

Participants:

GSA INDUSTRIES (AUST) PTY LTD
Applicant

- and -

BRISBANE CITY COUNCIL
Respondent

- and -

GS TECHNOLOGY PTY LTD
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letters from solicitors for the third party to the respondent alleging infringement or prospective infringement of certain patent rights and copyrights asserted by the third party - whether exempt documents under s.43(1) of the *Freedom of Information Act 1992 Qld* - consideration of legal principles relating to third party communications and legal professional privilege.

FREEDOM OF INFORMATION - whether documents in issue exempt under s.45(1)(a), s.45(1)(b) or s.45(1)(c) of the *Freedom of Information Act 1992 Qld* - whether prejudicial effects could reasonably be expected from disclosure under freedom of information legislation when relevant information is already available for public inspection through the Australian Patent Office.

Freedom of Information Act 1992 Qld s. 43(1), s.45(1), s.45(1)(a), s.45(1)(b), s.45(1)(c), s.45(1)(c)(i), s.45(1)(c)(ii), s.72(1), s.83(3)
Patents Act 1990 Cth s.200(2)

Attorney General (NT) v Maurice (1986) 161 CLR 475; 61 ALJR 92; 69 ALR 31
Cairns Port Authority and Department of Lands, Re (Information Commissioner Qld, Decision No. 94017, 11 August 1994, unreported)
Cannon and Australian Quality Egg Farms Limited, Re (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported)
Grant v Downs (1976) 135 CLR 674; 51 ALJR 198; 11 ALR 577
Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd (1985) 3 NSWLR 44
Norman and Mulgrave Shire Council, Re (Information Commissioner Qld, Decision No. 94013, 28 June 1994, unreported)
Pope and Queensland Health, Re (Information Commissioner Qld, Decision No. 94016, 18 July 1994, unreported)
Smith and Administrative Services Department, Re (Information Commissioner Qld, Decision No. 93003, 30 June 1993; (1993) 1 QAR 22)
Trade Practices Commission v Sterling (1979) 36 FLR 244; ATPR 40-121
Wundowie Foundry Pty Ltd & Anor v Milson Foundry Pty Ltd & Anor (1993) 27 IPR 202

DECISION

I set aside that part of the decision under review (being the decision made on behalf of the respondent by Mr R N Metcalfe on 3 February 1994) which relates to the documents identified and described in paragraph 8 of my reasons for decision as documents 1, 2 3, 4, 5 and 6; and in substitution for it, I decide that those documents (with the exception of the amount of money which appears in the third line of the penultimate paragraph of document 4) are not exempt under the *Freedom of Information Act 1992 Qld*, and that the applicant is entitled to have access to them.

Date of Decision: 25 August 1994

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F N ALBIETZ
INFORMATION COMMISSIONER

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OFFICE OF THE INFORMATION)
 COMMISSIONER (QLD))

L 9 of 1994
 (Decision No. 94020)

Participants:

GSA INDUSTRIES (AUST) PTY LTD
 Applicant

- and -

BRISBANE CITY COUNCIL
 Respondent

- and -

GS TECHNOLOGY PTY LTD
 Third Party

REASONS FOR DECISION

Background

1. The applicant, GSA Industries (Aust) Pty Ltd (GSA Industries), has applied under Part 5 of the *Freedom of Information Act 1992 Qld* (the FOI Act) for review by the Information Commissioner of the respondent's decision to refuse access to certain documents comprising tender documents lodged with the respondent for the supply of water meters, and also documents concerning some related matters.
2. It appears that many local authorities are moving to charge ratepayers on a "user-pays" basis for consumption of water. Such a charging regime requires the installation of water meters, and the trend appears to have encouraged a growing and intensely competitive market for the supply of water meters to local authorities. The present case is one of three applications for review presently before me which relate to tenders for the supply of water meters.
3. The applicant lodged an FOI access application on 3 December 1993 seeking:

All documents between:

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

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

4. By letter dated 3 February 1994, the then principal officer of the Brisbane City Council (the Council), Mr R N Metcalfe, decided to allow access to some of the requested documents, but refused access to other documents and parts of documents, relying upon s.43(1) (the legal professional privilege exemption) of the FOI Act in respect of a small number of documents, and s.45(1)(b) and s.45(1)(c) of the FOI Act in respect of the balance. GSA Industries applied for external review of Mr Metcalfe's decision, under Part 5 of the FOI Act, by letter dated 24 February 1994. GSA Industries was entitled to proceed directly to external review because Mr Metcalfe was the principal officer of the Council (see s.73(3) of the FOI Act). GS Technology Pty Ltd (GS Technology), having been alerted to the application for review, applied under s.78 of the FOI Act to be a participant in the review, and its application to be a participant was granted.
5. The documents and parts of documents claimed by the Council to be exempt, have been obtained and examined. They appear to fall into two broad categories. The first category comprises documents lodged with the Council by the third party, GS Technology, as part of its tender documentation for Contract No. R55/92/93 and for Contract No. R22/93/94, including routine follow-up inquiries by the Council seeking clarification of details of the tenders submitted, and responses by GS Technology to those inquiries. The second category comprises letters from Messrs Smits Leslie Barwick (a firm of solicitors acting on behalf of GS Technology) to the Council concerning alleged infringement of certain patent rights and copyrights to which GS Technology claims entitlement, and other documents related to that issue.
6. The two categories of documents raise different sets of issues. The first category raises issues in common with two related applications for review presently before me, which have arisen out of the same round of Brisbane City Council tenders, and I propose to deal with those common issues together, at a later date, if attempts to negotiate a resolution between the respective participants should ultimately prove unsuccessful. I propose in this decision to deal only with documents falling into the second category identified above.
7. The documents which fall into the second category were examined for the purpose of making a preliminary assessment as to whether the claimed exemption provisions appeared to have been properly applied. As a result of that examination, the Deputy Information Commissioner formed the preliminary view that five documents appeared to have been wrongly claimed to be exempt under s.43(1) of the FOI Act, and that parts of a sixth document had been claimed to be exempt under s.45(1)(b) or s.45(1)(c) of the FOI Act in circumstances where the bulk of the information claimed to be exempt appeared to be information in the public domain. On 15 June 1994, the Deputy Information Commissioner wrote to both the respondent and GS Technology identifying those six documents, explaining why he had formed the preliminary view that the documents did not appear to qualify for exemption on the basis claimed in the respondent's decision letter of 3 February 1994, and inviting responses (see paragraphs 10 and 11 below).
8. I will refer to those six documents, for the purposes of this decision, as the documents in issue. I have numbered them 1 to 6 as below, for ease of reference, and they can be described as follows:

BCC File No. (8)243/98-50/92/93(P2)

Document 1: Letter dated 3 September 1993 from Smits Leslie Barwick, Solicitors, to the Lord Mayor, Brisbane City Council, on the subject "GS Technology Pty Ltd -Tender for supply of water meter assemblies".

Document 2: Letter dated 10 September 1993 from Smits Leslie Barwick, Solicitors, to the Executive

Officer to the Lord Mayor, Brisbane City Council, on the subject "GS Technology Pty Ltd - Tender for supply of water meter assemblies - Contract No. R55/92/93".

Document 3: Letter dated 27 September 1993 from Smits Leslie Barwick, Solicitors, to Mr R N Metcalfe, Town Clerk, Brisbane City Council, on the subject "GS Technology Pty Ltd - Water meters assembly contract - R 55/92/93".

BCC File No. (0)243/98-22/93/94

Document 4: Letter dated 15 November 1993 from Smits Leslie Barwick, Solicitors, to the Lord Mayor, Brisbane City Council, on the subject "GS Technology Pty Ltd -Tender for supply of water meter assemblies".

Document 5: The attachment to document 4, being a copy of a letter dated 12 November 1993 from Pizzey & Company, Patent Attorneys, to GS Technology.

Document 6: Parts of the record of interview between Mr G Bellingham of the Council, and Mr G Stack (the managing director of GS Technology) and Mr J Pizzey (a patent attorney) comprised in folios 77-82 of BCC File No. (0)243/98-22/93/94.

