

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 03/2003
Application L 4/02

Participants:

MORGAN CONLEY, Solicitors, as agent for
WANLESS WASTECORP PTY LTD
Applicant

CABOOLTURE SHIRE COUNCIL
Respondent

JJ RICHARDS & SONS PTY LTD
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – résumés of staff contained in successful tender submission lodged by third party with respondent – whether information concerning the personal affairs of those staff members – application of s.44(1) of the *Freedom of Information Act 1992 Qld.*

FREEDOM OF INFORMATION – refusal of access – matter in issue comprising documents relating to tender process conducted by respondent for provision of waste collection services, including successful tender submission lodged by third party – whether parts of successful tender submission in issue comprise "trade secrets" – application of s.45(1)(a) of the *Freedom of Information Act 1992 Qld.*

FREEDOM OF INFORMATION – refusal of access – whether matter in issue lodged by third party with respondent (including parts of successful tender submission) has a commercial value to the third party which could reasonably be expected to be diminished by disclosure – application of s.45(1)(b) of the *Freedom of Information Act 1992 Qld.*

FREEDOM OF INFORMATION – refusal of access – whether matter in issue comprises information concerning the business, commercial or financial affairs of third party, and other firms who submitted tenders to the respondent – whether disclosure could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the third party and other firms – whether disclosure would, on balance, be in the public interest - application of s.45(1)(c) of the *Freedom of Information Act 1992 Qld.*

FREEDOM OF INFORMATION – refusal of access – whether parts of successful tender submission in issue were communicated in confidence – application of s.46(1)(a) and s.46(1)(b) of the *Freedom of Information Act 1992 Qld*.

Freedom of Information Act 1992 Qld s.22(a), s.30(3)(c), s.44(1), s.45(1)(a), s.45(1)(b), s.45(1)(c), s.46(1)(a), s.46(1)(b)

Corporations Act 2001 Cth s. 292, s.295, s. 319

Environmental Protection Act 1994 Qld

Local Government Act 1993 NSW s.428(2)(h)

Workplace Health and Safety Act 1995 Qld s.22, s.23, s.28

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

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

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

Cardwell Properties Pty Ltd & Williams v Department of the Premier, Economic and Trade Development (1995) 2 QAR 671

Commonwealth of Australia v Cockatoo Dockyard Pty Ltd (1995) 36 NSWLR 662

Dalrymple Shire Council and Department of Main Roads, Re (1998) 4 QAR 474

Esso Australia Resources Ltd & Ors v Plowman & Ors (1995) 183 CLR 10

"JM" and Queensland Police Service, Re (1995) 2 QAR 516

Macrossan & Amiet and Queensland Health & Ors, Re (S 116/99, Deputy Information

Commissioner, 27 February 2002, unreported, published at www.infocomm.qld.gov.au)

McCann and Queensland Police Service, Re (1997) 4 QAR 30

Pope and Queensland Health, Re (1994) 1 QAR 616

Smith Kline and French Laboratories (Australia) Limited v Secretary, Department of Community Services & Health (1991) 28 FCR 291

Stewart and Department of Transport, Re (1993) 1 QAR 227

University of Melbourne v Robinson [1993] 2 VR 177

DECISION

I decide to vary the decision under review (being the decision dated 14 November 2001 by Mr Noble on behalf of the Council) by making the following decisions with respect to the matter remaining in issue in this review (which is identified in the schedule attached to my reasons for decision):

- (a) the matter specified below is exempt matter under s.45(1)(c) of the *Freedom of Information Act 1992* Qld:
 - (i) the matter relating to unsuccessful tenderers (schedule, documents 1-14);
 - (ii) the credit information contained in attachment 5 to the third party's tender submission (schedule, document 15) and in the ACR Contractor Report (schedule, document 35);
 - (iii) the mapping system specification (schedule, document 34);
 - (iv) attachment 10 to the third party's tender submission (schedule, document 16);
 - (v) attachment 18 to the third party's tender submission, except for the cover sheet and page one (schedule, document 20);
 - (vi) attachment 27 to the third party's tender submission (schedule, document 23);
 - (vii) pages 1-17 of attachment 28 to the third party's tender submission (schedule, document 24);

- (b) the balance of the matter remaining in issue in this review does not qualify for exemption under the *Freedom of Information Act 1992* Qld, and the applicant is entitled to be given access to it under the Act.

Date of decision: 30 June 2003

.....
G J SORENSEN
DEPUTY INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant, Wanless Wastecorp Pty Ltd (Wanless), seeks review of a decision by the Caboolture Shire Council (the Council) to refuse it access under the *Freedom of Information Act 1992* Qld (the FOI Act) to certain tender submissions, and to documents created by the Council in processing and assessing those tender submissions.
2. In November 2000, the Council invited companies to respond to an invitation to tender for the provision of waste collection services to the Caboolture Shire. The applicant, who was the incumbent service provider, submitted a tender, but was unsuccessful. The tender was awarded to JJ Richards & Sons Pty Ltd (JJ Richards), the third party in this review.
3. By letter dated 20 August 2001, Morgan Conley, Solicitors, acting on behalf of Wanless, made an application to the Council in the following terms:

Please provide to us, pursuant to the Freedom of Information Act access to the following information:

All records of the number of dwellings in the Shire as at 30 June 2001 including but not limited to:

- a. *All tenders, offers, contracts, letters, diary notes, computer spreadsheets or analysis, working papers, submissions, reports or other documents relating to any tender, expression of interest,*

contract, interview, consultation, negotiations or meeting between any person or any representative employer or agent of the Caboolture Shire Council in relation to the provision of waste and garbage services to the Caboolture Shire Council pursuant to any public tender, request for expressions of interest or other dealing prepared, considered or utilised at any time subsequent to 1 January 2000; and

- b. All tenders, offers, contracts, letters, diary notes, computer spreadsheets or analysis, working papers, submissions, reports or other documents relating to the comparison of each of the various tenders received by the Caboolture Shire Council in relation to the provision of waste and garbage services pursuant to any public tender, request for expressions of interest or other dealing prepared, considered or utilised any time subsequent to 1 January 2000.*

4. The Council interpreted this rather awkward wording as a request for access under the FOI Act to two broad categories of documents, comprising:
 - (i) all records of the number of dwellings in the Caboolture Shire as at 30 June 2001; and
 - (ii) all documents relating to tenders submitted to the Council for the provision of waste and garbage services, subsequent to 1 January 2000.

5. By letter to Morgan Conley dated 12 October 2001, the Council's FOI officer, Ms Garnett, identified the documents she had located which fell within the terms of part (ii) in paragraph 4 above. Ms Garnett also advised of her decision to refuse access to documents falling within the terms of part (i) in paragraph 4 above, on the ground that to do so would substantially and unreasonably divert the resources of the Council and its staff (see s.28(2) of the FOI Act), and that such records were publicly available in any event (see s.22(b) of the FOI Act). At the outset of this review, the applicant indicated that it did not wish to pursue access to documents of the kind described in part (i) from paragraph 4 above.

6. The part (ii) documents identified in Ms Garnett's decision included:
 - the tender submissions lodged by three waste management companies who responded to the Council's invitation for tenders (i.e., the successful tenderer, JJ Richards, and two other companies which, like the applicant, were unsuccessful tenderers);
 - various Council minutes;
 - documents relevant to the probity audit process conducted in relation to the assessment and selection of the successful tenderer;
 - miscellaneous file notes and schedules prepared by Council officers in the course of evaluating the competing tenders; and
 - 'Contractor Reports' regarding each tendering company, which were obtained by the Council from a corporate information-provider, Australian Corporate Reporting Pty Ltd (ACR), and which contain background information about the tenderers, such as company history, creditworthiness, and referee appraisals.

7. Ms Garnett informed Morgan Conley that she had decided to grant access to a number of documents, but to refuse access to other documents which she decided were exempt from disclosure under s.41(1), s.43(1), s.45(1)(b), s.45(1)(c) and/or s.46(1)(b) of the FOI Act.

8. Morgan Conley applied for internal review of Ms Garnett's decision. The internal review was conducted by Mr Rob Noble, the Council's Chief Executive Officer. By letter to Morgan Conley dated 14 November 2001, Mr Noble affirmed Ms Garnett's decision in respect of the part (ii) documents.
9. By letter dated 14 January 2002, Morgan Conley applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr Noble's decision.

External review process

10. Copies of the matter in issue were obtained and examined.
11. As the result of discussions between staff of my office, the Council and the applicant, the matter in issue has been considerably reduced in volume. The applicant accepted preliminary views conveyed by Assistant Information Commissioner (AC) Moss that some matter qualified for exemption under s.43(1) of the FOI Act, and withdrew its application for access to that matter. The Council accepted preliminary views conveyed by AC Moss that some matter did not qualify for exemption under s.43(1) of the FOI Act, and agreed to give the applicant access to that matter. Early in the review process, the applicant also advised that it did not wish to pursue its application for access to various documents, including those relating to the probity audit process.
12. In a letter to Morgan Conley dated 18 July 2002, AC Shoyer requested that Morgan Conley advise whether or not its client wished to pursue access to the tender submissions lodged by the other two unsuccessful tenderers and to the ACR Contractor Reports in relation to those other unsuccessful tenderers. AC Shoyer advised that it was arguable that those documents qualified for exemption under s.45(1)(b), s.45(1)(c) or s.46(1)(b) of the FOI Act. He stated that it was difficult to envisage public interest arguments that would favour disclosure to the applicant of information relating to unsuccessful tenderers. AC Shoyer requested that Morgan Conley inform him by 1 August 2002, whether or not the applicant wished to pursue access to those documents. AC Shoyer stated that, if no response was received by that date, he would proceed on the basis that the applicant no longer sought access to those documents. No response was received from Morgan Conley, and, by letter to Morgan Conley dated 7 August 2002, AC Shoyer confirmed that the review would proceed on the basis that those documents were no longer in issue.
13. Consultation letters were then sent to both JJ Richards and ACR, to inform them of this review, and to ascertain whether or not they objected to disclosure of the matter in issue which concerned them. Each initially responded by stating an objection to disclosure of all matter in issue which concerned them. There then followed a lengthy period of consultation and negotiation between staff of my office, the Council, Morgan Conley, JJ Richards and ACR. AC Moss expressed a preliminary view that only parts of the matter in issue qualified for exemption under the FOI Act. That preliminary view was accepted in whole or in part by the various participants, which resulted in some concessions being made, and further matter in issue being disclosed to the applicant. For example, JJ Richards agreed to withdraw its objection to disclosure of the bulk of the Contractor Report which ACR had prepared in relation to it (with the exception of some financial matter contained in the report, in respect of which AC Moss had expressed the preliminary view that the s.45(1)(c) exemption probably applied). In light of JJ Richards' position, ACR withdrew its objection to disclosure of the relevant parts of its report, and played no further part in the review process.

14. However, when the stage was reached that none of the participants was prepared to make any further negotiated concessions, there remained a number of documents or parts of documents still in issue. The participants have lodged submissions in support of their respective cases for disclosure or exemption of the matter remaining in issue, and been given an opportunity to reply to each other's submissions.
15. In making my decision in this matter, I have taken into account:
- the contents of the matter in issue;
 - the applicant's FOI access application dated 20 August 2001, application for internal review dated 19 October 2001, and application for external review dated 14 January 2002;
 - the Council's initial and internal review decisions, dated 12 October 2001, and 14 November 2001, respectively;
 - submissions contained in letters from JJ Richards and/or its solicitors dated 13 August 2002, 9 January 2003 (being the final, amended version of submissions initially lodged on 12 December 2002) and 11 March 2003;
 - submissions contained in letters from Morgan Conley dated 14 November 2002 and 21 February 2003;
 - submissions contained in letters from the Council dated 27 November 2002 and 7 March 2003; and
 - the tender specifications issued by the Council to prospective tenderers.

