



Decision and Reasons for Decision

Application Number: 210244

Applicant: Mr P Tooker

Respondent: Central Queensland Ports Authority

Decision Date: 23 October 2007

Catchwords: FREEDOM OF INFORMATION – whether documents are excluded from the application of the *Freedom of Information Act 1992* (Qld) by section 11A – whether documents were received or brought into existence by the respondent in carrying out its commercial activities – Risk Management Committee minutes relating to coal dust

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Reasons for Decision

Summary

1. I have carefully considered the Matter in Issue in this review, and the submissions and evidence provided by the applicant and the Central Queensland Port Authority (CQPA) in this matter.
2. For the reasons set out at paragraphs 21 – 58 below, I am satisfied that:
 - the documents sought by Mr Tooker (the applicant) in this review have been received or brought into existence for the purpose of documenting the CQPA's risk assessment issues relating to coal handling services, and their appropriate commercial management
 - risk assessment and management of issues relating to coal handling services, a key income earning activity of the CQPA, is a strategic investment by the CQPA to ensure profitability of CQPA services and
 - the documenting of the CQPA Audit, Compliance and Risk Management Committee's consideration of the risk assessment of issues, and the appropriate commercial management of such issues, is an activity conducted on a commercial basis.
3. On that basis, I find that the matter in issue is excluded from the application of the *Freedom of Information Act 1992* (Qld) (FOI Act) by section 11A of the FOI Act. The CQPA are therefore not required under the FOI Act to provide access to the documents sought by the applicant.

Background

4. The applicant made a request under the FOI Act, in a letter dated 4 April 2007, for:

a copy of any CQPA Board Risk Committee (or any predecessor to the CQPA Board Risk Committee) minutes relating to coal dust. This request covers the period 1997 – present, and is to include the minutes from any pre-existing committee if the Board Risk Committee was formed later than 1997.
5. Mr G White, Corporate Services Manager, Central Queensland Ports Authority (CQPA) advised the applicant, in a letter dated 18 April 2007, that any commercial activities of the CQPA as a Government Owned Corporation (GOC) are excluded from the FOI Act.
6. In a letter dated 4 May 2007, the applicant applied for an internal review of Mr White's decision.
7. Mr M Galt, Commercial Services Manager, CQPA, in a letter dated 5 June 2007, affirmed the original decision of Mr White and refused to grant the applicant access to the documents.
8. The applicant wrote to this Office, in a letter dated 6 June 2007, seeking an external review of Mr Galt's decision under Part 5 of the FOI Act.

Decision under review

9. The decision under review is the internal review decision of Mr M Galt dated 5 June 2007 to refuse access to the documents on the basis that:
 - the documents relate to the commercial activities of the CQPA and are exempt from production under the *Transport Infrastructure Act 1996* and
 - the documents are also exempt from production under the FOI Act as they contain information that is commercially confidential.

Steps taken in the external review process

10. On 19 June 2007 I wrote to the CQPA seeking submissions regarding the application of section 11A of the FOI Act to the matter in issue.
11. In a letter dated 4 July 2007, the CQPA provided submissions to this Office relating to the application of section 11A of the FOI Act to the matter in issue.
12. On 16 July 2007 I wrote to the CQPA seeking further submissions on the application of section 11A of the FOI Act to the matter in issue and outlining specific issues to be addressed in those submissions. I also requested that the CQPA provide copies of the matter in issue and other supporting information.
13. In a letter dated 6 August 2007, this Office received further submissions from the CQPA, copies of the matter in issue and other supporting information.
14. Having carefully reviewed the applicant's external review application, the matter in issue, and the supporting information and submissions provided by the CQPA, I wrote to the applicant on 7 September 2007 advising that I had formed the preliminary view that the matter in issue had been received or brought into existence by the CQPA in carrying out its commercial activities and was therefore excluded from the operation of the FOI Act by section 11A of the FOI Act. In that letter I explained the reasons for my preliminary view and referred to and included the relevant parts of the CQPA's submissions. I invited the applicant to make submissions if he did not agree with my preliminary view.
15. In a letter dated 14 September 2007, the applicant advised that he did not accept my preliminary view and provided me with submissions in support of his case. The applicant also requested that he be provided with a copy of the submissions made by the CQPA.
16. In letters dated 19 September 2007 and 20 September 2007, the applicant provided me with further submissions and enclosed material for my consideration.
17. On 25 September 2007 I requested the views of CQPA about releasing parts of the CQPA submissions to the applicant. In a letter dated 28 September 2007 the CQPA provided its response, indicating parts of one submission that it considered referred to specific details of the matter in issue.
18. On 28 September 2007 I wrote to the applicant and provided him with a copy of the CQPA's submissions of 4 July 2007 in full and the CQPA's submissions of 6 August 2007 in part. Information was removed from the CQPA's submissions of 6 August 2007 as it made specific reference to, and revealed the contents of, the documents that I considered were excluded from the operation of the FOI Act in accordance with my preliminary view. I invited the applicant to provide any final submissions in this review.

