(c) is that I am not satisfied that the issues raised by the applicant necessitate disclosure of the information which I have found satisfies the requirements for exemption under s.45(1)(c)(i) and (ii) of the FOI Act. Rather, I agree with the thrust of the submission by Deacons quoted at paragraph 120(b) above. I am not satisfied that the public interest in disclosure of commercially sensitive information relating to the needs of the tenderers' clients, and the costing methodology proposed to be adopted by the tenderers, in order to enhance the public interest in the accountability of Queensland Health regarding the decisions it made in awarding the tender, is sufficiently strong to warrant exposing the tenderers to the reasonably apprehended adverse effects of disclosure. Having regard to the evaluation criteria contained in the Invitation for Offers, it is clear that those factors were only two of eight criteria which Queensland Health took into account in deciding to whom to award the contract. While pricing was undoubtedly a factor of some importance, and disclosure of the pricing information would further Queensland Health's accountability to some extent, I am not satisfied that its significance in that regard, when weighed against the reasonably apprehended adverse effects of disclosure, warrants a finding that disclosure would, on balance, be in the public interest.

129. As to the other issues raised by the applicant, I acknowledge that none of the successful tenderers for the general legal services panel for the Mackay Health Service District are Mackay firms, and that the applicant is obviously upset at what it regards as the apparent disregard paid by Queensland Health to the government's own "buy local" policy.

However, it would appear that Queensland Health did have regard to the locality of the offerers when assessing the tenders. One of the questions contained in the Invitation for Offers to which the offerers were asked to respond related to Local Economic Impact and the Offer Specification stated as follows (see Part J):

> *Queensland Health wishes to maximise the benefits to the Districts' economies while achieving its aims of accessing the highest quality, cost effective General legal services.*
>
> ***J.1*** *Quantify the economic benefits to the District(s) covered by the panel(s) to which you seek appointment.*

130. Moreover, one of the eight evaluation criteria specified by Queensland Health in assessing the tenders was "the economic benefit to the District(s) covered by the panel(s) to which a Firm seeks appointment".

131. It would appear that, while Queensland Health was prepared to take into account the locality of the tenderers in assessing the offers, and the benefit which the appointment of local firms could bring to the local economy, that was just one of a number of relevant considerations. Each individual consideration had to be assessed and weighed against the overall aim of the tender process, which was to procure delivery of the highest quality, most cost-effective, legal services available.

132. In any event, I have made a finding above that I am not satisfied that disclosure of the information provided by the successful tenderers in response to question J.1 quoted above, could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the successful tenderers. It will therefore be available for the applicant to access and scrutinise.

133. As to the applicant's contention that disclosure of the tender documents is necessary in order to test whether the tenderers were "stretching the truth" in the material they put forward in support of their offers, I can see no basis for such a claim, and I do not accept that it is a legitimate public interest consideration favouring disclosure of the matter in issue. It amounts to mere speculation by the applicant and is not sufficient to outweigh the public interest in protecting the tenderers from the reasonably apprehended adverse effects of disclosure of their commercially sensitive information. I also reject the applicant's assertion quoted at paragraph 121 above, that *"it is reasonable to an objective reader that if a party does <u>not</u> want any of the information disclosed they have something to hide"*. It is clear that the reason the tenderers do not want their tender documents disclosed is because of their strong belief that the documents contain commercially sensitive information which, if disclosed to a competitor, could cause them commercial disadvantage. That is a reasonable concern. In any event, as far as the particular matter in issue under consideration is concerned, neither I nor the applicant are in a position to judge whether any of the tenderers exaggerated their level of experience as far as identifying their clients and describing the work performed for their clients is concerned. As to the costing information, it is factual in nature and I can see no basis upon which it could be exaggerated. Accordingly, even if I were to accept that the applicant's concern about "stretching the truth" is a legitimate public interest consideration favouring disclosure of the matter in issue, I do not accept that disclosure of the information which I have found satisfies the

requirements of both s.45(1)(c)(i) and s.45(1)(c)(ii), would enhance an understanding of that consideration.

134. In summary, I am not satisfied that disclosure of the particular information identified above which I have found satisfies the requirements for exemption under both s.45(1)(c)(i) and (ii) of the FOI Act, would, on balance, be in the public interest, and I therefore find that it is exempt matter under s.45(1)(c) of the FOI Act.

135. As with the matter which I have found to be exempt under s.44(1) of the FOI Act, I will not attempt to identify in the body of this decision, each exempt folio, or segment of exempt information contained on a particular folio. Instead, as I have indicated, I will forward to Queensland Health, with these reasons for decision, a copy of the documents in issue, marked-up to show the matter which I have found to be exempt under s.44(1) and s.45(1)(c), and I will likewise forward to each of the tenderers, a marked-up copy of their own tender documents.

DECISION

136. For the foregoing reasons, I decide to vary the decision under review (being the decision made on 30 April 1999 by Dr John Youngman on behalf of Queensland Health) by finding that:

(a) segments of the matter in issue comprise exempt matter under s.44(1) of the FOI Act (as identified on the marked-up copy of the documents in issue forwarded to Queensland Health with these reasons for decision);

(b) the matter in issue described in paragraphs 97 and 110 above, and other segments of information in the documents in issue which contain costing information, or which disclose details of work performed for identifiable clients or the specific legal services needs of identifiable clients, are exempt from disclosure under s.45(1)(c) of the FOI Act (as identified on the marked-up copy of the documents in issue forwarded to Queensland Health with these reasons for decision); and

(c) the remainder of the matter in issue does not qualify for exemption from disclosure to the applicant under the FOI Act, and the applicant is therefore entitled to be given access to it under the FOI Act.