Matter in issue and exemption provisions relied upon by the participants

16. The matter remaining in issue is identified in the schedule which is attached to, and forms part of, my reasons for decision. That matter can be categorised as follows:
- (a) miscellaneous documents relating to unsuccessful tenderers (schedule, documents 1-14);
 - (b) parts of the successful tender submission lodged by JJ Richards, comprising attachments 5, 10, 12, 15, 17-20, and 27-29 (schedule, documents 15-25), an Environmental Plan (schedule, document 26), a Workplace Health and Safety Plan (schedule, document 27), and a Multimedia Package comprising a CD-Rom and video cassette (schedule, document 36);
 - (c) facsimile dated 23 May 2001 from JJ Richards to the Council, attaching four technical drawings (schedule, documents 28-33);
 - (d) JJ Richards' "Mapping System Specification" (schedule, document 34); and
 - (e) parts of the ACR Contractor Report in relation JJ Richards, comprising the second paragraph of the Executive Summary appearing on the first page, credit information appearing on page 10, and a number of financial statements of JJ Richards which are annexed to the report (schedule, document 35).
17. JJ Richards initially claimed that the overall structure and format of its tender submission gave it a commercial value, such that the tender submission as a whole qualified for exemption under s.45(1)(b) of the FOI Act. However, AC Moss advised that she could see no particular innovation in the way in which JJ Richards formatted its tender submission such as to give the submission itself a commercial value within the meaning of s.45(1)(b). The structure of the submission was governed by the structure of the tender specification issued by the Council. JJ Richards subsequently withdrew its claim that the tender submission as a whole qualified for exemption under s.45(1)(b) (letter from JJ Richards' solicitors dated 9 January 2003).

18. JJ Richards maintains, however, that the matter in issue identified above qualifies for exemption under s.44(1), s.45(1)(a), s.45(1)(b), s.45(1)(c) or s.46(1) of the FOI Act. In their letter dated 11 March 2003, JJ Richards' solicitors stated that, to the extent that I decided that particular matter did not qualify for exemption under s.45(1)(a) or s.45(1)(b), it relied upon s.45(1)(c) in the alternative.
19. The Council relies upon s.45(1)(b), s.45(1)(c) or s.46(1)(b) of the FOI Act in claiming that the matter in issue is exempt from disclosure to the applicant. However, the Council's arguments as to which exemption provision applies to particular segments of the matter in issue often differ from those of JJ Richards.
20. To reduce unnecessary length in these reasons for decision, where I have concluded that matter in issue qualifies for exemption, I have dealt with it once only, under the most appropriate applicable exemption provision.
21. Unfortunately, it has still been necessary, in respect of matter which I have decided is not exempt from disclosure under the FOI Act, to deal with the application, to particular segments of the matter in issue, of all of the exemption provisions relied upon by both JJ Richards and the Council. For ease of reference, I have noted in the attached schedule the exemption provisions relied upon by the Council, and by JJ Richards, in respect of particular segments of the matter in issue, and my corresponding decision as to which (if any) exemption provision is applicable.

Application of s.44(1) of the FOI Act

22. Section 44(1) of the FOI Act provides:

44.(1) Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.

23. JJ Richards has submitted that the résumés of several employees which are contained in attachment 28 to its tender submission ("Proposed Education Program") are exempt from disclosure under s.44(1) of the FOI Act, on the basis that the résumés concern the personal affairs of the relevant staff members.
24. In applying s.44(1) of the FOI Act, the first issue is whether disclosure of the matter in issue would disclose information that is properly to be characterised as information concerning the personal affairs of an individual other than the applicant for access. If that requirement is satisfied, a *prima facie* public interest favouring non-disclosure is established, and the matter in issue will be exempt, unless there exist public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.
25. In his reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, the Information Commissioner identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act (see pp.256-267, paragraphs 79-114, of *Re Stewart*). In particular, he said that information

concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well-accepted core meaning which includes:

- family and marital relationships;
- health or ill health;
- relationships and emotional ties with other people; and
- domestic responsibilities or financial obligations.

Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the information in question.

26. In *Re Pope and Queensland Health* (1994) 1 QAR 616, after reviewing relevant authorities, the Information Commissioner concluded (at p.660) that information which merely concerns or relates to the performance by an employee of his or her employment duties is ordinarily incapable of being properly characterised as information concerning the employee's "personal affairs" for the purposes of the FOI Act. The reference to "personal affairs" suggests that a distinction has been drawn by the legislature between those aspects of an individual's life which might be said to be of a private character, and those relating to or arising from any position, office or public activity with which the person occupies his or her time (see *University of Melbourne v Robinson* [1993] 2 VR 177 at p.187, quoted in *Re Pope* at p.660, paragraph 114).
27. I am satisfied that the résumés in issue, which focus only on the professional qualifications and work experience of the relevant staff members, are properly to be characterised as information concerning the employment affairs of the relevant staff members, rather than their personal affairs.

Finding

28. I find that the résumés of employees contained in attachment 28 to JJ Richards' tender submission do not comprise information concerning the personal affairs of the relevant staff members, and therefore do not qualify for exemption under s.44(1) of the FOI Act.

Section 45(1) of the FOI Act – general observations

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

45.(1) Matter is exempt matter if—

- (a) its disclosure would disclose trade secrets of an agency or another person; or*
- (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.

30. The Information Commissioner considered the application of s.45(1) of the FOI Act in some detail 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.

31. 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).

32. 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*". This phrase 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).

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

33. JJ Richards has submitted that the Environmental Plan, and the Workplace Health and Safety Plan, which were attached to its tender submission, qualify for exemption under s.45(1)(a) of the FOI Act. However, in the submissions contained in their letter dated 9 January 2003, JJ Richards' solicitors did not discuss the specific requirements for exemption under s.45(1)(a), nor did they address how the plans satisfied those requirements.

Requirements for exemption under s.45(1)(a)

34. In *Re Cannon*, the Information Commissioner examined the meaning of "trade secrets" at pp.507-511 (paragraphs 42-49). The following extract gives a sufficient summary of relevant principles:

43. *In the Ansell Rubber case, Gowans J found assistance in the American Restatement of the Law of Torts (1939; Volume 4, paragraph 757) which refers to a trade secret as "any formula, pattern or device or compilation of information which gives an advantage over competitors who do not know or use it". Gowans J referred to the following passage from the Restatement of the Law of Torts:*

Secrecy. The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret. Substantially, a trade secret is known only in the particular business in which it is used. It is not requisite that only the proprietor of the business know it.

He may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy. Others may also know of it independently, as, for example, when they have discovered the formula by independent invention and are keeping it secret. Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information. An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

...

49. *The net result of the Full Court's discussion [in Searle Australia v Public Interest Advocacy Centre (1992) 108 ALR 163] of the meaning of "trade secrets" appears to be that the term should be given its usual meaning in Australian law, which appears to correspond very closely to the passage (set out at paragraph 43 above) from the 1939 American "Restatement of the Law of Torts", as referred to by Gowans J in the Ansell Rubber case and subsequently applied by the Supreme Court of Victoria in Mense v Milenkovic [1973] VR 784. Certainly the Full Court accepted that the six indicia set out in that passage are appropriate for use as guides. As to the seventh added by the Tribunal in Re Organon, the Full Court emphasised that technicality is not a requirement, although the more technical the information is, the more likely it is that, as a matter of fact, the information will be classed as a trade secret. The other factors that received emphasis in the Full Court's judgment in Searle (nearly all of which are covered in the passage from the American "Restatement of the Law of Torts" which is set out at paragraph 43 above) are:*

- *the necessity for secrecy, including the taking of appropriate steps to confine dissemination of the relevant information to those who need to know for the purposes of the business, or to persons pledged to observe confidentiality;*
- *that information, originally secret, may lose its secret character with the passage of time;*
- *that the relevant information be used in, or useable in, a trade or business;*
- *that the relevant information would be to the advantage of trade rivals to obtain;*
- *that trade secrets can include not only secret formulae for the manufacture of products, but also information concerning customers and their needs.*

Application of s.45(1)(a) to the matter in issue

35. As stated in the passage set out above, the extent of the measures taken to guard the secrecy of information is a relevant indicator of whether or not the information can properly be characterised as a trade secret. In that regard, it is important to note that clause 16.0 of the Conditions of Tender issued by the Council specifically addressed the possibility of disclosure of tender submissions under the FOI Act. Specifically, clauses 16.1(d), (e) and (f), and clause 16.2(b), provided:

16.1 Tenderers should note the following information in relation to the Freedom of Information Act 1992 ...

...

(d) Tenderers are referred specifically to sections 45 and 46 of the FOI Act;

(e) information which is not specifically endorsed "commercial-in-confidence" may be disclosed to a member of the public making an application under the FOI Act; and

(f) when information is provided on a confidential basis as outlined above Council does not guarantee that the

information will not be disclosed in response to an application under the FOI Act. ...

16.2 *The Tenderer acknowledges that:*

...

(b) it is possible that information contained in a Tender might be obtained by a member of the public making a request under the FOI Act.

36. I note that the only part of JJ Richards' tender submission which was endorsed in accordance with clause 16.1(e) of the Conditions of Tender, was attachment 5, comprising unaudited financial statements. I considered a similar situation in *Re Macrossan & Amiet and Queensland Health & Ors* (S 116/99, Deputy Information Commissioner, 27 February 2002, unreported, published at www.infocomm.qld.gov.au), which involved an application for access under the FOI Act to the tender submissions lodged by law firms which were successful in tendering for legal work from Queensland Health. The Invitation for Offers issued by Queensland Health specifically drew the tenderers' attention to the operation of the FOI Act, and to s.45 and s.46 in particular, and requested that all tenderers endorse any confidential or commercially sensitive information. None of the tenderers endorsed any of the information they submitted. At paragraph 75 of *Re Macrossan & Amiet*, I said:

As I noted above at paragraph 45, clause 3 of Part D of the Invitation for Offers specifically stated that where any information provided by a tenderer was claimed to relate to a trade secret, it should be endorsed accordingly. Again, none of the tenderers endorsed any of the information contained in their tenders with a claim that it constituted a trade secret. The question of whether or not certain information is properly characterised as a trade secret is essentially a question of fact, but, as stated in the passages quoted above, the extent of the measures taken to guard the secrecy of the information is a relevant indicator. The fact that none of the tenderers made a specific request to Queensland Health for confidential treatment of any segment of information in their tenders, or sought an assurance of confidential treatment in respect of information asserted to comprise a trade secret, tends to confirm the view I have formed, on the basis of my inspection of the matter in issue, that none of the information in issue has the qualities which would justify it being characterised as a trade secret.

37. In their letter dated 9 January 2003, JJ Richards' solicitors stressed that the failure of their client to endorse relevant portions of its tender submission as a trade secret, or commercial-in-confidence information, was the result of error or oversight, and that JJ Richards had not intended to imply that the unendorsed parts of its tender submission were not confidential or commercially sensitive. JJ Richards' solicitors advised that no analysis of what information might comprise commercially sensitive or confidential matter had in fact been attempted by their client.
38. I think it is reasonable to expect that a substantial and sophisticated business organisation such as JJ Richards, which has responded to probably hundreds of tender specifications, and whose clients mainly comprise government agencies which are subject to freedom of information legislation, would have alerted itself to the significance of clause 16 of the Conditions of Tender, and the potential impact of FOI legislation on documents in the hands of government agencies. In my view, if JJ Richards had seriously considered that the information contained in the plans in issue comprised a genuine trade secret, it would have

taken the steps necessary to alert the Council to the significance of the information, and to stipulate a requirement for confidential treatment of that information. The failure to take such steps tends to confirm the view that I have formed, on the basis of my inspection of the documents claimed to be exempt under s.45(1)(a), that none of the information contained in them has the qualities which would justify it being characterised as a trade secret.

