



Decision and Reasons for Decision

Application Number: 2006 F0028

Applicant: Mr A Ringland

Respondent: Queensland Transport

Third Party: Black & White (Quick Service) Taxis Ltd

Decision Date: 27 November 2006

Catchwords: sections 45(1)(b), 45(1)(c) and 46(1)(a) of the *Freedom of Information Act 1992 (Qld)*

Contents

Background	2
Steps taken in the external review process	2
Matter in issue	4
Section 45 of the FOI Act	4
Application of section 45(1)(b) of the FOI Act	5
Commercial value.....	5
Application of section 45(1)(c) of the FOI Act	6
Adverse effect.....	7
Prejudice to future supply	10
Public interest balancing test.....	13
Section 46(1)(a) of the FOI Act.....	13
Application of section 46(1)(a) of the FOI Act.....	14
Decision	16

Reasons for Decision

Background

1. The applicant seeks review of the decision of Queensland Transport to refuse him access to documents which provide information about the performance of Black & White (Quick Service) Taxis Ltd of Cairns (Black & White) under its contract with Queensland Transport. The documents in issue are claimed by Queensland Transport and Black & White to be exempt under a number of provisions of the *Freedom of Information Act 1992 (Qld)* (FOI Act).
2. The applicant applied to Queensland Transport by letter dated 16 September 2005 for access to:
Minimum Service Level Performance for Cairns Taxis.
The time period would be the last reported to Queensland Transport by Black & White (Quick Service) Taxis of Cairns.
3. Queensland Transport, in accordance with section 51 of the FOI Act, consulted with Black & White and sought its view as to whether it objected to the release of the documents. By letter dated 8 November 2005, Black & White advised that it objected to the disclosure of the documents in issue to the applicant. Ms Vasta, Acting Administrative Law Co-ordinator of Queensland Transport considered the application of section 46(1)(b) of the FOI Act to the documents in issue but decided on 15 November 2005 that the documents in issue were not exempt from disclosure and could be released in full.
4. By letter dated 9 December 2005, Black & White, through its solicitors Shand Taylor Lawyers, applied for internal review of Ms Vasta's decision and raised the application of sections 45(1)(b), 45(1)(c), 46(1)(a) and 46(1)(b) to the documents in issue.
5. Ms Bullock, Director, Legal and Legislation, of Queensland Transport conducted an internal review and on 10 January 2006 decided that although the documents in issue did not qualify for exemption from disclosure under section 46(1)(b), the documents were exempt under sections 45(1)(b), 45(1)(c) and 46(1)(a) of the FOI Act.
6. By letter dated 3 February 2006, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Ms Bullock's decision.

Steps taken in the external review process

7. The documents in issue were obtained and examined. At the request of this office Queensland Transport also provided a copy of the service contract which exists between Black & White and Queensland Transport.
8. By letter dated 26 April 2006 Assistant Information Commissioner (AC) White wrote to Black & White advising it of the applicant's application for external review and inviting Black & White to become a participant in the review. Black & White responded by letter dated 2 May 2006 and advised that it wished to become a participant in the review and maintained its objection to the release of the documents in issue.
9. On 11 July 2006, AC White wrote to both Queensland Transport and Black & White and advised that Black & White's request to become a participant in the review had been granted and that she had formed the preliminary view that the documents in issue did not qualify for exemption from disclosure to the applicant. In the event that

Queensland Transport and Black & White did not accept AC White's preliminary view, they were requested to provide submissions in support of their case for exemption.

