



Decision and Reasons for Decision

Application Number: 210656

Applicant: Mr I Hawkswood

Respondent: Department of Health

Decision Date: 30 March 2009

Catchwords: **FREEDOM OF INFORMATION – Section 45(1)(c) of the *Freedom of Information Act 1992 (Qld)* – whether information concerns the business, professional, commercial or financial affairs of the agency or another person – prejudice to the future supply of information to government – draft deed of agreement**

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REASONS FOR DECISION

Summary

1. Having considered the parties' submissions, relevant legislation and decisions, I am satisfied that the relevant deed qualifies for exemption from disclosure under section 45(1)(c) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**).

Background

2. By application dated 24 June 2008, the applicant requested access to (**FOI Application**):

*The latest version of a Heads of Agreement/Agreement or similar document for the Hancock Street Car Park between Q health and all or some of Mater Health Services, St Laurence's College, Somerville House.*¹

3. By letter dated 2 September 2008, the Department of Health (**Department**) refused the applicant access to the 38 page document responding to the FOI Application under section 45(1)(c) of the FOI Act (**Original Decision**).
4. By application dated 8 September 2008, the applicant applied for internal review of the Original Decision.
5. By letter dated 6 October 2008, the Department affirmed its Original Decision (**Internal Review Decision**).
6. By letter dated 4 November 2008, the applicant applied to this Office for external review of the Internal Review Decision.

Decision under review

7. The decision under review is the Internal Review Decision referred to in paragraph 5 above.

Steps taken in the external review process

8. By letters dated 6 November 2008, this Office advised the applicant and the Department that the External Review Application had been accepted.
9. By letter dated 24 November 2008, the Department provided this Office with a copy of the document relevant to this review.
10. By letters dated 14 January 2009, I informed Mater Health Services and St Laurence's College of the review and invited them to apply to participate in the review in accordance with section 78 of the FOI Act. I also asked these third parties whether they had any objection to release of the document in issue.
11. By letters dated 19 January 2009 and 27 January 2009, Mater Health Services and St Laurence's College responded to this Office's correspondence (**Third Party Submissions**).

¹ I note that the scope of the application was later reduced by the applicant's email to the Department of Health dated 21 August 2008.

12. By letter dated 9 February 2009, I provided the applicant with a preliminary view regarding the exemption provision claimed by the Department.
13. By letter dated 17 February 2009, the applicant advised that he did not agree with the preliminary view and requested a copy of the Third Party Submissions.
14. By letter dated 23 February 2009, I provided the applicant with a copy of the Third Party Submissions.
15. By email dated 2 March 2009, the applicant provided submissions in response to the preliminary view.
16. In making this decision, I have taken into account the following:
 - the FOI Application, Internal Review Application and External Review Application
 - the Original Decision and Internal Review Decision
 - the relevant deed
 - the Third Party Submissions
 - letters from the applicant to this Office dated 17 February 2009 and 2 March 2009
 - file notes of telephone conversations between this Office and the applicant²
 - relevant provisions of the FOI Act as referred to in this decision
 - decisions of this Office and case law from other Australian jurisdictions referred to in this decision.

Matter in issue

17. The matter in issue in this review comprises a 38 page draft Deed of Agreement concerning the construction of the Hancock Street Car Park as part of the Queensland Children's Hospital Project (**Deed**).

Findings

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

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

45 Matter relating to trade secrets, business affairs and research

(1) Matter is exempt matter if—

...

(c) its disclosure—

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

² On 20 February 2009 and 19 March 2009.

- (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.

19. The Information Commissioner has previously stated that section 45(1) of the FOI Act is the primary vehicle for reconciling the main objects of the FOI Act, that is, promoting open and accountable government administration and fostering informed public participation in the process of government, with the legitimate concerns for the protection from disclosure of commercially sensitive information.³
20. The purpose of the section 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:
- persons carrying on commercial activity who supply information to government or about whom government collects information; or
 - agencies which carry on commercial activities.
21. Provisions such as section 45(1)(c) of the FOI Act (and interstate equivalents) have also been described as reflecting:⁴

... the commercial reality that many State and local governments are increasingly engaged in commercial activities and is intended to ensure that the commercial and business affairs of government agencies - conducted by those agencies for and on behalf of the ... public - are not jeopardised by the disclosure of documents under the FOI Act unless there is a public interest that requires such disclosure.

