OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 99007
Application S 94/96

Participants:

KENMATT PROJECTS PTY LTD
Applicant

BUILDING SERVICES AUTHORITY
Respondent

BRUCE GRAHAM
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - 'reverse FOI' application - matter in issue comprising dispute files held by the Building Services Authority concerning applicant builder and consumers - whether disclosure could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the builder - 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 Act 1992 Qld s.4, s.5, s.43(1), s.44(1), s.45(1)(c), s.45(1)(c)(i), s.45(1)(c)(ii), s.78
Freedom of Information Act 1982 Cth
Queensland Building Services Authority Act 1991 Qld s.3, Part 6

Alpert and Brisbane City Council, Re (1995) 2 QAR 618
"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Cairns Port Authority and Department of Lands, Re (1994) 1 QAR 663
Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491
Morris and Queensland Treasury, Re (1995) 3 QAR 1
Stewart and Department of Transport, Re (1993) 1 QAR 227
Willsford and Brisbane City Council, Re (1996) 3 QAR 368

DECISION

I vary the decision under review (being the decision of Mr M Miller on behalf of the respondent dated 7 May 1996), by finding that -

(a) the names of, and other identifying matter in respect of, the complainants in the respondent's dispute file 3-319-96 comprise exempt matter under s.44(1) of the *Freedom of Information Act 1992* Qld;

(b) the balance of the matter in issue in the dispute files identified at paragraph 9 of my accompanying reasons for decision is not exempt matter under the *Freedom of Information Act 1992* Qld.

Date of decision: 27 September 1999

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INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. This is a 'reverse FOI' application by Kenmatt Projects Pty Ltd (Kenmatt), a building company, which seeks review of a decision made by the Building Services Authority (the Authority) under the *Freedom of Information Act 1992* Qld (the FOI Act) to disclose to Mr Bruce Graham, a solicitor, a number of files relating to disputes which have arisen involving Kenmatt's building work. Kenmatt contends that the dispute files are exempt matter under s.45(1)(c) of the FOI Act.

2. By a form dated 14 February 1996, Mr Graham applied to the Authority for access, under the FOI Act, to dispute files involving Kenmatt. It became apparent early in this external review that, at the time of making his access application, Mr Graham was acting for a client who was engaged in proceedings against Kenmatt before the Queensland Building Tribunal. Although those proceedings have been resolved, Mr Graham continues to seek access to the dispute files on the basis that he has other clients who may wish to take action against Kenmatt, and the dispute files may be relevant to any such action.

3. In accordance with its consultation obligations under s.51 of the FOI Act, the Authority consulted with a number of persons, including Kenmatt. By letter dated 28 February 1996, Kenmatt objected to the disclosure to Mr Graham of the dispute files, on the basis that the files were exempt under s.45(1)(c) of the FOI Act.

4. By letter dated 1 April 1996, Ms R Wilkes, the Authority's authorised decision-maker, communicated her decision to grant access to most of the documents on the dispute files which fell within the terms of Mr Graham's access application. Access was refused to some documents, and parts of documents, on the basis that they comprised exempt matter under s.43(1) or s.44(1) of the FOI Act. Mr Graham has not challenged the Authority's decision to refuse him access to that matter, and, accordingly, that matter is not in issue in this review.

5. Kenmatt applied, through its solicitor, Mr B J Mulcahy, for internal review of the decision to disclose the dispute files to Mr Graham. The internal review was conducted by Mr M Miller, the Authority's General Manager, who, on 7 May 1996, affirmed Ms Wilkes' initial decision. By letters dated 21 May 1996, Ms Wilkes informed both Kenmatt and Mr Graham that the Authority had located a further dispute file which came within the terms of the relevant FOI access application, and that a decision had been made to grant access to that file, with the exception of certain specified matter. The matter found to be exempt on that additional file is not in issue in this review (as Mr Graham has not challenged the Authority's decision in that regard), but I will deal with the balance of the file.

6. By letter dated 7 June 1996, Mr Mulcahy applied to me (on behalf of Kenmatt) for review, under Part 5 of the FOI Act, of the Authority's decision to disclose the dispute files to Mr Graham.

External review process

7. Copies of the dispute files, including the additional dispute file, were forwarded by the Authority for my examination. Each dispute file contains material in the nature of correspondence between the respective complainants and the Authority, and between Kenmatt and the Authority, relating to complaints made by the respective complainants; documentation of the Authority's investigations and actions, including Direction notices and inspection reports; and associated drawings, plans, specifications and diagrams relating to house construction.

8. By letter dated 27 November 1996, Mr Graham agreed to narrow the scope of his access application so as to seek only those dispute files involving Kenmatt which related to complaints of the following types:

    1. *Arising from discrepancies between a home built for the consumer and the display home on which it was modelled;*

    2. *Instances where products in the house "as built" differed from products which were stipulated in the contract;*

    3. *Instances where the house "as built" differed from the relevant plans and specifications.*

9. This has reduced to five the number of dispute files in issue. Since the complainants in one dispute file have objected to the disclosure of their names and identifying information, I will refer to the dispute files in issue by number only. Three of the dispute files contain some documents which are not in issue in this review, because Mr Graham has not challenged the Authority's decision that the documents are exempt from disclosure under s.43(1) or s.44(1)

of the FOI Act. The matter in issue therefore consists of the documents contained on the following dispute files held by the Authority, except for the documents noted below:

- file numbered 3-319-96 (except for document 64)
- file numbered 3-3060-95 (except for documents 14, 24, 65, 125-130, 134, 149-152 and the bottom of document 148)
- file numbered 3-1999-95
- file numbered 3-829-94
- file numbered 3-2663-93 (except for documents 203, 185-199, 182-183, 179-180, 171-174, 164-165, 162, 154-157, 151-152, 146-147, 142-143, 135-136).