9. The respondent had decided that each of documents 1, 2, 3, 4 and 5 was exempt under s.43(1) of the FOI Act. Exemption under s.45(1)(b) or s.45(1)(c) was also claimed in respect of document 1, although it was not clear from the respondent's decision letter whether this claim was made in respect of all or only some parts of document 1, and if the latter, which parts. Document 6 was claimed to be exempt under s.45(1)(b) or s.45(1)(c).
10. The Deputy Information Commissioner's letter to the respondent dated 15 June 1994 (a copy of which was also forwarded to GS Technology) set out a detailed explanation of the basis on which the Deputy Information Commissioner had formed the preliminary view that documents 1, 2, 3, 4 and 5 were not subject to legal professional privilege, and hence not exempt under s.43(1) of the FOI Act. The letter then continued:
 20. *Section 45(1)(b) and/or s.45(1)(c) are claimed to apply to document 1 but with no clear indication of precisely which information in document 1 is said to be covered. I propose now to give you and GS Technology (to whom I will also forward a copy of this letter) the opportunity to specify what parts of document 1 are claimed to be exempt under s.45(1)(b) or s.45(1)(c) and explain to me the precise basis of the claim for exemption, having regard to the principles as to the interpretation and application of s.45(1)(b) and s.45(1)(c) which are set out in the Information Commissioner's reasons for decision in Re Cannon and Australian Quality Egg Farms Limited (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported). I ask that careful consideration be given as to whether the information that might be thought to be commercially sensitive is in fact already in the public domain, e.g. because it can be obtained by 'reverse engineering' of products that are available in the market place, or because it is available for inspection by interested persons through the Australian Patent Office, having formed part of the information lodged by GS Technology in connection with its Australian Patent Application No. 85236/91 or Divisional Petty Application No. 44897/93. As is made clear by*

the authorities referred to in Re Cannon, if information is already in the public domain, or is a matter of common knowledge in the relevant industry, it is extremely difficult (if not impossible) to establish any basis on which the judgment can be made that disclosure of that information under the FOI Act could reasonably be expected to have the prejudicial effects which would justify exemption under s.45(1)(b) or s.45(1)(c).

21. *These considerations would appear to also be relevant to document 6, and again I ask that the parts of document 6 claimed to be exempt under s.45(1)(b) or s.45(1)(c) be clearly specified, and the precise basis of the claim for exemption be explained, having regard to the principles set out in Re Cannon.*
22. *I request that you give detailed consideration to the preliminary views set out in this letter and advise me as soon as practicable, but in any event no later than **1 July 1994**:*
 - (a) *whether or not you accept my preliminary views that documents 1, 2, 3, 4 and 5 are not exempt under s.43(1) of the FOI Act; and*
 - (b) *precisely which parts (if any) of documents 1 and 6 you claim to be exempt under s.45(1)(b) or s.45(1)(c) of the FOI Act (as requested above, please also explain the precise basis of the claim for exemption); and*
 - (c) *consequently which of (or which parts of) documents 1, 2, 3, 4, 5 and 6 you are prepared to release to the applicant.*
23. *If you wish to contend that documents 1, 2, 3, 4, 5 and 6 are exempt under s.43(1), s.45(1), or any other provisions of the FOI Act, I am now extending to you the opportunity to lodge evidence and/or a written submission in support of your case. Any evidence should be lodged in the form of sworn affidavits or statutory declarations which annex as exhibits any relevant documentary evidence. Your evidence should aim to establish the material facts which you say bring documents 1, 2, 3, 4, 5 and 6 within the exemption provisions which you rely upon.*
24. *Any written submissions should set out:*
 - (a) *the material facts and circumstances; and*
 - (b) *any legal arguments:*

on which you rely to support your case for exemption. The following remarks are not intended to limit the scope of any submission you wish to make, but it would be of great assistance if your submission could be organised so that it:

- (a) *identifies the material facts said to be established by the evidence filed on your behalf, or said to be established from (or by reasonable inference from) the contents of the relevant documents in issue; and*

- (b) *demonstrates how each element of the exemption provision(s) relied upon is said to be satisfied; and*
- (c) *(where an exemption provision contains a public interest balancing test) identifies the relevant public interest considerations and explains why those favouring non-disclosure are said to outweigh those favouring disclosure.*

...

