

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 01/2004
Application S 49/02

Participants:

VAUGHAN JOHNSON MP
Applicant

QUEENSLAND TRANSPORT
Respondent

DEPARTMENT OF PUBLIC WORKS
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – matter concerning the redevelopment of Lang Park and the inner west precinct – whether disclosure would disclose deliberative process matter – whether disclosure would, on balance, be contrary to the public interest – application of s.41(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION – refusal of access – whether disclosure would disclose information concerning the business, commercial or financial affairs of the third party – whether disclosure could reasonably be expected to have an adverse effect on those affairs – whether disclosure would, on balance, be in the public interest – application of s.45(1)(c) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.28(1), s.41(1), s.41(2), s.45(1)(c), s.78

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Boehm and Department of Industry, Technology and Commerce, Re (1985) 7 ALN 186
Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491
Coulthart and Princess Alexandra Hospital and Health Service District Service, Re
(2001) 6 QAR 94
Criminal Justice Commission and Director of Public Prosecutions, Re (1996) 3 QAR 299
Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (1993)
1 QAR 60

Murphy and Queensland Treasury (No. 2), Re (1998) 4 QAR 446

Norman and Mulgrave Shire Council, Re (1994) 1 QAR 574

Trustees of the De La Salle Brothers and Queensland Corrective Services Commission, Re
(1996) 3 QAR 206

DECISION

I set aside the decision under review (which is identified in paragraph 4 of my accompanying reasons for decision). In substitution for it, I decide that the matter in issue (which is identified in paragraph 19 of my accompanying reasons for decision) does not qualify for exemption from disclosure under the *Freedom of Information Act 1992* Qld, and that the applicant is therefore entitled to obtain access to it under the *Freedom of Information Act 1992* Qld.

Date of decision: 5 January 2004

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D J BEVAN
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant, Vaughan Johnson MP, is the Shadow Minister for Transport and Main Roads. He seeks review of a decision by Queensland Transport to refuse him access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to certain information concerning the Lang Park redevelopment.
2. By letter dated 21 September 2001, the applicant sought access under the FOI Act to a wide range of documents concerning road, rail and bus transport infrastructure services for the Lang Park redevelopment. After clarifying with the applicant the scope of his FOI access application, Ms N Hall of Queensland Transport informed the applicant, by letter dated 19 November 2001, that she had identified 5136 documents as falling within the terms of the applicant's FOI access application. Ms Hall decided to give the applicant full access to 3087 documents, and partial access to 90 documents, but to refuse him access to the remaining 1959 documents, invoking s.11A, s.36(1), s.41(1), s.43(1), s.45(1)(c), s.46(1) and s.50(c)(i) of the FOI Act.
3. By letter dated 17 December 2001, the applicant sought internal review of Ms Hall's decision. He also requested that Queensland Transport exercise its discretion under s.28(1) of the FOI Act to give him access to matter which it claimed was exempt from disclosure to him, on the basis that its disclosure was in the public interest.
4. The internal review was conducted by Mr Bill Rodiger of Queensland Transport. In his letter to the applicant dated 21 December 2001, Mr Rodiger advised that he had decided to affirm Ms Hall's decision. By letter dated 28 February 2002, the applicant applied for review by the Information Commissioner, under Part 5 of the FOI Act, of Mr Rodiger's decision.

