



Decision and Reasons for Decision

Application Number: 210096

Applicant: Community Care Inc.

Respondent: Department of Communities

Third Party: Mr M Howard

Decision Date: 30 June 2008

Catchwords: **FREEDOM OF INFORMATION – Sections 46(1)(a), 46(1)(b) 41(1), 45(1)(c) and 44(1) of the *Freedom of Information Act 1992* (Qld) – audit report – whether audit report a document – entity in receipt of government funding – objection to disclosure by not-for-profit body – information communicated in confidence – information relating to deliberative process – information relating to business affairs – information concerning personal affairs**

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REASONS FOR DECISION

Summary

1. In summary:
 - I note that as a result of informal resolution processes the freedom of information applicant accepts non-disclosure of part of the information sought under the *Freedom of Information Act 1992 (Qld)* (FOI Act) and that this information is no longer in issue in this external review.
 - In respect of the remaining information sought, I vary the decision under review by finding that the balance of the information does not qualify for exemption from disclosure under the FOI Act
 - The FOI applicant is therefore entitled to access to the Audit Report, except for the information that is no longer in issue in this external review (see paragraph 52).

Background

2. By application dated 29 January 2006 (FOI Application), the Department of Communities (DOC) received a freedom of information application for access to the 'audit report or documents that examined the operational, governance and financial issues of Community Care Inc. to determine if funding conditions were complied with'.
3. By letter dated 16 February 2006, the DOC:
 - identified 1,353 possibly relevant documents
 - provided the freedom of information applicant (FOI Applicant) with a preliminary assessment notice
 - listed the options available to the FOI Applicant for proceeding with the application.
4. By email dated 13 March 2006 the FOI Applicant narrowed the scope of the FOI Application to the Community Care Inc. Audit Report (Audit Report).
5. By letter dated 15 March 2006 the DOC issued a new preliminary assessment notice to the FOI Applicant.
6. In a form dated 22 March 2006 the FOI Applicant agreed to pay the charge as detailed in the new preliminary assessment notice.
7. By email dated 10 May 2006 the DOC indicated to the FOI Applicant that Community Care Inc. (CCI) would be consulted regarding disclosure of the Audit Report.
8. By letter dated 10 May 2006, under section 51 of the FOI Act, the DOC sought CCI's views regarding disclosure of the Audit Report.
9. By letter dated 26 May 2006 to the DOC, CCI's solicitors indicated that their client objected to disclosure of the Audit Report in its entirety and explained the basis of their client's objection.
10. In a decision dated 25 August 2006 (Initial Decision), the DOC indicated to the external review applicant's solicitors that access to the Audit Report was deferred (under section 51(2)(e) of the FOI Act) and decided that:

- the Audit Report is a document for the purposes of the FOI Act
 - parts of the Audit Report qualified for exemption under sections 45(1)(c), 43(1) and 44(1) of the FOI Act
 - parts of the Audit Report were outside of the scope of the application
 - the balance of the Audit Report did not qualify for exemption under the FOI Act.
11. By letter dated 22 September 2006, CCI's solicitors sought internal review of the Initial Decision.
 12. In a decision dated 13 October 2006 (Internal Review Decision), the DOC affirmed the Initial Decision.
 13. By letter dated 9 November 2006 (External Review Application), CCI's solicitor's applied on behalf of their client for external review of the Internal Review Decision, indicating that the grounds for review are as follows:

Our client seeks a review on the basis that the Decision was:

1. *wrong in law; and*
2. *in excess of jurisdiction,*

as:

- a. *the Report was created without procedural fairness being afforded to our client. In those circumstances the Report is a legal nullity and does not fall within the definition of a 'document' for the purposes of the Act;*
- b. *further and/or alternatively the Report is exempt matter from disclosure pursuant to s 41 of the Act;*
- c. *further and/or alternatively the Report is exempt matter pursuant to s46 of the Act.*

Decision under review

14. The decision under review is the decision of C Irvine, Acting Director, Ministerial and Executive Support Branch, DOC, dated 13 October 2006.

Steps taken in the external review process

15. By letters dated 27 November 2006, Assistant Commissioner Henry indicated to both the external review applicant's solicitors and the DOC that the Internal Review Decision would be reviewed.
16. By letter dated 3 January 2007 Assistant Commissioner Henry indicated to the FOI Applicant that CCI had applied to this Office for external review and indicated that under section 78 of the FOI Act any person affected by the decision that is the subject of a review may apply to the Information Commissioner to participate in the review.
17. In a telephone discussion on 16 January 2007, a staff member of this Office made some initial inquiries with Mr Tanner, Director, Internal Audit Services Branch, DOC (at that time) regarding the conduct of the audit which resulted in the Audit Report being prepared (Audit).
18. In a letter received by this Office on 17 January 2007, the FOI Applicant indicated that he wished to participate in the external review.

19. In a telephone discussion on 23 January 2007, a staff member of this Office made some inquiries with Mr Smolinski, Department of Child Safety, whom Mr Tanner indicated was involved in carrying out the Audit.
20. By letter dated 24 January 2007, Assistant Commissioner Henry communicated to the external review applicant's solicitors a preliminary view that the Audit Report is a 'document' for the purposes of the FOI Act.
21. By letter dated 5 February 2007 the external review applicant responded to the preliminary view at paragraph 20 above.
22. The external review applicant subsequently commenced proceedings under the *Judicial Review Act 1991* (Qld) in the Supreme Court of Queensland.
23. On 19 June 2007, Justice Helman handed down his decision in *Community Care Inc v Cathi Taylor, Information Commissioner & Ors* [2007] QSC and dismissed the application for a statutory order of review.
24. By letters dated 20 June 2007 and 2 July 2007, I advised the parties to the external review that this Office was now able to continue to progress this review and that I had carriage of the review.
25. By facsimile dated 27 June 2007, the external review applicant's solicitors advised me that their client wished to make submissions on the issue of whether the Audit Report is a document for the purposes of the FOI Act.
26. By facsimile dated 17 July 2007 the external review applicant's solicitors provided the submissions referred to at paragraph 25 above.
27. By letter dated 14 August 2007 I communicated a preliminary view to the external review applicant's solicitors that the Audit Report is a document for the purposes of the FOI Act and asked that submissions in response be provided by 30 August 2007 if the external review applicant did not accept this preliminary view.
28. On 30 August 2007 the external review applicant's solicitors provided:
 - submissions in support of ground 2(a) of the External Review Application
 - a Statutory Declaration of Mr O'Hare.¹
29. By letter dated 13 September 2007 to the external review applicant's solicitors I acknowledged that the external review applicant did not accept the preliminary view at paragraph 27 above and notwithstanding this, I sought submissions regarding any exemption provisions the external review applicant submits apply to the Audit Report.
30. On 28 September 2008 the external review applicant's solicitors provided their client's submissions in respect of paragraph 29 above and Mr O'Hare's executed Statutory Declaration.
31. By letters dated 12 October 2007 I:
 - asked Mr Tanner to provide a response in the form of a Statutory Declaration to a number of issues

¹ Which the external review applicant's solicitors indicated was unsigned, but adopted.

- invited the external review applicant to provide supplementary submissions in respect of a number of the exemption provisions relied on.
32. On 26 October 2007 Mr Tanner provided this Office with a Statutory Declaration in response to my letter at paragraph 31 above.
 33. In a telephone discussion with a staff member of this Office on 4 December 2007 and by facsimile dated 5 December 2007 the external review applicant's solicitors sought an extension of time for their client to provide submissions in response to my letter dated 12 October 2007.
 34. By letter dated 5 December 2007 I extended the time for the external review applicant to provide submissions to 12 December 2007.
 35. On 12 December 2007 the external review applicant provided further submissions.
 36. By letter dated 14 December 2007 I invited the FOI Applicant to provide submissions, particularly with respect to the relevant public interest arguments.
 37. By letter dated 14 December 2007 to the external review applicant, I responded to some issues raised in the external review applicant's submissions.
 38. In a telephone discussion with a staff member of this Office on 11 January 2008 the FOI Applicant indicated that he had not received my letter at paragraph 36 above, raised an issue regarding the external review applicant and inquired as to whether this might alter the external review applicant's position regarding disclosure of the Audit Report.
 39. By letter dated 24 January 2008 I sought clarification from the external review applicant regarding the matters raised by the FOI Applicant at paragraph 38 above.
 40. By facsimile dated 7 February 2008 the external review applicant's solicitors responded to the letter at paragraph 39 above.
 41. In a telephone discussion with a staff member of this Office on 8 February 2008 the FOI Applicant requested that I forward a copy of the letter of 14 December 2007 to him and indicated that he would provide submissions.
 42. By letter dated 11 February 2008 I forwarded a copy of the letter of 14 December 2007 to the FOI Applicant.
 43. By letter dated 22 February 2008 the FOI Applicant provided submissions on public interest considerations.
 44. By letter dated 26 March 2008 I communicated to the external review applicant's solicitors a preliminary view that:
 - the names of the external review applicant's clients as they appear in the Audit Report qualify for exemption under section 44(1) of the FOI Act
 - a small amount of matter qualifies for exemption under section 43(1) of the FOI Act
 - the balance of the Audit Report does not qualify for exemption under the FOI Act and should be disclosed to the FOI Applicant.

45. In a telephone discussion on 28 March 2008:

- a staff member of this Office communicated to the FOI Applicant a preliminary view that:
 - the names of the external review applicant's clients as they appear in the Audit Report qualify for exemption under section 44(1) of the FOI Act
 - a small amount of matter in the Audit Report qualifies for exemption under section 43(1) of the FOI Act
- the FOI Applicant accepted the preliminary view subject to this Office confirming that the matter identified on a preliminary basis as qualifying for exemption did not comprise information of a type described by the FOI Applicant.

