



Decision and Reasons for Decision

Application Number: 210706

Applicant: Ensham Resources Pty Ltd

Respondent: Department of Natural Resources and Water

Decision Date: 19 October 2009

Catchwords: **FREEDOM OF INFORMATION – section 45(1)(c) of the *Freedom of Information Act 1992* – matter relating to trade secrets, business affairs and research – whether the matter in issue concerns the business affairs of another person – whether disclosure could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government – whether disclosure would, on balance, be in the public interest**

FREEDOM OF INFORMATION – section 46 of the *Freedom of Information Act 1992* – matter communicated in confidence – whether disclosure of the matter in issue would found an action for breach of confidence – whether the matter in issue consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest

FREEDOM OF INFORMATION – section 41 of the *Freedom of Information Act 1992* – matter relating to deliberative processes – whether the matter in issue would disclose an opinion, advice or recommendation that has been obtained, prepared or recorded or 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 – whether disclosure of the matter in issue would, on balance, be contrary to the public interest

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REASONS FOR DECISION

Summary

1. For the reasons set out below, I find that the matter in issue in this external review is not exempt from disclosure under sections 45(1)(c), 46 or 41(1) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**.)

Background

2. By letter dated 17 July 2008, Mallesons Stephen Jaques, on behalf of AOAI Insurance Co Limited (**FOI Applicant**), applied to the Department of Natural Resources and Water (now known as the Department of Environment and Resource Management) (**Department**) for access to various documents under the FOI Act (**FOI Application**). The documents sought relate to the Ensham Central Project, more particularly to the flood risk and/or flood protection levee banks in the Nogoia River floodplain.
3. By letter dated 19 September 2008, the Department consulted Ensham Resources Pty Ltd (**Ensham**) in relation to the possible release of a number of documents responding to the FOI Application.
4. By letter dated 29 September 2008, Clayton Utz, on behalf of Ensham, advised that Ensham objected to the release of the relevant documents and provided reasons in support of Ensham's case.
5. By letters dated 8 October 2008, the Department provided the FOI Applicant and Clayton Utz with considered decisions.¹ The Department located a large number of documents responding to the FOI Application and decided that some of the relevant documents qualified for exemption from disclosure under the FOI Act while the remainder of the relevant documents did not qualify for exemption or were only partially exempt from disclosure under the FOI Act.
6. By letter dated 11 November 2008, the FOI Applicant applied for internal review of the considered decision.
7. Clayton Utz did not apply on Ensham's behalf for internal review of the Department's considered decision.
8. By letter dated 12 December 2008, the Department issued a response to the FOI Applicant's internal review application and provided Clayton Utz with a copy of the response. The Department decided to release further documents to the FOI Applicant as the information contained in those documents was publicly available.
9. As the Department's response to the internal review application was received by the relevant parties outside the timeframe stipulated in the FOI Act, the Department is deemed to have affirmed its considered decision.² However, for the purpose of this review, the Department's response to the internal review application is treated as the Department's submissions.
10. By letter dated 9 January 2009, Clayton Utz, on behalf of Ensham, applied to the Information Commissioner for external review of the deemed affirmation.

¹ In accordance with section 27B(4) of the FOI Act.

² In accordance with section 52(6) of the FOI Act.

Decision under review

11. The decision under review is the deemed affirmation of the Department's considered decision.

Steps taken in the external review process

12. By facsimile on 13 January 2009, the Office of the Information Commissioner (**Office**) requested that the Department provide a number of initiating documents relevant to the review.
13. By letter dated 15 January 2009, the Department provided the requested documents.
14. By letter dated 20 January 2009, the Office wrote to Clayton Utz to:
 - advise that the external review application had been accepted
 - invite it to provide any further submissions on behalf of Ensham.
15. By letter dated 20 January 2009, the Office wrote to the Department to advise that the external review application had been accepted and to request a copy of the matter in issue.
16. By letter dated 21 January 2009, Clayton Utz confirmed that Ensham based its objection to release of the relevant matter in issue on sections 41, 45(1)(c) and 46 of the FOI Act.
17. By letter dated 30 January 2009, the Department provided a copy of the matter in issue.
18. On 18 February 2009, a staff member of the Office telephoned the Department to advise that the decision under review was the deemed affirmation of the considered decision.
19. On 15 April 2009 and 14 May 2009, a staff member of the Office telephoned the Department to clarify a number of issues relevant to the review.
20. On 19 May 2009, a staff member of the Office telephoned Clayton Utz and invited Ensham to provide updated submissions in support of its case, given the passage of time since its last submissions had been made.
21. On 2 June 2009, a staff member of the Office met with officers from the Department in order to discuss the extent that the relevant information was publicly available. The Department provided a file note setting out the reasons for its view that certain information was publicly available.
22. On 5 June 2009, a staff member of the Office telephoned Clayton Utz and, in an attempt to informally resolve all or part of the external review, invited it to meet with the Office to review:
 - the documents that Ensham objected to the release of
 - the information about Ensham's operations that is publicly available.
23. On 12 June 2009, two staff members of the Office met with two staff members of Clayton Utz. The staff member of the Office explained that:

- a large amount of information about Ensham's operations which also appears in the matter in issue is publicly available
 - as that information is publicly available it is unlikely that it would qualify for exemption from disclosure under the FOI Act
 - given the extent of publicly available information and the passage of time since Ensham last made submissions in support of its case, Ensham may wish to:
 - provide updated submissions if it still objected to disclosure of the matter in issue
 - narrow the scope of the matter in issue on external review by withdrawing its objections to the disclosure of documents containing information which is publicly available.
24. Clayton Utz was provided with a copy of the matter in issue in this review and a schedule setting out:
- the various types of relevant information
 - where that type of information is publicly available.
25. Clayton Utz was invited to provide updated submissions to the Office by no later than 3 July 2009.
26. On 3 July 2009, a staff member of Clayton Utz telephoned the Office to clarify which documents comprise the matter in issue in this review.
27. By facsimile on 3 July 2009, Clayton Utz declined the opportunity to provide submissions in support of Ensham's case and said:
- To the extent that it is said that certain documents might now be in the public domain, we ask that you identify those documents specifically and state the means by which each of those documents is said to be in the public domain. Upon receipt of that information we will seek further instructions from our client.*
- In the meantime, although our client has had no need to make submission in respect of this issue for some months, we wish to make it clear that our client maintains its objection to disclosure of each of the documents in issue on the grounds set out in our letters of 29 September 2008 and 9 January 2009.*
28. By letter dated 29 July 2009, I provided the applicant with a preliminary view in relation to the matter in issue. In that letter I:
- noted that section 81(2) of the FOI Act provides that if the decision under review is a disclosure decision, the party objecting to disclosure of the documents (which in this review is Ensham) has the onus of establishing that a decision not to disclose the matter is justified
 - set out the relevant law, with reference to previous decisions of the Office, in relation to the relevant sections of the FOI Act that Ensham was relying on and the applicant's submissions on each provision
 - specifically identified a range of information about Ensham's operations that is publicly available and provided various examples of instances where information which is subject to consideration in this external review appears in the public domain

- advised the applicant of my preliminary view that:
 - Ensham had not satisfied the requirements of sections 45(1)(c), 46(1)(b) or 41(1) of the FOI Act in respect of the matter in issue as this information is in the public domain and therefore not exempt from disclosure under the FOI Act
 - some of the information which the Department found was exempt from disclosure under the FOI Act is not exempt as it is publicly available.
- advised that if Ensham did not accept the preliminary view and wished to maintain that the matter in issue was exempt from disclosure under the FOI Act, it should, by 14 August 2009, specifically:
 - identify any information which is not publicly available
 - address the requirements for exemption under sections 45(1)(c), 46(1)(b) or 41(1) of the FOI Act which I set out in the letter.

29. By facsimile on 14 August 2009, Clayton Utz provided the following response to the issues set out in the preliminary view letter:

You appear to be of the view that our client has the onus of establishing that information contained within the matter in issue is not publicly available. With respect, in our view, that approach is incorrect as it would be impossible for our client to prove that information is not publicly available. In effect, you are asking our client to prove a negative. In the circumstances, it seems to us that the correct approach is for you to identify precisely where each item of information contained in matter in issue is publicly available and then to allow our client a proper opportunity to respond and, if necessary, establish that that is not the case.

...

In the meantime, our client repeats and relies on its earlier submissions regarding its objection to the release of the documents referred to in its submissions.

30. By letter dated 26 August 2009, I wrote to Clayton Utz and provided Ensham with a final opportunity to provide specific, substantive and updated submissions in support of its case if Ensham maintained its objection to release after considering all of the information provided by the Office. I requested that any submissions be provided to the Office by 9 September 2009.
31. By facsimile on 8 September 2009, Clayton Utz advised the Office that Ensham did not intend to make any further submissions in this review.
32. On 9 September 2009, I provided the Department with a copy of the preliminary view letter dated 29 July 2009 and asked the Department to advise whether it accepted my preliminary view in relation to the documents which:
- I considered were not exempt from disclosure
 - the Department had decided did qualify for exemption under the FOI Act.
33. By letter dated 21 September 2009, the Department advised that it accepted the preliminary view.

34. The FOI Act was repealed by the *Right to Information Act 2009 (RTI Act)*³ which commenced on 1 July 2009.⁴ However, because the FOI Application was made under the FOI Act and has not yet been finalised, for the purposes of making a decision in this review, I am required to consider the application of the FOI Act (and not the RTI Act) to the matter in issue.⁵
35. In making this decision, I have taken the following into account:
- the FOI Application dated 17 July 2008
 - the Department's considered decisions dated 8 October 2008
 - the Department's purported internal review decisions dated 12 December 2008
 - information provided by Clayton Utz on behalf of Ensham dated 29 September 2008, 21 January 2009, 3 July 2009, 14 August 2009 and 8 September 2009 and the external review application dated 9 January 2009
 - information provided by the Department dated 30 January 2009 and 21 September 2009
 - file notes of conversations with staff members of the Department on 15 April 2009 and 2 June 2009
 - the matter in issue
 - the relevant provisions of the FOI Act
 - previous decisions of the Information Commissioner as referred to in this decision.

