

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 98011
Application S 95/96

Participants:

SWICKERS KINGAROY BACON FACTORY PTY LTD

Applicant

DEPARTMENT OF PRIMARY INDUSTRIES

Respondent

HELEN VICTORIA McNAUGHT

Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - consultancy report prepared by respondent for a business operator - environmental management program submitted to local Council by the business operator in support of a rezoning application - existence and scope of any contractual or equitable obligation of confidence binding the respondent not to disclose the consultancy report or the environmental management program - whether those documents comprise exempt matter under s.46(1)(a) or s.46(1)(b) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - whether documents in issue concern the personal affairs of the business operator or its agent - application of s.44(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - whether documents in issue comprise information concerning the business, professional, commercial or financial affairs of the business operator, its agent, or the respondent - whether disclosure could reasonably be expected to prejudice the future supply of like information to government - whether disclosure could reasonably be expected to have an adverse effect on business, professional, commercial or financial affairs of the business operator, its agent, or the respondent - application of s.45(1)(c) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.25, s.44(1), s.45(1)(c), s.46(1), s.46(1)(a), s.46(1)(b), s.51(1), s.78

"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

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

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

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

Pemberton and The University of Queensland, Re (1994) 2 QAR 293

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

Wittingslow Amusements Group v Director-General of the Environment Protection Authority of NSW (Supreme Court of NSW, Equity Division, No. 1963 of 1993, Powell J, 23 April 1993, unreported)

DECISION

1. I vary the decision under review (which is identified in paragraph 4 of my accompanying reasons for decision) by finding that the matter in issue described in paragraph 24 of my reasons for decision is exempt matter under s.46(1)(a) of the *Freedom of Information Act 1992* Qld.
2. In other respects, I affirm the decision under review to the extent that it found that the balance of the matter in issue in this review is not exempt from disclosure under the *Freedom of Information Act 1992* Qld.

Date of decision: 27 November 1998

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INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. This is a 'reverse FOI' application brought by Swickers Kingaroy Bacon Factory Pty Ltd (Swickers), which objects to the respondent's decision to grant the third party access, under the *Freedom of Information Act 1992 Qld* (the FOI Act), to two documents relating to the environmental management of operations at Swickers' Kingaroy premises. Swickers contends that the documents are exempt under s.44(1), s.45(1)(c) and s.46(1) of the FOI Act.
2. On 7 December 1995, the third party applied to the Department of Primary Industries (the DPI) for access to all documents and information concerning Swickers. By letter dated 27 February 1996, the third party clarified the scope of her access application, stating:

I am interested in—

1. *Documents held by DPI on the proposal to build effluent lagoons at Swickers' abattoir and the associated rezoning application involving the irrigating of this effluent.*
2. *Documents relating to Swickers' waste disposal practices since Kingaroy Shire Town Plan was introduced in 1970.*
3. *Documents created since the 1980's relating to the proposals for buffers to be built at Swickers.*

3. The DPI then consulted Swickers, in accordance with s.51(1) of the FOI Act. A response on behalf of Swickers was received from Mr D Packer, of Packer Environmental Services Pty Ltd (Packer Environmental), a consultant to Swickers. Mr Packer indicated that Swickers objected to disclosure of any correspondence or draft proposal in respect of any environmental management program, and in particular to the two documents now in issue in this external review.
4. Acting on behalf of the DPI, Ms E McLeod (then Acting Manager, Access and Administrative Review) decided on 12 April 1996 that the two documents now in issue were not exempt from disclosure under the FOI Act. Swickers applied for internal review of Ms McLeod's decision. In his internal review decision dated 22 May 1996, Mr G T Johnson, General Manager (Forest Resources) of DPI, decided to affirm Ms McLeod's decision. By letter dated 7 June 1996, Packer Environmental, acting on behalf of Swickers, applied to me for review, under Part 5 of the FOI Act, of Mr Johnson's decision.

External review process

5. Copies of the documents in issue were obtained and examined. They are:
 - (a) a document prepared in November 1994 by Mr T Gardner and Ms A Vieritz of the DPI, entitled "Environmental Management and Monitoring Plan for the Irrigation of Effluent from Swickers Bacon Factory, Kingaroy" (hereinafter referred to as the "DPI report"); and
 - (b) a document dated 10 January 1995, prepared by Mr Packer (then of CMPS&F Pty Ltd, environmental consultants) on behalf of Swickers, entitled "CMPS&F, Swickers Kingaroy Bacon Factory Pty Ltd, Environmental Management Program" (hereinafter referred to as the "EMP document").
6. I then consulted the third party, who confirmed that she wished to pursue access to the documents in issue. The third party applied for, and was granted, status as a participant in this external review, in accordance with s.78 of the FOI Act.
7. In the course of this external review, the participants have lodged with me the following submissions and evidence in support of their respective cases:
 - submissions by Packer Environmental, on behalf of Swickers, dated 7 June 1996, 9 March 1997, 7 April 1997, and 2 July 1998;
 - a submission from the DPI dated 22 May 1998, and a statutory declaration of Edward Anderson Gardner dated 19 May 1998; and
 - a submission from the third party dated 5 August 1997.
8. I have also sought information from the Kingaroy Shire Council, which it provided to me in a letter dated 4 March 1998, and in the attachment to that letter. All relevant material has been exchanged among the participants. In addition to the above material, I have also had reference to the documents in issue and correspondence which passed among the participants during the course of the DPI's decision-making processes.
9. Swickers has submitted that the documents in issue are exempt under s.44(1), s.45(1)(c), and s.46(1) of the FOI Act. I will deal first with the claims under s.46(1), which relates to confidential communications.