39. It is clear from the list of factors set out in the passage quoted at paragraph 34 above, that the time and expense invested in preparing and developing the information may be relevant indicators in deciding whether or not it is a trade secret. I do not doubt that JJ Richards has invested a degree of time and effort in preparing the two plans in question, and I acknowledge that the plans were included in its tender submission as additional features (that is, they were not required to be included by the terms of the tender specification, nor by the standard form tender submission circulated by the Council to tenderers). Nevertheless, having examined the two plans in question, I am not satisfied that they can properly be characterised as trade secrets within the meaning of s.45(1)(a) of the FOI Act.
40. None of the information contained in either plan conveys specific details as to how JJ Richards conducts its operations. Much of the information in question simply consists of general "motherhood" statements of principle and intent, outlining in broad terms the basic policies of JJ Richards as they relate to issues such as employee safety, rehabilitation, industrial relations, and environmental management. The information does not descend into any level of particularity such that it could be argued that it discloses any secret formula, pattern or device, *et cetera*.
41. Moreover, I consider that participants in the waste management industry, and perhaps in industry in Queensland generally, would know a considerable amount of the material contained in the plans, in that it comprises information which JJ Richards is required to compile under statute, or through quality assurance processes. For example, s.22 of the *Workplace Health and Safety Act 1995 Qld* (WHSA) sets out broad measures for safeguarding the health and safety of employees, and sections 23 and 28 of that Act impose health and safety obligations on employers. In my view, the information contained in JJ Richards' Workplace Health and Safety Plan merely encapsulates JJ Richards' particular approach to its obligations under the WHSA. Rather than comprising some form of novel or secret formula or process for conducting its business, the Workplace Health and Safety Plan is simply a general statement of steps taken by JJ Richards to meet its obligations under the WHSA.
42. The Environmental Plan consists of a brief outline of JJ Richards' commitment to achieving environmental accreditation to the recognized Australian Standard, a certificate evidencing this intent, a general statement of environmental policy, and an environmental authority licence issued under the terms of the *Environmental Protection Act 1994 Qld*. I am not satisfied that it possesses the qualities that warrant its characterisation as a trade secret.

Findings

43. I am not satisfied that any of the information contained in the Environmental Plan, or the Workplace Health and Safety Plan, which were attached to JJ Richards' tender submission, can properly be characterised as a trade secret for the purposes of s.45(1)(a) of the FOI Act. I therefore find that those plans do not qualify for exemption under s.45(1)(a) of the FOI Act.

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

44. Given the findings which I have made below regarding the application of s.45(1)(c) of the FOI Act to the matter in issue, it is necessary for me to consider the application of s.45(1)(b) to the following documents only:
- facsimile from JJ Richards to the Council dated 23 May 2001 attaching technical drawings;
 - attachments 5 (part only), 12, 15, 17, 18 (part only), 19 (part only), 20 and 29 to JJ Richards' tender submission;
 - the Environmental Plan, and the Workplace Health and Safety Plan; and
 - the Multimedia Package.

Requirements for exemption under s.45(1)(b)

45. 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*, including (at paragraphs 51-60) 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 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.
46. 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 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.
47. 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). Information which is publicly available has no commercial value which can be destroyed or diminished by disclosure under the FOI Act.
48. Establishing that matter in issue comprises information which itself has a commercial value to an agency or another person is merely the first hurdle. It must then be established that disclosure of the information in issue could reasonably be expected to destroy or diminish its commercial value.

Application of s.45(1)(b) to the matter in issue

(i) Facsimile dated 23 May 2001 from JJ Richards to the Council attaching technical drawings

49. Subsequent to the award of the tender, JJ Richards sent a facsimile to the Council regarding transfer stations and the dimensions of containers or "skips" used by JJ Richards for transfer stations. Attached to the facsimile were four pages of technical drawings of the skips, showing basic design and dimensions.

50. In their letter dated 9 January 2003, JJ Richards' solicitors relevantly submitted:

It is our opinion that this document has commercial value in the sense of a person would purchase this information and therefore satisfies one of the accepted tests of 'commercial value' outlined in [Re Cannon]. In our view, it is reasonable to say the commercial value of the document would be diminished by disclosure under FOI. If disclosed, our client would hypothetically be unable to sell these plans and would be placed in the difficult (and costly) position of having to sue for any copyright infringement in the plans if they were used in an unauthorised manner. Therefore we argue the document is exempt under s.45(1)(b).

Alternatively, if it were the case that the ability of the public to view the equipment placed the detailed technical drawings and plans of the equipment in the public domain, then the applicant would have no grounds for viewing these drawings and plans in any event because they would already have 'access' to them. Therefore the need for disclosure under the FOI Act is displaced.

51. The submission contained in the second paragraph above is misconceived. The fact that a person may be able to visually observe something, does not prevent them from applying for access to relevant information under the FOI Act. Likewise, in respect of the argument put in the third sentence of the passage above, there is no doubt that the copyright in the plans is owned by a person other than the State of Queensland, and hence that access under the FOI Act could not be given by the provision of copies of the plans, but only by an opportunity to inspect them. This would not place JJ Richards in a position of having to sue for any copyright infringement in the plans.

52. The covering facsimile dated 23 May 2001 contains no information of any commercial significance and I am satisfied that it does not qualify for exemption under s.45(1)(b) of the FOI Act.

53. As to the technical drawings, they comprise four simple line drawings of skips manufactured by a subsidiary of JJ Richards, giving the dimensions of the skips and their basic design. Contrary to JJ Richards' submission, there is no evidence before me of the existence of genuine, arms-length buyers prepared to pay JJ Richards to obtain a copy of the drawings. JJ Richards' subsidiary manufactures the skips for use by JJ Richards in its business operations. I consider it improbable that a genuine market for the purchase of the plans exists, and the suggestion that it does is too speculative to form the basis for a finding, in the absence of reliable supportive evidence.

54. I also am not satisfied that the drawings are important to the profitability or viability of JJ Richards' continuing business operations, or otherwise fall within the first meaning of "commercial value" in s.45(1)(b). The skips are being used by JJ Richards in its business

operations. The drawings do not appear to contain any special detail which could not be observed by a person undertaking a visual inspection of the skips.

55. I am not satisfied that the facsimile dated 23 May 2001 from JJ Richards to the Council, and the attached technical drawings, have a commercial value which could reasonably be expected to be diminished by disclosure of those documents under the FOI Act. I therefore find that the facsimile and technical drawings do not qualify for exemption under s.45(1)(b) of the FOI Act.
- (ii) Attachments 5 (part only), 12, 15 and 17 to JJ Richards' tender submission
56. The Council decided that attachments 5, 12, 15 and 17 to JJ Richards' tender submission were exempt under s.45(1)(b) of the FOI Act. However, the Council did not address in its decisions the requirements for exemption under s.45(1)(b) with respect to the particular matter in issue. I have discussed the parts of attachment 5 which remain in issue in detail at paragraphs 114-127 below. I have found that some matter qualifies for exemption under s.45(1)(c), but that the rest does not. The latter consists of a solvency statement, which is entirely innocuous material, and unaudited financial statements of JJ Richards which are open to public access through the Australian Securities and Investments Commission (ASIC), and which therefore cannot qualify for exemption under s.45(1)(b) of the FOI Act: see paragraph 47 above. I find that the solvency statement, and the unaudited financial statements of JJ Richards, do not qualify for exemption under s.45(1)(b) of the FOI Act.
57. Attachment 12 contains details of staff turnover within JJ Richards from 1995/96 to 1999/2000, stated as a percentage of overall workforce. Attachment 15 consists of a one-page industrial relations policy. Attachment 17 lists all of the waste management contracts to which JJ Richards has been, or still is, a party, and gives details of the contract principal, annual value, services per week, nature of services and contact name on behalf of the principal.
58. There is no evidence before me of the existence of genuine, arms-length buyers prepared to pay to obtain a copy of attachments 12, 15 or 17. I am also not satisfied that the information contained in any of those documents is important to the profitability or viability of JJ Richards' continuing business operations, or otherwise falls within the primary meaning of "commercial value" in s.45(1)(b): see paragraph 45 above. The industrial relations policy merely consists of a general statement of philosophy, and four objectives, with a brief explanation beside each of the objectives.
59. Attachment 17 is in the nature of a customer list. Customer lists are a type of commercial information that can often possess commercial value, but not in this instance. Much of the information is now almost three years old, and many of the contracts referred to in this attachment have since expired. With one exception, the customers listed are local government authorities. I can see no particular commercial sensitivity attaching to the identities of those customers, or the overall value of the contracts, such as to give that information a commercial value under s.45(1)(b) of the FOI Act.
60. In Queensland, information about the award of waste management contracts would usually be disclosed in minutes of Council meetings (which are public documents) recording Council's approval of a recommendation to award a contract to a particular tenderer. That information, plus the amount of the contract, would usually appear in a Council's annual report and financial statements. In tendering processes, the price submitted by the successful tenderer is normally disclosed to other tenderers on request. It is not information of a kind which would ordinarily be exempt from disclosure under the FOI Act, if access to it was requested.

61. In New South Wales, local councils must publish in their annual reports details of contracts in excess of \$100,000, including the name of the contractor, the nature of the goods or services supplied by the contractor, and the total amount payable to the contractor under the contract: s.428(2)(h) of the *Local Government Act 1993* NSW. A check of the website for the largest of the Victorian local government authorities listed in attachment 17 disclosed that the total value of its contract with JJ Richards for domestic garbage and recycling contracts was published in its current financial plan, available on its website.
62. Moreover, as far as identifying the shires in which JJ Richards is the contracted waste service provider, I note that JJ Richards, like other waste management companies, openly identifies itself as a waste management service provider in a particular area through the branding of its trucks, bins, *et cetera*. I cannot accept that businesses competing in this industry are not aware of (or capable of ascertaining), at any given time, which of their competitors holds contracts for waste management services from particular local government authorities.
63. Yearly percentages of JJ Richards' staff turnover, as contained in attachment 12, may disclose information about the stability of JJ Richards' labour force, but it is not information that has a commercial value within either of the meanings of that phrase stated by the Information Commissioner in *Re Cannon*.
64. Accordingly, for the reasons explained above, I am not satisfied that attachments 12, 15 and 17 to JJ Richards' tender submission have a current commercial value which could reasonably be expected to be diminished by disclosure of those attachments under the FOI Act. I find that attachments 12, 15 and 17, and the insolvency statement and unaudited financial reports of JJ Richards in attachment 5, do not qualify for exemption under s.45(1)(b) of the FOI Act.
- (iii) Attachments 18 (part only), 19 (part only) and 20 to JJ Richards' tender submission
65. These attachments deal with "Management and Delivery of Services", "Quality Assurance", and "Maintenance Program Details", respectively. The thrust of JJ Richards' submissions in support of exemption under s.45(1)(b) is that each attachment contains information that is innovative and represents a commercially valuable business system, and that each provides JJ Richards with a "competitive edge". If JJ Richards could demonstrate these claims in respect of particular segments of information, then s.45(1)(b) might apply (assuming that it could also be demonstrated that disclosure of the information could reasonably be expected to diminish its commercial value). However, in their written submissions, JJ Richards' solicitors have done little more than state the claims noted above, and leave the information in the documents to speak for itself. Much of the information in the documents is of such an ordinary kind that I am unable to be satisfied that it has commercial value.
66. The first page of attachment 18 contains a brief synopsis of the management structure JJ Richards would propose to implement to deliver services to the Caboolture Shire, plus some general comments about its quality systems. I am unable to accept that the information contained on page one of attachment 18 matches the claims made in the submissions on behalf of JJ Richards (see paragraph 65 above). I am not satisfied that it has a commercial value which could reasonably be expected to be diminished by its disclosure, and I find that it does not qualify for exemption under s.45(1)(b) of the FOI Act. (The balance of attachment 18 is dealt with under s.45(1)(c) at paragraph 134 below.)
67. That part of attachment 19 which remains in issue consists of a "document master list". It is akin to a table of contents – i.e., a list of brief topic headings in a Quality Manual, and in quality assurance documents for particular operations. JJ Richards' solicitors have submitted that their client "prides itself on its quality assurance program and policies and

considers them commercially valuable". However, they are not in issue; rather, a list of their topic headings is in issue. In my view, the most that could be argued is that the list indicates the extent of the topics on which JJ Richards has prepared written quality assurance material. However, it gives none of the detail of that material. The submissions on behalf of JJ Richards argue that the list itself is "a successful and commercially valuable business system". I cannot see how that could be so. I am not satisfied that the part of attachment 19 which remains in issue has a commercial value to JJ Richards that could reasonably be expected to be diminished by its disclosure, and I find that it does not qualify for exemption under s.45(1)(b) of the FOI Act.

