

**OFFICE OF THE INFORMATION COMMISSIONER (QLD)**

**Decision No. 99011**  
**Application L 34/97**

**Participants:**

GREG SPILSBURY  
**Applicant**

BRISBANE CITY COUNCIL  
**Respondent**

JOHN WILSON AND PARTNERS PTY LTD  
ENVIRONMENTAL RESOURCES MANAGEMENT (QLD) PTY LTD  
**Third parties**

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - *Biosolids Management Study Report* prepared by consultants under contract to Council - whether disclosure of parts of Report would found an action for breach of confidence owed to consultants - whether contractual obligation of confidence - whether equitable obligation of confidence - application of s.46(1)(a) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether disclosure of parts of Report would disclose information that has a commercial value to the consultants - whether disclosure could reasonably be expected to destroy or diminish the commercial value of the information - application of s.45(1)(b) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether parts of Report comprise information concerning the business, professional, commercial or financial affairs of the consultants - whether disclosure could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the consultants - whether disclosure could reasonably be expected to prejudice the future supply of like information to government - whether disclosure of the information would, on balance, be in the public interest - application of s.45(1)(c) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether disclosure of parts of Report would disclose purpose or results of research - whether disclosure could reasonably be expected to have an adverse effect on agency or consultants by, or on whose behalf, research is or is intended to be, carried out - application of s.45(3) of the *Freedom of Information Act 1992 Qld*.

*Freedom of Information Act 1992 Qld* s.45(1)(b), s.45(1)(c), s.45(3), s.46(1)(a), s.51, s.78

*Freedom of Information Act 1982 Vic* s.34(4)(b)(ii), s.34(4)(b)(iii)

*Freedom of Information Act 1982 Cth* s.43A

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

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

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

*Hopkins & Presotto and Department of Transport, Re* (1995) 3 QAR 59

*Leicestershire County Council v Michael Farraday and Partners, Limited* [1941] 2 KB 205

*O'Brien v Komesaroff* (1982) 150 CLR 310

*O'Dwyer and The Workers' Compensation Board of Queensland, Re* (1995) 3 QAR 97

*Swickers Kingaroy Bacon Factory Pty Ltd and Department of Primary Industries and Another, Re* (Information Commissioner Qld, Decision No. 98011, 27 November 1998, unreported)

*Wittingslow Amusements Group Pty Ltd 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**

I set aside the decision under review (which is identified in paragraph 3 of my accompanying reasons for decision). In substitution for it, I decide that the matter remaining in issue (which is identified in the Schedule attached to my reasons for decision) is not exempt matter under the *Freedom of Information Act 1992* Qld.

Date of decision: 21 December 1999

.....  
F N ALBIETZ  
**INFORMATION COMMISSIONER**

# OFFICE OF THE INFORMATION COMMISSIONER (QLD)

**Decision No. 99011**  
**Application L 34/97**

## **Participants:**

GREG SPILSBURY  
**Applicant**

BRISBANE CITY COUNCIL  
**Respondent**

JOHN WILSON AND PARTNERS PTY LTD  
ENVIRONMENTAL RESOURCES MANAGEMENT (QLD) PTY LTD  
**Third parties**

## **REASONS FOR DECISION**

### **Background**

1. The applicant seeks review of a decision by the Brisbane City Council (the Council) refusing him access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to a *Biosolids Management Study Report* dated April 1997 (the Report) prepared by two consultants engaged by the Council, John Wilson and Partners Pty Ltd (JWP) and Environmental Resources Management (Qld) Pty Ltd (ERM). The report sets out a recommended management strategy for Brisbane's ten wastewater treatment plants up to the year 2011.
2. The applicant sought access to the Report by an FOI access application dated 12 June 1997. By letters dated 8 July 1997, the Council consulted JWP and ERM under s.51 of the FOI Act. ERM responded by letter dated 9 July 1997, stating that it objected to disclosure of the Report on the basis of s.45(1) and s.46(1) of the FOI Act. By letter dated 25 July 1997, JWP also conveyed its objection to disclosure of the Report.
3. By letter dated 8 August 1997, Mr P Wesener of the Council informed the applicant of his decision to refuse access to the Report under s.45(1)(b), s.45(1)(c), s.45(3) and s.46(1)(a) of the FOI Act. On 5 September 1997, the applicant sought internal review of Mr Wesener's decision. The internal review was conducted on behalf of the Council by Ms R Chapman who, by letter dated 4 November 1997, informed the applicant that she affirmed Mr Wesener's decision.

