

**Sport Drinks Australia Pty Ltd and Department of Tourism, Small Business
and Industry**

(S 178/96, 11 April 1997, Information Commissioner)

*(This decision has been edited to remove merely procedural information and
may have been edited to remove personal or otherwise sensitive information.)*

1.- 4. These paragraphs deleted.

Background

6. This is a 'reverse FOI' application by Sport Drinks Australia Pty Ltd (the applicant) which seeks review of the decision made on behalf of the Department of Tourism, Small Business and Industry (the Department) by Mr Peter Phair on 17 October 1996. Mr Phair decided to give the applicant for access, Mr Roy Yensch, access in full to a document described as a "conference memo" dated 7 November 1990 (the document in issue), which records details of a conference between Mr Payne, a director of the applicant, and a Mr Bob Smith of the Liquor Licensing Division of the Department.
7. The FOI access application which gave rise to this external review was lodged by Mr Yensch, who was formerly involved with the applicant in relation to co-operative business projects involving transfer of a hotel licence from Cheepie to Labrador at the Gold Coast. The document in issue concerns discussions between Mr Smith and Mr Payne in relation to transfer of the hotel licence. It is clear that Mr Yensch and the applicant have had a falling out.
8. After receiving Mr Yensch's FOI access application, Mr Mark Jones (Administrative Law Officer of the Department), by letter dated 16 August 1996, consulted Mr Payne, in accordance with s.51 of the FOI Act, about disclosure of the document in issue. In a facsimile transmission dated 23 August 1996, the applicant informed Mr Jones that the document in issue was regarded as "confidential and commercially sensitive".
9. In a letter dated 6 September 1996, Mr Jones informed the applicant of his initial decision that the document in issue was not exempt under the FOI Act, and that Mr Jones was prepared to give Mr Yensch access in full to the document in issue. Mr Jones considered the application of s.45(1)(c) of the FOI Act, and s.46(1)(a) and (b) of the FOI Act. In relation to s.45(1)(c) of the FOI Act, Mr Jones considered that the issues surrounding the application for removal of the Cheepie licence were common knowledge within the liquor industry, and as the information in the document in issue was out of date and innocuous in nature, he considered it unlikely to have any continuing commercial sensitivity. Mr Jones found that for the purposes of s.45(1)(c)(i), disclosure of the document in issue could not reasonably be expected to have an adverse effect on the applicant's business, commercial or financial affairs. Similarly, for the purposes of s.45(1)(c)(ii), Mr Jones could see no reasonable basis for expecting that any other person, if placed in a similar position to the applicant, would decline to provide the Department with information of the kind set out in the document in issue, if that matter were to be disclosed under the FOI Act.
10. In relation to the application of s.46(1)(a) and s.46(1)(b), Mr Jones took the view that the document in issue lacked the necessary quality of confidence for the document in issue to be exempt under either of those provisions.

11. By letter dated 3 October 1996, the applicant sought internal review of Mr Jones' decision. On behalf of the applicant, Mr Payne objected to the decision to disclose the document in issue to the applicant, and also asserted that the document in issue was incorrect in a particular detail. In his internal review decision, Mr Phair affirmed Mr Jones' decision, on the same grounds stated by Mr Jones. By letter dated 14 November 1996, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Phair's decision. Mr Payne has represented the applicant in the course of my review.