10. Attempts were made to consult the respective complainants in each of the five files remaining in issue. Of the three responses received, two complainants had no objection to the disclosure of any of the matter in issue on the files concerning them, and the other had no objection to disclosure of the relevant file, on condition that names and other identifying information were deleted. Although invited to do so, none of the complainants has applied to participate in this external review, in accordance with s.78 of the FOI Act.

11. By letter dated 28 January 1997, I wrote to Mr Mulcahy, informing him of my preliminary view that the dispute files remaining in issue did not qualify for exemption under s.45(1)(c) of the FOI Act. In the event that Kenmatt did not accept my preliminary view, I invited Mr Mulcahy to provide me with written submissions in support of his client's case. Mr Mulcahy responded with a submission on behalf of Kenmatt dated 20 March 1997. Because it raised specific allegations about Mr Graham's intended use of the matter in issue, the submission was put to Mr Graham for response. Mr Graham replied in a submission dated 12 May 1997.

12. By letters dated 2 June 1997, the Assistant Information Commissioner provided Mr Mulcahy and Mr Graham with copies of a number of my decisions concerning the application of the public interest balancing test in s.45(1)(c), and invited their submissions addressing the application of the public interest balancing test to the matter in issue. By letter dated 6 June 1997, an extensive submission was provided by Mr Mulcahy, and in turn forwarded to Mr Graham for reply. Mr Graham subsequently informed this Office that he did not wish to make any further submissions.

13. Members of my staff then met with officers of the Authority for the purpose of acquiring some additional information concerning the Authority's practices regarding disclosure to the public of information about builders, and documents relating to building disputes. I was subsequently provided with a statement signed by Mr Ray Potts, the Authority's Assistant General Manager (Corporate Support & Coordination), which was then forwarded to Mr Mulcahy, together with a letter making general observations concerning the statement, in order to provide Mr Mulcahy with an opportunity to respond. However, no response was received from Mr Mulcahy.

14. I have taken into account the following material in making my decision:

- correspondence between the participants relevant to the making of the initial and internal review decisions of the Authority
- submission of Mr Mulcahy dated 20 March 1997
- submission of Mr Graham dated 12 May 1997

- submission of Mr Mulcahy dated 6 June 1997
- statement of Mr Ray Potts dated 20 March 1998
- contents of the matter in issue.

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

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

> ***45.(1)*** *Matter is exempt matter if—*
>
> *...*
>
> *(c) its disclosure—*
>
> *(i) would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and*
>
> *(ii) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;*
>
> *unless its disclosure would, on balance, be in the public interest.*

16. The correct approach to the interpretation and application of s.45(1)(c) is explained in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at pp.516-523 (paragraphs 66-88). 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.

17. In his statement, Mr Potts explained how disputes are handled by the Authority:

> *3. The* [Authority] *frequently receives complaints from homeowners about aspects of building work carried out in Queensland. A dispute file is opened for each complaint made to the* [Authority], *on which are placed the documents received or created in the course of the dispute. Initial efforts of the* [Authority] *are aimed at achieving an informal resolution of any dispute by discussions between the builder and the complainant. At the conclusion of these discussions an officer of the* [Authority] *may give a builder an*

> *indication that particular work should be remedied by him within a certain time, failing which the* [Authority] *may issue a formal Direction to the builder to remedy the work in accordance with Part 6 of the* Queensland Building Services Authority Act 1991.
>
> *4. If, following a formal Direction from the [Authority], the builder fails to remedy the work, the work may be remedied under Parts 5 and 6 of the* Queensland Building Services Authority Act 1991, *and disciplinary action taken against the builder before the Queensland Building Tribunal under Part 8 of the* Queensland Building Services Authority Act 1991.

The dispute files form a record of this process in relation to each complaint.

Business, commercial or financial affairs

18. I am satisfied, from my examination of the dispute files that most, if not all, of the documents on those files concern the business affairs of Kenmatt. The matter on those files relates to disputes which have arisen in relation to building work carried out by Kenmatt.

Prejudicial effect under s.45(1)(c)(ii)

19. In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.339-341 (paragraphs 154-160), I analysed the meaning of the phrase "*could reasonably be expected to*", by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the *Freedom of Information Act 1982* Cth. In particular, I said in *Re "B"* (at pp.340-341, paragraph 160):

> *The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e., expectations for the occurrence of which real and substantial grounds exist.*

The ordinary meaning of the word "expect" which is appropriate to its context in the phrase "could reasonably be expected to" accords with these dictionary meanings: "to regard as probable or likely" (Collins English Dictionary, Third Aust. ed); "regard as likely to happen; anticipate the occurrence ... of" (Macquarie Dictionary, 2nd ed); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).

