



Decision and Reasons for Decision

Application Numbers: 210287, 210288

Applicants: TK and UL

Respondent: Department of Communities

Third Party: The Courier-Mail

Decision Date: 10 October 2007

Catchwords: **FREEDOM OF INFORMATION – section 45(1)(c) *Freedom of Information Act 1992 (Qld)* – compliance notices - ‘document of an agency’ – ‘business, professional, commercial or financial affairs’ – public interest balancing test – reverse FOI**

Contents

Background	2
Steps taken in the external review process	2
Matter in issue	4
Findings	6
Decision	11

Reasons for Decision

Background

1. The external review applicants seek review of two decisions of the Department of Communities (Department) to partially disclose to the Courier-Mail compliance notices issued to child care centres managed by them. As the same issues arise in both reviews, this decision is made in respect of both external review applications.
2. On 30 January 2007 the Courier-Mail applied to the Department for access under the *Freedom of Information Act 1992* (Qld) (FOI Act) to the following information:
 - *Copies of any compliance notices issued during 2006 or 2007*
 - *Copies of any suspension or revocation notices issued during 2006 or 2007.*
3. The Department processed the application and identified two compliance notices which relate to the applicants. Those two notices form the matter in issue in this external review (Compliance Notices).
4. The Department made an original decision. The applicants sought internal review of that decision and on 25 June 2007, the Department made its internal review decision to partially release the Compliance Notices to the Courier-Mail.
5. On 24 July 2007 the applicants applied to the Information Commissioner for external review of the Department's internal review decision dated 25 June 2007.

Steps taken in the external review process

6. By letter dated 25 July 2007 this Office sought copies of the Compliance Notices and other relevant documentation from the Department.
7. This Office received copies of relevant documentation from the Department on 30 July 2007 and undertook a careful analysis of them.
8. This Office sought clarification of factual matters from the Department including the number of child care centres located within the relevant region and the number of centres for which each authorised officer of the Department is responsible.
9. By emails dated 30 July 2007 and 8 August 2007 the information requested was received from the Department.
10. By letter dated 8 August 2007 this Office wrote to the Courier-Mail inviting it to become a participant in the external review.
11. By letter dated 10 August 2007 the Courier-Mail confirmed that it wished to participate in the review. On 20 August 2007 this Office granted the Courier-Mail participant status.
12. By email dated 31 August 2007 the Department submitted that the name of the 'region' and 'authorised officer' set out in the Compliance Notices was exempt from disclosure under the FOI Act as:
 - *each of the authorised officers in each region is directly linked to a limited number and defined set of child care centres...*

- *releasing the Compliance Notices with the identifying information relating to departmental officers/offices could indirectly identify the child care centres concerned.*
13. By email dated 31 August 2007 this Office sought clarification from the Department with regard to its submissions.
 14. By email dated 4 September 2007 the Department made further submissions as requested in respect of its claim for exemption of the names of authorised officers, their job titles and the relevant regions from which the Compliance Notices were issued. These submissions related to how the relevant centres might be able to be identified if these details were released.
 15. By letters dated 12 September 2007 I conveyed a preliminary view to the applicants' legal representatives that information contained in the Compliance Notices which directly or indirectly identifies the applicants, including the name and position title of the Department's authorised officers, but not the region, was exempt from disclosure under section 45(1)(c) of the FOI Act. I sought further submissions from the applicants if they did not accept the preliminary view.
 16. On 12 September 2007 a staff member of this Office phoned the Department to discuss the preliminary view and the Department's submissions. A copy of the preliminary view to the applicants was sent to the Department. The Department was invited to make submissions if it did not accept the view.
 17. By letter dated 12 September 2007 I conveyed to the Courier-Mail the preliminary view that the Compliance Notices were partially exempt from disclosure under section 45(1)(c) of the FOI Act and invited the Courier-Mail to make submissions if it did not accept the view.
 18. On 18 September 2007 the Department advised by telephone that it accepted the preliminary view, as discussed on 12 September 2007, and did not wish to make further submissions.
 19. By letter dated 18 September 2007 the Courier-Mail sought an extension of time in which to provide submissions and requested clarification of aspects of the preliminary view.
 20. By letter dated 19 September 2007 I advised the Courier-Mail of the considerations I had taken into account when forming the preliminary view as requested. I also granted the Courier-Mail an extension of time in which to provide its submissions.
 21. By letter dated 27 September 2007 the Courier-Mail advised that it did not accept the preliminary view and submitted that:
 - on balance, the public interest favours disclosure of information that would identify the external review applicants
 - release of the information could not reasonably be expected to have an adverse effect on the business, financial etc affairs of the external review applicants
 22. On 1 October 2007 (the applicants') legal representatives advised this Office that the applicants had not yet given final instructions regarding whether they accepted the preliminary view, but that instructions were expected in the next day or two.