68. Clauses 8.16 and 8.17 of the Conditions of Tender required tenderers to provide details of all vehicles and equipment to be used in the provision of services, and details of its program for maintenance of vehicles, plant, equipment, waste containers and facilities. Presumably, this was required for the Council to satisfy itself that there were not likely to be any significant disruptions to service delivery as a result of inadequate maintenance programs. Attachment 20 includes details of JJ Richards' vehicle and equipment service regime, including usage rates and times at which service or maintenance activities occur, and the processes undertaken. Much of this information depends on the particular make and manufacture of the equipment being used by JJ Richards, and is therefore information which is specific to JJ Richards' operations. On its face, it is difficult to identify any intrinsic commercial value in this information. JJ Richards' solicitors have merely submitted that "our client prides itself on the innovative and cost effective manner of its maintenance program. It considers its maintenance program details confidential and as important commercial information". There is no indication as to what aspects of the maintenance program are innovative, or are asserted to give a cost advantage, or other competitive advantage, over other users of the same vehicles and equipment. On the material before me, I am unable to be satisfied that any of the information in attachment 20 has a commercial value to JJ Richards that could reasonably be expected to be diminished by its disclosure. I find that attachment 20 does not qualify for exemption under s.45(1)(b) of the FOI Act.

(iv) Attachments 28 and 29 to JJ Richards' tender submission

69. Clause 8.21 of the Conditions of Tender required tenderers to submit a proposed education program which complied with the minimum requirements in clause 9.4 of the proposed Conditions of Contract, together with a draft layout of a proposed advertising campaign. These were provided in attachments 28 and 29, respectively. I have found at paragraph 137 below that pages 1-17 of attachment 28 qualify for exemption under s.45(1)(c) of the FOI Act, and hence I am now dealing only with the remainder of attachment 28. JJ Richards' solicitors contend that the information contained in these documents is commercially valuable to JJ Richards because it gives it a competitive edge which it does not want its competitors to replicate, and further that the education program in attachment 28 constitutes a product which JJ Richards could sell, *"in the way a consultant could sell a program devised for a business, or an environmental analysis"*.
70. Dealing first with the secondary meaning of "commercial value", I am not satisfied that there is a market for the purchase of either of these attachments, which are now almost three years old. There is no evidence before me of the existence of genuine, arms-length buyers prepared to pay JJ Richards in order to obtain copies of the attachments. Despite JJ Richards' submission that the proposed Education Program is a product which it could sell, I consider it improbable that a market for its purchase exists, and the suggestion that it

does is too speculative to form the basis for a finding, in the absence of reliable supporting evidence. The information appearing in attachment 28 describes educational activities specific to JJ Richards' products, personnel and services.

71. There is, likewise, no proper explanation of the precise nature of the commercial value which the information in issue is said to have for JJ Richards, for the purposes of its ongoing commercial activities. To the extent that it is generic information that might be used from tender to tender, I am not satisfied that its disclosure could reasonably be expected to diminish any value it has to JJ Richards for such ongoing commercial purposes, except perhaps in the case of any information having a degree of innovation or novelty which gives JJ Richards a competitive advantage over its competitors, that could be diminished by disclosure of the information. From my examination of the matter in issue in attachment 28 (other than pages 1-17) and attachment 29, however, I have not been able to discern any information of that kind.
72. In relation to the Draft Advertising Campaign comprising attachment 29, I do not accept that there is any ongoing commercial value in advertising material relevant to a tender process that is now almost three years past. Presumably, the advertising campaign within the Caboolture Shire has been implemented. In any event, the ideas contained in the draft advertising campaign could not, in my view, be regarded as novel or innovative, and most ratepayers in Queensland would have seen the same or similar, whether by JJ Richards, or another waste collection company.
73. I am not satisfied that attachment 29, and the parts of attachment 28 now under consideration, have a current commercial value which could reasonably be expected to be diminished by their disclosure, and I find that they do not qualify for exemption under s.45(1)(b) of the FOI Act.

(v) Environmental Plan, and Workplace Health and Safety Plan

74. I discussed these plans at paragraphs 39-42 above, in the context of the application of s.45(1)(a) of the FOI Act. In relation to the application of s.45(1)(b) to the plans, JJ Richards again argued that its attitude towards environmental, and workplace health and safety, issues, gives it a competitive edge. In their letter dated 9 January 2003, JJ Richards' solicitors submitted as follows regarding both plans:

Our client has invested time, skill, expertise and innovation in developing the plan and obviously if it were disclosed to a party applying under FOI, this party could replicate the plan and benefit from our client's intellectual property in the plan. If this information is known, it is likely to be used as a base for ideas from another party to replicate the plan and therefore our client would lose the commercial value it has invested in creating the plan.

Further this plan, in our view, would be capable of being sold by our client, in the sense that a consultant would sell [an] environmental analysis or program. Therefore the plan does have commercial value according to the two possible and acceptable interpretations of the phrase 'commercial value' outlined by the Information Commissioner in Re Cannon.

75. Again, I am not satisfied of the correctness of JJ Richards' submissions. At paragraphs 40-42 above, I noted that the two plans largely reflect JJ Richards' response to obligations imposed on it by legislation or quality assurance requirements, which are obligations which most businesses must address. I am not satisfied that JJ Richards' response is particularly

novel or innovative such as to give it a competitive edge that could be diminished by disclosure of the two plans. I am not satisfied that the information has a commercial value for the purposes of JJ Richards' ongoing commercial activities, and, even if it did, I am not satisfied that the nature of any value it could have would be of a kind that could be diminished by its disclosure.

76. I am not satisfied on the material before me, that there is a market for the purchase of any of the information in question. There is no evidence before me of the existence of genuine, arms-length buyers prepared to pay to obtain copies of these plans. The government has made a great deal of material available to Queensland employers, in the form of Advisory Standards, precedent forms and other instruments complementary to its workplace health and safety legislation, so as to assist employers to meet the obligations imposed on them by that legislation. I am unable to see how JJ Richards' response as contained in its Workplace Health and Safety Plan differs markedly from those generalised precedents.
77. As I noted at paragraph 42 above, the Environmental Plan contains a brief environmental policy, and general, "motherhood" type statements about JJ Richards' commitment to reducing potential environmental impacts arising from its operations. It is a broad outline of a plan aimed at implementing an accredited environmental management system under Quality Assurance Services. There is nothing before me to suggest that a genuine market exists for the purchase of what is, in effect, a general statement of intent as to how JJ Richards proposes meeting accepted benchmarks.
78. Accordingly, for the reasons explained above, I am not satisfied that the Environmental Plan, and Workplace Health and Safety Plan, which were attached to JJ Richards' tender submission, have a current commercial value which could reasonably be expected to be diminished by disclosure of the plans under the FOI Act. I therefore find that those plans do not qualify for exemption under s.45(1)(b) of the FOI Act.

(vi) Multimedia Package

79. The Multimedia Package consists of an electronic presentation in two formats – CD-ROM and VHS cassette. The presentation is effectively an electronic promotional brochure, and contains a general overview of JJ Richards' operations, and some customer testimonials. It may have been an innovative idea, some three years ago, to prepare promotional material in an electronic format, and I have no doubt that JJ Richards invested time and money in the production of the Package. However, exemption under s.45(1)(b) is not available for the format in which information is presented, but for the information itself (provided that information satisfies the prescribed criteria). I am not satisfied that the Package has a commercial value within either of the meanings of that phrase approved by the Information Commissioner in *Re Cannon*.
80. The Package was prepared to promote JJ Richards and its business operations, and it is reasonable to assume that it was therefore produced for the purpose of distribution to a wide audience, in particular, to any prospective purchaser of JJ Richards' services.
81. As noted, the Multimedia Package does contain some information (such as the testimonials) that identifies clients of JJ Richards. All customers identified, however, are government agencies, such as local councils, and for the reasons outlined in paragraphs 59-62 above, I do not consider that information of that type can be said to have a commercial value under s.45(1)(b) of the FOI Act.

82. Accordingly, for the reasons explained above, I am not satisfied that the Multimedia Package possesses a current commercial value which could reasonably be expected to be diminished by disclosure of the Package under the FOI Act. I therefore find that the Multimedia Package does not qualify for exemption under s.45(1)(b) of the FOI Act. (As to restrictions on the form of access to this document, see paragraphs 181-182 below.)

Findings

83. I am not satisfied that any of the matter in issue identified in paragraph 44 above has a commercial value that could reasonably be expected to be diminished by its disclosure, and I find that it does not qualify for exemption under s.45(1)(b) of the FOI Act.

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

84. The only matter remaining in issue which the Council claims is exempt under s.45(1)(c) of the FOI Act comprises segments of matter appearing in the ACR Contractor Report relating to JJ Richards. In a letter to Morgan Conley dated 4 November 2002, AC Moss expressed the preliminary view that that matter, together with the matter which remains in issue relating to unsuccessful tenderers, and attachment 5 to JJ Richards' tender submission (comprising its financial statements and other financial information), qualifies for exemption under s.45(1)(c) of the FOI Act.
85. As noted at paragraph 18 above, JJ Richards relies upon s.45(1)(c) in respect of any documents which I decide do not qualify for exemption under s.45(1)(a) or s.45(1)(b) of the FOI Act.
86. Given the positions of the participants, and the findings I have made above regarding the application of s.44(1), s.45(1)(a) and s.45(1)(b), it is necessary for me to consider the application of s.45(1)(c) of the FOI Act to the following matter in issue:
- matter relating to unsuccessful tenderers;
 - facsimile from JJ Richards to the Council dated 23 May 2001 attaching technical drawings;
 - mapping system specification;
 - attachment 5 to JJ Richards' tender submission and parts of the ACR Contractor Report relating to JJ Richards;
 - attachment 10 to JJ Richards' tender submission;
 - attachments 12, 18, 19, 20 and 27-29 to JJ Richards' tender submission;
 - the Environmental Plan;
 - the Workplace Health and Safety Plan; and
 - the Multimedia Package.

Requirements for exemption under s.45(1)(c)

87. 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.

- (i) Information concerning business, professional, commercial or financial affairs

88. 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 67-77). I am satisfied that all of the matter in issue noted at paragraph 86 above is properly to be characterised as information concerning the business, commercial or financial affairs of JJ Richards, or of the unsuccessful tenderers (apart from Wanless).

- (ii) Adverse effect

89. 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.

90. In his letter dated 27 November 2002, Mr Noble of the Council said there were eight waste management companies operating in Queensland. I am satisfied that the applicant and JJ Richards operate in a highly competitive market for the provision of waste management services.

91. I will discuss in detail below, this requirement for exemption as it applies to the particular matter in issue.

(iii) Prejudice to future supply of like information

92. 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.

93. In his letter dated 27 November 2002, Mr Noble of the Council stated:

In my consultations with JJ Richards, they have also indicated that they are not likely to provide some of the documents which were presented in our tender when making submissions for any future waste management contracts.

While I believe this would be mainly to their own detriment, this could also have some impact on the selection process, in that local authorities within Queensland, would not be given the benefit of any new or innovative ideas at the time of evaluating such tenders.

94. In their letter dated 9 January 2003, JJ Richards' solicitors argued that their client would not be prepared to provide some information in future tender processes (it did not specify which particular information) if it were to be disclosed under the FOI Act. They also argued that if access to tender submissions in their entirety were to be given, tenders would become "homogeneous", with no room for expressing innovative information which might give the particular tenderer a competitive advantage.

95. Whether or not JJ Richards would refrain from providing certain information in future tender processes, or would refrain from participating at all in future government tender processes, is not the relevant test. The issue is whether it is reasonable to expect that a substantial number of organisations would so refrain. I note the Information Commissioner's comments in *Re "B"* at paragraph 161:

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

(my underlining)

96. At paragraph 64 of *Re Macrossan & Amiet*, I said:

I do not consider that it is reasonable to expect that a substantial number of organisations would refrain from tendering for the award of government contracts, simply because some of the information they submit in support of their successful offers may become subject to disclosure under the FOI Act subsequent to the award of the tender (particularly when such organisations

are warned of the possibility of disclosure and advised how to take steps to request protection for information of particular sensitivity). 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 tender proposals, a tenderer 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 found below that some information in the tender documents has sufficient commercial sensitivity to qualify for exemption under s.45(1)(c) of the FOI Act. However, nearly all of that information had to be supplied for the purpose of evaluation of the tenders, and I doubt that disclosure even of that information could reasonably be expected to prejudice the future supply of like information. It will be sufficient for present purposes if I record a finding that, aside from the matter in issue which I have found below is exempt matter under s.45(1)(c), I am not satisfied that disclosure of the balance of the matter in issue could reasonably be expected to prejudice the future supply of such information.

