

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 98010
Application S 38/96

Participants:

DALRYMPLE SHIRE COUNCIL

Applicant

DEPARTMENT OF MAIN ROADS

Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - matter in issue comprising unit rates and lump sum amounts tendered by an 'in-house bidder' for road construction works - whether those amounts have commercial value, within the terms of s.45(1)(b) of the *Freedom of Information Act 1992* Qld, after contracts awarded - whether disclosure could reasonably be expected to have an adverse effect on the business affairs of the 'in-house bidder' - whether disclosure would, on balance, be in the public interest - application of s.45(1)(c) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.45(1)(b), s.45(1)(c)(i), s.45(1)(c)(ii), s.46(1)(a),
s.46(1)(b), s.52, s.78, s.81

Freedom of Information Act 1982 Cth

Actors Equity Association of Australia and Australian Broadcasting Tribunal, Re (No. 2)
(1985) 7 ALD 584

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279

Brown and Minister for Administrative Services, Re (1990) 21 ALD 526

Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491

Sexton Trading Company Pty Ltd and South Coast Regional Health Authority, Re
(1995) 3 QAR 132

DECISION

I set aside the decision under review (being the decision dated 29 January 1996, made on behalf of the respondent by Mr Hillier). In substitution for it, I find that:

- (a) in respect of those items in Schedules A, B, C and D of the tender documents lodged by RTCS (Central) for Job Numbers 16/98A/22 and 42/98B/43 -
 - (i) where the words "Lump Sum" appear in the columns headed "Estimated Quantity", the corresponding figures in the columns headed "Unit rate" and "Amount" are not exempt from disclosure under the *Freedom of Information Act 1992 Qld*; but
 - (ii) in respect of all other items, their corresponding figures in the columns headed "Unit rate" and "Amount" are exempt matter under s.45(1)(c) of the *Freedom of Information Act 1992 Qld*; and
- (b) the page subtotal figures on pages 5, 6, 7, 8, 11, 12 and 15 of the tender documents lodged by RTCS (Central) are not exempt from disclosure under the *Freedom of Information Act 1992 Qld*, but the page subtotal figure which appears on page 16 is exempt matter under s.45(1)(c) of the *Freedom of Information Act 1992 Qld*.

Date of decision: 28 September 1998

.....
F N ALBIETZ
INFORMATION COMMISSIONER

TABLE OF CONTENTS

	Page
<u>Background</u>	1
<u>External review process</u>	2
<u>Relevant provisions of the FOI Act</u>	3
<u>Application of s.45(1)(b) of the FOI Act</u>	5
Commercial value	5
Destroy or diminish commercial value	7
<u>Application of s.45(1)(c) of the FOI Act</u>	7
Section 45(1)(c)(i)	7
Section 45(1)(c)(ii)	8
<u>Adverse effect - evidence and submissions of the participants</u>	10
<u>Adverse effect - findings</u>	13
Public Interest Balancing Test	16
<u>Conclusion</u>	23

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 98010
Application S 38/96

Participants:

DALRYMPLE SHIRE COUNCIL
Applicant

DEPARTMENT OF MAIN ROADS
Respondent

REASONS FOR DECISION

Background

1. The applicant seeks review of a decision refusing it access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to unit rates and other figures contained in a particular tender submitted to the Department of Transport for the construction of sections of the Gregory Development Road in the Belyando and Dalrymple Shires. A tender for the relevant jobs was lodged by the applicant (and also by private contractors). An 'in-house tender' (which was successful in part) was lodged by a commercial unit of the Department of Transport. The matter remaining in issue is contained in that 'in-house tender', and is comprised of unit rates and other figures which the respondent contends are exempt matter under s.45(1)(b), or, alternatively, s.45(1)(c), of the FOI Act.
2. The commercial unit of the Department of Transport which lodged the relevant tender was known (at the time of lodgment) as CQ Civil Works. It is now known as Road and Transport Construction Services (Central), or RTCS (Central). Moreover, the relevant functions of the Department of Transport (including responsibility for the documents in issue) have since been transferred to the Department of Main Roads. For ease of reference, I will use the terms "the Department" or "the respondent" to refer to whichever of those two Departments was the responsible entity at a particular time.
3. By application dated 16 November 1995, the applicant sought access to the "entirety of the tenders" for Jobs 16/98A/22 and 42/98B/43 submitted to the Department by RTCS (Central), and by a private firm, Penna & Company Pty Ltd (Penna & Company), each of which was awarded contracts to perform segments of those roadworks for the Gregory Development Road that had been put out to tender. In his initial decision on behalf of the Department (dated 19 December 1995), Mr P Moar decided to grant access to the documents requested, subject to the deletion of matter which he decided was exempt matter under s.45(1)(b) of the FOI Act. By letter dated 19 January 1996, the applicant applied for internal review of

Mr Moar's decision, in accordance with s.52 of the FOI Act. In his internal review decision dated 29 January 1996, Mr R D Hillier decided to affirm Mr Moar's decision. By letter dated 20 February 1996, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Hillier's decision.

External review process

4. Penna & Company was notified of the review, and it applied to be a participant, in accordance with s.78 of the FOI Act. However, following discussions with my staff and with the applicant, Penna & Company advised me that it had agreed to disclose its tender documents direct to the applicant (i.e., outside the terms of the FOI Act) and, accordingly, it no longer wished to be a participant in this review. The applicant confirmed that it no longer sought access under the FOI Act to the tender submitted by Penna & Company, but indicated that it still wished to pursue access to the matter in issue contained in the RTCS (Central) tender.
5. The tender lodged by RTCS (Central) contained four schedules, being itemised tenders for construction work described as: General Works (Schedule A), Road Works (Schedule B), the Belyando River Bridge (Schedule C) and the Belyando River Overflow Bridge (Schedule D). Each schedule contains a list of items for which corresponding tender figures have been provided, either by way of a lump sum figure (where the tender document calls for that) or, more frequently, a unit rate for a specified item of construction work (which has then been multiplied by specific estimated quantities - set out by the Department in the fourth column of each schedule - to give the total amount tendered per item). For example, in Schedule B a lump sum figure is required for "Construction of stockpile site", while a unit rate per square metre is sought for "Supply and placement of Geofabric" at an estimated quantity of 3,740 square metres. More than one hundred individual items are listed in the four schedules. The matter remaining in issue comprises the figures in the last two columns on each page of the four schedules, being the tendered amounts for lump sum items, the tendered unit rate and total amount tendered (i.e., the unit rate multiplied by the estimated quantity) in respect of other items, as well as the page subtotals. The balance of the tender document has already been disclosed to the applicant, including the total tendered amount and (by virtue of a concession made by the respondent during the course of the review) the total amount tendered for each of the four schedules.
6. By letter dated 2 December 1996, I communicated to the respondent my preliminary view that the matter in issue was not exempt from disclosure under s.45(1)(b) of the FOI Act. I invited the respondent, in the event that it disagreed with my preliminary view, to lodge a submission and/or evidence in support of its position. By letter dated 24 January 1997, the Crown Solicitor, acting on behalf of the respondent, forwarded a written submission in support of a case for exemption under s.45(1)(b), and a supporting statutory declaration of Trevor John Los, dated 23 January 1997.
7. Copies of that material were provided to the applicant, which responded with a written submission dated 6 February 1997, supported by a statutory declaration of Allan Edward Griffiths, dated 24 February 1997. The Crown Solicitor, on behalf of the respondent, lodged a brief reply dated 21 March 1997. After reviewing the material lodged by the participants, I remained doubtful that the matter in issue could qualify for exemption under s.45(1)(b), but I considered that the nature of the potential detriment being asserted by the respondent raised

