Aries Tours Pty Ltd and Environmental Protection Agency

(S 27/01, 28 March 2002, Deputy Information Commissioner)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1.-2. These paragraphs deleted.

REASONS FOR DECISION

Background

3. This is a "reverse FOI" application by Aries Tours Pty Ltd ("Aries Tours") challenging a decision by the Environmental Protection Agency ("EPA") to give the FOI access applicant, Koala Blue Tours ("Koala Blue"), access under the FOI Act to parts of two Deeds of Agreement dated 23 December 1999 between the EPA and Aries Tours. Aries Tours claims that the matter in issue is exempt from disclosure under s.45(1)(b), s.45(1)(c) and/or s.46(1) of the FOI Act.

4. The Deeds of Agreement contain the various terms and conditions upon which Aries Tours is permitted to take tour groups to the Natural Bridge in Springbrook National Park. In June 1999, the EPA invited tourism operators to lodge expressions of interest to conduct commercial activities at the Natural Bridge. Advertisements were placed by the EPA in the *Courier Mail* and *Gold Coast Bulletin* newspapers. Aries Tours lodged a tourism proposal in response to the EPA's invitation. The proposal was accepted by the EPA, and Aries Tours and the EPA then negotiated the terms of the two Deeds of Agreement under s.63 of the *Nature Conservation Regulation 1994* Qld.

5. By letter dated 21 September 2000, Koala Blue (which is a competitor of Aries Tours) applied to the EPA for access to various documents concerning the Natural Bridge. The EPA identified the two Deeds of Agreement between Aries Tours and the EPA as falling within the terms of Koala Blue's FOI access application. Under s.51 of the FOI Act, the EPA consulted Aries Tours regarding disclosure of the Deeds to Koala Blue. Aries Tours advised that, while it did not object to disclosure of some parts of the Deeds (it identified the particular sections), it claimed that other parts (including all Schedules to the Deeds) were exempt from disclosure under s.45(1)(b) or s.45(1)(c) of the FOI Act. Aries Tours claimed that the relevant matter was "commercial-in confidence" information.

6. By letter dated 30 November 2000, Ms Judy Lloyd of the EPA advised Aries Tours of her decision that, with the exception of a small number of references to financial information contained in the Schedules to the Deeds (which information Ms Lloyd decided was exempt from disclosure to Koala Blue under s.45(1)(c) of the FOI Act), the bulk of the Deeds did not qualify for exemption under the FOI Act, and Koala Blue was therefore entitled to obtain access to that material. Ms Lloyd advised Aries Tours that, as

her decision was contrary to Aries Tours' objection to disclosure in respect of some segments of the Deeds, the EPA would defer giving Koala Blue access to that matter, until expiry of the time limit for Aries Tours to seek internal review of her decision.

7. (By another letter dated 30 November 2000, Ms Lloyd informed Koala Blue of her decision that some financial information contained in the Schedules to the Deeds was exempt from disclosure under s.45(1)(c) of the FOI Act. Ms Lloyd also decided that various other documents falling within the terms of Koala Blue's FOI access application (but which did not concern Aries Tours) were exempt from disclosure under the FOI Act. Koala Blue sought internal review of Ms Lloyd's decision refusing access to some documents and parts of documents, and subsequently applied to the Information Commissioner for external review under Part 5 of the FOI Act. Accordingly, the financial information contained in the Schedules to the Deeds which the EPA decided was exempt from disclosure to Koala Blue (along with various other documents and parts of documents) is in issue in application for review no. S 47/01, lodged with the Information Commissioner by Koala Blue.)

8. By letter dated 22 December 2000, Aries Tours sought internal review of Ms Lloyd's decision. The internal review was conducted by Mr John Gilmour of the EPA. By letter dated 5 January 2001, Mr Gilmour advised Aries Tours that he had decided to affirm Ms Lloyd's decision.