- 26. *I direct that you provide any evidence and any written submission which you wish to rely on as soon as practicable, but in any event, no later than **8 July 1994**.*

- 11. The Deputy Information Commissioner also wrote to GS Technology on 15 June 1994 in the following terms:

I have enclosed for your reference a copy of my letter of even date to the Brisbane City Council which sets out my preliminary views in respect of certain documents in issue. I have enclosed, for ease of reference, copies of documents 1, 2, 3, 4, 5 and 6 as referred to in the enclosed letter. I ask that you give careful consideration to the views expressed in the enclosed letter concerning documents 1, 2, 3, 4, 5 and 6 (and if you wish, obtain legal advice) and inform me as soon as practicable, but in any event no later than 1 July 1994, whether or not you object to the applicant obtaining access to documents 1, 2, 3, 4, 5 and 6. If there are parts only of those documents, to the disclosure of which you object, please specify what those parts are.

Please note, however, that the applicant has an enforceable legal right to have access to the documents that are in the possession of the Brisbane City Council, except to the extent of any information contained in the documents which is exempt matter under one or more of the provisions of Part 3, Division 2 of the FOI Act.

To save my reproducing them in this letter, would you please treat paragraphs 20 to 26 inclusive of my enclosed letter to the Council as applying, with any necessary modifications, to GS Technology Pty Ltd as a participant in this review, i.e. GS Technology Pty Ltd is also to comply with the requests and directions made in paragraphs 20 to 26 of the enclosed letter within the dates there specified.

- A copy of my reasons for decision in *Re Cannon and Australian Quality Egg Farms Limited* (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported) was also forwarded (as an attachment to the letter of 15 June 1994) to GS Technology for its assistance.

- 12. The Council wrote to me on 1 July 1994 stating that, after consideration of the preliminary views expressed in the Deputy Information Commissioner's letter of 15 June 1994, the Council agreed with the conclusions there reached that s.43(1) of the FOI does not apply to documents 1, 2, 3, 4 and 5. The Council stated that it was prepared to release those documents to the applicant upon my authorisation to do so. The Council also indicated that it was likewise prepared to release document 6 in light of the considerations set out in the Deputy Information Commissioner's letter of 15 June 1994.

13. GS Technology, on the other hand, notwithstanding that its managing director (Mr George Stack) had conferred by telephone with the Deputy Information Commissioner on 20 June 1994 to clarify aspects of the letters dated 15 June 1994, failed to inform me by 1 July 1994 whether or not it objected to the disclosure to the applicant of all or parts of documents 1, 2, 3, 4, 5 and 6. It also failed by 8 July 1994 to lodge any evidence or written submission in support of any claims that documents 1 to 6, or any parts thereof, comprised exempt matter under the FOI Act. On 15 July 1994, the Managing Director of GS Technology was requested by telephone to provide a written response to the letter of 15 June 1994. When no response had been received by 21 July 1994, a further telephone request to Mr Stack prompted a brief response received by facsimile transmission on that day. That facsimile transmission stated that GS Technology did not object to the release of document 6, but objected to the release of documents 1 to 5 inclusive. The facsimile transmission dated 21 July 1994 did not attempt to explain, or make out a case in support of, the claim for exemption, but merely asserted that documents 1 to 5 "refer to confidential company information for which exemption is claimed under s.45(1)". No attempt was made in that facsimile transmission to identify with precision any parts of documents 1 to 5 which were said to refer to confidential company information, nor to state which of the available exemptions in s.45(1)(a), s.45(1)(b) or s.45(1)(c) was said to apply to documents 1 to 5, or particular parts of them.
14. The provisions of the FOI Act concerning the conduct of an external review, as contained in Part 5, Division 4 of the FOI Act, include the following:

72.(1) On a review under this Part -

- (a) the procedure to be followed is, subject to this Act, within the discretion of the Commissioner; and*
- (b) proceedings are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Commissioner permits; and*
- (c) the Commissioner is not bound by the rules of evidence and may inform himself or herself on any matter in any way the Commissioner considers appropriate.*

(2) The Commissioner may, during a review, give directions as to the procedure to be followed on the review.

and

83. ...

(3) *In conducting a review, the Commissioner must -*

(a) *adopt procedures that are fair, having regard to the obligations of the Commissioner under this Act; and*

(b) *ensure that each participant has an opportunity to present the participant's views to the Commissioner;*

but subject to paragraph (a), it is not necessary for a participant to be given an opportunity to appear before the Commissioner.

