



## **Decision and Reasons for Decision**

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**Application Numbers:** 210263, 210264, 210265, 210266, 210267, 210268, 210269, 210270, 210271, 210272, 210273, 210274

**Applicants:** SJ and Ors

**Respondent:** Department of Communities

**Third Party:** The Courier Mail

**Decision Date:** 28 September 2007

**Catchwords:** **FREEDOM OF INFORMATION – section 45(1)(c) *Freedom of Information Act 1992 (Qld)* – compliance notices - ‘document of an agency’ – ‘business, professional, commercial or financial affairs’ – public interest balancing test – reverse FOI**

### **Contents**

Background .....	2
Steps taken in the external review process .....	2
Matter in issue .....	4
Findings .....	4
Decision .....	11

## Reasons for Decision

### Background

1. The external review applicants seek review of twelve decisions of the Department of Communities (the **Department**) to partially disclose to the Courier-Mail compliance notices issued to child care centres managed by them. As the same issues arise in each of the twelve decisions, this decision is made in respect of all twelve external review applications.
2. On 30 January 2007 the Courier-Mail applied to the Department for access under the *Freedom of Information Act 1992* (Qld) (**FOI Act**) to the following information:
  1. *Copies of any compliance notices issued during 2006 or 2007*
  2. *Copies of any suspension or revocation notices issued during 2006 or 2007.*
3. The Department processed the application and identified twelve compliance notices which relate to the applicants. Those twelve notices form the matter in issue in this external review (**Compliance Notices**).
4. The Department made an original decision. The applicants sought internal review of that decision and on 8 June 2007, the Department made its internal review decision to partially release the Compliance Notices to the Courier-Mail.
5. On 3 July 2007 the applicants applied to the Information Commissioner for external review of the Department's internal review decision dated 8 June 2007.

### Steps taken in the external review process

6. By letter dated 11 July 2007 this Office sought copies of the Compliance Notices and other relevant documentation from the Department.
7. By letter dated 11 July 2007 this Office wrote to the Courier-Mail inviting it to become a participant in the external review.
8. By letter dated 20 July 2007 the Courier-Mail confirmed that it wished to participate in the review. On 25 July 2007 this Office granted the Courier-Mail participant status and advised the applicants accordingly.
9. This Office received copies of relevant documentation from the Department on 24 July 2007 and undertook a careful analysis of its content.
10. This Office then sought clarification of factual matters from the Department including the numbers of child care centres located within each of the Department's regions and the number of centres for which each authorised officer of the Department is responsible.
11. By emails dated 30 July 2007 and 8 August 2007 the information requested was received from the Department.
12. By letters dated 8 August 2007 I conveyed a preliminary view to the applicants and the Department that information identifying the applicants, contained in the Compliance Notices, was exempt from disclosure under section 45(1)(c) of the FOI Act. I sought further submissions from these parties if they did not accept my preliminary view.

13. By letter dated 29 August 2007 the applicants submitted that the Compliance Notices are not valid compliance notices and on this basis fall outside the scope of the Courier-Mail's application. The applicants referred to 'ample' yet unspecified authority in support of their submissions and queried whether this Office required them to specify relevant case law.
14. By email dated 31 August 2007 the Department made submissions objecting to part of the preliminary view, specifically that the name of the 'region' and 'authorised officer' set out in the Compliance Notices was not exempt from disclosure under the FOI Act. The Department submitted that this information is exempt from release because:
  - *"each of the authorised officers in each region is directly linked to a limited number and defined set of child care centres..."*
  - *"releasing the Compliance Notices with the identifying information relating to departmental officers/offices could indirectly identify the child care centres concerned."*
15. By email dated 31 August 2007 this Office sought further clarification from the Department with regard to its further submissions.
16. By email dated 4 September 2007 the Department made further submissions as requested in respect of its claim for exemption of the names of authorised officers, their job title and the relevant region from which the Compliance Notice was issued. These submissions related to how the relevant centres might be able to be identified if these details were released.
17. By letter dated 5 September 2007 I wrote to the applicants confirming the preliminary view and advising that if they wished to make further submissions including in respect of supporting authority, they should do so by 14 September 2007.
18. On 12 September 2007 a staff member of this Office phoned the Department to discuss the preliminary view and the Department's further submissions. The Department was advised of my further preliminary view that:
  - the name of authorised officers (in this particular circumstance) is exempt from disclosure under section 45(1)(c) of the FOI Act as release could identify the relevant centre
  - given the large number of child care centres in each region, the regional office is not exempt from disclosure.
19. By letter dated 12 September 2007 I conveyed to the Courier-Mail the preliminary view that the Compliance Notices were partially exempt from disclosure under section 45(1)(c) of the FOI Act and invited the Courier-Mail to make further submissions if it did not agree with the view.
20. By letter dated 14 September 2007 the applicants provided this Office with their further submissions.
21. On 18 September 2007 the Department advised by telephone that it accepted my preliminary view, as discussed on 12 September 2007, and did not wish to make further submissions.
22. By letter dated 18 September 2007 the Courier-Mail sought an extension of time in which to provide submissions and requested clarification of aspects of my preliminary view.