<u>Adverse effect on business, commercial or financial affairs</u>

20. 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*, I stated:

> *84. In most instances, the question of whether disclosure of information could reasonably be expected to have an adverse effect will turn on whether the information is capable of causing competitive harm to the relevant agency, corporation or person. Since the effects of disclosure*

> *of information under the FOI Act are, with few exceptions, to be evaluated as if disclosure were being made to any person, it is convenient to adopt the yardstick of evaluating the effects of disclosure to a competitor of the agency which, or person whom, the information in issue concerns. (This yardstick is also appropriate when considering the application of s.45(1)(b).) A relevant factor in this regard would be whether the agency or other person enjoys a monopoly position for the supply of particular goods or services in the relevant market (in which case it may be difficult to show that an adverse effect on the relevant business, commercial or financial affairs could reasonably be expected), or whether it operates in a commercially competitive environment in the relevant market.*

21. Through its solicitor, Mr Mulcahy, Kenmatt has provided me with two submissions setting out its claims of expected adverse effects on its business affairs, if the matter in issue were disclosed under the FOI Act. In a submission dated 20 March 1997, Mr Mulcahy argued as follows:

> *Graham & Associates would be likely to approach the complainant named in the files and advise them they have legal claims against our client;*
>
> *If, rather than making the FOI application, Graham & Associates had obtained copies of the files through the subpoena process of the …Tribunal (which they could have in the then current action of their client against our client in that Tribunal), Graham & Associates would have been subject to the legal constraint that the evidence gathered by the subpoena could not then be used for a collateral purpose, in particular to approach other persons with a view to taking legal action.*
>
> …
>
> *Litigation claims arising out of the release of the information to Graham & Associates would be severely detrimental to our client's business, commercial and financial affairs due to the time and money our client would have to spend in defending the claims. This would be after the Building Services Authority has already dealt with the claims and the complainants have not proceeded further to the Queensland Building Tribunal.*
>
> *In short, release of the information is likely to have an adverse effect on our client's business…because Graham & Associates are highly likely to use the information to encourage new litigation by the several complainants. In fact, Graham & Associates have little other use of the information now as judgment was handed down by the Queensland Building Tribunal in their client's matter on 14 March 1997 (QBT Application No. C657-95 -Kenmatt Projects Pty Ltd -ats- Lehmann)… .*

22. In his submission in reply, dated 12 May 1997, Mr Graham stated:

> *As Mr Mulcahy gleefully points out, the matter in the QBT for which this application was made has now been disposed of … and the time for appeal has now expired with neither party lodging an appeal. Mulcahy is therefore*

correct in saying that the information will not benefit Mrs Lehmann. We emphatically deny that we will use the information to canvass business.

Mr Mulcahy is however aware that two of the witnesses giving evidence on behalf of Mrs Lehmann intimated to the Tribunal that they were still thinking about whether they would take action against Kenmatt Projects Pty Ltd or not. These people are already clients of ours and if they proceed will be making a similar claim which includes the fact that most, if not all of the "mistakes" (of which there were many) made by Kenmatt Projects favoured the builder. Under the law of averages, one would expect some mistakes to favour the builder and some to favour the owner. This information which we seek will help to establish that these "mistakes" are not in fact mistakes but represent a deliberate policy of shortcuts to save the builder money. If that is the case, the exposure of such behaviour is definitely in the public interest.

23. In *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663, at pp.713-719, paragraphs 102-130, I discussed the issue of whether the commencement of litigation is an "adverse effect" contemplated by s.45(1)(c). At pp.713-714, paragraphs 103-104, I said:

103. The CPA expects litigation against it to follow as a consequence of disclosure of the documents in issue. I have no doubt that most members of the community would accept that to be sued in respect of one's business, professional, commercial or financial affairs is "to have an adverse effect on those affairs" (within the terms of s.45(1)(c)(ii)) having regard to the expense, inconvenience and diversion of time and resources from more productive activities that is involved in dealing with litigation. (Of course, for some organisations, such as insurance companies, being subject to legal suits is such a regular and anticipated incident of the ordinary conduct of their business that it could scarcely qualify as an adverse effect.) There may be a legitimate issue, however, as to whether it is repugnant to public policy that a risk of litigation should be accepted as an adverse effect which is deserving of recognition for the purposes of s.45(1)(c)(ii) of the FOI Act. Litigation in the system of courts comprising the judicial branch of government is the pre-eminent means sanctioned by liberal democratic societies for the peaceful settlement of disputes concerning the assertion of legal rights, and it promotes and reinforces respect for the rule of law, which is one of the cornerstones of our tolerant, liberal democratic traditions. I sympathise with the comment by Cairns Shelfco, in the penultimate paragraph of the extract from its submission set out at paragraph 94 above, that there is something grotesque about the argument that Parliament could have intended an exemption provision to operate so as to prevent disclosure of information which would assist a person to air a grievance (or to seek to vindicate an asserted legal right) in the courts. ...