Application of s.46(1) of the FOI Act

10. Section 46(1) of the FOI Act provides:

46.(1) Matter is exempt if—

- (a) *its disclosure would found an action for breach of confidence; or*
- (b) *it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*

Section 46(1)(a)

11. I explained the requirements for exemption under s.46(1)(a) in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. The test for exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency faced with an application, under s.25 of the FOI Act, for access to the information in issue.
12. The action for breach of confidence may be based on a contractual obligation or an equitable obligation. A contractual obligation of confidence may be imposed pursuant to an express term in the relevant contract, or an implied term in the relevant contract. Since the DPI and CMPS&F Pty Ltd (CMPS&F), as agent for Swickers, entered into a contract for the production of the DPI report, it is primarily to the terms of that contract that one must look to ascertain any relevant obligations of confidence affecting the DPI report.
13. On the material available to me, there is nothing to show that the EMP document (which was created by CMPS&F for its client, Swickers, using material from the DPI report and other sources) was ever, in fact, provided by Packer Environmental or Swickers to the DPI (see paragraph 35 below). It is clear, however, that the EMP document came into the possession of the DPI because the Kingaroy Shire Council, which received the EMP document in support of a rezoning application lodged by Swickers, asked the DPI for assistance in evaluating the proposal to construct effluent treatment lagoons on Swickers' property. Thus, no contractual relationship affects the issue of whether or not the EMP document was received by the DPI pursuant to an obligation of confidence. Any action for breach of confidence in respect of the EMP document must be based on principles of equity.
In *Re "B"*, I indicated that there are five cumulative criteria which must be satisfied in order to establish a case for protection in equity of allegedly confidential information:
 - (a) it must be possible to specifically identify the information in issue, in order to establish that it is secret, rather than generally available information (see *Re "B"* at pp.303-304, paragraphs 60-63);
 - (b) the information in issue must possess "the necessary quality of confidence"; i.e., the information must not be trivial or useless information, and it must possess a degree of secrecy sufficient for it to be the subject of an obligation of conscience, arising from the circumstances in or through which the information was communicated or obtained (see *Re "B"* at pp.304-310, paragraphs 64-75);

- (c) the information in issue must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322, paragraphs 76-102);
- (d) it must be established that disclosure to the applicant for access under the FOI Act would constitute a misuse, or unauthorised use, of the confidential information in issue (see *Re "B"* at pp.322-324, paragraphs 103-106); and
- (e) it must be established that detriment is likely to be occasioned to the original confider of the confidential information in issue if that information were to be disclosed (see *Re "B"* at pp.325-330, paragraphs 107-118).

The DPI report

14. The DPI report was commissioned by Mr Packer (then of CMPS&F). As an initial step in preparing an overall environmental management program for the Swickers site, CMPS&F engaged the DPI to prepare a report relating to irrigation utilising effluent from Swickers' operations. The DPI was essentially acting as a technical consultant in preparing the report, drawing on its knowledge of effluent irrigation generally, information gained from public records and other sources, and information provided to it by Swickers specifically for use in the preparation of the DPI report. CMPS&F then used the DPI report (and other materials) in preparing the EMP document, which was lodged with the Kingaroy Shire Council in support of an application for rezoning of farming land adjacent to Swickers' abattoir operation.
15. Mr Packer, on behalf of Swickers, submitted that it was agreed at the outset that the consultancy would be undertaken "on an entirely *confidential* basis" (submission dated 7 June 1996). He submitted that the "express verbal conditions" upon which Mr Gardner undertook the consultancy were that the documents would concern only himself (and his project team), Mr Packer and Swickers; and that copies of the report (and associated material) would not be made available to any other parties (application for internal review dated 10 May 1996).
16. Mr Packer has not impressed me as a reliable source of accurate information on material questions of fact. There have been instances of factual assertions that are mutually contradictory, and/or contradicted by the contents of relevant documents. He has left me with the impression that his only concern was to secure the interests of his client, Swickers, and perhaps his own reputation as a consultant. In general, where there has been conflict in the material before me as to factual issues, I have given greater credence to evidence supplied by officers of the DPI, and to evidence gleaned from relevant documents which essentially speak for themselves as to certain material questions of fact.
17. In his statutory declaration dated 19 May 1998, Mr Gardner (who was the primary author of the DPI report) referred to an exchange of facsimile transmissions between himself and Mr Packer which dealt with confidentiality requirements in respect of the DPI report. Mr Gardner attached those facsimile transmissions to his statutory declaration.
18. The first of the facsimile transmissions was dated 17 October 1994, on the letterhead of CMPS&F, from Mr Packer to Mr Gardner. It communicated acceptance of DPI's fixed price quotation for the preparation of the required technical report, and attached a schedule

detailing the scope of the required work. It set a time limit for completion of the technical report, and described the information which CMPS&F would provide to DPI for use in preparing the technical report. It referred to the importance of the project to Swickers, its urgency relative to Swickers' rezoning application, and its sensitivity to Swickers in terms of the proposed construction of a competing abattoir in a neighbouring district. Most relevantly for present purposes, it stated that acceptance of the DPI's fixed price quotation was subject, among other things, to:

The work being carried out in a confidential manner and the supplied data and results not being used for any other purpose without the proper written consent of Swickers. A brief written undertaking to this effect is to be provided.

