



Decision and Reasons for Decision

Application Numbers:	210811, 210812
Applicants:	Fairfield Constructions Pty Ltd Fairfield Land Pty Ltd
Respondent:	Department of Environment and Resource Management
Third Party:	C & R Consulting Pty Ltd
Decision Date:	23 December 2009
Catchwords:	<p>FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER RELATING TO TRADE SECRETS, BUSINESS AFFAIRS AND RESEARCH – applicant seeking access to consultant report(s) – whether disclosure would disclose trade secrets of an agency or another person – whether the report(s) are exempt under section 45(1)(a) of the <i>Freedom of Information Act 1992</i> (Qld)</p> <p>FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER RELATING TO TRADE SECRETS, BUSINESS AFFAIRS AND RESEARCH – applicant seeking access to consultant report(s) – whether disclosure would disclose information that has a commercial value to an agency or another person – whether disclosure could reasonably be expected to destroy or diminish the commercial value of the information – whether the report(s) are exempt under section 45(1)(b) of the <i>Freedom of Information Act 1992</i> (Qld).</p> <p>FREEDOM OF INFORMATION – REFUSAL OF ACCESS – EXEMPT MATTER – MATTER RELATING TO TRADE SECRETS, BUSINESS AFFAIRS AND RESEARCH – applicant seeking access to consultant report(s) – whether disclosure would disclose information concerning the business, professional, commercial or financial affairs of an agency or another person – whether disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of such information to government – whether the report(s) are exempt under section 45(1)(c) of the <i>Freedom of Information Act 1992</i> (Qld)</p>

**FREEDOM OF INFORMATION – REFUSAL OF ACCESS –
EXEMPT MATTER – MATTER RELATING TO TRADE
SECRETS, BUSINESS AFFAIRS AND RESEARCH –
applicant seeking access to consultant report(s) – whether
disclosure would disclose the purpose or results of
research – whether disclosure could reasonably be
expected to have an adverse effect on an agency or
another person by or on whose behalf the research was, is
being, or is intended to be, carried out – whether the
report(s) are exempt under section 45(3) of the *Freedom of
Information Act 1992* (Qld)**

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REASONS FOR DECISION

Summary

1. On the information available to me, I find that the matter in issue is not exempt from disclosure under section 45(1)(a), 45(1)(b), 45(1)(c) or 45(3) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**).
2. The decision under review is set aside.

Background

3. By letter dated 22 October 2008 (**FOI Application**), Fairfield Land Pty Ltd and Fairfield Constructions Pty Ltd (**Applicants**), sought access to:

All documents relating to the removal of a parcel of land which was amalgamated from Lot 1 on RP 705903 (part) and Lot 2 on RP 715670 (part) from the Environmental Management Register ("EMR") being contained in 14 volumes of files held by the EPA (your reference IDALIA files BNE327722.

4. In accordance with section 51 of the FOI Act, the Department consulted with Dr Christopher Cuff of C&R Consulting Pty Ltd (**Third Party**) in relation to the document authored by the Third Party titled "Final Revised Report Vol. 1 and Vol. 2 dated 12 June 2008" (the **Report**).
5. By letter dated 16 December 2008, the Third Party objected to the release of parts of the Report on the basis that it qualified for exemption under section 45(1) and 45(3) of the FOI Act.
6. On 7 January 2009 (**Original Decision**), the Department of Environment and Resource Management¹ (**Department**) advised the Applicants that it had located 2583 folios relating to the request and decided to:
 - release 1401 folios in full (apart from some matter that was deleted because it was not considered relevant pursuant to section 27(3) of the FOI Act)
 - refuse access to four folios in full on the basis that they qualify for exemption from disclosure under section 43(1) of the FOI Act
 - partially refuse access to twenty one folios on the basis that the information contained in these folios qualifies for exemption from disclosure under section 44(1) of the FOI Act
 - partially refuse access to three folios and refuse access to 863 folios in full on the basis that the relevant information qualifies for exemption from disclosure under section 45(1)(c) of the FOI Act
 - exclude 268 folios as exact duplicates.
7. By letter dated 2 February 2009 (**Internal Review Application**), the Applicants sought internal review of the Original Decision by stating that:

We hereby request an internal review of the decision of Ms Billington pursuant to section 52 of the Freedom of Information Act (Qld). We believe that the information in issue should not be exempt under section 45(1)(c) or section 45(3) on the following grounds...

¹ Formerly the Environmental Protection Agency.

8. On 12 February 2009 (**Internal Review Decision**), Paul Arthur, Corporate Counsel of the Department, decided to uphold the Original Decision and also decided that the information qualified for exemption from disclosure under section 45(1)(b) of the FOI Act.
9. By letter dated 17 March 2009 (**External Review Application**), the applicants sought external review of the Internal Review Decision.
10. As the two applicant companies seek access to the same information and are represented by the same solicitor, I consider it is appropriate to issue one decision in respect of files 210811 and 210812.

Decision under review

11. The decision under review is the Internal Review Decision.

Applicable legislation

12. The FOI Act was repealed by the *Right to Information Act 2009 (RTI Act)*² which commenced on 1 July 2009.³ However, because the FOI Application was made under the FOI Act and has not yet been finalised, for the purposes of this decision, I am required to consider the application of the FOI Act (and not the RTI Act) to the matter in issue.⁴

Steps taken in the external review process

13. This Office:
 - made preliminary inquiries under section 75 of the FOI Act
 - determined that it would conduct an external review of the Internal Review Decision and notified the parties on 23 March 2009.⁵
14. A copy of the matter in issue and documents relating to Third Party consultation undertaken by the Department in response to the FOI Application were received and reviewed.
15. During a telephone conversation on 7 April 2009, the Applicants' solicitor clarified the issues in dispute and the scope of the FOI Application.
16. During a telephone conversation on 22 April 2009, the Third Party was advised that an external review application had been received in relation to the Department's decision to refuse access in full and in part to the matter in issue.
17. By letter dated 27 April 2009 to the Third Party, the Office confirmed the matters discussed by telephone on 22 April 2009 and:

² Section 194 of the RTI Act.