104. While I have reservations about whether an adverse effect of the kind claimed by the CPA should be recognised on public policy grounds, I think that is an issue which should properly be determined by a court. I am prepared to approach the application of s.45(1)(c) of the FOI Act on the basis that, as a matter of ordinary language, being sued in the courts in respect of their business, professional, commercial or financial affairs will, for most persons and organisations, ordinarily constitute an adverse effect on those affairs. In

> *respect of an adverse effect of this kind, however, there will generally be countervailing public interest considerations favouring disclosure, of the kind I have referred to in the preceding paragraph (i.e. that access to information may assist persons to determine whether they have legal rights which may be asserted, and perhaps vindicated, through the courts) which are to be taken into account in the application of the public interest balancing test incorporated within s.45(1)(c).*

24. Therefore, I will consider whether disclosure of any of the documents in issue could reasonably be expected to cause legal action to be brought against Kenmatt. Kenmatt also argued that the information contained in the files could be misused and misrepresented by the applicant for access so as to deter potential customers and damage its reputation. I will consider both arguments against the background of information already made available to the public by the Authority.

25. The Authority has provided me with material, supported by Mr Potts' statement, which indicates that there is already a considerable amount of information relating to builders made available to the public. On payment of a fee, any person can obtain a Licence Search printout, from the Authority's database, in relation to any licensed builder. The Licence Search printout sets out the class or classes of licence held by the builder, company details (if relevant), the total number of Directions to rectify or complete work which have been issued to the builder since 1 July 1992, and the number of jobs and value of residential construction work that that builder has undertaken for each year since July 1992. In the section dealing with the issue of Directions, the Licence Search printout advises the reader to consider the information recorded, in context, so that the number of Directions issued should be seen in terms of a percentage of the number and value of jobs that the builder has engaged in since July 1992. The Licence Search printout does not list the number of complaints made against a builder (as opposed to the number of Directions issued), nor does it give details of complaints (for which resort to the details recorded in the dispute files would be necessary). The Licence Search printout also contains a statement that to "*ascertain the specifics of the directions issued you may consider applying to the* [Authority] *for access to specific documents under the* [FOI Act] ... ." (However, I note that Mr Potts has informed me of the Authority's policy that its dispute files can be made available to the builder and the complainant involved in any particular dispute, as a matter of administrative access.)

26. The Authority's most recent Annual Report (1997/98) records that, during the financial years 1996/97 and 1997/98, respectively:

    (a) the numbers of complaints received were 4,421 and 4,514 (at p.32);

    (b) the incidence of defective work in the building industry was 5.7% and 7.6% (at p.17); and

    (c) the numbers of Directions issued were 1,584 and 1,356.

    In that context, disclosure (through use of the FOI Act) of the mere fact that a builder had a number of complaints against it could not reasonably be expected to turn business away from that builder, except perhaps in the case of a disproportionately high number of complaints, or of formal Directions to remedy defective building work. (In any event, the

applicant for access in this case, Mr Graham, has already been made aware, by the Authority's decisions in respect of his FOI access application, of the number of dispute files held by the Authority concerning Kenmatt.)

27. Similarly, in the context referred to in the preceding paragraphs, I do not consider that an adverse effect on a builder's business or financial affairs could reasonably be expected to follow as a consequence of disclosure of the contents of those dispute files which show that disputes have arisen and been resolved by mutual agreement, or resolved in favour of the builder following Authority intervention. It may be that disclosure of details of cases in which a builder has been found to be at fault, but has refused to co-operate with the Authority, could inhibit potential customers from dealing with that builder. In each case, the potential for an adverse effect on the reputation and business affairs of the builder may vary, depending on the nature of the dispute as revealed by the dispute file. Those judgments must be made paying proper regard to the fact that complaints are common, and many builders have Directions issued against them.

28. There are many documents in the dispute files which are merely of an administrative nature, and do not disclose anything concerning Kenmatt other than the fact that a complaint was made. However, there is some matter in the files in issue in respect of which I am prepared to accept that disclosure could reasonably be expected to cause concern to potential customers if it were available for disclosure; for example, documents such as document 98 on file 3-319-96 and document 200 on file 3-1999-95 (which relate to alleged failures to attend to rectification work in the time prescribed in Directions issued by the Authority). In order not to unduly lengthen my decision, and in light of the finding I have ultimately come to on the application of the public interest balancing test in s.45(1)(c), I will not attempt to identify those documents (or segments of matter) in issue the disclosure of which could reasonably be expected to have an adverse effect on the business affairs of Kenmatt. However, I should point out that, given the nature of the particular files, and the fact that the number of Directions issued by the Authority to particular builders is information that is available to the public through the Authority, I do not consider that the apprehended adverse effect on Kenmatt's business affairs, through disclosure under the FOI Act, is a particularly strong one.

29. As to the argument that disclosure could reasonably be expected to lead to court action against Kenmatt, I have significant doubts. It is one thing to say that documents might be of some use in any action commenced by a client of Mr Graham. It is quite another to say that disclosure would be the cause of court action. Any decision to commence proceedings should logically be based on an assessment of the liability of Kenmatt in the particular circumstances of the case. Information concerning investigations by the Authority in other cases would be of peripheral evidentiary value, if indeed it could be put into evidence at all. Perhaps at best it could lead to further investigations which might (or might not) produce useful evidence. I consider that the suggested link between disclosure of the matter in issue and commencement of proceedings against Kenmatt is tenuous and speculative, and does not afford a sufficient basis for a finding that disclosure could reasonably be expected to have an adverse effect on the business affairs of Kenmatt.