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

22. To qualify for exemption under section 45(1)(c) of the FOI Act it must be established that:
- a) the Deed is information concerning the business, professional, commercial or financial affairs of a person, including a company or agency
 - b) disclosure of the Deed could reasonably be expected to have either of the following effects:
 - an adverse effect on the business, professional, commercial or financial affairs of the person which the information in issue concerns; or
 - prejudice to the future supply of such information to government.
23. If both a) and b) are established, the Deed is exempt unless its disclosure would, on balance, be in the public interest.

Application of section 45(1)(c) of the FOI Act to the Deed

24. I will consider each of the above requirements in turn.

³ *Cannon and Australian Quality Farms Limited* (1994) 1 QAR 491 (**Cannon**).

⁴ *Lee Phillips Hemsley and City of Subiaco and Foxington P/L, Re* 2008] WAICmr 46 at paragraph 45.

a) Information concerning the business, professional, commercial or financial affairs of an agency or another person

25. The Department submits that the information contained within the Deed concerns the business, professional, commercial and financial affairs of the Department, Mater Health Services and St Laurence's College.
26. Both Mater Health Services and St Laurence's College advise that they support the Department's position and submit that the information contained within the Deed also concerns their business, commercial and/or financial affairs.
27. Although Mater Health Services and St Laurence's College have not provided detailed submissions on this point, I note that for the purposes of section 45(1)(c) of the FOI Act, it is only necessary for the Department to demonstrate that its business, professional, commercial and/or financial affairs would be adversely affected by disclosure of the Deed.
28. The extent to which a document contains information concerning an agency's business, professional or commercial affairs has previously been explained in the following terms:

*"for a document to concern business, professional or commercial affairs, the document must contain material that goes beyond simply referring to those affairs. The document must contain something relating to business, professional or commercial affairs that is of a real and genuine substance."*⁵

*The words "business, professional, commercial or financial" are hardly apt to establish distinct and exclusive categories; there must in fact be substantial overlap between the kinds of affairs that would fall within the ambit of the ordinary meanings of the words "business", "commercial" and "financial", in particular. The common link is to activities carried on for the purpose of generating income or profits...*⁶

29. Similarly, business affairs are generally understood to concern the conduct of a business or the carrying on of a commercial operation.⁷
30. Having carefully considered the Deed, I am satisfied that the information contained within that document:
 - identifies the respective rights and obligations of the Department, Mater Health Services and St Laurence's College at a particular point in time as they relate to the construction of the Hancock Street car park
 - concerns the business, professional, commercial or financial affairs of the Department, in that it relates directly to a commercial transaction to which the Department is a party.

b) Adverse effect on business, professional, commercial or financial affairs

31. The Information Commissioner has previously stated that an 'adverse effect' will typically be established on the facts if the information comprised within the document/s in issue is capable of causing competitive harm to the relevant agency/person:⁸

⁵ *Fulham v Director-General, Department of Environment and Conservation* [2005] NSWADT 88 at paragraph 29 as approved in *McDermott v Junee Shire Council* [2009] NSWADT 29.

⁶ *Cannon and Australian Quality Egg Farms Ltd* [1994] QICmr 9 at paragraph 81.

⁷ *Young v Wicks* (1986) 79 ALR 448 at paragraph 453.

⁸ *Cannon* at paragraph 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. ... 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.