Matter in issue

36. The matter in issue in this review (**Matter in Issue**) comprises the documents:
- about which the applicant was consulted
 - which the Department decided to release (either in full or in part) after considering the applicant's objections to disclosure.
37. The following folios, which the Department decided qualify for partial exemption under the FOI Act, are also in issue in this review:
- Collection 1 Folio 428 (which is the same as Collection 5 Folio 17 and Collection 13 Folio 44)
 - Collection 5 Folio 12
 - Collection 6 Folios 135, 134, 115, 96 and 65
 - Collection 13 Folios 40 and 37.
38. For ease of reference, I have provided both the applicant and the Department with a schedule identifying the specific folios which comprise the Matter in Issue in this review.
39. The Matter in Issue in this review does not include the information the Department decided was exempt from disclosure under section 44(1) of the FOI Act.⁶
40. The Matter in Issue in this review is comprised of the following types of documents:

³ Section 194 of the RTI Act.

⁴ With the exception of sections 118 and 122 of the RTI Act.

⁵ Section 199 of the RTI Act.

⁶ See footnote 46 below.

- maps, diagrams and photographs of the region and aspects of Ensham’s mine
- emails between the Department and Ensham
- various slides from presentations given by Ensham to the Department
- information relating to flood studies and technical specifications for the Ensham mine.

Onus on external review

41. Section 81 of the FOI Act provides:

81 Onus

- (1) *On a review by the commissioner, the agency which or Minister who made the decision under review has the onus of establishing that the decision was justified or that the commissioner should give a decision adverse to the applicant.*
- (2) *However, if the decision under review is a disclosure decision, the participant in the application for review who opposes the disclosure decision has the onus of establishing that a decision not to disclose the document or matter is justified or that the commissioner should give a decision adverse to the person who wishes to obtain access to the document.*
- (3) *In this section—*
disclosure decision means—
 - (a) *a decision to disclose a document or matter contrary to the views of a person obtained under section 51; or*
 - (b) *a decision to disclose a document or matter if the agency or Minister should have taken, but has not taken, steps to obtain the views of a person under section 51.*

42. As the Department has decided to disclose matter contrary to the applicant’s view, the applicant has the onus of establishing that a decision not to disclose the Matter in Issue is justified and/or that the Information Commissioner should give a decision adverse to the FOI Applicant.

43. By letters dated 29 September 2008 and 9 January 2009, the applicant made submissions objecting to release of the Matter in Issue. Those submissions refer to the application of sections 45(1)(c), 46(1)(a), 46(1)(b) and 41 of the FOI Act. I will consider the application of each section below.

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

Relevant law

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

45. The Information Commissioner has previously indicated that section 45(1) of the FOI Act is the primary vehicle for reconciling the main objects of the FOI Act, that is, promoting open and accountable government administration and fostering informed public participation in the process of government, with the legitimate concerns for the protection from disclosure of commercially sensitive information.⁷ The purpose of the section is to provide a means whereby the general right of access to documents in the possession or control of government agencies can be prevented from causing unwarranted commercial disadvantage to:
- persons carrying on commercial activity who supply information to government or about whom government collects information; or
 - agencies which carry on commercial activities.
46. Section 45(1)(c) of the FOI Act can apply only if sub-sections 45(1)(a) and (b) are inapplicable, that is, if the matter in issue is information other than trade secrets or information that has an intrinsic commercial value to an agency or another person.⁸
47. To be *prima facie* exempt under section 45(1)(c):
- the matter in issue must be properly characterised as information concerning the business, professional, commercial or financial affairs of an agency or another person; and
 - it must be determined that disclosure of the matter in issue could reasonably be expected to have either of the prejudicial effects contemplated by section 45(1)(c)(ii), namely:
 - an adverse effect on the business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns or
 - prejudice to the future supply of such information to government.
48. If these requirements are established, the information will qualify for exemption, unless disclosure would, on balance, be in the public interest.
49. The common link between the words ‘business, professional, commercial or financial’ in section 45(1)(c) is to activities carried on, at least to some degree, for the purpose of generating income or profits.
50. The phrase ‘*could reasonably be expected to*’ in this context requires consideration of whether the expectation that disclosure of the matter in issue could result in either of the prejudicial effects contemplated by section 45(1)(c)(ii) is reasonably based.⁹

⁷ *Cannon and Australian Quality Farms Limited* (1994) 1 QAR 491 (**Cannon**).

⁸ *Cannon* at paragraph 66.

⁹ *Sheridan and South Burnett Regional Council, Local Government Association of Queensland Inc. and Dalby Regional Council* (Unreported, Queensland Information Commissioner, 9 April 2009) referring to *Attorney-General v Cockcroft* (1986) 64 ALR 97.

51. In *Cannon*¹⁰ the Information Commissioner made the following observations:

- 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').
- 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 as the information.
- 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 in this is whether the entity enjoys a monopoly position or whether it operates in a commercially competitive environment.
- The phrase 'prejudice the future supply of information' has the same meaning in section 45(1)(c) as it does in section 46(1).¹¹ Accordingly, where a person/entity would be disadvantaged by withholding information, then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information.¹²

The applicant's submissions

52. By letter dated 29 September 2008, the applicant made submissions to the Department on the application of section 45(1)(c) of the FOI Act. Those submissions can be summarised as follows:

- It is evident that all the documents relate to the commercial affairs of Ensham.
- All of the photographs and figures included in the Matter in Issue depict Ensham's mine layouts (or potential layouts) from which a person with the requisite knowledge can easily infer with some accuracy, sensitive information concerning Ensham's commercially sensitive existing and planned operations.
- All the emails included in the documents under consideration for access plainly disclose sensitive business and commercial information concerning Ensham.
- The potential for adverse effect and prejudicing of information supply is again borne out by the very nature of the documents. Ensham has provided the documents, many of which are strictly confidential in nature to the Queensland Government outside of any statutory obligation to do so. If this information is released then it may be republished without limitation or restriction. Where this occurs, businesses will be less inclined to provide such sensitive information to the Queensland Government outside of the restrictions of some formal legal arrangement such as a contract of secrecy.