23. By letter dated 19 September 2007 I advised the Courier-Mail of the considerations I had taken into account when forming my preliminary view as requested. I also granted the Courier-Mail an extension of time in which to provide its further submissions.
24. By letter dated 27 September 2007 the Courier-Mail advised that it did not accept the preliminary view and submitted that:
  - on balance, the public interest favours disclosure of information that would identify the external review applicants
  - release of the information could not reasonably be expected to have an adverse effect on the business, financial etc affairs of the external review applicants
25. In making this decision I have taken the following into account:
  - the Courier-Mail's FOI application dated 30 January 2007
  - the Compliance Notices (which comprise the matter in issue)
  - the initial decision of the Department dated 14 May 2007
  - the internal review decision dated 8 June 2007
  - correspondence from the external review applicants to the Department setting out the applicants' objections to the release of the Compliance Notices dated 3 April 2007, 30 May 2007, 1 June 2007 and 5 June 2007
  - the applicants' applications for external review
  - the applicants' letter to this Office dated 29 August 2007 objecting to the preliminary view
  - the applicants' letter to this Office dated 14 September 2007 objecting to the preliminary view and providing submissions
  - advice received from the Department on 30 July 2007 regarding the number of child care centres within each region
  - advice received from the Department on 8 August 2007 regarding the number of child care centres for which each authorised officer has responsibility
  - the Department's submissions dated 31 August 2007
  - the Department's submissions dated 4 September 2007
  - the Courier-Mail's letter dated 18 September 2007
  - the Courier-Mail's submissions dated 27 September 2007
  - relevant sections of the FOI Act and applicable case law.

## **Matter in Issue**

26. The matter in issue in this external review comprises 12 Compliance Notices issued by the Department to the applicants (**Matter in Issue**).

## **Findings**

### ***Does the Matter in Issue comprise 'documents of an agency'***

27. In summary, the applicants submit that the Matter in Issue:
  - is invalid
  - was issued by the Department other than in accordance with the requirements of the *Child Care Act 2002* (Qld) (**CC Act**).
  - does not fall within the scope of the Courier-Mail's FOI application as it does not comprise valid compliance notices.

28. I have carefully considered the applicants' submissions and the case law to which I have been referred.
29. The FOI Act applies to 'documents of an agency' and 'official documents of a Minister'<sup>1</sup>.
30. I also note that the object of the FOI Act is to extend as far as possible the right of the community to access to information held by Queensland government<sup>2</sup>.
31. Section 7 of the FOI Act defines 'document' as including:
  - 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.
32. Section 7 also refers to the definition of 'document' set out in section 36 of the *Acts Interpretation Act 1954* (Qld) (**AI Act**), which 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).
33. A 'document of an agency' or 'document of the agency' is defined in section 7 of the FOI Act as '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.
34. Section 8(1) of the FOI Act provides that 'agency means a department, local government or public authority.'
35. Based on the provisions set out above, any question as to the validity of the Matter in Issue is irrelevant for the purposes of this external review under the FOI Act.
36. This Office's jurisdiction as set out in the FOI Act, does not extend to considerations of a document's 'validity'. If a document exists and is a document of an agency, it is accessible under the FOI Act subject to any relevant exemption.
37. As the Matter in Issue is entitled Compliance Notices and has been issued by the Department as such, they are Compliance Notices for the purposes of this external review and fall within the scope of the Courier-Mail's FOI application.
38. In summary, after carefully considering all of the information available to me including the applicants' submissions, I am satisfied that:
  - there is no legal requirement that the Matter in Issue 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 set out above