4. By letter dated 18 December 1997, the applicant applied to me for review, under Part 5 of the FOI Act, of Ms Chapman's decision.

### **External review process**

5. The Council provided me with a copy of the Report, together with the Council's Long Form of Consultancy Agreement (which was the form of Agreement entered into between the Council and JWP and ERM) and a document entitled "Terms of Reference for the Provision of Consultancy Services to Study and Make Recommendations on an Appropriate Strategy for the Management of Brisbane Water's Biosolids".
6. In his application for external review, the applicant stated that his reasons for seeking access to the Report were *"to ascertain the nature and quantity of biosolids needing management by Brisbane Water, and the alternative management options being considered. ... I at least expected that waste stream quantification data and alternate strategies for its management would be made available from the report."* The applicant stated that he had no interest in any commercially sensitive data pertaining to costs, revenues, *et cetera*, associated with the study.
7. By letters dated 21 January 1998, the Assistant Information Commissioner wrote to JWP and ERM informing them of the background to the applicant's FOI access application, and inviting them to apply to participate in this external review if they objected to the disclosure of any part of the Report (see s.78 of the FOI Act). Both applied for, and were granted, status as participants in the review. After a series of consultations with my staff, JWP and ERM agreed to the disclosure to the applicant of pages 45-59, table 2.2 on page 9, and pages i-x of the Table of Contents of the Report. The Council also agreed to disclosure, and I authorised the Council to give the applicant access to, those parts of the Report, under the FOI Act.
8. Following disclosure of the above matter, the applicant informed my office that there were further parts of the Report to which he wished to obtain access. He forwarded to my Office a copy of the Table of Contents on which he had marked those parts of the Report in respect of which he wished to pursue access. In a letter to the applicant dated 21 April 1998, the Assistant Information Commissioner pointed out that some of the parts of the Report which the applicant had marked contained information that was, arguably, commercially sensitive, and that the applicant had previously indicated that he was not interested in obtaining information of that kind. The applicant subsequently agreed to confine the scope of the matter to which he still wished to pursue access to those segments of the Report identified in a letter dated 27 May 1998 from my Office to the applicant. Those segments are listed in the Schedule to these reasons for decision. The applicant also indicated that he did not seek access to third party sources of information, or the identities of third parties with whom potential commercial negotiations may take place. On that basis, the names of a number of sources of information, and other third parties appearing in the segments in issue, are no longer in issue. The matter no longer in issue within the parts to which the applicant seeks access is also specified in the Schedule.
9. In support of his case, the applicant provided me with a copy of a Draft Report of the *"Public Inquiry into the Management of Sewage and Sewage By-products in the NSW Coastal Zone"* as evidence that the New South Wales government has been willing to make available to the public, studies of a similar type to that now in issue.
10. I then wrote to JWP and ERM setting out the amended scope of the applicant's FOI access application and conveyed my preliminary view that the matter remaining in issue did not qualify for exemption under s.45(1)(b), s.45(1)(c), s.45(3) or s.46(1)(a) of the FOI Act.

11. By letter dated 14 July 1998, ERM provided me with brief submissions (in which JWP concurred, by letter dated 7 September 1998) supporting its objection to disclosure of any part of the Report, and enclosed a paper entitled "*Brisbane Water's Biosolids Management Strategy*" for the information of the applicant. ERM's submissions and the enclosed paper were forwarded to the applicant under cover of a letter dated 11 September 1998, which invited the applicant to make submissions in response.
12. The applicant responded by letter dated 23 October 1998, with which he enclosed submissions in support of his case.
13. The submissions of ERM, and of the applicant, were forwarded to the Council on 12 March 1999.  
The Council then informed my Office that it no longer objected to disclosure of those parts of the Report sought by the applicant. I wrote to JWP and ERM inviting them to reconsider their objection and enclosing the applicant's submissions. By letter dated 8 June 1999, ERM advised me that it maintained its objection to disclosure. In a telephone conversation with a member of my staff, Dr Kempton of ERM advised that he wrote on behalf of JWP also.
14. As JWP and ERM continue to object to disclosure of any part of the Report to the applicant, (although the Council itself no longer objects to disclosure of those parts of the Report remaining in issue), I must proceed to make a formal decision in this matter.
15. In making my decision, I have taken into account the submissions provided by JWP and ERM to the Council during the internal review process, ERM's submissions to my Office dated 14 July 1998, and the applicant's submissions dated 23 October 1998. I have also considered the comments made in the applicant's application for external review, which were provided to JWP and ERM in the course of this review.