10. Queensland Transport provided its submissions by letter dated 1 August 2006 and after being granted an extension of time in which to respond, Black & White provided its submissions in a letter dated 29 August 2006.
11. After considering the submissions of both Queensland Transport and Black & White, I wrote to those participants on 31 October 2006 and advised that their submissions did not persuade me to alter AC White's preliminary view, and I remained of the view that the documents did not qualify for exemption from disclosure. I invited Queensland Transport and Black & White, if they still contended that the documents in issue were exempt from disclosure, to provide me with any final submissions in support of their case by 17 November 2006.
12. Both Queensland Transport and Black & White were advised that if they provided no response to my letter of 31 October 2006 I would assume that they accepted my preliminary view on the matter and had withdrawn their claims for exemption of the matter in issue.
13. By letter dated 10 November 2006, Queensland Transport advised that it did not accept my preliminary view but did not wish to make further submissions and relied on those previously made.
14. Black & White did not respond to my letter of 31 October 2006 and are therefore deemed to have accepted the preliminary view set out therein and to have withdrawn their claims for exemption of the matter in issue. Accordingly this decision will only deal with the submissions of Black & White in so far as they were relied upon by Queensland Transport.
15. In making my decision in this matter, I have taken into account the following documents:
 - The documents in issue;
 - The service contract between Queensland Transport and Black & White;
 - The applicant's initial and external review applications dated 16 September 2005 and 3 February 2006 respectively;
 - Black & White's letter of objection dated 8 November 2005 and its internal review application dated 9 December 2006.
 - Queensland Transport's initial decision dated 15 November 2005 and its internal review decision dated 10 January 2006;
 - Queensland Transport's letters dated 1 August 2006 and 10 November 2006
 - Black & White's letter dated 29 August 2006.
 - AC White's preliminary view letters dated 11 July 2006;
 - Submission dated 31 August 2004 from the Taxi Council of Queensland to Queensland Transport in response to the Taxi and Limousine Development Discussion Paper; and
 - Letter dated 12 December 2005 from the Taxi Council of Queensland to Queensland Transport.

Matter in issue

16. The matter in issue comprises 3 folios titled as follows:
- Minimum service level performance report for Cairns (Black & White Quick);
 - Cairns Queensland Transport Service Contract Report from 1/4/05 – 30/6/06 for 131 taxi service licence; and
 - Cairns Queensland Transport Service Contract Report from 1/4/05 – 30/6/06 for 131 taxi service licence (with notations).
17. A brief outline of the operation of the taxi industry in Queensland in the context of this review is useful at this point. Black & White is a taxi booking service which operates a call centre for taxi bookings. Black & White and other booking services are required to hold a contract with Queensland Transport in order to operate the service. Taxi licence holders are required to affiliate with a booking service company (unless they operate in smaller communities) and must also hold a licence granted by Queensland Transport.
18. The matter in issue comprises data which represents Black & White's performance against the Minimum Service Levels (MSLs) prescribed by the contract between Queensland Transport and Black & White. MSL data measures the time between a request being made for a taxi and when the fare meter is started for that request. The information in the documents in issue records the percentage of taxis which reached their customers within certain time periods. For example the documents in issue record what proportion of taxis arrived between 5-10 minutes from the time an order for a taxi is placed.

Section 45

19. Section 45 of the FOI Act provides as follows:

45.(1) Matter is exempt matter if—

...

(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.

20. Queensland Transport, with reference to the submissions of Black & White, argued that either section 45(1)(b) and 45(1)(c) apply to the documents in issue. In *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 (Re Cannon),

the Information Commissioner discussed the relationship between sections 45(1)(b) and 45(1)(c) of the FOI Act (at p.516, paragraph 66):

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).

21. Accordingly, the matter in issue, in this case, cannot be exempt under both sections 45(1)(b) and 45(1)(c) of the FOI Act. However, Queensland Transport has raised the application of both sections in the alternative and I will consider each section below.

Application of section 45(1)(b)

22. At paragraphs 51-60 of *Re Cannon*, Information Commissioner Albeitz explained the meaning of "commercial value" in section 45(1)(b) of the FOI Act. He said 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 section 45(1)(b) of the FOI Act. The first and primary meaning is that information has a commercial value to an agency or 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.
23. The second meaning is that information has a commercial value to an agency or person if a genuine arms-length buyer is prepared to pay to obtain that information from that agency or person, such that the market value of the information would be destroyed or diminished if it could be obtained under the FOI Act from a government agency which has possession of it.