19. If the words "the work being carried out in a confidential manner" are given their natural meaning, they would be taken to refer to the process by which the DPI scientists assembled, tested and evaluated relevant information, and prepared their report. The words "the supplied data and results" are somewhat ambiguous. They might refer to:

- (a) data and results supplied by CMPS&F and/or Swickers to DPI for the purpose of undertaking the consultancy;
- (b) data and results supplied to CMPS&F and Swickers by DPI upon completion of the consultancy;
- (c) data supplied by CMPS&F and/or Swickers to DPI for the purpose of undertaking the consultancy, and results supplied to CMPS&F and Swickers by DPI upon completion of the consultancy.

20. In any event, by facsimile transmission dated 10 November 1994 and addressed to Mr Packer at CMPS&F, Mr Gardner provided the brief written undertaking which Mr Packer had stipulated was required. It was in the following terms:

In response to your letter of 17 October requesting confidentiality on the Swickers Bacon Factory consultancy, I undertake to treat the data obtained from the company and through your firm on an in confidence basis and will not use the information for any purpose other than the consultancy without permission of the client (Swickers).

21. Thus, Mr Gardner indicated that he had understood the words "the supplied data and results" in Mr Gardner's facsimile transmission dated 17 October 1994 as having the first of the three possible meanings suggested in paragraph 19 above. If the scope of Mr Gardner's written undertaking of confidentiality was not acceptable to Mr Packer or Swickers, they had the opportunity to negotiate to vary the scope of the written undertaking of confidentiality they required. They did not do so, and it must be taken that they were satisfied to accept the written undertaking of confidence provided by Mr Gardner. Mr Gardner's written undertaking of confidentiality took effect as an express written term of the contract.

22. In those circumstances, I do not consider there to be any warrant for finding that an implied term existed in the contract binding the DPI to any wider obligation of confidence than was specified in Mr Gardner's written undertaking. Nor do I consider that equity would hold the DPI bound in conscience to observe any wider obligation of confidence than was specified in Mr Gardner's written undertaking.

23. There is no suggestion that either of the parties was at some disadvantage in negotiating the agreement. CMPS&F must have appreciated that the DPI might want to use general information that was created or obtained from other sources in the course of the consultancy, for the purposes of future consultancies or indeed for its own future research work. In such circumstances, I think it was incumbent on CMPS&F, if it wished to restrict the use or disclosure which the DPI could make of the material which it created for the purposes of the consultancy, to spell out any restrictions. CMPS&F did so by requiring an undertaking in writing in relation to confidentiality. An undertaking in the terms set out in Mr Gardner's facsimile transmission dated 10 November 1994 was accepted. I do not consider that there is any justification for extension of the understanding of confidentiality beyond the terms of that written undertaking, whether under the law of contract or principles of equity, in the circumstances of this case.
24. I therefore find that the DPI was bound by a contractual obligation of confidence owed to Swickers, the precise scope of which was stated in Mr Gardner's facsimile transmission dated 10 November 1994. I consider that the obligation of confidence extended not only to information supplied to the DPI by or on behalf of Swickers for the purposes of the DPI undertaking the consultancy, but also to results obtained by the DPI using that information, from which that information could be derived. Where information of that kind has been included in the DPI report, I consider that the DPI is obliged not to disclose that information (i.e., those segments of the DPI report) without the permission of Swickers. I have made two copies of the DPI report on which I have highlighted the information which I consider the DPI is contractually bound not to disclose without the permission of Swickers, and which I find is exempt matter under s.46(1)(a) of the FOI Act. I will forward one highlighted copy of the DPI report to the applicant, and one to the DPI, together with my decision and reasons for decision in this case.
25. The balance of the matter in the DPI report (i.e., the matter which is not highlighted on the copies which I will forward to the applicant and to the DPI) was either:
- taken from published sources;
 - taken from non-published sources other than Swickers or Mr Packer/CMPS&F;
 - information consisting of pre-existing knowledge or expertise of the DPI; or
 - information created by the DPI in the course of the consultancy.

I find that disclosure of that matter would not found an action for breach of confidence, and hence that it is not exempt matter under s.46(1)(a) of the FOI Act.

26. In *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 at pp.690-691, paragraph 60, I expressed the view that any matter which has become public knowledge or is publicly available would cease to be capable of protection on the basis of an action for breach of confidence. Many segments of the matter which I have found not to be exempt have been derived from public sources, or have been made public, e.g., by the public display of the information which was subsequently included in the EMP document (see paragraphs 36-37 below). That is another basis on which such matter would fail the test for exemption under s.46(1)(a) of the FOI Act.

27. In his statutory declaration, Mr Gardner indicated that he had given a copy of the DPI report to a DPI officer outside his project team, stating:

I also gave a copy of the [DPI] report to Ken Casey, DPI Toowoomba, in his capacity as a member of the research team developing the MEDLI effluent disposal model. The report was marked confidential and I informed Ken Casey it was supplied to him only for the purpose of scientific discussion of the MEDLI model.

