OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 04/2004
Application S 105/02

Participants:

JEFF SEENEY MP
Applicant

DEPARTMENT OF STATE DEVELOPMENT
Respondent

BERRI LIMITED
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – matter concerning a grant of financial assistance to the third party under an investment incentive scheme – whether disclosure would disclose information that has a commercial value to the respondent or the third party – whether disclosure could reasonably be expected to destroy or diminish the commercial value of the information – application of s.45(1)(b) of the *Freedom of Information Act 1992* Qld.

FREEEDOM OF INFORMATION – refusal of access – whether disclosure would disclose information concerning the business, commercial or financial affairs of the respondent or the third party – whether disclosure could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government – whether disclosure would, on balance, be in the public interest – application of s.45(1)(c) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION – refusal of access – whether disclosure would found an action for breach of confidence - application of s.46(1)(a) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION – refusal of access – whether disclosure could reasonably be expected to have a substantial adverse effect on the ability of government to manage the economy of the State – whether disclosure would, on balance, be in the public interest – application of s.47(1)(a) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION – refusal of access – whether disclosure could reasonably be expected to have a substantial adverse effect on the financial interests of the State or the respondent – whether disclosure would, on balance, be in the public interest – application of s.49 of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.45(1)(b), s.45(1)(c), s.46(1)(a), s.47(1)(a), s.49, s.52(6), s.78, s.87(1), s.87(2), s.89(5)
Freedom of Information Act 1982 Cth s.43(1)(a), s.43(1)(b)
Freedom of Information Act 1984 Vic s.34(4)(a)(ii)

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Bracks and Department of State Development, Re [1998] VCAT 579
Brown and Minister for Administrative Services, Re (1990) 21 ALD 526
Cairns Port Authority and Department of Lands, Re (1994) 1 QAR 663
Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491
Cardwell Properties Pty Ltd & Williams and Department of the Premier, Economic and Trade Development, Re (1995) 2 QAR 671
Commonwealth of Australia v Cockatoo Dockyard Pty Ltd (1995) 36 NSWLR 662
Commonwealth v Esber (1990) 101 ALR 35
Costello and Secretary, Department of Transport, Re (1979) 2 ALD 934
Director-General, Department of Families, Youth and Community Care and Department of Education, Re (1997) 3 QAR 459
Esso Australia Resources Ltd & Ors v Plowman & Ors (1995) 183 CLR 10
Fewster and Department of Prime Minister and Cabinet (No. 2), Re (1987) 13 ALD 139
Hughes Aircraft Systems International v Airservices Australia (1997) 146 ALR 1
Johnson and Queensland Transport; Department of Public Works (Third Party), Re (2004) 6 QAR 307
Secretary, Department of Employment, Workplace Relations and Small Business v The Staff Development & Training Centre Pty Ltd [2001] FCA 382 (4 April 2001); (2002) 66 ALD 514
Secretary, Department of Workplace Relations & Small Business v The Staff Development & Training Centre Pty Ltd [2001] FCA 1375 (28 September 2001)
Woodyatt and Minister for Corrective Services, Re (1995) 2 QAR 383

DECISION

I set aside the decision under review (which is identified in paragraphs 12-13 of my accompanying reasons for decision). In substitution for it, I decide that the category 3 matter (which is identified in paragraph 28 of my reasons for decision) is exempt matter under s.46(1)(a) of the *Freedom of Information Act 1992* Qld, but that the rest of the matter in issue (which is identified in paragraphs 23-27 and 29 of my reasons for decision, and in the schedule attached to my reasons for decision) is not exempt from disclosure under the *Freedom of Information Act 1992* Qld.

Date of decision: 29 June 2004

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D J BEVAN
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to information concerning a grant of financial assistance made to the third party, under an investment incentive scheme administered by the respondent.

(a) The Queensland Investment and Incentive Scheme

2. The Queensland Investment and Incentive Scheme (QIIS) is administered by the Department of State Development (the Department). It is a discretionary scheme, under which companies may apply to the Department for financial assistance in relation to particular projects or planned investment in Queensland. Funding is available for:

   (a) the establishment of QIIS-eligible projects, i.e., those which satisfy specific eligibility criteria that were initially approved by Cabinet in 1997 and subsequently amended in August 1999; and

   (b) Major/Strategic Project incentive packages, i.e., those which do not meet all the QIIS eligibility criteria, but which are considered to be of strategic importance to the State and to have considerable flow-on economic benefits.