32. In reliance on the first limb of section 45(1)(c)(ii) of the FOI Act,⁹ the Department submits that disclosure of the Deed could reasonably be expected to have an adverse effect on its business, professional, commercial and financial affairs¹⁰ as:

- construction of the Hancock Street car park is critical to the uninterrupted operation of the Mater Hospital and the construction of the new Queensland Children's Hospital
- confidential negotiations between the Department, Mater Health Services and St Laurence's College regarding the construction works of the Hancock Street car park were not finalised at the time the Deed was created¹¹
- disclosure of the Deed may enable a third party to seek to influence ongoing negotiations
- any interference in present negotiations would affect the commercial and financial affairs of all negotiating parties by causing unnecessary delays to the construction of the Queensland Children's Hospital and may result in additional costs to the Department
- release of the terms and conditions in the Deed may enable other parties (with whom the Department is currently negotiating compensation issues) to seek similar commercial arrangements with the Department.

33. In relation to any adverse effect which may be experienced by the Department, Mater Health Services and St Laurence's College, the applicant submits:

- none of the parties have car parking operations as their core business
- the adverse effect on the financial affairs of those parties would be less than 0.00001% of the Department's budget, less than 0.01% of the Mater Health budget and less than 1% of St Laurence's budget
- because Mater Health Services is the only significant land holder who has the capacity to control car parking availability and fees in the area, there is no

⁹ The Department does not argue that disclosure of the Deed could reasonably be expected to prejudice the future supply of similar information to government. Accordingly, it is not necessary for me to consider the second limb of section 45(1)(c)(ii) of the FOI Act.

¹⁰ Mater Health Services and St Laurence's College support the Department's position in respect of this point.

¹¹ This situation can be contrasted to a situation where a project has been finalised or is at an advanced stage. See *Johnson and Queensland Transport; Department of Public Works (Third Party)* [2004] QICmr 1 where the Information Commissioner considered that:

- the lapse of time since the report was written and the consultation processes were undertaken
- the advanced stage the project had reached by the time the matter came to external review, meant that the adverse effect of disclosure claimed by the agency was too remote and speculative to warrant a finding that on balance disclosure would be contrary to the public interest.

information that could be released that will have an adverse effect on it being the monopoly supplier and controller of car parking in the immediate vicinity.¹²

34. In respect of the applicant's first submission, I do not consider that whether car parking operations fall within the Department's core business is determinative in considering whether its business, professional, commercial and/or financial affairs would be adversely affected.
35. In respect of the applicant's second submission that only a small percentage of the Department's budget would be adversely affected, I note that the Queensland Children's Hospital project represents an investment of approximately \$1.1 billion¹³ by the Department.
36. In respect of the applicant's third submission, I confirm that in the circumstances, it is unnecessary to consider whether disclosure could reasonably be expected to adversely affect the business, professional, commercial or financial affairs of Mater Health Services.
37. Having carefully considered the particular circumstances of this case, I am satisfied that the Deed:
 - is a working document which has been, and will continue to be amended to reflect ongoing negotiations between the parties until it is finalised
 - does not reflect the final negotiated position of the Department with Mater Health Services and St Laurence's College
 - may, when compared with the finalised agreement, disclose the respective negotiating positions of the Department with Mater Health Services and St Laurence's College to its competitors and could prejudice the Department's ability to negotiate favourably with other entities in the future.
38. Accordingly, on the information available to me, I consider that disclosure of the Deed could reasonably be expected to adversely effect the business, professional, commercial and/or financial affairs of the Department.

Public interest balancing test

39. As I have found that the requirements of section 45(1)(c)(i) and (ii) of the FOI Act are met, I must now consider whether there are public interest considerations favouring disclosure of the Deed which, on balance, outweigh the public interest in protecting the business, professional, commercial or financial affairs of the Department.
40. In terms of public interest arguments favouring disclosure of the Deed, the applicant submits that:
 - he has a direct interest in the Deed because he is a nearby resident who will be directly affected by the construction and operation of the Hancock Street car park
 - to date, substantial detrimental effects have been experienced by the residents of Stephens Road
 - at a time when funding is tighter than it has been in previous years, any public spending must be very carefully targeted to benefit the greatest number of jobs for state workers

¹² I confirm that in the circumstances it is unnecessary to consider any adverse effect attributable to the business, professional, commercial or financial affairs of Mater Health Services.