¹⁰ At paragraphs 82 – 84.

¹¹ *Cannon* at paragraph 85.

¹² *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (**B**) at paragraph 161.

- There are no arguments of significance that can be submitted to sustain an assertion that disclosure of the Matter in Issue could be in the public interest. It is evident from the wording of section 45(1)(c) of the FOI Act that the onus of proof is on the FOI Applicant to show that it is in the public interest for such access to be granted. The documents and materials under consideration here are of a high level of official communication involving sensitive issues that calls for them to be kept confidential. No factual matter is shown which satisfies the onus that it is in the public interest to disclose these documents.

53. By letter dated 9 January 2009, the applicant made submissions to the Office on the application of section 45(1)(c) of the FOI Act. Those submissions can be summarised as follows:

- Information about Ensham's sales, and the sales Ensham aims to achieve, relates to Ensham's business affairs and should be exempt because the release of such information could have an adverse effect on Ensham's contractual discussions with service providers.
- Information such as sales Ensham aims to achieve, Ensham's future plans and proposed timeframes for recommencing mining activity are still the subject of internal discussions between Ensham and its owners/investors and are commercially sensitive issues.
- Information regarding how Ensham aims to achieve its plans in the future, such as the proposed use of various mining techniques, directly relates to the business affairs of Ensham and should be exempt. Information about the future is commercially and operationally sensitive, and remains the subject of deliberation and due diligence (for example to undergo community consultation, discussions with environmental authorities, mining lease applications, safety and management considerations and industrial relations considerations).
- Information regarding proposed timeframes for recommencing mining activity also clearly relates to Ensham's business affairs. The release of such information could have an adverse effect on Ensham in that it could affect contractual arrangements with its customers and future negotiations with existing and potential customers.
- The release of information about the future of the Ensham mine is not in the public interest (and does not relate to the flood risk and/or flood protection levee banks) and clearly could have adverse effects on the business affairs of Ensham because competitors and contractors of Ensham could use the information to their commercial advantage when dealing with Ensham.

Section 46 of the FOI Act

Relevant law

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

46 Matter communicated in confidence

(1) *Matter is exempt if—*

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

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

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

55. The test for exemption under section 46(1)(a) of the FOI Act is considered by reference to a hypothetical legal action in which an identified plaintiff has standing to enforce an obligation of confidence in respect of the matter in issue.¹³ In other words the decision-maker must determine whether the disclosure of a particular document would be actionable under the general law.¹⁴
56. An obligation of confidence may arise, either expressly or impliedly, between the parties to a contract.¹⁵
57. In *B*, the Information Commissioner identified five requirements, all of which must be established, to obtain protection in equity of allegedly confidential information as follows:
- a) It must be possible to specifically identify the information, in order to establish that it is secret, rather than generally available information.¹⁶
 - b) The information in issue must have ‘the necessary quality of confidence’; i.e. the information must not be trivial or useless information, and it must have a degree of secrecy sufficient for it to be the subject of an obligation of conscience.¹⁷
 - c) The information must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it.¹⁸
 - d) Disclosure to the applicant for access would constitute an unauthorised use of the confidential information.¹⁹
 - e) Disclosure would be likely to cause detriment to the confider of the confidential information.²⁰

Section 46(1)(b) of the FOI Act

58. The Information Commissioner has previously found that to establish the *prima facie* ground of exemption under section 46(1)(b) three requirements must be satisfied:²¹
- a) the matter in issue must consist of information of a confidential nature
 - b) it must be information that was communicated in confidence
 - c) the disclosure of the information could reasonably be expected to prejudice the future supply of such information.

¹³ *B* at paragraph 44.

¹⁴ *Corrs Pavey v Collector of Customs* (1987) 74 ALR 428 per SweeneyJ at 430.

¹⁵ *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

¹⁶ At paragraphs 60 – 63.

¹⁷ At paragraphs 64 – 75.

¹⁸ At paragraphs 76 – 102.

¹⁹ At paragraphs 103 – 106.

²⁰ At paragraphs 107 – 118.

²¹ *B* at paragraph 146.