15. I am satisfied that although no evidence or detailed submission has been received from GS Technology in connection with the issues raised on this external review, GS Technology has been provided with a fair opportunity to present its views to me (even though it has not taken advantage of that opportunity), and that the requirements of s.83(3) of the FOI Act have been met in the circumstances of this case.
16. Neither the respondent nor GS Technology now claims that document 6 is exempt from disclosure under the FOI Act, and accordingly the applicant may be given access to document 6. Having examined documents 1, 2, 3, 4 and 5, I am satisfied that they are not exempt documents under the FOI Act (with the possible exception of one price quoted in document 4 as a modified tender price - see paragraph 40 below). Section 43(1) and s.45(1) have been suggested as possible bases for exemption of documents 1, 2, 3, 4 and 5, and I will briefly record my reasons for holding that neither s.43(1), nor any of the grounds of exemption in s.45(1), can apply to those documents.

Application of s.43(1)

17. Section 43 of the FOI Act provides as follows:

43.(1) Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.

(2) *Matter is not exempt under subsection (1) merely because it appears in an agency's policy document.*

18. I have considered the application of s.43 in several prior decisions, notably in *Re Smith and Administrative Services Department* (Information Commissioner Qld, Decision No. 93003, 30 June 1993, now reported at (1993) 1 QAR 22) and *Re Norman and Mulgrave Shire Council* (Information Commissioner Qld, Decision No. 94013, 28 June 1994, unreported), where the tests for determining whether legal professional privilege applies to lawyer-client communications are explained; see especially *Re Smith* at paragraph 82 (1 QAR at p.52) and following. In *Re Norman* (at paragraph 20), I pointed out that while the High Court cases referred to in *Re Smith* are authoritative as to those aspects of legal professional privilege which were in issue on the facts of each case, they did not purport to exhaustively state all aspects of legal professional privilege which have been accepted by Australian courts.

19. None of documents 1, 2, 3, 4 and 5 is a communication between a practising solicitor or barrister and a client, so they do not qualify for consideration under the principles of legal professional privilege relating to lawyer-client communications. In certain circumstances, however, legal professional privilege may extend to third party communications, that is, communications between the client or the client's solicitor or barrister, and a third party who is not an agent of the client or the client's solicitor or barrister. In the context of documents 1, 2, 3 and 4, GS Technology is the client and the Council is a third party to which communications have been made by a firm of solicitors acting on behalf of GS Technology. Document 5 is a copy of a communication addressed to GS Technology from a firm of patent attorneys acting on behalf of GS Technology.
20. In *Trade Practices Commission v Sterling* (1979) 36 FLR 244, Lockhart J held that legal professional privilege extends to communications and documents passing between the client's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence. This principle was affirmed by Wood J in *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44, who also made it clear (at p.52) that (as is the case with lawyer-client communications) third party communications cannot qualify for a claim to legal professional privilege unless they are confidential and satisfy the sole purpose test (i.e. that the sole purpose for which a document was brought into existence was a purpose which satisfies the legal tests for attracting legal professional privilege - see *Grant v Downs* (1976) 135 CLR 674). That view is endorsed by the learned authors of Cross on Evidence (4th Aust Ed) at p.700.
21. There is nothing on the face of documents 1, 2, 3 and 4 to indicate that they were intended to be confidential communications, nor, having regard to the nature of the material contained in them, do I consider that it is reasonable to infer that it could have been intended that the Council was not to communicate to the other business entities, against whom allegations of infringement of patent rights and/or copyrights were made (by the solicitors acting on behalf of GS Technology), the substance of the allegations made against them. Documents 1, 2, 3 and 4 seem to me to fall into a like category of documents to the one to which Dawson J referred in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at p.496:

... a letter to the other side in litigation which is drafted in a solicitor's office may be privileged before it is sent because it may reveal confidential communications between the solicitor and his client. Once it is sent, however, it ceases to be confidential and there is no privilege in it, not because privilege in the document is waived, but because no privilege attaches to it.

... Legal professional privilege exists to secure confidentiality in communications between a legal adviser and his client but it can have no application in relation to a document the purpose of which is to communicate information to others.

The primary purpose of these documents is to communicate information to the Council as to certain legal rights asserted by GS Technology.

