OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 96005
Application S 176/94

Participants:

AUSTRALIAN RAINFOREST CONSERVATION SOCIETY INC
Applicant

QUEENSLAND TREASURY
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - matter in issue comprising handwritten notes, and parts of formal minutes, of meetings of the Charter Preparation Committee appointed under the *Government Owned Corporations Act 1993* Qld to develop a charter for the corporatisation of the Forest Service of the Department of Primary Industries - matter in issue comprising deliberative process matter falling within the terms of s.41(1)(a) of the *Freedom of Information Act 1992* Qld - whether disclosure of the matter in issue would, on balance, be contrary to the public interest - consideration of public interest factors weighing for and against disclosure - application of s.41(1) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.26, s.34(2)(f), s.34(2)(g), s.36(1), s.36(1)(f), s.36(1)(g), s.41(1), s.41(1)(a), s.41(1)(b), s.81
Acts Interpretation Act 1954 Qld s.27B
Government Owned Corporations Act 1993 Qld s.16, s.17, s.19, s.23, s.26, s.28, s.29(1), s.34, s.37(2), s.38, s.39, s.42(1)

Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (1994) 1 QAR 60
Trustees of the De La Salle Brothers and Queensland Corrective Services Commission, Re (Information Commissioner Qld, Decision No. 96004, 4 April 1996, unreported)

DECISION

I set aside that part of the decision under review (being the internal review decision made on behalf of the respondent by Mr M Lawrence on 14 October 1994) which relates to the matter described at paragraph 7 of my reasons for decision. In substitution for it, I decide that the matter described at paragraph 7 of my reasons for decision is not exempt matter under s.41(1) of the *Freedom of Information Act 1992* Qld, and that, in accordance with s.21 of the *Freedom of Information Act 1992* Qld, the applicant has a right to be given access to that matter.

Date of Decision: 9 April 1996

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant (also referred to in these reasons for decision as "the Society") seeks review of the respondent's decision to refuse it access under the *Freedom of Information Act 1992* Qld (the FOI Act) to documents relating to preparatory work for the proposed corporatisation of the Department of Primary Industry's Forest Service (the Forest Service). The nature of the corporatisation process provided for in the *Government Owned Corporations Act 1993* Qld is explained at paragraphs 12-15 below. The only matter remaining in issue in this external review (after concessions by both participants) consists of passages from the formal minutes of meetings of the Charter Preparation Committee (CPC), established to assist in the corporatisation of the Forest Service, and handwritten notes taken at those meetings, from which the formal minutes were developed. The respondent contends that the matter remaining in issue is exempt matter under s.41(1) of the FOI Act.

2. By letter dated 21 March 1994, the Society applied to the Department of Primary Industries (the DPI) for all documents relating to corporatisation of the Forest Service. Without limiting the scope of its application, the Society specified some of the categories of documents sought. Minutes of meetings of the CPC was one of the categories specified.
The Society's FOI access application was transferred in part to Queensland Treasury under s.26 of the FOI Act. The initial decision was made on behalf of Queensland Treasury by Ms F Smith on 26 September 1994. Ms Smith identified more than 140 documents as falling within the terms of the Society's FOI access application. Ms Smith decided to give access in full to some 70 documents, to give access in part to 17 documents, and to deny access to the remaining documents. Among the matter released in part were minutes of CPC meetings, and the handwritten notes from which they were drawn. Ms Smith determined that matter to which access was not granted was exempt under one or more of s.36(1), s.38, s.41(1), s.44(1), s.45(1) and s.46(1) of the FOI Act.

3. By letter dated 3 October 1994, the Society applied for internal review of Ms Smith's decision. The internal review decision was made by Mr M Lawrence of Queensland Treasury on 14 October 1994. Mr Lawrence affirmed Ms Smith's decision on slightly varied grounds. By letter dated 28 November 1994, the Society applied for external review by the Information Commissioner, under Part 5 of the FOI Act, of Mr Lawrence's decision.

The external review process

4. I first obtained and examined the several hundred pages of documents which comprised or contained the matter that was in issue at the commencement of this external review. I then requested that Queensland Treasury identify the specific paragraphs of s.36(1) upon which it relied to contend that matter in issue was exempt. After receiving that information, a member of my staff had further discussions with Queensland Treasury in relation to its claims for exemption under s.36(1).