23. On 2 and 3 October 2007 further discussions took place between the applicants' legal representatives and a staff member of this Office in respect of the preliminary view.
24. By letter dated 4 October 2007 the applicants' legal representatives advised that the applicants accepted the preliminary view dated 12 September 2007.

Matter taken into account

25. In making this decision I have taken the following into account:
 - the Courier-Mail's FOI application dated 30 January 2007
 - the Compliance Notices (which comprise the matter in issue)
 - the initial decision of the Department dated 14 May 2007
 - the internal review decision dated 25 June 2007
 - correspondence from the external review applicants to the Department, setting out the applicants' objections to the release of the Compliance Notices, dated 3 April 2007 and 13 June 2007
 - the applicants' applications for external review dated 25 June 2007
 - file notes of telephone conversations between the applicant's legal representatives and a staff member of this Office, on 1 October, 2 October and 3 October 2007
 - the letter from the applicant's legal representatives dated 4 October 2007
 - advice received from the Department on 30 July 2007 regarding the number of child care centres within each region
 - advice received from the Department on 8 August 2007 regarding the number of child care centres for which each authorised officer has responsibility
 - the Department's submissions dated 31 August 2007
 - the Department's submissions dated 4 September 2007
 - advice received from the Department on 18 September 2007 that it accepted my preliminary view
 - the Courier-Mail's letter dated 18 September 2007
 - the Courier-Mail's submissions dated 27 September 2007
 - relevant sections of the FOI Act and applicable case law.

Matter in issue

26. The matter in issue in this external review comprises two Compliance Notices issued by the Department to the applicants (Matter in Issue).

Submissions made by the parties

The applicants' submissions

27. The applicants submitted that the Matter in Issue:
 - is exempt in its entirety, under sections 41, 42 (e), 42(f), 45 and 46 of the FOI Act
 - could not be released, as section 167 of the *Child Care Act 2002* (Qld) (CC Act) imposes a duty of confidentiality on the Department, which prevents disclosure
 - comprises untested allegations which the applicants have not been able to contest
 - should not be released as the applicants reserve their rights to make applications seeking amendment of the Matter in Issue.

28. On September 2007 I advised the applicants' legal representatives of the preliminary view that:
- parts of the Matter in Issue qualify for exemption from disclosure under section 45(1)(c) of the FOI Act
 - the remainder of the Matter in Issue does not qualify for exemption from disclosure under section 45(1)(c) of the FOI Act
 - none of the Matter in Issue qualifies for exemption from disclosure under sections 41, 42(e), 42(f) or 46 of the FOI Act
 - section 167 of the CC Act does not prevent disclosure of the Matter in Issue
 - the submission that the Matter in Issue contains unsubstantiated allegations is irrelevant for the purposes of this external review.
29. On 4 October 2007 the applicants' legal representatives advised that the applicants accept the preliminary view.