46. By letter dated 28 March 2008, I confirmed the FOI Applicant's acceptance of the preliminary view at paragraph 45 above. Accordingly, the names of the external review applicant's clients, as they appear in the Audit Report and the matter summarised in the table below are no longer in issue in this external review and will not be released to the FOI Applicant.²

Page	Matter
Page 5	<ul style="list-style-type: none"> • specified words in dot point 5
Page 23	<ul style="list-style-type: none"> • paragraph 4 • specified words in paragraph 5 • part of one sentence in paragraph 6 • the first sentence of paragraph 7
Page 27	<ul style="list-style-type: none"> • specified words in dot point 4 • dot points 5 to 8
Page 28	<ul style="list-style-type: none"> • specified words in dot point 4

47. By letter dated 18 April 2008 the external review applicant's solicitors:

- indicated that they are instructed that, to the extent that the preliminary view is to release portions of the Audit Report, they do not accept the preliminary view
- indicated that given the significant and substantial submissions already made to the DOC and to this Office, their client did not wish to make any further submissions
- clarified an issue in respect of the possible application of section 46(1)(a) of the FOI Act.

48. On 12 June 2008 a staff member of this Office:

- contacted an employee of the external review applicant to consult with them regarding possible release of a small amount of matter in the Audit Report
- contacted the President of the Crestmead Community Association Inc. (CCAI) to consult with the Association regarding possible release of some matter in the Audit Report

² I note that this Office will provide the DOC with a redacted version of the Audit Report specifically identifying the matter to be deleted prior to release.

- attempted unsuccessfully³ to contact another employee of the external review applicant to consult with them regarding possible release of a small amount of matter in the Audit Report.
49. The President of CCAI indicated to the staff member of this Office that the CCAI did not object to disclosure of the information concerning the CCAI.
50. By letter dated 12 June 2008 I indicated to the external review applicant's employee consulted at paragraph 48 above that if she wished to make additional submissions to this external review those submissions should be received by this Office by 27 June 2008. The employee did not respond to my letter by the due date. I note that in a telephone conversation with a staff member of this Office on 23 June 2008 the employee advised that if she did not provide submissions by the due date this Office could assume that she did not wish to make submissions.
51. In reaching my decision in this matter I have taken the following into account:
- FOI Application
 - preliminary assessment notice dated 8 March 2006
 - email from the FOI Applicant to the DOC dated 13 March 2006
 - new preliminary assessment notice dated 15 March 2006
 - FOI Applicant's response to the new preliminary assessment notice dated 22 March 2006
 - email from the DOC to the FOI Applicant dated 10 May 2006 deferring access to the Audit Report
 - letter from the DOC to CCI consulting under section 51 of the FOI Act
 - letter from Hall Payne Lawyers to the DOC dated 26 May 2006
 - letter from Hall Payne Lawyers to the DOC dated 9 July 2006
 - Initial Decision
 - letter from the DOC to the FOI Applicant dated 25 August 2006 indicating that a decision had been made 'as to the release of the documentation' and deferring access for the review period
 - Internal Review Application
 - Internal Review Decision
 - External Review Application
 - file note of telephone discussion between a staff member of this Office and Mr Tanner on 16 January 2007
 - letter from FOI Applicant to this Office dated 17 January 2007 indicating that he wished to participate in this external review
 - file note of telephone discussion between a staff member of this Office and Mr Smolinski on 23 January 2007
 - letter from Hall Payne Lawyers to this Office dated 17 July 2007 setting out submissions
 - letter from Hall Payne Lawyers to this Office dated 30 August 2007 enclosing submissions and Statutory Declaration of Mr O'Hare (including annexures) (adopted but unsigned)
 - letter from Hall Payne Lawyers to this Office dated 28 September 2007 enclosing submissions and Statutory Declaration of Mr O'Hare (signed)
 - letter from Mr Tanner to this Office, received 26 October 2007, enclosing:
 - Statutory Declaration of Mr Tanner
 - letter to Mr Rielly from the Director-General, DOC

³ As the individual is no longer in the employ of the external review applicant.

- note of file summary
- letter dated 12 December 2007 from Hall Payne Lawyers to this Office enclosing submissions
- file note of telephone discussion between a staff member of this Office and the FOI Applicant on 11 January 2008
- letter from the FOI Applicant to this Office dated 22 February 2008 setting out submissions
- file note of telephone discussion between a staff member of this Office and the FOI Applicant on 28 March 2008
- letter from Hall Payne Lawyers to this Office dated 18 April 2008
- media coverage as identified in this decision
- Department of Communities Standard Conditions of Funding accessed from DOC website
- the matter in issue
- relevant case law, administrative decisions (including decisions of this Office) and legislation.

Matter in issue

52. The matter remaining in issue in this review comprises a document titled 'Audit Report on Community Care Inc,' dated 18 November 2005 from which the information identified at paragraph 46 above has been deleted by redaction. For the remainder of this decision I will refer to the matter remaining in issue as the Redacted Audit Report.

Findings

Jurisdiction of this Office

53. In the External Review Application, the external review applicant's solicitors state:

Our client seeks a review on the basis that the Decision was:

1. *wrong in law; and*
2. *in excess of jurisdiction, as:*
 - a. *the Report was created without procedural fairness being afforded to our client. In those circumstances the Report is a legal nullity and does not fall within the definition of a 'document' for the purposes of the Act;*
 - b. *...*

The external review applicant's submissions

54. The external review applicant's submissions regarding the jurisdictional issue identified at paragraph 53 above can be summarised as follows.
- The external review applicant was not afforded procedural fairness in the process leading to the creation of the Audit Report, in that, factual allegations prejudicial to the external review applicant were not brought to its attention and the external review applicant was not afforded an opportunity to respond to the allegations prior to the Audit Report being finalised.
 - 'A document created in the absence of procedural fairness is a nullity 'that may be ignored for all purposes' (*Posner v Collector for Interstate Destitute Persons* (Vic)(1946) 74 CLR 461 at 480) (*Posner*), including (for) the purposes of the Act'.

- As the auditor did not advise the external review applicant of the ‘critically adverse material’ prior to finalising the Audit Report, the Audit Report is a legal nullity.
- Under the *Judicial Review Act 1991* (Qld) (JR Act), an application can be brought in respect of either a decision or conduct engaged in for the purpose of making a decision.
- The Audit Report constitutes a decision for the purposes of the JR Act.
- Adverse findings as expressed in the report, made in breach of the rules of natural justice, cannot stand’ and ‘would be quashed as a nullity ... by the Supreme Court on judicial review’. The consequence of this is that ‘before the Audit Report could be said to be a document for the purposes of the Act, it was necessary for the auditor to set out critical issues adverse to the external review applicant and give the external review applicant the opportunity to persuade the auditor that the report was wrong’.
- ‘A decision involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all’ (*Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 53) (*Bhardwaj*).
- By analogy with *Bhardwaj*, the Audit Report should not be considered a document.
- If the Audit Report would be quashed by the Supreme Court on judicial review and declared a legal nullity, the Audit Report is not a document for the purposes of the FOI Act.
- The Audit Report is not a document for the purposes of the FOI Act and should not be disclosed.

Relevant provisions of the FOI Act and the Acts Interpretation Act 1954 (Qld) (AI Act)

55. The jurisdiction of this Office is established by the FOI Act. The functions of the Information Commissioner include investigating and reviewing a decision of an agency to disclose documents contrary to a person’s views obtained under section 51 of the FOI Act.⁴

56. Section 21 of the FOI Act provides that:

21 Right of access

Subject to this Act, a person has a legally enforceable right to be given access under this Act to—

- (a) *documents of an agency; and*
- (b) *official documents of a Minister.*

57. Section 7 of the FOI Act and the Note to that section relevantly provide that:

document *includes—*

- (a) *a copy of a document; and*
- (b) *a part of, or extract from, a document; and*
- (c) *a copy of a part of, or extract from, a document.*

⁴ Section 101C(1)(k)(i) of the FOI Act.

Note—

Under the Acts Interpretation Act 1954, section 36, **document** includes—

- (a) any paper or other material on which there is writing; and
- (b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and
- (c) any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device).

58. Section 7 of the FOI Act also provides that:

document of an agency or document of the agency means a document in the possession or under the control of an agency, or the agency concerned, whether created or received in the agency, and includes—

- (a) a document to which the agency is entitled to access; and
- (b) a document in the possession or under the control of an officer of the agency in the officer's official capacity.

59. I have carefully considered the external review applicant's submissions and am satisfied that:

- whether or not the external review applicant was afforded procedural fairness in the lead up to the Audit Report being finalised (and I make no comment on the veracity of this assertion) is not a relevant issue for determining whether the Audit Report is a document for the purposes of the FOI Act because the meaning of the term document for the purposes of the FOI Act is clearly governed by the FOI Act and the AI Act
- accordingly, speculation as to what findings the Supreme Court might make in respect of an application under the JR Act, had it been brought, in respect of the auditor's purported decision or conduct, is not a relevant consideration in this matter nor is the argument regarding analogy with the decision in *Bhardwaj*
- *Posner* does not stand for the proposition that a document created in the absence of procedural fairness is a nullity because in *Posner* the Court considered the validity of a Court Order
- there is no legal requirement that the Audit Report meet any threshold test relating to its creation, rather, its status as a document for the purposes of the FOI Act derives from the specific and relevant provisions of the FOI Act and the AI Act, as discussed at paragraph 60 below.

