

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

L 9 of 1994
(Decision No. 95027)

Participants:

GSA INDUSTRIES (AUST) PTY LTD
Applicant

- and -

BRISBANE CITY COUNCIL
Respondent

- and -

GS TECHNOLOGY PTY LTD
Third Party

REASONS FOR DECISION

FREEDOM OF INFORMATION - document in issue not dealt with in respondent's initial response to the applicant's FOI access application - respondent accepts that document in issue falls within the terms of the applicant's FOI access application, and raises no objection to its disclosure - third party objects to disclosure of document in issue but presents no evidence or argument that the document contains exempt matter - no material to justify a finding that the document in issue contains exempt matter under the *Freedom of Information Act 1992* Qld.

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

GSA Industries (Aust) Pty Ltd and Brisbane City Council and GS Technology Pty Ltd, Re
(Information Commissioner Qld, Decision No. 94020, 25 August 1994, unreported)

DECISION

The decision under review (being the decision made on behalf of the respondent by Mr R N Metcalfe on 3 February 1994) is varied, in that -

- (a) I find that the document described in paragraph 5 of my reasons for decision (and referred to as the 1990 record of interview), which was not dealt with in the respondent's decision under review, falls within the terms of the applicant's FOI access application dated 3 December 1993; and
- (b) since I am not satisfied that it contains exempt matter, I find that the applicant has a right to be given access under the FOI Act to the document described in paragraph 5 of my reasons for decision (and referred to as the 1990 record of interview).

Date of Decision: 20 November 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

Participants:

GSA INDUSTRIES (AUST) PTY LTD
Applicant

- and -

BRISBANE CITY COUNCIL
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GS TECHNOLOGY PTY LTD
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REASONS FOR DECISION

1. This decision is by way of a post-script to my decision in *Re GSA Industries (Aust) Pty Ltd and Brisbane City Council and GS Technology Pty Ltd* (Information Commissioner Qld, Decision No. 94020, 25 August 1994, unreported), which is referred to in these reasons for decision as *Re GSA Industries*. The background to this case is explained at paragraphs 1-6 of *Re GSA Industries*, and I need not repeat it here.
2. The relevant FOI access application, lodged by GSA Industries (Aust) Pty Ltd (GSA Industries) on 3 December 1993, sought access to:

All documents between:

- 1) *Russell Plastics Pty Ltd and/or GS Technology Pty Ltd and/or George Stack and/or any parties representing any of them AND*
- 2) *Brisbane City Council*

relating to Tender Nos. R55/92/93 and R22/93/94 including documents dealing with claims or prospect of litigation in respect of Australian Patent Application No. 85236/91 and Divisional Petty Application No. 44897/93 and in particular letters from Smits Leslie Barwick to Brisbane City Council dated 3 September 1993 and 15 November 1993.

3. In *Re GSA Industries*, I dealt with six of the documents which were identified by the Brisbane City Council (the Council) as falling within the terms of the above FOI access application. GS Technology Pty Ltd (GS Technology) objected to disclosure of five of those documents, but consented to disclosure of document 6 (see paragraph 13 of *Re GSA Industries*) which comprised parts of a record of interview between Mr G Bellingham of the Council, and Mr G Stack (the Managing Director of GS Technology) and Mr J Pizzey (a patent attorney acting on behalf of GS Technology), identified as folios 77-82 of the Council's File No. (0)243/98 - 22/93/94. The purpose of the interview was to obtain further details of GS Technology's tender

submitted to the Council in respect of Tender No. R22/93/94.

4. Having obtained access to document 6 under *Freedom of Information Act 1992 Qld* (the FOI Act), GSA Industries subsequently drew my attention to the fact that document 6 incorporates by reference an earlier document. I shall quote the relevant parts of document 6 which demonstrate this:

G. Bellingham: The other thing I would wish to table is the tender interview notes from the 60,000 tender interview which was for Contract R34/90/91. We asked some specific questions then as to what was covered by any patent at that time.

G. Stack: I would just like to clarify this at moment we are now moving away from R22/93/94 to WS 34. Is that correct?

G. Bellingham: No its not.

...