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

16. Both JWP and ERM maintain that the Report prepared by them was supplied to the Council in confidence, and that commercial information contained in the Report was sought and received from other third parties on a confidential basis.
17. Section 46(1)(a) provides:

*46.(1) Matter is exempt if—*

*(a) its disclosure would found an action for breach of confidence;*

18. I considered the application of s.46(1) of the FOI Act in some detail in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, where I said (at p.296, paragraph 43) that the words "found an action for breach of confidence" in s.46(1)(a) refer to a legal action brought in respect of an alleged obligation of confidence in which reliance is placed on one or more of the following causes of action:
  - a cause of action for breach of a contractual obligation of confidence;
  - a cause of action for breach of an equitable duty of confidence;
  - a cause of action for breach of a fiduciary duty of confidence and fidelity.

## Contractual obligation

19. In *Re "B"* at p.297 (paragraph 45), I said:

*In the context of s.46(1)(a) the word "confidence" must be taken to be used in its technical, legal sense, thus:*

*"A confidence is formed whenever one party ('the confider') imparts to another ('the confidant') private or secret matters on the express or implied understanding that the communication is for a restricted purpose." ( F Gurry "Breach of Confidence" in P Finn (Ed.) Essays in Equity; Law Book Company, 1985, p.111.)*

*My references to a cause of action for breach of a contractual obligation of confidence must be understood in this sense. A contractual term requiring that certain information be kept secret will not necessarily equate to a contractual obligation of confidence: an issue may arise as to whether an action for breach of the contractual term would satisfy the description of "an action for breach of confidence" (so as to fall within the scope of s.46(1)(a) of the FOI Act). An express contractual obligation of confidence ordinarily arises in circumstances where the parties to a disclosure of confidential information wish to define clearly their respective rights and obligations with respect to the use of the confidential information, thereby enabling the parties to anticipate their obligations with certainty. ...*

20. The Council initially decided that disclosure of the Report would be in breach of the following statement set out in the Report:

*The contents of the report is confidential and remains the intellectual property of John Wilson and Partners Pty Ltd and Environmental Resource Management Pty Ltd. No part of this document may be disclosed to a third party without the written consent of John Wilson and Partners Pty Ltd or Environmental Resource Management (Qld) Pty Ltd.*

21. However, clause 7 of the Consultancy Agreement (in which the Council is the Principal) states that:

*All intellectual property rights attaching to Contract Material created or prepared by the consultant in connection with the performance of the consultancy services shall vest in the Principal upon the creation of the Contract Material. ...*

In addition, clause 9.2 provides:

*The consultant shall -*

- (a) keep all Records in a secure location so no unauthorised person is able to gain access to them; and*
- (b) ensure Records are kept confidential and are not disclosed to any person other than the Principal and the Project Officer except where -*
  - (i) required by law; or*



(ii) *the Principal's consent is obtained in writing.*

22. The confidentiality statement in the Report conflicts with the terms of the Agreement entered into by JWP and ERM. While both argue that the Council "awarded the contract with full knowledge that the final report would be commercial in confidence...", they have provided no evidence to support that claim, and the rights of the parties are those set out in the written Agreement, which was freely entered into by JWP and ERM. The terms of the written Agreement do not expressly require the Council to keep the Report confidential, and the material before me does not support a finding that it was an implied term of the Agreement that the Principal (i.e., the Council) must keep the Report confidential. The Consultancy Agreement was intended to result in the creation of a Report which the Council could use for its own purposes. The Report itself recognised that public consultation would be necessary (clause 20). JWP and ERM could not, subsequent to the Agreement, unilaterally impose an obligation of confidentiality on the Council by inserting a statement to that effect in the Report. I find that there is no contractual obligation of confidence binding on the Council (cf. *Re Swickers Kingaroy Bacon Factory Pty Ltd and Department of Primary Industries and Another* (Information Commissioner Qld, Decision No. 98011, 27 November 1998, unreported) at paragraphs 18-24.)