60. Having reviewed the Audit Report and the statutory provisions noted at paragraphs 56 to 58 above, I am satisfied that:

- the Audit Report is comprised of paper on which there is writing and is therefore a document, as defined by section 36 of the AI Act
- the Audit Report is a document of an agency because it is a document of the DOC, which is an agency within the meaning of section 8 of the FOI Act
- the DOC has made a decision regarding disclosure of the Audit Report under section 27(2) of the FOI Act
- under section 101C(1)(k)(i) of the FOI Act, the Information Commissioner has jurisdiction to review the DOC's decision regarding disclosure of the Audit Report because the Information Commissioner's functions include investigating and

reviewing decisions of agencies of various kinds including 'a decision to disclose documents contrary to the views of ... a person obtained under section 51'

- under section 88(1) of the FOI Act the Information Commissioner has the power to review the Internal Review decision because the Information Commissioner may review any decision made by an agency in relation to the application concerned and decide any matter in relation to the application that could have been decided under the FOI Act by the DOC.

Conclusion on jurisdictional issue

61. In view of the above I am satisfied that:

- the Audit Report is a document for the purposes of the FOI Act
- the Information Commissioner or their delegate has jurisdiction to review the Internal Review Decision.

Scope of the FOI Application

62. I note that in the Initial Decision,⁵ the decision-maker determined that the following parts of the Audit Report were outside of the scope of the FOI Application:

- parts of page 4
- page 6
- part of page 13
- pages 14 to 16
- part of page 29
- pages 30 to 33.

63. Regarding the scope of the FOI Application, I note that:

- by application to the DOC dated 29 January 2006, the FOI Applicant sought access under the FOI Act to:

the audit report or documents that examined the operational, governance and financial issues of Community Care Inc to determine if funding conditions were complied

This report would have been completed during November 2005. Authors of this report being Mr David Tanner A/Director and Mr Martin Wild, Principal Audit Consultant from the Internal Audit Services Branch.

- in a preliminary assessment notice dated 8 March 2006 provided to the FOI Applicant, the DOC listed 4 files that it considered relevant to the request
- in an email dated 13 March 2006 to a staff member of the DOC, the FOI Applicant referred to an earlier telephone discussion and stated:

In your correspondence under 'searches for relevant documents' you show 4 relevant files, of those files, report number: 2 – namely

'Community Care Inc. Audit Report – Internal Audit Services (34 pages) – community Funding Unit'

is the document I wish to obtain.

⁵ Which was affirmed by the Internal Review Decision.

64. I am satisfied that a plain reading of the communication between the FOI Applicant and the DOC indicates that the FOI Applicant sought access to the entire Audit Report and not just to those parts of the report that relate to the external review applicant.

Conclusion regarding scope of the FOI Application

65. In view of the above, I am satisfied that the matter in issue in this review comprises the Redacted Audit Report, in its entirety.

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

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

46 Matter communicated in confidence

(1) *Matter is exempt if—*

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

67. The test for exemption under section 46(1)(a) of the FOI Act is considered by reference to a hypothetical legal action in which an identified plaintiff has standing to enforce an obligation of confidence in respect of the matter in issue.⁶ In other words the decision-maker must determine 'whether the disclosure of a particular document would be actionable under the general law.'⁷

68. I note that 'the party complaining must be the person who is entitled to the confidence and to have it respected'.⁸ Accordingly, a plaintiff bringing an action for breach of confidence must have *communicated* the information in respect of which they claim that the recipient is bound by an obligation of confidence.

69. The applicant submits⁹ that the following information is exempt from disclosure under section 46(1)(a) of the FOI Act:

- the entirety of page 5
- paragraphs 6 and 7 of page 21
- paragraphs 1 and 3 to 6 and the first sentence of paragraph 7 of page 23
- all of page 25 except paragraph 1
- paragraphs 1 to 5 of page 26
- the last sentence of paragraph 6 of page 26
- the last sentence of paragraph 8 of page 26
- all of the last paragraph of page 26
- all of the first paragraph of page 27
- dot points 5 to 10 of page 27; and
- dot points 2 and 6 of page 28.

70. However, I note that to the extent that information identified in paragraph 69 above also comprises information in paragraph 46, that information is no longer in issue in this review and will not be released to the FOI Applicant.

⁶ *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (B) (at paragraph 44).

⁷ *Corrs Pavey v Collector of Customs* (1987) 74 ALR 428 per SweeneyJ at 430.

⁸ *Fraser v Evans & Others* [1969] 1 All ER 8, at page 11.

⁹ Letters dated 18 April 2008 and 28 September to the Office of the Information Commissioner, referring to letters dated 26 May 2006 and 22 September 2006 to the DOC.

71. The applicant submits that in respect of pages 25 and 26 of the Redacted Audit Report it is not possible to know which of various sources provided the information therein¹⁰ and that therefore all of the information in those pages should be found to be confidential. However, I note that the applicant has also identified specific parts of pages 25 and 26 of the Redacted Audit Report which it submits were communicated in confidence.
72. I am not persuaded that it is appropriate to adopt the approach suggested at paragraph 71 above, for the following reasons.
73. Section 4 of the FOI Act provides that the object of the Act *'is to extend as far as possible the right of the community to have access to information held by Queensland government...'* and that the object of the Act is to be achieved by *'giving members of the community a right of access to information held by government to the greatest extent possible with limited exceptions'*.
74. Section 46(1)(a) of the FOI Act is one of the 'limited exceptions' to the general right of access. Burchett J has noted in respect of section 3 of the *Freedom of Information Act 1982* (Cth), which is substantially similar to section 4 of the FOI Act, that 'the rights of access and the exemptions are designed to give a correct balance of the competing public interests involved.'¹¹
75. In addition, section 81 of the FOI Act provides that:

81 Onus

(1) *On a review by the commissioner, the agency which or Minister who made the decision under review has the onus of establishing that the decision was justified or that the commissioner should give a decision adverse to the applicant.*

(2) *However, if the decision under review is a disclosure decision, the participant in the application for review who opposes the disclosure decision has the onus of establishing that a decision not to disclose the document or matter is justified or that the commissioner should give a decision adverse to the person who wishes to obtain access to the document.*

(3) *In this section—*

disclosure decision means—

(a) ***a decision to disclose a document or matter contrary to the views of a person obtained under section 51; or***

(b) *a decision to disclose a document or matter if the agency or Minister should have taken, but has not taken, steps to obtain the views of a person under section 51.*
[emphasis added]

76. In this review, the DOC has the onus of establishing that its decision not to disclose parts of the Redacted Audit Report is justified and the applicant has the onus of establishing that disclosure of the balance of the Redacted Audit Report is not justified. However, as the applicant opposes disclosure of the Redacted Audit Report, in its entirety, on bases that were in large part not accepted by the DOC, the applicant carries a practical onus of establishing that non-disclosure is justified.

¹⁰ And acknowledging that confidentiality in some of the information may have been lost because it was provided by sources other than the applicant.

¹¹ *Arnold (on behalf of Australians for Animals) v Queensland and Another* (1987) 73 ALR 607 at 626.

77. I have reviewed the information identified by the applicant at paragraph 69 above. I am satisfied that the following information is information that is commonly known and accordingly is neither confidential information communicated by the external review applicant to the Auditors nor comments, recommendations or findings of the Auditors which are based on or incorporate confidential information communicated by the external review applicant to the Auditors.

Page number	Matter
5	<ul style="list-style-type: none"> • the page header • the title of the section of the Report • dot points 1 to 3
25	<ul style="list-style-type: none"> • paragraph 2¹² • dot points 5 to 7

78. I am satisfied that the external review applicant would not have standing to bring an action for breach of confidence in respect of the information identified at paragraph 77 above and accordingly will not consider this information further in my consideration of the possible application of section 46(1)(a) of the FOI Act.

79. I am satisfied that the external review applicant would have standing to bring an action for breach of confidence in respect of the following information (Communicated Information):

Page number	Matter
5	<ul style="list-style-type: none"> • dot points 4 to 9¹³
21	<ul style="list-style-type: none"> • paragraphs 6 and 7
23	<ul style="list-style-type: none"> • paragraphs 1 and 3 and 5-6¹⁴
25	<ul style="list-style-type: none"> • dot points 1 to 4 • dot points 8 to 10
26	<ul style="list-style-type: none"> • paragraphs 1 to 5 • the last sentence of paragraph 6 • the last sentence of paragraph 8 • all of the last paragraph
27	<ul style="list-style-type: none"> • all of the first paragraph • dot points 9-10
28	<ul style="list-style-type: none"> • dot points 2 and 6

¹² I consider paragraph 2 to be the first full paragraph of page 25.

¹³ Except for specified words in dot point 5 which are no longer in issue – see paragraph 46 above.

¹⁴ Except for specified words in paragraph 5 which are no longer in issue – see paragraph 46 above.

Section 46(2) of the FOI Act

80. Section 46(2) of the FOI Act provides that:

46 Matter communicated in confidence

...

(2) Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless it consists of information communicated by a person or body other than—

(a) a person in the capacity of—

(i) a Minister; or

(ii) a member of the staff of, or a consultant to, a Minister; or

(iii) an officer of an agency; or

(b) the State or an agency.

81. The Information Commissioner has previously indicated that when considering the possible application of section 46(1) of the FOI Act, a decision-maker must first consider whether section 46(2) of the FOI Act excludes the possible application of section 46(1).¹⁵ The effect of section 46(2) of the FOI Act is that a claim for exemption under section 46(1) cannot be sustained if section 46(2) applies.

82. The external review applicant is not a body listed at paragraphs (a) or (b) of sub-section 46(2) of the FOI Act. Accordingly, I am satisfied that the possible application of sub-section 46(1) of the FOI Act is not excluded by sub-section 46(2) of the FOI Act.

Requirements for exemption under section 46(1)(a) of the FOI Act

Contractual obligation of confidence

83. An obligation of confidence may arise, either expressly or impliedly, between the parties to a contract.¹⁶ I do not have any information before me to indicate that a contractual obligation of confidence arises. Accordingly, the test for exemption under section 46(1)(a) of the FOI Act must be evaluated in terms of whether an equitable obligation of confidence arises.