97. I noted at paragraphs 35-36 above that, with the exception of its financial statements which it marked "commercial-in-confidence", JJ Richards took no steps to request protection from disclosure of any information contained in its tender submission on the basis that it was commercially sensitive.
98. I do not accept JJ Richards' contention that disclosure of its tender submission would result in an homogenisation of tender submissions generally. There is no evidence before me to suggest that this is the case and, given the significant amount of business which waste management companies derive from government agencies, and the clearly competitive nature of the industry, I cannot accept that participants in such an industry would, in some way, generalise their tender submissions or omit significant information needed for the evaluation of their tenders, and thus intentionally disadvantage themselves in the competition for government contracts, simply because parts of their submission may become subject to public disclosure after the award of the tender, if they were the successful tenderer.
99. As in *Re Macrossan & Amiet*, I accept that it is possible that some sensitive commercial information would not be volunteered by tenderers if it could not be safeguarded from disclosure to competitors. However, if the information were required for evaluation of the tender proposals, a tenderer 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 found below that some information in JJ Richards' tender submission has sufficient commercial sensitivity to qualify for exemption under s.45(1)(c) of the FOI Act. However, nearly all of that information had to be supplied for the purpose of evaluation of the tender, and I doubt that disclosure even of that information could reasonably be expected to prejudice the future supply of like information.
100. Some of the matter in issue which concerns the unsuccessful tenderers consists of tables of pricing data, which the unsuccessful tenderers put forward as an alternative offer for Council's consideration. (Information comprising the conforming charging rates submitted by all tenderers was disclosed publicly at the opening of the tenders, in accordance with clause 10 of the Conditions of Tender. However, the Council also invited tenderers to put forward alternative offers. Such offers were specifically excluded from disclosure under the Conditions of Tender, so as to encourage tenderers to submit flexible and innovative pricing alternatives for Council's consideration. JJ Richards did not submit an alternative offer.) It

may be arguable that the future supply of information of this type could reasonably be expected to be prejudiced if it were to be disclosed under the FOI Act. It may be reasonable to assume that tenderers would be reluctant to supply alternative pricing offers, or other commercially sensitive material, if it were to be subject to disclosure under the FOI Act when their offer was not successful. But in any event, it is not necessary for me to make a finding in that regard, because, for the reasons explained at paragraphs 105 to 109 below, I am satisfied that the matter in issue which concerns the unsuccessful tenderers meets the other requirements for exemption under s.45(1)(c) of the FOI Act.

101. It will be sufficient for present purposes if I record a finding that, aside from the matter in issue which I have found below is exempt matter under s.45(1)(c) of the FOI Act (see paragraph 153), I am not satisfied that disclosure of the balance of the matter remaining in issue could reasonably be expected to prejudice the future supply of like information.

(iv) Public interest balancing test

102. Matter which satisfies the requirements of both s.45(1)(c)(i) and (ii) will be *prima facie* exempt from disclosure under s.45(1)(c), subject to the application of the public interest balancing test incorporated in s.45(1)(c) of the FOI Act. That test requires consideration of whether there are public interest considerations favouring disclosure of that information which outweigh the public interest in protecting the business, commercial or financial affairs of JJ Richards and the unsuccessful tenderers from the reasonably apprehended adverse effects of disclosure, so as to warrant a finding that disclosure of that information would, on balance, be in the public interest.

Submissions of the participants

103. Apart from the financial matter contained in attachment 5 and the matter in issue in the ACR Contractor Report, the applicant did not address, in any substantive manner, the application of s.45(1)(c) to the bulk of the matter in issue. In their facsimile dated 21 February 2003, Morgan Conley, on behalf of the applicant, argued:

Commercial sensitivity

We note JJ Richards' objection to disclose the remainder of the tender documents in issue on the basis that they are subject to the limitations of s.45(1)(b) and (c) of the Act.

Given the amount of time that has lapsed since the tender documentation was lodged with the Council there would seem to be no basis for claiming that commercial sensitivity in relation to the documentation continues to exist.

...

In relation to the operational documentation we note that the tender documents are now some two years old.

It is recognised that entities tendering for Council contracts do so under Council's overlying duty to its rate payers and public interest. By s.5(1)(a) and (b) of the Act, such documentation should be made available through the FOI process given the public interest that is imported through the tender process and local Governments need to be fiscally accountable.

...

104. In their letter dated 9 January 2003, JJ Richards' solicitors did not raise the application of s.45(1)(c) of the FOI Act. In their letter dated 11 March 2003 (written in response to the applicant's solicitors' submissions discussed above)), they argued:

The documents for which exemption have been claimed under section 45 of the Act ...continue to have commercial value notwithstanding the period of time that has elapsed since submission of the tender. ...

Our client derives a large portion of its work from successful tenders. As could be reasonably expected, a tender document is not a 'one-off' piece of work. Particular components of a tender can be reused when tendering with other Councils for similar services. The applicant's argument seems to imply that because of the passage of time, our client has somehow waived its rights to claiming a document has commercial value in terms of section 45 of the Act, or that the documents are confidential in nature. This is not the case. ...

As stated in Re Cannon "where information about a business has no commercial value in itself, but would, if disclosed, damage that business, section 45(1)(c) is the only one of the exemptions that might be applicable." If the Commissioner forms the view the documents do not have commercial value we request that the exemption contained in section 45(1)(c) also be considered by the Commissioner in those cases where we have claimed exemption under section 45(1)(a) or section 45(1)(b).

Our client strongly contends that if it is not able to tender by providing as much detail as possible to the Council then it will be deterred from providing certain information in the future. The very existence of s.45(1)(c) in the Act recognises this. If a business can tender with confidence that certain information will remain confidential or disclosed only to the Council for the permitted purpose, more businesses will tender for government services. In our client's experience price regularly represents less than 50% of the criteria for assessing a tender. This leaves much room for businesses to display a competitive advantage by delivering other services to fulfil a tender. This benefits the public in that a 'better' service is provided.

Further, if access to tender documents in their entirety were granted to competing tenderers, it is arguable the situation would develop where tenders would become 'homogeneous'. There would be no room for competitive advantages, the benefits of which, in turn, flow through to the public.

...

Application of s.45(1)(c) to the matter in issue

(i) Matter relating to unsuccessful tenderers

105. The only matter remaining in issue which relates to the unsuccessful tenderers consists of tables of referee scores, several tables of pricing data supplied by the two unsuccessful tenderers as alternatives to their conforming tender submission (see the explanation at paragraph 100 above), and various handwritten notes made by Council officers during the tender appraisal process. In her letter to Morgan Conley dated 4 November 2002, AC Moss expressed the preliminary view that this matter qualified for exemption under s.45(1)(c) of

the FOI Act. In their response dated 14 November 2002, Morgan Conley did not address the matter in question specifically, but simply stated that all documents remaining in issue, as a matter of public policy, should not be exempt from disclosure.

106. I am satisfied that disclosure of the matter in issue which relates to the unsuccessful tenderers could reasonably be expected to have an adverse effect on their business, commercial or financial affairs. The tables of referee scores effectively reveal the level of satisfaction which then existing customers of the unsuccessful tenderers had with their performance. I consider that information of that type, in the hands of a competitor, could enable that competitor to identify any perceived weaknesses in the contractor's performance, and to use that information in trying to win business from the customer, whether through future tender processes, or generally. I consider that it is reasonable to expect that a company motivated enough to win new business and armed with the type of specific client satisfaction information which is contained in these tables, could gain assistance in marketing itself to another company's customers by demonstrating an awareness of satisfaction levels with the existing contractor, and its ability to meet or exceed those levels. I do not regard this scenario as merely speculative, given the highly competitive market in which waste management contractors appear to operate, which leads to a constant focus on the attraction of new business and new customers.
107. Similarly, I am satisfied that there exist reasonable grounds for expecting that disclosure of the Council's notes about aspects of the offers made by the unsuccessful tenderers, and the alternative tender prices submitted by the unsuccessful tenderers, could cause commercial detriment to the unsuccessful tenderers. I consider that the alternative pricing matter in issue is analogous to the unit price information which was considered by the Information Commissioner in *Re Dalrymple Shire Council and Department of Main Roads* (1998) 4 QAR 474, at p.489 (paragraphs 41 and 42):
41. *Disclosure of the level of finely detailed costing information available in the (approximately) 140 quoted unit rates appearing in the matter in issue could, in my view, be reasonably expected to assist a competitor to make more informed estimates of the unit rates likely to be submitted by RTCS (Central) in future tenders where the same, or similar, items are included in the tender documents published by the procuring agency. I accept that unit rates are liable to variation according to site-specific and job-specific factors of the kind referred to in Mr Griffiths' statutory declaration. However, disclosure is here being contemplated to a competitor which also submitted a tender for the same roadworks contract, and in the process would have made its own assessment of many of the site-specific and job-specific variables affecting the costs of performing that job.*
42. *I consider that a competitor in the roadworks construction industry, with knowledge and expertise of the pricing components and variables that go into the costing of tenders for contract jobs in that industry, could use the unit rates in issue to assess comparative cost advantages and disadvantages between itself and RTCS (Central) across a large range of construction items (thus enabling it to assess those areas in which it would need to find savings/efficiencies in order to be more competitive in future tenders, and those areas in which it may not need to find savings/efficiencies). I consider that a competitor could also use the unit rates in issue (perhaps, in conjunction with other similar or*

complementary material available to it: see paragraph 37 above, and Re Actors Equity Association of Australia and Australian Broadcasting Tribunal (No. 2) (1985) 7 ALD 584 at p.593, paragraph 36) to predict with a greater degree of accuracy future tender bids by RTCS (Central) for contracts involving a substantial number of the same or similar items to those listed in Schedules A, B, C and D.

108. While I recognise the age of this pricing information, I consider that the significance of the material lies not in the actual figures which it contains, but in the ratios and distinctions between the alternative tenders submitted, and the conforming tender prices lodged by each tenderer (the latter having been publicly disclosed in accordance with clause 10.0 of the Conditions of Tender). I consider that the very manner in which the tenderers proposed to approach the whole costing issue with respect to alternative tender prices, regardless of the specific rates quoted, would be of use and interest to competitors. I consider that the unsuccessful tenderers could reasonably be expected to suffer a competitive disadvantage as a result of the applicant (with the benefit of both the conforming tender price information submitted by the unsuccessful tenderers, and their alternative tender pricing) being able to compare that material and assess the distinctions upon which its competitors framed all pricing possibilities, and therefore anticipate the positions of those competitors in a future tender process.
109. Accordingly, for the reasons explained above, I am satisfied that disclosure of the matter remaining in issue which relates to unsuccessful tenderers could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of those tenderers. Hence, that matter is *prima facie* exempt from disclosure under s.45(1)(c) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.45(1)(c), which is discussed below.
- (ii) Facsimile from JJ Richards to the Council dated 23 May 2001 attaching technical drawings
110. As I noted at paragraph 52 above, the covering facsimile is merely an administrative document which contains no information of any commercial significance or sensitivity. The technical drawings are simple line sketches of garbage skips, showing their basic design and dimensions. The skips are being used by JJ Richards in its business operations. The drawings do not appear to contain any special detail which could not be observed by a person making a visual inspection of the skips. I am not satisfied that disclosure of these documents could reasonably be expected to have an adverse effect on JJ Richards' business, commercial or financial affairs, and I find that they do not qualify for exemption under s.45(1)(c) of the FOI Act.
- (iii) Mapping system specification
111. The mapping system specification did not form part of JJ Richards' tender submission, but was provided to the Council following the award of the tender to JJ Richards. It outlines the system which JJ Richards proposed implementing in plotting waste collection and disposal routes within the Caboolture Shire.
112. Mapping and planning efficient and cost-effective waste collection routes is obviously an important ongoing part of a waste collection company's commercial operations. The specification in issue is a description of the methodology used by JJ Richards in carrying out this exercise, and contains a step-by-step description of the various processes. Given the importance of the mapping and planning exercise to the efficiency and profitability of a waste management company's business operations, I am satisfied that disclosure of the

detail of JJ Richards' mapping system specification could reasonably be expected to confer an advantage on JJ Richards' competitors, with a corresponding disadvantage for JJ Richards. For example, disclosure could reasonably be expected to enable a competitor to make cost savings on its operations, enabling it to compete more effectively with JJ Richards in future tender processes.