External review process

5. By letter dated 5 March 2002, the Deputy Information Commissioner drew to Queensland Transport's attention the applicant's earlier request that Queensland Transport exercise its discretion under s.28(1) of the FOI Act to disclose, in the public interest, documents for which Queensland Transport had claimed exemption. (Under s.28(1), agencies have a discretion to give an applicant access to matter which qualifies for exemption under the FOI Act: see *Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 at paragraph 13; *Re Murphy and Queensland Treasury (No. 2)* (1998) 4 QAR 446 at paragraphs 61-62. The Information Commissioner does not have that discretion when conducting a review under Part 5 of the FOI Act: see s.88(2) of the FOI Act.) The Deputy Information Commissioner noted that Mr Rodiger had not addressed that issue in his internal review decision, and asked Queensland Transport to give it consideration. By letter dated 15 March 2002, Queensland Transport stated that it declined to exercise its discretion in favour of giving the applicant access to any documents which it considered to be exempt.
6. Copies of the documents in issue were then obtained and examined, together with copies of Cabinet Submissions and schedules (provided by the Cabinet Secretary) which were relevant to Queensland Transport's claims for exemption under s.36(1) of the FOI Act.
7. Examination of the documents in issue revealed that a number of government agencies and private sector firms might be affected by disclosure. By letters dated 11 July 2002, the Deputy Information Commissioner informed those parties of this review, and invited them to apply to become participants in the review, in accordance with s.78 of the FOI Act. The Deputy Information Commissioner also conveyed his preliminary view that the balance of the public interest weighed in favour of disclosure of those documents claimed by Queensland Transport to be exempt under s.41(1) and s.45(1)(c) of the FOI Act.
8. Some of those parties did not respond to the Deputy Information Commissioner's consultation letter, or responded by advising that they did not object to disclosure of the matter concerning them and therefore did not wish to participate in the review. However, the Department of Innovation and Information Economy, Sport and Recreation (DIIESR), Ove Arup Pty Ltd (Ove Arup) and the Department of Public Works (Public Works) each raised an objection to disclosure of some or all of the matter in issue which concerned them. Each applied for, and was granted, status as a participant in the review, in accordance with s.78 of the FOI Act.
9. There then followed a lengthy period of consultation and negotiation (facilitated by my staff) between the applicant, Queensland Transport and the third parties. The applicant withdrew his application for access to some of the matter then in issue, and Queensland Transport and the third parties withdrew their objections to disclosure to the applicant of some matter. At the point when it became clear that no further progress could be made through negotiation with the participants, the scope of the matter in issue had been considerably reduced. The only participant which maintained an objection to disclosure of any matter remaining in issue was Public Works.
10. Public Works was then invited to provide written submissions and/or evidence in support of its case that the matter remaining in issue qualified for exemption under s.41(1) and/or s.45(1)(c) of the FOI Act. That material was provided on 23 May 2003 by Crown Law on behalf of Public Works, and consisted of written submissions, and a statutory declaration dated 22 May 2003 by Mr Malcolm Grierson, the Director-General of Public Works. Public Works initially objected to the disclosure to the applicant of some of the material contained in the submissions and the statutory declaration. However, Public Works later withdrew its

reliance upon some of that material, and consented to the disclosure to the applicant of the balance. Copies of the relevant parts of the written submissions and the statutory declaration were provided to the applicant, but the applicant did not lodge any material in response.

11. The thrust of Public Works' submissions was that the public interest weighed against disclosure of the matter remaining in issue because the City West Task Force, of which Mr Grierson is a member, was still deliberating about the development plan for the area immediately to the east of Lang Park (known as "Infrastructure East"). The City West Task Force is a joint initiative of the State Government and the Brisbane City Council, responsible for producing and implementing a "master plan" for infrastructure and other development in the area immediately west of Brisbane's central business district, including the Lang Park precinct. Public Works submitted that premature disclosure of the matter in issue would prejudice the Task Force's deliberations.
12. In a letter dated 12 June 2003, Crown Law, on behalf of Public Works, advised that, once the Task Force had completed its deliberations and issued its report, Public Works would withdraw its objection to disclosure of the matter in issue:

As outlined in the Submissions, one of [Public Works'] concerns about disclosure of the ... documents at this stage, is that the City West Task Force deliberations with respect to the Infrastructure East Project may be prejudiced. [Public Works] advises that once the Task Force has completed its deliberations, and has issued its report, it would withdraw its objection to disclosure of the subject documents. [Public Works] would agree to your raising this proposal with [the applicant] in an effort to resolve this matter without the need for formal external review.

13. On 18 July 2003, the City West Task Force released, for public consultation, its Draft City West Strategy titled "Making Connections" (hereinafter referred to as the "Draft Strategy"). The public consultation period regarding the Draft Strategy closed on 29 August 2003. Also in that period of time, Lang Park itself was completed and opened. Accordingly, by letter dated 29 August 2003, I asked Crown Law whether its client was now prepared to consent to disclosure to the applicant of the matter in issue. Crown Law responded by letter dated 16 September 2003, advising that:

... [Public Works] maintains its objection to disclosure of the remaining matter in issue on the basis that the draft strategy does not constitute the taskforce's final report. It is merely a consultation document. The taskforce's report will not be finalised until after full consideration of the feedback provided by the community and stakeholders in response to the draft strategy.

14. There were then further attempts made by my officers to informally resolve the issues remaining for determination in this review. The scope of the matter in issue was further reduced as a result of concessions made by the applicant. On 10 December 2003, a conference was held between two of my officers, and representatives of Public Works and Crown Law, in order to try to clarify Public Works' submissions and evidence. Public Works did not withdraw its objection to disclosure of the matter in issue, or its reliance upon the material it had previously lodged in support of its case. The representatives of Public Works stated that "the Director-General of Public Works continues to feel that the matter in issue is sensitive".

15. Following that conference, Public Works was invited to provide any further submissions and/or evidence in response to two specific issues discussed during the conference:
- whether Public Works could properly be regarded as having business, commercial or financial affairs for the purposes of s.45(1)(c) of the FOI Act (Public Works was specifically invited during the conference to provide further information relevant to the issue of whether its Infrastructure and Major Projects Division operated on a commercial, 'fee for service' basis); and
 - whether Public Works wished to respond to information obtained by my staff from a senior planner with the City West Task Force regarding the planning stages being undertaken by the Task Force.