Equitable obligation of confidence

84. To succeed in an equitable action for breach of allegedly confidential information, a plaintiff must show that:¹⁷

- a) the information can be specifically identified
- b) the information has the necessary quality of confidence
- c) the information was communicated in confidence
- d) there is actual or threatened misuse of the information

I consider each of these cumulative requirements below.

¹⁵ B at paragraph 35.

¹⁶ *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

¹⁷ *Corrs Pavey v Collector of Customs* (1987) 74 ALR 428 (a decision concerning the Commonwealth equivalent to section 46(1)(a) of the FOI Act), at 437 per Gummow J.

Requirement a) – specifically identified information

85. I note that in identifying the requirements for a court of equity's intervention for alleged breach of confidence, Gummow J has indicated that it is now settled under Australian law that a plaintiff '*must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question.*'¹⁸

86. Further, in *O'Brien v Komesaroff*,¹⁹ Mason J observed:

... One needs to know not only what was the information conveyed but also what part of that information was not common knowledge ... See also Deta Nominees at pp. 189-190. There Fullagar J said (at p.190) 'I do not think that equity will exert itself to protect allegedly confidential information so widely expressed'.

87. Accordingly, the Information Commissioner has previously noted, having considered relevant case law and commentary that:²⁰

matter in a document which is claimed to be exempt under s.46(1)(a) [must] be clearly specified, and differentiated from other matter which is available for access pursuant to the general right of access conferred by s.21 of the FOI Act.

88. The applicant submits that the Communicated Information is 'specific and identifiable'.²¹

89. I have reviewed the Communicated Information and am satisfied that:

- the Communicated Information is specifically identified
- requirement a) is established.

Requirement b) – necessary quality of confidence

90. The Information Commissioner has previously identified the following matters as being relevant in determining whether information contains the necessary quality of confidence:²²

- the basic requirement is inaccessibility
- it is not necessary to demonstrate absolute secrecy or inaccessibility
- secrecy may attach to a way in which publicly available information has been utilised
- the question of confidentiality is to be determined by reference to the substance of the information for which protection is sought, not by reference to an express marking of 'confidential' on a document
- confidentiality may be lost with the passage of time
- the confider's own attitude and conduct toward preserving the secrecy of allegedly confidential information may be relevant to whether it should properly be characterised as confidential information.

¹⁸ *Corrs Pavey v Collector of Customs* (1987) 74 ALR 428 at 437.

¹⁹ (1982) 150 CLR 310 at 327-28.

²⁰ *B* at paragraph 63.

²¹ Letter dated 26 May 2006 to the DOC, as amended by letter of 9 July 2006 to the DOC.

²² *B* at paragraph 71.

91. I note that the external review applicant's submissions on this second requirement in respect of various aspects of the Redacted Audit Report can be summarised as follows:

- the information has the necessary quality of confidence
- the information²³ was supplied to the Auditors from personal files and was inaccessible and not widely known
- information concerning the work practices,²⁴ private meetings,²⁵ internal responsibilities²⁶ of the external review applicant ought to be regarded as confidential information
- specific information about membership details²⁷ and dealing with memberships²⁸ ought to be regarded as confidential information
- the Auditors' commentary,²⁹ opinions³⁰ and findings³¹ where they disclose confidential information about and/or provided by the external review applicant, discloses the external review applicant's confidential information
- information provided by numerous sources in circumstances where it is not possible for the external review applicant to determine whether it or the other sources provided the information is confidential.³²

92. I have carefully considered the Communicated Information and the external review applicant's submissions and am satisfied that:

- the Communicated Information is not commonly known and accordingly has the necessary quality of confidence
- requirement b) is established.

Requirement c) – information communicated in confidence

93. With respect to the third requirement, I must evaluate all the relevant circumstances concerning the communication of the Communicated Information for indications as to whether conscionable conduct on the part of the DOC does, or does not require that the Communicated Information be treated in confidence. The Information Commissioner has previously indicated that the relevant circumstances to consider include, but are not limited to:³³

- the nature of the relationship between the parties
- the nature and sensitivity of the information
- the purpose(s) for which the information was communicated
- the nature and extent of any detriment to the interests of the information-supplier that would follow from an unauthorised disclosure of the information

²³ Paragraph 6 of page 21.

²⁴ Paragraph 7 of page 21.

²⁵ Paragraph 1 of page 23.

²⁶ Paragraph 3 of page 23.

²⁷ Paragraphs 8 and 9 of page 26 and paragraph 1 of page 27.

²⁸ The last sentence of paragraph 6 of page 26, Dot point 6 on page 28.

²⁹ Paragraph 7 of page 21.

³⁰ Dot points 5 to 10 on page 27, dot point 2 of page 28.

³¹ Page 5.

³² all of page 25 excepting paragraph 1, paragraphs 1 to 5 of page 26, the last sentence of paragraph 6 of page 26, the last sentence of paragraph 8 of page 26 and all of the last paragraph of page 26.

³³ B at paragraphs 82 and 84.

- the circumstances relating to the information's communication.³⁴

94. I note that on this point the external review applicant's submissions can be summarised as follows:

- the external review applicant 'repeatedly advised the Auditor that [it] did not consider the power conferred under section 12 of the *Family Services Act 1987* (Qld) (FS Act) to be broad enough to enable an investigation to be conducted into issues' covered by the Redacted Audit Report
- at all times the external review applicant reserved its 'rights with respect to continued provision and use of this confidential information'
- as the Auditor did not have authority to compel production of the information provided by the external review applicant, 'any reasonable person in the Auditor's position would have known or ought to have known that the information was being imparted in confidence'
- the Auditor was clearly aware that the information was being imparted by the external review applicant in confidence and 'this state of knowledge is evidenced by the warning placed on page two of the report.'

95. In a Statutory Declaration dated 19 September 2007, Mr O'Hare, Executive Director of the external review applicant declared that:

- a) at a meeting with the Auditors on 7 October 2005, he asked the Auditors in words to the following effect:

Is this going to be a public or private process? The reason I ask is that we consider much of the information you will be seeking access to, to be confidential in nature. If this is to be a public process we will need to seek legal advice as to what information we are lawfully obligated to provide to you and that will be the bare minimum provided.

- b) in response, one of the Auditors said in words to the following effect:

No this will be a private process. It will be entirely confidential. None of the material supplied will be made publicly available. We are required under the auditing guideline to only provide the report to the Director General and all other matters are commercial in confidence.

- c) in response, Mr O'Hare replied in words to the following effect:

If it is to be a confidential process and the documents are not to be made public we are happy to provide you with access to all of our confidential information but only on the basis that it remains confidential and is only used for this process.

- d) the auditors agreed that the confidentiality in the information would be maintained.

96. In a statutory declaration dated 25 October 2007, Mr Tanner, Director, DSQ Internal Audit, having considered Mr O'Hare's Statutory Declaration, stated that he had no recollection of:

- Mr O'Hare making the statement at a) of paragraph 95 above

³⁴ B at paragraph 82 referring also to *Re Smith Kline and French Laboratories (Aust) Limited and Ors ats Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at paragraph 46.

- he or any of the auditors present making the statement at b) of paragraph 95 above
- Mr O'Hare making the statement at c) of paragraph 95 above
- he or any of the auditors present making the precise statement at d) of paragraph 95 above.

97. Mr Tanner further indicates in his statutory declaration that:

- Internal Audit units within a State government environment would not normally use terms like 'commercial in confidence' and he has no recollection of ever using this term within his current role
- the auditors involved in the Audit have confidentiality requirements set out in their respective Internal Audit Charters and they would observe these requirements
- normal practice is that Audit would advise that the information provided would be confidential to the extent allowed by the Internal Audit Charter, however, he 'always understood that this does not limit the Director-General's capacity to release information'
- he has no recollection of either himself or any of the auditors present agreeing to any conditions regarding confidentiality except those stated in the respective Internal Audit Charters
- his recollection is that the external review applicant accepted the terms of reference as set out in the Director-General's letter to the external review applicant
- his recollection is that Mr O'Hare and other staff and Board members of the external review applicant did not raise the issue of scope with him during the course of the investigation, but freely answered questions outside the scope of section 12 of the FS Act and it was only once the report was released that Mr O'Hare objected to the items reported on outside the scope of section 12.

Scope of the audit

98. I note that an attachment to the Director-General's letter to the external review applicant notifying the external review applicant of the Audit sets out in some detail the intended scope of the audit, including the matters to be reported on and the areas of operation that would be considered. I also note that the Internal Audit Charter indicates that Internal Audit Services perform their role by providing independent advice on a wide range of matters including the '*economical and efficient use of resources, compliance with policies and the accomplishment of goals for operations.*'³⁵

99. Mr Tanner also provided this Office with a copy of his Note for File summary of the discussion at the meeting of 3 October 2005. This Note for File provides in part as follows:

Entry Interview – 3 October 2005

Audit met with Tony O'Hare, Executive Director, Leanne Dean, Assistant Director & Jeff Reilly President CCI. Representing Audit were Greg Condon & George Smolinski from Child Safety and Martin Wild and myself from DSQ Communities.

Matters discussed were

- *Audit outlined the scope and process of the audit to be undertaken*

³⁵ Internal Audit Charter Department of Communities & Disabilities Services Queensland, 9 November 2005 at 2.2.

- *Mr O'Hare advised that CCI welcomed the audit as it provided a chance for CCI to clear its name. He explained it had been difficult to be exposed to allegations in the press without the capacity to respond.*
- *Mr O'Hare advised that Audit was welcome to review the records of CCI.*

Mr O'Hare then provided some background to the events as follows

100. I note that in a telephone discussion with a staff member of this Office on 23 January 2007, Mr Smolinski (previously of the Department of Child Safety), an auditor involved in the Audit, said that he did not have a very good recollection of what was said regarding confidentiality, however, he indicated that during the audit process the external review applicant was more than happy to assist and complied with requests.