Prejudicial effect on future supply of information

30. In his submission dated 6 June 1997, Mr Mulcahy stated:

> *... if dealings were subject to disclosure then builders when confronted with an inspector of the Queensland Building Services Authority dealing with the consumer complaint would have to consider that any admissions or concessions made to that inspector could one day fall into the public domain and as a result builders would have to strongly consider denying liability or, within legal parameters, avoiding co-operation; ...*

31. In *Re "B"* at p.341 (paragraph 161), I said:

> *161 Where persons are under an obligation to continue to supply such confidential 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 confider whose confidential 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]

32. I do not consider that disclosure of the dispute files in issue could reasonably be expected to deter a substantial number of builders from responding to complaints lodged with the Authority. Each dispute file is already available to the person who would have the most to gain from disclosure of admissions or concessions (i.e., the relevant complainant) by way of administrative access (see paragraph 6 of Mr Potts' statement). In addition, there is always the possibility that any admission or concession might enter the public domain through a hearing in the Queensland Building Tribunal, if the dispute cannot be resolved earlier.

33. It is in the interests of builders to supply explanations to Authority inspectors in order to justify their position and resolve complaints, without proceeding to the stage of a Direction (and potential disciplinary proceedings) or to court proceedings. If builders did not supply information, the dispute files would still exist: they would merely contain the uncontradicted complaints of dissatisfied clients. I consider that most builders would perceive the benefits of disclosure of a balanced file, which shows a builder willing to co-operate and resolve a dispute, as opposed to a bare file of complaints.

34. I therefore do not consider that disclosure of the files in issue could reasonably be expected to prejudice the future supply of like information to government.

Public interest balancing test

35. I explained the nature, and application, of the public interest balancing test incorporated in s.45(1)(c) of the FOI Act, in *Re Cannon* at pp.522-523 (paragraph 87).

Considerations favouring non-disclosure

36. In his submission opposing disclosure, Mr Mulcahy addressed the public interest test, asserting that there were no considerations favouring disclosure to Mr Graham. At point 8 of his submission, Mr Mulcahy said:

> *8. We also submit there are a number of other considerations the Information Commissioner must have regard to in the public interest balancing exercise being:*
>
> *(a) that it is an object of the Queensland Building Services Authority Act which establishes the statutory body which holds the contentious information to provide for the regulation of the building industry to ensure the maintenance of proper standards in the industry and to achieve a reasonable balance between the interests of building contractors and consumers and to provide remedies for defective building work and to provide for the efficient resolution of building disputes and to provide support, education and advice for those who undertake building work and consumers (see Section 3 Queensland Building Services Authority Act);*
>
> *(b) the Queensland Building Services Authority receives complaints by consumers relating to building work being carried out by builders and the relevant documents relate to that mechanism;*
>
> *(c) on receiving complaints from consumers the Queensland Building Services Authority endeavours to obtain an early resolution of the matter through consultation with the consumer and the builder;*
>
> *(d) the public interest would not be served if builders in* [sic] *the belief that their dealings with the Queensland Building Services Authority would be disclosed to the public at large;*
>
> *(e) if dealings were subject to disclosure then builders when confronted with an inspector of the Queensland Building Services Authority dealing with the consumer complaint would have to consider that any admissions or concessions made to that inspector could one day fall into the public domain and as a result builders would have to strongly consider denying liability or, within legal parameters, avoiding co-operation;*
>
> *(f) this could have a consequence of defeating the very purposes of the Act to provide for speedy resolution of conflict between consumers and builders in a fair manner, and enabling the Authority to carry out its functions.*

> *For these above reasons the balance must go against the release of this information to either the real Applicant or to the public at large. Similar considerations were considered by the Information Commissioner in* Re Pemberton and the University of Queensland. *Whilst in that case the Information Commissioner ultimately found on balance that the public interest favoured disclosure in this case the facts are slightly different in that a party such as our client dealing with a statutory authority being the Queensland Building Tribunal dealing with complaints relating to trade and business must in the public interest be accorded an expectation that these matters will remain confidential between our client, the Tribunal and any relevant consumer who brought such a complaint and will be only disclosed in a wider context under the auspices of a Court or a Tribunal with the jurisdictional safeguards which have previously been pointed out.*

37. Mr Mulcahy has submitted that knowledge that dealings between builders and the Authority may be disclosed could mean that builders would be less willing to make admissions or concessions and thereby cooperate in an early resolution of a dispute with a consumer. I have already rejected that argument in the context of prejudice to the future supply of information (see paragraphs 32-34 above). Any concessions, and probably most admissions, made by a builder are no doubt quickly communicated to the complainant involved in the dispute, with no restriction on the further dissemination by the complainant of information obtained through the dispute process (apart from any restrictions imposed by the general law). Both builders and complainants have administrative access to their dispute files (see paragraph 6 of Mr Pott's statement). I consider that the benefits to builders of co-operation with the Authority in informal resolution of disputes tell against this argument.