19. The applicant provided this Office with his final submissions by letter dated 3 October 2007.
20. In making my decision in this matter, I have taken the following into account:
- the applicant's FOI application dated 4 April 2007, application for internal review dated 4 May 2007 and application for external review dated 6 June 2007
 - Mr White's initial decision dated 18 April 2007 and Mr Galt's internal review decision dated 5 June 2007
 - the CQPA's submissions dated 4 July 2007 and 6 August 2007
 - the applicant's submissions dated 14 September 2007, 19 September 2007, 20 September 2007 and 3 October 2007 and
 - relevant provisions of the FOI Act and the TI Act, and decisions of this Office.

Matter in issue

21. The matter in issue in this review comprises CQPA Board Risk Committee (or any predecessor to the CQPA Board Risk Committee) minutes relating to coal dust for the period 1997 to 4 April 2007 (Matter in Issue).

Findings

Section 11A of the FOI Act

22. Section 11A of the FOI Act provides:

11A Application of Act to GOCs

This Act does not apply to documents received, or brought into existence, in carrying out activities of a GOC mentioned in schedule 2 to the extent provided under the application provision mentioned for the GOC in the schedule.

23. Schedule 2 of the FOI Act relevantly states:

Schedule 2 Application of Act to GOCs	
<i>section 11A of the Act</i>	
GOC	Application provision
1 Queensland Rail, or a port authority (within the meaning of the Transport Infrastructure Act 1994) that is a GOC	Transport Infrastructure Act 1994, section 486

24. Section 486 of the *Transport Infrastructure Act 1994* (Qld) (TI Act) is applicable and provides as follows:

486 Application of Freedom of Information Act and Judicial Review Act

- (1) *The Freedom of Information Act 1992 does not apply to a document received or brought into existence by a transport GOC in carrying out its excluded activities.*
- (2) *The Judicial Review Act 1991 does not apply to a decision of a transport GOC made in carrying out its excluded activities.*
- (3) *A regulation may declare the activities of a transport GOC that are taken to be, or are taken not to be, activities conducted on a commercial basis.*

(4) *In this section—*

commercial activities means activities conducted on a commercial basis.

community service obligations has the same meaning as in the Government Owned Corporations Act 1993.

excluded activities means—

(a) commercial activities; or

(b) community service obligations prescribed under a regulation.

transport GOC means a GOC whose functions relate mainly to transport.

25. I am satisfied that the CQPA is a port authority that is a GOC within the meaning of the TI Act.
26. The CQPA has not argued that the Matter in Issue was brought into existence in the course of carrying out community service obligations that have been prescribed as excluded activities under a regulation. Accordingly, the question I must determine is whether the Matter in Issue was received or brought into existence by the CQPA in carrying out its activities conducted on a commercial basis.