¹³ As reported on the following website: <http://www.health.qld.gov.au/childrenshospital/>.

- given the significant amount of public monies being expended by the government on this project, there is a public interest in members of the public being advised of the real cost of the car park and the Queensland Children's Hospital.

41. In consideration of the applicant's submissions, I will consider the following public interest considerations favouring disclosure:

- the applicant's justifiable need to know information
- the accountability of government.

Justifiable need to know

42. This public interest consideration recognises that in certain cases, information contained within a document may affect or concern an applicant to such a degree that it gives rise to a public interest in the applicant having a justifiable need to know that information, which is more compelling than for other members of the public.¹⁴

43. The Information Commissioner has previously indicated that this public interest will not arise if the applicant merely has a personal interest in having access to particular information. Rather, the information must either concern the personal affairs of the applicant or relate to a situation where the applicant's involvement in, and concern with, the particular information is of such a nature or degree as to give rise to a justifiable need to know.¹⁵

44. While I acknowledge that the applicant's interest in the information may be greater than for other members of the public, I note that:

- the Deed does not concern the applicant's personal affairs
- the Department has gone to considerable effort to ensure that interested members of the public are kept informed about the construction of the Hancock Street car park and Queensland Children's Hospital.¹⁶

45. On the information available to me, I find that this public interest consideration should be afforded little or no weight in the circumstances.

Accountability of government

46. Facilitating the accountability of government is a public interest consideration recognised by section 4 of the FOI Act. Enabling accountability of government also promotes informed public participation in the processes of government, recognised as one of the FOI Act's major objectives.

47. The question in this case is whether disclosure of the Deed would allow members of the public a better understanding of action taken by the Department and enable them to better scrutinise and assess the Department's performance.¹⁷

¹⁴ *Pemberton and The University of Queensland* (1994) 2 QAR 293 (**Pemberton**) at paragraphs 164-193

¹⁵ *Pemberton* at paragraphs 188 – 200.

¹⁶ See the website specifically concerned with matters relating to the construction of the new Queensland Children's Hospital - see <http://www.health.qld.gov.au/childrenshospital/>.

¹⁷ *Burke and Department of Families, Youth and Community Care* (1997) 4 QAR 205

48. Accordingly, I must consider whether disclosure of the Deed would materially enhance this public interest consideration to an extent that warrants it being accorded significant weight in favour of disclosure.
49. Although I acknowledge the significant public interest in enhancing the accountability of government agencies in respect of the performance of their functions (including their management of major projects), I am also mindful of the Information Commissioner's statement regarding the issue of government accountability in the context of commercially sensitive information concerning other entities:¹⁸

... the legitimate public interest in commercial organisations being able to protect commercially sensitive information must be taken into account in the balancing process. Often, sufficient information to serve the public interest in scrutiny and accountability of government can be disclosed while accommodating legitimate interests in the protection of commercially sensitive information.

50. In consideration of the above and having regard to the following factors:
- the amount of information about this project which is already publicly available
 - the fact that the agreement comprising the Deed does not reflect the final negotiated position of the parties,

I consider that disclosure of the Deed would not materially enhance this public interest consideration and on this basis, it should be afforded little or no weight in the circumstances.

Summary - public interest considerations

51. In summary, I am satisfied that:
- the public interest considerations favouring disclosure in this matter are insufficient to outweigh the public interest in protecting the business, professional, commercial and/or financial affairs of the Department
 - the Deed qualifies for exemption from disclosure under section 45(1)(c) of the FOI Act.

DECISION

52. I affirm the decision under review by finding that the Deed qualifies for exemption from disclosure under section 45(1)(c) of the FOI Act.
53. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

Assistant Commissioner Henry

Date: 30 March 2009

¹⁸ *Cardwell Properties Pty Ltd; Williams and Department of the Premier, Economic and Trade Development; North Queensland Conservation Council Inc (Third Party)* (1995) 2 QAR 671 at paragraph 31.