38. I have, however, indicated at paragraph 28 above, that I am prepared to proceed on the basis that disclosure of some of the matter in issue could reasonably be expected to have some adverse effect on the business affairs of Kenmatt, by raising concerns among potential customers of Kenmatt. This raises a public interest consideration favouring non-disclosure of that matter in issue. However, as I noted at paragraph 28 above, I do not consider that the apprehended adverse effect is a particularly strong one.

Information to assist in pursuit of a remedy

39. Mr Graham submitted that he has clients who may have an action against Kenmatt in relation to building work performed by Kenmatt. In this regard, I drew to the attention of the participants my decision in *Re Willsford and Brisbane City Council* (1996) 3 QAR 368, in which, at paragraphs 16-18, I said:

> *16. I consider that, in an appropriate case, there may be a public interest in a person who has suffered, or may have suffered, an actionable wrong, being permitted to obtain access to information which would assist the person to pursue any remedy which the law affords in those circumstances (*cf. Re Cairns Port Authority and Department of Lands (1994) *1 QAR 663 at pp.713-714, paragraphs 103-104; p.717, paragraph 120; and p.723, paragraph 142). The public interest necessarily comprehends an element of justice to the individual: see* Re Pemberton and The University of Queensland *(Information Commissioner Qld, Decision No. 94032, 5 December 1994, unreported) at paragraphs 178 and 190, and the cases there cited.*

Although the public interest I have described is one which would apply so as to benefit particular individuals in particular cases, I consider that it is nevertheless an interest common to all members of the community and for their benefit.

17. *The mere assertion by an applicant that information is required to enable pursuit of a legal remedy will not be sufficient to give rise to a public interest consideration that ought to be taken into account in the application of a public interest balancing test incorporated into an exemption provision in the FOI Act (*cf. Re Alpert and Brisbane City Council *(Information Commissioner Qld, Decision No. 95017, 15 June 1995, unreported) at paragraph 30). On the other hand, it should not be necessary for an applicant to prove the likelihood of a successful pursuit of a legal remedy in the event of obtaining access to information in issue. It should be sufficient to found the existence of a public interest consideration favouring disclosure of information held by an agency if an applicant can demonstrate that -*

    (a) loss or damage or some kind of wrong has been suffered, in respect of which a remedy is, or may be, available under the law;
    (b) the applicant has a reasonable basis for seeking to pursue the remedy; and
    (c) disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.

18. *The existence of a public interest consideration of this kind would not necessarily be determinative - it would represent one consideration to be taken into account in the weighing process along with any other relevant public interest considerations (whether weighing for or against disclosure) which are identifiable in a particular case. On the other hand, it would ordinarily be true to say (to the extent that a decision-maker under the FOI Act is able to make an objective assessment of these matters from the material put forward by an applicant to establish (a), (b) and (c) above) that the greater the magnitude of the loss, damage or wrong, and/or the stronger the prospects of successfully pursuing an available remedy in respect of the loss, damage or wrong, then the stronger would be the weight of the public interest consideration favouring disclosure which is to be taken into account in the application of a public interest balancing test incorporated in an exemption provision of the FOI Act.*

40. In his response dated 6 June 1997, Mr Mulcahy submitted as follows:

1. *The Application by Graham & Associates Solicitors was brought on behalf of Nevenka Lehmann. Mrs …Lehmann can be categorised as the true Applicant in this matter. This is clearly evidenced by the terms of Mr Graham's letter of 12 May 1997 and cannot in any way be categorised as an application brought by any other party… Mr Graham's third paragraph makes it clear that as far as the true Applicant is concerned, there can be said to be no longer any basis for*

release in the public interest on the ground that she suffered or may have suffered an actionable wrong…the issue has been now subject to final determination by the …Tribunal so that we would respectfully submit that the matter now falls outside the principles enumerated in paragraphs 16 to 18 of Re Willsford.

...

4. *...*

Further we submit that the Information Commissioner in carrying out the balancing of public interest considerations cannot ignore that once a matter is on foot in a Court or a Tribunal such as Queensland Building Tribunal then the public interest is best served by not allowing the Freedom of Information Act to be used to circumvent that Court or Tribunal's procedures for discovery against bodies under the Freedom of Information Act, and for that reason the Information Commissioner should rule against any release.

5. *In* Re Willsford *in paragraph 17 it makes it clear that the mere assertion that information is required to enable pursuit of a legal remedy is not in itself sufficient. Mr Graham's Submission in no way deals with the matters set out in Paragraph 17 but falls into the category of a mere assertion that the information is required to enable the pursuit of a legal remedy and on that basis alone Mr Graham's Submissions fall short of invoking any public interest consideration based on assisting pursuit of legal remedies. In this case there is simply no material being put before the Information Commissioner upon which a decision could be made that the Applicant has a reasonable basis for seeking to pursue a legal remedy and therefore in the public interest the dispute information should be released notwithstanding its character. [We would also note for the record that our client does not accept there is any such liability against it]. Mr Graham's Submission deals with vague generalities, it does not set out any proposed cause of action or even the most basic facts to support the availability of any action. Whilst it was made clear in the reasoning of* Re Willsford *that it is not necessary for the Information Commissioner to go into issues or prospects, it is submitted there must be established to the Information Commissioner at least a reasonable basis by the Applicant to pursue a legal remedy. Here this has not been done.*