That invitation was extended in scope (by an email dated 12 December 2003) to encompass any further submissions or evidence Public Works wished to lodge in support of its case for exemption generally.

16. By letter dated 16 December 2003, Mr Grierson stated that a "Precinct Plan" relating to Infrastructure East was still to be approved by the Lord Mayor and the Deputy Premier, and that he therefore maintained his objection to disclosure of the matter in issue. Mr Grierson also stated that the information provided by the Task Force's senior planner was provided by "a person who does not represent the City West Task Force", although he did not take issue with the accuracy of that information.
17. By an email dated 17 December 2003, Public Works' FOI Co-ordinator provided further information which she considered relevant to the application of s.45(1)(c) of the FOI Act, including copies of Public Works' Corporate Plan, Statement of Affairs, and information taken from Public Works' website about the activities of its Infrastructure and Major Projects division. No specific information was provided in response to the request by my officers for clarification of whether or not that division operated on a 'fee for service' basis.
18. Given Public Works' continued objection to disclosure of the matter in issue, it is necessary for me to give a decision regarding whether or not the matter in issue qualifies for exemption from disclosure under the FOI Act. In making my decision, I have taken into account the following:
- the contents of the matter in issue;
 - the applicant's FOI access application dated 21 September 2001, application for internal review dated 17 December 2001, and application for external review dated 28 February 2002;
 - Queensland Transport's initial and internal review decisions, dated 19 November 2001 and 21 December 2001, respectively;
 - the statutory declaration of Mr Grierson dated 22 May 2003, and Public Works' written submissions dated 23 May 2003;
 - Draft City West Strategy dated July 2003;
 - letter dated 16 September 2003 from Crown Law on behalf of Public Works;
 - email dated 26 November 2003 from a senior town planner with the City West Task Force;
 - letter from Public Works dated 16 December 2003; and
 - email from Public Works dated 17 December 2003, with attachments.

Matter remaining in issue

19. The matter remaining in issue in this review comprises:
- (i) parts of a letter dated 4 April 2001 from Queensland Transport to Public Works (there are several drafts of this letter in existence, but the matter in issue in each of them is the same);
 - (ii) parts of a letter dated 3 September 2001 from Sinclair Knight Merz to Public Works; and
 - (iii) parts of a Detailed Pedestrian Study dated 21 February 2001 by Ove Arup.
20. I note that Queensland Transport no longer objects to the disclosure of item (i) (or, indeed, items (ii) and (iii)). Sinclair Knight Merz has not at any stage submitted an objection to the disclosure of item (ii), and Ove Arup no longer objects to the disclosure of item (iii).
21. However, Public Works claims that item (i) qualifies for exemption under s.41(1) of the FOI Act, and that items (i), (ii) and (iii) qualify for exemption under s.45(1)(c) of the FOI Act.

Application of s.41(1) of the FOI Act

22. Section 41(1) and s.41(2) of the FOI Act provide:

41.(1) Matter is exempt matter if its disclosure—

(a) would disclose—

(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) a consultation or deliberation that has taken place;

in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and

(b) would, on balance, be contrary to the public interest.

(2) Matter is not exempt under subsection (1) if it merely consists of—

(a) matter that appears in an agency's policy document; or

(b) factual or statistical matter; or

(c) expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.

Requirements for exemption

23. A detailed analysis of s.41 of the FOI Act can be found in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.66-72, where, at p.68 (paragraphs 21-22), Commissioner Albietz said:

21. Thus, for matter in a document to fall within s.41(1), there must be a positive answer to two questions:

(a) *would disclosure of the matter disclose any opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, the deliberative processes involved in the functions of government? and*

(b) *would disclosure, on balance, be contrary to the public interest?*

22. *The fact that a document falls within s.41(1)(a) (ie. that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest. ...*

24. An applicant for access is not required to show that disclosure of deliberative process matter would be in the public interest; an applicant is entitled to access unless an agency can show that disclosure of the particular deliberative process matter that is in issue would be contrary to the public interest. In *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206, Commissioner Albietz said (at paragraph 34):

The correct approach to the application of s.41(1)(b) of the FOI Act was analysed at length in my reasons for decision in Re Eccleston, where I indicated (see p.110; paragraph 140) that an agency or Minister seeking to rely on s.41(1)(a) needs to establish that specific and tangible harm to an identifiable public interest (or interests) would result from disclosure of the particular deliberative process matter in issue. It must further be established that the harm is of sufficient gravity when weighed against competing public interest considerations which favour disclosure of the matter in issue, that it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.