³ With the exception of sections 118 and 122 of the RTI Act.

⁴ Section 199 of the RTI Act.

⁵ Although the applicants' External Review Application was made outside of the time limit specified in section 73(1)(d) of the FOI Act, the Office decided to exercise discretion under section 73(1)(d) of the FOI Act to extend the time for the applicants to apply for external review given the short time period involved, the lack of likely prejudice to the Department and the issues raised in the application.

- notified the Third Party of the possible release of documents (or parts of documents) under the FOI Act
 - consulted the Third Party regarding whether or not it objected to any or all of the document being released under the FOI Act
 - invited the Third Party to apply to become a party in the external review.
18. By email dated 30 April 2009, the Third Party:
- continued to object to the release of the matter in issue and relied on its earlier submissions made to the Department
 - confirmed there may be an opportunity to reduce the number of documents in issue
 - made further submissions in relation to the content of the matter in issue.
19. By letter dated 11 May 2009, the Applicants sought directions in relation to the conduct of the external review.
20. During a telephone discussion on 25 May 2009, the Third Party confirmed that:
- it was seeking legal advice in relation to its objection to the release of the matter in issue
 - Mr Cuff would be uncontactable for a period of approximately 1 month due to travel commitments
 - a copy of the Report was given to Mr Grant McOmish⁶ after it was prepared
 - it continued to object to the release of the Report, even though it conceded that a copy of the Report had been given to a director of the Applicants.
21. During telephone discussions in late May and early June 2009, a member of staff of this Office spoke with the Third Party's legal representative, Clark McNamara Lawyers, regarding the issues in the external review and relevant exemption provisions.
22. By email dated 7 July 2009 to Clark McNamara Lawyers, I confirmed:
- that we were awaiting advice as to whether the Third Party continues to object to the release of the matter in issue to the Applicants on the basis that these documents were already in the possession of a director of the Applicant companies
 - my preliminary view that the documents are not exempt from disclosure under the FOI Act and should be released to the Applicants.
23. By email dated 10 July 2009 (and again on 13 July 2009), Clark McNamara Lawyers confirmed that the Third Party continues to object to the release of the matter in issue and made further submissions on its behalf.
24. During telephone discussions in July 2009, a member of staff of this Office:
- discussed various matters with the Department including the preliminary view, clarification that the Office had received all of the relevant matter in issue and a request for further documentation to assist in identifying the matter in issue

⁶ An ASIC Current and Historical Extract as at 13 January 2009 confirms that Mr Grant McOmish is a director of Fairfield Land Pty Ltd and Fairfield Constructions Pty Ltd (a copy of this Extract was provided by the Third Party by letter dated 4 December 2009).

- discussed the scope of the matter in issue with the Applicants' legal representative (to confirm that the Applicants sought access to all of the relevant documents)
25. By letter dated 5 October 2009, I wrote to the Applicants' legal representative to clarify the issues in the review and confirm the documents sought by the Applicants.
 26. By letter dated 22 October 2009, the Applicant's legal representative advised that the Applicants continue to seek access to all of the matter in issue identified in my letter of 5 October 2009.
 27. By letter dated 28 October 2009, I communicated a preliminary view to the Third Party that the matter in issue was not exempt from disclosure under section 45(1)(a), (b) or (c) of the FOI Act (**Preliminary View Letter**).
 28. By email dated 29 October 2009, the Third Party advised that its legal representative was on leave until 2 December 2009 and sought an extension of time in which to respond to the Preliminary View Letter above.
 29. By email dated 2 November 2009, I granted the Third Party the requested extension of time.
 30. By letter dated 2 November 2009, I advised the Applicants that I had communicated a written preliminary view to the Third Party and asked the Third Party to provide submissions in response by 4 December 2009.
 31. By email dated 4 December 2009, the Third Party provided submissions in response to the preliminary view letter.
 32. During telephone discussions on 8 December 2009, a staff member of this Office asked the Applicants' legal representative to confirm those documents in the Applicants' possession.
 33. By facsimile transmission dated 14 December 2009, the Applicants' legal representative confirmed those documents in the Applicants' possession.
 34. In reaching a decision in external reviews 210811 and 210812, I have taken the following into consideration:
 - the FOI Application and Original Decision
 - the Internal Review Application
 - the External Review Application
 - relevant written and/or verbal submissions made by the Applicants during the course of the review
 - relevant written and/or verbal submissions made by the Third Party during the course of the review
 - the matter in issue
 - provisions of the FOI Act and other legislation referred to in this decision
 - case law and decisions of this Office referred to in this decision.

Matter in issue

35. The matter in issue comprises documents relating to a parcel of land amalgamated from Lot 1 on RP 705903 and Lot 2 on RP 715670 from the Environmental

Management Register. The documents comprise part of a report prepared by the Third Party for Fairfield Land Pty Ltd and/or Fairfield Construction Pty Ltd titled *Final Revised Report (vol. 1 and 2) 12 June 2008*.