9. By letter dated 1 February 2001, Aries Tours applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr Gilmour's decision.

External review process

10. Copies of the two Deeds of Agreement were obtained and examined.

11. During the course of the review, Aries Tours withdrew its objection to disclosure of the information contained in the body of the Deeds, with the exception of clause 3 in each of the Deeds, which specifies the term (i.e., the commencement and expiry dates) of each Agreement. (With the exception of clause 3, Koala Blue has been given access to the body of both Deeds and that information is no longer in issue in this review.) However, Aries Tours maintained its claim for exemption in respect of that information contained in the various Schedules to both Deeds which the EPA had decided was not exempt from disclosure under the FOI Act.

12. By letter dated 21 August 2001, Assistant Information Commissioner Shoyer advised Aries Tours that he had formed the preliminary view that the matter remaining in issue did not qualify for exemption under s.45(1)(b), s.45(1)(c) or s.46(1) of the FOI Act. Aries Tours responded by letter dated 30 November 2001. It advised that it did not accept the Assistant Information Commissioner's preliminary view. It provided documents in support of its contention that its negotiations with the EPA, which had resulted in the signing of the Deeds, were conducted on a commercial-in-confidence basis. It stated that it required my office to contact the two EPA officers who were

involved in the negotiation process, as they would confirm that the Deeds were confidential.

13. The issue of the confidentiality of the Deeds was referred to the EPA for response. Mr Henderson (of the Queensland Parks and Wildlife Service division of the EPA) responded by undated facsimile, received at my office on 6 December 2001. Mr Henderson advised that *"confidentiality was always an important part of negotiating the agreement with Aries Tours"*. He provided certain documents relating to the negotiation process. I will discuss the issue of confidentiality and the submissions of Aries Tours and the EPA in that regard in further detail below, in the context of the application of s.46(1) of the FOI Act to the matter in issue.

14. In making my decision in this matter, I have taken into account:

    1. the contents of the matter in issue;
    2. Koala Blue's FOI access application dated 21 September 2000;
    3. Aries Tours' letter of objection to the EPA dated 23 November 2000; its applications for internal and external review dated 22 December 2000 and 1 February 2001, respectively; and its letters to my office dated 11 May 2001 and 30 November 2001; and
    4. the EPA's initial and internal review decisions dated 30 November 2000 and 5 January 2001, respectively; its letter to my office 7 February 2001, and its undated facsimile received at my office on 6 December 2001.

Matter in issue

15. The matter in issue in this review consists of:

    1. clause 3 contained in a Deed of Agreement dated 23 December 1999 between the EPA and Aries Tours relating to tours of the Natural Bridge between 4.30am and 6.30am (hereinafter referred to as "Deed 1");
    1. the whole of Schedules A, D and E to Deed 1, and parts of Schedules B and C to Deed 1;
    2. clause 3 contained in a Deed of Agreement dated 23 December 1999 between the EPA and Aries Tours relating to tours of the Natural Bridge between 10pm and 11pm (hereinafter referred to as "Deed 2"); and
    3. the whole of Schedules A, C, D and E to Deed 2, and parts of Schedule B to Deed 2.

16. (As I noted at paragraph 7 above, the financial information which is contained in the Schedules to both Deeds 1 and 2, and which the Department decided was exempt from disclosure to Koala Blue under s.45(1)(c) of the FOI Act, is in issue in external review no. S 47/01, and will not be dealt with in these reasons for decision.)

Application of s.45(1)(b) and s.45(1)(c) of the FOI Act to the matter in issue

17. Section 45(1)(b) and s.45(1)(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.*

18. The Information Commissioner explained the correct approach to the interpretation and application of s.45(1) of the FOI Act in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491. He observed 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.

19. In *Re Cannon* (at p.516, paragraph 66), the Information Commissioner discussed the relationship between s.45(1)(a), s.45(1)(b) and s.45(1)(c):

> *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).*

20. 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 his reasons for decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (at pp.339-341, paragraphs 154-160), the Information Commissioner 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, the Information Commissioner 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).