Valuable for the purposes of carrying on the commercial activity

24. In its letter dated 29 August 2006, Black & White submitted that along with the fact that it goes to considerable trouble and expense to collect MSL data, the data is also used to assist in making budgeting and management decisions about the number of taxis required in a certain area at certain times, staffing issues, infrastructure and technology upgrades and other issues. Black & White argued that in this way the information is important to the profitability and viability of its business.

25. I accept that Black & White would be able to make use of the MSL data as collated in the documents in issue, for managing various aspects of its business. However, I do not accept that the information (which is merely a report outlining performance against MSLs) is important or essential to the profitability or viability of its business as required by section 45(1)(b). My view is substantiated by the somewhat contradictory statement of Black & White in its letter dated 29 August 2006 that if the matter in issue is released it will not “*continue to collate it and provide it to government*”. If Black & White are so readily prepared to stop collating the MSL data it can hardly be considered to have the degree of commercial value to their business as is required by section 45(1)(b).
26. In relation to Black & White’s comments about the trouble and expense it goes to in collecting the MSL data, Commissioner Albeitz has previously rejected the proposition that the investment of time and money is, of itself, a sufficient indicator of the fact that information has a commercial value (see *Re Cannon* at paragraph 52).

Arms-length buyer

27. In the course of the review, Black & White conceded that the information contained in the documents in issue would have limited value to a genuine arms-length buyer. Apart from the suggestion that if the documents in issue were to become available, along with the MSL data of other taxi booking service companies, there would be reasonable prospects for benchmarking and consulting organisations to package and sell the information to unnamed buyers, it has not provided any evidence to suggest that the information has commercial value in this sense.

Findings

28. I am not satisfied that the information contained in the documents in issue comprises information having a “commercial value” in either of the senses described in *Re Cannon* or that even if it did possess intrinsic commercial value, its disclosure could reasonably be expected to destroy or diminish that commercial value. The information simply discloses a record of the performance of Black & White as against the MSLs prescribed by the taxi service contract. I do not consider that the MSL data, although perhaps useful for Black & White, is important or essential to the profitability or viability of the business. Additionally, I consider that, as the information is particular to Black & White and its performance during the specified time period, disclosure of that information could not reasonably be expected to advantage a potential competitor of Black & White, or disadvantage Black & White *vis-à-vis* a potential competitor. Nor do I consider that there exists a genuine arms-length buyer who would be prepared to purchase the documents. Accordingly, I find that the documents in issue do not qualify for exemption under section 45(1)(b) of the FOI Act.

Application of section 45(1)(c)

29. The correct approach to section 45(1)(c) is explained in *Re Cannon* at paragraphs 66-88. Matter will be exempt under section 45(1)(c) if:
- (a) the matter in issue is information concerning the business, professional, commercial or financial affairs of a person (including a company or agency); and
 - (b) disclosure of the matter in issue could reasonably be expected to have either of the following effects:

- (i) an adverse effect on the business, professional, commercial or financial affairs of the person, which the information in issue concerns; or
- (ii) prejudice to the future supply of such information to government,

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

30. I accept that the documents in issue can broadly be described as concerning the business, professional, commercial or financial affairs of Black & White.

Adverse effect

31. Queensland Transport, in reliance upon submissions made by Black & White, contended that should the documents in issue be disclosed, there is a reasonable expectation that adverse publicity and uninformed public debate would cause an adverse effect, in monetary terms, to Black & White's business.

32. Black & White suggested that an adverse effect to its business could reasonably be expected to occur in the following ways:

- that adverse publicity and uninformed public debate is likely to effect its profitability in the sense that it may increase the possibility for potential competitors to be able to provide alternative services;
- that Queensland Transport may be influenced by pressure from media and political spheres to increase the number of taxi licences it issues in the area; and
- that its affiliate base of licence holders will potentially be affected by adverse publicity and the possible decrease in value of taxi licences, should a greater number be issued.

33. I accept that there are various factors about which the public is generally unaware, which can influence, or skew, the MSL data in a way which could be interpreted as being unfavourable to Black & White. I do not consider, however, that an uninformed public having access to the MSL data could reasonably be expected to have the kind of adverse effects suggested.