### **Equitable obligation**

23. In *Re "B"*, I discussed the five cumulative criteria which must be satisfied in order to found an action in equity for breach of confidence, namely:
- (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 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 54-75);
  - (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).

24. For similar reasons to those discussed in paragraphs 19-22 above, I find that the matter to which the applicant seeks access is not subject to an equitable obligation of confidence (element (c)). I consider that the relationship between JWP and ERM, as consultants, and the Council, was that of professional and client, given the special skill and knowledge that was involved in the study (see *Re Hopkins & Presotto and Department of Transport* (1995) 3 QAR 59 at pp.69-70, paragraph 28 and also *Leicestershire County Council v Michael Farraday and Partners, Limited* [1941] 2 KB 205). While it is a recognised incident of the relationship between professional and client that the professional has a legal duty to keep the client's affairs secret, it is not an ordinary incident of the relationship of professional and client that the client owes a duty of confidence to the professional in respect of information communicated by the professional to the client as part of the service which the professional contracted to perform for the benefit of the client (see *Re Hopkins & Presotto* at p.70, paragraph 31).
25. In this instance, the Council contracted with JWP and ERM for the provision of professional services (being a consultancy study to develop and recommend an environmentally responsible and economic strategy for the management of Brisbane Water's biosolids to the year 2011) including the provision of a detailed report. As a client, paying for a report from consultants under a contract which gave it full rights to all contract material, the Council had every right to expect that it could do as it wished with any part of the Report. In the ordinary case, a report of this kind becomes the property of the client who has paid for it, to do with as the client pleases. I do not believe that there is anything special or unusual about this case that takes it outside of the ordinary principle that a report prepared by professional consultants, for a client who is paying for the production of a report, becomes the property of the client to be used as the client sees fit.
26. JWP and ERM have argued that the Report contains methodology used in developing biosolids management strategies. The matter to which the applicant seeks access is of the type which has been described in many reported cases as "know-how": it sets out the basis on which the professional consultants exercised their skills, knowledge and experience in executing the task that they contracted to perform, and the results of that exercise (see the quotes from the High Court judgment in *O'Brien v Komesaroff* (1982) 150 CLR 310 set out in *Re Hopkins* at p.71-73, paragraphs 35-36). Neither JWP nor ERM has identified to me any particular pieces of information in the Report which disclose something more than the application of accumulated knowledge, experience or skill in their particular field of study, such as to amount to some new innovation or improvement in which they have a legitimate interest in protecting from competitors, so as to preserve a commercial advantage.
27. In response to consultation by the Council under s.51 of the FOI Act, and in a telephone discussion with my office, ERM made the broad claim that the information and methodology in the Report was based on intellectual property developed as part of its business, and that disclosure of such methodology to a third party would significantly jeopardise its ability to conduct future business in that area. However, nothing more specific has been provided to me to indicate either the way in which that methodology could be commercially sensitive, or how disclosure to a third party would have an adverse effect on ERM's (or JWP's) business.
28. It has been argued, by JWP in particular, that other companies provided information contained in pages 5-34 of the Report (Industry Best Practice), and that this was done on a confidential basis. Again, I have no evidence before me to indicate that that information was of a type that was entitled to the protection of an obligation of confidence on the basis

that it constituted some special innovation or technique other than recognised industry "know-how". In fact, most of it appears to have come from published sources.