Extent of any obligation of confidence

101. I note that the Communities/DSQ Internal Audit Charter (Charter) at the time stated at section 7.4. that:

Internal Audit Services Branch officers will be required to maintain the confidentiality of information obtained in the course of their duties. Information will not be released to third parties unless required or authorised by or under law to comply with the Privacy Standards. Information will only be used for the purpose for which it is obtained.

102. Further, page 2 of the Audit Report states:

Audit in confidence

This is a confidential report prepared by the internal audit services branch, disability services Queensland.

This document is 'strictly confidential'. The unauthorised possession, reproduction and/or discussion of the information contained in this document is prohibited and may result in prosecution.

If in doubt as to the dealing with information arising out of this document, please contact the director, internal audit services branch, disability services Queensland.

103. In a telephone discussion with a staff member of this Office on 16 January 2007, Mr Tanner indicated that the statement at paragraph 102 above is a standard statement that is included on every audit report and that the purpose of the statement is to protect against unauthorised internal disclosure. Mr Tanner indicated that this clause is not intended to prohibit third party disclosure under FOI legislation.

104. I note that DOC agreements clearly indicate that information provided to the DOC is subject to the FOI Act.³⁶

³⁶ The DOC website indicates that in respect of older style service agreements, the DOC Standard Conditions of Funding (SCF) apply. Item 3 of the SCF is headed 'Freedom of Information' and provides:

3. Freedom of Information

Applications for funds and other written information provided to the Department will generally be treated in confidence. However, documents held by the Queensland Government are subject to the Freedom of Information Act 1992. Funded organisations are required to advise the Department if they:

105. In view of the operation of the FOI Act, a government agency cannot give an absolute guarantee that information provided by a third party will not be disclosed under the FOI Act.³⁷ This is explained in relation to the Commonwealth freedom of information legislation in *Searle Australia Pty Ltd v Public Interest Advocacy Centre*³⁸ where a Full Federal Court noted that:

With the commencement of the FOI Act on 1 December 1982, not only could there be no understanding of absolute confidentiality, access became enforceable, subject to the provisions of the FOI Act. No officer could avoid the provisions of the FOI Act simply by agreeing to keep documents confidential. The FOI Act provided otherwise.

106. However, if it is established that a document meets the requirements for exemption, an agency has discretion under section 28 of the FOI Act to refuse access to that document.
107. I note that the Audit Report is marked 'strictly confidential.' Though this is not determinative, it is a factor that tends to support a conclusion that information contained within the Redacted Audit Report may have been communicated in confidence. Though I also note that all audit reports are similarly marked and this tends to reduce the veracity of this factor.
108. I also note that the Charter provides that information provided in an audit 'will only be used for the purpose for which it is obtained.' Though the purpose test may be of assistance in determining whether an obligation of confidence 'chrysalises around a limited purpose,'³⁹ it does not determine the issue.⁴⁰ In addition, I note that the Charter governs the disclosure and use of information by the Auditors including the purpose to which information collected by the Auditors can be used by the Auditors. However, the DOC is not necessarily bound to use the information contained in the Redacted Audit Report in a particularly narrow way because this would be potentially inconsistent with its obligation to account to the public for the administration and oversight of public funds.
109. The information contained in the Audit Report is more than two years old. I am satisfied that the sensitivity of this information is likely to be significantly reduced due to the passage of time.
110. In *Queensland Gridiron Football League Inc. and Department of Tourism, Sport and Racing*⁴¹ (QGFL) the external review applicant objected to a government department disclosing documents (including an audit report) to an FOI applicant relating to an audit of the external review applicant. In QGFL the Information Commissioner noted that the external review applicant was a body incorporated under the *Associations Incorporation Act 1981* (Qld) in receipt of funding from the government department under the Queensland Sports Development Scheme for 'administration, management,

(a) *Have any substantial concern about the release of documents held by the Department of Communities.*

Wish to be consulted should documents fall within the scope of an application under the Freedom of Information Act 1992. [emphasis added]

³⁷ B at paragraph 99.

³⁸ (1992) 108 ALR 163 at page 180.

³⁹ F Gurry in Finn, *Essays in Equity* (1985) page 118 cited in B at paragraph 82.

⁴⁰ *Smith Kline & French Laboratories (Australia) Ltd And Others v Secretary To The Department Of Community Services And Health And Another* 28 FCR 291 at 302-303.

⁴¹ (1994) 2 QAR 230.

coaching and development.’ In considering whether the third element of section 46(1)(a) was satisfied, the Information Commissioner stated:

*Having regard to all of the relevant circumstances and, in particular, the nature of the relationship between the QGFL and the respondent, the nature and alleged sensitivity of the information in issue, and the purposes for which it was sought and given, I am satisfied that none of the information in issue was communicated in such circumstances as to fix the Department with an equitable obligation of confidence. **The Department in effect acts as an agent of the public in ensuring that public funds advanced to a private sector organisation to further purposes considered to be in the public interest** (i.e. fostering the development of opportunities for participation in sporting activities through enhancing the efficiency of sports administration and management) **are expended in a proper manner and properly accounted for. In my opinion, these general circumstances tell against the imposition of enforceable equitable obligations of confidence.** It is always possible that particular items of information could attract such an obligation, depending on the circumstances of a particular case, but criterion (c) is not, in my opinion, satisfied in respect of any of the information in issue in this case, including the particular portion of the audit report singled out by the QGFL in its letter to the Department dated 15 February 1994 (see paragraph 29 above). [emphasis added]*

111. I have carefully considered the external review applicant’s submissions as well as the matters set out above and I am satisfied that:

- Mr Tanner was not of the view that the external review applicant expected the information it communicated to the Auditors to be kept in confidence except to the extent provided for in the Audit Charter. The confidentiality provision in the Audit Charter prescribes the use and disclosure limitations with respect to Audit personnel, however, it does not impose such limitations on the DOC generally. As Mr Tanner indicates in his Statutory Declaration, he was aware that this provision of the Audit Charter is still subject to the Director-General’s discretion to release the information. Accordingly, Mr Tanner could not give a guarantee regarding confidence in the particular case, and it therefore seems unlikely that he would have specifically done so.
- As an undertaking to keep any information provided by the external review applicant absolutely confidential would constitute a departure from normal practice, I would expect that Mr Tanner would be more likely to recall this.
- Both Mr Tanner’s and Mr Smolinski’s recollection of the external review applicant’s co-operative stance in relation to the Audit and Mr Tanner’s Note to File weigh against a conclusion that the external review applicant expressed strong concerns to the Auditors about the confidentiality of the information.
- The DOC is accountable to the public for the administration of public funds which are expended to provide essential services to sectors of the community that are often most in need of support.
- Much of the information in question concerns/or impacts on issues that relate to the external review applicant’s management of public funds.
- The relationship between the DOC and the external review applicant as well as the circumstances in which the Communicated Information was provided are substantially analogous to those in QGFL and these circumstances ‘tell against the imposition of enforceable equitable obligations of confidence’ because the DOC must account for the proper administration of public funds.

112. Accordingly, I am satisfied that:

- the Communicated Information was not communicated in confidence
- the third requirement is not established.

Requirement (d) – unauthorised use

113. I note that the external review applicant strongly objects to disclosure of the Redacted Audit Report.

114. Accordingly, I am satisfied that this requirement is established.

Detriment

115. The external review applicant submits that disclosure of the Redacted Audit Report would result in:

- loss of the external review applicant's privacy
- unwanted and unnecessary scrutiny of the external review applicant's internal affairs
- exposure of the external review applicant's legal strategy for dealing with internal disputes.

116. I note that it is presently uncertain whether detriment is a necessary element of an action for breach of confidence in Australia.⁴² However, if it is necessary for a plaintiff to establish detriment, I am satisfied that the matters raised by the external review applicant at paragraph 115 above are sufficient to satisfy this requirement.

Possible defences

117. In considering section 46(1)(a) of the FOI Act, it is appropriate to take into account any equitable defences that might be available to an action for breach of confidence.⁴³ I have no evidence or submissions before me regarding any possible defences available to the DOC. In view of my conclusion regarding 46(1)(a) of the FOI Act, it is unnecessary for me to consider this issue further.

Conclusion on application of section 46(1)(a) of the FOI Act

118. The Communicated Information does not qualify for exemption under section 46(1)(a) of the FOI Act because the external review applicant has not established all of the elements of an action for breach of confidence under the general law.

Section 46(1)(b) of the FOI Act

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

46 Matter communicated in confidence

(1) *Matter is exempt if—*

...

⁴² In *Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39 at 50–52 (Fairfax)*, Mason J, (citing *Coco v A N Clark (Engineers) Ltd [1969] RPC 41 (Coco)* as authority) broadly stated that to succeed in an action for breach of confidence a plaintiff must establish detriment. However, in *Coco*, Sir Robert Megarry J expressly questioned whether a plaintiff would be required to demonstrate detriment in all cases. In *NP Generations Pty Ltd v Fenely (2001) 80 SASR 151*, a decision of a Full Court of the Supreme Court of South Australia, Debelle J noted the anomaly between the decisions in *Fairfax* and *Coco* and observed that the decision in *Fairfax* may have to be reviewed (see also *National Roads and Motorists' Association Ltd v Geeson (2001) 40 ACSR 1 (at 58)*).

⁴³ See *B* at paragraphs 119 to 134.

- (b) *it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

120. Matter is exempt under section 46(1)(b) of the FOI Act if:⁴⁴

- a) it consists of information of a confidential nature
 - b) it was communicated in confidence
 - c) its disclosure could reasonably be expected to prejudice the future supply of such information
- and
- d) the weight of the public interest considerations favouring non-disclosure equals or outweighs that of the public interest considerations favouring disclosure.