34. The meaning of "could reasonably be expected to" was explained in Information Commissioner Albeitz' decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (*Re "B"*) at paragraphs 154-160. The words "could reasonably be expected to" call for a decision-maker applying an exemption provision like section 45(1)(c) to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible and expectations that are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist. Accordingly, where an expectation is asserted that the disclosure of the information in issue would have an adverse effect on the business, commercial or financial affairs of a corporation, it must be determined whether the expectation claimed is reasonably based. The adverse effect contemplated by section 45(1)(c)(ii) must be an adverse effect on the business, commercial or financial affairs of the corporation or other person, which the information in issue concerns.

35. As set out in Information Commissioner Albeitz' decision in *Re Cannon*, a relevant factor in determining whether an agency or another person is likely to suffer an adverse effect is whether the agency or other person enjoys a monopoly position for the supply of particular services in the relevant market or whether it operates in a commercially competitive environment. Black & White is the only taxi booking service company in Cairns.

Potential competitors

36. Black & White, in its letter dated 29 August 2006, submitted that:

Since the cost of long distance telecommunications has fallen there is intense competition between booking service companies to centralise call centre operations. Call centre services in regional centres, such as Mackay, Rockhampton Townsville and Cairns, etc. can be delivered from, for example, Brisbane or Sydney or New Delhi, India.

...

Accordingly, [Black & White's] business operates in the context of competitive threats emerging from other taxi booking companies operating in larger centres....

Additionally, Black & White submitted that substitutable transport providers (such as limousine and shuttle bus services) seeking to compete with Black & white may use MSL data to generate adverse publicity.

37. While I accept that there exists a possibility that other taxi booking services may seek to compete with Black & White to provide booking or call centre services in the future, or that substitutable transport providers may endeavour to compete with Black & White using MSL data to generate adverse publicity, the following factors make such an outcome only a mere possibility:

- There are at present no direct competitors to Black & White in Cairns. Each taxi booking service operates across designated service areas as defined in the contract it is required to enter into with Queensland Transport. In order for another taxi booking service to compete in Cairns, it would have to enter into a contract with Queensland Transport for that designated service area. Queensland Transport have advised that they will only enter into such a contract when the proposed taxi booking service has the affiliation of 30% of the local taxi licence holders, a booking system and a demonstrated ability to deliver the MSLs from the commencement of the new booking service.

Queensland Transport has been conferred with responsibility for the regulation of the taxi industry in Queensland for the benefit of the public. Queensland Transport is therefore charged with the responsibility of ensuring that the number of taxi booking services operating in a particular area is appropriate according to the level of demand. I consider that Queensland Transport is well aware of the factors which may influence the MSL data provided to it by Black & White and other taxi booking service companies in Queensland (see paragraph 39), and therefore would be unlikely to enter into a contract with a competitor to Black & White unless it were satisfied that the MSL data supported such an arrangement (and certainly not purely on the basis of uninformed public debate). The data contained in the documents in issue is merely a record of Black & White's performance against the MSLs agreed to in the service contract and I am not satisfied that access to this data would provide a potential competitor any significant advantage.

- In so far as substitutable transport providers are concerned, I note that the MSL data collected by Black & White has been provided to the applicant in the past by Black & White. The applicant has also advised that he was able to obtain the MSL data for last year from his local Member of Parliament. Despite this relative availability of the data, neither Black & White nor Queensland Transport has provided any evidence to suggest that an adverse effect to Black & White has resulted from the release of MSL data in the past.