G. Stack: What date was this?

G. Bellingham: This was the 25th October, 1990 and it did pertain to the 60,000 as you said before.

G. Stack: OK

G. Bellingham: I'm willing to give you another copy of this if you like. But you would already have a copy of that.

G. Stack: I'm happy for you to read it into the minutes.

G. Bellingham: Well I think we have covered it. I refer specifically to the minutes of the meeting held at the control room here at 8.00 am on Thursday 25th October, 1990 relating to contract No. 34/90/91 Supply of Water Meters and present was myself, Ian Saunders, Graham Phillips, George Stack and Alan Grieves. I believe you have a copy of those minutes as part of those contract documents.

5. GSA Industries asserts a right to obtain access to the document incorporated by reference into document 6, i.e. the record of interview between Mr G Stack and officers of the Brisbane City Council on 25 October 1990 relating to contract No. 34/90/91 (hereinafter referred to as the 1990 record of interview).
6. GSA Industries asserts that access to the 1990 record of interview is necessary to understand the discussion recorded in document 6. It further asserts that the 1990 record of interview falls within the terms of its FOI access application (set out at paragraph 2 above) because it was incorporated by reference in a Council document relating to Tender No. R22/93/94, and/or was clearly treated by Council officers as relevant to Tender No. R22/93/94. I consider that GSA

Industries is correct in this regard. I have examined a copy of the 1990 record of interview, which was forwarded to me by the Council. I make no criticism of Council officers who did not notice the significance of the incorporation by reference when first assessing document 6, but I am satisfied that the 1990 record of interview falls within the terms of GSA Industries' FOI access application.

7. The Council has informed me by letter dated 5 September 1995 that it accepts that this is the case, and, having reviewed the 1990 record of interview, that it raises no objection to disclosure under the FOI Act of the 1990 record of interview.
8. On 19 July 1995, the Deputy Information Commissioner wrote to Mr George Stack of GS Technology, forwarding a copy of the 1990 record of interview and explaining the application by GSA Industries for access to it. The letter continued in the following terms:

*I consider it likely that, because of their greater age, and because they do not appear to contain any information of any greater sensitivity than the information contained in document 6 which you were prepared to release to GSA Industries (Aust) Pty Ltd, you would also have no objection to disclosure of the minutes of the 25 October 1990 meeting. I should be grateful if you would confirm that in writing as soon as possible, but in any event no later than **2 August 1995**.*

*Having regard to the legal principles explained in the Information Commissioner's reasons for decision in Re GSA Industries (Aust) Pty Ltd and Brisbane City Council and GS Technology Pty Ltd (Information Commissioner Qld, Decision No. 94020, 25 August 1994, unreported), a copy of which is enclosed for ease of reference, it does not appear that any of the information contained in the minutes of the meeting held on 25 October 1990 is exempt matter under the FOI Act. However, if you contend that some part or parts of the minutes of the meeting on 25 October 1990 are exempt from disclosure under the FOI Act, would you please forward, by **2 August 1995**, a letter identifying precisely which parts of the minutes of the meeting on 25 October 1990 are claimed to comprise exempt matter and which exemption provisions of the FOI Act are claimed to be applicable, and also explaining the relevant facts and circumstances which you say exist so as to attract the application of those exemption provisions.*

9. I subsequently received a letter dated 2 August 1995 from Mr George Stack of GS Technology Pty Ltd, the only relevant parts of which are as follows:

1.1 simply, my consenting to the recording of a private conversation did not change the effect of the conversation being private;

1.2 if there can be no entitlement on the part of GSA Industries (Aust) Pty Ltd to a private conversation there can be no entitlement to a taped conversation. I refer to RV Salami [sic];

1.3 you have not verified the document;

1.4 the document is incomplete and is not verified by the board and the document is nobody's business;

1.5 for you to consider differently raises serious and important questions which deal with Human Rights;