36. Specifically the matter in issue can be identified as follows:

Department file reference	Folio number	Description
902074	22-62	SGS Report, October 2000
	63-66	SGS letter to EPA dated 25 April 2000 re: Notice to supply additional information
	175-193	SGS Report, volume 1, June 1999
	210-228	Appendix 8 of SGS Report, volume 1, June 1999
	230-244	Australian Environmental Laboratories report no.25483 (to SGS), 14 April 1999
	245-248	Australian Environmental Laboratories report no.25519 (to SGS), 20 April 1999
	249-255	Australian Environmental Laboratories report no.26017 (to SGS), 23 June 1999
	256-261	Australian Environmental Laboratories report no.25564 (to SGS), 28 April 1999
902076 Part 1	2-11	SGS Report, volume 1 of 1, 1 December 1997
	28-37	Australian Environmental Laboratories report no.20540 (to SGS), 4 October 1997
902076 Part 4	2-5, 7, 9-18	Parts of SGS Report, volume 1 of 1, June 1998
	39-55	Australian Environmental Laboratories report no.22882 (to SGS), 15 June 1998
BNE 2239 Vol 14	10-18 (only part of 14)	Pages 9 to 17 of the C&R Consulting <i>Final Revised Report</i> , volume 1, 12 June 2008
	48-54	Pages 47 to 53 of the C&R Consulting <i>Final Revised Report</i> , volume 1, 12 June 2008
	62-63	Pages 61 to 62 of the C&R Consulting <i>Final Revised Report</i> , volume 1, 12 June 2008
	69-72	Pages 68 to 71 of the C&R Consulting <i>Final Revised Report</i> , volume 1, 12 June 2008
	75-87	Pages 74 to 86 of the C&R Consulting <i>Final Revised Report</i> , volume 1, 12 June 2008
BNE 2239 Vol 15	2-3, 12-17	Part of Appendix A of the <i>Final Revised Report</i> by C&R Consulting, volume 2, 12 June 2008
	82-131	Appendix C: Soils of the Site, Pits 1999 and 2001 of the <i>Final Revised Report</i> by C&R Consulting, volume 2, 12 June 2008
	156-204; 208-229; 230-294; 296-297; 301-457	Parts of Appendices E: Analytical Results (including previous reports) E1-E8
	458-525	Fairfield Waters Precinct 3N

		Additional Investigations, 21 December 2007
BNE 2239 Vol 12	32-91; 97-107; 117-121; 171-220	Parts of Fairfield Waters Final Report by C&R Consulting, 29 June 2007 (including appendices)
Loose Docs 2	15-31	Part of SGS Report 46170445.4A, Addendum to Volume 1 of 1, submitted April 1998
	76-78	Letter from Australian Environmental Laboratories to SGS, 5 March 2008
Loose Pages	13-78	Part of C&R Consulting 'Fairfield Waters Precinct 3N' Additional Investigations, 21 December 2007

Findings

37. Pursuant to section 21 of the FOI Act, a person has a legally enforceable right to be given access under the FOI Act to documents of an agency and official documents of a Minister. This right of access is subject to other provisions of the FOI Act, in particular, section 28 of the FOI Act, which provides that an agency may refuse access to exempt matter or an exempt document, and the provisions of Part 3, Division 2 of the FOI Act, which set out those exemption provisions.

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

38. Section 45(1)(a) of the FOI Act provides:

45 Matter relating to trade secrets, business affairs and research

(1) *Matter is exempt matter if -*

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

...

39. The Information Commissioner considered the meaning of 'trade secrets' in detail in paragraphs 42 – 49 of *Cannon and Australian Quality Egg Farms Limited (Cannon)*.⁷

40. In *Searle Australia Pty Ltd v Public Interest Advocacy Centre (Searle)*,⁸ the court said:

The determination of what is a trade secret is primarily a question of fact for the administrative decision-maker. Nevertheless, it is an error of law for a decision-maker to define a statutory criterion in terms which are not reasonably open.

41. Having regard to the comments in *Searle*, generally speaking, the following principles are applicable to an analysis of the meaning of a trade secret:

- a trade secret has been referred to as 'any formula, pattern or device or compilation of information which gives an advantage over competitors who do not know or use it'.⁹

⁷ (1994) 1 QAR 491.

⁸ (1992) 108 ALR 163, Davies, Wilcox and Einfeld JJ at page 172.

- the following indicia have largely been accepted as elements of a trade secret:
 - the extent to which the information is known outside of the business
 - the extent to which it is known by employees and others involved in the business
 - the extent of measures taken by the business to guard the secrecy of the information
 - the value of the information to the business and its competitors
 - the amount of effort or money expended in developing the information
 - the ease or difficulty with which the information could be properly acquired or duplicated by others.¹⁰
- there is no requirement that information which is a trade secret be of a technical nature¹¹
- in *Cannon*,¹² the Information Commissioner noted the other factors which received emphasis in the Full Court's judgment in *Searle* including:
 - the necessity for secrecy, including the taking of appropriate steps to confine dissemination of the relevant information to those who need to know for the purposes of the business, or to persons pledged to observe confidentiality
 - that information, originally secret, may lose its secret character with the passage of time
 - that the relevant information be used in, or useable in, a trade or business;
 - that the relevant information would be to the advantage of trade rivals to obtain;
 - that trade secrets can include not only secret formulae for the manufacture of products, but also information concerning customers and their needs.
- having regard to the wording of section 45(1)(a) of the FOI Act, there is no need to prove or describe the harm that would be occasioned to business interests due to disclosure of a 'trade secret'.¹³ It is sufficient that disclosure of the matter would disclose trade secrets of any agency or other person.