113. I find that disclosure of the mapping system specification could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of JJ Richards. Hence, that matter is *prima facie* exempt from disclosure under s.45(1)(c) of the FOI Act, subject to the application of the public interest balancing test which is incorporated in s.45(1)(c).

(iv) Attachment 5 to JJ Richards' tender submission and parts of the ACR Contractor Report relating to JJ Richards

114. Attachment 5 to JJ Richards' tender submission comprises JJ Richards' unaudited financial statements for the 1999/2000 financial year, a statement about solvency, and details about creditors. The parts of the ACR Contractor Report which remain in issue relate to JJ Richards' financial position.

115. In her letter to Morgan Conley dated 4 November 2002, AC Moss expressed the preliminary view that (with the exception of the solvency statement) this matter qualified for exemption under s.45(1)(c) of the FOI Act, on the basis that its disclosure could reasonably be expected to have an adverse effect on JJ Richards' business, commercial or financial affairs. AC Moss noted that the financial statements had been endorsed as "commercial-in-confidence" (see paragraphs 35-36 above). In their facsimile dated 21 February 2003, Morgan Conley stated:

Generally we note that the documentation which JJ Richards claims are [sic] commercially sensitive, relate to its operations and finances.

We note that section 319 of the Corporations Act requires that a large proprietary company lodge with the ASIC its financial reports, unless it is defined as an exempt proprietary company. Such reporting requirements would make the financial documentation which JJ Richards's objects to disclosing through the FOI process, public documents, which as you are aware would not inhibit their disclosure in this [sic].

116. In their response dated 11 March 2003, JJ Richards' solicitors stated:

Certain financial reports of any large proprietary company (including those of our client) are available at the Australian Securities and Investments Commission ('ASIC') in accordance with these companies obligations under section 319 of the Corporations Act 2001. Indeed, a simple application to inspect documents lodged with ASIC is available to all members of the public including the applicant. Because of this, it is our view such information is not the proper subject matter of an FOI application.

Section 22 of the Act provides that an Agency or Minister may refuse access to a document that is reasonably open to public access under another enactment, whether or not the access is subject to a fee or charge. In contrast to the decision of Re JM and Queensland Police Service [(1995) 2 QAR 516] there is no argument documents held on the ASIC register are not 'reasonably open to public access.'

It is our view it is [an] abuse of process to use the Act and thereby harness resources of both Caboolture Shire Council and the Office of the Information Commissioner to obtain those documents.

To the extent that Financial Records provided in our client's tenders are not publicly available through the ASIC, we rely on our submissions dated 12 December 2002 to deny the applicant access to those records.

117. Section 319 of the *Corporations Act 2001* Cth relevantly provides:

SECT 319

Lodgment of annual reports with ASIC

(1) a company, registered scheme or disclosing entity that has to prepare or obtain a report for a financial year under Division 1 must lodge the report with ASIC. This obligation extends to a concise report sent to members under section 314.

118. Section 292 of the *Corporations Act* provides that large proprietary companies such as JJ Richards must prepare annual financial and directors' reports, and the required contents of such reports is set out in s.295 of the *Corporations Act*. It is clear that JJ Richards is required under the *Corporations Act* to provide ASIC with annual reports and returns regarding its financial position. Such documents are open to public access through ASIC on payment of a prescribed fee.

119. I have obtained from ASIC a copy of the Annual Return lodged by JJ Richards for the financial year ending 30 June 2000. The information in it is identical to that contained in attachment 5 to JJ Richards' tender submission. In addition, while I have not obtained and inspected copies of the Annual Returns for 1997, 1998 and 1999 (all of which are listed in the register of documents filed by JJ Richards with ASIC), I note that the copies which appear in the ACR Contractor Report merely consist of the details and information which JJ Richards was required to lodge with ASIC in accordance with s.295 of the *Corporations Act*.

120. Since the information is already publicly available, I am not satisfied that disclosure under the FOI Act of JJ Richards' financial statements for the financial years ended 30 June 1997, 1998, 1999 and 2000, could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of JJ Richards. I find that that information does not qualify for exemption under s.45(1)(c) of the FOI Act.

121. The Council did not turn its attention to the possible application of s.22(a) of the FOI Act, because it decided that the documents in question were exempt from disclosure. Section 22(a) is not an exemption provision. It confers a discretion on an agency to refuse access to a document under the FOI Act if the document is reasonably open to public access under another enactment, whether or not the access is subject to a fee or charge. The correct approach to the interpretation and application of s.22(a) (and s.22(b)) was explained by the Information Commissioner in *Re "JM" and Queensland Police Service* (1995) 2 QAR 516 at pp.524-529 (paragraphs 21-43). The discretion conferred on an agency by s.22 is able to be exercised by the Information Commissioner (or his delegate) in a review under Part 5 of the FOI Act, by virtue of s.88(1)(b) of the FOI Act.

122. However, it seems to me that there is some doubt as to whether the documents available through ASIC are the same documents as those in issue in this review (*cf.* the Information Commissioner's observations at paragraph 43 of *Re "JM"*), although I am satisfied that the information contained in them is identical. There may also be an issue as to whether the word "enactment" in s.22(a) was intended to be confined to Acts of the Queensland Parliament, or to extend to Acts of the Commonwealth Parliament, such as the *Corporations Act 2001* Cth. These issues are not worth addressing in these already lengthy reasons for decision. Therefore, assuming s.22(a) is applicable, I decline to exercise the discretion conferred by s.22(a) so as to refuse access, under the FOI Act, to the matter in issue which comprises financial statements of JJ Richards.
123. The other matter in respect of which AC Moss expressed a preliminary view that it qualified for exemption under s.45(1)(c), consisted of credit information about JJ Richards, and the second paragraph of the Executive Summary contained on the first page of the ACR Contractor Report (which refers to the net profits and shareholders' funds of JJ Richards for the 2000 financial year).
124. Upon further review of this matter, and taking into account the reporting requirements to which JJ Richards is subject under the *Corporations Act*, I am not satisfied that disclosure of the second paragraph of the Executive Summary could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of JJ Richards. The information contained in this paragraph is merely a repetition of factual matter contained in the financial statements of JJ Richards for the year ending June 2000, which, as I have noted above, is matter which is publicly accessible through the ASIC registry.
125. However, I consider that credit information relating to JJ Richards is information the disclosure of which could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of JJ Richards. I acknowledge that information of this type (such as credit ratings) can often be purchased through commercial credit reference providers. However, as I understand it, such information is usually only made available in those circumstances with the consent of the relevant entity. Credit information is commercially sensitive information, the disclosure of which could result, for example, in adverse commercial decisions being made about a company by prospective customers, suppliers, business partners *et cetera*, or even by prospective credit-providers. While I note that the information in issue in this case is now nearly three years old, I consider that it still has commercial sensitivity.
126. I am satisfied that disclosure of the credit information contained in attachment 5 to JJ Richards' tender submission, and on the last page of the ACR Contractor Report, could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of JJ Richards. Hence, that matter is *prima facie* exempt from disclosure under s.45(1)(c) of the FOI Act, subject to the application of the public interest balancing test which is incorporated in s.45(1)(c).
127. I find that the remainder of the matter in issue in attachment 5, and in the ACR Contractor Report, does not qualify for exemption under s.45(1)(c) of the FOI Act.
- (v) Attachment 10 to JJ Richards' tender submission
128. Attachment 10 comprises a table of base prices for recyclable waste, which JJ Richards described as a form of wholesale price list. JJ Richards submitted that such information is still of commercial sensitivity, despite the passage of time since the tender was awarded. It stated that such prices are not publicly available, and that giving a competitor access to specific on-sale pricing would enable the competitor to undercut JJ Richards' prices.

129. The applicant did not provide any submissions to counter JJ Richards' arguments about this particular matter. In view of the relatively low inflationary economic environment which has existed in the past two to three years, I accept that prices for recyclable waste have not moved to such an extent in that period as to substantially diminish the commercial sensitivity of this pricing information, and that its disclosure could reasonably be expected to assist competitors to try to undercut JJ Richards' prices.
130. Accordingly, I am satisfied that disclosure of attachment 10 could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of JJ Richards. I find that attachment 10 is *prima facie* exempt from disclosure under s.45(1)(c) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.45(1)(c).
- (vi) Attachments 12, 18, 19, 20 and 27-29 to JJ Richards' tender specification, the Environmental Plan, the Workplace Health and Safety Plan, and the Multimedia Package
131. I have discussed most of these documents in detail above, in the context of the application to them of s.45(1)(a) or s.45(1)(b) of the FOI Act. JJ Richards has provided no specific submissions in support of its case that disclosure of any of these documents could reasonably be expected to have an adverse effect on its business, commercial or financial affairs, and so has not identified the precise nature of an apprehended adverse effect. As I noted at paragraph 18 above, JJ Richards simply raised the application of s.45(1)(c) of the FOI Act late in the review, stating that it relied upon that provision if I decided that any matter did not qualify for exemption under s.45(1)(a) or s.45(1)(b) of the FOI Act.
132. I gather that the thrust of JJ Richards' objection to disclosure of the bulk of this material is that it is innovative, and was instrumental in the tender being awarded to JJ Richards by the Council, and that its disclosure to a competitor would allow the competitor to replicate the material and to compete more effectively in future tender processes, thereby having an adverse effect of JJ Richards' business, commercial or financial affairs.
133. Details of JJ Richards' staff turnover as contained in attachment 12 may be of interest to a competitor, but I am not satisfied that there is a reasonable basis for expecting that a competitor could use the information in attachment 12 in such a manner to have an adverse effect on JJ Richards' business, commercial or financial affairs. I do not accept JJ Richards' submission that disclosure of yearly staff turnover percentages would arm a competitor with sufficient information to enable it to identify and approach JJ Richards' staff in order to offer them alternative employment. I find that attachment 12 does not qualify for exemption under s.45(1)(c) of the FOI Act.
134. The information on page 1 of attachment 18 is too innocuous, in my view, for its disclosure to afford any reasonable basis for expecting an adverse effect on the business, commercial or financial affairs of JJ Richards. The balance of attachment 18, however, goes into considerable detail as to how JJ Richards would propose to implement some significant aspects of service delivery under the contract. This material comprises a detailed description of business systems and service standards, which has been designed to appeal to prospective customers, and which is intended for repeated use in tender situations. I am satisfied that there is a reasonable basis for expecting that its disclosure could confer a competitive advantage on competitors of JJ Richards (with a corresponding adverse effect on JJ Richards) by enabling a competitor to match or exceed the detailed business systems and service standards contained in attachment 18. With respect to attachment 18, I find that the cover sheet and the first page do not qualify for exemption under s.45(1)(c), but that the rest of attachment 18 satisfies the requirements for *prima facie* exemption under s.45(1)(c), subject to the application of the public interest balancing test.