an arguable case for the application of s.45(1)(c) of the FOI Act. In *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 (at p.516, paragraph 66), I discussed the relationship between s.45(1)(b) and s.45(1)(c) of the FOI Act:

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

8. Accordingly, I invited, and obtained, from the applicant further submissions (dated 1 May 1997 and 23 May 1997) dealing with the application of s.45(1)(c) to the matter in issue. Copies of those submissions were forwarded to the respondent, which provided a further submission dated 9 July 1997, contending that the matter in issue qualified for exemption under s.45(1)(c) of the FOI Act. The applicant lodged a brief reply dated 23 July 1997.

Relevant provisions of the FOI Act

9. Sections 45(1)(b) and (c) of the FOI Act provide:

45.(1) Matter is exempt matter if—

...

(b) its disclosure—

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

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

(c) its disclosure—

(i) would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and

(ii) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;*

unless its disclosure would, on balance, be in the public interest.

10. I considered the application of s.45(1) in some detail in *Re Cannon*. I stated that s.45(1) is the primary vehicle for reconciling the main objects of the FOI Act (i.e., promoting open and accountable government administration, and fostering informed public participation in the processes of government) with legitimate concerns for the protection from disclosure of commercially sensitive information. Its basic object is to provide a means whereby the general right of access to documents in the possession or control of government agencies can be prevented from causing unwarranted commercial disadvantage to:
- (i) persons carrying on commercial activity who supply information to government, or about whom government collects information; or
 - (ii) agencies which carry on commercial activities.
11. The requirements for exemption under both s.45(1)(b) and s.45(1)(c) turn in large measure on the test imported by the phrase "*could reasonably be expected to*". In my reasons for decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (at pp.339-341, paragraphs 154-160), I analysed the meaning of that phrase by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the *Freedom of Information Act 1982* Cth. Those observations are also relevant here. In particular, I said in *Re "B"* (at pp.340-341, paragraph 160):

The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.

The ordinary meaning of the word "expect" which is appropriate to its context in the phrase "could reasonably be expected to" accords with these dictionary meanings: "to regard as probable or likely" (Collins English Dictionary, Third Aust. ed); "regard as likely to happen; anticipate the occurrence ... of" (Macquarie Dictionary, 2nd ed); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).

12. No suggestion has been made in the respondent's submission that s.45(1)(b) or s.45(1)(c) applies by reference to apprehended prejudice to the respondent's activities as a principal contracting agency, which seeks tenders from prospective contractors for the supply of goods and services. The respondent's case is based entirely on protection of RTCS (Central) from apprehended prejudice to its commercial operations. RTCS (Central) forms part of a government agency; however, the terms of both s.45(1)(b) and s.45(1)(c) extend to protecting the commercial activities of such an agency.

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

Commercial value

13. I explained the requirements for exemption under s.45(1)(b) at pp.511-516 (paragraphs 50-65) of *Re Cannon*. The first requirement is that the matter in issue must comprise information which has a commercial value to an agency or another person. There are two possible interpretations of the phrase "commercial value" which are not only supportable on the plain meaning of those words, but also apposite in the context of s.45(1)(b) of the FOI Act. The first and primary meaning is that information has a commercial value to an agency or person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged. The information may be valuable because it is important or essential to the profitability or viability of a continuing business operation or a pending 'one off' commercial transaction.
14. The second meaning is that information has a commercial value to an agency or person if a genuine arms-length buyer is prepared to pay to obtain that information from that agency or person, such that the market value of the information would be destroyed or diminished if it could be obtained under the FOI Act from a government agency which has possession of it. I should note in that regard that I am not referring to transactions in the nature of industrial espionage or the like, but rather to the existence of a legitimate market in which an agency or person could sell particular information to a genuine arms-length buyer at a market value which would be destroyed or diminished if the information could be obtained under the FOI Act.
15. The information in question must have a commercial value to an agency or another person at the time that an authorised decision-maker under the FOI Act comes to apply s.45(1)(b), i.e., information which was once valuable may become aged or out of date such that it has no remaining commercial value (see *Re Brown and Minister for Administrative Services* (1990) 21 ALD 526, at p.533, paragraph 22).
16. The respondent has not provided me with any evidence capable of supporting a finding that any of the matter in issue in this review has a commercial value in the sense referred to in paragraph 14 above. Nor am I satisfied that any of the matter in issue has a commercial value in the sense referred to in paragraph 13 above. I consider that the nature of pricing information submitted in a tender for a contract which has since been awarded (or pricing information relevant to a comparable 'one off' commercial transaction) is such that it will not ordinarily have the intrinsic value, or continuing value to the conduct of an ongoing business operation, to satisfy the test of having "commercial value" for the purposes of s.45(1)(b) of the FOI Act. In my view, the basis of the case put forward by the respondent (with its emphasis on competitive disadvantage to RTCS (Central) in future tenders if competitors could, through obtaining access to the detailed pricing information in the matter in issue, make more accurate estimates of RTCS (Central)'s future tender prices) is more appropriate to the application of s.45(1)(c).
17. There is only one respect in which I apprehended the respondent's case as being arguably relevant to the application of s.45(1)(b). In paragraph 6 of his statutory declaration, Mr Los, the Director of RTCS (Central), stated:

6. *While it is standard practice to calculate unit rates for major items in the preparation of a tender, it is also common practice to reference these calculated unit rates against those tendered and achieved for items regarded to be of a similar nature on other jobs. In most cases, tendered unit rates closely reflect expected costs.*
18. As I understand it, Mr Los is asserting that pricing information of the kind in issue is used for the commercial purposes of RTCS (Central) even after the submission of a particular tender, by way of a reference check to ensure that unit rates for future tenders on jobs which are similar in nature, are appropriate.
19. The applicant, on the other hand, contends that all roadworks jobs are different and that tender information about a past job would be of little use in assessing unit rates for future jobs (see the applicant's detailed contentions in this regard, set out at paragraphs 32 and 34 below).
20. While I accept that different jobs will require individual assessment, I consider that it is reasonable to expect that an organisation carrying on extensive specialised business operations (like RTCS (Central) with its road construction operations) will be able to draw some assistance from past experience in formulating future unit rates for similar tenders. However, it seems to me that the information which will be of real assistance to RTCS (Central) in its future business undertakings is information as to the actual costs of providing particular services and/or goods following a successful tender. I cannot see how it could assist RTCS (Central) to refer back to previously tendered unit rates if they are not in line with actual costs. If actual costs were above (or even significantly below) the tendered unit rates, RTCS (Central) would be doing itself a disservice if it merely referred to the unit rates in a previous tender, when preparing a new tender. Mr Los indicated that it is standard practice to calculate unit rates independently for each job, but that it is also common practice to reference these rates against those tendered and achieved for items on other jobs. It seems to me that the key reference point in such an exercise must be the rate "achieved" rather than the rate tendered.
21. The respondent has not convinced me (see s.81 of the FOI Act) that the unit rates contained in the matter in issue have the intrinsic value, or continuing value to the conduct of an ongoing business operation, that is necessary to satisfy the test of having commercial value for the purposes of s.45(1)(b) of the FOI Act. Further, I am not satisfied that the lump sum rates contained in the matter in issue have any commercial value to RTCS (Central) in this sense (*cf.* paragraph 39 below).
22. The respondent also submitted that: *To release this information would be to give a competitor commercially sensitive information of general application which could be used in future tender processes.* The respondent argued that for similar styles of jobs, while there may be some variation, the disclosure of the unit rates would enable future competitors to calculate the tender price for similar jobs to within 90% accuracy. I will return to that contention when I deal with the application of s.45(1)(c). For present purposes, however, I merely wish to note that I do not consider that the possibility that competitors may be able to use certain information to the detriment of a business, is sufficient, in itself, to mean that the information has commercial value to the business.
23. I find that the matter in issue does not qualify for exemption under s.45(1)(b) of the FOI Act.

Destroy or diminish commercial value

24. The second requirement for exemption under s.45(1)(b) is that disclosure of the information in issue could reasonably be expected to destroy or diminish the commercial value of that information. Given my findings above, it is not strictly necessary for me to consider this requirement. However, I think I should do so for the sake of recording my view that, even assuming the correctness of the respondent's contention that the matter in issue has a commercial value to RTCS (Central) in using it as a reference check for future tenders, disclosure of the matter in issue could not reasonably be expected to diminish any such commercial value. RTCS (Central) would still be able to use the information, which was developed as a function of its unique business attributes (e.g., size, available capital and human resource assets, past experience) in the formulation of future tender rates. It could continue to make its own assessments of unit rates for particular jobs in new tenders, and then to check them against rates tendered in the past, and actual costs of work performed under prior contracts. Neither the individual assessments for particular jobs in new tenders, nor the actual costs of work performed, would be available to competitors through disclosure of the matter in issue. Whatever value the information in issue may have to RTCS (Central) for the preparation of future tenders through its use in the manner described by Mr Los, I cannot see how any such value could reasonably be expected to be diminished by disclosure.

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

25. The correct approach to the interpretation and application of s.45(1)(c) is explained in *Re Cannon* at pp.516-523, paragraphs 66-88. In summary, matter will be exempt matter under s.45(1)(c) of the FOI Act if:
- (a) the matter in issue is properly to be characterised as information concerning the business, professional, commercial or financial affairs of an agency or another person (s.45(1)(c)(i)); and
 - (b) disclosure of the matter in issue could reasonably be expected to have either of the prejudicial effects contemplated by s.45(1)(c)(ii), namely:
 - (i) an adverse effect on the business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns; or
 - (ii) prejudice to the future supply of such information to government;

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

Section 45(1)(c)(i)

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

Section 45(1)(c)(ii)

27. In *Re Cannon* at p.521 (paragraph 85), I said:

85. *The second kind of prejudice contemplated by s.45(1)(c)(ii) focuses not on the protection of the legitimate commercial interests of agencies and private sector business undertakings, but on protecting the continued supply to government of information (of the kind referred to in s.45(1)(c)(i)) which it is necessary for the government to have to undertake the functions expected and required of it in the public interest (including those functions identified in paragraph 28 above). The words "prejudice the future supply of such information" also appear in s.46(1)(b) of the FOI Act, and what I said about those words in Re "B" and Brisbane North Regional Health Authority (at paragraph 161) is also apposite in the context of s.45(1)(c)(ii):*

Where persons are under an obligation to continue to supply such ... information (e.g. for government employees, as an incident of their employment; or where there is a statutory power to compel the disclosure of the information) or persons must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information) then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information. In my opinion, the test is not to be applied by reference to whether the particular [supplier] whose ... information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of the sources available or likely to be available to an agency.

28. The respondent has not argued, and I do not consider, that disclosure of the matter in issue could reasonably be expected to prejudice the future supply of like information to the respondent by RTCS (Central), or generally, to government agencies by businesses seeking the award of government contracts. It could not reasonably be expected that potential tenderers would fail to tender in unit rate prices, as required by the respondent, merely because of disclosure of the matter in issue. I will therefore address the question of whether disclosure of the matter in issue could reasonably be expected to have an adverse effect on those business affairs of RTCS (Central) which the matter in issue concerns.

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

84. *In most instances, the question of whether disclosure of information could reasonably be expected to have an adverse effect will turn on whether the information is capable of causing competitive harm to the relevant agency,*

corporation or person. Since the effects of disclosure of information under the FOI Act are, with few exceptions, to be evaluated as if disclosure were being made to any person, it is convenient to adopt the yardstick of evaluating the effects of disclosure to a competitor of the agency which, or person whom, the information in issue concerns. (This yardstick is also appropriate when considering the application of s.45(1)(b).) A relevant factor in this regard would be whether the agency or other person enjoys a monopoly position for the supply of particular goods or services in the relevant market (in which case it may be difficult to show that an adverse effect on the relevant business, commercial or financial affairs could reasonably be expected), or whether it operates in a commercially competitive environment in the relevant market.