Activities conducted on a commercial basis

27. The applicant has provided me with lengthy submissions in relation to this issue. I have carefully considered those submissions in detail. The submissions may be summarised as follows:
- That the intent of the FOI Act was to provide freedom of information and a more narrow interpretation of ‘commercial activities’ is an appropriate interpretation in this context.
 - The approach that I adopted in forming a preliminary view would mean that any activity undertaken by a GOC (in this case the CQPA) is by definition a commercial activity and that the logical effect of that approach is that all activities of the CQPA are protected from scrutiny under the FOI Act. For example ‘a secretary who takes in a cup of tea to her manager is engaged in a commercial activity’.
 - The intent of the FOI Act was for non-commercial activities of the CQPA to be covered by the legislation.
 - ‘Commercial activities’ in this context would therefore extend to normal commercial activities, for example the negotiation of coal contracts or construction contracts but not to normal CQPA Board Risk Committee minutes that relate to CQPA strategy for managing both public and EPA reaction to CQPA environmental pollution/environmental harm.
 - the actual contents of that portion of the CQPA Board Risk Committee minutes the applicant has sought access to should be examined, and make a clearly reasoned decision on whether those minutes are a ‘commercial activity’.
 - That as a general principle, each activity within each CQPA function should be considered on its merits and there should be no blanket exemption applied to any function.
28. The applicant’s submissions also included general arguments relating to the purpose and intent of the FOI Act and section 11A of the FOI Act including the following:
- ‘... the intent of the FOI Act was to ‘open the books’ to the maximum extent possible...’.

- That the applicant's request is in keeping with the mood of the people as expressed through the media and in keeping with the mood of the government in its effort to return 'freedom' to freedom of information.
- *'It is difficult for anyone to participate in government if the government (in this case embodied in a GOC) is making its decisions in secrecy, under the cloak of 'commercial activities'.'*
- *'... a balance needs to be struck between 'commercial activity' and 'freedom of information' and that the term 'commercial activity' should be given a narrow interpretation and not read to cover the field of all GOC corporate objectives / commercial activity'.*
- In this case, the FOI Act is *'being used to conceal potentially embarrassing information'.*

29. In his submissions, the applicant also referred to the following material to support his assertions:

- articles published in The Australian on 18 September 2007, 19 September 2007 and 20 September 2007
- an article published in The Courier-Mail on 19 September 2007
- the decision of the Information Commissioner in *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 (*Eccleston*) and
- the second reading speech of the Attorney-General Dean Wells for the FOI Act.

30. The CQPA, in its submissions to this Office, stated:

The CQPA is a statutory Government Owned Corporation (statutory GOC) with shares held equally by the State Treasurer and Minister for Transport on behalf of the Queensland Government. The CQPA is responsible for funding its own operations and capital works programs. Funds may be derived from day to day operations or from borrowings. Although borrowings are guaranteed by the Queensland Treasurer, CQPA is responsible for the payment of interest at market rates and repayment of principal.

...

The Port's major function is to facilitate the export of resources from Central Queensland (such as coal) and to handle the import of raw material and the export of finished products from the various industries located in and around Gladstone.

To this end, the CQPA has the following activities and/or functions:

- *To establish, manage, and operate effective and efficient port facilities and services in the Port of Gladstone and Port Alma;*
- *To make land available for the establishment, management and operation of effective and efficient port facilities and services in the Ports by other persons, or other purposes consistent with the operation of the Ports;*
- *To provide or arrange for the provision of ancillary services or works necessary or convenient for the effective and efficient operation of the Ports;*
- *To keep appropriate levels of safety and security in the provision and operation of the facilities and services;*
- *To provide other services incidental to the performance of its other functions or likely to enhance the usage of the Ports; and*
- *To perform any other functions conferred on it by legislation.*

Risk assessment and management is utilised by the CQPA in the pursuance of its activities and functions.

31. The CQPA also submits that its activities and functions are conducted on a commercial basis as the objective of each of those activities is to return a profit and earn a commercial rate of return. No regulation has been made under section 486(3) of the TI Act declaring activities of the CQPA that are taken to be, or are taken not to be, activities conducted on a commercial basis.
32. As set out above, section 486(4) of the TI Act defines 'commercial activities' as 'activities conducted on a commercial basis'. No other definition of 'commercial' is contained in the TI Act, or in the *Acts Interpretation Act 1954* (Qld).
33. The Information Commissioner discussed the application of section 11A of the FOI Act and the meaning of 'commercial' in the decision *Hansen and Queensland Industry Development Corporation* (1996) 3 QAR 265 (*Hansen*). At paragraphs 25 and 26 of that decision the Information Commissioner stated:

Major dictionaries give the primary meaning of the adjective "commercial" as "of, connected with, or engaged in, commerce; mercantile" (Collins English Dictionary, Third Aust. Ed), "of, engaged in, bearing on, commerce" (Australian Concise Oxford Dictionary), "of, or of the nature of, commerce" (Macquarie Dictionary). The corresponding primary meaning of the noun "commerce" is "the activity embracing all forms of the purchase and sale of goods and services" (Collins English Dictionary, Third Aust. Ed.), "exchange of merchandise or services ... buying and selling" (Australian Concise Oxford Dictionary), "interchange of goods or commodities" (Macquarie Dictionary)...