Third Party submissions

42. The Third Party submits that:

The method developed for the in-situ remediation of the site in a Tropical area represents a research advance on methods described in the literature and available elsewhere. Whereas other methods have been compound or agent specific, this method is quite deliberately non-specific and is analogous to a strong, broad spectrum antibiotic approach to resistant bacteria. In this case the resistant bacteria are equivalent to a broad range of environmentally intransigent Polycyclic Aromatic Hydrocarbons (PAH's) which are broken down by a broad spectrum of biodegradation bacteria. The

⁹ See *Cannon* at paragraph 43, citing the American *Restatement of the Law of Torts* (1939, Volume 4 para 757) which was referred to by Gowan J in *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37 (**Ansell Rubber**).

¹⁰ *Restatement of the Law of Torts* (1939, Volume 4) referred to by Gowan J at page 50 of *Ansell Rubber*.

¹¹ *Searle*, page 172 – 173.

¹² At paragraph 49.

¹³ *Cannon* at paragraph 36.

complementary use of both acidic alkaline nutrient media is unique and particularly appropriate to Tropical areas with high annual temperatures. On account of the novel nature of this approach we seek exemption from release under FOI using the provisions of Section 45...

and:

There is no information in the report indicating proprietary technology or commercial-in-confidence but the "Important Note" at the beginning of the report, in our view covers this matter.

and further:

Our client objects to the release of documents to Fairfield Land Pty Limited because that entity has already been supplied with an original and copies of the report the subject of the application.

Our client objects to the release of documents to any party because the report contains trade secrets comprising the specifics of the recommended remediation treatment... Once armed with the information such parties could use the information to remediate sites contaminated with TPH/BTEX/PAH. These processes are subject to a patent that is in the process of being drafted and release of that information would seriously prejudice the prospects of successful prosecution of the patent. These are trade secrets within the meaning of section 45(1) of the Act and are therefore an exempt matter.

Application of section 45(1)(a) of the FOI Act

43. I have considered the application of section 45(1)(a) of the FOI Act to the matter in issue having regard to the submissions referred to above.
44. On the information available to me, I am satisfied that:
- the Third Party disseminated the Report by previously providing it to a director of one of the Applicant companies
 - there is no evidence that the Report was provided to the Applicants by the Third Party on a confidential basis
 - the relevant information does not have, or has lost its 'secret character' because its dissemination was not confined
 - there is no evidence that the Third Party took any steps to guard the secrecy of the information contained in the Report.
45. Accordingly, I am satisfied that the matter in issue is not exempt from disclosure under section 45(1)(a) of the FOI Act.

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

46. Section 45(1)(b) of the FOI Act provides:

45 Matter relating to trade secrets, business affairs and research

(1) Matter is exempt matter if -

...

(b) its disclosure –

- (i) *would disclose information (other than trade secrets) that has a commercial value to an agency or another person; and*
- (ii) *could reasonably be expected to destroy or diminish the commercial value of the information; or*

47. The Information Commissioner considered the requirements of section 45(1)(b) of the FOI Act in paragraphs 51-60 of *Cannon*.
48. The relevant principles from *Cannon* in relation to the application of section 45(1)(b) of the FOI Act can be summarised as follows:
- there are two possible interpretations of the phrase ‘commercial value’ in the context of section 45(1)(b) of the FOI Act which are set out below:
 - information has commercial value for the purposes of section 45(1)(b) of the FOI Act if it is valuable for the purposes of carrying on the commercial activity in which an agency or business is engaged, because it is important or essential to the profitability or viability of a continuing business operation, or a pending, one-off, commercial transaction.
 - information has commercial value for the purposes of section 45(1)(b) of the FOI Act if a genuine arms-length buyer is prepared to pay to obtain that information from the agency or person, such that the market value of the information would be destroyed or diminished if it could be obtained from a government agency under the FOI Act.
 - the information must have a current commercial value at the time a decision is made as to whether section 45(1)(b) applies. This is because information which was once valuable may become aged or out-of-date such that it has no remaining commercial value.
 - the fact that resources have been expended in producing information, or money has been expended in acquiring it, are factors that may be relevant to take into account in determining whether information has a commercial value for the purposes of section 45(1)(b) of the FOI Act.
 - furthermore, there must be a reasonable basis, not just speculation, for expecting the commercial value of the information to be diminished by its disclosure. This could not be shown if the information was public knowledge or common knowledge among competitors in the relevant industry.
49. In *Attorney-General v Cockcroft* (**Cockcroft**)¹⁴ which dealt with the interpretation of the phrase ‘*could reasonably be expected to prejudice the future supply of information*’ in the context of the section 43(1)(c)(ii) (business affairs) exemption contained in the Commonwealth FOI Act, Bowen CJ and Beaumont J said:¹⁵

¹⁴ (1986) 64 ALR 97.

¹⁵ *Cockcroft*, at 106.

*In our opinion, in the present context, the words "could reasonably be expected to prejudice the future supply of information" were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act. It is undesirable to attempt any paraphrase of these words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like. To construe s.43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based (see *Jason Kioa v. The Honourable Stewart John West*, High Court, unreported, 18 December 1985 per Mason, J. at p 36; see also per Gibbs, C.J. at p 12).*

50. The Justices' interpretation of the phrase '*could reasonably be expected to*' and the proposed line of inquiry, while made in the context of the business affairs exemption contained in Commonwealth FOI legislation, is relevant in the context of the exemption contained in section 45(1)(b) of the FOI Act.
51. Accordingly, the phrase '*could reasonably be expected to*' in this context requires a consideration of whether the expectation that disclosure of the matter in issue could destroy or diminish the commercial value of the information is reasonably based.
52. Shepherd J also noted in *Cockcroft* that it is not necessary for a decision-maker '*to be satisfied upon a balance of probabilities*' that disclosing the document will produce the anticipated prejudice.¹⁶

Third Party submissions

53. The Third Party submits that:

The business and commercial context of this application and review is that our client has issued but remains unpaid for invoices rendered for providing the report the subject of the application in the sum of \$54,780.00 (Invoice dated 19 May 2008 for \$51,260.00 and Invoice dated 14 August 2008 for \$3,520). On 11 July 2008 Grant McComish of Fairfield Land Pty Ltd advised our client by email that the invoice for \$51,260.00 would be processed for payment, but that invoice was not paid. The invoice issued on 14 August 2008 for \$3,520 also remains unpaid.