30. This case bears some similarities to *Re Sexton Trading Company Pty Ltd and South Coast Regional Health Authority* (1995) 3 QAR 132. In that case, the matter in issue comprised quoted prices for more than 1,000 items in a successful tender for the supply and installation of various kinds of curtains and blinds, of various widths and drops. In the particular circumstances of that case, I found that disclosure of the quoted prices could not reasonably be expected to have an adverse effect on the business affairs of the successful tenderer. At paragraphs 16 and 21, I said:

16. *It is generally accepted that pricing information has a degree of commercial sensitivity for suppliers of goods and services operating in a competitive market. The degree of commercial sensitivity may be greater or lesser according to the nature and detail of the pricing information, whether it is current or merely historical, the nature and custom of the particular market, and no doubt a variety of other circumstances which may affect its sensitivity in any particular case.*

In certain markets, for instance, suppliers routinely publish their prices to the world at large or to prospective customers on request, and consumers routinely compare prices offered by different suppliers of comparable goods and services. Speaking generally, the total price at which a supplier is prepared to offer particular items would be considered less sensitive than details of the supplier's pricing structure, e.g., detailed descriptions of the component elements of a tender price.

Thus in Re Maddock Lonie and Chisholm (a firm) and Department of State Services (Information Commissioner, WA, Decision Ref: D01595, 2 June 1995, unreported), the Western Australian Information Commissioner held (in circumstances where the long-standing practice in regard to State Government tenders was that names and prices of successful tenderers were published in the Government Gazette) that disclosure of the prices offered by unsuccessful tenderers did not qualify for exemption under cl.4(3) of Schedule 1 to the Freedom of Information Act 1992 WA (which is, for practical purposes, identical to s.45(1)(c) of the Queensland FOI Act) but that detailed descriptions of the manner in which tender prices were calculated (disclosing a company's margins, costs and approach to tendering) did qualify for exemption under that provision: see paragraphs 33, 43 and 46 of Re Maddock Lonie and Chisholm.

...

21. *Although the documents in issue contain prices for a substantial number of items, each price represents the total price offered for each item. The documents in issue do not contain any indication of the component elements of the tender price for each item - there is nothing which directly discloses the third party's margins or, for instance, the costs at which the third party can obtain materials from its suppliers.*

Adverse effect - evidence and submissions of the participants

31. In his statutory declaration, Mr Los, the Director of RTCS (Central), stated:

...

2. *RTCS stands for Road and Transport Construction Services. Since early 1996 RTCS has been the official trading name of the commercial arm of the Department of Main Roads (formerly the Queensland Department of Transport). During its formative period, RTCS traded under the names QTCS and in Central Queensland, CQ Civil Works, the name appearing on the subject tender.*

3. *RTCS has four Directors each responsible for a region within the State of Queensland. As Director, RTCS (Central) I am responsible for the commercial operation of four branch offices located at Rockhampton, Barcaldine, Mackay and Emerald.*

4. *RTCS is a fully commercial operation which pays tax equivalents and has to tender for government work in competition with local authorities and private contractors.*

5. *Main Roads uses a standard set of items for roadworks eg. roadway embankment, roadway excavation and base pavement are items to be found in most roadwork jobs, measured in cubic metres. In my experience, the unique nature of any particular road job is more the combination of specific quantities of standard items rather than a combination of unique items.*

...

7. *While the information is now more than 12 months old, inflation in the road building industry has been quite low and the extent of this inflation is readily available by reference to the CPI and industry specific indices.*

8. *If the unit rates were released, a competitor would easily be able to determine RTCS (Central)'s likely tender rates for future jobs of a similar nature by adding CPI increases to the tendered rates.*

9. *In relation to this particular job, the tender was submitted by the RTCS (Central) Mackay Branch Office to the Main Roads Emerald District Office. The tender covered a large range of standard items, as is evidenced by the four separate schedules totaling 13 pages. Thus, the particular unit rates tendered closely reflect RTCS (Central)'s costs and future tender price for a broad range of items.*

10. *The Dalrymple Shire Council was a direct competitor to RTCS (Central) on this particular job and is a likely competitor on future jobs. Releasing RTCS (Central)'s tendered rates for this or any other job to a competitor would therefore give the competitor a distinct advantage and place RTCS (Central) at a considerable disadvantage at the tender box for future jobs.*

32. Evidence in reply was given in a statutory declaration by the applicant's Director of Engineering Services, Mr Allan Griffiths, who referred to his professional qualifications and his 26 years experience in road construction and maintenance, before stating:

...

2. *The Department of Main Roads uses standard work items to describe the nature of work to be carried out. For example, Item 42100 always has the description "Road excavation, all materials". Although each job is made up primarily of these standard items, job specific items are also included in each job schedule. These item numbers usually commence with 90001, and are numbered consecutively. They may be unit rate items or lump sum items.*
3. *The unit rate for any particular item is job specific. In my experience, it would be of little use to compare unit rates for any particular item unless the jobs being compared are in the same location, of similar size and duration. There are too many variables which go to make up any particular unit rate to be able to compare them with any confidence. For example, the following circumstances are different for each job, and all will affect the unit rate of any particular item (list not exhaustive) -*

Size of job

Duration of job

Climate

Terrain

Timing of project (eg during wet season)

Employee ability

Accommodation of employees

Quantities of work to be performed

Provision for traffic (whether sidetracked, detoured or constructed under traffic)

Size and type of plant used

Plant ownership

Types of material encountered

Distance to suppliers

Method of delivery (work practices, subcontract, day labour, purchase or manufacture etc.)

Allocation of overheads

Distribution of overheads

Weighting of unit rates for cash flow purposes

4. *The job being referred to is a "one-off" situation, as there are no future jobs in the locality where the Dalrymple Shire Council is likely to be a competitor of RTCS Mackay in a contract situation. I do not see that the release of their unit rates would be disadvantageous, as the methods of operation and make-up of job personnel for various organisations are very different.*

33. In a submission in reply dated 21 March 1997, the respondent acknowledged that costs will vary according to factors of the kind referred to in paragraph 3 of Mr Griffiths' statutory declaration. However, the respondent submitted that *"for similar styles of jobs while there may be some variation, the disclosure of RTCS (Central)'s unit rates would enable future competitors to calculate the tender price for similar jobs to within 90% accuracy"*.

34. The applicant's submission dated 1 May 1997 argued as follows:

Council contends that disclosure could not reasonably be expected to have an adverse effect on the business affairs of the agency insofar as the algorithms necessary to predict future tender figures more accurately would be absolutely staggering in complexity if indeed possible at all.

Apropos of the above, as Principals in their own right, or in anticipation of potential sub-contractual arrangements, organisations may, and do, seek tenders from RTCS with disclosure of unit rates specific to particular jobs.