3. The published objectives of the QIIS are as follows:

> *1. To positively influence the location of major projects and strategic investments in favour of Queensland.*
> *2. To assist projects where there is a demonstrated net economic benefit to the State.*
> *3. To create long term sustainable jobs in emerging growth sectors of the economy.*
> *4. To attract catalyst projects to Queensland to drive further industry development.*
> *5. To promote technology innovation, transfer and commercialisation.*

4. For a project to be considered QIIS-eligible, it must meet all of the following criteria:

- promote the competitive base of the State economy;
- provide a significant net economic benefit to the State;
- demonstrate commercial viability in the absence of financial incentives;
- demonstrate a need for the State to intervene and provide support to overcome a short-term impediment to the project's development in Queensland; and
- demonstrate no significant detriment to, and/or substitution for, existing businesses in Queensland.

5. As to the second kind of incentive package, in a submission to the Cabinet Budget Review Committee (CBRC) in December 2001 (in support of a request for additional funding in the QIIS budget to provide incentive assistance for attracting Major/Strategic projects), the Department set out the criteria which it used to assess whether or not a project was eligible for incentive assistance:

> *The project must:*
> - *demonstrate that it is of a highly strategic nature in sectoral, regional or infrastructure terms to the State and is ineligible under QIIS;*
> - *demonstrate financial and commercial viability in the absence of financial incentives;*
> - *demonstrate significant economic and strategic outcomes for the State in the form of product, market and technology innovations that will generate additional business activity, export income, value adding and justify State intervention;*
> - *result in significant industry development and/or regional outcomes for the State.*

(b) The grant of financial assistance to the third party

6. The third party sought financial assistance under the QIIS in connection with the expansion of its fruit juice operations and the associated costs. On 3 December 1999, the third party's General Manager submitted an application to the Department seeking financial assistance in relation to the costs involved in relocating the third party's fruit juice operations from Bulimba to the Lytton Industrial Estate. The Department decided that the third party's application was not QIIS-eligible due to a number of factors, but offered to provide financial assistance in the form of Major/Strategic Project funding, since the Lytton Industrial Estate (referred to by the Department as the "Australia TradeCoast business precinct") was designated by the Government as a site for strategic clusters of export industries.

7. In December 1999, the third party advised the Department that it had elected to defer the planned relocation for 12 months. The Director-General of the Department then informed the third party that the Department's offer of financial assistance had been withdrawn. On 7 March 2000, the third party advised the Department that the third party's Board had resolved to proceed with the relocation to the Lytton Industrial Estate, and it sought reinstatement of the Department's offer of financial assistance. On 20 March 2000, the Director-General notified the third party that the Department's previous offer had been reinstated, and the third party accepted that offer on 23 May 2000. A Financial Assistance Agreement between the State of Queensland and the third party was executed on 19 February 2001.

8. The provision of funds to the third party was subject to the third party committing to the Lytton Estate and to satisfying the performance criteria in the Project Development Program specified in Part 3 of Schedule A to the Financial Assistance Agreement. The key performance criteria included a minimum initial capital expenditure of $15 million by the third party in connection with the project, and the employment, within 12 months of the commissioning of the new facility, of 30 full time equivalent staff, with existing staff numbers at the third party's Bulimba facility to be retained. The third party was also required to provide an unconditional and irrevocable bank guarantee for the amount of the grant, to secure repayment of the grant in the event that the project did not proceed and/or the agreed criteria/performance milestones were not satisfied by the third party: see the discussion at p.31 of the Auditor-General of Queensland's report No.3, 2002-03, *A Review of Grants and Other Incentives at the Department of State Development*.

9. That report by the Auditor-General was published in November 2002, following an investigation into the circumstances surrounding the grant made to the third party. (It appears that fruit juice operators in the applicant's electorate of Callide had raised concerns with the applicant regarding the grant and whether QIIS guidelines had been followed in awarding it. Those concerns, and others regarding an alleged link between the third party and the Premier's brother, were referred to the Auditor-General, and the Crime and Misconduct Commission (CMC), for investigation.) It was found that there was no evidence of corruption or inappropriate relationships between the third party and the State Government, but recommendations were made for improvement of the administration of the QIIS by the Department. I will refer to those recommendations further below, in the context of a discussion of the application of public interest balancing tests contained in the relevant exemption provisions.

(c) The FOI access application, and the decision by the Department

10. By letter dated 8 March 2002, the applicant (who is the Member for Callide, and currently the Shadow Treasurer) applied to the Department for access, under the FOI Act, to all documentation concerning the following:

- *The application and the assessment of the application made by* [the third party] *under the* [QIIS] *in respect of* [the third party's] *application which was received by Queensland Government on 3 December 1999;*
- *All Briefing Notes, memoranda and any other correspondence in relation to* [the third party's] *application.*

11. By letter dated 7 June 2002, Ms Potter of the Department advised the applicant that 346 folios had been located in response to his application, and that she had decided to give the applicant access in full to 283 folios, access in part to 31 folios, and to refuse access to 32 folios.