Requirements for exemption under s.45(1)(b) of the FOI Act

21. The Information Commissioner explained the correct approach to the interpretation and application of s.45(1)(b) of the FOI Act at pp.511-516 (paragraphs 50-65) of *Re Cannon*.

22. At paragraphs 51-60 of *Re Cannon,* the Information Commissioner explained the meaning of "commercial value" in s.45(1)(b). He said that there are two possible

interpretations of the phrase "commercial value" which are not only supportable on the plain meaning of those words, but also apposite in the context of 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.

23. The second meaning is that information has a commercial value to an agency or person if a genuine arms-length buyer is prepared to pay to obtain that information from that agency or person, such that the market value of the information would be destroyed or diminished if it could be obtained under the FOI Act from a government agency which has possession of it. The Information Commissioner noted in that regard in *Re Cannon* that he was 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.

24. 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).

Analysis

25 Dealing firstly with the secondary meaning of "commercial value", I am not satisfied that there is a market for the purchase of the particular matter in issue in this review. I note that the terms of both Deeds of Agreement have now expired. The matter in issue comprises general information about the conditions upon which Aries Tours is permitted to take tour groups to the Natural Bridge, including the obligation of Aries Tours to perform certain services in connection with its tourism operations. I note that at least some of that information has been disclosed, in general terms, in a newspaper article dated 27 April 2000, concerning tourism activities in Springbrook National Park.

26. There is no evidence before me of the existence of genuine, arms-length buyers prepared to pay Aries Tours to obtain a copy of the matter in issue in this review.

27. As to the primary meaning of "commercial value", Aries Tours submitted as follows in its letter dated 11 May 2001:

> *The reason for my concern over the Schedules in the Deed is that the approach Aries Tours took in responding to the expression of interest was innovative, novel and very comprehensive. …*
> …

> *Traditionally, commercial operators would respond to an expression of interest with a price-only based offer. Aries Tours made an offer based on a strong interaction with the QPWS* [Queensland Parks and Wildlife Service] *and other operators through …* [details of the offer are then given].
>
> *This approach remains the intellectual property of Aries Tours. The value of such an approach is considerable and should not be made freely available to the public or our competitors.*
>
> *…*
>
> *The contents of the Schedules outlines the innovative approach Aries Tours adopted and if released publicly provides our competitors with significant insight into:*
>
> 1. *the scope of initiatives … ;*
> 2. *the dollar value of initiatives;*
> 3. *the linking of the initiatives with the draft management plan for Springbrook National Park; and*
> 4. *the timing, frequency and terms of initiatives.*

28. Aries Tours has argued that its overall approach to the conduct of tours in Springbrook National Park (as disclosed in the Schedules to the Deeds) is innovative, and therefore of commercial value to Aries Tours. Even accepting that such information could be said to have had a commercial value at the time it was first proposed by Aries Tours, the fact of this different approach is discussed in the newspaper article which I have referred to above. While I accept that the article only discusses such matters in general terms, I am satisfied that disclosure of the particular matter in issue could not reasonably be expected to diminish any commercial value to Aries Tours in adopting that particular approach. Aries Tours can continue to adopt such an approach, but any competitor (including Koala Blue) which has had access to the newspaper article would already be aware of the general nature of the approach, and would be in a position to adopt a similar approach in the future.

29. It must also be remembered that the Deeds were entered into over two years ago and have now expired. I think it is reasonable to expect that, quite apart from the discussions contained in the newspaper article, aspects of Aries Tours' operations in Springbrook National Park would be apparent, simply on the basis of participation in, and/or observation of, those operations by the general public and other tour operators.

30. Accordingly, I am not satisfied that any of the matter in issue has a commercial value to Aries Tours that could reasonably be expected to be diminished by disclosure of the matter in issue. I find that none of the matter in issue qualifies for exemption under s.45(1)(b) of the FOI Act.