External review process

12. The Assistant Information Commissioner, Mr G Sammon, arranged for representatives of the Department to provide a briefing on the factual background to the issue of the transfer of the relevant hotel licence. My office also obtained the files of the Liquor Licensing Division of the Department in relation to the transfer of the licence. The Deputy Information Commissioner informed Mr Yensch and the applicant that it was proposed to inform each of them of the other's identity (as FOI access applicant, and 'reverse FOI' applicant for review, respectively) unless an objection was received to this proposal. No objection was received, and Mr Yensch and the applicant were informed accordingly. Mr Yensch applied to become a participant in this external review, in accordance with s.78 of the FOI Act and I granted that application.
13. The document in issue referred to a third party, a Mr Bate. He was also invited to participate in this external review, but he declined the invitation. Mr Bate wrote to my office on 20 December 1996 objecting to disclosure of the document in issue, not on the basis of any exemption under the FOI Act, but on the principle that he objected to a person obtaining access to a document held by a government department merely by paying a \$30 application fee. Given the clear legislative intent of the FOI Act, and the legal right conferred by s.21 of the FOI Act, Mr Bate's objection obviously has no substance in law.
14. In a letter dated 10 December 1996, I conveyed to the applicant my preliminary views on the status of the document in issue in this external review. In the event that the applicant did not accept those preliminary views, I extended to the applicant the opportunity to lodge evidence and submissions in support of any case that it wished to make that the document in issue was exempt under the FOI Act.
15. The applicant responded by letter dated 15 January 1997, suggesting that this external review may be resolved by a compromise involving release to the applicant of a document which concerns Mr Yensch, which was partially released to the applicant as a result of its own FOI access application to the Department (the document has been referred to by the applicant as "Memo B"), in return for which the applicant would consent to release of the document in issue to Mr Yensch. This proposal was put to Mr Yensch, and to the Department, but was rejected by both of them.
16. After the applicant was informed of the response to its compromise proposal, it was again given the opportunity to lodge evidence and submissions in support of its claim for exemption in respect of the document in issue. The applicant replied on 21 March 1997 complaining in general that it was unfair that the Department was prepared to give Mr Yensch access to the document in issue in this external review, but was prepared to claim that at least part of Mr Yensch's document (Memo B) was exempt from disclosure to the applicant under the FOI Act. (It appears that the applicant did not seek internal review of the Department's decision to give it access to part only of Memo B. Certainly,

I do not have jurisdiction in this review to determine whether the Department was correct in finding that part of Memo B comprises exempt matter under the FOI Act.)

17. Ultimately, the applicant did not lodge any evidence and/or written submissions to support its claim that the document in issue comprises exempt matter under the FOI Act. Given the applicant's response (when consulted by the Department under s.51 of the FOI Act) that the document in issue was "confidential and commercially sensitive", I will consider the application of s.45(1) and s.46(1) of the FOI Act, to the document in issue. In the course of its letter dated 15 January 1997, putting its compromise proposal, Mr Payne, on behalf of the applicant, said:

In the normal course of events, we would raise no objection to the disclosure of the Memo in question. However, the Record of Interview contains incorrect and/or confused points and therefore is inaccurate in parts.

18. In a facsimile transmission to my office dated 21 March 1997, Mr Payne said:

... the tone reflected in your recent letters, suggests to us that you have ascertained our conference with Mr Smith was above board, open and just a normal business discussion - we agree.

19. These extracts appear to me to be tantamount to an admission on behalf of the applicant that there is really nothing so sensitive in the document in issue as to warrant exemption from disclosure under the FOI Act.

20. As a result of inquiries made during the course of the external review, through the conference referred to in paragraph 12 above, and examination of the Department's files in relation to transfer of the Cheepie hotel licence, I am satisfied that the following information, which is relevant to the document in issue, must be considered to be public knowledge:

1. An application was made to the Licensing Commission (the predecessor to the Liquor Licensing Division of the Department) to remove the licence of the Royal Mail Hotel, Cheepie, to a site situated at the corner of Olsen Avenue and Central Street, Labrador, (see the order dated 27 November 1989 made by the Licensing Court);
2. This removal did not proceed, and the licence was purchased by Lewiac Pty Ltd which then successfully applied to the Licensing Court to substitute a new site at Oxley Drive, Coombabah, for the site at Olsen Avenue and Central Street, Labrador (see the order of the Licensing Court, Judge Quirk D.C.J. dated 7 June 1991).