5. As a general observation, I consider it important that agencies state as specifically as possible the exemption provision or provisions under which they determine matter to be exempt. It is often not sufficient merely to identify a section or subsection. For example, section 36(1) consists of seven separate exemption provisions, and decision-makers should clearly identify in their decisions the specific exemption provisions claimed to apply to particular documents, or parts of documents, as well as explaining (according to the requirements imposed by s.27B of the *Acts Interpretation Act 1954* Qld, read in conjunction with s.34(2)(f) and (g) of the FOI Act) the basis on which the exemption provisions are claimed to be applicable. In addition, I note that agencies frequently rely on s.36(1)(f) or s.36(1)(g) (which cover drafts, and copies or extracts, respectively, of matter which is exempt under earlier paragraphs of s.36(1)) without identifying the earlier paragraph of s.36(1) which is claimed to be relevant and explaining the basis on which the test for exemption under the earlier paragraph is claimed to have been satisfied. This is a prerequisite for a draft, or a copy or extract, of such matter to be exempt under s.36(1)(f) or s.36(1)(g), respectively. I consider that s.34(2)(f) of the FOI Act requires explanation of the reasons for refusal of access in at least this level of detail.

6. Returning to the present external review, after the discussions with Queensland Treasury, I wrote to the Society identifying the matter in issue according to subject categories, and asking the Society to indicate the categories to which it wished to pursue access. In the same letter, I expressed the preliminary view that some (but not all) of the matter which Queensland Treasury claimed to be exempt under s.36(1) was exempt matter under either s.36(1)(c), s.36(1)(f) or s.36(1)(g) of the FOI Act. In response to my letter, the Society significantly narrowed the number of documents to which it sought access, a step which has hastened the resolution of this external review. With regard to two of the documents then remaining in issue, I consulted third parties who indicated that they did not object to the release of documents recording information supplied by them. With the agreement of Queensland Treasury, those documents were released to the Society.

7. With respect to the matter then remaining in issue, I wrote to Queensland Treasury conveying my preliminary view in relation to its claimed exemptions under s.36(1)(e), s.40(d) and s.41(1) of the FOI Act, and inviting it to lodge submissions and/or evidence in support of any claim for exemption which it wished to maintain. In response, Queensland Treasury agreed to release further matter, but maintained its contention that the balance (listed below) is exempt matter under s.41(1) of the FOI Act. Queensland Treasury indicated that it did not

wish to submit any further evidence regarding this external review, and stated that it would rely on the reasons previously given. The only matter remaining in issue, therefore, is parts of CPC minutes, and corresponding parts of the handwritten notes from which they were drawn, as described in the following table:

Document No.	**Description**	**Page No.**	**Matter in Issue**
75 and 86	Minutes of CPC meeting on 27/10/93	2	Last paragraph
		5	Fourth paragraph
		7,8	The whole
		9	Second paragraph
		10	The whole
		12	Last paragraph
		13	First 5 paragraphs
96	Minutes of CPC meeting on 2/12/93	1	Fourth paragraph
		3	Last 4 paragraphs (and preceding heading)
		4	First 8 paragraphs
107 and 130	Minutes of CPC meeting on 27/1/94	3	Last 2 paragraphs (and preceding heading)
		4,5,6	The whole
		7	First 3 paragraphs
55	Handwritten notes of meeting on 27/10/93		Parts corresponding to matter in issue in 75 & 86
110	Handwritten notes of meeting on 27/1/94		Parts corresponding to matter in issue in 107 & 130

Section 41(1) of the FOI Act

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

> ***41.(1)*** *Matter is exempt matter if its disclosure—*
>
> *(a) would disclose—*
>
> *(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) a consultation or deliberation that has taken place;*
>
> *in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and*
>
> *(b) would, on balance, be contrary to the public interest.*

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

> *21. Thus, for matter in a document to fall within s.41(1), there must be a positive answer to two questions:*
>
> *(a) would disclosure of the matter disclose any opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, the deliberative processes involved in the functions of government? and*
>
> *(b) would disclosure, on balance, be contrary to the public interest?*
>
> *22. The fact that a document falls within s.41(1)(a) (ie. that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest. ...*

10. An applicant for access is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; an applicant is entitled to access unless an agency can establish that disclosure of the relevant deliberative process matter would be contrary to the public interest. In *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (Information Commissioner Qld, Decision No. 96004, 4 April 1996, unreported), I said at paragraph 34:

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

Application of s.41(1) to Charter Preparation Committee minutes

11. While Queensland Treasury has released the bulk of the minutes of CPC meetings, it maintains that some parts of the minutes of three meetings are exempt matter under s.41(1) of the FOI Act. Before considering this claim, I will briefly refer to relevant provisions of the statutory regime for "corporatisation", and the steps undertaken towards corporatisation of the Forest Service.