Application of s.41(2)(b) and (c)

25. The matter claimed to be exempt under s.41(1) of the FOI Act is contained in a letter from the Director, Transport Planning – SEQ, of Queensland Transport to the Director (Infrastructure and Major Projects) of Public Works. The letter contains what the author refers to as a "desk-top review" of the external infrastructure drawings and the associated cost plan for the Lang Park redevelopment.
26. I am satisfied, from my examination of the matter in issue, that it answers the general description in s.41(1)(a) of the FOI Act, being opinion or advice sought from Queensland Transport by the Infrastructure and Major Projects division of Public Works for the purposes of the latter's deliberative processes. However, I am also satisfied that the opinion and advice was sought from the Director, Transport Planning – SEQ, because of his expertise in matters of transport infrastructure planning and analysis. The matter in issue in the letter dated 4 April 2001 consists of expert opinion or analysis, plus some factual matter. I therefore find that the matter in issue does not qualify for exemption under s.41(1), because of the operation of s.41(2)(b) and (c) of the FOI Act.

Public interest balancing test

27. On the assumption (contrary to my finding) that the matter in issue is eligible for exemption under s.41(1), provided s.41(1)(b) is satisfied, I will consider whether Public Works has established that disclosure of the matter in issue would, on balance, be contrary to the public interest.

28. The submissions and evidence lodged on behalf of Public Works on 23 May 2003 argued that the public interest weighs against disclosure of the matter in issue because the City West Task Force has not yet completed its deliberations concerning the "master plan" for the Lang Park and inner west precinct, and that premature disclosure of the matter in issue would adversely impact upon the Task Force's work. Specifically, Public Works objected to the disclosure of the matter in issue on the basis that it concerned "Infrastructure East", that is, the proposed pedestrian walkways and associated infrastructure around the Upper Roma Street and Victoria Barracks area (annexure "B" to Mr Grierson's statutory declaration is an external infrastructure plan for the Lang Park precinct, which shows the Infrastructure East and West areas). Construction of those walkways has been deferred by the Government pending further advice from the City West Task Force. However, it has been made clear by the Government that the walkways are to be built, and the amount of \$12 million has been set aside for the work (see paragraph 19 of Mr Grierson's statutory declaration, and an article appearing in *The Courier Mail* on 6 October 2003 entitled "No hurry on new stadium walkway").
29. In seeking clarification from the City West Task Force of what steps were still to be completed by it in finalising the "master plan" referred to by Public Works in its submissions, a senior planner with the Task Force stated, in an email dated 26 November 2003, that there was, in fact, no single master plan to be produced by the Task Force. The email advised that the next stages of the Task Force's planning work (following the release of the final form of the Strategy) were divided into three projects - Milton-Roma, Normanby and City-West Green Belt - and that these three projects would form the overall master plan for the area (although there is no intention to combine them into a single plan). The email also advised that the Task Force was currently incorporating any final changes into the Draft Strategy as a result of the public consultation process, and that it would then obtain the approval of the Lord Mayor and the Premier with respect to any such changes with a view to releasing the final strategy early in 2004. This was planned to coincide with the release of public discussion papers for the three projects referred to earlier. It was confirmed that the Task Force did not intend to undertake further public consultation about the strategy itself, or about the pedestrian walkways that comprise the bulk of Infrastructure East.
30. In his letter dated 16 December 2003, Mr Grierson referred for the first time to the existence of a draft "Precinct Plan" covering the Infrastructure East area, which was still to be approved by the Lord Mayor and the Deputy Premier. Mr Grierson stated that he maintained his objection to disclosure until the Precinct Plan is published. It is not clear to me from Mr Grierson's letter whether the Precinct Plan is part of the Strategy, or a separate document.
31. In its submissions on behalf of Public Works, Crown Law quoted this passage from a letter dated 11 July 2002 conveying the Deputy Information Commissioner's preliminary view as to the application of the public interest balancing test in s.41(1) and s.45(1)(c):

The Lang Park redevelopment is now at an advanced stage, and I can see no discernible harm to the public interest in disclosing the deliberations that took place in the planning stage. Given a significant public interest in understanding how the development of major public infrastructure of this nature is expected to affect the community, there is, in my preliminary view, an overwhelming public interest favouring disclosure of all matter concerning the planning stages, including the appraisal of potentially controversial issues: see Re Cardwell Properties Pty Ltd and Williams and the Department of the Premier, Economic and Trade Development (1995) 2 QAR 671 at pp.684-685, paras 27-29.

Crown Law's submission stated (at paragraph 38) that Public Works accepted this public interest, and, moreover, accepted "the desirability of public participation within the processes of government, the ability for the public to be able to scrutinise those processes, open discussion and the need for open and accountable government". The submission continued: "This is particularly so when government is dealing with a proposal for a large scale development which is likely to have substantial social, economic and environmental effects on the regions surrounding the development".