Increase in licence numbers

38. Black & White has also asserted that Queensland Transport may be influenced by special interest groups, sympathetic media exposure or political pressure to increase the number of taxi licences issued in the area. As noted above Queensland Transport is the agency responsible for the regulation of the taxi industry in Queensland for the benefit of the public. Accordingly, Queensland Transport ensures that the number of taxi licences issued in a particular area is appropriate according to the level of demand. Queensland Transport is well aware (see paragraph 39) of the factors which may influence the MSL data provided to it by Black & White and other taxi booking service companies in Queensland.
39. I note that, in its submission dated 29 August 2006, Black & White advised, in relation to the public interest balancing test contained in section 45(1):

Queensland Transport and taxi booking companies have an interest in taking the necessary time and spending the necessary resources, to:

- *research and understand the many and varied issues affecting the MSL data;*
- *have regular dialogue to discuss and accurately assess what the MSL data really means in terms of service provision; and*
- *research and determine what can effectively be done about improving service provision when and where it is truly needed.*

Additionally, I note that Queensland Transport, in its submission dated 1 August 2006, advised that:

...varying interpretations can be drawn from MSL data, and various parties could use either to leverage their own agendas through not understanding that the [MSL] mechanism is really in essence the point around which dialogue to improve service levels is held, and Queensland Transport's leverage point with industry.

and that:

...the booking companies are keen to work with Queensland Transport to lift their performance to limit the potential of a rival booking company being born.... and we are also keen to have them at the discussion table as the public benefit is in the forefront of Queensland Transport's objectives.

40. It seems clear that Queensland Transport is the body best placed to analyse the MSL data and, taking into account all the relevant circumstances, make decisions regarding the number of taxi licences it issues. If, as Black & White's submission suggests, representations made to Queensland Transport on the basis of the raw data contained in the documents in issue would not be well founded, then it should be a simple matter for Black & White, through its regular dialogue with Queensland Transport, to advise the government of this fact.

Affiliate Base

41. It is my view that any adverse publicity which may result from the release of the documents in issue is unlikely to cause an adverse effect to Black & White in terms of its affiliate base. As mentioned, licensees are required to affiliate with a booking service company in the relevant area. Licence holders, whether affiliated with a booking service or otherwise, are still required to obtain their licences from Queensland Transport which, as I have noted, is well aware of any factors adversely

effecting MSL data. There is no alternative issuer of licences from whom a licensee could obtain a licence.

42. Black & White also advised that there are significant benefits of affiliation for licensees. Even if Black & White's relationship with licensees were affected, I do not consider that it, or Queensland Transport, has shown that there is any reasonable basis to suggest that licensees would be persuaded to affiliate with another booking service company, even if one existed.
43. I do not consider that any adverse publicity which may occur, could reasonably be expected to result in the kind of adverse effect required by section 45(1)(c).

Findings

44. I do not consider that, should the matter in issue be disclosed, Black & White would suffer the kind of competitive harm contemplated by section 45(1)(c) of the FOI Act. Therefore, disclosure of the matter in issue could not reasonably be expected to have an adverse effect on the business, commercial or financial affairs of Black & White and therefore do not qualify for exemption under section 45(1)(c) of the FOI Act.

Prejudice to future supply of information

45. Matter which answers the description in section 45(1)(c)(i) may also qualify for *prima facie* exemption under section 45(1)(c)(ii) if its disclosure could reasonably be expected to prejudice the future supply of such information to government. The relevant test to be applied in this instance is whether it is reasonable to expect that a substantial number of taxi booking services would refrain from supplying to the government information concerning their MSL data, simply because some of the information they submit may become subject to disclosure under the FOI Act.
46. Queensland Transport, in reliance upon the internal review submission of Black & White that it would not continue to collate and provide minimum service level data to Queensland Transport if the documents in issue were released to the applicant, suggested that disclosure could reasonably be expected to prejudice the future supply of MSL data. Additionally, Queensland Transport provided a copy of a letter dated 12 December 2005 from Mr Davies, CEO of the Taxi Council of Queensland in which he stated that if the documents in issue were released '*it is virtually certain that no MSL data will be supplied to QT in the future*'.
47. In its submission of 29 August 2006, Black & White advised that it will not, "*continue to collate [MSL data] and provide it to government*" if the matter in issue is released. Additionally, Black & White advised that it understood other taxi booking services would be prepared to do the same.
48. At paragraph 161 of *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 Information Commissioner Albeitz commented as follows:

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)

49. Section 37 of the *Transport Operations (Passenger Transport) Act 1994* (TOPTA) provides as follows:

37 Purpose of service contracts

The purpose of service contracts is to hold operators accountable for minimum performance levels to ensure the communities served under the contracts receive, at a reasonable cost, quality and innovative public passenger services.