6. *Further if these other clients of Mr Graham wish to pursue purported legal actions against our client (which our client denies is available) then applying the Information Commissioner's reasoning in* Re Willsford *a fundamental distinction can be drawn in respect to this particular matter. In* Re Cairns Port Authority and Department of Lands *the information sought from the Cairns Port Authority was essential for the third party to determine if in fact the third party had the basis for a suit against the Cairns Port Authority. In* Re Willsford *again the information sought being the disclosure of the identity of a dog owner*

was again essential in that no litigation could be commenced unless the identity was properly ascertained. We would submit that establishing the availability of alleged causes of actions against our client in relation to building matters do not depend upon accessing information from the Queensland Building Services Authority file but can properly be determined by the potential Plaintiff's reviewing the contractual obligations and surrounding circumstances with competent legal advisers assisting them and obtaining proper expert evidence in respect of building work carried out to determine if that was in accordance with our client's obligations. We would submit it cannot be Parliament's intention that provisions of the Freedom of Information Act 1992 be used as a means of usurping proper procedures of a Court or a statutory tribunal relating to the discovery of relevant evidence in an action, not fundamental to enabling or assisting a party to commence legal action.

7. In those terms we would submit that the concept set out in paragraph 16 of Re Willsford *must be read in terms of assisting a person in terms of establishing identities of necessary parties or the availability of information which is essential to determine the existence of an available cause of action and not in a wider context of displacing Court and Tribunal procedures framed also to protect the public interest.*

41. I do not accept that the public interest consideration is as narrow as that suggested by Mr Mulcahy in paragraphs 4, 6 and 7 of his submission. In paragraph 17(c) of *Re Willsford*, I indicated that information that would assist an applicant to pursue a remedy would fall within the terms of the test. It is not limited to information which is essential to establish a cause of action. Nor do I consider that use of the FOI Act can generally be viewed as usurping the proper procedures of Courts or tribunals relating to discovery/disclosure of documents. The FOI Act confers a separate, substantive legal right, i.e., a "legally enforceable right" to be given access, under the FOI Act, to documents of an agency or official documents of a Minister: see s.21 of the FOI Act.

42. However, I do consider that there is more merit in paragraph 5 of Mr Mulcahy's submission. Mr Graham has not informed me of the name of any existing client who claims to have suffered loss or damage through the actions of Kenmatt, or the details of any loss or damage claimed to be suffered. On the information before me, I cannot realistically address any of the factors discussed in paragraphs 16-18 of *Re Willsford*.

43. I do not consider that Mr Graham can be regarded as being in any better position concerning disclosure of the dispute files than any other member of the public.

Public interest considerations favouring disclosure

44. In keeping with the objects expressed in s.4 and s.5 of the FOI Act, I consider that there is a strong public interest in members of the public having access to information which provides an understanding of how the Authority carries out its licensing and compliance functions in relation to builders in Queensland, which functions are entrusted to the Authority by the *Queensland Building Services Authority Act 1991*. The provisions in the *Queensland Building Services Authority Act* governing such matters exist for the protection of

Queensland consumers who have obtained, or seek to obtain, the services of those builders that the Authority has considered fit to be licensed.

45. The objects of the *Queensland Building Services Authority Act* are as follows:

> ***Objects of Act***
>
> ***3.*** *The objects of this Act are—*
>
> *(a) to regulate the building industry—*
>
> *(i) to ensure the maintenance of proper standards in the industry; and*
>
> *(ii) to achieve a reasonable balance between the interests of building contractors and consumers; and*
>
> *(b) to provide remedies for defective building work; and*
>
> *(c) to provide for the efficient resolution of building disputes; and*
>
> *(d) to provide support, education and advice for those who undertake building work and consumers.*

46. In his statement, Mr Potts said:

> *1. The BSA considers that in carrying out its functions, it is required to deal equitably with both consumers and licensees. The objects of the* Queensland Building Services Authority Act 1991 *include regulation of the building industry to ensure the maintenance of proper standards and the achievement of a reasonable balance between the interests of building contractors and consumers, and the provision of support, education and advice for those who undertake building work and consumers.*
>
> *2. The emphasis which the BSA places on information provision to both consumers and contractors is exemplified in the following quote from the 1996/97 BSA Annual Report:*
>
> > Well-informed consumers and contractors are more likely to make sound decisions and avoid disputes. Access to useful advice and information therefore plays an important role in contributing to improved building industry performance. *(page 9)*
>
> *The practice of the BSA is to provide as much information as possible to consumers, particularly given the significant financial outlays that attend the construction of a home.*
>
> ...