32. However, the submission sought to differentiate the matter in issue because it concerned Infrastructure East, and that part of the development was not then at an advanced stage, having been deferred for detailed consideration by the City West Task Force.
33. The submission contended that "discernible harm" to the public interest would result from the "premature disclosure" of the matter in issue because:
 - It relates to deliberative processes to be undertaken by the City West Task Force that involve complex investigations and delicate discussions between the various arms of two governments (the Queensland government and the Brisbane City Council) and representatives of peak bodies.
 - There is heightened interest, speculation and expectations in the Lang Park precinct and the market place is highly sensitive and geared up to take advantage of commercial opportunities which might arise. The premature disclosure of the matter in issue would add to the market speculation and activity and have the effect of putting such pressure and demands upon Public Works' staff dealing with purely speculative and unsubstantiated concerns, as to divert them from their tasks and the proper performance of their "deliberative and governmental functions".
 - Disclosure of "piecemeal" information would confuse and mislead the public and would misrepresent the scope and direction of the Task Force's deliberative processes to such an extent that the overall public interest in the development and the integrity of the planning process would be jeopardized.
 - There is an unacceptable risk that a misleading or confusing impression will inevitably be created in the public mind if the information is released at this time and in the present circumstances and climate of this particular case.
 - The preservation of the *status quo* will enable the Task Force to pursue its proper governmental functions efficiently and effectively, to have an orderly public consultation process which will enable all stakeholders to contribute to the "master plan" on an even footing, and to undertake sensitive and complex deliberations without undue pressure from specific interest groups seeking to attempt to influence the Task Force's deliberations to a particular or vested view point.
 - Not only does the matter in issue not represent the Task Force's views *in toto*, it cannot be said to represent their views at all. The Task Force is yet to complete its investigations and reports and formulate a master plan. The Task Force is still to form a concluded or even a preliminary view. Disclosure of the subject information would not show the range of considerations, competing arguments and complex and countervailing factors which the Task Force is considering. The information represents one small element of one view, opinion or advice, about one aspect of a major joint government project. Disclosure would harm the public interest by misrepresenting the scope and direction of the Task Force's work and matters it is considering, and mislead or confuse as it may be taken to represent a final, concluded consensus or even preferred position (which it certainly does not).

34. These submissions were made prior to the public release by the City West Task Force of its Draft Strategy. As noted above, Mr Grierson recently raised the existence of a draft Precinct Plan covering the Infrastructure East area and asserted that disclosure of the matter in issue prior to the finalisation of that Precinct Plan would be contrary to the public interest.

Analysis

35. I am satisfied from my examination of the matter in issue that an average reader (and certainly the kind of readers who, in the submission of Public Works, are geared up to take advantage of commercial opportunities, or to seek to influence the outcome of deliberations) could not fail to appreciate its preliminary quality. The author refers to it as a "desktop review", and it is clearly a limited and preliminary analysis of technical and costing issues, which the author clearly contemplated would be the subject of further development and refinement. That development and refinement have been undertaken by the City West Task Force in the nearly three years since the matter in issue was written.
36. I am not satisfied that the matter in issue is capable, if disclosed, of confusing or misleading the public to an extent that warrants a finding that disclosure would, on balance, be contrary to the public interest.
37. I agree with observations made by Commissioner Albietz about the justification for scepticism when dealing with claims by a government agency that disclosure of information would confuse or mislead the public: see *Re Criminal Justice Commission and Director of Public Prosecutions* (1996) 3 QAR 299 at pp.310-311, paragraphs 33-38; *Re Coulthart and Princess Alexandra Hospital and Health Service District Service* (2001) 6 QAR 94 at pp.119-120, paragraphs 73-77. In *Re Coulthart* at p.120, paragraph 77, Commissioner Albietz observed that it may well be appropriate, in the application of a public interest balancing test, to discount any weight to be accorded to an agency argument that disclosure of information would confuse or mislead the public, when it is within the power of the agency, without otherwise causing undue harm to the public interest, to disclose additional or clarifying information that could mitigate or avoid the potential for misleading or confusing the public. Public Works could easily mitigate or avoid any adverse effects of the kind it apprehends may follow from disclosure of the matter in issue (an apprehension which I do not share). It could simply disclose the matter in issue together with:
- a disclaimer in terms similar to those of paragraphs 34 and 56 in its written submission (summarised in the last dot point subparagraph of paragraph 33 of these reasons for decision), and
 - information as to when and how interested members of the public can obtain up-to-date details of planning proposals for Infrastructure East, and when and how they can submit their views on the planning proposals.
38. The matter in issue still has value for informing the public because of the expertise and experience of the author, and because, on the material available to me, very little detail has been made available to the public about the kind of construction work that has been under consideration for Infrastructure East.
39. I am confident that members of the public are sufficiently aware of the procedures adopted by government organisations to be able to distinguish the significance of preliminary opinions and analysis from expressions of a final and considered position by a government agency (which

may be reached after many stages of development). During the stages of development, divergent views are likely to be canvassed. Some may be followed up and some may be rejected at an early stage. Disclosure of this type of material:

- furthers the accountability, and public understanding, of the operations of government agencies;
- allows members of the public to examine the processes by which an agency has come to its final position;
- shows the alternatives that were considered, and the differing views that were taken into account, and can educate members of the public about the many inputs that can go into the process of government decision-making.