59. If all of these requirements are established, the matter in issue will be *prima facie* exempt from disclosure. It is then necessary to determine whether the *prima facie* ground is displaced by the weight of identifiable public interest considerations which favour disclosure of the matter in issue.²²
60. The requirements of section 46(1)(b) are cumulative, that is, each one must be satisfied before the information can qualify for exemption under section 46(1)(b) of the FOI Act.
61. In relation to requirement c), to determine whether disclosure of information could reasonably be expected to prejudice the future supply of such information to government, I must be satisfied that disclosure could reasonably be expected to prejudice the future supply of such information from a substantial number of the sources available or likely to be available to an agency.²³
62. I note that where individuals or companies must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information) then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information.²⁴

The applicant's submissions

63. By letter to the Department dated 29 September 2008, the applicant submitted that all documents under consideration are exempt under section 46(1)(b) of the FOI Act.²⁵
64. In relation to the public interest considerations, the applicant refers to the submissions which are set out above in relation to section 45(1)(c) of the FOI Act.
65. By letter to the Office dated 9 January 2009, the applicant made submissions on the application of section 46(1)(b) of the FOI Act. Those submissions can be summarised as follows:
 - Documents were marked '*commercial-in-confidence*' because it was understood that the information contained in the documents was confidential to Ensham and was only communicated to the Department with the understanding that the Department would keep the information confidential.
 - The Department intends to release documents contained within presentations given by Ensham to the Department which are marked commercial-in-confidence. Any presentations given by Ensham are not in the public domain and so the information in those presentations retains its confidential nature.

²² B at paragraph 147.

²³ B at paragraph 161.

²⁴ B at paragraph 161.

²⁵ The applicant has not made any specific submissions on the application of section 46(1)(a) of the FOI Act to the Matter in Issue in this review. I have therefore assumed that the applicant bases its objection primarily on section 46(1)(b) of the FOI Act. I also note that by letter to the Department dated 29 September 2008, the applicant made submissions in relation to the application of section 46(1)(a) of the FOI Act to Collection 12 Folios 80 – 77. In its initial decision (which was affirmed on internal review) the Department decided that these folios are exempt from disclosure under section 46(1)(a) of the FOI Act. Therefore these folios are not in issue in this review.

- The Department in its statement of reasons at page 8 says that confidentiality was confirmed by the recipient and the documents are subject to a sustainable undertaking of confidentiality.

Section 41 of the FOI Act

Relevant law

66. Section 41(1) of the FOI Act provides:

41 Matter relating to deliberative processes

(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.*

67. For matter to be exempt under section 41(1) of the FOI Act, the following questions must be answered affirmatively:²⁶

- 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?
- Would disclosure, on balance, be contrary to the public interest?

68. The fact that a document falls within section 41(1)(a) (i.e. that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest.

69. The term 'deliberative processes' is sometimes explained as the pre-decisional thinking processes of an agency. The term refers to the processes of evaluating relevant evidence, arguments and options, for the purpose of making a decision related to the performance of an agency's functions. It includes contributions to the formulation of policy, or to the making of decisions under statutory powers. The Information Commissioner in *Eccleston* stated that:²⁷

Normally, deliberative processes occur toward the end stage of a larger process, following investigations of various kinds, establishing facts, and getting inputs from relevant sources...

70. The term 'public interest' under the FOI Act refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. In general, a public interest consideration is one which is common to all members of, or a substantial segment of the community, as distinct from matters that concern purely private or personal interests.

²⁶ *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 (**Eccleston**) at paragraphs 21-22.

²⁷ At paragraph 30.

71. Under section 41(1) of the FOI Act an applicant is entitled to access documents unless it can be demonstrated that disclosure of the particular deliberative process matter would be *contrary to the public interest*.
72. Unlike other exemption provisions within the FOI Act that incorporate a public interest test, there is no *prima facie* public interest consideration favouring non-disclosure within section 41(1) of the FOI Act. Finding that disclosure would be contrary to the public interest is a separate requirement for exemption which must be independently established.
73. The onus is on the party relying on the exemption to establish that:²⁸
 - a) specific and tangible harm to an identifiable public interest(s) would result from disclosing the matter in issue
 - b) the harm is of sufficient gravity that, when weighed against competing public interest considerations which favour disclosure, it would, on balance, be contrary to the public interest.
74. This means that the party relying on the exemption must identify the specific and tangible harm that would result to an identifiable public interest or interests if the particular documents comprising the matter in issue were disclosed. The identified harm to the public interest must then be weighed against public interest considerations in favour of disclosure.

The applicant's submissions

75. By letter to the Department dated 29 September 2008, the applicant made submissions in relation to the application of section 41(1) of the FOI Act to Collection 14 Folios 131 – 127. I note that in its initial decision (which was affirmed on internal review) the Department decided that these folios fall outside the scope of the FOI Application. Therefore these folios are not in issue in this review.
76. The applicant also submits that section 41(1) of the FOI Act applies to exempt all of the Matter in Issue but the applicant does not address the specific requirements of the provision.

The Department's submissions

77. The Department submits²⁹ that the Matter in Issue is not exempt from disclosure under the FOI Act as the information is in the public domain and accordingly:
 - in relation to section 45(1)(c) of the FOI Act, its release could not have an adverse effect on Ensham's business affairs nor does it have the potential to prejudice the future supply of similar information
 - in relation to section 46 of the FOI Act, the information no longer possesses the necessary quality of confidence.

²⁸ *Eccleston* at paragraph 140; *Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206 at paragraph 34.

²⁹ In its purported internal review decision.