There is a subsidiary meaning of the adjective "commercial" which may be appropriate to the context of the phrase "activities conducted on a commercial basis" in s.35 of the Queensland Industry Development Corporation Act 1994, that is, "having profit as the main aim" (Collins English Dictionary, Third Aust. Ed.), "capable of returning a profit; ... preoccupied with profits or immediate gains" (Macquarie Dictionary).

34. The applicant has submitted that a narrow interpretation of 'commercial activities' is an appropriate interpretation in the context. Section 4 of the FOI Act sets out the object of the FOI Act as follows:

4 Object of Act and its achievement

- (1) *The object of this Act is to extend as far as possible the right of the community to have access to information held by Queensland government.*
- (2) *Parliament recognises that, in a free and democratic society—*
 - (a) *the public interest is served by promoting open discussion of public affairs and enhancing government's accountability; and*
 - (b) *the community should be kept informed of government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community; and*
 - (c) *members of the community should have access to information held by government in relation to their personal affairs and should be given a way to ensure the information is accurate, complete, up-to-date and not misleading.*
- (3) *Parliament also recognises there are competing interests in that the disclosure of particular information could be contrary to the public interest because its disclosure in some instances would have a prejudicial effect on—*
 - (a) *essential public interests; or*

- (b) *the private or business affairs of members of the community about whom information is collected and held by government.*
- (4) *This Act is intended to strike a balance between those competing interests.*
- (5) *The object of this Act is achieved by—*
 - (a) *giving members of the community a right of access to information held by government to the greatest extent possible with limited exceptions for the purpose of preventing a prejudicial effect on the public interest of a kind mentioned in subsection (3); and*
 - (b) *requiring particular information and documents concerning government operations to be made available to the public; and*
 - (c) *giving members of the community a right to bring about the amendment of documents held by government containing information in relation to their personal affairs to ensure the information is accurate, complete, up-to-date and not misleading.*
- (6) *It is Parliament's intention that this Act be interpreted to further the object stated in subsection (1) in the context of the matters stated in subsections (2) to (5).*

35. Therefore, in summary, Parliament's intention was that the FOI Act:

- extends as far as possible the right of the community to have access to information held by Queensland government in the context of the matters stated in subsections (2) to (5) of section 4 and
- strikes a balance between competing interests.

36. For these reasons, Parliament has enacted provisions under which documents are to be considered exempt or under which certain bodies or types of information are to be excluded from the application of the FOI Act. Section 11A of the FOI Act is one of these provisions which, if applicable, means that the FOI Act will not apply to that particular information.

37. I note that the jurisdiction of the Information Commissioner in this matter is to conduct an external review of Mr Galt's decision, and by applying the provisions of the FOI Act and the TI Act, decide whether the particular Matter in Issue in this case meets the criteria set out in those provisions such that it should be excluded from the application of the FOI Act. Specific exclusions and exemptions to strike the balance between competing interests recognised in section 4 of the FOI Act have been set out in the legislation by Parliament, as noted above. This Office merely applies the law. Whether section 11A of the FOI Act applies to information sought by an applicant is an issue that is determined in accordance with the relevant legislative provisions on a case by case basis, following careful consideration of the documents in issue, submissions of the parties and relevant case law and decisions of this Office.

Whether the Matter in Issue was received or brought into existence by the CQPA in carrying out its commercial activities

38. In determining whether the Matter in Issue was received or brought into existence by the CQPA in carrying out activities conducted on a commercial basis, the content of the Matter in Issue is relevant only to the extent that it assists the task of properly characterising the nature of the activity carried out by the CQPA in the course of which the Matter in Issue was brought into existence.