22. It is not clear to me that documents 1, 2, 3 and 4 can satisfy the requirement (for a third party communication to attract legal professional privilege) that a document must have been brought into existence at a time when relevant litigation had commenced or was reasonably anticipated. Assuming, however, that this could be demonstrated, documents 1, 2, 3 and 4 are not on their face capable of satisfying the requirement stated by Lockhart J in *Sterling's* case, i.e. that the documents

were made or prepared for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence. There is simply nothing on the face of those documents which is directed to the relevant purpose. In both documents 1 and 4 there is an explicit threat of litigation against the Council should it choose to adopt a particular course of action with respect to the award of a tender. The threat is a contingent one, and its predominant purpose seems to have been to attempt to influence a business decision to be made by the Council.

23. Even if it could be shown that documents 1, 2, 3 and 4 were directed to the relevant purpose referred to above, it appears from the face of the documents that they are incapable of satisfying the sole purpose requirement. The apparent purposes of document 1 are:
- (a) to make the Council aware of GS Technology's application for patent protection in respect of its claimed improvements to water meter assemblies;
 - (b) to alert the Council to GS Technology's claims of infringement and prospective infringement of patent rights and/or copyrights asserted by GS Technology; and
 - (c) as noted in the preceding paragraph, to attempt to influence a business decision to be made by the Council.
24. The apparent purpose of documents 2 and 3 is to request the Council to retain (rather than dispose of) certain items which are assumed (by GS Technology and its solicitors) to be in the Council's possession.
25. The apparent purposes of document 4 include those referred to in paragraph 23 above. Moreover, document 4 goes further than document 1 in that it also has the apparent purposes of:
- (a) seeking to persuade the Council that a competitor's product does not meet the Council's tender specifications in certain nominated respects; and
 - (b) advising the Council that GS Technology is prepared to modify its tender previously submitted, in a particular respect, and seeking the Council's advice as to whether it is prepared to allow that modification.
26. I am satisfied that documents 1, 2, 3 and 4 would not be privileged from production in a legal proceeding on the ground of legal professional privilege and hence that they are not exempt under s.43(1) of the FOI Act.
27. Document 5 is a copy of a letter from Pizzey & Company, Patent Attorneys, to their client, GS Technology. No privilege exists at common law in respect of communications between a patent attorney and his or her client. Indeed, at common law, communications between a client and the client's solicitor who was also the client's patent attorney were not privileged if the solicitor received them in his or her capacity as a patent attorney (see *Wundowie Foundry Pty Ltd & Anor v Milson Foundry Pty Ltd & Anor* (1993) 27 IPR 202 at p.206). However, s.200(2) of the *Patents Act 1990 Cth* now provides that:

(2) A communication between a patent attorney and his or her client, and any record or document made for the purposes of such a communication, are privileged to the same extent as a communication between a solicitor and his or her client.

28. Section 43(1) of the FOI Act, however, refers only to legal professional privilege, and is not, in my opinion, to be interpreted as extending to the statutory privilege conferred by s.200(2) of the *Patents Act*, even though the scope of that statutory privilege is to be assessed by reference to the scope of legal professional privilege. In my opinion, document 5 is not eligible for consideration under the principles of legal professional privilege relating to lawyer-client communications. In case I am mistaken in that view, I should make it clear that I am satisfied in any event that document 5 would not be privileged even if it were a communication between a solicitor and his or her client, for the reason noted in paragraph 30 below (i.e. any privilege which might have attached to document 5 has been waived).
29. It is possible that the original document, of which document 5 is a copy, might have been subject to legal professional privilege if it could be demonstrated that it was prepared for submission to GS Technology's solicitors, that litigation was commenced or was reasonably anticipated at the time of its creation, and that it was a confidential communication for the sole purpose of use in that litigation. (In this regard it is well-established that the question whether litigation is contemplated at the time a document is prepared is an objective one. It is necessary that circumstances be shown to exist, at the time, from which, objectively viewed, the court can subsequently conclude that litigation could reasonably be anticipated: *Grant v Downs* at p.682). In the absence of any evidence on these issues, it is open to infer from the timing of its creation, and the use that was made of it, that document 5 was prepared on 12 November 1993 for the purpose of being used as an attachment to document 4 (which was forwarded on 15 November 1993, i.e. three days later) so as to support the multiple purposes for which document 4 was created and communicated to the Council.
30. In any event, the document which is subject to the FOI Act and is in issue in this review, is the copy document which is in the possession of the Council. Any privilege which may have attached to that copy has been waived through its intentional disclosure to the Council (see *Attorney-General (NT) v Maurice* at p.487 per Mason and Wilson JJ). The purpose of that intentional disclosure was to support the purposes for which document 4 (to which document 5 was an attachment) was forwarded to the Council.
31. The copy document (document 5) which is in the possession of the Council would not, in these circumstances, be privileged from production in a legal proceeding on the ground of legal professional privilege. Accordingly, I am satisfied that document 5 is not an exempt document under s.43(1) of the FOI Act.