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<sup>1</sup> Section 21 of the FOI Act

<sup>2</sup> Section 4(1) of the FOI Act

- the Matter in Issue in this external review comprises ‘documents of an agency’ as defined by the FOI Act and is therefore responsive to the relevant FOI application
- this Office has jurisdiction to conduct this external review.

39. Having made this finding, I must now consider whether any of the material contained in the Matter in Issue is exempt from disclosure under section 45(1)(c) of the FOI Act.

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

40. Section 45(1)(c) provides:

**45 Matter relating to trade secrets, business affairs and research**

(1) Matter is exempt matter if—

(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.*

41. In respect of this exemption provision, the applicants submit that:

- if the relevant notices are considered to be Compliance Notices under section 142 of the CC Act, and therefore subject to the FOI Act and within the scope of the request by the Courier-Mail, they are fully exempt from disclosure under section 45(1)(c) of the FOI Act
- certain competitors of the applicants are not subject to regulation under the CC Act which unfairly prejudices the applicants.

42. In respect of this exemption provision the Department submits that parts of the Matter in Issue are exempt from disclosure under section 45(1)(c) of the FOI Act, including:

- the addressee and address appearing on the notice as it identifies the applicants
- the licence details as they identify the applicants
- references to names of centres or persons connected with centres as these details identify the applicants
- the name of the Department’s authorised officers as this could identify the relevant centre and the applicants
- the signature block of the officer issuing the notice (i.e. signature, job title and region) as it may identify the applicants
- the Department’s ‘footer’ as it discloses the region in which the notice was issued.

43. In respect of this exemption provision the Courier-Mail submits that:

- there is not a reasonable expectation that the applicants’ business, professional, commercial or financial affairs would be adversely affected if the Matter in Issue was released in full
- even if a reasonable expectation could be established, the public interest considerations favouring disclosure outweigh those designed to protect commercially sensitive information.

44. I will consider each of the elements relevant to section 45(1)(c) of the FOI Act in turn.

**(a) Information concerning business, professional, commercial or financial affairs**

45. The first element in the test for exemption under section 45(1)(c) of the FOI Act is that the information in issue must actually concern the business, professional, commercial or financial affairs of the agency or business operator.

46. In *Cannon and Australian Quality Egg Farms Ltd* [1994] QICmr 9 (30 May 1994) (*Cannon*) the Information Commissioner set out at paragraph 81 that:

*The words “business, professional, commercial or financial” are hardly apt to establish distinct and exclusive categories; there must in fact be substantial overlap between the kinds of affairs that would fall within the ambit of the ordinary meanings of the words “business”, “commercial” and “financial”, in particular. The common link is to activities carried on for the purpose of generating income or profits...*

47. Further, as set out in *Bouly and Department of Natural Resources; Stevenson Financial Corp. Pty Ltd & Anor (Third Parties)* [1998] QICmr 1 (3 March 1998) at paragraph 62:

*It is not sufficient that the matter in issue has some connection with a business, or has been provided to an agency by a business, or will be used by a business in the course of undertaking its business operations. The matter in issue must itself be information about business, commercial or financial affairs, in order to satisfy the first element of the test for exemption under s.45(1)(c).*

48. In *Johnson and Queensland Transport; Department of Public Works (Third Party)* [2004] QICmr 1 (5 January 2004), the Information Commissioner explained at paragraph 50 that:

*I consider that Parliament's intention in enacting the s.45(1)(c) exemption was to provide a means by which the general right of access to documents in the possession or control of government agencies could be prevented from causing unwarranted commercial disadvantage to:*

- (a) individuals who offer professional services to the public on a fee for service basis (see *Re Pope and Queensland Health* [1994] QICmr 16 (18 July 1994) at paragraph 29);*
- (b) private sector business operators (whether they be individuals, partnerships, or corporations); and*
- (c) government agencies which function on a business model to generate income from the provision of goods or services.*

49. The Matter in Issue comprises information including that which identifies the relevant child care centres by their name, address and licence details, the names of persons employed at or connected to particular child care centres, and the names of the Department's authorised officers responsible for the relevant child care centres and the regions in which the centres operate.