28. Although in his earlier submissions (e.g., internal review application dated 10 May 1996), Mr Packer took some comfort from the fact that the DPI report was "reviewed independently by Mr ... Casey ... acting on behalf of the DPI as a Regulatory Authority", he later submitted that this disclosure amounted to an unauthorised breach of confidence. In any event, I do not regard the limited disclosure to Mr Casey as destroying the confidentiality of that matter in the DPI report which falls within the scope of the contractual obligation of confidence.
29. I note that, in an action for breach of confidence concerning information supplied to government, it has been established that Australian law will recognise a public interest exception (the precise scope of which is not yet clear), on the basis that an obligation of confidence claimed to apply in respect of information supplied to government will necessarily be subject to the public's legitimate interest in obtaining information about the affairs of government: see *Esso Australia Resources Ltd & Ors v Plowman & Ors* (1995) 183 CLR 10, *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662, and my comments on this development in *Re Cardwell Properties Pty Ltd & Williams and Department of the Premier, Economic and Trade Development* (1995) 2 QAR 671, at pp.693-698, paragraphs 51-60.
30. Information which a government agency holds by reason of having undertaken paid consultancy work for a business operator would not, in my opinion, ordinarily attract the application of the public interest exception referred to in paragraph 29 above, at least while its only sensitivity relates to the business operator's concern to protect commercially sensitive information from potential disclosure to competitors. The position may be different where the business operator proposes to use information obtained through the consultancy to undertake some project which may affect a substantial number of people (in which case public interest considerations of the kind referred to in *Re Cardwell Properties Pty Ltd* at p.684, paragraph 24, and p.685, paragraph 29, may come into play), or to support an application for some kind of regulatory approval (in which case, the public interest in accountability of the regulatory authority for the performance of its regulatory functions for the benefit and protection of the community may favour disclosure of information that would enable informed scrutiny of the propriety of the discharge of the relevant regulatory functions).
31. In the present case, the DPI report related to a proposed land use by Swickers - the construction of large effluent treatment lagoons - which would undoubtedly be of substantial concern to neighbouring landowners and residents of the local community. In my view, there would be a strong public interest in the disclosure of information, for the benefit of the local community, concerning the technical viability, and public health and safety aspects, of a proposal for the construction of large effluent treatment lagoons.

32. On the material before me, the DPI does not appear to have had any formal regulatory role in respect of regulatory approvals required by Swickers for its project. The DPI was approached for advice by the Kingaroy Shire Council when it received the EMP document in support of Swickers' rezoning application. Interestingly, the DPI expert on effluent disposal (Mr Ken Casey) who was approached by the Kingaroy Shire Council for advice was the same DPI officer to whom Mr Gardner forwarded (in confidence) a copy of the DPI report "for the purpose of scientific discussion of the MEDLI model".
33. Although nothing untoward happened in this case, the circumstances hint at potential difficulties for government agencies which seek to hire out the services of officers with technical expertise, to undertake paid consultancy work, in a field in which the government agency may also have to discharge a regulatory function. In my view, it would cause justifiable disquiet to any reasonable observer (let alone members of the public who felt their interests could be affected by the outcome of a regulatory approval process), if the primary technical evidence to support an application for a regulatory approval had been generated by officers of the same agency which is required to undertake the regulatory function. Such circumstances would, in my view, ordinarily weigh in favour of public scrutiny of the technical evidence submitted in support of the application for regulatory approval, and, indeed, weigh in favour of transparency in the entire regulatory approval process in the interests of proper accountability. (Indeed, I tend to the view that an obligation of confidence binding an agency which has supplied information to a business operator in the capacity of a paid consultant, would not be applicable to that information in the form in which it was submitted back to the agency to be evaluated in the discharge of a regulatory function which the agency was required to undertake for the benefit and protection of the public. Rather, one would have to look at the circumstances attending the communication of the information to the agency in support of an application for some regulatory approval, to determine whether any obligation of confidence attached to the agency when it received the information in that capacity.)
34. However, in the present case, having carefully examined the matter in issue in the DPI report, I am not satisfied that the public interest exception to an action for breach of confidence would warrant disclosure of that information which I have found qualifies for exemption under s.46(1)(a) of the FOI Act.

The EMP document

35. Mr Packer, for the applicant, contended (in his letter to the DPI dated 8 April 1996) that the EMP document is a draft document provided for consultation with the DPI. However, that letter (twice) refers to a draft EMP document dated 10 January 1996. The EMP document which is in issue in this review is clearly dated 10 January 1995. The final paragraph of Mr Gardner's statutory declaration states that he "had no involvement in the distribution or review of the [EMP Report]". There is no evidence before me to indicate that the EMP document dated 10 January 1995 was ever, in fact, provided to the DPI by Mr Packer or by Swickers. It is possible that Mr Packer forwarded a copy of the EMP document to Mr Gardner, merely for his reference, but I have no evidence that that occurred. I do have clear evidence, however, that the EMP document dated 10 January 1995 was forwarded by the Kingaroy Shire Council to Mr Ken Casey, Principal Environmental Engineer, of the DPI, who in turn (by letter dated 21 March 1995) conveyed certain advice back to the Council, concerning the quality of the environment management plan set out in the EMP document. (On the material before me, it appears that Mr Casey was not undertaking any formal regulatory role on behalf of the DPI, in conveying advice to the Council.)