Application of s.45(1)

32. Section 45(1) of the FOI Act provides as follows:

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.

33. The separate grounds of exemption provided for in s.45(1)(a), s.45(1)(b) and s.45(1)(c) were analysed and explained in my reasons for decision in *Re Cannon*, and I have applied those principles to documents 1, 2, 3, 4 and 5.
34. I am satisfied that there is no information contained in documents 1, 2, 3, 4 and 5 which is capable of being properly characterised as a trade secret for the purposes of s.45(1)(a) of the FOI Act, having regard to the criteria discussed in *Re Cannon* at paragraphs 42 to 49. GS Technology has lodged applications for patent protection (Australian Patent Application No. 85236/91 and Divisional Petty Patent Application No. 44897/93) in respect of those aspects of its water meter assemblies which it claims to be inventive. A patent is a temporary statutory monopoly of the right to exploit an invention (or to authorise another person to exploit that invention) granted to the patentee in return for the disclosure of the invention to the public in the form of a patent specification. Part of the rationale of the patent system (in addition to encouraging investment in research, and affording incentives to foster invention) is to encourage dissemination of the inventor's knowledge in order to facilitate its use by the public and prevent duplication of research (see R Dean, The Law of Trade Secrets, Law Book Co, 1990, at p.14 and pp.19-21).
35. The applicant has forwarded to me copies of documents obtained from the Australian Patent Office (including specifications and provisional specifications lodged by Mr George Stack, the Managing Director of GS Technology, which are open to public inspection), and requested that I assess whether there can, in truth, be any commercial detriment flowing from disclosure under the FOI Act of the documents in issue, having regard to the information which is already in the public domain. Having examined the material which is available for public inspection by any interested person through the Australian Patent Office, I am satisfied that none of the information relating to innovative aspects of GS Technology's water meter assemblies which is contained in documents 1, 2, 3, 4 and 5, is secret information which might qualify for exemption under s.45(1)(a) of the FOI Act.
36. Turning to s.45(1)(b) (and applying the principles discussed in *Re Cannon* at paragraphs 51 to 65, and in particular, those relating to the meaning of "commercial value" addressed at paragraphs 54-56), I am satisfied that the only information contained in documents 1, 2, 3, 4 and 5 which is capable

of having a commercial value to GS Technology is the information relating to innovative aspects of GS Technology's water meter assemblies. The disclosure of that information under the FOI Act could not reasonably be expected to destroy or diminish its commercial value, because it is information which is already in the public domain, as explained in the preceding paragraph. Moreover, it appears from the face of the documents in issue that water meter assemblies of the kind marketed by GS Technology and its competitors can readily be obtained, and broken down and examined ("reverse-engineering"), to ascertain any details of inventiveness in design. (It would not therefore appear possible to keep any such details confidential for protection as a trade secret, once marketing commences, and this is presumably why GS Technology has sought protection through the patent system). In the circumstances, I am not satisfied that any information which is capable of being obtained through "reverse engineering" of water meter assemblies that are able to be procured by competitors, has a commercial value which could reasonably be expected to be destroyed or diminished by its disclosure under the FOI Act.