29. The Council no longer maintains that the parts of the Report sought by the applicant are subject to an obligation of confidence. Other than JWP and ERM continuing to assert that they always understood that the Report was provided to the Council in confidence (which, in light of the clear contractual provisions to the contrary, indicates a misunderstanding on their part), I have no evidence to suggest that the matter to which the applicant seeks access is subject to an equitable obligation of confidence. Thus, I find that criterion (c) (see paragraph 23 above) is not satisfied.
30. In addition, I note that in its letter to the Council dated 9 July 1997, ERM stated that the information contained on pages 5-34 of the Report (Industry Best Practice) could be considered as being in the public domain. This comment was disputed by JWP in its letter to the Council dated 25 July 1997, in which it stated that much of the information in that section was provided by other contributors to the Report, and that permission would need to be obtained from those companies before any part of that section was disclosed to third parties.
31. On examination of pages 5-34 of the Report, it appears that a large amount of information was taken from published sources, references to which are acknowledged on p.147 of the Report. I would have considerable difficulty in finding that those parts, at least, have the necessary quality of confidence to satisfy criterion (b) necessary to found an action in equity for breach of confidence (see paragraph 23 above). However, because I have found that criterion (c) is not established, it is unnecessary for me to go through the process of identifying that matter.
32. I find that the matter remaining in issue does not qualify for exemption under s.46(1)(a) of the FOI Act.

**Section 45(1)(b) and s.45(1)(c) of the FOI Act**

33. ERM has claimed that disclosure of the methodology used in the Report would significantly jeopardise its ability to conduct future business in the area. JWP has argued that such information and methodology is its own intellectual property. Both have expressed concern as to the motives of the applicant, believing that he might be able to use that methodology and information contained in the Report to his commercial advantage. ERM has said that disclosure of the Report to the applicant would provide him with a complete 'product', rather than having to undertake his own research to find the necessary information.
34. Section 45(1) of the FOI Act provides:

*45.(1) Matter is exempt matter if—*

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

*(b) its disclosure—*

*(i) would disclose information (other than trade secrets) that has a commercial value to an agency or another person; and*

(ii) *could reasonably be expected to destroy or diminish the commercial value of the information; or*

(c) *its disclosure—*

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

(ii) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;*

*unless its disclosure would, on balance, be in the public interest.*

35. In *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, I discussed the relationship between s.45(1)(b) and s.45(1)(c) of the FOI Act (at p.516, paragraph 66):

*Just as the words of s.45(1)(b) exclude trade secrets from its sphere of operation, the s.45(1)(c) exemption is so worded (see paragraph 25 above) that it applies only to information other than trade secrets or information mentioned in s.45(1)(b). This means that particular information cannot ordinarily be exempt under more than one of the s.45(1)(a), s.45(1)(b) or s.45(1)(c) exemptions. (However, an agency or other participant may wish to argue, on a review under Part 5 of the FOI Act, that information is exempt under one of those provisions, and put arguments in the alternative as to which is applicable). Whereas both s.45(1)(a) and (b) require that the information in issue must have an intrinsic commercial value to be eligible for exemption, information need not be valuable in itself to qualify for exemption under s.45(1)(c). Thus, where information about a business has no commercial value in itself, but would, if disclosed, damage that business, s.45(1)(c) is the only one of the exemptions in s.45(1) that might be applicable. For information to be exempt under s.45(1)(c), it must satisfy the cumulative requirements of s.45(1)(c)(i) and s.45(1)(c)(ii), and it must then survive the application of the public interest balancing test incorporated within s.45(1)(c).*

36. In both s.45(1)(b) and s.45(1)(c), the test for exemption incorporates the phrase "*could reasonably be expected to*". In *Re "B"* 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.*

37. 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).