39. It is possible for a document containing information about the CQPA's commercial activities to have been brought into existence in carrying out an activity that was not conducted on a commercial basis, for example accounting to the shareholding Ministers for the performance of the CQPA's functions or in carrying out a function of a public regulatory nature. In such a case, the document would be subject to the application of the FOI Act and a decision would be required as to whether any of the matter contained in the documents in issue was exempt matter under any of the exemption provisions in Part 3, Division 2 of the FOI Act. If, on the other hand, the document was brought into existence in carrying out an activity conducted by the CQPA on a commercial basis, the document would be excluded from the application of the FOI Act.
40. In *Readymix Holdings Pty Ltd and Port of Brisbane Corporation; Brisbane Mini Mix Pty Ltd (Third Party)* (2003) 6 QAR 294, the Information Commissioner determined whether documents relating to the assessment and approval of a development application lodged by a third party in respect of land vested in the Port of Brisbane Corporation were documents received or brought into existence by the Port of Brisbane Corporation in carrying out its commercial activities. In that decision, the Information Commissioner found that in receiving, assessing and approving the third party's development application, the Port of Brisbane Corporation was carrying out a public regulatory activity, not an activity conducted on a commercial basis. Therefore the documents were not excluded from the operation of the FOI Act by section 11A of the FOI Act.
41. Similarly, in *Hansen*, the Information Commissioner was required to determine whether documents relating to a review of a decision by the Queensland Industry Development Corporation (QIDC) to terminate the applicant's employment were documents received or brought into existence by the QIDC in carrying out its commercial activities. In that decision, the Information Commissioner found that the termination of the applicant's employment and the activities of the QIDC in response to the applicant's submission disputing the decision to terminate his employment were not activities conducted on a commercial basis. Therefore the documents were not excluded from the operation of the FOI Act by section 11A of the FOI Act.

Coal handling services

42. As mentioned above, one of the activities undertaken by the CQPA is to provide coal handling services as part of its functions to facilitate the export of resources from Central Queensland and to handle the import of raw material and the export of finished products from the various industries located in and around Gladstone.
43. I am of the view that the provision of coal handling services is a key activity the CQPA performs in order to return a profit and to achieve its corporate objectives and as such, is a commercial activity.
44. The characterisation of the provision of CQPA coal handling services as a commercial activity does not necessarily lead to the conclusion that the Matter in Issue was received or brought into existence by the CQPA in carrying out its commercial activities. It does however assist in the characterisation of the Matter in Issue.

Risk assessment and management of coal handling services

45. The CQPA submitted, in a letter dated 6 August 2007:

The Minutes of the Committee and Board meetings were brought into existence for the purpose of documenting the risk assessment issues and their appropriate commercial

management. We would submit that the Risk Committee documents, which were the subject of the original FOI request, pertain to the commercial activities of the CQPA, and were brought into existence in the pursuit of that purpose.

...

... the issues dealt with by the Board (particularly as they relate to the Committee reports to the Board) involve the identification and minimisation of the various risks related to the pursuance of the commercial activities of the CQPA, which affect its ability to establish, manage, and operate effective, efficient and safe port facilities and services in the Port of Gladstone and Port Alma.

46. Having carefully examined the Matter in Issue, I am satisfied that such documents relate to coal handling services and have been received or brought into existence for the purpose of documenting the CQPA's risk assessment issues and their appropriate commercial management. The documents are a record of the Board and/or Risk Management Committee having met to address risk assessment and management issues associated with coal handling services.
47. It is necessary to consider whether the documenting of the CQPA's risk assessment issues and their appropriate commercial management in relation to coal handling services can be characterised as an 'activity conducted on a commercial basis'. If it can be characterised as such, then in accordance with section 11A of the FOI Act and section 486 of the TI Act, the FOI Act does not apply to the Matter in Issue.
48. I note the CQPA's Risk Management Policy is available on its website. Relevantly, paragraph 1.1 contains a policy statement as follows:

CQPA is committed to:

- *Behaving as a responsible corporate citizen protecting employees, clients, contractors, visitors, the community and the general public from unnecessary injury, loss or damage.*
- *Achieving its business objectives by minimising the impact of risks it can meaningfully and realistically control.*

49. Further, one of the aims of the risk management system and frameworks the CQPA will put in place, as outlined on page 3 of that document, is to 'align risk management with business objectives'.
50. The definition of 'risk' on page 4 of that document states:

Within CQPA, a risk to the business is any action or event that has the potential to impact on the achievement of our business objectives.