RTCS is delighted to provide unit rates under those circumstances to whomever has called tenders or quotations for works. Indeed RTCS has recently provided unit rates to Council for consideration with specific regard to jobs on the Mingela Range (unit rates for paving operations) and on the Gregory Development Road (unit rates for plant hire).

Main Roads' logic, therefore, could naturally be extrapolated to the extent that, in tendering, it is already doing itself harm.

This is, of course, not the case, but rather supports Council's most basic argument that unit rates are site specific. It is exactly and precisely the site specific unit rates ... which are required by the Council.

...

... Council would vigorously contest ... how the Department would justify logically and mathematically its submission that "disclosure of RTCS (Central)'s unit rates would enable future competitors to calculate the tender price for similar jobs to within 90% accuracy."

35. In its final submission, the respondent argued as follows:

It is submitted that to disclose the matter in issue could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of RTCS (Central) in that the disclosure of the unit rates would enable a competitor of RTCS (Central) to be able to predict future tender figures more accurately.

... it is submitted that inflation in the building industry has remained low. Accordingly, despite the passage of time that has elapsed since the tender was submitted, it is considered that disclosure of the unit rates could reasonably be expected to have an "adverse effect" as contemplated by s.45(1)(c)(ii) of the FOI Act.

It is submitted that the decision in Re Sexton can be distinguished on the basis that in that case the applicant was not seeking the detailed pricing structure of the successful tenderer but rather the prices as supplied by the successful tenderer. In this review, the applicant seeks the unit rates themselves which form the component elements of the tender price.

...

The applicant makes reference ... to recently being provided with unit rates by the RTCS in relation to paving operations and plant hire. It should be noted that the projects referred to were undertaken by a different office, i.e., RTCS (Northern). In any event, the specific rates refer to one item on each job, not a complete job. Further, plant hire is usually calculated at \$x per hour rather than as a unit rate.

... It is submitted that the assertion that future competitors would be able to calculate the tender price for similar jobs to "within 90% accuracy" does not need to be justified "logically and mathematically". Persons who are buyers do not work out the base principles of the calculation but rather have a good idea of the price by reference to market rate and are able to calculate the price of a job to within 90% accuracy.

Adverse effect - findings

36. Both participants have adverted to one of the peculiarities of the market for road construction contracts (in which they both conduct business operations) following the National Competition Policy reforms. Both RTCS (Central) and the applicant are liable to compete for contracts put out to tender by the respondent or by other local authorities. In addition, RTCS (Central) is liable to compete for contracts put out to tender by the applicant. Either participant might successfully tender or quote for sub-contracting work on a contract obtained by the other.
37. The Queensland government has adopted policies aimed at ensuring that an 'in-house bidder' (RTCS (Central) being one example) for contracts put out to tender by a Queensland government agency, obtains no unfair advantage in comparison to other bidders, e.g., by requiring that 'in-house bids' should be prepared by an organisational unit which is separate from all aspects of the buyer's procurement process, and which is forbidden to obtain access to any information which is not available to all prospective tenderers (see Queensland Government, State Purchasing Policy, May 1997, Part D, Section 12: "Guidelines for Tendering Processes involving In-House Bids and the Private Sector"). I am not aware of whether the applicant has adopted similar policies to insulate information obtained through its procurement processes from its organisational units which conduct competitive business operations, in the interests of competitive neutrality. (The argument put in the second and third paragraphs quoted from the applicant's submission dated 1 May 1997, at paragraph 34 above, tends to suggest that the applicant had not done so at that stage.) However, in the market I have described, it would seem that there is a reasonable chance of prospective

competitors obtaining some information concerning each other's prices for particular items of construction activity (albeit on jobs affected by site-specific considerations) from time to time.

38. In such circumstances, one might expect a prudent business operator to specify any commercial information of genuine sensitivity contained in a tender, and seek undertakings (preferably contractually binding undertakings) that such information would not be used, or further disclosed, for any purpose other than evaluation of its tender. However, such an approach would not avail RTCS (Central) in a case like the present. For a number of technical legal reasons, RTCS (Central) (or any similar body which has no distinct legal personality but functions merely as a commercial unit within a Department of the Queensland government) would not have standing to bring an action for breach of confidence against the State of Queensland, and hence could not avail itself of the s.46(1)(a) exemption. Nor is the s.46(1)(b) exemption likely to succeed in cases like the present, because the third element of the test for exemption under s.46(1)(b) could rarely be satisfied, for reasons of the kind indicated at paragraph 28 above. Thus, the respondent has not sought to raise an argument that the matter in issue is exempt under s.46(1)(a) or s.46(1)(b) of the FOI Act. Rather, I must assess whether there is a reasonable basis for expecting the claimed adverse effect on the business affairs of RTCS (Central), if the matter in issue were to be disclosed.
39. I am not satisfied that disclosure of those items in Schedules A, B, C and D which are described in the fourth column of each schedule as "Lump Sum" items could reasonably be expected to have an adverse effect on the business affairs of RTCS (Central). Each lump sum item is not only site-specific and job-specific (as asserted by the applicant and conceded by the respondent), but must itself be comprised of a range of component costs elements which are not individually identified or costed. Thus, in Schedule C, disclosure of the quoted price for lump sum items such as "Removal of existing timber bridge", "Excavation to clear waterway at existing road", "Bridge site preparation", would merely indicate to a competitor how RTCS (Central)'s price for that item compared to its own: it would give no indication of what component costs were allowed for, nor any real potential to make more informed estimates of RTCS (Central)'s component costs, margins, or approach to calculation of tender prices. I am not satisfied that disclosure of the quoted prices for lump sum items in Schedules A, B, C and D could reasonably be expected to confer any competitive advantage on RTCS (Central)'s competitors, nor occasion any competitive disadvantage to RTCS (Central), in future tenders for the award of roadworks construction contracts, and I find that those quoted prices for lump sum items do not qualify for exemption under s.45(1)(c) of the FOI Act.
40. However, the other prices quoted in the schedules are given in unit rates using the type of basic unit measurements at which a business is liable to measure its basic costs of service performance, and their disclosure could, in my view, have considerable commercial sensitivity. Thus, for example, tender prices are quoted for construction activity (of a kind liable to be repeated in many contract jobs) on the basis of a unit rate per metre (e.g., construction of fencing, and steel beam guard rail: see Schedule B) or per square metre (e.g., supply and placement of geofabric: see Schedule B), or per cubic metre (e.g., construction of different lengths, using specified different types, of unbound pavement: see Schedule B). In Schedule B, prices are quoted for the installation of concrete pipe culvert components in five different sizes, and for the installation of concrete box culvert components in eleven different sizes. Also in Schedule B, a price per unit is quoted for the supply and installation of timber

guideposts, steel guideposts, and raised pavement markers. In Schedules C and D, prices are quoted for the supply, per tonne, of hot-mixed asphalt pavement (20 mm mix), and for the supply, per litre, of a specified kind of tack coat.