The Courier-Mail's submissions

30. By letter dated 12 September 2007 I conveyed to the Courier-Mail the preliminary view that the Matter in Issue was partially exempt from disclosure under section 45(1)(c) of the FOI Act and invited the Courier-Mail to make submissions if it did not accept the view.
31. On 27 September 2007 the Courier-Mail advised that it did not accept the preliminary view and submitted that:
- on balance, the public interest favours disclosure of information that would identify the external review applicants
 - release of the information could not reasonably be expected to have an adverse effect on the business, financial etc affairs of the external review applicants

The Department's submissions

32. The Department submits that:
- any matter which identifies the child care centres involved is exempt from disclosure under section 45(1)(c) of the FOI Act
 - the name of the 'region' and 'authorised officer' set out in the Matter in Issue is exempt from disclosure under the FOI Act because:
 - *each of the authorised officers in each region is directly linked to a limited number and defined set of child care centres...*
 - *releasing the Compliance Notices with the identifying information relating to departmental officers/offices could indirectly identify the child care centres concerned.*
33. On 12 September 2007 a staff member of this Office phoned the Department to discuss the preliminary view and the Department's submissions. A copy of the preliminary view to the applicants was sent to the Department. The Department was invited to make submissions regarding the preliminary view if it did not accept the view.
34. On 18 September 2007 the Department advised by telephone that it accepted the preliminary view, as discussed on 12 September 2007, and did not wish to make further submissions.

Findings

Section 45(1)(c) of the FOI Act

35. Section 45(1)(c) provides:

45 Matter relating to trade secrets, business affairs and research

(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.

36. In respect of this exemption provision, the applicants submit that:

- publication of the Matter in Issue could reasonably be expected to have an adverse effect on the applicants' business, professional, commercial and financial affairs
- no public interest benefit would result from disclosure as the applicants have at all times complied with lawful requirements of the Department.

37. In respect of this exemption provision the Department submits that parts of the Matter in Issue are exempt from disclosure under section 45(1)(c) of the FOI Act, including:

- the addressee details appearing on the notice as it identifies the applicants
- the licence details as they identify the applicants
- references to names of centres or persons connected with centres as these details identify the applicants
- the name of the Department's authorised officers as this could identify the relevant centres and the applicants
- the signature block of the officers issuing the notices (i.e. signature, job title and region) as they may identify the applicants
- the Department's 'footer' as it discloses the region in which the relevant notice was issued.

38. The Department submits that disclosure of this information could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the applicants.

39. In respect of this exemption provision the Courier-Mail submits that:

- there is not a reasonable expectation that the applicants' business, professional, commercial or financial affairs would be adversely affected if the Matter in Issue was released in full
- even if a reasonable expectation could be established, the public interest considerations favouring disclosure outweigh those designed to protect commercially sensitive information.

40. I will consider each of the elements relevant to section 45(1)(c) of the FOI Act in turn.

(a) Information concerning business, professional, commercial or financial affairs

41. The first element in the test for exemption under section 45(1)(c) of the FOI Act is that the information in issue must actually concern the business, professional, commercial or financial affairs of the agency or business operator.

42. In *Cannon and Australian Quality Egg Farms Ltd* [1994] QICmr 9 (30 May 1994) (*Cannon*) the Information Commissioner set out at paragraph 81 that:

The words "business, professional, commercial or financial" are hardly apt to establish distinct and exclusive categories; there must in fact be substantial overlap between the kinds of affairs that would fall within the ambit of the ordinary meanings of the words "business", "commercial" and "financial", in particular. The common link is to activities carried on for the purpose of generating income or profits...

43. Further, as set out in *Bouly and Department of Natural Resources; Stevenson Financial Corp. Pty Ltd & Anor (Third Parties)* [1998] QICmr 1 (3 March 1998) at paragraph 62:

It is not sufficient that the matter in issue has some connection with a business, or has been provided to an agency by a business, or will be used by a business in the course of undertaking its business operations. The matter in issue must itself be information about business, commercial or financial affairs, in order to satisfy the first element of the test for exemption under s.45(1)(c).