Government Owned Corporations

12. In May 1993, the *Government Owned Corporations Act 1993* Qld (the GOC Act) was enacted. The meaning of "corporatisation" and the objectives of the Act are set out at sections 16 and 17 of the GOC Act, which provide:

Meaning of "corporatisation"

16. ***"Corporatisation"*** *is a structural reform process for nominated government entities that—*

(a) changes the conditions and (where required) the structure under which the entities operate so that they operate, as far as practicable, on a commercial basis and in a competitive environment; and

(b) provides for the continued public ownership of the entities as part of the process; and

(c) allows the State, as owner on behalf of the people of Queensland, to provide strategic direction to the entities by setting financial and non-financial performance targets and community service obligations.

Objectives of corporatisation

17. *The objectives of corporatisation are to improve Queensland's overall economic performance, and the ability of the Government to achieve social objectives, by—*

(a) improving the efficiency and effectiveness of GOCs; and

(b) improving the accountability of GOCs.

13. The objectives of corporatisation are to be achieved through application of four key principles which are detailed in s.19 of the GOC Act. These are: clarity of objectives, management autonomy and authority, strict accountability for performance, and competitive neutrality.

14. Chapter 2 of the GOC Act sets out the machinery for creating a GOC. A government entity must first become a "candidate GOC" (s.23). Candidate GOCs are nominated by regulation made by the Governor in Council (s.26). A candidate GOC will normally become a full GOC only following the preparation and implementation of a Corporatisation Charter (s.29(1)). Section 28 provides that a Corporatisation Charter of a candidate GOC:

… sets out the steps by which, and the basis on which—

(a) a candidate GOC is to become a GOC or is to change its type to a company GOC; and

(b) the key principles of corporatisation, and their elements, are to be implemented.

15. The responsible Ministers of a candidate GOC may require the preparation of a draft Corporatisation Charter (s.34). The responsible Ministers may also appoint a Charter Preparation Committee to prepare a draft Corporatisation Charter (s.38). The candidate GOC is required to cooperate with the CPC (s.37(2)). A CPC is responsible for the conduct of its own business but must comply with any direction given by the responsible Ministers (s.39). The CPC must give a copy of the draft Corporatisation Charter to the responsible Ministers (s.42(1)).

16. The Forestry Service was duly nominated as a candidate GOC. The responsible Ministers were the Treasurer and the Minister for Primary Industries. A CPC of seven members was appointed. It consisted of five representatives of government (three from the DPI, one from Queensland Treasury and one from the former Office of Cabinet), an industry representative and an external consultant specialising in environmental economics. The members of the CPC undertook work towards the preparation of a draft Corporatisation Charter over a number of months and the CPC met on a several occasions. Handwritten notes were taken at those meetings and formal minutes produced after each meeting. (It should be noted that at some time after the lodgment of this external review application, the Forest Service was removed from the list of candidate GOCs.)

Deliberative process material

17. I am satisfied that the formal minutes of CPC meetings fall within the terms of s.41(1)(a) of the FOI Act. The minutes record the deliberations of the CPC and the advice and opinions of members working towards the goal of preparing a draft Corporatisation Charter for consideration by the responsible Ministers.

The public interest

18. With respect to the application of s.41(1)(b) of the FOI Act, the only material I have received from Queensland Treasury comprises the comments made by Mr Lawrence in his internal review decision. With respect to s.41(1) of the FOI Act, Mr Lawrence stated:

> *I have considered that releasing the matter would serve the public interest by*
> - *allowing individuals to make informed comment on Government business.*
> - *allowing individuals access to all documentation pertaining to a particular matter.*
>
> *Conversely, I have considered that release of the matter would not be in the public interest because*
> - *If this type of matter were to be released it may affect ultimately the information that can be obtained for the purposes of deliberation.*
> - *The matter concerned, if generally considered to be in the public domain, may not be made as readily available, hence limiting the scope of any such deliberations.*
>
> *I have considered the above and have decided that the matter is exempt under section 41(1) of the Act and that release of that matter, on balance, would not be in the public interest.*

19. In its application for external review, the Society stated:

> *The request relates to the issue of corporatisation of the Department of Primary Industries Forest Service. This is clearly a matter of major public interest. In particular, there are potentially very serious environmental implications with respect to the proposed corporatisation of wood production from native forests. Documents released under the request clearly show that officers involved in steering the corporatisation process are concerned about the response of conservation groups. The released documents do nothing to allay conservation concerns. For example, the minutes of a meeting of the Forestry Charter Preparation Committee (28 September 1993) record Dr David James alluding to "the need to ensure that commercial activity is not inhibited by excessively disruptive environmental regulation". In response, Mr Terry Johnston, Director, DPI Strategic Policy Unit, "explained the distinction between the Department of Environment & Heritage's (DEH's) and DPI's regulatory roles in Queensland which he felt provided adequate safeguard's against such an occurrence".*

20. The first question I must ask is whether there are any public interest considerations which weigh against disclosure. Essentially, what Queensland Treasury contends is that if the information contained in those parts of the minutes which have been withheld from disclosure were made available to the public, the future free flow of information might be disrupted. In this case, it is possible to discern two sources of advice and information to which Queensland Treasury may be referring. The first is input from officers of the public service who are members of the CPC. The second is input from members of the CPC drawn from outside the public service.