36. The Kingaroy Shire Council had earlier obtained the EMP document as a supporting document in respect of a rezoning application lodged by Swickers. The Kingaroy Shire Council has confirmed to me, by letter dated 4 March 1998, that the EMP document dated 10 January 1995 was made available for public display at the Council, and has forwarded to me a copy of the EMP document put on public display by the Council. I have compared it to the EMP document in the possession of the DPI (a copy of which was supplied to me by the DPI) and I am satisfied that they are identical.
37. I find that the EMP document no longer possesses the necessary quality of secrecy to sustain an action for breach of confidence. The document was placed on public display and copies were available to members of the public on request. The third party states that she and others obtained copies of the EMP document from the Council at the time of the public display process. The fact that it may no longer be on public display does not, in my view, assist the applicant. The EMP document lost the necessary quality of confidence when it was placed on public display. The applicant must have appreciated, when lodging the EMP document with the Council in support of its rezoning application, that the EMP document would be, or was liable to be, placed on public display. Criterion (b) to establish an action in equity for breach of confidence (see paragraph 13 above) is not satisfied in respect of the EMP document. Nor is there any evidence which would support a finding that the EMP document was communicated to the DPI in circumstances which imported an obligation of confidence binding on the DPI. I find that no part of the EMP document qualifies for exemption under s.46(1)(a) of the FOI Act.

Section 46(1)(b)

38. In *Re "B"* (at pp.337-341; paragraphs 144-161), I considered in detail the elements which must be established in order for matter to qualify for exemption under s.46(1)(b) of the FOI Act. In order to satisfy the test for *prima facie* exemption under s.46(1)(b), three cumulative requirements must be established:
- (a) the matter in issue must consist of information of a confidential nature;
 - (b) that was communicated in confidence; and
 - (c) the disclosure of which could reasonably be expected to prejudice the future supply of such information.

If the *prima facie* ground of exemption is established, it must then be determined whether the *prima facie* ground is displaced by the weight of identifiable public interest considerations which favour the disclosure of the particular information in issue.

39. I have found above that certain matter in the DPI report qualifies for exemption under s.46(1)(a), and I will not further consider the status of that matter under s.46(1)(b) of the FOI Act.
40. The first and second requirements for exemption under s.46(1)(b) are similar to the second and third requirements for exemption under s.46(1)(a). For similar reasons to those expressed above at paragraphs 21-26, I am not satisfied that any of the matter contained in the DPI report, apart from the matter which I have already found to be exempt under s.46(1)(a), was "communicated in confidence" so as to satisfy the second requirement for

exemption under s.46(1)(b). Nor would those parts of the DPI report which have been made public by their inclusion in the EMP document (since publicly displayed), or which have been taken from published sources, satisfy the first requirement for exemption under s.46(1)(b).

41. I therefore find that the matter in issue in the DPI report (other than the matter which I have found to be exempt matter under s.46(1)(a) of the FOI Act) is not exempt matter under s.46(1)(b) of the FOI Act.
42. For the same reasons explained at paragraph 37 above, no part of the EMP document now comprises information of a confidential nature; nor am I satisfied that the EMP document was communicated to the DPI in confidence. I find that no part of the EMP document qualifies for exemption under s.46(1)(b) of the FOI Act.

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

43. 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.

44. In applying s.44(1) of the FOI Act, one must first consider whether disclosure of the matter in issue would disclose information that is properly to be characterised as information concerning the personal affairs of a person. If that requirement is satisfied, a *prima facie* public interest favouring non-disclosure is established, and the matter in issue will be exempt, unless there exist public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.
45. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, I identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act (see pp.256-257, paragraphs 79-114, of *Re Stewart*). In particular, I said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:
 - family and marital relationships;
 - health or ill health;
 - relationships and emotional ties with other people; and
 - domestic responsibilities or financial obligations.

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

46. In his internal review application dated 10 May 1996, Mr Packer claimed that the documents in issue contain information concerning the personal affairs of Swickers, Packer Environmental and himself as a director of Packer Environmental. In relation to Swickers,

I am satisfied that, for the purposes of the FOI Act, as Swickers is a corporation, it is incapable of having "personal affairs": see *Re Stewart* at p.237, paragraphs 20-21, and the cases there cited. Similarly, Packer Environmental is an incorporated body which, in any event, appears to have come into being after the creation of the two documents in issue.

47. In a letter to me dated 7 June 1996, Mr Packer further submitted that: "*The personal and business affairs of Daryl Packer are proposed to be paraded. This is most unfair.*" However, I informed Mr Packer in a letter dated 30 January 1997 of my preliminary view that disclosure of the documents in issue would not disclose the personal affairs of any person, and that no part of the documents comprised exempt matter under s.44(1):

At the time at which the two documents in issue were prepared, you were an employee of CMPS&F which commissioned document 1 and prepared document 2. Neither document in fact refers to your relationships with others, except for the information (on p.1) that document 2 was developed with the assistance of the Department and other persons working in the agricultural industry. In this context, you were acting as an employee of CMPS&F and any such relationships were clearly of a business or professional nature (see Re Cannon and Australian Quality Egg Farms Limited 1 QAR 491, at paragraphs 73-75 and Re Stewart at paragraphs 82-84). Although your name appears in document 2 (once on an introductory page with a contact telephone number, and once on p.1), you are clearly identified as an employee of CMPS&F. In Re Stewart (at paras 82-84),

I endorsed decisions made in other jurisdictions to the effect that, although a document may refer to an employee by name, if the employee is doing no more than his or her apparent duties, the information is properly classified as information concerning the affairs of the employer, not those of the employee.