Findings

Age of the Matter in Issue

78. I consider that information which was once commercially sensitive may lose its sensitivity with the passage of time in circumstances where the information becomes aged or out of date.
79. In this review, some of the Matter in Issue is more than three years old. For example, the Matter in Issue in Collections 4 and 7 is comprised of flood study documents which were created in 2006 and 2007. Given the significant flooding event which affected Ensham's operations in January 2008, I am satisfied that this information:
- is likely to have been significantly revised or superseded
 - is likely to have lost any commercial sensitivity due to subsequent events and/or the passage of time.
80. During the course of this external review, I have invited the applicant on several occasions to provide updated submissions to the Office in respect of the application of the relevant exemption provisions.³⁰ The applicant declined the opportunity to provide the requested submissions and has not specifically identified any information within the Matter in Issue which it considers has retained any commercial sensitivity.

General nature of the Matter in Issue

81. I consider that the disclosure under the FOI Act of information which is general in nature (that is, not specific to Ensham's operations) does not satisfy the requirements of sections 45(1)(c), 46(1)(b) or 41(1) of the FOI Act.
82. In this review, some of the Matter in Issue is information which, is not only commonly known, but is also general and does not reveal any detailed information about Ensham or its operations. For example, some of the Matter in Issue in Collection 6 relates generally to the process by which coal is formed and provides a citation for that information.

Matter in Issue that is publicly available

83. The Office has referred the applicant to a range of information about Ensham's operations that is publicly available including:
- the Environmental Impact Statement for the Ensham Central Project (**EIS**) (including appendices) which is available in full on Ensham's website³¹
 - information about the Ensham Central Project on the Department of Environment and Resources Management's (**DERM**) website³²
 - other information from Ensham's website including:

³⁰ Given the significant passage of time since the FOI Application was made and Ensham was consulted by the Department.

³¹ Available at: <http://www.ensham.com.au/updated/eis.asp>.

³² The Department of Environment and Resource Management is the Department formerly known as the Environmental Protection Agency. Available at: http://www.epa.qld.gov.au/environmental_management/impact_assessment/current_eis_processes/ensham_central_project/.

- various company announcements
 - a customer brochure
 - fact sheets
 - information under the 'latest news' section of the website
 - general information about Ensham's vision and existing operations
- other articles and information available on the internet.

84. I am satisfied that the following categories of information appearing in the Matter in Issue are publicly available:

- diagrams, maps and photographs of the region and the mine layout³³
- the sales that Ensham aims to achieve in 2009 (by reference to the amount of coal sold)³⁴
- how Ensham hopes to achieve its mid-term plan³⁵
- the proposed timeframes for recommencing mining activity³⁶
- the number of people Ensham employs³⁷
- Ensham's economic losses as a result of the flood and other economic losses in the region³⁸
- the amount of freehold land Ensham supports³⁹
- Ensham's yearly coal mining amount⁴⁰

³³ See, for example, the EIS which includes numerous and detailed maps, diagrams and photographs of the region and the mine layout and the Layout Plan on the DERM website which shows Ensham's land boundary, existing open cut operations and potential mining area and is available at http://www.epa.qld.gov.au/environmental_management/impact_assessment/current_eis_processes/en_sham_central_project/.

³⁴ See, for example, the Ensham Company Announcement *Ensham dragline returns to service as the mine rebuilds* and the article *Ensham takes the road less travelled in* (Mining Australia 10/11/02008).

³⁵ See, for example, the following articles *Ensham announces \$1bn project* (Central Queensland News 24/03/2009), *Ensham plans mine expansion* (Ensham website), *Ensham gets creative* (Australia's Mining Monthly 07/2007), *Innovation key to future at Ensham* (Queensland Government Mining Journal 07/2007) and *Pressing on with development plans* (Mining Chronicle 04/2007). See also under the 'vision' tab on Ensham's website and Ensham Resources – *Energy Efficient Opportunities: First Public Report*.

³⁶ See, for example, the following articles *Dewatering flooded coal mine like draining Sydney Harbour* (Earthmover and Civil Contractor 07/2008), *Ensham's flooded dragline high and dry* (ABC Capricornia 02/05/2008), *Goliath plane to Ensham's rescue* (The Mining Chronicle), *Ensham reaches millstone under the pump* (Queensland Coal Review 06/2008). See also the Channel 10 news report on 06/05/2008 (Ensham website) and the Ensham Fact Sheet *The Way Forward*.

³⁷ See, for example, the following articles *Ensham announces \$1bn project* (Central Queensland News 24/03/2009), *Ensham reaches millstone under the pump* (Queensland Coal Review 06/2008), *Approvals fast-tracked* (Townsville Bulletin 23/04/2008). See also Ensham Fact Sheets *The Way Forward* and *Flood Response and Recovery* and Company announcement *Ensham mine conducts flood review* 14/02/2008.

³⁸ See, for example, the Ministerial Media Statement *Impacts of Queensland's 40 days, 40 nights of flooding rains* (Minister for Emergency Services 04/02/2008) and the following articles *Rising above the flood* (Australia's Mining Monthly 07/2008) and *Ensham reaches millstone under the pump* (Queensland Coal Review 06/2008).

³⁹ See, for example, page 4 of the Customer Brochure on Ensham's website.