44. In *Johnson and Queensland Transport; Department of Public Works (Third Party)* [2004] QICmr 1 (5 January 2004), the Information Commissioner explained at paragraph 50 that:

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] QICmr 16 (18 July 1994) at 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.*

45. The Matter in Issue comprises information including that which identifies the relevant child care centres by their name, address and licence details, the names of persons employed at or connected to particular child care centres, and the names of the Department's authorised officers responsible for the relevant child care centres and the regions in which the centres operate.

46. After carefully considering all of the information available to me, I am satisfied that:
- disclosure of some of the Matter in Issue would disclose information concerning the business or commercial affairs of the applicants on the basis that it directly concerns a commercial enterprise or business pursued by the applicants in an organised way for the purpose of profit or gain¹.
 - the following parts of the Matter in Issue discloses such information (Identifying Information):
 - addressee details
 - licence details
 - authorised officer's name, signature and job title
 - name of or reference to a person connected to a centre or name of or reference to a centre itself
 - disclosure of the remaining Matter in Issue, including the region, would not disclose information concerning the business or commercial affairs of the applicants, nor information which could identify the applicants and therefore does not qualify for exemption from disclosure under the FOI Act.
47. In the ordinary course, the name of a government employee (in this case an authorised officer of the Department) acting in a professional capacity would not be exempt from disclosure.
48. However, I note the Department's submissions that:
- *"each of the authorised officers in each region is directly linked to a limited number and defined set of child care centres..."*
 - *"releasing the Compliance Notices with the identifying information relating to departmental officers could indirectly identify the child care centres concerned."*
49. In the present circumstances, I am satisfied that the names of the authorised and issuing officers comprise Identifying Information as disclosure could lead to identification of the relevant child care centres.
50. On this same basis, I consider that the issuing officers' position titles (where they appear in relevant signature blocks) also form part of the Identifying Information as revealing the position title would, in turn, identify the relevant authorised officer.

(b) Adverse effect reasonably expected from disclosure

51. The next element for consideration is whether disclosure of the Identifying Information could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the applicants.
52. The Information Commissioner considered the phrase 'could reasonably be expected to' at paragraphs 62 to 63 of *Cannon*:

The phrase "could reasonably be expected to" ...:

... calls for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.

¹ *Re Stewart and Department of Transport* [1993] QICmr 6 (9 December 1993) at para 103

It is appropriate to record what was said by the Full Court of the Federal Court in Searle's case [Searle Australia Pty Ltd v Public Interest Advocacy Centre 108 ALR 163 (Searle)] (at p.176) about the comparable test in s.43(1)(b) of the Commonwealth FOI Act:

In the application of s.43(1)(b), there would ordinarily be material before the decision maker which would show whether or not the commercial value of the information would be or could be expected to be destroyed or diminished if the information were disclosed. It would be for the decision-maker to determine whether, if there were an expectation that this would occur, the expectation was reasonable.

53. In summary, the Information Commissioner made the following observations in relation to section 45(1)(c):
- an adverse effect under section 45(1)(c) will almost invariably be financial in nature, whether directly or indirectly (e.g. an adverse effect on an entity's 'business reputation or goodwill ... is feared ultimately for its potential to result in loss of income or profits, through loss of customers') (at paragraph 82 of *Cannon*)
 - if information is already in the public domain or is common knowledge in the industry, it would ordinarily be difficult to show that disclosure of the information could reasonably be expected to have an adverse effect (paragraph 83 of *Cannon*)
 - in most instances the question of whether disclosure of information could reasonably be expected to have an adverse effect will turn on whether the information is capable of causing competitive harm to the relevant entity. A relevant factor is whether it enjoys a monopoly position or whether it operates in a commercially competitive environment (paragraph 84 of *Cannon*).
54. The Courier-Mail submits that the decision to exempt matter (the Identifying Information) is based on an unreasonable expectation and could be considered merely speculative.
55. On the information available to me, I am satisfied that:
- the Identifying Information is neither in the public domain nor is it common knowledge
 - the applicants operate in a commercially competitive environment and I consider that it is more than merely speculative to conclude that release of the Identifying Information would cause damage to their reputations
 - disclosure of the Identifying Information could therefore reasonably be expected have an adverse financial effect on the business, commercial or financial affairs of the applicants.
56. Given my finding that disclosure of the Identifying Information could reasonably be expected to cause an adverse effect on the business, commercial or financial affairs of the applicants, it is unnecessary to consider whether disclosure would prejudice the future supply of information to government.