50. After carefully considering all of the information available to me, I am satisfied that:

- disclosure of some of the Matter in Issue would disclose information concerning the business or commercial affairs of the applicants on the basis that it directly concerns a commercial enterprise or business pursued by the applicants in an organised way for the purpose of profit or gain<sup>3</sup>.

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<sup>3</sup> *Re Stewart and Department of Transport* [1993] QICmr 6 (9 December 1993) at para 103

- the following parts of the Matter in Issue discloses such information (**Identifying Information**):
  - addressee details
  - licence details
  - authorised officer's name, signature and job title
  - name of or reference to a person connected to a centre or name of or reference to a centre itself
- disclosure of the remaining Matter in Issue, including the region, would not disclose information concerning the business or commercial affairs of the applicants, nor information which could identify the applicants and therefore does not qualify for exemption from disclosure under the FOI Act.

51. In the ordinary course, the name of a government employee (in this case an authorised officer of the Department) acting in a professional capacity would not be exempt from disclosure.

52. However, I note the Department's submissions that:

- *“each of the authorised officers in each region is directly linked to a limited number and defined set of child care centres...”*
- *“releasing the Compliance Notices with the identifying information relating to departmental officers could indirectly identify the child care centres concerned.”*

53. In the present circumstances, I am satisfied that the names of the authorised and issuing officers comprise Identifying Information as disclosure could lead to identification of the relevant child care centres.

54. On this same basis, I consider that the issuing officers' position titles (where they appear in relevant signature blocks) also form part of the Identifying Information as revealing the position title would, in turn, identify the relevant authorised officer.

**(b) Adverse effect reasonably expected from disclosure**

55. The next element for consideration is whether disclosure of the Identifying Information could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the applicants.

56. The Information Commissioner considered the phrase 'could reasonably be expected to' at paragraphs 62 to 63 of *Cannon*:

*The phrase "could reasonably be expected to" ...:*

*... calls 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.*

*It is appropriate to record what was said by the Full Court of the Federal Court in Searle's case [Searle Australia Pty Ltd v Public Interest Advocacy Centre 108 ALR 163 (Searle)] (at p.176) about the comparable test in s.43(1)(b) of the Commonwealth FOI Act:*

*In the application of s.43(1)(b), there would ordinarily be material before the decision maker which would show whether or not the commercial value of the information would be or could be expected to be destroyed or diminished if the information were disclosed. It would be for the decision-maker to determine*



*whether, if there were an expectation that this would occur, the expectation was reasonable.*

57. In summary, the Information Commissioner made the following observations in relation to section 45(1)(c):
- an adverse effect under section 45(1)(c) will almost invariably be financial in nature, whether directly or indirectly (e.g. an adverse effect on an entity's 'business reputation or goodwill ... is feared ultimately for its potential to result in loss of income or profits, through loss of customers') (at paragraph 82 of *Cannon*)
  - if information is already in the public domain or is common knowledge in the industry, it would ordinarily be difficult to show that disclosure of the information under FOI could reasonably be expected to have an adverse effect (paragraph 83 of *Cannon*)
  - 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 entity. A relevant factor is whether it enjoys a monopoly position or whether it operates in a commercially competitive environment (paragraph 84 of *Cannon*).
58. The Courier-Mail submits that the decision to exempt matter (the Identifying Information) is based on an unreasonable expectation and could be considered merely speculative.
59. On the information available to me, I am satisfied that:
- the Identifying Information is neither in the public domain nor is it common knowledge
  - the applicants operate in a commercially competitive environment and I consider that it is more than merely speculative to conclude that release of the Identifying Information would cause damage to their reputations
  - disclosure of the Identifying Information could therefore reasonably be expected have an adverse financial effect on the business, commercial or financial affairs of the applicants.
60. Given my finding that disclosure of the Identifying Information could reasonably be expected to cause an adverse effect on the business, commercial or financial affairs of the applicants, it is unnecessary to consider whether disclosure would prejudice the future supply of information to government.