Our client is concerned that the applicants are seeking to get a copy of the report by means of a request under the Act because one or more of the applicants have misplaced or lost control of the original report given to Fairfield Land Pty Limited, or require the report to be provided pursuant to the Act to satisfy some other proposed use of the report or the information contained within it. A full copy of the report and copies having been provided to Fairfield Land Pty Limited, they cannot see any other legitimate basis for a request to access to the report.

Release of the report will deprive our client of the only commercial lever or business pressure point it may have to recover fees of \$51,260.00 due by Fairfield Land Pty Limited for the report. Our client is a small business and the information in the report has a commercial value not only to the those with an interest in the land the subject of the report, but also has a commercial value to our client in the sense that it can only realise the value of the work by getting payment for it.

¹⁶ *Cockcroft*, at 106.

...

The report contains information with a commercial value to Fairfield Land Pty Ltd and/or Fairfield Constructions Pty Ltd and/or to our client that will be diminished on release to Fairfield Land Pty Ltd or Lancomp Pty Ltd or to Fairfield Constructions Pty Ltd because once disclosed, it could reasonably be expected that Fairfield Land Pty Ltd and/or Fairfield Constructions could use the information without having to pay our client for it, thus diminishing its value. The report discloses a method to remediate the land, that has a commercial value to our client, and disclosure could reasonably be expected to diminish the value the commercial value of the information to our client because it removes all incentive for Fairfield Land Pty Ltd to pay for the report. This satisfies the requirements of section 45(1)(b) of the Act.

and:

Commercial value in the C&R reports contemplated by s45(1)(b) of the FOI Act

In the decision of Cannon and Australian Quality Egg Farms Limited (1994) 1 QAR 491 (the "Cannon Case"), cited in your letter, the Information Commissioner stated at paragraphs 54 and 55 that:

It seems to me that there are two possible interpretations of the phrase "commercial value" which are not only supportable on the plain meaning of those words, but also apposite in the context of s45(1)(b) of the FOI Act.

...

The second interpretation of "commercial value" which is reasonably open is that information has commercial value to an agency or another person if a genuine, arms-length buyer is prepared to pay to obtain that information from that agency or person. it would follow that the market value of that information would be destroyed or diminished if it could be obtained from a government agency that has come into possession of it, through disclosure under the FOI Act.

The C&R Reports which are the subject of the application contain information that has a commercial value to C&R, as C&R prepared the C&R reports on the basis that C&R would be paid for the C&R Reports. The information contained in the reports was prepared for a specific purpose with high degree of expertise and analysis. The methodology and style of the report has been developed by C&R and of itself holds commercial value. That commercial value is the amount C&R invoiced for the C&R Reports, which remains unpaid. Once that commercially valuable information is obtained then its commercial value is diminished if not destroyed.

The statements in your letter ... are contrary to the legal position as disclosed by the dicta in the Cannon Case. Accordingly, we submit the C&R reports do have commercial value for the purposes of section 45(1)(b) and any decision made pursuant to the FOI Act should be made on that basis.

Prior disclosure of information is not determinative

The Federal Court case of Re Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health [1992] FCA 241 (the "Searle Case"), also cited in your letter, was an appeal from the Administrative Appeals Tribunal concerned with exemption under s 43(1)(b) of the Federal Freedom of Information Act (upon which s45(1)(b) of the FOI Act is based). The Searle Case related in part to information, some of which was published.

At paragraphs 46 to 48 of the Searle Case, Davies, Wilcox and Einfeld JJ stated the following:-

.. the question under s43(1)(b) is... whether the commercial value of the information could reasonably be expected to be destroyed or diminished if it were disclosed... The decision-maker is concerned...with the effect of disclosure.

...

The Tribunal went on to say:-

“...The Tribunal is of the view that to interpret s 43(1)(b) as applying to the compilation of material otherwise publicly available would not be in accord with the object of the Act nor the intention of Parliament...”

On this basis, the Tribunal refused the disclosure of some documents but not of others.

...

In those paragraphs, the Tribunal stated the question as whether the information contained in the documents, which included information as to the particular tests made by Searle, had commercial value. But to find that similar results were stated in public articles would not conclude the inquiry. Commercial value may attach to information contained in any documents which concerned the nature of, techniques used in, and the actual results of Searle’s tests. The Tribunal did not make the findings required in this respect.

Prior disclosure of the information, it itself, does not determine that there is no commercial value in the information or that any commercial value would not be diminished or destroyed by disclosure. The Information Commissioner should consider the effect of disclosure. The statement in your letter set out in paragraph 3(c) above is not consistent with the reasoning applied in Searle’s Case, and we submit, would be rejected.

It is also relevant to consider that although Fairfield Land Pty Limited (“Fairfield Land”) the owner of the land to which the C&R Reports relate, was provided with a copy of the C&R Reports, C&R believes that Fairfield Land is no longer in possession of the information in the C&R Reports. This is evidenced by the Freedom of Information application by Fairfield Construction Pty Limited (“Fairfield Construction”), a company in the same company group as Fairfield Lands. If Fairfield Land still had the C&R Reports, Fairfield Construction would be able to obtain the report from Fairfield Land (its sister company) and there would be no need for the Freedom of Information application. We consider any assessment should be made on the basis that Fairfield Construction or its related entities are not in possession of the information in the C&R reports.

