

Evans and Queensland Health

(S 45/01, 20 November 2001, Assistant Information Commissioner Shoyer)

(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 removed.]

REASONS FOR DECISION

Background

3. On 21 July 1997, the Minister for Health and representatives of the Corporation of The Sisters of Mercy of the Diocese of Rockhampton (the Corporation) signed various contracts relating to the establishment of a private health care facility in collocation with the Gladstone Hospital. (I will refer to the documents as "the Agreement".) The applicant, Dr Simon Evans, is a doctor on the staff of the Gladstone Hospital. He has expressed concern at the effectiveness of the arrangements set down in the Agreement for provision of medical services to the Gladstone community and queried whether the Corporation is complying with all aspects of the Agreement.
4. By letter dated 5 October 2000, the applicant sought access under the FOI Act from Queensland Health to the Agreement. Queensland Health consulted the Corporation, which objected to disclosure of the Agreement on the grounds that it was exempt under s.45(1)(c) of the FOI Act. During further consultation with Queensland Health, the solicitors for the Corporation pointed to specific aspects of the Agreement of most concern to their client. In her initial decision dated 10 January 2001, Ms M O'Connor granted access to large parts of the Agreement but found that other parts were exempt under s.45(1)(c) of the FOI Act, and that some signatures were exempt under s.44(1) of the FOI Act.
5. The applicant sought internal review of Ms O'Connor's decision and, when he did not receive a decision from Queensland Health within the prescribed period, sought external review by the Information Commissioner, under Part 5 of the FOI Act, on the basis of a deemed refusal of access to the matter in issue: see s.79(1) of the FOI Act. The applicant indicated that he did not seek to dispute the finding that certain matter was exempt under s.44(1) of the FOI Act.

External review process

6. Queensland Health provided copies of the Agreement and subsequent collocation agreements relating to other sites. By letter dated 31 July 2001, I advised the solicitors for the Corporation that it could apply to become a participant in this external review. I also advised of my preliminary view that the matter in issue did not qualify for

exemption under s.45(1)(c) of the FOI Act. The Corporation did not seek to become a participant in this review and did not lodge submissions in relation to the review. It did, however, indicate that it did not withdraw its objection to the disclosure to the applicant of the matter in issue.

7. By letter dated 28 August 2001, I expressed my preliminary view to Queensland Health that the matter in issue did not qualify for exemption under s.45(1)(c) of the FOI Act, and invited it to lodge any submissions it cared to make in support of exemption of the matter. By letter dated 3 October 2001, Queensland Health informed me that it no longer wished to take an active role in the external review, and stated that, although it maintained its position that the matter was exempt under s.45(1)(c) of the FOI Act, it no longer objected to disclosure of the matter in issue to the applicant.
8. As the Corporation did not seek to become a participant in the external review, I inquired of Queensland Health whether it would be willing to grant access to the matter in issue without the need for this office to proceed to a decision. By letter dated 16 October 2001, Queensland Health indicated that, because of the continued objection to disclosure by the Corporation, it did not feel it was in a position to disclose the matter in issue. It is therefore necessary for me to make a decision with respect to whether the matter in issue qualifies for exemption under s.45(1)(c) of the FOI Act.
9. In making my decision, I have taken into account the following:
 1. the contents of the Agreement;
 2. Ms O'Connor's initial decision dated 10 January 2001;
 3. the application for external review dated 16 February 2001, including attachments;
 4. correspondence from solicitors for the Corporation to Queensland Health dated 15 November 2001;
 5. information supplied by Queensland Health in the course of this external review.

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

10. Section s.45(1)(c) of the FOI Act provides:

45.(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.

11. The correct approach to s.45(1)(c) is explained in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at pp.516-523 (paragraphs 66-88). Matter will be exempt under s.45(1)(c) if:

- (a) it is information concerning the business, professional, commercial or financial affairs of an agency or another person; and
- (b) disclosure of the matter in issue could reasonably be expected to have either of the following effects:
 - (i) an adverse effect on the business, professional, commercial or financial affairs of the 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.