21. With its reference to disruption to the future free flow of information, Queensland Treasury seeks to invoke what I have referred to in previous decisions as the 'candour and frankness' argument. I discussed the validity of the 'candour and frankness' argument with respect to the advice and opinion of public servants in *Re Eccleston* at pp.103-107, paragraphs 124-135. At paragraphs 132-134, I said:

> *132. I consider that the approach which should be adopted in Queensland to claims for exemption under s.41 based on the third* Howard *criterion (ie. that the public interest would be injured by the disclosure of particular documents because candour and frankness would be inhibited in future communications of a similar kind) should accord with that stated by Deputy President Todd of the Commonwealth AAT in the second* Fewster *case (see paragraph 129 above): they should be disregarded unless a very particular factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative process communications of a like kind, and that tangible harm to the public interest will result from that inhibition.*
>
> *133. I respectfully agree with the opinion expressed by Mason J in* Sankey v Whitlam *that the possibility of future publicity would act as a deterrent against advice which is specious or expedient or otherwise inappropriate. It could be argued in fact that the possibility of disclosure under the FOI Act is, in that respect, just as likely to favour the public interest.*

> *134. Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest. If the diminution in previous candour and frankness merely means that unnecessarily brusque, colourful or even defamatory remarks are removed from the expression of deliberative process advice, the public interest will not suffer. Advice which is written in temperate and reasoned language and provides justification and substantiation for the points it seeks to make is more likely to benefit the deliberative processes of government. In the absence of clear, specific and credible evidence, I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could be materially altered for the worse, by the threat of disclosure under the FOI Act.*

22. Queensland Treasury has not provided any evidence to justify a claim of this type. It has offered no explanation as to why the matter remaining in issue would be regarded by the public servants involved as any more sensitive (and its disclosure any more likely to inhibit future candour and frankness) than the matter which has already been provided to the Society. The public servants on the CPC would no doubt have recognised that they were performing an important public function with regard to the future of the Forest Service and the DPI, and the future of plantation and native forests in Queensland. I find it difficult to believe that these officers or other public servants in similar positions would have refrained, or would in future refrain, from frankly discussing issues of such public significance, merely because minutes of their discussions might at some stage be made public. I am not satisfied that disclosure of the CPC minutes would reduce the candour and frankness of public servants to such an extent that the efficiency and quality of the deliberative processes undertaken by similar committees would materially suffer, with consequent harm to the public interest in the effective working of government.

23. As to the question of reduced input from representatives of the community, and/or particular interest groups, who serve on similar committees, I accept that there is a public interest in maintaining consultation with, and input from, committee members drawn from outside the public service. However, I am not satisfied that input from committee members of that kind would be diminished in future by the release of the matter in issue. The two members of the CPC not drawn from the public service were serving on a publicly established committee dealing with a matter of significant public interest to Queensland. One was a paid consultant, whom the people of Queensland have every right to expect would fully and frankly participate in the proceedings of the CPC, regardless of whether or not those proceedings are made public.
I am not satisfied that a significant number of suitably qualified persons would be dissuaded from performing roles of such public significance, or would refrain from making a full contribution to such a committee, if the matter remaining in issue (of which only a small part comprises inputs, of no particular sensitivity, from the non-government members of the CPC) were to be disclosed.

24. On the case presented by Queensland Treasury (which carries the onus, under s.81 of the FOI Act, of establishing that its decision was justified, or that I should give a decision adverse to the applicant), I am not satisfied that there is any public interest consideration weighing against disclosure of the matter in issue. However, even if some public interest consideration weighing

against disclosure, of the kinds canvassed above or some other kind, could be demonstrated, I consider that there are substantial public interest considerations favouring disclosure of the matter in issue.