41. Disclosure of the level of finely detailed costing information available in the (approximately) 140 quoted unit rates appearing in the matter in issue could, in my view, be reasonably expected to assist a competitor to make more informed estimates of the unit rates likely to be submitted by RTCS (Central) in future tenders where the same, or similar, items are included in the tender documents published by the procuring agency. I accept that unit rates are liable to variation according to site-specific and job-specific factors of the kind referred to in Mr Griffiths' statutory declaration. However, disclosure is here being contemplated to a competitor which also submitted a tender for the same roadworks contract, and in the process would have made its own assessment of many of the site-specific and job-specific variables affecting the costs of performing that job.
42. I consider that a competitor in the roadworks construction industry, with knowledge and expertise of the pricing components and variables that go into the costing of tenders for contract jobs in that industry, could use the unit rates in issue to assess comparative cost advantages and disadvantages between itself and RTCS (Central) across a large range of construction items (thus enabling it to assess those areas in which it would need to find savings/efficiencies in order to be more competitive in future tenders, and those areas in which it may not need to find savings/efficiencies). I consider that a competitor could also use the unit rates in issue (perhaps, in conjunction with other similar or complementary material available to it: see paragraph 37 above, and *Re Actors Equity Association of Australia and Australian Broadcasting Tribunal (No. 2)* (1985) 7 ALD 584 at p.593, paragraph 36) to predict with a greater degree of accuracy future tender bids by RTCS (Central) for contracts involving a substantial number of the same or similar items to those listed in Schedules A, B, C and D.
43. I do not mean to suggest that any large competitive advantage would be conferred on a competitor of RTCS (Central), or any large competitive disadvantage imposed on RTCS (Central), by disclosure of the unit rates in issue. Assessments of the kind described above (which disclosure of the unit rates in issue would enable a competitor to undertake) would still necessarily be attended by a degree of imprecision. Moreover, a competitor's ability in the future to undercut a predicted tender bid by RTCS (Central) may be constrained by its own costs structures and the extent to which it is capable of reducing its margins and remaining viable. Nevertheless, I am satisfied that disclosure of the unit rates in issue could reasonably be expected to confer a competitive advantage, and corresponding disadvantage to RTCS (Central), that is more than minimal, and I find that disclosure of the unit rates contained in the matter in issue could reasonably be expected to have an adverse effect on the business affairs of RTCS (Central).
44. I should note that I accept the respondent's evidence that, given the low rate of inflation in the construction industry, the potential for prejudice has not yet been erased by the aging of the unit rate prices in issue. The applicant did not contest the respondent's evidence in that regard. Nevertheless, I do not think it will be too many more years before the information in question is too out-of-date for its disclosure to be capable of having any adverse effect.
45. In respect of those items in Schedules A, B, C and D where a unit rate price, rather than a lump sum price, has been quoted, the corresponding total tendered amount for each such item must also be treated in the same way as the unit price. That is because the applicant

already has access to the estimated quantities specified by the respondent against each item. A simple division of the total tendered amount for a particular item, by the estimated quantity for that item, would give the unit rate tendered for that item. I therefore find that, in respect of those items in Schedules A, B, C and D where a unit rate price, rather than a lump sum price, has been quoted, disclosure of the total tendered amount (as recorded in the last column of each page) for each such item could reasonably be expected to have an adverse effect on the business affairs of RTCS (Central).

46. I am not satisfied, however, that disclosure of the page subtotals which appear on most of the pages comprising Schedules A, B, C and D, could reasonably be expected to reveal any sufficient level of detail about unit rate prices as to have an adverse effect on the business affairs of RTCS (Central). There is one exception in that regard. Page 17 contains only one item for which a unit rate price has been quoted. Immediately below it is the total tender amount for Schedule D, being a figure which has now been disclosed to the applicant. If the page subtotal appearing at the foot of page 16 were subtracted from the total tendered amount for Schedule D, it would disclose the total tendered amount for the only item on page 17 (which could then be divided by the estimated quantity for that item, which is already known to the applicant, to give the unit rate price quoted for that item). The page subtotal at the foot of page 16 should therefore be treated on the same basis as the unit rate prices, and I find that its disclosure could reasonably be expected to have an adverse effect on the business affairs of RTCS (Central). No similar situation occurs on other pages of the schedules. I find that those figures which comprise page subtotals appearing on pages 5, 6, 7, 8, 11, 12 and 15 of the tender documents lodged by RTCS (Central) do not qualify for exemption under s.45(1)(c) of the FOI Act.

Public Interest Balancing Test

47. Satisfaction of the requirements of s.45(1)(c)(i) and s.45(1)(c)(ii) raises a *prima facie* public interest consideration favouring non-disclosure of information that would reveal the unit rate prices quoted in the matter in issue. I must therefore consider whether there are public interest considerations favouring disclosure of that information which outweigh the public interest in protecting the business affairs of RTCS (Central) from a reasonably apprehended adverse effect, so as to warrant a finding that disclosure of that information would, on balance, be in the public interest.
48. With regard to the balance of the public interest, the applicant raised the issue of the National Competition Policy principles and the need for protection of jobs in rural Queensland, with particular regard to the Queensland Government's commitment to ensuring no further job losses occurred in rural shire councils. Further, the applicant submitted that:

It is crucial to the public interest that the information be made available to test for appropriateness given that the RTCS is ... Main Roads' own construction and maintenance organisation.

49. In its supplementary submission dated 23 May 1997, the applicant developed its argument that disclosure of the matter in issue was in the public interest (given the advent of National Competition Policy principles embraced by the Queensland government) due to the fact that it involved expenditure of public money on public works. It submitted:

As you are no doubt aware, Main Roads in purported execution of Government policy, has been awarding road construction contracts following an open market tendering process. Council, as well as other private road

building construction companies, has been active in the tendering process and has been successful on occasions. ...

Main Roads is actively involved in direct contracting through its so called "RTCS" component.

Whilst Council is not averse to RTCS involvement, it is concerned to ensure that expenditure of public monies is optimised. You will, of course, appreciate that notwithstanding self-promotion of an independent entity in respect of the legal status of RTCS, RTCS still remains an arm of the Department of Main Roads and as such the monies employed by RTCS are in essence public funds.

The Government is of course accountable and as such, it is in the public interest to ensure that monies are not misspent or losses suffered on projects, recompense for which becomes necessary from public funds.