50. Section 40 of TOPTA also relevantly provides:

40 Service contracts to include minimum service levels

(1) A service contract must state minimum service levels to be complied with by the holder.

51. Section 47(1) of TOPTA provides as follows:

47 Amendment, suspension or cancellation of service contracts for breach of service contracts

(1) The chief executive may, by notice given to a holder, amend, suspend or cancel the holder's service contract if—

(a) the holder contravenes a condition of the contract; or

(b) the chief executive reasonably believes a contravention of the contract by the holder is imminent.

52. Clause 12 and Schedule 3 of the Taxi Service Contract (the service contract) entered into between taxi booking services and Queensland Transport, provides that taxi booking services must collate and provide records of their performance against the MSLs set out in Schedule 2 of the service contract.

53. Accordingly, the requirement to provide MSL data is a term of the contract under which Black & White is granted the right to provide a taxi booking service. The requirement for MSLs to be included in service contracts is set out in TOPTA, and TOPTA also specifically provides that the purpose of service contracts is to hold operators accountable for minimum performance levels.

54. Queensland Parliament has determined that MSL data be provided to Queensland Transport under service contracts as a way of ensuring that the public receives an adequate level of service. I note that a review of the TOPTA was conducted in 1998. The review addressed performance management and it appears to be the view of Queensland Transport as well as stakeholders such as the Taxi Council of Queensland, that the use of MSLs is appropriate for the continuing regulation of the Taxi industry and to ensure that the Queensland public is provided with an adequate service.

55. In fact, in its submission to Queensland Transport on the Taxi and Limousine Development discussion paper the Taxi Council of Queensland recorded its view as follows:

Taxi Initiative 1: Continuing Regulation

It is the Taxi Council's position that the Government must continue to regulate the supply of taxi licences in a manner consistent with the

responsible expectations for customer service and the viability for taxi businesses.

...

Accordingly it is reasonable to conclude that much of the current regulatory environment is working very effectively. The following elements in particular have proven to be successful and deserve to be preserved:

- *taxi services (on demand, door-to-door, public transport services) should only be operated under a taxi licence issued by the Government;*
- *every taxi should be required to affiliate with a taxi service contract holder (ie where such is available);*
- *taxi service contract holders should be accountable for managing and reporting taxi booking performance in a timely and accurate manner.*

56. It would appear from the submission of the Taxi Council of Queensland that it is generally happy with the current reporting requirements of Queensland Transport. I note in this regard that the comments of the Taxi Council outlined in paragraph 46 were provided to Queensland Transport in the context of section 46(1)(b) regarding the confidentiality of MSL data.
57. In the course of this review I advised Black & White of my view that failure to provide the MSL data would amount to a breach of contract on their part. At that time I invited Black & White to provide evidence, in the form of statutory declarations, of their intention to refuse to supply the data (and thus breach their contract) and the intentions of the other booking service companies to act in the same manner. Perhaps not surprisingly, Black & White did not provide such evidence and resiled from their position in relation to the future supply of MSL data. Accordingly, in light of Black & White having resiled from its position, I do not consider that Queensland Transport can suggest that the release of the matter in issue will result in prejudice to the future supply of MSL data from a substantial number of taxi booking services.

Findings

58. I do not consider that it is reasonable to expect that a substantial number of taxi booking services would be likely to stop supplying minimum service level data to Queensland Transport, given that provision of this information is required under the service contracts which grant their very right to operate taxi booking services. A taxi booking service simply can not operate in the absence of a contract with Queensland Transport.
59. While it is apparent that the measurement of taxi booking service companies' performance by MSLs is a useful measure for Queensland Transport's purposes but a potentially misleading one from the perspective of the consumer or the "uninformed public", the use of MSLs is provided for in legislation as an appropriate performance measurement.
60. I find that the matter in issue does not qualify for exemption under section 45(1)(c) of the FOI Act.