#### **Section 45(1)(b)**

38. I explained the requirements for exemption under s.45(1)(b) at pp.511-516 (paragraphs 50-65) of *Re Cannon*. The first requirement is that the matter in issue must comprise information which has a commercial value to an agency or another person. There are two possible interpretations of the phrase "commercial value" which are not only supportable on the plain meaning of those words, but also apposite in the context of s.45(1)(b) of the FOI Act. The first and primary meaning is that information has a commercial value to an agency or person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged. The information may be valuable because it is important or essential to the profitability or viability of a continuing business operation or of a pending 'one off' commercial transaction.
39. The second meaning is that information has a commercial value to an agency or person if a genuine arms-length buyer is prepared to pay to obtain that information from that agency or person, such that the market value of the information would be destroyed or diminished if it could be obtained under the FOI Act from a government agency which has possession of it. I should note in that regard that I am not referring to transactions in the nature of industrial espionage or the like, but rather to the existence of a legitimate market in which an agency or person could sell particular information to a genuine arms-length buyer at a market value which would be destroyed or diminished if the information could be obtained under the FOI Act.
40. The information in question must have a commercial value to an agency or another person at the time that an authorised decision-maker under the FOI Act comes to apply s.45(1)(b), i.e., information which was once valuable may become aged or out-of-date, such that it has no remaining commercial value (see *Re Brown and Minister for Administrative Services* (1990) 21 ALD 526, at p.533, paragraph 22).
41. As I have mentioned previously, neither JWP nor ERM have specifically referred me to the way in which it can be said that the matter remaining in issue comprises information having a "commercial value" in either of the senses set out in *Re Cannon*. The matter in issue comprises much information that does not appear to have any particular sensitivity.
42. I am not satisfied that there is anything so novel in the methodology adopted by JWP and ERM in preparing the Report as to warrant a finding that it is information which has a commercial value in the requisite sense.
43. It may be more arguable that the compilation of information from various sources gives rise to a product which has some commercial value, although in a very limited market. There is, however, no evidence before me to support such a finding.

44. However, more fundamental to the case against exemption under s.45(1)(b) is the fact that JWP and ERM assigned any commercial interest they may have had in the Report to the Council. Clause 7 of the Agreement entered into with the Council (referred to above at paragraph 21) assigns all intellectual property rights attaching to contract material created or prepared by the consultant to the Council. It is the Council that now owns the intellectual property in the Report and that is able to decide how it is to be used. The Council has no objection to the disclosure of the Report to the applicant. JWP and ERM do not have any basis upon which to maintain a claim under s.45(1)(b) of the FOI Act that the matter in issue has any commercial value to them that might be diminished by disclosure.

#### **Section 45(1)(c)**

45. The correct approach to the interpretation and application of s.45(1)(c) is explained in *Re Cannon* at pp.516-523 (paragraphs 66-88). In summary, matter will be exempt under s.45(1)(c) of the FOI Act if:

- (a) the matter in issue is properly to be characterised as information concerning the business, professional, commercial or financial affairs of an agency or another person (s.45(1)(c)(i)); and
- (b) disclosure of the matter in issue could reasonably be expected to have either of the prejudicial effects contemplated by s.45(1)(c)(ii), namely:
  - (i) an adverse effect on the business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns; or
  - (ii) prejudice to the future supply of such information to government;

unless disclosure of the matter in issue would, on balance, be in the public interest.

46. In relation to the first element of s.45(1)(c), I do not consider that the matter remaining in issue can properly be characterised as information concerning the business, commercial or financial affairs of JWP or ERM.
47. In interpreting this requirement, 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 Pty Ltd 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 referred to 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 the business, commercial or financial affairs of a person or agency who objects to its disclosure, in order to satisfy this requirement.
48. The information contained in the matter remaining in issue deals with possible business opportunities for the Council connected with biosolids management, but it does not discuss the business affairs of JWP or ERM. The fact that the Report was generated in the course of

JWP's and ERM's consultancy operations, and employs methodology developed by them, does not, of itself, mean that the matter in issue concerns their business, commercial or financial affairs. The Report deals with the business of the Council in the area of biosolids management, and future opportunities for its development. The Council does not object to disclosure of the matter in issue. I find that the matter in issue in the Report is not information about the business, commercial or financial affairs of JWP or ERM.

49. As to the second element of s.45(1)(c), I am not satisfied that disclosure could reasonably be expected to prejudice the future supply of like information to government. The information in issue was provided in return for financial reward. I am not satisfied that a significant number of consultants could reasonably be expected to refrain from tendering for Council contracts, or from applying their full knowledge, experience and expertise in performing contractual obligations, if the matter in issue is disclosed.
50. Nor do I consider that disclosure could reasonably be expected to have an adverse effect on the business, professional or financial affairs of JWP or ERM. Whatever commercial rights they had to the information in the report have been assigned to the Council by agreement. There is no evidence before me to support a finding that disclosure of the matter remaining in issue could reasonably be expected to have an adverse effect on the business, professional or financial affairs of JWP or ERM.