Moreover, provided access can be obtained at a timely stage in the process, disclosure of preliminary documents relating to policy or planning proposals in development is essential if the FOI Act is to achieve one of its major objects, i.e., promoting informed public participation in the processes of government.

40. Public Works' position, that the preliminary or deliberative process matter in issue should not be disclosed until after a final government decision has been made and published, is at odds with these considerations, particularly the last one. As the Commonwealth Administrative Appeals Tribunal observed in *Re Boehm and Department of Industry, Technology and Commerce* (1985) 7 ALN 186 (at p.189):

The submissions [of the respondent] that final decisions only, and not earlier discussions, should be disclosed, seem to us to be inconsistent with the very existence of the [Commonwealth FOI] Act.

41. I am not persuaded that disclosure of the matter in issue is likely to result in a substantial diversion of officers of Public Works (or the City West Task Force) from the performance of their functions by requiring them to deal with increased demands from speculators or representatives of special interest groups. The evidence and submissions of Public Works have not satisfactorily explained how or why items of information in the matter in issue are liable to excite activity by speculators and special interest groups to such a prejudicial extent. In any event, given the lapse of time since the matter in issue was written, the consultation processes undertaken by the City West Task Force since then, and the advanced stage the project has reached, I consider that this adverse effect claimed by Public Works is too remote and speculative to warrant a finding that disclosure would, on balance, be contrary to the public interest.
42. In summary, I am not satisfied that the contentions by Public Works (see paragraph 33) are valid, or valid to an extent that would justify a finding that disclosure of the matter in issue would harm the public interest. Those contentions by Public Works have to be weighed against the public interest considerations which favour disclosure of the matter in issue (Public Works accepts those considerations: see paragraph 31). There is a strong public interest in the accountability of Public Works (and of other government agencies which have contributed to the project), and in informing the community generally of details of planning proposals that have been considered for Infrastructure East, given the importance of the Lang Park precinct redevelopment for the community as a whole, its potential impact upon the community, and its significant cost implications for the taxpayers of Queensland.

Finding

43. I am not satisfied that disclosure of the matter in issue would, on balance, be contrary to the public interest. This affords an additional basis for finding that the matter in issue does not qualify for exemption under s.41(1) of the FOI Act.

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

44. 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.

Requirements for exemption

45. 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) if:
- (a) the matter in issue is information concerning the business, professional, commercial or financial affairs of an agency or another person (including a company); and
 - (b) disclosure of the matter in issue could reasonably be expected to have either of the following prejudicial effects:
 - (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. The phrase "*could reasonably be expected to*" requires a reasonably based expectation, namely, an expectation for which real and substantial grounds exist. A mere possibility, speculation or conjecture is not enough. In this context "*expect*" means to regard as likely to happen. (See *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, at pp.339-341, paragraphs 154-160, and the Federal Court decisions referred to there.)

s.45(1)(c)(i) - Business, commercial or financial affairs

47. Public Works claims that the matter in issue described in items (i), (ii) and (iii) in paragraph 19 qualifies for exemption under s.45(1)(c) of the FOI Act. I have already discussed the nature of the matter in issue from item (i). Item (ii) comprises parts of a letter dated 3 September 2001 from Sinclair Knight Merz (SKM) to Public Works containing SKM's proposal to undertake a review of certain infrastructure matters. Item (iii) comprises parts of a report and associated plans dated 21 February 2001, prepared by Ove Arup, regarding pedestrian movement and associated pedestrian infrastructure in the Lang Park area. As noted above, neither Queensland Transport, SKM nor Ove Arup objects to disclosure of the matter in issue contained in the documents which originated from their respective organisations.
48. On the question of whether the matter now under consideration comprises information concerning the business, commercial or financial affairs of Public Works for the purposes of s.45(1)(c)(i), Mr Grierson has stated (at paragraphs 6, 7 and 8 of his statutory declaration dated 22 May 2003):

[Public Works] provides essential services and resources to Queensland government agencies to assist them in the delivery of programs. It is the Government's Capital Works Building Program lead agency, and to that end, its role includes the design, construction and maintenance of government owned facilities.