Yardstick for evaluating effects of disclosure

The Information Commissioner states at paragraph 84 of the Cannon Case that:-

...Since the effects of disclosure of information under the FOI Act are, with few exceptions, to be evaluated as if disclosure were being made to any person, it is convenient to adopt the yardstick of evaluating the effects of disclosure to a competitor of the agency which, or person whom, the information in issue concerns. (This yardstick is also appropriate when considering the application of s 45(1)(b).)

Disclosure would destroy commercial value in the C&R reports

Using the above yardstick and considering the effect of disclosure, the commercial value of C&R Reports would be destroyed if they were disclosed to Fairfield Land whom the information in the C&R Reports concerns.

The commercial value in the C&R Reports includes C&R's ability to use the C&R Reports as a commercial lever or business pressure point to procure payment in respect of the C&R Reports. The quantum of the commercial value is \$54,780. If the C&R Reports were disclosed to Fairfield Construction, there would be no incentive for Fairfield Land to pay C&R's invoices thereby destroying the commercial value in the C&R Report.

Application of section 45(1)(b) of the FOI Act

54. I have considered the application of section 45(1)(b) of the FOI Act to the matter in issue having regard to the submissions referred to above.
55. It is agreed that:
- the Third Party was engaged by one of the Applicant companies to prepare a report regarding the subject land
 - the Report was prepared by the Third Party and provided to a director of both Applicant companies.
56. I must determine whether the information contained in the Report has commercial value in either of the senses described in *Cannon* and if it does, whether its disclosure could reasonably be expected to destroy or diminish that commercial value.
57. In summary, the Third Party submits that:
- the commercial value of the Report is the amount the Third Party invoiced the Applicants for the preparation of the Report
 - the invoiced amount remains unpaid
 - if the Report is disclosed to the Applicants, then its commercial value is diminished if not destroyed because there would be no incentive for the Applicants to pay the invoiced amount which remains owing to the Third Party.
58. I have carefully considered all of the matters set out above.
59. On balance, I find that:
- the effect of the Applicants' alleged non-payment of an invoice (to which the Third Party refers) does not ascribe the type of commercial value contemplated by s.45(1)(b) of the FOI Act to the information contained in the Report itself
 - any commercial value to the Third Party arises out of the relevant contractual arrangement between the parties
 - it is a matter for the Third Party whether it chooses to enforce its contractual arrangement with the Applicants to recover monies allegedly owed (in proceedings outside of this freedom of information application)
 - disclosure of the Report will not impact upon the Third Party's ability to sue on that contract.
60. I am also satisfied that neither of the Applicant companies comprise a genuine arms-length buyer in the marketplace as contemplated by s.45(1)(b) of the FOI Act as:
- one of the Applicant companies commissioned relevant work from the Third Party which is the subject of the Report
 - the Third Party has previously provided a director of both Applicant companies with a copy of the Report.

61. In summary, I am satisfied that:

- the information contained in the matter in issue does not comprise information having a commercial value in either of the senses described in *Cannon*
- even if the information did possess intrinsic commercial value, its disclosure could not reasonably be expected to destroy or diminish that commercial value as the effect of disclosure is to release a Report which has already been disclosed to a director of both Applicant companies
- the matter in issue is not exempt from disclosure under section 45(1)(b) of the FOI Act.

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

62. 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.

63. The Information Commissioner considered the application of section 45(1)(c) of the FOI Act in *Cannon*.¹⁷ In summary, matter will be exempt under section 45(1)(c) of the FOI Act if it satisfies the following three cumulative requirements:

- the information concerns the business, professional, commercial or financial affairs of an agency or person, including a company (other than trade secrets or information mentioned in section 45(1)(b) of the FOI Act) (**Requirement 1**)
- disclosure of the relevant information could reasonably be expected to have either of the following effects:
 - an adverse effect on the business, professional, commercial or financial affairs of the agency or person, which the relevant information concerns; or
 - prejudice to the future supply of such information to government**(Requirement 2)**
- the weight of all identifiable public interest considerations against disclosure equals or outweighs that of all of the identifiable public interest considerations favouring disclosure (**Requirement 3**).

Applicants submissions

64. In summary, the Applicants relevantly submit that:

- the matter in issue cannot properly be characterised as information concerning the business, commercial or financial affairs of C&R

¹⁷ See paragraphs 67 – 88.

- the information contained in the excluded material deals with remedial management of contaminated land and the dealings of C&R with the EPA for and on behalf of the Applicants. The documents do not discuss the business, commercial or financial affairs of C&R. The fact that the documents were generated in the course of consultancy operations, and employs methodology developed by C&R, does not, of itself, mean that the matter in issue concerns C&R's business, commercial or financial affairs. (*Spilsbury and Brisbane City Council* 1997 at para 48)
- disclosure of the documents in issue could not reasonably be expected to have an adverse effect on the business, commercial or financial affairs of C&R
 - the reports are an important source of information to establish the relevance of the chosen method of remediation in relation to contaminated land on the Lot 1 on RP 705903 and Lot 2 on RP 715670, the effectiveness of this method and which are necessary to understand the remediation and validation process involved. They are not directly relevant to the decision of the Department regarding whether or not the land in question could be removed from the Environmental Management Register, and consist almost entirely of information crucial to the Applicants' proposed development of the land. The Applicants have no intention to use the information sought for commercial purposes, therefore the documents should not be exempt (*Readymix Holdings Pty Ltd and Port of Brisbane Corporation; Brisbane Mini Mix Pty Ltd (Third Party)* 2003 F0501, 15 December 2003).
 - The information from the C&R report is embodied in a Third Party review report titled 'No: REP001 by ENSR Australia as Third Party Reviewer of C&R Consulting Report: Fairfield Waters Lot 903 SP111983'. The material and the quantities of the material used for bioremediation of the site have already been disclosed to ENSR Australia in the C&R Consulting Report and can be found in the ENSR Australia Report REP001. Therefore, the disclosure of the information in issue could not reasonably be expected to have an adverse effect on the business, commercial or financial affairs of C&R.
 - The methods and quantities of materials used by Dr Cuff in remediation of the land are already known to all participants. Therefore, the disclosure of the information in issue will not reveal any trade secrets and consequently damage C&R Consulting's financial position.