135. I have described attachments 19 and 20 at paragraphs 67 and 68 above. On the basis of the brief submissions put by JJ Richards' solicitors, I am not satisfied that there is a reasonable basis for expecting that disclosure of any of the information in issue from attachments 19 or 20 could have an adverse effect on the business, commercial or financial affairs of JJ Richards. I find that attachments 19 and 20 do not qualify for exemption under s.45(1)(c) of the FOI Act.
136. All tenderers were required to indicate the key performance indicators they proposed for service delivery under the contract. A format indicating the sort of performance indicators and benchmarks used in the Council's existing waste management contracts was given in Appendix 3 of the tender specifications. In attachment 27, JJ Richards proposed a more detailed set of performance indicators than was suggested in Appendix 3. To that extent, its response could be said to be innovative and perhaps to give a competitive edge. The document is similar to the material discussed in paragraph 134 above in that it offers a range of performance measures and some key service standards, designed to appeal to prospective customers, and it is in a format that is clearly intended to be adaptable for repeated use in tender situations. I accept that disclosure of attachment 27 could reasonably be expected to confer a competitive advantage on competitors of JJ Richards (with a corresponding adverse effect on JJ Richards), by enabling a competitor to match or exceed the extent of performance measures, and some particular service standards, that JJ Richards is prepared to offer. I find that attachment 27 satisfies the requirements for *prima facie* exemption under s.45(1)(c) of the FOI Act, subject to the application of the public interest balancing test.
137. Clause 8.21 of the Conditions of Tender required tenderers to submit a proposed education program which complied with the minimum requirements in clause 9.4 of the proposed Conditions of Contract. JJ Richards' solicitors contend that the company's proposed education program, comprised in attachment 28, gives it a competitive edge, which it does not want its competitors to replicate. I accept that the area of education programs with respect to waste management is one that affords a tenderer an opportunity to distinguish itself from its competitors with innovative ideas, or at least a comprehensive and appealing program, that may give it a competitive edge in the overall tender process, and that JJ Richards appears to have committed substantial resources to these educational activities. Attachment 28 contains detailed proposals that are adaptable for use in other tender situations. While JJ Richards' solicitors have not demonstrated that any particular segments of information are innovative or novel, I accept that disclosure of pages 1-17 of attachment 28 could reasonably be expected to confer a competitive advantage on competitors of JJ Richards (with a corresponding adverse effect on JJ Richards) by enabling a competitor to match or exceed the comprehensive nature of the educational programs that JJ Richards can offer. I find that pages 1-17 of attachment 28 satisfy the requirements for *prima facie* exemption under s.45(1)(c), subject to the application of the public interest balancing test. I am not satisfied that disclosure of the balance of attachment 28 could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of JJ Richards, and I find that it does not qualify for exemption under s.45(1)(c).
138. I have already referred (at paragraphs 72-73 above) to the draft advertising campaign in attachment 29, and my view that it contains nothing novel or innovative. I am not satisfied that disclosure of that material, some three years after conclusion of the tender process, could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of JJ Richards.

139. I have discussed the Environmental Plan, and the Workplace Health and Safety Plan, at paragraphs 39-42 and 74-78 above. In my view, the character of the information in these documents is derivative and innocuous. I am not satisfied that disclosure of either plan could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of JJ Richards, and I find that those plans do not qualify for exemption under s.45(1)(c) of the FOI Act.
140. Nor am I satisfied that disclosure of the Multimedia Package, which merely comprises promotional material in an electronic format, could reasonably be expected to have an adverse effect on JJ Richards' business, commercial or financial affairs. I have noted, at paragraph 81 above, the references in the Package to the identities of government agency customers of JJ Richards, and indicated why such information cannot be regarded as commercially sensitive. While parts of the presentation refer to JJ Richards' educational programmes, they do not approach the level of detail contained in, and do not warrant a similar finding to that which I have made in respect of, pages 1-17 of attachment 28 (see paragraph 137 above). It is possible that a competitor might, upon seeing JJ Richards' Multimedia Package, decide that it too will format its promotional material electronically, rather than in a brochure. However, exemption is not available on that account under s.45(1)(c), even if such an occurrence could reasonably be expected to adversely affect JJ Richards' business, commercial or financial affairs. (To suggest that such an occurrence would result in JJ Richards losing future tenders to such a competitor is, in my view, far-fetched and speculative.) Rather, exemption under s.45(1)(c) could only attach to the information presented in the multi-media electronic format. I am not satisfied that disclosure of that information could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of JJ Richards, and I find that the Multimedia package does not qualify for exemption under s.45(1)(c) of the FOI Act.

Public interest balancing test

141. The matter which I have found satisfies the requirements of both s.45(1)(c)(i) and s.45(1)(c)(ii) (i.e., the matter relating to unsuccessful tenderers, the credit information contained in attachment 5 to JJ Richards' tender submission and in the ACR Contractor Report, the mapping system specification, and attachments 10, 18 (except for the cover sheet and page 1), 27 and 28 (pages 1-17 only), to JJ Richards' tender submission) is *prima facie* exempt from disclosure, subject to the application of the public interest balancing test incorporated in s.45(1)(c) of the FOI Act.

Submissions of the participants

142. In his letter dated 27 November 2002, Mr Noble of the Council said:

Council accepts that there is a public interest in the disclosure of documents to facilitate the accountability of government. In this case, there appears to be a facet of government activity worthy of consideration, that being, the compliance of Council with the provisions of Division 1 – Contracts and Division 2 – Purchasing of the Local Government Act.

I refer in particular, to Sections 481 ... and 490 which state:

481 Principles governing the making of contracts

In entering into contracts for the carrying out of work, or the supply of goods or services, a local government must have regard to the following principles—

- (a) open and effective competition;
- (b) value for money;
- (c) enhancement of the capabilities of local business and industry;
- (d) environmental protection;
- (e) ethical behaviour and fair dealing.

490 Acceptance of tender or quotation

- (1) If a local government decides to accept a tender or quotation, it must accept the tender or quotation most advantageous to it.
- (2) In deciding the tender or quotation most advantageous to it, the local government must have regard to the principles mentioned in section 481.
- (3) However, a local government may decide not to accept any tender or quotation available to it.

Council's Waste Management Tender Specification provided for the full disclosure of all rate prices for conforming tenders. In addition, an independent probity audit was conducted. The applicant in this matter ... has been granted access to and has obtained copies of some 4,000 documents, including preliminary reports, assessment scores, evaluations, internal memoranda, and others.

I do not consider that the further disclosure of JJ Richards' tender submission document, in its entirety, would significantly enhance government accountability.

There is no doubt that there is a level of public interest in knowing whether or not a tender is being awarded properly and within the specified guidelines of the relevant legislation. However, I do not believe there is anything in the particular matter in issue, the disclosure of which would further serve that public interest; for example, there is nothing suggestive of fault within Council's tender evaluation process or with any particular officer within Council.

I am also of the opinion that there is a public interest in maintaining the confidentiality of sensitive commercial and business information about third parties which is in the hands of government agencies, including information within a tender offer to an agency. Against these interests I have considered the public interest in the accountability of Council for the decisions that it makes.

... I recognise that there is a public interest in ensuring the viability of private sector bodies that do business with government agencies by maintaining the confidentiality of business, professional, commercial or financial information provided to agencies by those organisations in circumstances where disclosure could adversely affect their business and commercial interests.

Therefore, in balancing the competing public interests, I have given more weight to the public interest in maintaining the confidentiality of the business, professional, commercial or financial information of JJ Richards & Sons Pty Ltd.

143. Messrs Morgan Conley addressed the public interest balancing test in their facsimile dated 21 February 2003:

The Local Government Act requires that Council accept the most favourable tender. To disclose all tender documents would ensure the public is satisfied with the tender selected.

The object of Government is to ensure public confidence. The FOI process was put in place to ensure that this occurs.

Specifically we refer you to section 5 which provides that:

(a) the public interest is served by promoting open discussion of public affairs and enhancing government's accountability; and

(b) the community should be kept informed of Government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community.

We understand that Council has an underlying business and commercial interest in the tender process. However we do not consider that this precludes council from making disclosure under the FOI process on the basis that claims of commercial sensitivity are made. It must be assumed in tendering that the information disclosed is not done on the basis that strict confidentiality continues, but that the information provided is to satisfy Council's requirements in providing services for its rate payers.

In our opinion it is precisely why the documentation should be disclosed given the meaning and effect of s5 of the Act.

Similarly, any information within the documents relating to the unique and innovative methods of JJ Richards is no longer confidential as their operations are active in the public eye.

The principle established in Dalrymple Shire Council v Department of Main Roads provides that information relating to the business of an entity should be disclosed where it would be in the public interest to do so.

On the authority of this case it is open to Council to disclose the documentation where currently the tendering parties have claimed exemption under s45(1) as the public interest in a tender process warrants such a course by Council.

Clearly Council's tender process should be transparent given its fiscal accountability to ratepayers. On the balance of convenience, Council is obliged to allow inspection of such documents.

144. In their letter dated 11 March 2003, JJ Richards' solicitors stated:

Section 5 of the Act provides that in free and democratic society, the public interest is served by promoting open discussion of public affairs and enhancing government's accountability.

To this end, the Act creates a right of access for any person to government documents. However, these rights are subject to expressly worded limitations. The Act acknowledges that in appropriate cases the right of disclosure must yield to competing considerations such as commercial sensitivity or confidentiality.

In addition, the analysis of what is 'in the public interest' is not a simple one. It is also valid to state that the public interest is also served by promoting competition in the marketplace and a fair trading environment where trade secrets that are disclosed in the course of public tender processes are respected.

In assessing whether a document should be exempt under the Act on the basis of 'confidentiality', the practice is to import the common law on confidential information into the Act to determine whether a document is exempt or not. This practice clearly upholds the protection of confidential information that has been given to businesses under the general law.

In response to Morgan Conley's specific assertion that 'the unique and innovative methods of JJ Richards are no longer confidential as their operations are active in the public eye', we reiterate our previous submissions ... that providing direct access to plans and specifications is certainly a different matter to allowing people to view processes in public. Indeed, the analogy can be drawn that a person may be able to view the latest Collins classic submarine at a naval review but, understandably, the same right of access is not given in relation to the specific design specifications for the submarine.

In summary, we submit that the analysis of public interest conducted by Morgan Conley Solicitors is too simplistic in its application and fails to recognise that the public interest is served by protecting and promoting competition for government projects and by promoting a commercial environment in which intellectual property rights are respected. In order that the best party be awarded a government tender (which then provides flow on benefits to the public), private industry needs to be able to tender with confidence that exemptions to disclosure under the Act will be upheld when the specified criteria provided by the Act are met.

Analysis

145. Tenderers are not accountable to the public for the contents of their tenders. (Rather, it is simply a consequence of the terms of s.21 of the FOI Act that the fact that those documents are in the possession of the Council means that any person has a right to obtain access to them under the FOI Act, except to the extent that they contain matter which qualifies for exemption under the FOI Act.) However, government agencies and local government authorities are accountable to the public regarding the decisions they make to award contracts for the performance of services to be undertaken for the benefit of the public (or a particular segment of the public) and which are to be paid for from funds raised by imposts on the public. Private sector businesses who wish to contract with government to perform services for the public have to accept an appropriate level of scrutiny of their dealings with government, and of their performance in terms of service delivery to the public, as something which goes with the territory.
146. In a report by the Industry Commission on *Competitive Tendering and Contracting by Public Sector Agencies* (Report No.48, 24 January 1996, AGPS, Melbourne), the Industry Commission considered questions of accountability at pp.81-103 and stated 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.

147. The Industry Commission went on to state in its report:

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

148. I agree with those broad statements of principle.
149. Two of the documents which I have found to be *prima facie* exempt under s.45(1)(c) - attachment 18 (except for the cover sheet and page one) and attachment 27 - contain information about service standards and performance indicators. However, that information is indicative of what JJ Richards had the capability to offer, rather than being service standards and performance indicators that JJ Richards has contracted to deliver. The tender specifications indicate that the Council and the successful tenderer would negotiate to develop key performance indicators and benchmarks to measure the contractor's performance, and which would become agreed terms of the contract. Information about standards of service, and performance indicators, in the contract eventually concluded with the successful tenderer, and information about performance standards achieved by the

contractor, is the kind of information which attracts a strong public interest consideration favouring disclosure. However, I am not satisfied that there are sufficiently strong public interest considerations favouring disclosure of the information in attachments 18 and 27 as to warrant a finding that disclosure would, on balance, be in the public interest.

150. The documents generated by the Council in evaluating the various tender submissions are the kind of documents most relevant to furthering accountability for the Council's decision to award the contract to JJ Richards. I note that the applicant has been given access to such evaluation material in respect of itself and JJ Richards. I am not satisfied that disclosure of the matter in issue that relates to the other unsuccessful tenderers would further the public interest in accountability of the Council's tender processes to such an extent as to warrant a finding that disclosure would, on balance, be in the public interest.
151. I am not satisfied that the public interest in disclosure of commercially sensitive information (which I have found satisfies the requirements of both s.45(1)(c)(i) and (ii) of the FOI Act) in order to enhance the accountability of the Council regarding the decision it made to award the tender to JJ Richards, is sufficiently strong to warrant exposing JJ Richards (and two of the unsuccessful tenderers) to the reasonably apprehended adverse effects of disclosure. (I also note that the mapping system specification was provided to the Council after JJ Richards had been awarded the contract. Disclosure of this document would therefore not assist in enhancing the accountability of the Council for its decision on the award of the contract.)
152. I consider that the applicant either has already had, or will have, as the result of my decision, access to sufficient information to enable it to assess the propriety of the tender process conducted by the Council, and the Council's decision to select JJ Richards as the successful tenderer. I am not satisfied that disclosure of the commercially sensitive information which I have found satisfies the requirements of s.45(1)(c)(i) and (ii) of the FOI Act, would, on balance, be in the public interest.