48. Mr Packer then submitted that:

Document 2 [the EMP document] was subsequently upgraded by Daryl Packer on a private basis (without any financial remuneration) to an Environmental Management Plan which was submitted to the Department of Environment for its regulatory approval. Accordingly, the upgraded document does not hold commercial status as claimed by the commissioner, and falls within the ambit of personal affairs of Daryl Packer concerning relationships with other people. (Submission dated 9 March 1997); and

My relationship with Ted Gardner was one of personal goodwill - there being no exchange of monies to or from DPI on account of CMPS&F or myself - CMPS&F did not commission the Report, but I did (as a private individual) on behalf of Swickers. The purpose of the DPI report was simply to be input into the subsequent draft EMP report undertaken by myself on behalf of CMPS&F. I believe the personal affairs between Ted Gardner and myself to come under the ambit of your term - relationship with and emotional ties with other people. (Submission dated 7 April 1997)

49. Mr Packer's claim that CMPS&F did not commission the DPI document is clearly contradicted by the Acceptance of Quotation document (which appears on CMPS&F letterhead) and associated correspondence which clearly establishes that the DPI and CMPS&F (acting on behalf of Swickers) entered into a commercial arrangement involving payment for the production of the DPI report.
50. But even if I were to accept Mr Packer's claims, they have no bearing on the proper characterisation of the matter in issue. Nothing in the documents in issue concerns Mr Packer's personal affairs. Whatever Mr Packer's relationship with Mr Gardner may have been, it was not the subject of the documents in issue. The documents in issue concern aspects of the business operations of Swickers. In *Re Stewart* (at pp.238-239, paragraphs 23-27), I indicated that "personal affairs" are to be distinguished from "business affairs", which are dealt with in s.45(1)(c) of the FOI Act.
51. I find that none of the matter in issue qualifies for exemption under s.44(1) of the FOI Act.

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

52. 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.

53. 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.

54. The test for exemption under s.45(1)(c) turns in large measure on the test imported by the phrase "*could reasonably be expected to*". In my reasons for decision in *Re "B"* (at pp.339-341, paragraphs 154-160), I analysed the meaning of that phrase by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the *Freedom of Information Act 1982* Cth. Those observations are also relevant here. 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).

55. I have found above that certain matter in the DPI report qualifies for exemption under s.46(1)(a) of the FOI Act, and I will not further consider the status of that matter under s.45(1)(c) of the FOI Act.

Business, professional, commercial or financial affairs

56. I am satisfied that substantial parts of the two documents in issue concern the business affairs of Swickers. However, large segments of the documents in issue must properly be characterised as general technical information relating to effluent disposal, general principles of environmental management, and a profile of the general locality around Swickers' establishment (i.e., soil types in the area, nature of the terrain, *et cetera*). That general matter would not, in my opinion, satisfy the test for exemption posed by s.45(1)(c)(i), having regard to the principle of characterisation stated in the last two sentences of paragraph 57 below. Given the view I have reached on other elements of the test for exemption under s.45(1)(c), it is not necessary that I particularise the segments of matter in issue which I consider comprise information concerning the business affairs of Swickers, and those which I consider do not satisfy the test imposed by s.45(1)(c)(i).
57. I should also note that I am not satisfied that any of the matter in issue can be properly characterised as information concerning the business, professional, commercial or financial affairs of any of the relevant players apart from Swickers, i.e., of the DPI, CMPS&F, Mr Packer or Packer Environmental. In interpreting s.45(1)(c)(i), I have adopted a confined approach to the construction of the term "*concerning the business, ... commercial or financial affairs of another person*", which accords with the approach taken by Powell J of the NSW Supreme Court in *Wittingslow Amusements Group v Director-General of the Environment Protection Authority of NSW* (Supreme Court of NSW, Equity Division, No. 1963 of 1993, Powell J, 23 April 1993, unreported). The relevant passage from Powell J's decision is reproduced in *Re Cannon* at p.518, paragraph 72. A similar approach has also been adopted by Victorian judges (see the cases analysed in *Re Cannon* at pages 517-518, paragraphs 69-71). It is not sufficient that the matter in issue has some connection with a

business, or has been provided to an agency by a business, or will be used by a business in the course of undertaking business operations. The matter in issue must itself be information about business, commercial or financial affairs, in order to satisfy this requirement.

58. The information contained in the documents in issue concerns Swickers' business affairs, and the application of some general information to proposed developments at Swickers' establishment. It does not discuss the business affairs of the DPI, CMPS&F or Packer Environmental. The fact that the documents have been generated by the DPI and Mr Packer in the course of business operations is not in itself sufficient to justify a finding that the matter in the documents concerns their business, professional, commercial or financial affairs. Nevertheless, I will proceed to consider the application of s.45(1)(c)(ii) to all of the matter in issue.