⁴⁰ See, for example, the information on the DERM website, the Initial Advice Statement for the Ensham Central Project (see for example paragraph 1.2), the Public Notice of the EIS, Company Announcements *Ensham dragline returns to service as the mine rebuilds* and *Ensham flood recovery continues* 31/01/2008 and the following articles *Dewatering flooded coal mine like draining Sydney*

- the other land uses on Ensham land⁴¹
 - photographs of the flooding and pumps⁴²
 - floodplain levee management (including flood studies and technical specifications for levees)⁴³
 - the amount of money spent on recovery activities⁴⁴
 - Ensham's total coal resource and the nature of the coal resource.⁴⁵
85. Where information is publicly available, a claim that the information is exempt from disclosure under the FOI Act is difficult to sustain. This is because, ordinarily, the release of information under the FOI Act that is already publicly available cannot reasonably be expected to have an adverse effect on business affairs or prejudice the future supply of information to government. It is also difficult to satisfy the requirement for exemption on the basis of confidentiality where the relevant information is publicly available.
86. It is not necessary for me to establish that the Matter in Issue is publicly available in the same form. Rather, for present purposes, it will be sufficient to establish that the information contained within the Matter in Issue is publicly available.
87. I am satisfied that in some cases, the Matter in Issue in this review is publicly available in the same form. For example:
- the diagrams which are located in the Matter in Issue at Collection 3 Folios 328, 327 and 326 are publicly available at Section 3, Figures 3-1, 3-2 and 3-3 of the EIS
 - the map which is located in the Matter in Issue at Collection 1 Folio 437 is publicly available at page 8 of the Customer Brochure on Ensham's website.
88. I am satisfied that for the most part, it is the *information contained within the matter in issue* that is publicly available. For example, information regarding proposed timeframes for recommencing mining activity (which the applicant claims is exempt) is publicly available from the following sources:
- Article – *Dewatering flooded coal mine like draining Sydney Harbour* (Earthmover and Civil Contractor 07/2008) on page 2 which states: *'The company hopes to reach full mining capacity by mid-2009.'*

Harbour (Earthmover and Civil Contractor 07/2008), *Ensham reaches millstone under the pump* (Queensland Coal Review 06/2008) and *Pressing on with development plans* (Mining Chronicle 04/2007).

⁴¹ See, for example, the EIS at Section 6 (Land Use) paragraph 6.6 and Figure 6-1.

⁴² See, for example, the Channel 10 news report on 06/05/2008 (Ensham website) and the following articles *Ensham consults on aftermath of flood* (Blackwater Herald 06/05/2008), *Ensham's flooded dragline high and dry* (ABC Capricornia 02/05/2008) and *Ensham consults with neighbours in flood aftermath* (Queensland Government Mining Journal 07/2008).

⁴³ See, for example, the EIS at Annexure D (Surface Water).

⁴⁴ See, for example, the Channel 10 news report on 06/05/2008 (Ensham website), Ensham Resources – *Energy Efficient Opportunities: First Public Report* and the article *Ensham's flooded dragline high and dry* (ABC Capricornia 02/05/2008).

⁴⁵ See, for example, pages 14 – 16 of the Customer Brochure on Ensham's website, the Company Announcement *Ensham dragline returns to service as the mine rebuilds*, the Ensham Fact Sheet *The Way Forward* and the article *Ensham announces \$1bn project* (Central Queensland News 24/03/2009).

- Report – Channel 10 news 06/05/2008 (Ensham website) which states: *'The dragline will be jumpstarted in a few weeks time. They hope it will be uncovering coal again by Christmas and they'll be back just mining early next year.'*
- Ensham Fact Sheet – *The Way Forward* on page 1 which states: *'Development plans for the site were suspended as a result of the January 2008 flood and did not recommence until the flood recovery process was completed in January 2009.'*
- Article – *Ensham's flooded dragline high and dry* (ABC Capricornia 02/05/2008) at paragraph 9 which states: *'... they expect the dragline to be back operating later this year.'*
- Article – *Goliath plane to Ensham's rescue* (The Mining Chronicle) at the last paragraph which states: *'Meanwhile, Ensham hopes to have its two flooded mine pits back in operation in the first half of 2009.'*
- Article – *Ensham reaches millstone under the pump* (Queensland Coal Review 06/2008) at paragraph 6 which states: *"Provided we encounter no unexpected setbacks, we hope to have the flooded pits emptied, dried and stabilised to allow the resumption of normal production by the end of the first quarter of 2009," Ensham chief executive John Pegler said.'*

Matter in Issue which the Department found was not exempt under the FOI Act

89. For the reasons set out above, I am satisfied that:

- the applicant has not discharged its onus in accordance with section 81(2) of the FOI Act
- the Department has correctly decided that the relevant Matter in Issue is not exempt from disclosure under the FOI Act.

Matter in Issue which the Department found was partially exempt under the FOI Act

90. The Department found that the following folios which form part of the Matter in Issue were partially exempt from disclosure under sections 45(1)(c) and 46(1)(a) of the FOI Act:⁴⁶

- Collection 1 Folio 428 (which is the same as Collection 5 Folio 17 and Collection 13 Folio 44)
- Collection 5 Folio 12
- Collection 6 Folios 135, 134, 115, 96 and 65
- Collection 13 Folios 40 and 37.

91. For the reasons set out below, I am not satisfied that the folios listed in paragraph 90 above are partially exempt from disclosure under the FOI Act.

⁴⁶ The Department also found that a number of folios were partially exempt from disclosure under section 44(1) of the FOI Act. Those folios are not in issue in this review and I will not consider this aspect of the Department's decision any further.