51. I am of the view that the management of risks by the CQPA relating to coal handling issues, where coal handling services is a key income earning activity of the CQPA, is an activity that is inextricably linked with achieving its business and commercial objectives.
52. In its submissions to this Office, the CQPA argued that:

... the activities and functions of the CQPA are activities conducted on a commercial basis as the objective of each of those activities is, as identified in the Statement of Corporate Intent, to return a profit and earn a commercial rate of return.

Clearly, the assessment of any risks which will affect the ability of CQPA to earn a commercial return and affect profit margins is a direct part of its commercial activities.

This is particularly so in the case of the alleged coal dust issues which arise in the conduct of CQPA's principal income earning business; namely, the conduct of coal handling services at the Port of Gladstone.

...

In this case, the risk management assessments undertaken by the CQPA Board and Committee are a strategic commercial investment necessary to reduce or minimise the risks to profitability and the return to its shareholders.

53. In *Qantas and Cairns Port Authority* (2005 F0268, 15 November 2005), the Information Commissioner found that the Cairns Port Authority's bird and wildlife risk management program for the Cairns International Airport was an activity conducted on a commercial basis. In that case, the Commissioner found that the documents in issue clearly demonstrated that the program was a comprehensive activity carried out on a commercial basis involving a substantial investment by the Authority to manage the significant risks to the Authority's profit margins posed by bird strikes. The Information Commissioner subsequently decided that the documents relating to the program were received or brought into existence by the Authority in carrying out an activity conducted on a commercial basis and were excluded from the application of the FOI Act by section 11A of the FOI Act and section 486 of the TI Act.
54. I am of the view that a system for the management of all risks associated with coal handling services (which would include any alleged issues relating to the risk management of coal dust) is a strategic investment by the CQPA and is part of the CQPA's commercial activities. As set out above, the CQPA has stated that coal handling services are the '*principal income earning business*' of the CQPA. Risk management issues relating to coal dust are therefore critical to the success of CQPA coal handling services, and therefore the profitability of the CQPA as a whole. I am of the view that it is clear that the system for risk management of coal dust issues is being undertaken to ensure that such risks are reduced or minimised to ensure business objectives can be achieved, including profitability of the CQPA and return to shareholders.
55. The Information Commissioner considered the application of section 11A of the FOI Act and the characterisation of 'activities conducted on a commercial basis' in *Re Hansen*. In that matter, the QIDC argued that all of its activities were conducted on a commercial basis and that the effect of the exclusion provisions was to afford it a complete exclusion from the application of the FOI Act. The Information Commissioner did not accept this argument and at paragraph 22 commented that:

The application of the exclusion provisions requires a determination of the nature of the activity carried out by the QIDC, in the course of which each of the documents in issue was received or brought into existence, and a determination as to whether that activity is a commercial activity of the QIDC, that is, an activity conducted by the QIDC on a commercial basis.

56. At paragraph 28 of that decision, the Information Commissioner held:

For reasons already addressed above, I do not consider that the words employed by Parliament in the exclusion provisions contemplate or necessarily require that all activities conducted by a GOC (which, by definition, will necessarily have a commercial orientation) must be characterised as commercial activities. Moreover, the fact that a commercially oriented decision is made in the conduct of an activity does not necessarily make the activity a commercial activity, or an activity conducted on a commercial basis.

57. I agree with the comments in the Information Commissioner's decision in *Re Hansen* and I consider that my decision in this review is consistent with those comments.

I indicated at paragraph 38 above that it is possible for a document containing information about the CQPA's commercial activities to have been brought into existence in carrying out an activity that was not conducted on a commercial basis and noted that in such a case, the document would be subject to the application of the FOI Act. I have also given examples at paragraphs 39 and 40 above of instances where the Information Commissioner has decided that section 11A of the FOI Act does not apply.

58. I do not consider, as submitted by the applicant, that the effect of my approach is to effectively exclude all activities of the CQPA from scrutiny under the FOI Act or that this decision would result in all CQPA activity being characterised as a commercial activity. In this case the particular documents sought (the Matter in Issue), which I have carefully examined, relate to risk issues regarding coal handling services, the principal income earning activity of the CQPA. As set out above, I consider that the risk management of such issues is critical to profitability of the CQPA.
59. I am satisfied that the Matter in Issue has been brought into existence for the purpose of documenting the CQPA's risk management of issues associated with coal handling services, an activity conducted by the CQPA on a commercial basis. I find that the documenting of the CQPA Audit, Compliance and Risk Management Committee's consideration of the risk assessment of issues, and the appropriate commercial management of such issues, is an activity conducted on a commercial basis.