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

31. 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 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) - Information concerning business, professional, commercial or financial affairs

32. 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, commercial or financial affairs of Aries Tours.

First limb of s.45(1)(c)(ii) - Adverse effect

33. The common link between the words "business, professional, commercial or financial" in 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*, the Information Commissioner said:

    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.

34. It is also appropriate to note the observations by the Information Commissioner at paragraph 83 of *Re Cannon*:

> *83. For similar reasons to those noted in respect of s.45(1)(b) (see paragraphs 59, 60 and 64 above), if information is already in the public domain, or is common knowledge in the relevant industry, it will ordinarily be difficult to show that disclosure of that information under the FOI Act could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the agency which, or person whom, the information concerns.*

35. I am unable to identify any specific adverse effect which disclosure of the particular matter in issue in this review could reasonably be expected to have on Aries Tours' business, commercial or financial affairs. I acknowledge that Aries Tours and Koala Blue are competitors. However, for the reason explained below, it is not clear to me how disclosure of the particular matter in issue could assist Koala Blue, or any other competitor, to take steps which could result in competitive harm to Aries Tours.

36. In its letter dated 11 May 2001, Aries Tours submitted:

> *Aries Tours does not have ongoing tenure under the Agreement. Our sensitivity to the release of the information may not be so great if that was so. However, Aries Tours has only two years tenure under the Agreement, and within six months may be faced with responding to a fresh 'expression of interest' for its late evening and morning tours at Springbrook National Park.*
>
> …
>
> *When the Expressions of Interest is next called Aries Tours will be seriously disadvantaged if our competitors are armed with Aries Tours' intellectual property.*

37. However, I note that clause 25 of each of the Deeds of Agreement provides Aries Tours with a "right of first refusal", which entitles it to receive the first offer of any new Agreement which the EPA proposes to enter into for the conduct of tours in Springbrook National Park. Recent advice received from the EPA indicates that no fresh 'Expressions of Interest' have been called by the EPA and that negotiations are currently occurring between Aries Tours and the EPA regarding the execution of new Deeds of Agreement. Accordingly, it appears that Aries Tours has not had to enter into a competitive process regarding the continuation of its tour operations in Springbrook National Park. In those circumstances, it is difficult to see how disclosure of the matter in issue could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of Aries Tours.

38. In any event, as I have already noted at paragraphs 28-29 above, the general nature of Aries Tours' approach to conducting tours in the Springbrook National Park has been in practical operation for over two years. It is effectively information that is in the public

domain in the relevant industry, and which could be adopted (or be proposed for adoption) by Aries Tours' competitors, regardless of the disclosure or otherwise of the matter in issue under the FOI Act. The situation is analogous to that which occurs when a new product is released in the market place, and any technically innovative aspects of its design become available to competitors through 'reverse engineering' of the product: *cf. Re GSA Industries (Aust) Pty Ltd and Brisbane City Council* (1994) 2 QAR 49 at pp.61-62, paragraphs 36-38. Any innovative element which the matter in issue may once have possessed has been lost with the passage of time and its practical implementation in the market place (for tour operators servicing tourists in South East Queensland), such that I am not satisfied that its disclosure could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of Aries Tours.

<u>Second limb of s.45(1)(c)(ii) - prejudice to future supply of information</u>

39. Matter which answers the description in s.45(1)(c)(i) may also qualify for *prima facie* exemption under s.45(1)(c) if its disclosure could reasonably be expected to prejudice the future supply of such information to government.