Department submissions

65. In the Original Decision the Department states that:

The information in these folios concerns the business, professional, commercial or financial affairs of companies with which this Agency has dealt. In deciding whether the above information should be released, I have obtained and considered the views of third parties. Those views include objections to release of the matter in question. Having considered the arguments put forward, in conjunction with the content of the documents in question, I am of the belief that disclosure of this information could have an adverse effect on the affairs of those companies. Hence I consider that this information is, prima facie, exempt.

I next need to consider whether public interest considerations would favour the disclosure of this information. Whilst the object of the Act is to extend as far as possible the right of the community to have access to information held by the Queensland Government in the interests of open and accountable government, it was not intended to enable a Third Party to access documents relating to a company's commercial operations the release of which could ultimately affect the viability of that operation. I believe on balance, the

public interest test in this instance does not overturn the argument for non-disclosure, since the effect on the companies' commercial affairs would be disproportionate to any benefit to the public as a result of disclosure.

I believe the documents satisfy the criteria for exemption under section 45(1)(c) and as such should not be released.

Third Party submissions

66. The Third Party's submissions are set out in paragraphs 42 and 53 of this decision.
67. In relation to the Third Party review report REP001 by ENSR Australia, the Third Party submits that:

We do not have a copy of the document entitled "Report of Third Party Reviewer of C & R Consulting Report: Fairfield Waters Lot 903 SP111983" and consequently we cannot answer specifically the comments made in relation to this report. On the information provided, however, we would certainly contest some of the points listed.

1. There is disclosure in section 8.2 of the C & R report of 12 June, 2008, relating to a literature search. The majority of the references listed therein are post November 2001, the time that the methodology was developed. Consequently, at the time of the initiation of the investigation, the methodology was not developed nor well known.

This is particularly the case for the specific situation of the remediation of Polycyclic Aromatic Hydrocarbons (PAH'S) in the seasonally arid tropics. Thus we contest some of the assertions made within dot point one, specifically parts 1 and 3.

2. With respect to dot point 1, part 2, the communication from Greg O'Brien (EPA) was a short, 5-line, reply to a fax sent, by us, on 14 November 2001 where he is in fact agreeing with our suggestions in relation to the land-farming. He did make the suggestion of adding brioler house manure but this was not done and instead raw chook manure was added.

Application of section 45(1)(c) of the FOI Act

Requirement 1

68. For information to 'concern' the business, professional, commercial or financial affairs of a person or agency, it must be information 'about' or 'regarding' those affairs.¹⁸
69. As noted in *Readymix Holdings Pty Ltd and Port of Brisbane Corporation; Brisbane Mini Mix Pty Ltd (Third Party)*,¹⁹

It is not enough that the matter in issue has some connection with a business, or has been provided to an agency by a business, or will be used by a business in the course of undertaking business operations. The matter in issue must itself be information about business, commercial or financial affairs, in order to satisfy this requirement.

70. In paragraph 73 of *Cannon*, the Information Commissioner said that as none of the words business, professional, commercial or financial affairs were defined in the FOI Act, they are to be given their ordinary meaning, or whichever of their accepted meanings is most appropriate to the statutory context. The meaning of each of

¹⁸ See paragraph 67 of *Cannon*.

¹⁹ (2003) 6 QAR 294 at paragraph 41.

‘business, professional, commercial and financial affairs’ has been considered in previous decisions of this Office.²⁰

71. In relation to *business affairs*, the Information Commissioner has said:

*For a matter to relate to ‘business affairs’ in the requisite sense, it should ordinarily, in my opinion, relate to the affairs of a business undertaking which is carried on in an organised way (whether it be full time or only intermittent) with the purpose of obtaining profits or gains (whether or not they actually be obtained)*²¹

and sought assistance from the comments of O’Byrne J in *Accident Compensation Commissioner v Croom*²² who considered that:

... it would be necessary to show that the information impinged some way or other upon the actual conduct or operations of the undertaking itself.

72. In *Queensland Community Newspapers Pty Ltd and Redland Shire Council; Civic Projects (Raby Bay) Pty Ltd, Sinclair Knight Merz, Coffey Partners International Pty Ltd (Third Party)*, the Information Commissioner said:

*It is not sufficient that the information in issue is derived from a business, or has a connection with 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, professional, commercial or financial affairs, in order to satisfy the first element of the test*²³
...

73. The Information Commissioner considered the application of section 45(1)(c) of the FOI Act to a report recommending a waste water management strategy, prepared by two consultants in *Spilsbury and Brisbane City Council: John Wilson and Partners Pty Ltd, Environmental Resources Management (Qld) Pty Ltd (Third parties)*.²⁴ At paragraph 48, the Information Commissioner said:

The fact that the Report was generated in the course of JWP’s and ERM’s consultancy operations, and employs methodologies developed by them does not, of itself, mean that the matter in issue concerns their business, commercial or financial affairs.