121. As I am satisfied that requirement c) of section 46(1)(b) of the FOI Act is not established for the reasons set out below it is unnecessary for me to consider the remaining requirements.

122. Requirement c) necessitates a consideration of whether disclosure of the Redacted Audit Report could reasonably be expected to prejudice the future supply of information to the DOC.

123. The phrase 'could reasonably be expected to' requires a decision-maker applying section 46(1)(b) of the FOI Act to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible and expectations which are reasonably based. The Information Commissioner has previously described these as expectations for which real and substantial grounds exist.⁴⁵

124. In respect of the term 'prejudice the future supply of information' the Information Commissioner has previously stated that:⁴⁶

... the test is not to be applied by reference to whether the particular confider whose confidential 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

and that:

[w]here persons are under an obligation to continue to supply such confidential 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.

125. I note that in respect of the future supply of information, the external review applicant's solicitors make the following submissions.

⁴⁴ B at paragraphs 146 to 147.

⁴⁵ B at paragraphs 154-160.

⁴⁶ B at paragraph 161.

- '[O]ur client's objection relates to confidential information that they were not required, by law, to disclose. Our client would have been well within their rights to have not disclosed the confidential information. However, our client disclosed this confidential information to facilitate the Auditor's investigation.'
- 'If our client had been aware that the confidential information would have been disclosed to parties other than the Auditor, the confidential information would not have been provided.'
- 'It is therefore reasonable to consider that the disclosure of this confidential information to parties other than those our client intended to disclose the material to, would result in information of this kind being withheld in future.'

126. I understand that the external review applicant's argument is in essence that it was issued with a notice under section 12 of the FS Act which allows the Department's chief executive to examine books and records relating to the receipt and expenditure of grant funds. Under section 12 of the FS Act CCI was compelled to give the Auditors access to a limited class of documents, but nonetheless allowed access to additional documents and information. However, if the Redacted Audit Report is disclosed, the external review applicant would in future ensure only strict compliance with the requirements of section 12 of the FS Act.
127. As indicated at paragraph 124 above, the appropriate test is whether disclosure could reasonably be expected to prejudice the future supply of information of the type provided by the external review applicant to the Auditors for preparation of the Redacted Audit Report from a substantial number of the sources available or likely to be available to the DOC.
128. I note that in *QGFL* the Information Commissioner indicated that the Department's reasoning in finding that the matter in issue was not exempt under section 46(1)(b) was correct, that is, that '*organisations like the QGFL are obliged to supply the Department with information of the kind in issue if they wish to continue to obtain funding.*'⁴⁷ This was because:⁴⁸
- It is apparent that the failure of organisations to provide this information to the Department would result in funding being withdrawn by the Department. Accordingly, there is no basis upon which it could reasonably be expected that disclosure of the information in issue would prejudice the future supply of such information to government.*
129. I acknowledge that I do not have before me details of the funding agreements between the external review applicant and the DOC. I note though that section 10(1) of the FS Act relevantly provides that the chief executive may, subject to the Minister's approval, make grants to any body corporate to develop or carry out programs for the provision of family or community services. However, if the chief executive has reasonable cause to suspect that the conditions of a grant are not being complied with, they may issue a show cause notice to the person receiving the grant.⁴⁹ If, having considered any submissions made by the person and at the conclusion of the statutory period, the chief executive is satisfied that the conditions of a grant are not being or have not been complied with, the chief executive, with the Minister's approval, may cease payments under the grant.⁵⁰

⁴⁷ At paragraph 42.

⁴⁸ At paragraph 32.

⁴⁹ Section 11(5) of the FS Act.

⁵⁰ Section 11(6) of the FS Act.

130. On this point I note that in a letter to the external review applicant dated 30 September 2005 the Director-General, Department of Communities, indicated concern regarding possible non-compliance with grant conditions. I am satisfied that in circumstances where an organisation is in receipt of a government grant and the chief executive suspects that the conditions of the grant may not be being complied with, it could be anticipated that a substantial number of such organisations would disclose any necessary and relevant information to avert a withdrawal of funding.

Conclusion on application of section 46(1)(b) of the FOI Act

131. Accordingly, I am satisfied that the:

- third requirement of section 46(1)(b) of the FOI Act is not established
- Communicated Information does not qualify for exemption under this provision.

Section 41 of the FOI Act

132. Section 41(1) of the FOI Act provides that:

41 Matter relating to deliberative processes

(1) Matter is exempt matter if its disclosure—

(a) would disclose—

(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) a consultation or deliberation that has taken place;

in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and

(b) would, on balance, be contrary to the public interest.

133. Sections 41(2) and (3) of the FOI Act list a number of exceptions to the exemption contained in section 41(1)(a) of the FOI Act, as follows:

(2) Matter is not exempt under subsection (1) if it merely consists of—

(a) matter that appears in an agency's policy document; or

(b) factual or statistical matter; or

(c) expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.

(3) Matter is not exempt under subsection (1) if it consists of—

(a) a report of a prescribed body or organisation established within an agency; or

(b) the record of, as a formal statement of the reasons for, a final decision, order or ruling given in the exercise of—

(i) a power; or

(ii) an adjudicative function; or

(iii) a statutory function; or

(iv) *the administration of a publicly funded scheme.*

Requirements for exemption under section 41(1) of the FOI Act

134. For matter to qualify for exemption under section 41 of the FOI Act, an agency/party objecting to disclosure must establish the following:

- disclosure of material of a type described in 41(1)(a)(i) or (ii) would disclose matter arising 'in the course of or for the purposes of the deliberative processes involved in the functions of government'
- exemption is not precluded by section 41(2) or (3) of the FOI Act
- disclosure would, on balance, be contrary to the public interest (section 41(1)(b) of the FOI Act).

135. As I am satisfied for the reasons set out below that disclosure of the Redacted Audit Report would not, on balance, be contrary to the public interest, it is unnecessary for me to consider whether the first two requirements of the provision are satisfied.

Public interest test

136. Unlike other exemption provisions within the FOI Act that incorporate a public interest test, there is no prima facie public interest consideration favouring non-disclosure within section 41(1) of the FOI Act. Finding that disclosure would be contrary to the public interest is a separate requirement for exemption which must be independently established.

137. It is the responsibility of the party claiming the exemption to establish that:⁵¹

- specific and tangible harm to an identifiable public interest(s) would result from disclosing the matter in issue
- the harm is of sufficient gravity that, when weighed against competing public interest considerations which favour disclosure, it would, on balance, be contrary to the public interest.

138. This means that the party claiming the exemption must identify the specific and tangible harm that would result to an identifiable public interest or interests if the particular documents comprising the matter in issue were disclosed. The identified harm to the public interest must then be weighed against public interest considerations that favour disclosure.

139. The external review applicant's submissions regarding the public interest considerations can be summarised as follows:

- 'Mr O'Hare's statutory declaration makes it clear that the Audit Report contains errors of fact in law about the Applicant's operations and internal governance' and this has not been challenged
- '[a]s a result of the report containing significant and substantial errors of fact and law the Applicant made substantial and lengthy submissions to the Department. These submissions addressed the adverse findings made against the Applicant and errors of fact and law made in the Audit Report'

⁵¹ *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at paragraph 140; *Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206 at paragraph 34.

- '[a]s a result of those submissions we were advised by the Minister on 11 April 2006 that the Minister would not, when determining the funding allocations for the Applicant, rely upon the findings in the Audit Report'⁵²
- disclosure may cause unnecessary distress and anxiety to CCI clients because they would lose faith in CCI's ability to provide necessary services
- the concerns regarding CCI have been addressed and dealt with
- there are presently no public concerns regarding CCI's governance or service provision, however, disclosure of the Audit Report will re-enliven this issue
- harm to CCI's reputation and the services provided will outweigh the value of disclosing the Audit Report
- 'the errors of fact and law contained in the Audit Report are not readily apparent' and disclosure would have the effect of endorsing these errors
- disclosure 'will not serve the interests of accountability, but will distort the public record'
- 'in light of the unchallenged and uncontradicted evidence of Mr Tony O'Hare the Applicant considers that:
 - the publication of the Audit Report would do a specific and tangible harm to the local community; and
 - the harm caused by the publication of the Audit Report is of sufficient gravity and would effect sufficient members of the local community to outweigh the value of the Audit Report being disclosed.'

140. The external review applicant also repeats and relies on its submissions in respect of public interest consideration under section 46(1)(b) of the FOI Act. These submissions can be summarised as follows:

- 'it is clear from the contents of the audit report, with respect to the internal governance issues that no illegality or impropriety has taken place ... [and accordingly] there is no legitimate community interest served by our client's confidential information being disclosed to the public'
- 'no element of individual justice which would be served'
- 'the unchallenged evidence of Mr O'Hare makes it clear that the Audit Report contains significant errors of fact and law... [and] it is not in the public interest to disclose a document which contains such errors of fact and law and would be to make wrong the public record.'
- disclosing the Audit Report will damage the external review applicant's image and its position within the local community and this damage will adversely affect the external review applicant's ability to provide services effectively to disadvantaged local community members.

141. In a letter dated 22 February 2008 the FOI Applicant makes submissions regarding public interest considerations favouring disclosure and these can be summarised as follows:

- 'the thrust of recent legislative changes and public discussions by all tiers of government has been to give charitable community based not-for-profit organisations greater flexibility but counterbalanced with greater community accountability'
- 'to achieve the parity between groups such as CCI and the community and their seeking of community funds, there needs to be community accountability through uniformity and transparency, done in a way that will instil 'Respect' and 'Trust' from that same community'

⁵² A copy of the relevant correspondence from the Minister was provided to this Office.