### ***Public Interest Balancing Test***

61. The final matter for consideration is whether disclosure of the Identifying Information is in the public interest.
62. In relation to the public interest balancing test, the Courier-Mail relevantly submits that:
- there is a public interest consideration favouring disclosure that provides an understanding of how the Department carries out its licensing and compliance functions...such public accountability is fundamental to all government agencies which perform functions on behalf of the community.
  - disclosure of issues of general concern can also assist the community to make decisions concerning their children's welfare particularly with respect to health and safety.

63. I consider that the accountability and transparency of government is a public interest consideration favouring disclosure of the Identifying Information. In other words, disclosure of information about how government functions are conducted can enhance the accountability of agencies and individual officers in the performance of their official functions.
64. Against this, I must balance the public interest in maintaining the secrecy of sensitive commercial information held by government agencies about business operators which, among other things, could benefit competitors and adversely affect the relevant businesses.
65. I note that the Identifying Information comprises a small proportion of information contained in the Compliance Notices.
66. After carefully weighing the public interest considerations set out above, and the submissions of the parties, I am satisfied that:
- there is a public interest consideration favouring non-disclosure as release of details which identify or which could reasonably be expected to identify relevant childcare centres may damage the applicants' reputation and/or benefit the applicants' competitors
  - in respect of the Identifying Information, the public interest consideration favouring non-disclosure (which is intended to protect commercially sensitive information held by government about business operators) outweighs the public interest consideration favouring disclosure
  - release of the majority of the information contained in the notices (subject to exemption of the Identifying Information) provides transparency and accountability of government by demonstrating how the Department and its officers perform compliance functions.

### **Provision of further information to the Courier-Mail**

67. I note that the Courier-Mail, in its submissions dated 27 September 2007, also states that:

*other than the information contained in your letters, the Courier-Mail has not been provided with evidence to support the notion that release of this information (the Identifying Information) would cause any adverse effect on the businesses concerned. Further the Courier-Mail has not been provided with any supporting documentation or evidence from the external review applicants.*

68. In circumstances such as this, where revealing information which could identify the applicants would reveal matter claimed to be exempt, I have not been able to provide the Courier-Mail with any additional material. In any event, I note that there is very minimal overlap between the issues raised by the applicants and those raised by the Courier-Mail.

### **Conclusion**

69. I am satisfied that release of the Identifying Information would disclose information that is properly characterised as information:

- concerning the business, commercial or financial affairs of the applicants
- which could reasonably be expected to have an adverse effect on those affairs

thereby establishing a public interest consideration favouring non-disclosure.

70. After carefully considering the public interest considerations for and against disclosure of the Identifying Information, I am satisfied that the arguments in favour of disclosure do not outweigh the considerations favouring non-disclosure.
71. In summary, I find that only the Identifying Information qualifies for exemption under section 45(1)(c) of the FOI Act, namely:
- addressee details
  - licence details
  - authorised officer's name, signature and job title
  - name of or reference to a person connected to a centre or name of or reference to a centre itself.

## **Decision**

72. I vary the decision of Ms Cynthia Irvine of the Department made on 8 June 2007, by finding that:
- the Matter in Issue in this external review comprises 'documents of an agency' as defined by the FOI Act and is therefore responsive to the relevant FOI application
  - disclosure of the Identifying Information could reasonably be expected have an adverse effect on the business, commercial or financial affairs of the applicants
  - in respect of the Identifying Information, public interest considerations favouring non-disclosure outweigh public interest considerations favouring disclosure
  - the Identifying Information qualifies for exemption from disclosure under section 45(1)(c) of the FOI Act
  - the remainder of the Matter in Issue does not qualify for exemption from disclosure under the FOI Act.
73. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

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**F Henry**  
**Assistant Commissioner**

**Date: 28 September 2007**