40. At paragraph 161 of *Re "B"* the Information Commissioner said:

> *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) <u>or persons must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information)</u> then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information. In my opinion, the test is not to be applied by reference to whether the particular [supplier] whose ... information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of the sources available or likely to be available to an agency.*
>
> (my underlining)

41. In its letter to the EPA dated 23 November 2000, Aries Tours stated that *"the release of commercial-in-confidence information to the public could jeopardise Aries Tours preparedness to participate in future expressions of interest offered by the Queensland Government".*

42. As noted above, whether or not Aries Tours would refrain from participating in future expressions of interest is not the relevant test. The issue is whether it is reasonable to expect that a substantial number of organisations would so refrain. I do not consider that it is reasonable to expect that a substantial number of organisations would refrain from responding to expressions of interest for the opportunity to enter into lucrative commercial agreements with the government, simply because some of the information

they submit in support of their successful proposals may become subject to disclosure under the FOI Act (and, in this case, after the expiry of the relevant agreements). It is possible that some sensitive commercial information would not be volunteered if it could not be safeguarded from disclosure to competitors. However, if the information was required for evaluation of the proposal, an offer or would either have to withdraw from the process, or seek agreement on a contractual obligation not to disclose the information that was of particular commercial sensitivity. I have already recorded my finding that none of the matter in issue in this review has sufficient commercial sensitivity to qualify for exemption under s.45(1)(c) of the FOI Act. (Without expressing any view about the commercial sensitivity or otherwise of the financial information contained in the Schedules to the Deeds, I simply note that that information is in issue in external review no. S 47/01 and will be dealt with in that review in due course, with both Koala Blue and Aries Tours being given the opportunity to argue their respective cases for disclosure/non-disclosure of that information).

43. I am not satisfied that disclosure of the matter in issue in this review could reasonably be expected to prejudice the future supply of such information.

Public interest balancing test

44. Even if I were to be persuaded that some of the matter in issue meets the requirements of s.45(1)(c)(i) and (ii) of the FOI Act, that would establish a *prima facie* public interest consideration favouring non-disclosure. It would then be necessary for me to consider whether there are public interest considerations favouring disclosure of the matter in issue which, on balance, outweigh the public interest in protecting the business, commercial or financial affairs of Aries Tours. For the reasons which I have discussed below at paragraphs 62-63, I consider that there is a strong public interest in disclosure of the matter in issue, such that its disclosure would, on balance, be in the public interest.

Application of s.46(1) of the FOI Act to the matter in issue

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

> ***46.(1)*** *Matter is exempt if—*
>
> *(a) its disclosure would found an action for breach of confidence; or*
>
> *(b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

46. The correct approach to the interpretation and application of s.46(1) of the FOI Act was explained by the Information Commissioner in *Re "B"*.

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

47. The test for exemption under s.46(1)(a) must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the respondent agency not to disclose the information in issue. I am satisfied that Aries Tours would have standing to enforce an obligation of confidence claimed to bind the EPA not to disclose the contents of the Deeds.

48. At paragraph 43 of *Re "B"*, the Information Commissioner said that an action for breach of confidence may be based on a contractual or an equitable obligation of confidence. The Deeds of Agreement contain no reference to any obligation of confidentiality. Accordingly, an action for breach of confidence in the circumstances of this case would be reliant on establishing a breach of an equitable obligation of confidence. (It might also be possible to contend that an obligation of confidence is based on an implied contractual term, but it would seem to matter little in practical terms whether an equitable obligation of confidence, or an implied contractual obligation of confidence, is relied upon. As the Information Commissioner noted in *Re "B"* at pp.298-299, paragraphs 49-52, there are cases in which the courts have indicated that whether implied contract or equity is chosen is irrelevant because they are interchangeable, and the extent of the obligations under each is identical.)