12. The phrase "*could reasonably be expected to*" requires a reasonably based expectation, namely, an expectation for which real and substantial grounds exist. A mere possibility, speculation or conjecture is not enough. In this context "*expect*" means to regard as likely to happen. (See *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, at pp.339-341, paragraphs 154-160, and the Federal Court decisions referred to there.)

13. I am satisfied that the matter in issue concerns the business or commercial affairs of the Corporation. There may however, be a question as to whether the matter in issue can be said to concern the business, financial, or commercial affairs of Queensland Health. There must be some question as to whether the activities that Queensland Health undertakes when entering into a hospital collocation agreement for the benefit of members of the Queensland community is the type of activity that was intended to be caught by s.45(1)(c)(i) of the FOI Act. However, given my findings on the other elements of s.45(1)(c), it is not necessary for me to address that issue at this time.

14. Ms O'Connor considered and rejected the relevance of the "prejudice to future supply of information" limb of s.45(1)(c)(ii) in her initial decision. In his letter dated 15 November 2000, the solicitor for the Corporation relied solely on the "adverse effect" limb. The material before me does not disclose any basis for a reasonable expectation of prejudice to the future supply of information to government in the circumstances of this case, and I will not consider it further.

Adverse effect

15. 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. So, an adverse effect under s.45(1)(c) will almost invariably be financial 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 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.*

16. In expressing my preliminary view to the solicitors for the Corporation in a letter dated 31 July 2001, I said:

I am uncertain whether your client regards itself as operating in competition with any other service provider, or whether there is any other service provider in the area with respect to which it could operate in competition. However, given that the information relates to the operation of a specific health facility, it is not apparent to me how disclosure of the information from the Agreements would be relevant to the operation of any other facility. The terms of the particular Agreements have obviously been settled and your client has the right to conduct the facility according to its terms for many years to come. I am not aware that your client proposes to, or would have the opportunity to, enter into any new development of this type in the future.

17. I then went on to address each segment of the matter in issue in the following terms:

Clause 3.3 - Agreement To Enter Into Contract for Sale - *It is unclear to me why disclosure of this information concerning entry into a contract for sale could be regarded as sensitive at this time. Disclosure of the clause would not appear to offer any advantage to a competitor or cause any detriment to your client. [Queensland Health has informed me that it no longer objects to the disclosure of this clause to the applicant.]*

Clause 11 - Operator's Obligations - While this clause goes into some detail concerning the obligations that rest on your client, it is not clear to me, on the material presently available, how disclosure of this matter could reasonably be expected to have an adverse effect on your client's business or financial affairs.

Clause 22 - Term - This clause merely indicates the term of the Agreement Again, I am unable to see how disclosure of that fact could reasonably be expected to have an adverse effect on your client's affairs.

Clause 23 - Assignment and Sub-Leasing - There would appear to be nothing in this relatively straight-forward, almost a "boiler plate" clause, the disclosure of which could reasonably be expected to have an adverse effect on your client's business or financial affairs.

Schedule 2 - Services - Given that the facility is now operating, many, if not all, of the services referred to would now be open to the public. I also note that Schedule 7 - Community Consultation, requires your client to establish consultation procedures and "ensure to its best endeavours that they are operative at all times during the term". Under Clause 1 of Schedule 7 - Program of Consultation, this includes:

The general community will be fully briefed about the services and facilities being proposed. It will be kept informed of avenues for their contribution in the determination of these service needs and opportunities for ongoing involvement with the project.

In the circumstances, it is unclear how disclosure of Schedule 2 could reasonably be expected to have an adverse effect on your client's business or financial affairs.

Schedule 6 - Employment and Specialists - Part A of the Schedule discussed in very general terms aims for staff performance at the facility and co-operation with the public hospital in relation to staff. Part B discusses, again in very general terms, efforts to be made to attract specialists to the facility. It is not clear, how disclosure of this very general information could reasonably be expected to have an adverse effect on the business or financial affairs of your client.