- accountability, transparency and consultation processes foster trust and respect from the community
- media coverage of concerns about the external review applicant's operations in 2005, 2006 and early 2007 indicate that such respect was noticeably not apparent
- 'community support is imperative for the continued existence and success of any community based organisations' and this trust was noticeably not apparent by the community of Logan as evidenced in Media coverage of concerns about the external review applicant's operations in 2005, 2006 and early 2007
- 'the release of this document will go somewhat to answer many concerns in regard to CCI's operations within this community and may help to improve the governance procedures for other community based and community funded organisations.'

142. Beaumont J has previously stated⁵³ that in evaluating where the public interest lies under section 36 of the Commonwealth FOI Act:⁵⁴

... it is necessary to weigh the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper working of government and its agencies on the other ...

143. In respect of the above statement, the EARC FOI Report⁵⁵ indicates that the objects clause of the draft Bill to the FOI Act 'makes it clear that [Beaumont J's statement at paragraph 142 above] is an appropriate framework for the consideration of the public interest' under section 41(1) of the FOI Act.

144. I have carefully considered the matters at paragraphs 134 to 143 above and am satisfied that there is a public interest in ensuring that:

- the external review applicant's clients are not caused unnecessary distress and anxiety regarding the external review applicant's ability to provide services
- the external review applicant's ability to effectively deliver services to its clients is not adversely affected

145. The external review applicant submits that the public interests identified at paragraph 144 above would be harmed by disclosure of the Audit Report through:

- damage to its reputation
- re-opening matters of concern that have been addressed and are no longer in issue.

146. In this review I must weigh the gravity of any harm to these public interests against competing public interest considerations that favour disclosure.

147. The FOI Applicant's submissions broadly reflect the object of the FOI Act in which section 4(2) relevantly provides that:

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*

⁵³ *Harris v Australian Broadcasting Corporation* (1983) 5 ALD 545 at 554.

⁵⁴ The Commonwealth equivalent of section 41(1) of the FOI Act.

⁵⁵ December 1990, Serial No. 90/R6 at 7.120

- (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...*

148. The FOI Applicant has emphasised that this is particularly so in circumstances concerning community based not-for-profit organisations because of the inter-relationship between the community, the organisation and the funding body. I have also noted at paragraph 110 above the Information Commissioner's comment that in respect of a non-government organisation in receipt of government funding, 'the Department in effect acts as an agent of the public in ensuring that public funds advanced to a private sector organisation to further purposes considered to be in the public interest ... are expended in a proper manner and properly accounted for.'
149. I note that the external review applicant submits that there is 'no element of individual justice which would be served' by disclosure of the Audit Report. However, the Information Commissioner has previously indicated that in appropriate cases the nature of a particular applicant's involvement in and concern with particular information can give rise to 'a justifiable need to know' the information sought under the FOI Act that is more compelling than for other members of the public and which can be taken into account in applying the public interest balancing test.⁵⁶ Though closely related, the scope of the public interest outlined above is broader than the public interest consideration in an individual receiving fair treatment in accordance with the law.⁵⁷
150. On this point I note that in a telephone discussion on 11 January 2008 the FOI Applicant indicated to a staff member of this Office that he is the Treasurer of the CCAI and that concerns had been raised about the financial reporting from the external review applicant to the CCAI. I note that the FOI Applicant was interviewed by the Auditors in conducting the Audit.
151. I am not aware of any public statements in the media or from the Department that convey the outcome, findings, recommendations or the details of the Audit Report. In any event, I am satisfied that in this review, because of the:
- FOI Applicant's involvement in⁵⁸ and concern with the Redacted Audit Report
 - particular nature of the applicant's concern, that is, financial accountability

disclosure of the Redacted Audit Report's findings and/or recommendations would not be sufficient to satisfy the public interest in transparency and accountability of government in this instance.

152. Having carefully considered the above, I am satisfied that, on balance, the gravity of any harm to the public interest considerations identified by the external review applicant is not sufficient to outweigh the public interest considerations favouring disclosure of the Redacted Audit Report because:

⁵⁶ *Pemberton and The University of Queensland* (1994) 2 QAR 293 (*Pemberton*) at paragraphs 164 to 189.

⁵⁷ *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at paragraph 55 (regarding the public interest consideration in an individual receiving fair treatment in accordance with the law in their dealings with government); *Pemberton* at paragraph 190.

⁵⁸ I note for example that the FOI Applicant was interviewed by the Auditors and information that he communicated is included in the Audit Report.

- although disclosure of the Redacted Audit Report may result in some tarnishing of the external review applicant's reputation, the sensitivity of the information in the Redacted Audit Report is reduced by the passage of time and accordingly it is unlikely that its disclosure at this point in time will significantly impact on client confidence in the external review applicant's ability to deliver services
- there is a very strong public interest in the community being able to ascertain whether the DOC is ensuring that public funds are being properly administered
- the media coverage of issues concerning the external review applicant suggests that there was a very high level of concern in the local community among the external review applicant's clients, staff and members about financial matters, management issues and employment issues over a significant period⁵⁹
- there does not appear to have been any media coverage or governmental statement indicating the outcome of steps taken by the DOC in respect of the issues raised in the media
- there is a very strong public interest in government accountability and transparency and disclosure of the Redacted Audit Report would significantly address the concerns raised above
- due to his involvement in and concern with the Audit Report, the FOI Applicant has a justifiable need to know the information contained in the Audit Report that is more compelling than for other members of the public.

153. Accordingly, I am satisfied that, on balance, disclosure of the Redacted Audit Report is not contrary to the public interest.

154. I note that in considering the relevant public interest arguments I have not accorded any significant weight to the external review applicant's submission that 'Mr O'Hare's statutory declaration makes it clear that the Redacted Audit Report contains errors of fact in law about the Applicant's operations and internal governance' and this has not been challenged. On this point I note that the external review applicant submits that 'the errors of fact and law contained in the Audit Report are not readily apparent.' I have also noted the Minister's letter dated 11 April 2006 in this regard. I note that I have previously indicated to the external review applicant that 'it is not apparent to me from a reading of Mr O'Hare's Statutory Declaration what information recorded in the Audit Report, according to Mr O'Hare, constitutes errors of fact or the factual basis or evidence that substantiates Mr O'Hare's position'⁶⁰ and I note that the external review applicant has not sought to clarify this issue.

155. In any event, in respect of the external review applicant's submission that disclosure of the Audit Report would '*make wrong the public record,*' I note that in *QGFL* the Information Commissioner, in balancing public interest considerations under section 45(1)(c) of the FOI Act, found that the applicant's contention that the final audit report contained discrepancies did not 'detract from the overall significance of the audit report'

⁵⁹ Logan West Leader, 'CCI: Is there a cover-up?' 19 October 2005; Logan West Leader, 'House closes: Doors shut on needy' 17 January 2007, Logan West Leader, 'Promises over CCI' 12 October 2005, Logan West Leader, 'Don't see the funny side' 12 October 2005, Logan West Leader, 'Clarke calls for State involvement' 5 October 2005, Logan West Leader, 'Call to check books: Move for CCI probe' 28 September 2005, Logan West Leader, 'CCI issues are not imaginary' 28 September 2005, Logan West Leader, 'Resignation call' 21 September 2005, Logan West Leader, 'Chief rejects claims' 21 September 2005, Logan West Leader, 'Concerns ignored: ex-manager' 21 September 2005, Logan West Leader 'Care group crisis, 14 September 2005, Logan West Leader, 'Staff denied access' 14 September 2005, Logan West Leader, 'Closure not true' 17 May 2006.

⁶⁰ See my letter dated 12 October 2007.

or the predominant weight of public interest considerations favouring disclosure.⁶¹ In that decision, the Information Commissioner stated:

... it is possible to envisage circumstances in which it would be contrary to the public interest in the fair treatment of persons or organisations in their dealings with government, to disclose a document containing demonstrable errors which were unfair or unjust to a person or an organisation. Each case must be judged according to its particular circumstances (e.g. there may be instances where disclosure would assist to redress any unfairness or injustice, or where accountability of an agency for its unfair or unjust treatment of an individual or organisation was the paramount consideration) and there may be questions of degree involved.

156. As I have already indicated, I am not aware of any specific errors contained in the Redacted Audit Report and am therefore unable to accord any significant weight to this issue.

Conclusion on application of the public interest test

157. I am satisfied that, on balance, disclosure of the Redacted Audit Report is not contrary to the public interest.

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

158. Section 45(1)(b) and (c) of the FOI Act provide:

45 Matter relating to trade secrets, business affairs and research

(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.

159. The Information Commissioner has indicated that section 45(1) of the FOI Act is the primary vehicle for reconciling the main objects of the FOI Act, that is, promoting open and accountable government administration and fostering informed public participation in the process of government, with the legitimate concerns for protecting from disclosure commercially sensitive information.⁶² The purpose of the section is to provide a means whereby the general right of access to documents in the possession

⁶¹ At paragraph 35.

⁶² *Cannon and Australian Quality Farms Limited* (1994) 1 QAR 491 (*Cannon*).

or control of government agencies can be prevented from causing unwarranted commercial disadvantage to:

- persons carrying on commercial activity who supply information to government or about whom government collects information; or
- agencies which carry on commercial activities.

Requirements for exemption under section 45(1)(c) of the FOI Act

160. Matter will be exempt under section 45(1)(c) if it satisfies the following three cumulative requirements:

- the matter is information concerning the business, professional, commercial or financial affairs of a person, including a company or agency (but not trade secrets or information that has an intrinsic commercial value)
- disclosure of the matter could reasonably be expected to have either of the following effects:
 - an adverse effect on the business, professional, commercial or financial affairs of the person which the information in issue concerns; or
 - prejudice to the future supply of such information to government
- the weight of all identifiable public interest considerations against disclosure must equal or outweigh that of all identifiable public interest considerations favouring disclosure.