49. As the Information Commissioner explained in *Re "B"*, there are five cumulative requirements for protection in equity of allegedly confidential information:

    (a) it must be possible to specifically identify the information, in order to establish that it is secret, rather than generally available information (see *Re "B"* at pp.303-304, paragraphs 60-63);

    (b) the information in issue must have "the necessary quality of confidence"; i.e., the information must not be trivial or useless information, and it must have a degree of secrecy sufficient for it to be the subject of an obligation of conscience (see *Re "B"* at pp.304-310, paragraphs 64-75);

    (c) the information must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322, paragraphs 76-102);

    (d) disclosure to the applicant for access would constitute an unauthorised use of the confidential information (see *Re "B"* at pp.322-324, paragraphs 103-106); and

    (e) disclosure would be likely to cause detriment to the confider of the confidential information (see *Re "B"* at pp.325-330, paragraphs 107-118).

50. If I find that any one of the above criteria is not established in respect of the matter in issue, the matter in issue will not qualify for exemption under s.46(1)(a) of the FOI Act.

Requirement (a)

51. I am satisfied that the information claimed to be confidential can be specifically identified.

Requirement (b)

52. I am not satisfied that all of the matter in issue has a degree of secrecy sufficient for it to be the subject of an obligation of confidence. As I have noted at paragraphs 28 and 38 above, at least some of the matter in issue is in the public domain.

53. Accordingly, while I accept that some of the matter in issue may still be confidential in nature, it is clear that much is not. Given my findings below, however, it is not necessary for me to identify specifically those parts of the matter in issue which I consider do or do not satisfy requirement (b) to found an action in equity for breach of confidence.

Requirement (c)

54. Determining whether or not an enforceable obligation of confidence exists (and, if so, construing its scope) requires an evaluation of the whole of the relevant circumstances including (but not limited to) the nature of the relationship between the parties, the nature and sensitivity of the information, and the circumstances relating to its communication, such as those referred to by a Full Court of the Federal Court of Australia in *Re Smith Kline and French Laboratories (Aust) Limited and Ors ats Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at pp.302-3 (see *Re "B"* at pp.314-316).

55. I would firstly note that not all of the information in issue in the Schedules to the Deeds can be said to have been communicated by Aries Tours to the EPA. Some of the details no doubt came about by negotiation between the EPA and Aries Tours. Other details (for example, the address for service of notices and contact persons at the EPA which are contained in Schedule E to both Deeds 1 and 2), were supplied by the EPA.

56. With respect to the issue of whether any assurances were given by the EPA regarding the confidentiality of the information contained in the Deeds that was supplied by Aries Tours, Ms Lloyd of the EPA said as follows in her decision dated 30 November 2000:

> *…In relation to your claim that the documents are commercial in confidence, I have not been able to find any documentation confirming this. I have consulted with Departmental officers who have advised that assurances were given to treat the expressions of interest in confidence but not the Deeds of Agreement, although I agree it may have been reasonable that you would have had an*

expectation that the financial amounts were peculiar to your company and should therefore have been kept confidential. ...

57. In its letter to this office dated 30 November 2001, Aries Tours submitted:

    I also include [a] *letter from Minister Welford's office (July 1999) noting the commercial in confidence of the process.*

    I also include a letter received 23 June 1999 from Mr Bob Spiers, which was forwarded to all operators at Natural Bridge, that negotiations would be on a commercial-in-confidence basis.

    I require your office contact EPA and interview the two officers present, Ralph Henderson and Bob Spiers, whom both believe our agreement is confidential.

58. I have examined the letters from Mr Welford and from Mr Spiers, copies of which were provided by Aries Tours. Both contain assurances to the effect that information contained in an expression of interest submitted in response to the EPA's invitation, would be treated in confidence by the EPA, as do the advertisements which were published in the *Courier Mail* and *Gold Coast Bulletin* newspapers. I also note that the Expressions of Interest guidelines issued by the EPA contain the following statement:

    Information contained in the proposals will be kept confidential and not publicly disclosed, except as required under the provisions of the Freedom of Information Act 1992.