Application of s.45 of the FOI Act

21. Section 45(1) of the FOI Act provides as follows:

45.(1) Matter is exempt matter if -

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

22. I considered in detail, the correct interpretation of s.45(1) of the FOI Act in my decision in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491. At paragraph 43 (p.504) of *Re Cannon*, I indicated my agreement with a decision of the Victorian Supreme Court in *Ansell Rubber Company Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37 that in order for matter to qualify as a trade secret, it must be secret and that matters of public knowledge or of general knowledge in an industry cannot be claimed to be secret. In relation to s.45(1)(b) of the FOI Act, in paragraphs 57-60 (pp.514-515) of *Re Cannon*, I indicated that matter will not have any commercial value if it is already in the public domain. Finally, at paragraph 83 (p.521) of my reasons for decision in *Re Cannon*, I indicated that, under s.45(1)(c) of the FOI Act, if information is already in the public domain, or is common knowledge in the relevant industry, it would ordinarily be difficult to show that disclosure of that information could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the person whom the information concerns.

23. I find, therefore, that the matter in the document in issue which comprises information already in the public domain (namely, the proposal to transfer the Cheepie licence to the site at Olsen Avenue and Central Street, Labrador) does not qualify for exemption under s.45(1)(a), s.45(1)(b) or s.45(1)(c) of the FOI Act.

24. The applicant has not demonstrated that there is anything in the document in issue which would disclose trade secrets of the applicant, have a commercial value to the applicant, or the disclosure of which could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the applicant, or to prejudice the future supply of such information to government. My own examination of the document in issue does not suggest to me that there is any matter in the document in issue which qualifies for exemption under s.45(1) of the FOI Act. Finally, in *Re Cannon* I indicated that matter may lose its exempt status over time. The relevant references are as follows:

- Section 45(1)(a) - *Re Cannon*, paragraph 48 (pp.508-609)
- Section 45(1)(b) - *Re Cannon*, paragraph 56 (pp.513-514)
- Section 45(1)(c) - *Re Cannon*, paragraphs 83 and 84 (p.521).

25. I consider that the matter in issue no longer concerns the applicant's business plans, because the applicant no longer has an interest in the Cheepie licence, it having been sold to Lewiac Pty Ltd. It appears to me that the entire document is of historical interest only. I therefore find that there is no matter in the document in issue which qualifies for exemption under s.45(1)(a), s.45(1)(b) or s.45(1)(c) of the FOI Act.

Application of s.46(1) of the FOI Act

26. Section 46(1) of the FOI Act provides as follows:

46.(1) Matter is exempt if -

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

27. I considered the correct interpretation and application of s.46(1)(a) and s.46(1)(b) in my decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279. In that decision, I noted that an element in common to both s.46(1)(a) and s.46(1)(b) is that, in order for matter to qualify for exemption under those provisions, the matter must be confidential in nature. For the reasons set out above, I consider that the information described in paragraph 20 above which is now in the public domain cannot be considered to be confidential in nature.

28. In addition, the applicant has not demonstrated that any of the matter in the document in issue is confidential in nature, and on my examination of the document in issue, I find that there is nothing in the document in issue which I consider to be confidential in nature. In *Re "B"*, at paragraph 71 (p.307), I noted that information may lose its quality of confidence with the passage of time, and so fail to qualify for exemption under s.46(1)(a). The same proposition also applies to s.46(1)(b) of the FOI Act - see paragraph 148 of *Re "B"* (pp.337-338). I am satisfied that there is no information in the document in issue which retains the quality of confidence (if, indeed, it ever was confidential) necessary to found an action for breach of confidence. I consider the information to be of historical interest only, and I note that the applicant no longer has an interest in the Cheepie licence.

29. I conclude that the document in issue does not qualify for exemption under s.46(1)(a) or s.46(1)(b) of the FOI Act.

Decision

30. For the foregoing reasons, I affirm the decision under review.