Public interest balancing test

51. Turning finally to the public interest balancing test, the applicant submitted that:
- ... [the environmental organisation for which the applicant works] has a strong involvement in legislation, planning, policy and regulation of wastes in South East Qld. The range of pathogens and contaminants in biosolids are of concern to our organisation. The US EPA has identified the strong potential of these substances to contaminate lands, water storage facilities, waterways and food chains with pathogens, heavy metals and other toxicants.*
52. The applicant argued that the public should be fully informed of such risks before any activity begins:
- Quite simply ... environmental and community groups require the detailed information contained in the [Report] to estimate the risks, review the processes and make informed input into government policy and regulations concerning the matter of biosolids disposal.*
53. In my view, there are significant public interest considerations favouring disclosure of the information comprising the matter in issue. I consider that, even if the *prima facie* test for exemption under s.45(1)(c) had been established, there would have been an overriding public interest in the disclosure of the matter in issue. I consider that members of the public (many of whom are ratepayers, who ultimately paid for the study and the Report) have a considerable interest in evaluating the alternatives available to the Council for the management of, and possible marketing opportunities for, biosolids in the Brisbane area over the next decade, and ensuring that environmental and health considerations and other relevant factors are properly considered by the Council. Members of the public with an interest in assessing the various strategies outlined in the Report may wish to have input into

any course of action the Council might propose to take as a result. This clearly accords with one of the major objects of the FOI Act, i.e., promoting informed public participation in the processes of government.

54. I find that the matter remaining in issue does not qualify for exemption under s.45(1)(c) of the FOI Act.

**Section 45(3) of the FOI Act**

55. Section 45(3) of the FOI Act provides:

*45.(3) Matter is exempt matter if—*

- (a) *it would disclose the purpose or results of research (including research that is yet to be started or finished); and*
- (b) *its disclosure could reasonably be expected to have an adverse effect on the agency or other person by or on whose behalf the research is being, or is intended to be, carried out.*

56. I briefly considered this exemption provision in *Re O'Dwyer and The Workers' Compensation Board of Queensland* (1995) 3 QAR 97 at pp.105-106, paragraphs 21-23. It is a clumsily drafted provision (I note that it was added to the *Freedom of Information Bill* only in the Committee stage of debate on the Bill in the Legislative Assembly) which, in my view, requires reconsideration by Parliament, and amendments to clarify its intended sphere of application.

57. No submissions were made in support of this exemption provision. Even if it were accepted that disclosure of the matter in issue would "disclose the results of research", two issues arise concerning the application of s.45(3) in this case.

58. One concerns the use of the words "research is being, or is intended to be, carried out". The use of these words indicates that s.45(3) only applies at a time when research is proposed to be, or is being, conducted, i.e., it does not extend to research which has been completed. (I note that the use of the word "including" in s.45(3)(a) tends to suggest that s.45(3)(a) extends more broadly than just to research that is yet to be started or finished. However, the operative test for exemption of matter that answers the description in s.45(3)(a) is imposed by s.45(3)(b), which refers only to adverse effects on an agency or person by or on whose behalf research is being, or is intended to be, carried out.) This is the way corresponding (although differently worded) provisions are applied in Victoria (s.34(4)(b)(ii) and (iii) *Freedom of Information Act 1982 Vic*) and the Commonwealth (s.43A *Freedom of Information Act 1982 Cth*). I consider that to be the correct interpretation of s.45(3) of the Queensland FOI Act. Clearly, in this case, any "research" has been completed and incorporated into the Report, so that the matter in issue does not qualify for exemption under s.45(3).

59. The other issue concerns interpretation of the words "by or on whose behalf" in s.45(3)(b). These words carry two possible meanings:

- they may refer to two persons simultaneously, i.e., both the beneficiary of the research and the person carrying out the research; or



- they may refer to only one person (i.e., the beneficiary of the research) but recognise that that person may in some cases carry out the research for their own benefit, but, in other cases, have it carried out for them.