10. The discussion recorded in the 1990 record of interview was not a private conversation. It was a conversation in which representatives of the Brisbane City Council sought clarifying details of the tender submitted by Mr Stack's firm for a contract that would involve the payment of a substantial sum of ratepayers' money to the successful tenderer for the supply of water meter assemblies. Mr Stack's firm was, in fact, the successful tenderer on that occasion. The ratepayers of Brisbane had a legitimate interest in that contract and its effective performance. No question of privacy or human rights is involved.
11. In responding to an earlier request by Mr Stack for an extension of time to lodge material in this case, the Deputy Information Commissioner had explained (by letter dated 21 July 1995) the basic legal position which Mr Stack needed to take into account in presenting his case:

Under s.21 of the FOI Act, any person has a legally enforceable right to be given access to a document in the possession or control of the Brisbane City Council, except to the extent that a document contains exempt matter (under one of the exemption provisions in Part 3, Division 2 of the FOI Act) or otherwise falls within one of the exceptions to access provided for in the FOI Act itself. The Council's copy of [the 1990 record of interview] ... is a document in the possession or control of the Council which is subject to the FOI Act. GSA Industries (Aust) Pty Ltd has a legally enforceable right to obtain access to that document, except to the extent that it contains exempt matter (there being no other exception provided for in the FOI Act which could apply to that document).

...

*... you have not really explained to me why an extension of time should be necessary to allow you to examine a five page document and decide whether there are any parts of it which, if disclosed to GSA Industries (Aust) Pty Ltd, would cause any real harm to your commercial interests, and if so whether any of those parts comprise exempt matter under the FOI Act. I will allow you until **2 August 1995** to identify to me in writing any particular parts of the Council's copy of the minutes of the meeting of 25 October 1990, to the disclosure of which you wish to formally object. I will then allow you until **Friday 18 August 1995** to forward to me any evidence or written submission on which you wish to rely to contend that those parts of the document are exempt matter under the FOI Act.*

12. Neither Mr Stack's letter dated 2 August 1995, nor any other correspondence or telephone communication from him concerning this matter, has put forward any evidence or argument relevant to the application of exemption provisions in the FOI Act to the 1990 record of interview. Mr Stack's letter dated 2 August 1995 stated that a solicitor, Mr Andrew Abaza, would be handling the matter on his behalf. When Mr Stack had not lodged any further evidence or submissions within the period of further time given to him for that purpose, Mr Abaza was contacted by telephone. Mr Abaza stated that he had advised GS Technology that it was not worth spending any more time and money on a dispute over access to the 1990 record of interview. Mr Abaza stated that GS Technology maintained its objection to disclosure under the FOI Act of the 1990 record of interview, but it would not be contributing anything further to the

review process.

13. Thus, I am left in a position where the respondent Council agrees to the disclosure of the document in issue, and a third party, which formally objects to disclosure of the document in issue, has not presented any evidence or argument to the effect that the document in issue contains exempt matter, and indeed has not even nominated an exemption provision said to be applicable to the document in issue.
14. The matter in issue is clearly not exempt matter under s.44(1) of the FOI Act (an exemption provision which is basically concerned with protection of personal privacy) because it concerns the business affairs of a company, rather than the personal affairs of a person.
15. There is no evidence on which I could base a finding, nor anything in the nature of the matter in issue from which I could infer, that the matter in issue was communicated in confidence (see s.46(1) of the FOI Act). It is apparent that the Council considers either that the matter in issue was not communicated in confidence, or that, after the passage of some five years, the matter in issue has lost any quality of confidence that it might once have had.
16. The matter in issue is now some five years old and relates to a contract that has long since been performed. I cannot see anything in the matter in issue which, after this length of time, would have any commercial value, nor anything the disclosure of which could reasonably be expected to have any of the prejudicial consequences identified in s.45(1)(a), s.45(1)(b) or s.45(1)(c) of the FOI Act. The attitude of the third party as conveyed in paragraph 12 above (i.e. that this case is not worth any expenditure of time or money) tends to confirm that this is so. In respect of the small amount of matter in issue that refers to patent entitlements, the same considerations referred to in paragraphs 34-38 of *Re GSA Industries* apply.
17. I am not satisfied that the matter in issue is exempt matter under the FOI Act. The applicant therefore has a right to be given access, under the FOI Act, to the 1990 record of interview.

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F N ALBIETZ
INFORMATION COMMISSIONER