> *8. Many documents on dispute files are routine administrative documents, the disclosure of which could not reasonably be expected to have an adverse effect on the business affairs of builders. Other documents detail the claims of complainants, the opinions of BSA officers on those claims, and the responses of builders to those claims. It is my view that these documents should usually be made available to consumers to enable them to assess the performance of builders, and that disclosure of the entire dispute file allows readers to obtain a balanced view of the position of the homeowner, the response of the builder and the actions taken by the BSA.*
>
> *9. Given the large number of disputes which arise between builders and owners, and the comparatively minor nature of the issues in dispute in most cases, it is my view that the disclosure of dispute files concerning a particular builder would not usually be expected to have an adverse effect on the business affairs of the builder. Even in cases where there is potentially some adverse effect, it is my view that disclosure of the files would usually be, on balance, in the public interest, because of the need to provide as much information as possible to consumers.*

47. I am satisfied that disclosure of the matter in issue would further the public interest in enhancing the accountability of the Authority for the manner in which it performs its licensing, dispute resolution, and consumer protection functions. For most members of the public, a residential home is the biggest investment they will ever make. I consider it essential that they have confidence in the functions performed by the Authority of ensuring that licensed builders perform building work properly, or, if they do not, that the Authority will ensure that any problems are remedied. I consider that disclosure of dispute files would enable interested members of the public to obtain a balanced view of investigations undertaken by the Authority, and to assess the performance of the Authority in responding to particular complaints.

48. I also consider that there is a significant public interest in members of the public, many of whom are potential homebuyers or home renovators, having access to information about the performance of builders, and their responses to complaints, to enable them to make informed choices about the builder they engage. I believe that it is valuable for consumers to have before them as much information as possible about the performance of builders they might choose to engage. While the present availability of the number of Directions for rectification work issued by the Authority offers some guidance, disclosure of dispute files would afford more balanced (and hence more detailed and valuable) guidance. Indeed, access to dispute files would place in proper perspective the information presently available to the public, through Licence Search printouts, as to the bare number of Directions issued against a particular builder, informing consumers of the nature of disputes and the perspectives of each participant in the dispute.

49. On balance, I am satisfied that the public interest considerations favouring disclosure of the dispute files are of such substantial weight as to outweigh the public interest in protecting Kenmatt from the apprehended adverse effects of disclosure of some of the matter in issue, and to warrant a finding that (subject to my findings in relation to the application of s.44(1) below) disclosure of the dispute files in issue in this case would, on balance, be in the public interest. I find that the matter in issue does not qualify for exemption under s.45(1)(c) of the FOI Act.

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

50. The complainants in dispute file 3-319-96 have objected to the disclosure of their names or identifying information, although they have no objection to the disclosure of the remaining contents of the file. Although the complainants have not specifically raised the issue of the application of s.44(1) of the FOI Act, it is clear that that is the exemption provision which is relevant. 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.*

51. In *Re Alpert and Brisbane City Council* (1995) 2 QAR 618, at paragraphs 20-22, I accepted that documents relating to the construction of a person's home fell "within that zone of domestic affairs which is central to the concept of 'personal affairs'". I have also held in previous cases that the fact that an individual has, in a personal capacity, made a complaint to a government agency, is itself information concerning that individual's personal affairs: see *Re Morris and Queensland Treasury* (1995) 3 QAR 1 at p.12, paragraph 30, and the other cases there cited.

52. The complainants do not, in fact, object to the disclosure to Mr Graham of the substance of the information on their dispute file relating to the construction of their home, only to the disclosure of identifying information in respect of themselves. In *Re Stewart and Department of Transport* (1993) 1 QAR 227 at p.258 (paragraph 81), I said:

> *For information to be exempt under s.44(1) of the FOI Act, it must be information which identifies an individual or is such that it can readily be associated with a particular individual. Thus deletion of names and other identifying particulars or references can frequently render a document no longer invasive of personal privacy, and remove the basis for claiming exemption under s.44(1). This is an expedient (permitted by s.32 of the Queensland FOI Act) which has often been endorsed or applied in reported cases: see, for example,* Re Borthwick and Health Commission of Victoria *(1985) 1 VAR 25 where the applicant sought disclosure of the names and medical history (clearly "personal affairs" information) of intellectually handicapped children who had been the subject of a Health Commission inquiry. Rowlands J (President) held that the applicant's interest in the documents, and the privacy of the children, could both be accommodated by substituting letters of the alphabet for the children's names.*

53. I consider that deletion of names and other identifying particulars of the complainants in dispute file 3-319-96 will mean that disclosure of that file will not be invasive of their personal privacy. I can discern no public interest considerations that favour the disclosure of the names, or other identifying information, of the complainants in that case. The complainants are willing to disclose the substance of the dispute file and, given that the processes and functions engaged in by the Authority in its dealings with Kenmatt, and the responses of Kenmatt, will be revealed, I do not consider that disclosure of the names and other identifying information would, on balance, be in the public interest.

54. I find that the names of the complainants, and other identifying information in respect of them, on dispute file 3-319-96, comprise exempt matter under s.44(1) of the FOI Act. I will forward to the Authority a copy of that file, with that matter which I have found to be exempt matter under s.44(1) appropriately marked for identification (and deletion prior to access being given to that file).

Conclusion

55. I vary the decision under review (being the decision of Mr Miller on behalf of the Authority dated 7 May 1996) by finding that -

(a) the names of, and other identifying matter in respect of, the complainants in dispute file 3-319-96 comprise exempt matter under s.44(1) of the FOI Act;

(b) the balance of the matter in issue in the dispute files identified in paragraph 9 above is not exempt matter under the FOI Act.

.....
F N ALBIETZ
INFORMATION COMMISSIONER