60. It is unnecessary for me to express a concluded view on this issue in this case since, even adopting the interpretation which is most beneficial to the third parties, I am not satisfied, on the material before me, that disclosure of the matter in issue could reasonably be expected to have an adverse effect on JWP or ERM, or on the Council as the beneficiary of the research.

61. I find that the matter in issue does not qualify for exemption under s.45(3) of the FOI Act.

**Conclusion**

62. For the reasons given above, I set aside the decision under review (being the decision of Ms Chapman on behalf of the Council dated 4 November 1997). In substitution for it, I decide that the matter remaining in issue (which is specified in the attached Schedule) does not qualify for exemption under the FOI Act.

.....

F N ALBIETZ  
**INFORMATION COMMISSIONER**

**Spilsbury and Brisbane City Council - L 34/97**

**Matter remaining in issue**

<b>Parts remaining in issue</b>		<b>Pages of Report</b>	<b>Matter no longer in issue</b>
2	Industry Best Practice		
2.2	World Trends in Biosolids Management	5-8	p.8 - 4th - 13th words of fourth paragraph
2.3	Biosolids Treatment and Disposal Processes	8-10	
2.4	Biological Processes	11-20	p.15 - last two sentences
3	Review of Regulatory Requirements		
3.1	Review of Guidelines for Beneficial Use of Biosolids	35-38	
3.7	Recommendations for Biosolids Classification	43-44	
7	Sludge Dewatering	60-62	p.60 - last sentence of first paragraph; last sentence of fifth paragraph p.61 - first 13 words in fifth bullet point
8	Review of Environmental Factors		
8.1	Odours	63	
8.7	Summary	65	

Parts remaining in issue	Pages of Report	Matter no longer in issue
9 Markets & Analysis  9.1 Products & Product Characteristics  9.2 Market security  9.3 Biosolids Loading Rates  9.6.3 Application to Agricultural Lands  9.7 Summary of Market Potential	  66  66-67  67-68  72-76  78-79	        p.78 - second entry in table under main bold heading - underlined heading of final paragraph - 10th & 11th words in first sentence of final paragraph - first 10 words of last sentence p.79 - 15th & 16th, 26th & 27th words of second sentence - 10th - 13th and 26th - 27th words in second last paragraph
10 Factors Impacting on Pricing and Beneficial Use of Markets  10.2 Effect of Other Local Authorities  10.3 Operating Procedures  10.4 Transport  10.5 On-Site Stockpiling  10.6 Out-of-Specification materials	  80 (part)  81  81  81  81	          

Parts remaining in issue	Pages of Report	Matter no longer in issue
<p>11 Screening of Biosolids Treatment and Disposal Processes</p> <p>11.1 Selection of Shortlisted Biosolids Treatment and Disposal Processes</p>	82-84	
<p>12.5 Evaluation of Biosolids Treatment &amp; Disposal options</p> <p>14 Detailed Analysis of Oxley Creek Biosolids Treatment and Disposal Processes (apart from Table 12.2 and Fig. 12.1)</p> <p>14.2.4 Land Application of Dewatered Cake</p> <p>14.4 Evaluation of Biosolids Treatment and Disposal Processes (apart from Table 14.1 and Fig. 14.1)</p> <p>14.5 Conclusions and Recommendations</p>	98-101	<p>p.98 - last word of first italicised heading in 12.5.1 - sixth word of second last paragraph (immediately beneath first italicised heading)</p> <p>p.101 - 5th - 13th words in second sentence second last paragraph</p>
	113	p.113 - \$ figure in paragraph 14.2.4
	113-116	
	116	
<p>23 Recommendations</p>	143-146	<p>p.143 - sixth - eighth words and 23rd - 24th words in 23.4(ii)</p> <p>- fifth - sixth words in 23.5(i)</p> <p>p.144 - first full paragraph, last word of first sentence of (iv) under "short term strategy"</p> <p>p.145 - sixth - seventh words of paragraph (5)</p>
<p>Appendix C</p>		

Tables 2.1, 3.4, 3.2, 9.3 and 9.4		
-----------------------------------	--	--