Public interest balancing test

61. Even if I were satisfied that some of the matter in issue meets the requirements of section 45(1)(c)(i) and (ii) of the FOI Act, that would only establish a *prima facie* public interest consideration favouring non-disclosure. It would then be necessary to consider whether there are public interest considerations favouring disclosure of the matter in issue which, on balance, outweigh the public interest in protecting the business, commercial or financial affairs of Black & White.
62. It is not strictly necessary, given my findings above, to consider the application of the public interest balancing test. However, I wish to note my view that there is a strong public interest in disclosure of the matter in issue in this review, such that its disclosure would, on balance, be in the public interest.
63. As I have mentioned above, Queensland Parliament has determined that MSL data be provided to Queensland Transport under service contracts as a way of ensuring that the public receives an adequate level of service. There is a strong public interest in the accountability of Queensland Transport to the Queensland public in discharging its function of regulating the taxi industry, having regard to the legitimate public interest in ensuring that adequate service levels are being provided. This public interest consideration is reflected in the fact that Queensland Transport is obliged, under section 37 of TOPTA to hold booking services and taxi licence holders accountable for their levels of performance.
64. I have noted my view that uninformed public debate is not likely to cause an adverse effect to Black & White, and I consider that the public interest is served by making the information available to the public. The Information Commissioner has previously rejected the argument that it is not in the public interest to release reports containing raw data on the basis that they have the potential for being misrepresented. Information Commissioner Albeitz noted in *Queensland Community Newspapers Pty Ltd and Redland Shire Council; Civic Projects (Raby Bay) Pty Ltd & Others (Third Parties)* (1998) 4 QAR 262 at paragraph 48:
- If the public were to be denied access to any report answering that description, on the ground of its potential for being misrepresented by quoting out of context, there would be a substantial diminution in the flow of information to the public on issues of significant public importance that are being addressed through political/governmental processes. Opportunities for informed public debate allow for misrepresentations to be corrected.*
65. There is also a public interest in giving the public the opportunity to scrutinise Queensland Transport's role in ensuring that minimum service levels are being met by taxi booking services in Queensland. I consider the disclosure of the matter in issue would enhance the accountability of Queensland Transport in that regard.

Section 46(1)(a)

66. Section 46(1)(a) of the FOI Act provides as follows:

46 Matter communicated in confidence

(1) *Matter is exempt if—*

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

Application of section 46(1)(a)

67. The test for exemption under section 46(1)(a) must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the agency not to disclose the information in issue. I am satisfied that there is an identifiable plaintiff (Black & White) who would have standing to bring such an action for breach of confidence.
68. Queensland Transport contended that it is under both an equitable and contractual obligation to keep the information in the documents in issue confidential.
69. Queensland Transport claimed that a contractual obligation of confidence exists with respect to the documents in issue based on clause 31.1 of the service contract. Clause 31 provides as follows:

31.1 Keep Confidential

Subject to clause 31.2 each party shall keep confidential the contents of all books, documents and information made available to that party for the purposes of entering into this contract and the business plan attached to this contract and shall not disclose the same to any other person without the written consent of the other parties.

70. I am not satisfied that the terms of this confidentiality clause include the documents in issue. Although I accept that the documents in issue have been provided to Queensland Transport in connection with Black & White's performance of the contract, they are not books, documents, or information made available for the purposes of entering into the contract, and are not connected to the business plan. It is my view that the terms of this clause relate solely to documents exchanged for the purposes of entering into the service contract and the business plan, and do not operate with respect to the provision of performance data which clearly occurs in performance of the contract and subsequent to the parties entering into the contract.
71. Clause 12 of the contract makes it a requirement that Black & White maintain complete and accurate records sufficient to record its performance under the contract, and in turn requires that that information be provided to the Chief Executive of Queensland Transport. Clause 12.4 provides as follows:
- 12.4 The contractor gives permission for the chief executive to publish information provided under this clause relating to the Contractor's performance under this contract in any form whatsoever other than confidential financial data or information regarding the Contractor's business structure, shareholding arrangements, business operation or staff and personnel which has been provided by the contractor.*
72. It is my view that clause 12.4 of the service contract expressly provides Black & White's permission for the Chief Executive to publish information provided under that clause which relates to Black & White's performance under the contract.
73. Queensland Transport submitted that the information in the documents in issue falls within the category of confidential financial data or information regarding Black & White's business structure, shareholding arrangements business operation or staff and personnel which is excluded from the operation of clause 12.4.
74. I do not consider that the information contained in the documents in issue can properly be categorised as confidential financial data. Clause 12 refers to records created in the form of Schedule 3. Schedule 3 deals exclusively with the contractor's performance under the contract and does not require reporting about the contractor's financial performance or records. Clause 12.4 specifically differentiates confidential