The applicant's submissions on public interest considerations

60. In his submissions to this Office, the applicant raised issues relating to the public interest in disclosure of the Matter in Issue. His submissions on this point may be summarised as follows:
 - A decision to not release the information would result in a loss of transparency and may ultimately result in loss of accountability and must be challenged.
 - *'Philosophically, the CQPA should seek to conduct its business on an open and transparent basis, without seeking to extend the coverage of 'commercial activities' to prevent public scrutiny via Freedom of Information legislation of areas that (in my view) are manifestly not commercial activities.'*
 - *'The legislation itself, while not defining the public interest, says that such interest is served 'by promoting open discussion of public affairs and enhancing government's accountability.' '... making the requested CQPA Board Risk Committee minutes available would promote open discussion of public affairs and enhance the government's accountability.'*
 - Even if it is found that the requested information is a commercial activity, *'any commercial implication is sufficiently remote from the requested information and at the lower end of the scale and is outweighed in this particular case by public interest considerations.'*
61. I have carefully considered the applicant's submissions in relation to this issue. In those submissions, the applicant also referred to a previous decision of this Office, *Eccelston*, in which the Information Commissioner considered and discussed in some detail public interest issues. However, in that case the concept of the 'public interest' was discussed in the context of exemption provisions contained in the FOI Act. The Information Commissioner noted that the majority of exemption provisions in Part 3 of the FOI Act contained a specific public interest test.
62. The exemption provisions contained in the FOI Act determine when certain information should not be disclosed under the FOI Act. Some of these exemption provisions incorporate a public interest balancing test and require that a decision maker must

weigh up the public interest considerations both in favour of and against disclosing the information.

63. Section 11A of the FOI Act, however, is an exclusionary provision and provides that the FOI Act does not apply to certain information. Where section 11A of the FOI Act applies, the Information Commissioner does not have jurisdiction to consider whether the information should be disclosed to an applicant under Part 3 of the FOI Act. Section 11A of the FOI Act does not include a specific public interest balancing test.
64. As set out above, in this case I have found that section 11A of the FOI Act applies to the Matter in Issue. Therefore, there is no requirement to consider whether information should be disclosed to an applicant under Part 3 of the FOI Act.

The applicant's submissions on whether the information is 'commercial in confidence'

65. In his submissions to this Office dated 3 October 2007, the applicant argued, in summary, that:
 - The CQPA has said that all of its activities and functions are exempt from the FOI Act by virtue of the commercial in confidence exemption.
 - The CQPA has released commercially sensitive information in the past and therefore the CQPA has, by its own actions, established that such information is not necessarily covered by the commercial in confidence exemption.
 - There is no consistency in the CQPA approach and its decision to release commercially sensitive information is almost a matter of whim.
 - I should determine that the Board Risk Committee minutes, as they relate to coal dust, are not commercial in confidence.
66. I have carefully considered the applicant's submissions in relation to this issue.
67. The CQPA, in its submissions to this Office dated 4 July 2007, submitted that, as an alternative to section 11A of the FOI Act, it relied on the following exemption provisions of the FOI Act:
 - section 45: matter relating to trade secrets, business affairs and research
 - section 49: matter affecting financial or property interests or
 - section 46: matter communicated in confidence.
68. The CQPA has not made specific submissions to this Office on the exemption provisions referred to above as it has relied, primarily, on section 11A of the FOI Act. As I am satisfied that section 11A of the FOI Act applies to the Matter in Issue in this review, it is not necessary for me to address the other exemption provisions the CQPA rely on in the alternative and those provisions are not relevant to this decision.
69. Any consideration of whether the information is 'commercial in confidence' and whether the CQPA has released information in the past that the applicant claims is commercially sensitive in nature is not relevant to my decision as to whether the Matter in Issue in this review is excluded from the application of the FOI Act under section 11A.

Decision

70. I affirm the decision of Mr M Galt, Commercial General Manager, CQPA, dated 5 June 2007, by finding that the Matter in Issue is excluded from the operation of the FOI Act by section 11A of the FOI Act.

R Rangihaeata
Acting Information Commissioner

Date: 23 October 2007