59. A process by which expressions of interest are called for is similar to a tender process. Like tenders, while it may be reasonable to expect that information contained in preliminary proposals (which are yet to be assessed/evaluated, and in respect of which a decision as to their acceptance or otherwise is yet to be made) will be kept confidential during the assessment/evaluation stage, I consider that the situation is materially different once a decision is made to accept a proposal. The matter in issue in this review is contained in Deeds of Agreement, negotiated and executed following the acceptance by the EPA of Aries Tours' proposal. There is nothing in the material I have reviewed which expressly refers to the confidentiality or otherwise of information contained in the Deeds, as opposed to information provided in a preliminary proposal.

60. As requested by Aries Tours, contact was made with Mr Bob Spiers and Mr Ralph Henderson of the EPA regarding their understanding of the confidentiality or otherwise of the contents of the Deeds. In his undated facsimile received at this office on 6 December 2001, Mr Henderson advised that confidentiality was an important part of negotiating the agreements with Aries Tours. He stated that Aries Tours had prepared a confidentiality agreement which the EPA had declined to sign, *"but we agreed to keep the information confidential"*. He also stated that *"Confidentiality of the agreement was not highlighted specifically as confidentiality of the whole process was assumed by all"*

and *"The schedules to the final agreements contain the information that was in the proposals, so to release the schedules would be to release the proposals"*.

61. The position taken by Mr Henderson appears to be contrary to that taken by Ms Lloyd and Mr Gilmour in their decisions on behalf of the EPA. Mr Henderson appears to be of the view that it was understood by the EPA that any information contained in Aries Tours' proposal, which was then incorporated into the executed Deeds of Agreement, would be kept confidential by the EPA.

62. I do not consider that it was reasonable in all the circumstances for either the EPA or Aries Tours to have formed an expectation that the matter in issue would be kept confidential. Aries Tours entered into commercial agreements with a government agency. Those agreements entitled Aries Tours to access, for purely commercial purposes, a valuable natural resource, the responsibility for the management of which vests in the EPA on behalf of the public of Queensland. Given the significance of the Natural Bridge as an area of environmental value and sensitivity, I consider that Aries Tours and the EPA should always have anticipated a legitimate public interest in the EPA being accountable to the Queensland public for its management of that area, including giving the public the opportunity to scrutinise the terms of any agreements entered into by the EPA (on the public's behalf) with commercial tour operators, so as to ensure that the area is being properly managed and not suffering environmental damage. Such public accountability is fundamental to all government agencies which perform functions on behalf of the public. At paragraph 93 (page 319) of *Re "B"*, the Information Commissioner said:

> *Thus when a confider purports to impart confidential information to a government agency, account must be taken of the uses to which the government agency must reasonably be expected to put that information, in order to discharge its functions.*

63. I do not consider that equity would hold the EPA conscience-bound not to disclose the matter in issue, because that information should be available to any interested member of the public who wishes to scrutinise how well the EPA is discharging its function of licensing, and supervising the performance of, commercial tour operators in national parks, having regard to the legitimate public interest in the proper management and protection of a valuable, publicly-owned, natural resource. In my view, this case falls squarely within the principle explained by the Information Commissioner in some detail in *Re Cardwell Properties Pty Ltd & Williams and Department of the Premier, Economic and Trade Development* (1995) 2 QAR 671 at pp.693-698, paragraphs 51-60, but more succinctly in *Re Swickers Kingaroy Bacon Factory Pty Ltd and Department of Primary Industries* (1998) 4 QAR 498, where he said (at p.507, paragraph 29):

> *I note that, in an action for breach of confidence concerning information supplied to government, it has been established that Australian law will recognise a public interest exception (the precise scope of which is not yet clear), on the basis that an obligation of confidence claimed to apply in respect*

of information supplied to government will necessarily be subject to the public's legitimate interest in obtaining information about the affairs of government: see Esso Australia Resources Ltd & Ors v Plowman & Ors *(1995) 183 CLR 10,* Commonwealth of Australia v Cockatoo Dockyard Pty Ltd *(1995) 36 NSWLR 662, and my comments on this development in* Re Cardwell Properties Pty Ltd & Williams and Department of the Premier, Economic and Trade Development *(1995) 2 QAR 671, at pp.693-698, paragraphs 51-60.*

64. Even if there were an implicit mutual understanding, or an implied contractual term, about confidential treatment of the matter in issue in this case, I consider that its disclosure would be required in any event pursuant to this public interest exception, having regard to the public's legitimate interest in obtaining information of the kind in issue for the reasons indicated above.