Having regard to the variance in tenders of the subject job and in view of certain information available to Council, it would appear that the cost of the job may have exceeded the tendered amount. If this is proven to be the case, then unlike any independent contractor, which must utilise independent resources, RTCS would benefit from the use of public monies having regard to its principal legal status as a Government Department.

In that particular regard, it would no doubt be in the public interest to determine how public monies are being spent in keeping with the doctrine of accountability.

It is also in the public interest to determine whether the government itself is abiding by its own policies on National Competition Reform, and the intended development of "a level playing field" in view of industry disillusionment, having regard to perceived advantages being available to RTCS as a Department of the Government.

50. The applicant provided me with a copy of a paper it had presented to Queensland government representatives, setting out its concerns regarding the government's moves towards "open tendering". The following extracts summarise what I consider to be the main points raised by the applicant in its paper:

- *Executive Management of both Main Roads and RTCS is one and the same with ultimate responsibility and decision making remaining with the Main Roads Director General and of course, Minister for Main Roads.*
- *Being the same organisation rather than autonomous, there appears to be nothing preventing migration of senior staff between the two (2) entities nor would there be any reason to suspect an embargo on "trade secrets" between the "entities". In that regard, Council is of the opinion that crucial information regarding jobs will be available to RTCS as against any other private tenderer. It is also difficult to accept that Main Roads would, on the one hand, prepare its costings for job tendering purposes while RTCS itself will prepare its own documentation covering the same ground in preparation of its tender.*
- *Council's road construction and maintenance unit is dealt with separately by reference to Council's traditional work and no cross-subsidisation occurs*

financially or otherwise. It is not apparent that RTCS acts financially on its own with regard to purchase of equipment, machinery etc, as it is understood that all such fleet and other equipment is dealt with by way of purchase, trade and sale through Main Roads (Government) fleet dealings. In that regard, it is questionable as to whether hidden costs such as depreciation or amortisation amongst others are taken into account in determining tender rates....

- *... It is understood that RTCS, being a Government instrumentality, is not required to deposit security for works as required of any other successful tenderer. This of course raises the legal implications applicable to contracting in that -*
 - (i) *Contractual arrangements entered into between RTCS and Main Roads securing performance etc. would in the Council's opinion, be invalid having regard to long-standing legal principles preventing an entity from contracting with itself; and*
 - (ii) *If a breach of contract occurs, on what basis can Main Roads purport to enforce the provisions of the contract by way of penalty, damages, specific performance or otherwise having regard to the inability of an entity to sue itself or secure court orders against itself.*

51. In response, the Department made the following points:

- While the applicant may have a particular interest in obtaining access to the matter in issue, it cannot be said that disclosure of the unit rates is in the public interest.
- The tenders were opened publicly, and the names of each tenderer, and its total tender price, were publicly declared. The respondent submitted that the public interest had been satisfied by such a process.
- RTCS (Central) is not publicly funded, but must fund itself through income from its commercial operations and is required to make a return on investment on its asset base.
- Since 1 January 1996, RTCS (Central) has been required to conduct its operations under the principles of competitive neutrality. (I note that the tender documents in issue were submitted prior to 1 January 1996.)
- RTCS (Central) is not privy to any of the information provided by local authorities to the functional units of the Department responsible for procurement.
- It is not the case, as suggested by the applicant, that "*crucial information regarding jobs is available to RTCS as against any other tenderer*". RTCS (Central) prepares its own tenders without any reference to other functional units of the Department.

52. There is, of course, a public interest in enhancing the accountability of the respondent for the efficient and effective performance of the functions it undertakes for the benefit of the Queensland public, and the extent to which disclosure of the information in issue would enhance that public interest in accountability must be assessed. In this case, the applicant contends that the considerations are two-fold. First, it says there is a public interest in scrutiny of the actions of the respondent in its role as a procurement agency, disbursing

public funds for the maintenance and construction of road infrastructure for the benefit of the Queensland public. Secondly, the applicant contends that there is the public interest in scrutiny of the operations of RTCS (Central), as a commercial unit of the respondent.

53. The respondent's role as a procurement agency extends not only to the selection of the best tender for a particular job, but also to ensuring that its 'in-house bidder' is not unfairly advantaged in competition for the award of contracts over other prospective tenderers. The Department has indicated that it has achieved this goal by ensuring compliance with the principles of competitive neutrality, so as to create 'a level playing field' as between its 'in-house bidder' and other potential contractors.
54. A number of salient points with regard to in-house tendering are discussed in a report by the Industry Commission on *Competitive Tendering and Contracting by Public Sector Agencies* (Report No. 48, 24 January 1996, AGPS, Melbourne). As regards the applicant's submission that RTCS (Central) enjoys an unfair advantage over other tenderers because of its relationship with the respondent, many of the concerns raised by the applicant are discussed in Chapter C5 of the Industry Commission report, which deals with 'in-house bids' and the concept of competitive neutrality. Competitive neutrality refers to a number of administrative and legal arrangements aimed at ensuring that all organisations and individuals (including public, private, and not-for-profit service providers) are treated in an equivalent manner in competition for the award of contracts.
55. At pp.292-293 of its report, the Industry Commission stated:

The National Competition Policy Report (commonly called the Hilmer report) developed a range of policy principles aimed at assisting governments to formulate a consistent approach to competition policy issues.

With reference to competitive neutrality, the report recommended that "government businesses should not enjoy any net competitive advantage by virtue of their ownership when competing with other businesses". ... Indeed, the report noted:

... reforms intended to promote the contracting out of services traditionally supplied by an in-house monopoly provider may be thwarted or undermined if the in-house producer's advantages serve to limit the emergence of effective competition.

...

The concept of competitive neutrality does not require that all firms compete on a completely equal basis. Indeed, differences in size, asset base, staff and management skills and experience may influence the relative competitive advantages and disadvantages of competing firms.

However, where organisations are competing in the same market, competitive advantages may arise through the imposition of different regulatory or other requirements. Governments and their agencies operate in environments which may confer on them a number of advantages and disadvantages relative to external suppliers of services. Box C5.2 [on p.294 of the report] lists a range of potential advantages and disadvantages arising from public ownership.