[Public Works'] Infrastructure and Major Projects Division acts as Project Director of significant capital works building projects in Queensland and as facilitator and advisor for building projects that provide public facilities and infrastructure, including the Suncorp Stadium and the project to be developed from the Master Plan of the City West Task Force.

[Public Works] discharges its functions in a traditional commercial manner through the maintenance and publication of Statements of Financial Performance, Financial Position, Cash Flow and Statements of Outputs/Major Activities.

49. In its submissions dated 23 May 2003, Public Works argued:

The primary responsibility of [Public Works] in the present case is business, financial and commercial. It is to act as Project Director of the Suncorp Stadium and of the City West development area. In that task, it also acts as facilitator and advisor in the provision of public facilities and infrastructure. The documents do not just contain information used by [Public Works] in its business and financial affairs. They do record information and details of [Public Works'] management of the Project's infrastructure development. But more importantly, that information, properly characterised, is essentially of a business, commercial or financial nature. It consists of correspondence from within government and from consultants examining options, costings, proposals and studies, prepared to examine the efficiency and efficacy of infrastructure development associated with the Suncorp Project and the City West area.

50. In my view, the contention of Public Works that the matter in issue concerns its business, commercial or financial affairs, for the purposes of s.45(1)(c), is misconceived and cannot be accepted. I consider that Parliament's intention in enacting the s.45(1)(c) exemption was to provide a means by which the general right of access to documents in the possession or control of government agencies could be prevented from causing unwarranted commercial disadvantage to:
- (a) individuals who offer professional services to the public on a fee for service basis (see *Re Pope and Queensland Health* (1994) 1 QAR 616 at p.625, paragraph 29);
 - (b) private sector business operators (whether they be individuals, partnerships, or corporations); and
 - (c) government agencies which function on a business model to generate income from the provision of goods or services.
51. Subject to the possible reservation mentioned in paragraph 54, I consider that an agency will have business or commercial affairs within the terms of s.45(1)(c) if, and only to the extent that, it is engaged in a business undertaking carried on in an organised way for the purpose of generating income or profits, or is otherwise engaged in an ongoing operation involving the provision of goods or services for the purpose of generating income or profits.
52. All government agencies, even those engaged in work of a purely governmental kind such as policy development, operate in accordance with a budget and financial plan, maintain financial accounts, and engage in fairly substantial commercial transactions from time to time (such as the purchase of computers and photocopying equipment). All government agencies carry on what they no doubt refer to as their 'business', but I cannot accept that it was Parliament's intention that all government agencies are to be regarded as having business affairs for the purposes of s.45(1)(c). In a piece of legislation with 48 separate grounds of exemption, it cannot have been Parliament's intention to provide an exemption so broad as to be triggered by a reasonably based apprehension of any adverse effect on the operations which any government agency carries on as its 'business'.
53. As Commissioner Albietz observed in *Re Cannon* (at p.520 paragraph 81), the common link among the words "business", "commercial" or "financial" in s.45(1)(c) is to activities carried on for the purpose of generating income or profits, and I consider that the phrase "business [or] commercial affairs of an agency" in s.45(1)(c) was intended to have the confined meaning I have stated at paragraph 51. That meaning affords a logical and sensibly confined scope for the application of s.45(1)(c), having regard to the stated objects of the FOI Act.
54. In *Re Cannon* at p.519, paragraph 76, Commissioner Albietz considered that the word "financial" refers to information about the finances (i.e., money resources) of an agency or another person, in particular the management of money resources, including credit, and that the phrase "financial affairs of an agency" is broad enough to cover the finances of government agencies which do not carry on a function of supplying goods and services on a commercial basis. If that is correct, then it is also arguable that the phrase "commercial affairs of an agency" is broad enough to cover situations in which an agency, that does not carry on a function of supplying goods or services on a commercial basis, enters into a contract for the purchase of goods or services. While I do not consider that the primary intention of s.45(1)(c) was to cover a situation of that kind, it is arguable that the ordinary meaning of the words employed affords scope for an agency to claim protection from disclosure of information that could reasonably be expected to have an adverse effect on the commercial or financial affairs of an agency that are involved in a commercial contract for the purchase of goods or services.