Draft Contract for Sale of Land - This is standard form contract, although it does have a number of special conditions attached. I can see nothing in the special conditions or in the details completed in the draft contract which could reasonably be expected to have an adverse effect on the business affairs of your client. No doubt the purchase price for the land would be available by a search of a public registry.

Side Agreement - This is a very specific agreement in relation to a residential duplex that is, or was, sited on the private hospital site. The circumstances surrounding the Agreement would appear to be so specific that there could be no suggestion that its disclosure could provide information to competitors of your client or Queensland Health which would be useful in any future negotiations or dealings.

Contour Survey Map - This map merely shows the site of existing buildings along with the proposed private hospital site and gives relevant contours. It is not clear how this information could be used by any competitor of your client or how its disclosure could otherwise have an adverse effect on your client's business affairs.

18. In expressing my preliminary view to Queensland Health in a letter dated 28 August 2001, I said:

I note that Ms O'Connor's initial decision dated 10 January 2001 referred to the potential adverse effect on the affairs of Queensland Health. In particular she referred to its position at the bargaining table and in other contractual situations. I do not presently have before me any further information on which to base such a conclusion. In my preliminary view, Queensland Health, as the sole entity in Queensland in a position to negotiate the public aspects of co-location Agreements, would not be disadvantaged by the terms and conditions of these Agreements being made publicly available. In fact, by enhancing the competitive process it may reduce the overall cost to the government.

19. Neither the Corporation nor Queensland Health has responded with evidence or submissions in support of exemption. Section 81 of the FOI Act places on Queensland Health the onus of justifying its decision that the matter qualifies for exemption.
20. As to the adverse effect on the Corporation, the Corporation submitted that disclosure of the matter in issue to its competitors could reasonably be expected to give those competitors an advantage. However, the Corporation did not explain to what sort of use competitors might be able to put the information. Clearly, with respect to the operation of the particular health facility, the Corporation has the benefit of a very long term agreement with the State of Queensland concerning its operation. Assuming that there is a competitor for the Corporation (and no evidence has been put before me in this regard), I am unable to see how disclosure of any of the matter in issue could be used by a competitor to its advantage or to the disadvantage of the Corporation.
21. As to Queensland Health, Ms O'Connor's initial decision stressed the unique qualities of the Agreement with the Corporation. I do not accept that disclosure of an Agreement made in 1997, which was the first of its kind, and which is stated to have had such unique features, could reasonably be expected to adversely effect Queensland Health's position at the bargaining table in contractual situations in the future. Whatever the specific terms agreed to in 1997, it does not preclude Queensland Health from taking

the position in future negotiations for collocation agreements that the circumstances and times are sufficiently different for the terms of the Agreement to have no significant bearing on negotiations with other private sector entities.

22. I therefore find that disclosure of the matter in issue could not reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of an agency or another person. It does not qualify for exemption under s.45(1)(c) of the FOI Act.

Public interest balancing test

23. Given my finding that there is no reasonable expectation of a relevant adverse effect, it is not strictly necessary for me to make a decision as to the balance of the public interest. However, I will record my view that there are significant public interest considerations favouring disclosure. Queensland Health has entered into a significant development agreement with the Corporation. It involves a substantial commitment of public resources. There is a weighty public interest in enhancing the accountability of Queensland Health for the agreement it has entered into by allowing members of the community to examine the terms of the Agreement. There is also a significant public interest in allowing members of the community access to the terms of the Agreement so that they can consider whether Queensland Health is taking adequate steps to ensure that the Corporation continues to comply with the Agreement, or that the interests of the public of Queensland are otherwise being appropriately safeguarded. Even if it could be established that disclosure of some of the matter in issue could reasonably be expected to have an adverse effect of the kind contemplated in s.45(1)(c)(ii) of the FOI Act, I would find that the public interest considerations favouring disclosure are of sufficient weight to warrant a decision that disclosure would, on balance, be in the public interest.

DECISION

24. I set aside the deemed decision of Queensland Health to refuse access to the matter remaining in issue described at paragraph 17 above. In substitution for it, I find that the matter remaining in issue does not qualify for exemption from disclosure under the FOI Act, and that the applicant is entitled to be given access to it.