Prejudice to future supply of information to government

59. In his internal review application dated 10 May 1996 made on behalf of Swickers, Mr Packer wrote:

The information supplied (namely the two documents), was undertaken on the reasonable presumption of complete and total confidentiality between Swickers and the Government. Release of such information will not only curtail information to the government of such detail and workings but will prevent the future disclosure of such information to government except for motherhood statements. This will prevent good environmental care from being exercised, stall the process of exchange of ideas and commitments and adversely affect the public in the longer term.

The disclosure of such material is likely to adversely prejudice the future working relationship of client/consultant and the consultants future ability to undertake projects of this type in the public interest and that of their clients in particular. The reports were released on a goodwill basis and belief that the contents would be dealt with on a normal government/individual confidential basis without third party being privy to such content. Your proposed release of these reports make a mockery of such perceived confidentiality by the community at large, and the consultants involved (including DPI) in particular.

60. I have already found that information provided by Swickers to the DPI for the purposes of its consultancy is exempt matter under s.46(1)(a) of the FOI Act. Swickers commissioned the documents in issue because it believed it needed to obtain approvals or consents from the Kingaroy Shire Council, and other government agencies, in order to proceed with its proposed development. I do not accept that disclosure of the documents in issue (subject to deletion of matter which I have found to be exempt under s.46(1)(a) of the FOI Act) could reasonably be expected to cause a significant number of proponents of development to refrain, in the future, from applying for necessary approvals, and supplying such information as is necessary to obtain those approvals. Developers will continue to supply necessary information when they are obliged to do so, and when it is in their commercial interests to do so.
61. I am not satisfied that any of the matter in issue satisfies the test for exemption under this (second) limb of s.45(1)(c)(ii) of the FOI Act.

Adverse effect on business affairs

The EMP document

62. I have already found that the EMP document has entered the public domain. In such circumstances, I am not satisfied that its disclosure under the FOI Act could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of Swickers (or of any other person or agency): *cf.* paragraph 83 of *Re Cannon*. Even if the EMP document had not been made available for public display and purchase, I do not consider that there is anything so unique or novel in the EMP document as to provide a basis for a claim that disclosure to competitors of Swickers, or of Mr Packer, might allow them to utilise the approach in the future in a manner that could reasonably be expected to have an adverse effect on Swickers or on Mr Packer. I find that the EMP document does not qualify for exemption under s.45(1)(c) of the FOI Act.

The DPI report

63. In his letter to the DPI dated 8 April 1996, Mr Packer claimed that:

... release of the above documentation would disclose professional and commercial information derived by Daryl Packer in the direct interests of its current client, and that disclosure of this information could jeopardise the environmental and economic viability of Swickers since the use of the proposed land for the intended purpose of wastewater treatment and disposal by irrigation is central to the commercial functionality of the business and any limiting of these activities would severely decrease the current value and profitability of the business.

64. In response to this submission, Mrs McLeod of the DPI decided that:

I have considerable difficulty in seeing a possible adverse effect on the activities of Swickers Bacon Factory. The reports appear to have been prepared as part of a process of obtaining approval to undertake a certain course of action or showing the capability to address environmental concerns if a certain course of action was followed. The reports appear to contain factual information or interpretation of factual information regarding environmental issues. I can not see any possible competitive advantage to the business activities of any competitor of the Factory arising from disclosure of the material under FOI.

65. Similarly, in my letter to the applicant dated 30 January 1997, I expressed the following preliminary view:

The contention made on behalf of Swickers appears to be that disclosure of the documents in issue would limit the effectiveness of Swickers' proposed wastewater treatment program and would cause Swickers competitive harm. I take it that you do not suggest that disclosure of the documents in issue could have an adverse effect on the operations of Swickers once a plan was approved and operational. I understand rather that you suggest that an adverse effect could arise from an opponent of the proposed development

getting access to the documents prior to approval of the plan and, by use of the information in the documents, managing to have the project rejected by regulatory authorities. If that is not the case, I fail to see how disclosure of the documents in issue could affect the operation of the project.

If my assessment of your claim is correct, and it is based on the possibility that an opponent would find an actual flaw in the proposed plan, it is my preliminary view that the public interest (which I discuss further below) would strongly favour disclosure of the documents in issue in order to enable that flaw to be identified and drawn to the attention of the appropriate regulatory authorities. If, on the other hand, your claim is that an opponent, having obtained access to the document, might misrepresent its contents in some way to the detriment of Swickers, I do not consider this a valid basis for a finding of exemption under s.45(1)(c). In such a case the decision of an opponent to misrepresent information would be too far divorced from disclosure of the document to regard misrepresentation as an effect of disclosure.

In respect of any adverse effect on Swickers' business reputation or goodwill, my preliminary view is that disclosure of information detailing responsible and effective treatment of wastewater must surely enhance Swickers' reputation and goodwill amongst the community.