25. First, there is the public interest in enhancing the accountability of government. Sections 16 and 17 of the GOC Act (see paragraph 12 above) reinforce the government's role as owner of government enterprises on behalf of the people of Queensland, and the idea of accountability as an objective of the corporatisation process. In his second reading speech to the GOC Bill, the then Treasurer indicated that the facilitative mechanisms for creation of GOCs were "*essential for the success of the overall corporatisation agenda*", and stressed that the government's approach to corporatisation would continue to be a consultative one throughout the corporatisation process (*Hansard*, 12 May 1993, p.2711).

26. The CPC was a committee established under the GOC Act to advise on a draft Corporatisation Charter for the Forest Service. All but one of its members were public servants, or otherwise publicly remunerated. The Corporatisation Charter was central to the corporatisation process. It was the role of the CPC to consider not only the procedural elements of transition of the Forest Service to a GOC, but also to consider substantive issues dealing with the scope of operations of the GOC, for example, to what extent it would have involvement in the area of native forests. Its role was to consider every facet of corporatisation, including the relationship between, and the respective roles of, the new GOC and the DPI. It was a committee established and funded by the public, which was intended to make recommendations relating to matters of significant public interest.

27. Disclosure of the matter in issue would give insight into the CPC's operations, including the options it discussed. It would also give insight into the operations of the various government Departments who provided representatives to the CPC. I do not consider that the fact that the Forest Service has (whether temporarily or permanently) been removed from the list of candidate GOCs, reduces the significance of the public interest in enhancing the accountability of government in this instance. (Queensland Treasury has not indicated to me the reason for that development, or whether it is intended to renominate the Forest Service at a later date.) The CPC was a publicly established committee and there is a public interest in members of the community having access to its minutes in order that they may be informed about, and consider the efficacy of, its operations.

28. In addition, the matter in issue would also provide valuable insights into issues relating to the conservation, use and management of forests in Queensland. It would give the public access to the views of public servants, and a publicly remunerated consultant, with considerable experience in these areas. I am sure that access to this information would be of assistance in future debate, not only relating to possible corporatisation, but also relating to forestry policy in Queensland in general. In this sense, disclosure would further the public interest in promoting informed community debate relating to the government's forest policy in the future.

29. I consider that there are very strong public interest considerations weighing in favour of disclosure of the matter in issue. In terms of s.41(1)(b) of the FOI Act, I am not satisfied that disclosure of the matter remaining in issue from the CPC minutes would, on balance, be contrary to the public interest, and I find that it is not exempt matter under s.41(1) of the FOI Act.

Application of s.41(1) to handwritten notes

30. Queensland Treasury contends that those parts of documents 55 and 110 from which the matter in issue in the formal minutes was drawn, are also exempt matter under s.41(1) of the FOI Act. The handwritten notes are by no means a transcript of proceedings at the CPC meetings. They are rough notes made during the course of meetings in order to serve, no doubt, as an *aide-memoire* for the preparation of the formal minutes. The notes are in point form and contain many abbreviations. They are frequently difficult to understand. In one sense they contain more detail than the formal minutes, but this detail is often difficult to unravel, given the abbreviated nature of the information in the notes. Nevertheless, it is my estimation that careful perusal of the notes could provide some information about what took place at the meetings additional to the information contained in the formal minutes.

31. I accept that there may be cases where it could be argued that disclosure of rough notes of a meeting would be contrary to the public interest. Notes taken in haste by a person at a meeting may well be very abbreviated. They may list keywords and may omit significant passages or ideas. An officer preparing formal notes may rely heavily on his or her recollection of the meeting to supplement the rough notes. In such circumstances, there may be cases where rough notes would positively mislead readers as to what took place at a meeting. In a case of that type an agency might be in position to claim that disclosure of a particular passage would be contrary to the public interest. However, for such a claim to be successful, there would have to be clear evidence that disclosure would positively mislead readers, and further that this situation could not be easily corrected by disclosure of other information, or perhaps by the tendering of an explanation with the notes.

32. In this case, Queensland Treasury has not suggested that such a situation has arisen, and from my examination of the handwritten notes I cannot readily identify such a possibility. The notes add, to some extent, to the record of discussions which took place within the CPC. For similar reasons to those discussed above in relation to the formal minutes, I am not satisfied that disclosure of the matter in issue in the handwritten notes would be contrary to the public interest, and I find that it is not exempt matter under s.41(1) of the FOI Act.

Conclusion

33. For the reasons stated above, I set aside that part of the decision under review in which Mr Lawrence decided that the matter listed at paragraph 7 above is exempt matter under s.41(1) of the FOI Act. I find that the matter listed at paragraph 7 is not exempt matter under s.41(1), and that the Society has a right to be given access to it under the FOI Act.

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F N ALBIETZ
INFORMATION COMMISSIONER