65. In this regard, I note and endorse the following view expressed in a report by the Industry Commission on *Competitive Tendering and Contracting by Public Sector Agencies* (Report No.48, 24 January 1996, AGPS, Melbourne) at p.95:

> *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.*

66. I find that the matter in issue does not satisfy requirement (c) to found an action in equity for breach of confidence, and that it therefore does not qualify for exemption under s.46(1)(a) of the FOI Act. It is unnecessary to consider requirements (d) and (e) set out in paragraph 49 above.

Requirements for exemption under s.46(1)(b) of the FOI Act

67. Matter will be exempt under s.46(1)(b) of the FOI Act if:

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

    (See *Re "B"* at pp.337-341; paragraphs 144-161).

68. The first two requirements for exemption under s.46(1)(b) are similar in nature to requirements (b) and (c) to found an action in equity for breach of confidence. I note that some of the matter in issue is not information of a confidential nature, for the reasons

explained at paragraphs 28 and 38. As to the second requirement for exemption under s.46(1)(b), the Information Commissioner explained the meaning of the phrase "communicated in confidence", at paragraph 152 of *Re "B"*, as follows:

> *I consider that the phrase "communicated in confidence" is used in this context to convey a requirement that there be mutual expectations that the information is to be treated in confidence. One is looking then for evidence of any express consensus between the confider and confidant as to preserving the confidentiality of the information imparted; or alternatively for evidence to be found in an analysis of all the relevant circumstances that would justify a finding that there was a common implicit understanding as to preserving the confidentiality of the information imparted.*

69. The test inherent in the phrase "communicated in confidence" in s.46(1)(b) requires an authorised decision-maker under the FOI Act to be satisfied that a communication of confidential information has occurred in such a manner, and/or in such circumstances, that a need or desire, on the part of the supplier of the information, for confidential treatment (of the supplier's identity, or information supplied, or both) has been expressly or implicitly conveyed (or otherwise must have been apparent to the recipient) and has been understood and accepted by the recipient, thereby giving rise to an express or implicit mutual understanding that the relevant information would be treated in confidence (see *Re McCann and Queensland Police Service* (1997) 4 QAR 30 at paragraph 34).

70. Unlike the position under s.46(1)(a) where equity might, in the circumstances of a particular case, impose an obligation of confidence even where the recipient of information honestly believed that no confidence was intended, s.46(1)(b) operates by reference to mutual understandings. In the present case, as I have noted above, there appears to be some conflict within the EPA regarding whether or not the EPA understood that the information in issue would be treated in confidence.

71. In any event, however, for the reasons explained at paragraphs 39-43 and 62-63 respectively above, I am satisfied that requirements (c) and (d) for exemption under s.46(1)(b) are not satisfied by the matter in issue. I am not satisfied that disclosure of the matter in issue could reasonably be expected to prejudice the future supply of such information. Moreover, consistently with my finding at paragraphs 44 and 62-64 above, I am satisfied that disclosure of the matter in issue would, on balance, be in the public interest.

72. Accordingly, I find that the matter in issue does not qualify for exemption under s.46(1)(b) of the FOI Act.

DECISION

73. I affirm the decision under review (being the decision of Mr John Gilmour on behalf of the EPA dated 5 January 2001) that the matter in issue in this review (identified at

paragraph 15 above) is not exempt from disclosure under the FOI Act, and that Koala Blue is therefore entitled to be given access to it under the FOI Act.