66. Mr Packer submitted, however, that:

The subject neighbours are effectively active competitors in the sense that they have and are exercising the will to reduce Swickers profits. For this sense they are able to adversely affect Swickers even after approval of the EMP. I refute the Commissioner's claim that this matter is too far divorced to have no adverse effect upon disclosure. (Submission dated 9 March 1997)

Significant parts of the documents in issue concern the business affairs of Swickers. In the broader sense, the FOI applicant has been shown to be acting in competition - ie has limited or reduced Swickers potential to earn a profit.

... You simply do not understand that the FOI applicant has continued to wage a public media campaign against Swickers - Regulatory Authorities are not the only potential opponent to Swickers' operations.

67. The third party, in turn, submitted that:

I am not competing with Swickers having nothing to do with their industry. I have good reason to suspect that Swickers had a big advantage in the past in that they have not had to meet certain health and environmental standards... I expect it now does reduce their profit if they have to bring their operations up to standard. I understand that both the DPI and DEH insisted that something had to be done and a better method found. Swickers cannot blame me that they never kept up to date gradually and now have to spend big money on their operation... I am aware that Swickers management has advised people that I am trying to close them down and jobs are at risk

but this is a red herring to take the heat off the real issue - the lagoons. I am not trying to close Swickers and I couldn't anyway as the abattoir has the correct zoning - when Council Gazetted their Strategic and Town Plan in 1988 they included a Special Facilities Zone for the factory.

68. I am not satisfied that disclosure of the DPI report (subject to the deletion of matter I have found to be exempt under s.46(1)(a) of the FOI Act), could reasonably be expected to have any adverse effect on Swickers' business affairs at this point in time. The document describes the general type of operation proposed for effluent irrigation at Swickers. It does not reveal any sensitive commercial information about Swickers' present operations, or its operations at the time the document was created. I understand that rezoning of the Swickers site was not ultimately required and that the lagoons which form a major part of the effluent irrigation system have been in place for some time. Disclosure of the DPI report at this stage might enable some members of the public to make comments on the general type of operation in relation to effluent irrigation. However, I am not satisfied that disclosure of the DPI report (subject to deletion of the matter I have found to be exempt under s.46(1)(a) of the FOI Act), at a time when the relevant system is already operational, could reasonably be expected to have an adverse effect on Swickers' business, commercial or financial affairs.
69. Mr Packer also contended that the consultancy activities of the DPI would be affected by release of the DPI report. I consider it significant that the DPI has not itself sought to claim exemption for any part of the DPI report under s.45(1)(c). CMPS&F was a commercial consultant which entered into a consultancy agreement with the DPI for production of the DPI report. The express undertaking given in the facsimile transmission dated 10 November 1994 set out the scope of the agreement between the parties as to confidentiality. I do not consider that a significant number of potential users of the DPI as a consultant could reasonably be expected to be dissuaded from engaging the DPI merely because matter that was not protected by the terms of an express contractual stipulation for confidentiality, was disclosed to an applicant under the FOI Act.
70. Mr Packer also contended that disclosure would have an adverse effect on his business, professional, commercial or financial affairs. The DPI report was created by the DPI on the instructions of CMPS&F. It does not discuss the business operations of CMPS&F or Packer Environmental. I can see no reasonable basis for expecting that disclosure of the DPI report could have an adverse effect on the business affairs of CMPS&F, Packer Environmental, or Mr Packer.
71. I therefore find that disclosure of the DPI report (subject to the deletion of matter which I have found to be exempt under s.46(1)(a)), could not reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of Swickers, or of any agency or other person. Given my finding above that disclosure could not reasonably be expected to prejudice the future supply of information to government, I find that the DPI report (apart from those segments which I have found to be exempt under s.46(1)(a) of the FOI Act) does not qualify for exemption under s.45(1)(c) of the FOI Act.
72. That finding makes it unnecessary for me to consider the application of the public interest balancing test incorporated in s.45(1)(c). I note, however, that the third party's submission marshalled an impressive case for disclosure of the documents in issue being warranted in the public interest. As she remarked in her submission dated 5 August 1997:

If I was wrong in considering that Council's approving the 3 effluent treatment lagoons in such a position in town, upwind and in such close proximity to extensive residential development, childcare centres and school, was a grave potential problem to residents then I would have thought that Swickers and Packer Environmental would have been pleased to prove me wrong and supply whatever information would prove that.

73. In my view, there are general public interest considerations which favour disclosure of the information in issue (apart from that which I have found to be exempt under s.46(1)(a) of the FOI Act) for the purpose of informing the local community of the nature, technical viability, and public health and safety aspects, of a development of the type in question: *cf. Re Cardwell Properties Pty Ltd* at p.684 (paragraph 24) and p.685 (paragraph 29). Moreover, as the third party is an owner of land neighbouring the site of Swickers' development, it could reasonably be argued that there is a public interest in the third party having access to information which affects or concerns her to such a degree as to give rise to a justifiable "need to know" which is more compelling than for other members of the public (see *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.368-377, paragraphs 164-193).

Conclusion

74. For the foregoing reasons, I decide to vary the decision under review (being the decision of Mr G T Johnson dated 22 May 1996 on behalf of the respondent), by finding that the parts of the DPI report identified in paragraph 24 above are exempt matter under s.46(1)(a) of the FOI Act. In other respects, I affirm the decision under review to the extent that it found that the balance of the matter in issue is not exempt from disclosure under the FOI Act.

.....
 F N ALBIETZ
INFORMATION COMMISSIONER