37. The three elements which must be satisfied to establish that information is exempt matter under s.45(1)(c) of the FOI Act were analysed and explained at paragraphs 66 to 88 of *Re Cannon*. (For further illustrations of those principles, see *Re Pope and Queensland Health* (Information Commissioner Qld, Decision No. 94016, 18 July 1994, unreported) at paragraph 16 and following, and *Re Cairns Port Authority and Department of Lands* (Information Commissioner Qld, Decision No. 94017, 11 August 1994, unreported) at paragraphs 73-144). In this case, I am satisfied that the information in documents 1, 2, 3, 4 and 5 can properly be characterised as information concerning the business or commercial affairs of GS Technology for the purposes of s.45(1)(c)(i) of the FOI Act. I am not satisfied, however, that disclosure of the information in documents 1, 2, 3, 4 and 5 (with the possible exception of one item - see paragraph 40 below) could reasonably be expected to have an adverse effect on the business or commercial affairs of GS Technology.
38. GS Technology has not taken up the opportunity afforded to it (see paragraphs 13-15 above) of supporting its claim for exemption by explaining the nature of any adverse effects which it asserts can reasonably be expected to follow from disclosure of the information in issue. I am unable to discern any such adverse effects. The disclosure under the FOI Act of information concerning innovative aspects of GS Technology's water meter assemblies could not reasonably be expected to have an adverse effect, because the information is already in the public domain, and available to any person sufficiently interested to obtain it, as explained above.
39. Nor could GS Technology have reasonably expected or intended that the Council was not to communicate to its competitors, against whom allegations of infringement of patent rights and/or copyrights were made, the substance of the allegations made against them. (The applicant has in fact been so informed by the Council, and has provided me with copies of a letter dated 15 November 1993 to Mr George Stack concerning the allegations, and a reply from Smits Leslie Barwick dated 22 November 1993). I cannot discern any adverse effect to the business or commercial affairs of GS Technology which could reasonably be expected to follow from the disclosure under the FOI Act of information of that kind, since a business entity which makes allegations of that kind has to be prepared to support them, in any event (see, for example, Chapter 11, Part 3 of the *Patents Act* which deals with unjustified threats of infringement proceedings. Generally speaking, if a letter of demand does not produce undertakings that a competitor will cease any conduct alleged to infringe patent rights or copyrights, it is up to the person asserting infringement to take legal action to vindicate the rights asserted). Even if an adverse effect on the business or commercial affairs of GS Technology could be established, I am satisfied that the public interest in fair treatment of the competitors would require that allegations of that kind made against them be disclosed to them. Thus, in my opinion (on the application of the public interest balancing test incorporated within

s.45(1)(c) of the FOI Act) disclosure of that information would on balance be in the public interest.

40. The penultimate paragraph of document 4 contains a request to the Council that GS Technology be permitted to modify its previously submitted tender in respect of one item and quotes a price for that item. I consider that there is an arguable case that disclosure of the price could have an adverse effect on GS Technology's business or commercial affairs. The question of whether prices quoted in tenders are exempt from disclosure under the FOI Act is a major issue in respect of the first broad category of documents identified at paragraph 5 above, and I propose to defer consideration of the exempt status of the price quoted in document 4 until that issue is dealt with in respect of the tender documents proper. The applicant has written to me indicating that my proposed course of action in that regard is acceptable to it.
41. I also note that documents 1, 2, 3, 4 and 5 comprise information that was not solicited by the Council, but forwarded on behalf of GS Technology with the object of furthering and/or protecting GS Technology's commercial interests, and obtaining some benefit or advantage which it sought from Council. There is no basis on which I could be satisfied that disclosure of that information could reasonably be expected to prejudice the future supply of such information to government, within the terms of s.45(1)(c)(ii) of the FOI Act.

Conclusion

42. I am satisfied that documents 1, 2, 3, 4 and 5 are not exempt documents under the FOI Act, with the possible exception of the price quoted in the penultimate paragraph of document 4, which price will be withheld from the applicant pending further consideration of whether it is exempt matter under the FOI Act. I have already noted in paragraph 16 above that neither the respondent nor GS Technology now claims that document 6 is exempt. It is appropriate, then, that I set aside that part of the decision, made on behalf of the respondent by Mr R N Metcalfe on 3 February 1994, which relates to documents 1, 2, 3, 4, 5 and 6 as identified and described in paragraph 8 above; and in substitution for it, I decide that those documents (with the exception of the price quoted in the penultimate paragraph of document 4) are not exempt documents under the FOI Act, and that the applicant is entitled to have access to them.

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F N ALBIETZ

INFORMATION COMMISSIONER