Does the matter concern the business, professional, commercial or financial affairs of the external review applicant?

161. The external review applicant submits that it supports and relies on the Internal Review Decision to support its claim for exemption under section 45(1)(c) of the FOI Act. Accordingly, identified below are those parts of the Redacted Audit Report that the DOC found qualify for exemption under section 45(1)(c) of the FOI Act (Section 45(1)(c) Matter).

<i>Page</i>	<i>Matter</i>
Page 4	• the first sentence of dot point 6
Page 5	• dot point 7
Page 10	• dot points 1 to 10 under a specified heading
Page 11	• paragraph 1 and dot points 1-11 under a specified heading
Page 12	• the last paragraph
Page 17	• paragraphs 1 to 4 under a specified heading and the last paragraph
Page 18	• the first paragraph, the second sentence in paragraph 4 and the table at the end of the page
Page 19	• whole page
Page 20	• paragraphs 1 to 4 and the last paragraph
Page 21	• paragraphs 1, 2 and 5 to 10
Page 22	• paragraphs 1 to 4

162. Section 45(1)(c) of the FOI Act can apply only if sub-sections 45(1)(a) and (b) are inapplicable, that is, if the matter in issue is information other than trade secrets or information that has an intrinsic commercial value to an agency or another person.⁶³
163. I have carefully reviewed the Section 45(1)(c) Matter and I am satisfied that the Section 45(1)(c) Matter:
- concerns the external review applicant's business or financial affairs
 - satisfies the first cumulative requirement for section 45(1)(c) of the FOI Act.

Could disclosure of the Section 45(1)(c) Matter reasonably be expected to have an adverse effect on CCI's financial or business affairs?

164. The Information Commissioner has previously noted that an adverse effect under section 45(1)(c) of the FOI Act will almost invariably be financial in nature, whether directly or indirectly and that:⁶⁴

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. ... 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.

165. I note also that a significant lapse of time since documents were created often makes it difficult to demonstrate that the documents retain any sensitivity, and consequently, that release of such documents could reasonably be expected to have an adverse effect on an organisation's business affairs.
166. As the external review applicant had not provided submissions to this review on the possible application of section 45(1)(c), by letter dated 12 October 2007 I raised this issue and afforded the external review applicant an opportunity to provide submissions on the possible application of this provision.
167. In submissions dated 12 December 2007 the external review applicant indicated that:
- (as noted above) it supports and relies on the Internal Review Decision to the extent that the DOC determined that parts of the Audit Report qualified for exemption under section 45(1)(c) of the FOI Act
 - the information found by the DOC to qualify for exemption:
 - concerns the business, commercial and/or financial affairs of the external review applicant

⁶³ see paragraph 66 of *Cannon*.

⁶⁴ *Cannon* at paragraphs 81, 82 and 84.

- if disclosed could reasonably be expected to prejudice future supply of such information from the external review applicant to government agencies.

168. I note that the:

- external review applicant has not made any specific submissions to establish the first limb of the 2nd requirement for exemption under section 45(1)(c) of the FOI Act
- Internal Review Decision does not specify the basis (in terms of the 2nd requirement for exemption) on which the Section 45(1)(c) Matter qualifies for exemption and in particular does not specify what the adverse effect of disclosure will be.

169. It is conceivable that disclosure of information of the type comprising the Section 45(1)(c) Matter to a (hypothetical) community agency that competes with the external review applicant for funding may have an adverse effect on the external review applicant's business or financial affairs. However, the Section 45(1)(c) Matter is now quite dated as more than two years have elapsed since the Audit Report was created. Thus, sensitivity of the information is significantly reduced. In any event, a number of the issues canvassed in the Redacted Audit Report are not unknown to the local community.

170. Accordingly:

- the adverse effect has not been sufficiently established to make a finding that this requirement is satisfied or met
- on the material available to me I am not satisfied that this limb of the 2nd requirement of section 45(1)(c) is satisfied.

Could disclosure of the Section 45(1)(c) Matter reasonably be expected to prejudice the future supply of such information to the DOC?

171. The external review applicant submits that the Section 45(1)(c) Matter qualifies for exemption under this alternative limb of the 2nd requirement for exemption under section 45(1)(c) of the FOI Act.

172. The phrase 'prejudice the future supply of information' has the same meaning in section 45(1)(c) as it does in section 46(1).⁶⁵ I have already indicated in respect of section 46(1)(b) that where a person would be disadvantaged by withholding information, then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information.⁶⁶

173. For the reasons discussed at paragraphs 124 to 131 above in respect of section 46(1)(b) of the FOI Act, I am satisfied that:

- notwithstanding any relevant statutory and/or contractual requirements to disclose information, the external review applicant and other non-government organisations, as a matter of practical necessity, are required to provide information such as that comprising the Section 45(1)(c) Matter to the DOC
- disclosure of the Section 45(1)(c) Matter could not reasonably be expected to prejudice the supply of such information to the DOC from a substantial number of persons/organisations in receipt of funding from the DOC

⁶⁵ Cannon at paragraph 85.

⁶⁶ B at paragraph 161.

- the Section 45(1)(c) Matter does not satisfy the second limb of the 2nd requirement in section 45(1)(c) of the FOI Act.

Public interest test

174. As I am not satisfied that the Section 45(1)(c) Matter satisfies the second requirement for exemption under section 45(1)(c) of the FOI Act, it is unnecessary for me to consider the public interest arguments in respect of this provision. However, I do so briefly.
175. I note that the public interest test under section 45(1)(c) of the FOI Act (unless its disclosure would, on balance, be in the public interest) is worded differently to the public interest test under section 41(1)(b) of the FOI Act (disclosure would, on balance, be contrary to the public interest).
176. However, notwithstanding the lower threshold envisaged by the public interest test under section 45(1)(c) of the FOI Act, the external review applicant's submissions (at paragraphs 139 to 140 above), the FOI Applicant's submissions (at paragraph 141 above) and the discussion (at paragraphs 144 to 145 and 147 to 151 above) are relevant to consideration of the relative balance of public interest in disclosure of the Section 45(1)(c) Matter under section 45(1)(c) of the FOI Act.
177. On the information available to me I am satisfied that:
- To the extent, if any, that disclosure of the Section 45(1)(c) Matter adversely affects the external review applicant's reputation or standing in the community, there is a public interest in preserving public confidence in organisations that deliver services for the benefit of the community and this should be accorded some weight. However, the sensitivity of the Section 45(1)(c) Matter is reduced by the passage of time and accordingly it is likely that any negative effect is likely to be limited. In view of this the weight accorded to this public interest consideration should be relatively low.
 - There is a very strong public interest in the community being able to ascertain whether the DOC is ensuring that public funds are being properly administered, particularly in light of the:
 - media coverage of issues concerning the external review applicant
 - lack of any media coverage or governmental statement indicating the outcome of steps taken by the DOC in respect of the issues raised in the media.
 - There is a very strong public interest in government accountability and transparency and disclosure of the Section 45(1)(c) Matter would significantly address the concerns raised above.
 - Due to his involvement in and concern with the Audit Report, the FOI Applicant has a justifiable need to know the information contained in the Audit Report that is more compelling than for other members of the public.

178. Having considered the matters above, I am satisfied that the weight of all identifiable public interest considerations favouring disclosure outweigh all identifiable public interest considerations against disclosure.

Conclusion on application of section 45(1)(c) of the FOI Act

179. I am satisfied that the Section 45(1)(c) Matter does not qualify for exemption under section 45(1)(c) of the FOI Act.

Section 44(1) of the FOI Act

180. I note that in the Internal Review Decision the DOC decided that the Appendices to the Audit Report qualified for exemption under section 44(1) of the FOI Act.
181. The Appendices comprise two spreadsheets. The Audit Report authors indicate that they prepared the spreadsheets (Appendix A and Appendix B) to determine various matters in respect of expenditure and funding in the context of the relevant funding agreements. Both Appendices have a column listing the names of individual CCI clients. The remaining columns include financial data and financial calculations. Appendix A also includes a 'Comment' column in which the authors have noted certain financial matters. I also note that the names of four of the external review applicant's clients appear on page 16 of the Audit Report.
182. As already indicated at paragraph 46 above, the names of the external review applicant's clients, as they appear in the Audit Report, are no longer in issue in this external review.
183. Section 44(1) of the FOI Act provides:

44 Matter affecting personal affairs

- (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.*

184. In this review I must consider the following issues in relation to section 44(1) of the FOI Act:
- would disclosure of the Appendices to the Audit Report (with client names removed) reveal information concerning an identifiable individual's/individuals' personal affairs?
 - if it would,⁶⁷ are there public interest considerations favouring disclosure, which, on balance, outweigh the public interest considerations against disclosure.
 - I note that apart from the names of the external review applicant's clients, the information in the Appendices is financial data concerning the external review applicant's clients.

Conclusion on application of section 44(1) of the FOI Act

185. I am satisfied that removal of the names of the external review applicant's clients means that the information remaining in the Appendices:
- only discloses financial data that cannot be connected with any identifiable individual
 - if disclosed, would not reveal information concerning an identifiable individual's/individuals' personal affairs
 - does not qualify for exemption under section 44(1) of the FOI Act.

⁶⁷ The matter in issue is exempt, subject to the public interest test. However, I note that matter is not exempt *merely* because it relates to the personal affairs of the applicant (section 44(2) of the FOI Act), though this is not in issue in this external review and is accordingly, not considered further.

DECISION

186. I vary the decision under review by finding that the Redacted Audit Report (see paragraph 52 above) does not qualify for exemption and should be disclosed to the FOI Applicant.
187. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

First Assistant Commissioner Rangihaeata

Date: 30 June 2008