55. I do not need to express a concluded opinion on that issue in this case, because none of the matter in issue comprises information concerning the commercial or financial affairs of an agency in the senses discussed in paragraph 54.
56. Public Works' Annual Report, Statement of Affairs and Corporate Plan make it clear that Public Works operates some business units (e.g., QBuild, QFleet *et cetera*). However, there is no indication that Public Works' Infrastructure and Major Projects Division operates as a commercialised business unit, or that it charged fees for the services it provided to other government agencies in acting as Project Director of the City West development area. The Division does not appear to generate income from charging 'clients' for the performance of its services, nor, as I understand it, does it actively compete in the commercial market with private firms offering project management services. In acting as Project Director in the terms described in its submissions, Public Works was simply discharging the duties and responsibilities allocated to it by government, and funded out of consolidated revenue.
57. As I have explained above, I cannot accept the argument that, in discharging the functions and responsibilities allocated to it (and funded from consolidated revenue) by the Queensland Government, the Infrastructure and Major Projects Division of Public Works has business or commercial affairs for the purposes of s.45(1)(c) of the FOI Act. I cannot accept that it was Parliament's intention that it should be open to government agencies to mount such an argument; e.g., Education Queensland in operating schools, Queensland Health in operating public hospitals, *et cetera*.
58. I am satisfied from my examination of the matter in issue that it contains no information concerning the business, commercial or financial affairs of Public Works, within the terms of s.45(1)(c)(i) of the FOI Act.
59. Some of the matter in issue can properly be characterised as information concerning the business, commercial or financial affairs of SKM, or Ove Arup, but neither of those firms has sought exemption for any of the matter remaining in issue on the ground that its disclosure could reasonably be expected to have an adverse effect on their business, commercial or financial affairs.
60. I therefore find that the matter in issue does not qualify for exemption under s.45(1)(c) of the FOI Act because it does not comprise information concerning the business, commercial or financial affairs of Public Works.

s.45(1)(c)(ii)/ public interest balancing test

61. Public Works did not seek to argue that disclosure of the matter in issue could reasonably be expected to prejudice the future supply of similar information to government. It submitted that: "in the context of this case, adverse effect would also include non-competitive damage in the form of reduced efficiency and effectiveness in the performance of departmental functions... . It is submitted that the harm to the deliberative process, set out [earlier in its submission] also constitutes adverse effects for the purposes of s.45(1)(c). That is, that disclosure of the preliminary stages of the Project, will directly cause the Departmental officers to be unduly diverted from the proper performance of their functions."
62. On the assumption (contrary to my finding) that the matter now under consideration concerns the business, commercial or financial affairs of Public Works, I am not satisfied that there is a reasonable basis for expecting that disclosure of the matter in issue from the

letter dated 3 September 2001 from SKM could have an adverse effect on those affairs. The letter from SKM is merely a proposal – it outlines the tasks it would undertake if selected to carry out an expert review of technical issues relating to Infrastructure East, the personnel who would be involved and their qualifications, and an estimate of cost. It does not contain the results of studies undertaken, expert opinion on technical issues, or recommendations for the construction or configuration of relevant infrastructure. I can see no reasonable basis for expecting that disclosure of this letter could have an adverse effect of the kind suggested in the submissions lodged on behalf of Public Works.

63. With respect to the matter in issue from the letter by the Director, Transport Planning – SEQ, of Queensland Transport, the claimed adverse effects of disclosure are essentially identical to those claimed in respect of the harm to the public interest component of the test for exemption under s.41(1). For the same reasons explained at paragraphs 35-37 and 41, I am not satisfied that Public Works has established a reasonable basis for expecting that disclosure of the matter in question could have the adverse effects asserted by Public Works. But even if it had, I consider that the public interest considerations favouring disclosure which have been outlined at paragraphs 31, 38-39 and 42 are sufficiently strong to warrant a finding that disclosure would, on balance, be in the public interest.
64. The matter in issue in the Ove Arup report comprises expert technical opinion about management of pedestrian flows before and after major events, and how best to construct relevant infrastructure in that regard. It is of a similar general character to the expert opinion obtained from the Director, Transport Planning – SEQ, and the considerations addressed at paragraphs 35-42 apply equally to it. Public Works contends that its disclosure could reasonably be expected to result in an increased level of inquiries or activity by speculators, or representatives of special interest groups, to an extent that would unduly divert officers of Public Works or the City West Task Force from the performance of their functions. Such an outcome is, in my view, merely speculative. The evidence and argument submitted by Public Works have not satisfied me that there is a reasonable basis for expecting such an outcome.
65. In any event, public interest considerations of the kind outlined in paragraphs 31, 38-39 and 42, in my view, overwhelmingly favour disclosure of the matter in issue in the Ove Arup report, and warrant a finding that its disclosure would, on balance, be in the public interest.

Finding

66. For the reasons explained above, I find that none of the matter in issue qualifies for exemption under s.45(1)(c) of the FOI Act.

Conclusion

67. For the foregoing reasons, I set aside the decision under review, being the decision dated 21 December 2001 made by Mr Bill Rodiger on behalf of Queensland Transport. In substitution for it, I decide that none of the matter in issue, identified in paragraph 19, qualifies for exemption from disclosure under the FOI Act, and that the applicant is therefore entitled to obtain access to it under the FOI Act.

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D J BEVAN

INFORMATION COMMISSIONER