Collection 1 Folio 428

92. In its purported internal review decision, the Department identified part of Collection 1 Folio 428 (and Collection 5 Folio 17 and Collection 13 Folio 44) as exempt from disclosure under section 45(1)(c) of the FOI Act. The relevant information in those folios relates to:
- the amount of freehold land Ensham supports
 - information about the multiple land uses Ensham supports.
93. As I have noted above, I am satisfied that this information is publicly available from:
- page 4 of the Customer Brochure on Ensham's website (although the figure is different)
 - the EIS at Section 6 (Land Use) at paragraph 6.6 and figure 6-1.
94. I confirm that the applicant has not provided any specific submissions in relation to my view that this information is publicly available and therefore does not qualify for exemption from disclosure. Accordingly, as the information is publicly available, I am not satisfied that it is exempt from disclosure under the FOI Act.

Collection 5 Folio 12 and Collection 13 Folio 40

95. In its purported internal review decision, the Department identified the amount that Ensham has spent on recovery activities which appears in Collection 5 Folio 12 and Collection 13 Folio 40 as exempt from disclosure under section 45(1)(c) of the FOI Act.
96. I am satisfied that this information is publicly available from:
- the Channel 10 news report on 06/05/2008 which states: *'The financial blow is staggering. Ensham predicts losses somewhere above \$300 million.'*
 - pages 3 – 4 of the report *Energy Efficient Opportunities: First Public Report* which state:⁴⁷ *'Expenditure for the recovery was in the order of \$350 million and significant management time was occupied by these tasks rather than routine operations.'*
 - the article *Ensham's flooded dragline high and dry* (ABC Capricornia 02/05/2008) which states: *'Mr Pegler says cost of a new dragline would be over \$10 million, with the total damages bill for the mine at least \$270 million.'*
97. I confirm that the applicant has not provided any specific submissions in relation to my view that this information is publicly available and therefore does not qualify for exemption from disclosure. Accordingly, as the information is publicly available, I am not satisfied that it is exempt from disclosure under the FOI Act.

⁴⁷ Available at:

<http://www.ensham.com.au/updated/pdf/Ensham%20Resources%20EEO%20Public%20Report%20December%202008.pdf>.

Collection 6 Folio 115

98. In its purported internal review decision, the Department identified information about Ensham's total coal resource which appears in Collection 6 Folio 115 as exempt from disclosure under section 45(1)(c) of the FOI Act.
99. I am satisfied that this information is publicly available from:
- the Company announcement *Ensham dragline returns to service as the mine rebuilds* which states: *'Ensham has a very large 1 billion tonne coal resource and we are committed to recovering that resource in a sustainable manner'*.
 - the Ensham Fact Sheet *The Way Forward* which states: *'Ensham's vast coal resource of around 900 million tonnes of thermal coal naturally differs in quality'*.
 - the article *Ensham announces \$1bn project* (Central Queensland News 24/03/2009) which states: *'With the five-metre open cut thermal coal seam that has yielded some 75 million tonnes in the last 15 years dipping downward and an estimated in situ 800 million tonne resource to mine, the richest vein forms the Ensham Central expansion project'*.
 - page 3 of the Customer Brochure which states: *'Ensham has ... [a] resource of more than 1000Mt of high quality coal'*.
100. I confirm that the applicant has not provided any specific submissions in relation to my view that this information is publicly available and therefore does not qualify for exemption from disclosure. Accordingly, as the information is publicly available, I am not satisfied that it is exempt from disclosure under the FOI Act.

Collection 6 Folios 96 and 65

101. In its purported internal review decision, the Department decided that parts of Collection 6 Folios 96 and 65 are exempt from disclosure under section 45(1)(c) of the FOI Act.
102. The applicant was invited to provide specific submissions on how the information in those folios qualifies for exemption from disclosure under section 45(1)(c) of the FOI Act but has declined the opportunity to do so. The Department has not provided any specific submissions on this issue.
103. In the absence of any specific submissions on the issue, I am unable to contemplate how disclosure of these folios could reasonably be expected to have either of the prejudicial effects contemplated by section 45(1)(c)(ii) of the FOI Act. Accordingly, I am not satisfied that these folios are exempt from disclosure under section 45(1)(c) of the FOI Act.

Collection 6 Folios 134 – 135 and Collection 13 Folio 37

104. In its purported internal review decision, the Department decided that parts of Collection 6 Folios 134 – 135 and Collection 13 Folio 37 are exempt from disclosure under section 46(1)(a) the FOI Act.

105. The applicant was invited to provide specific submissions on how the information in those folios qualifies for exemption from disclosure under section 46(1)(a) of the FOI Act but has declined the opportunity to do so. The Department has not provided any specific submissions on this issue.
106. In the absence of any specific submissions on the issue, I am unable to contemplate how the information in these folios satisfies the requirements for exemption under section 46(1)(a) of the FOI Act. Accordingly, I am not satisfied that these folios are exempt from disclosure under section 46(1)(a) of the FOI Act.

Conclusion

107. In summary, I find that the Matter in Issue in this review which I have identified above does not qualify for exemption from disclosure under the FOI Act.

DECISION

108. For the reasons set out above, I set aside the Department's decision and find that the Matter in Issue is not exempt from disclosure under sections 45(1)(c), 46 or 41(1) of the FOI Act.
109. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

Assistant Commissioner Henry

Date: 19 October 2009