Findings

153. I find that the matter relating to unsuccessful tenderers, the credit information contained in attachment 5 to JJ Richards' tender submission and in the ACR Contractor Report, the mapping system specification, and attachments 10, 18 (except for the cover sheet and page one), 27 and 28 (pages 1-17 only) to JJ Richards' tender submission, comprise exempt matter under s.45(1)(c) of the FOI Act.
154. I am not satisfied that the remainder of the matter in issue identified in paragraph 86 above, qualifies for exemption under s.45(1)(c) of the FOI Act.

Section 46(1) of the FOI Act – general observations

155. 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.*

156. Having regard to concessions made by the Council, the submissions of the participants, and the findings I have made above regarding the application of s.45(1)(c), it is necessary for me to consider the application of s.46(1) of the FOI Act only in respect of the following documents:

- attachments 12, 15, 17, 18 (part only), 19 (part only) and 20 to JJ Richards' tender submission; and
- the Multimedia Package.

I have discussed above, in detail, the nature and content of these documents.

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

Requirements for exemption

157. 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"*. 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 JJ Richards, as author of the relevant matter in issue, would have standing to enforce an obligation of confidence claimed to bind the Council not to disclose the relevant information.

158. 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. At the time JJ Richards provided its tender submission to the Council, their relationship was of a pre-contractual nature. Although the Information Commissioner referred at paragraph 48 of *Re "B"* to an example of a case where a court had managed to construct an implied contract around a disclosure of confidential information between parties who did not stand in a subsisting contractual relationship, I consider that 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. In any event, 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.

159. 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);
- (c) 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
- (d) disclosure would be likely to cause detriment to the confider of the confidential information (see *Re "B"* at pp.325-330, paragraphs 107-118).

160. 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.

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

Requirement (a)

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

Requirement (b)

162. As to requirement (b), I am not satisfied that all of matter in issue has a degree of secrecy sufficient for it to be the subject of an obligation of confidence. Some of it is generic in nature (e.g., the broad statements of intent outlined in the Industrial Relations policy) or is already in the public domain (such as some of the promotional material contained in the Multimedia Package). Other information would appear to be confidential in nature, such as details of JJ Richards' staff turnover rates.

163. JJ Richards submitted that attachment 17 is highly sensitive and confidential, and that it amounts to a major client list. It relied upon the decision of Gowans J in the *Ansell Rubber* case (referred to paragraph 34 above) in contending that "client lists have long been regarded as material that is inherently confidential".

164. I do not accept that the mere characterisation of a document as a "client list" is sufficient to base a finding of confidentiality. Client or customer lists may often contain commercially sensitive information, but each such list must be assessed according to its particular circumstances. In this case, with one exception, all of the customers listed are local governments. I have explained at paragraphs 59-62 above, my reasons for concluding that the information in attachment 17 lacks commercial sensitivity, and I am also satisfied that the information about the existence and value of contracts between local government authorities and JJ Richards at the time attachment 17 was created is not information of a confidential nature in the relevant industry.

165. Nor can I see anything of a confidential nature in identifying the number of services per week which JJ Richards provides to each particular shire, or the nature of such services. This information would appear to be governed simply by the number and type of dwellings, businesses, parks and recreational areas *et cetera* in the particular shire, which require waste removal services (such details would presumably have been provided to tenderers in the relevant tender specification, so as to enable them to properly formulate the basis of their offer), rather than comprising confidential information supplied by JJ Richards.

166. Accordingly, while it may be that some of the matter in issue is confidential in nature, I consider that much of it 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)

167. 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 *Smith Kline and French Laboratories (Australia) Limited v Secretary, Department of Community Services & Health* (1991) 28 FCR 291 at pp.302-3: see *Re "B"* at pp.314-316.

168. In addressing this requirement for exemption in their letter dated 9 January 2003, the solicitors for JJ Richards made the general submission that "*providing the information as part of a tender document, in our view, imposes an equitable obligation of confidence on the part of [the Council] not to use the information for any reason other than assessing the tender...*".

169. There is no evidence before me that the Council expressly agreed to receive tender submissions in confidence. Indeed, on the contrary, clause 16.0 of the Conditions of Tender (see paragraph 35 above) expressly recognised that matter contained within tender submissions might be disclosed under the FOI Act. As I noted in the course of discussing the application of s.45(1)(a), JJ Richards did not mark any of its tender submission as "confidential" (with the exception of its financial statements), despite the express caution contained in clause 16.0. I reiterate my view that it is reasonable to expect that a large and sophisticated business operation like JJ Richards, which regularly submits tenders for government contracts in several states, would have appreciated the significance of clause 16.0 of the Conditions of Tender, and the effect of the FOI Act on documents in the hands of government agencies, and taken the appropriate steps to safeguard any relevant information. While I accept that this failure does not, of itself, conclusively determine that no obligation of confidence exists, and that JJ Richards has submitted that its failure to endorse what it now asserts are sensitive parts of its tender submission was largely the result of oversight, I do consider that the wording of clause 16.0 effectively rebuts any suggestion that the mere inclusion of information in a tender submission is akin to expressly requesting confidential treatment in respect of that information.

170. It remains possible (*cf.* paragraph 90 of *Re "B"*) that JJ Richards could have communicated information to the Council that, on its face, was information of such commercial sensitivity to JJ Richards that equity would hold that the Council ought to have known that confidential treatment was required, despite the omission of JJ Richards to draw attention to that specific information and request confidential treatment. However, consistently with my findings above that the information in attachments 12, 18 (the cover sheet and page one only), 19 and 20 to JJ Richards' tender submission, and the Multimedia Package, did not have sufficient commercial sensitivity to qualify for exemption under s.45(1)(b) or s.45(1)(c) of the FOI Act, I am not satisfied that equity would hold that the Council ought to have known that confidential treatment of those documents was required. I am also satisfied that attachments 15 and 17 do not contain any information that might attract an equitable obligation of confidence on the basis indicated in the first sentence of this paragraph.

171. I should add that, even if JJ Richards had stipulated that it sought confidential treatment for any of the matter in issue, it would not necessarily follow that the Council thereby automatically became subject to an obligation of confidence in respect of the relevant information. The language of clause 16.0 of the Conditions of Tender makes it clear that the Council was not promising confidential treatment of such specified information, only that it would give special attention to whether or not confidential treatment was required. That is consistent with the legal obligations of a government agency. The High Court of Australia has held that public interest considerations (relating to the public's legitimate interest in obtaining information about the affairs of government) may affect the question of whether enforceable obligations of confidence should be imposed on government agencies, in respect of information relevant to the performance of their functions, that has purportedly been supplied in confidence by parties outside 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; *Re Cardwell Properties Pty Ltd & Williams v Department of the Premier, Economic and Trade Development* (1995) 2 QAR 671 at pp.693-698, paragraphs 51-60.
172. Government agencies are accountable to the public regarding the decisions they make to award tenders for the performance of work that is to be paid for from public funds. Agencies must be able to demonstrate that tender processes have been carried out fairly and equitably, and that the successful firms were the best candidates, in terms of efficiency, effectiveness and economy in the delivery of services to be paid for from public funds. Such considerations would have to be weighed against the adverse consequences for a tenderer of disclosure of commercially sensitive information, in deciding precisely what information could or could not be disclosed by the Council, consistent with conscientious conduct on its part.

Finding

173. I am not satisfied that any of the matter in issue identified at paragraph 156 above satisfies requirement (c) to found an action in equity for breach of confidence. I find that none of that matter qualifies for exemption under s.46(1)(a) of the FOI Act.

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

Requirements for exemption

174. Matter will be exempt under s.46(1)(b) 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 considerations favouring disclosure.

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

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

175. 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 162-166 above. 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.

176. 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).
177. 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, having regard to clause 16.0 of the Conditions of Tender, and the failure of JJ Richards to endorse any of the matter now under consideration as 'Confidential', I am not satisfied that there is any basis for a finding that the Council understood and accepted that JJ Richards sought confidential treatment of that matter. I am not satisfied, therefore, that the second requirement for exemption under s.46(1)(b) is established in respect of any of the matter in issue identified at paragraph 156 above.
178. It is not necessary for me to consider the third requirement for exemption under s.46(1)(b), given my finding in the preceding paragraph. However, I note that I discussed at paragraphs 93-100 above, in the context of the application of the second limb of s.45(1)(c)(ii) of the FOI Act, whether disclosure of JJ Richards' tender submission could reasonably be expected to prejudice the future supply of similar information to government from a substantial number of sources. I consider that those comments apply equally to the specific matter in issue which is claimed to be exempt under s.46(1)(b). Even if I were satisfied that that matter met the first two requirements for exemption under s.46(1)(b), I am not satisfied that its disclosure under the FOI Act some three years after the award of the relevant tender, could reasonably be expected to prejudice the future supply of similar information from a substantial number of waste management companies wishing to tender for the award of government contracts.
179. Given my findings above, it is not necessary for me to address the public interest balancing test which is incorporated in s.46(1)(b).

Finding

180. I find that none of the matter in issue identified at paragraph 156 above qualifies for exemption under s.46(1)(b) of the FOI Act.

Copyright

181. JJ Richards has claimed copyright in respect of the documents in issue which it authored, and has advised that if those documents are found not to comprise exempt matter under the FOI Act, it requires access to be given to the applicant by way of inspection only. In respect of the Multimedia Package, it has stated that it objects to the applicant being entitled to view the video cassette recording and CD-Rom, and requires that access be given only by way of a written transcription of the contents.
182. As has been explained to all participants during the course of this review, the Information Commissioner, and his delegates, have no jurisdiction under s.71, or Part 5 generally, of the FOI Act, to rule on issues of copyright, or disputes over the form of access to non-exempt matter. If the Council accepts that copyright exists in the relevant documents, then, under s.30(3)(c) of the FOI Act, it can decide to give access to the documents in a form that would not infringe copyright. That decision is for the Council to make. However, as regards the Multimedia Package, I note that I can see no grounds upon which the applicant could be refused access in the form of viewing its contents. I cannot see how viewing the Package's contents could be claimed to amount to an infringement of copyright. Section 30(1)(c) of the FOI Act makes specific reference to the viewing of "documents" from which sounds or images are capable of being reproduced. In addition, there is no basis in the FOI Act for JJ Richards to require the Council to undertake what would undoubtedly be an onerous and expensive task of preparing a written transcript of the contents of the Multimedia Package.

Conclusion

183. I decide to vary the decision under review (being the decision dated 14 November 2001 by Mr Noble on behalf of the Council) by making the following decisions with respect to the matter remaining in issue in this review (which is identified in the attached schedule):
- (a) the matter specified below is exempt matter under s.45(1)(c) of the FOI Act:
 - (i) the matter relating to unsuccessful tenderers (schedule, documents 1-14);
 - (ii) the credit information contained in attachment 5 to JJ Richards' tender submission (schedule, document 15) and in the ACR Contractor Report (schedule, document 35);
 - (iii) the mapping system specification (schedule, document 34);
 - (iv) attachment 10 to JJ Richards' tender submission (schedule, document 16);
 - (v) attachment 18 to JJ Richards' tender submission, except for the cover sheet and page one (schedule, document 20);
 - (vi) attachment 27 to JJ Richards' tender submission (schedule, document 23);
 - (vii) pages 1-17 of attachment 28 to JJ Richards' tender submission (schedule, document 24);
 - (b) the balance of the matter remaining in issue in this review does not qualify for exemption under the FOI Act, and the applicant is entitled to be given access to it under the FOI Act.
184. I have made this decision as a delegate of the Information Commissioner's powers, under s.90 of the FOI Act.

.....
 G J SORENSEN
DEPUTY INFORMATION COMMISSIONER