56. Having regard to its length, I will not reproduce that list of potential advantages and disadvantages affecting public sector agencies which operate on a commercial basis. Some participants in the Industry Commission's review submitted that those factors provided a net advantage to 'in-house bidders', while others argued that the combined effect of all the factors produced a net disadvantage to 'in-house bidders'. A number of participants highlighted the potential problems that may occur where the 'in-house bidder' is not adequately separated from the unit with responsibility for procurement. Many saw a need for physical and informational barriers between the 'in-house bidder' and those responsible for purchasing services.
57. The Industry Commission's recommendations in respect of these issues were as follows (see p.296 of its report):

The introduction of an effective form of organisational separation is central to the maintenance of confidence in the legitimacy of in-house bids. This will be achieved by:

- *separating the in-house team from all aspects of service regulation and specification, tender evaluation and contract management;*
- *introducing a degree of commercial autonomy, including the discipline of a requirement to cover costs and return an appropriate profit; and*
- *ensuring a transparent relationship between the in-house provider and the contracting agency.*

58. These recommendations have been adopted by the Queensland government, and are reflected in the State Purchasing Policy, May 1997 (see, in particular, Part A, Section 1: "Open and Effective Competition"; Part A, Section 5: "Ethical Behaviour and Fair Dealing"; Part D, Section 10: "Managing National Competition Policy Issues in Purchasing"; and Part D, Section 12: "Guidelines for Tendering Processes involving In-House Bids and the Private Sector"). The respondent submits that it achieves the necessary degree of organisational separation in that:
- RTCS (Central) is not publicly funded but is required to make a return on investment based on its asset base;
 - RTCS (Central) is not privy to any of the information provided by other tenderers to the respondent; and
 - the respondent prepares its own tender specification documents by reference to the market rate. RTCS (Central) prepares its own tenders without any reference to the respondent.
59. The Department may well have documents which record steps taken to ensure organisational separation of RTCS (Central) from other aspects of its operations, and to ensure that all relevant costs are taken into account in the running of RTCS (Central) and the formulation of tenders. However, I am not satisfied that disclosure of the unit rates in issue will shed light on any matters relevant to the steps taken by the Department to ensure compliance with the principle of competitive neutrality. I therefore do not consider that disclosure of the unit rates in issue would enhance the accountability of the Department in that regard.
60. Turning to consider the accountability of the respondent in respect of the awarding of the particular contract, I consider that there is a public interest in disclosure of information which will enhance the accountability of the respondent for its selection of contractors for (and

monitoring their performance on) projects on which public funds are expended. I have previously indicated in *Re Sexton* that the interest extends to disclosure of the total price tendered by the successful tenderer.

61. I note that the Industry Commission also considered questions of accountability, and the provision of information relating to contracts generally, at pp.81-103 of its report. At p.95, the Industry Commission stated:

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

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

62. At p.6, the Industry Commission summarised its position, and recommendation, as follows:

Wherever possible decisions must be open to public scrutiny.

There is sometimes tension between making information on contracting decisions public and protecting commercial confidentiality. While the obligation of the government to be open and accountable may legitimately give way to conflicting considerations of 'commercial sensitivity' in some cases (for example, where information contains valuable intellectual property), there should be a preference for disclosure.

RECOMMENDATION 1:

Recognising the balance between commercial confidentiality and accountability, governments should make public as much information as possible to enable interested people to assess contracting decisions made by agencies. Of particular importance is information on the specifications of the service, the criteria for tender evaluation, the criteria for the measurement of performance and how well the service provider has performed against those criteria.

63. I note that detailed pricing information that would reveal costing components of a total tender bid was not information of the kind which the Industry Commission considered should be disclosed in the interests of a proper level of accountability. Indeed, both the Industry Commission report, and the State Purchasing Policy, affirm the need for government procurement agencies to protect from disclosure any information obtained from tenderers that has genuine commercial sensitivity.
64. The difficulty I have with the applicant's case on the application of the public interest balancing test in s.45(1)(c) is that I am not satisfied that the concerns raised in the applicant's submission (at paragraph 49 above) necessitate disclosure of the unit rate prices that are in issue. In the particular circumstances attending this case, all that is necessary for those concerns to be further explored or addressed is access to the total tender price for each of Schedules A, B, C and D, and that information has already been disclosed to the applicant during the course of my review. This was not a situation where a contract was to be awarded for the performance of individual items in the detailed schedules. Unit rates were required because quantities per item were estimates only, and the Department needed a proper basis for comparative assessment (and ultimately for payment of costs incurred) if there were any substantial revision of estimated quantities. But variations between different tenderers on unit rates for particular items could not have had any substantial significance in the evaluation of tenders, other than for reasons of the kind I have indicated. Contracts were to be awarded for the performance of the whole of the works comprised in a particular schedule, and thus the total tendered price for each Schedule (subject to any variation caused by revised estimates of quantities for a particular item for which a unit rate price was quoted) was the key determinant in evaluation of the tenders, at least so far as price was concerned.
65. In addition, there is a public interest in enhancing the accountability of the respondent in respect of the operations of RTCS (Central), including (as the applicant has pointed out) in the public being able to confirm that RTCS (Central) is operating in a commercially sound manner, and not performing in a way that is liable to require its operations to be subsidised by public funds. However, as I indicated in paragraph 64 above, I am not satisfied that disclosure of the unit rates in issue is necessary to assist the applicant's stated concern of establishing whether the costs of RTCS (Central)'s performance of the contracts it was awarded exceeded the amount of its corresponding tenders. The total amount tendered by RTCS (Central) for each schedule is already known to the applicant. The actual construction costs incurred in performing the contract do not form part of the matter in issue. Assuming that that information is available to, or could be obtained by, the applicant, I am not satisfied that the applicant needs any more information than has already been disclosed to it, to be able to pursue its stated concerns.
66. Ultimately, although the public interest in non-disclosure of the information in issue which satisfies the requirements of both s.45(1)(c)(i) and s.45(1)(c)(ii) is not, in the circumstances of this case, a particularly weighty one, I am not satisfied that there are public interest considerations favouring disclosure which are sufficiently strong to warrant a finding that disclosure of information which would reveal the unit rate prices quoted in the tender documents in issue would, on balance, be in the public interest. I therefore find that that information is exempt matter under s.45(1)(c) of the FOI Act.

Conclusion

67. I set aside the decision under review. In substitution for it, I find that:
- (a) in respect of those items in Schedules A, B, C and D of the tender documents lodged by RTCS (Central) for Job Numbers 16/98A/22 and 42/98B/43 -
 - (i) where the words "Lump Sum" appear in the columns headed "Estimated Quantity", the corresponding figures in the columns headed "Unit rate" and "Amount" are not exempt from disclosure under the FOI Act; but
 - (ii) in respect of all other items, their corresponding figures in the columns headed "Unit rate" and "Amount" are exempt matter under s.45(1)(c) of the FOI Act; and
 - (b) the page subtotal figures on pages 5, 6, 7, 8, 11, 12 and 15 of the tender documents lodged by RTCS (Central) are not exempt from disclosure under the FOI Act, but the page subtotal figure which appears on page 16 is exempt matter under s.45(1)(c) of the FOI Act.

.....
F N ALBIETZ
INFORMATION COMMISSIONER