Public Interest Balancing Test

57. The final matter for consideration is whether disclosure of the Identifying Information is in the public interest.

58. In relation to the public interest balancing test, the Courier-Mail relevantly submits that:
- *there is a public interest consideration favouring disclosure that provides an understanding of how the Department carries out its licensing and compliance functions...such public accountability is fundamental to all government agencies which perform functions on behalf of the community.*
 - *disclosure of issues of general concern can also assist the community to make decisions concerning their children's welfare particularly with respect to health and safety.*
59. I consider that the accountability and transparency of government is a public interest consideration favouring disclosure of the Identifying Information. In other words, disclosure of information about how government functions are conducted can enhance the accountability of agencies and individual officers in the performance of their official functions.
60. Against this, I must balance the public interest in maintaining the secrecy of sensitive commercial information held by government agencies about business operators which, among other things, could benefit competitors and adversely affect the relevant businesses.
61. I note that the Identifying Information comprises a small proportion of information contained in the Compliance Notices.
62. After carefully weighing the public interest considerations set out above and the submissions of the parties, I am satisfied that:
- in respect of the Identifying Information, the public interest consideration favouring non-disclosure (which is intended to protect commercially sensitive information held by government about business operators) outweighs the public interest consideration favouring disclosure
 - release of the majority of the information contained in the Matter in Issue (subject to exemption of the Identifying Information) provides transparency and accountability of government by demonstrating how the Department and its officers perform compliance functions.

Provision of further information

63. I note that the Courier-Mail, in its submissions dated 27 September 2007, also states that:
- other than the information contained in your letters, the Courier-Mail has not been provided with evidence to support the notion that release of this information (the Identifying Information) would cause any adverse effect on the businesses concerned. Further the Courier-Mail has not been provided with any supporting documentation or evidence from the external review applicants.*
64. In circumstances such as this, where revealing information which could identify the applicants would reveal matter claimed to be exempt, I have not been able to provide the Courier-Mail with any additional material. I also note that there is minimal overlap between the issues raised by the applicants and the Courier-Mail.

Conclusion

65. I am satisfied that release of the Identifying Information would disclose information that is properly characterised as information:

- concerning the business, commercial or financial affairs of the applicants
- which could reasonably be expected to have an adverse effect on those affairs

thereby establishing a public interest consideration favouring non-disclosure.

66. After carefully considering the public interest considerations for and against disclosure of the Identifying Information, I am satisfied that the arguments favouring disclosure do not outweigh the considerations favouring non-disclosure.

67. In summary, I find that only the Identifying Information qualifies for exemption under section 45(1)(c) of the FOI Act, namely:

- addressee details
- licence details
- authorised officer's name, signature and job title
- name of or reference to a person connected to a centre or name of or reference to a centre itself.

Decision

68. I vary the decision of Ms Sharon Hatchman of the Department made on 25 June 2007, by finding that:

- disclosure of the Identifying Information could reasonably be expected have an adverse effect on the business, commercial or financial affairs of the applicants
- in respect of the Identifying Information, public interest considerations favouring non-disclosure outweigh public interest considerations favouring disclosure
- the Identifying Information qualifies for exemption from disclosure under section 45(1)(c) of the FOI Act
- the remainder of the Matter in Issue does not qualify for exemption from disclosure under the FOI Act.

69. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

F Henry
Assistant Commissioner

Date: 10 October 2007