financial data from information provided in the form of Schedule 3, that is, records of the contractor's performance levels.

75. The documents are clearly a record of Black & White's performance under the contract, and Black & White has given its express permission for this category of information to be published. I am not satisfied that Queensland Transport is under a contractual obligation of confidence which would found an action for breach of confidence.
76. Queensland Transport also argued that the documents in issue were communicated and received in confidence and that the criteria required to establish an equitable obligation of confidence are met. I accept that where parties are already subject to a subsisting contractual relationship, it is still possible to obtain protection in equity in the alternative.
77. There are five requirements, all of which must be established, to obtain protection in equity of allegedly confidential information:
 - (a) 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" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.303-304, paragraphs 60-63);
 - (b) 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);
 - (c) the information must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322, paragraphs 76-102);
 - (d) 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
 - (e) disclosure would be likely to cause detriment to the confider of the confidential information (see *Re "B"* at pp.325-330, paragraphs 107-118).
78. I am not satisfied that the documents in issue possess the necessary quality of confidence as required by criterion (b) above. Black & White has disclosed MSL data to the applicant in the past and I understand that the applicant has had access to MSL data from his local Member of Parliament. This indicates that the kind of information contained in the documents in issue has not been treated, by either Black & White or Queensland Transport as possessing a particular degree of secrecy or confidentiality.
79. Even if the information contained in the documents in issue could be shown to possess the necessary quality of confidence, I am not satisfied that criterion (c) identified above can be established in respect of the matter in issue. Black & White argues that it understood that its MSL data was being provided to Queensland Transport on a confidential basis, despite the content of clause 12.4 of the service contract. I do not consider that the information could have been communicated in such circumstances as to fix Queensland Transport with an equitable obligation of confidence not to use the information in a way that is not authorised by the confider of it. Black & White has given its express agreement, as a term of the service contract, that information regarding its performance under the contract may be published in any form whatsoever. There is nothing before me to suggest that the circumstances

of the communication of the information would give rise to an equitable obligation of confidence.

Findings

80. I find that the matter in issue does not qualify for exemption under section 46(1)(a) of the FOI Act.

Application of section 46(1)(b)

81. Black & White raised the application of section 46(1)(b) in its application for internal review dated 9 December 2005 and Ms Bullock of Queensland Transport decided that the matter in issue was not exempt from disclosure under section 46(1)(b). During this review neither Queensland Transport nor Black & White have made specific submissions regarding section 46(1)(b). AC White advised Black & White in her letter dated 11 July 2006 that it was her preliminary view that the matter in issue did not qualify for exemption under section 46(1)(b) and in my letter dated 31 October 2006 I advised that unless Black & White made further specific submissions in respect of section 46(1)(b) I would assume it did not wish to rely on this exemption provision and would not further consider it in this review. Black & White have not made any submissions regarding the application of section 46(1)(b) and consequently I will not consider its application in this decision.

Decision

82. I set aside the decision under review (being the decision made by Ms Bullock on 10 January 2006 on behalf of Queensland Transport). In substitution for it, I decide that the documents in issue do not qualify for exemption from disclosure under sections 45(1)(b), 45(1)(c) or 46(1)(a) of the FOI Act, and that the applicant is entitled to be given access to them.
83. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992*.

V. Corby
Assistant Information Commissioner

Date: 27 November 2006