74. The matter in issue can generally be described as a report concerning the remediation of the subject land and related correspondence that was provided to the Applicants and the Department by the Third Party.
75. Having considered the content of the matter in issue, I accept the submissions made by the Applicants that the information itself does not concern the business, professional, commercial or financial affairs of the Third Party.
76. Given my finding that the first requirement for exemption from disclosure under section 45(1)(c) of the FOI Act is not satisfied in the circumstances, it is unnecessary to determine the further requirements of the exemption provision.

²⁰ For instance, see *Cannon*.

²¹ See *Cannon*, citing the Information Commissioner’s earlier decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227 at paragraph 103.

²² [1991] 2 VR 322 at page 330. See paragraph 75 of *Cannon*.

²³ (1998) 4 QAR 262. See also *Readymix Holdings Pty Ltd and Port of Brisbane Corporation; Brisbane Mini Mix Pty Ltd (Third Party)* (2003) 6 QAR 294 at paragraph 41.

²⁴ (1999) 5 QAR 335 at paragraph 48.

77. On the basis of the matters set out above, I find that the matter in issue is not exempt from disclosure under section 45(1)(c) of the FOI Act.

Section 45(3) of the FOI Act

78. Section 45(3) of the FOI Act exempts matter which would disclose the purpose or results of research in certain circumstances.
79. In particular, Section 45(3) of the FOI Act provides that:

45 Matter relating to trade secrets, business affairs and research

(3) *Matter is exempt matter if -*

- (a) *it would disclose the purpose or results of research, whether or not the research is yet to be started, the research has started but is unfinished, or the research is finished; and*
- (b) *its disclosure could reasonably be expected to have an adverse effect on the agency or other person by or on whose behalf the research was, is being, or is intended to be, carried out.*

80. Information will only be exempt if the following two cumulative requirements are satisfied:
- a) it discloses the purpose or results of research; and
 - b) its disclosure could reasonably be expected to have an adverse effect on the agency or other person by or on whose behalf the research was, is being, or is intended to be, carried out.

Applicants submissions

81. In summary, the Applicants submit that:
- disclosure of the matter in issue would not disclose the purpose or results of 'research' in the sense that word is used in the context of section 45(3)
 - the reports were produced to reflect on the process and the method of remediation of the contaminated land adopted by the Third Party in relation to the property of Fairfield Constructions Pty Ltd for the purpose of removing the land from the Environmental Management Register. The report was not produced to record any systematic enquiry or investigation into the subject to discover new conclusions by the critical study of a subject, but to reflect on the remediation progress the successfulness of which went to the very nature of the contract between the Third Party and Fairfield Constructions Pty Ltd
 - alternatively, if the reports were to be viewed as disclosing the purpose or results of research, section 45(3) does not extend to the research which has been completed. In this case, any research has been completed and incorporated in the reports, so that the matter in issue does not qualify for exemption under section 45(3) (**Spilsbury and Brisbane City Council 1997** at para 58)
 - the Objective test for the exemption of the matter under section 45(3) refers only to adverse effects on an agency or person by or on whose behalf research is being carried out. The Third Party produced the reports whilst under a contractual obligation to Fairfield Constructions Pty Ltd. Therefore, Fairfield Constructions Pty Ltd is a company on whose behalf the research was carried out and a beneficiary of the research. The matter cannot have an adverse effect on

Fairfield Constructions Pty Ltd as a beneficiary of the research and should not be exempt under section 45(3)

- the Third Party was engaged as a paid agent of Fairfield Constructions Pty Ltd at all times. All reports produced by the Third Party in respect of Fairfield Construction Pty Ltd's property were issued in the capacity of an agent of Fairfield Constructions Pty Ltd and for their benefit. Therefore, the reports in issue are, in fact, intellectual property of Fairfield Constructions Pty Ltd vested in Fairfield Constructions Pty Ltd by virtue of consultancy and agreement (**Spilsbury and Brisbane City Council 1997**).

Third Party submissions

82. The Third Party's submissions are set out in paragraphs 42, 53 and 67 of this decision.

Application of section 45(3) of the FOI Act

83. The Information Commissioner has previously considered the meaning of the word 'research' in the context of section 45(3) of the FOI Act and found that it was used in the sense of 'a search or investigation undertaken to discover facts and reach new conclusions by the critical study of a subject or by a course of scientific enquiry', or a 'diligent and systematic enquiry or investigation into a subject in order to discover facts or principles.'²⁵
84. On the information available to me, I find that the matter in issue was prepared by the Third Party in relation to the remediation of the relevant land and could not be described as 'a search or investigation undertaken to discover facts and reach new conclusions by the critical study of a subject or course of scientific enquiry' or a 'diligent and systematic enquiry or investigation into a subject in order to discover facts or principles' for the purpose of section 45(3) of the FOI Act.
85. In this respect, I accept the Applicants submission that the matter in issue is not research for the purpose of section 45(3) of the FOI Act.
86. Further, I am not satisfied that there is a reasonable basis for expecting that disclosure of the matter in issue could have an adverse effect on the person by or on whose behalf the research is carried out (one of the Applicant companies) because the matter in issue has already been disseminated by the Third Party to a director of the Applicant companies.²⁶
87. Accordingly, the matter in issue does not qualify for exemption under section 45(3) of the FOI Act.

DECISION

88. I set aside the decision under review and find that the matter in issue is not exempt from disclosure under section 45(1)(a), 45(1)(b), 45(1)(c) or 45(3) of the FOI Act.

²⁵ *O'Dwyer and the Workers' Compensation Board of Queensland* (1995) 3 QAR 97 at paragraph 23.

²⁶ See section 45(4) of the FOI Act which states that '*matter is not exempt under subsection (3) merely because it concerns research that was, is being, or is intended to be, carried out by the agency or other person by, or on whose behalf, an application for access to the document containing the matter is being made.*'

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

Assistant Commissioner Henry

Date: 23 December 2009