12. By letter dated 19 June 2002, the applicant applied for internal review of Ms Potter's decision. The Department failed to give an internal review decision within the 14 day time limit specified in s.52(6) of the FOI Act, and was therefore deemed to have affirmed Ms Potter's decision.

13. By letter dated 4 July 2002, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of the Department's deemed affirmation of Ms Potter's decision.

External Review Process

14. Copies of the documents in issue were obtained and examined.

15. The third party was consulted regarding disclosure of those documents in issue which concerned it. It objected to the disclosure of some documents under s.45(1)(b) and s.45(1)(c) of the FOI Act, but did not object to the disclosure of others. The third party was granted participant status in this review, in accordance with s.78 of the FOI Act.

16. The Office of the Auditor-General of Queensland was also consulted. As noted in paragraphs 8-9 above, the Auditor-General had been conducting an investigation into the circumstances surrounding the grant of financial assistance to the third party and was (at that time) still to present his report to Parliament. However, after meetings with staff of my office, the Auditor-General's Office advised that, since none of the documents in issue was generated by the Auditor-General's Office in relation to its investigation, it did not wish to participate in my review, and had no objection to the disclosure to the applicant of any of the documents in issue in this review.

17. Throughout the course of the review, the participants made a number of concessions, which resulted in a reduction in the number of documents in issue. However, when the stage was reached that none of the participants was prepared to make any further negotiated concessions, there remained a number of documents or parts of documents still in issue. The participants were invited to lodge written submissions and evidence in support of their respective cases for disclosure or exemption of the matter remaining in issue, and were given an opportunity to reply to each other's written submissions and evidence.

18. After assessing that material, I directed inquiries by my staff into certain factual matters which I believed could affect the exempt status of some of the information in issue (namely, the amount of the grant awarded to the third party). By letter dated 10 October 2003, the Deputy Information Commissioner informed Crown Law (which was acting on behalf of the Department) of the results of those inquiries, and conveyed his preliminary view that that information did not qualify for exemption under the various exemption provisions relied upon by the Department. The Department did not accept the Deputy Information Commissioner's preliminary view and provided submissions and evidence in support of its continued claim for exemption of that information, by way of a letter from Crown Law dated 28 November 2003, and a statutory declaration dated 9 December 2003 by Mr John Strano (Executive Director of the Department's Investment Division).

19. It was not possible to provide this material to the applicant for response without disclosing some of the information in issue in this review (or at least a means of obtaining it).

20. Having regard to s.87(1) and s.87(2) of the FOI Act, it is necessary for me, in dealing with this issue in these reasons for decision, to record my findings in a separate addendum to be made available only to the Department and the third party, and their respective legal representatives, so as to preserve the efficacy of the Department's entitlement to seek judicial review of my decision. The addendum can be disclosed to the applicant, and otherwise published in accordance with s.89(5) of the FOI Act, in the event that the Department does not initiate judicial review proceedings in respect of this aspect of my decision, or in the event that judicial review proceedings do not result in this aspect of my decision being overturned.

21. In making my decision in this matter, I have taken into account:

- the contents of the matter in issue;
- the applicant's FOI access application dated 8 March 2002, application for internal review dated 19 June 2002, and application for external review dated 4 July 2002;
- the Department's initial decision dated 7 June 2002;
- written submissions lodged by Crown Law on behalf of the Department dated 30 September 2002, 19 November 2002, 20 December 2002, 12 March 2003 and 28 November 2003;
- statutory declarations dated 30 September 2002 and 9 December 2003 by Mr Strano of the Department;
- facsimile letters dated 29 October 2002 and 3 March 2003 from the solicitors for the third party;
- letters from the applicant dated 5 November 2002 and 17 February 2003;
- letter dated 10 October 2003 from the Deputy Information Commissioner to Crown Law;
- various public records, as referred to in these reasons for decision, including media releases, newspaper articles and entries in *Hansard*;
- reports by the Auditor-General of Queensland – No.2 2000-01 and No.3 2002-03;
- report by the Public Accounts Committee (No.61, November 2002) and various submissions made to that Committee;
- report by the Auditor-General of Victoria – *"Investment attraction and facilitation in Victoria"*, November 2002; and
- speech given on 6 November 2002 by the Chairman of the Productivity Commission to the Committee for Economic Development of Australia – *"Inter-State bidding wars: calling a truce"*.

Matter in issue

22. The matter remaining in issue is identified in the schedule attached to these reasons for decision. It can be categorised as follows.

Category 1 matter

23. The category 1 matter comprises references to the dollar amount of the financial assistance granted to the third party (folios 6a, 11, 47 and 50 in full, and parts of folios 4-6, 10, 11a, 12, 36, 45, 48, 49, 53-56, 58-60, 75, 94, 108, 109, 118, 147, 154, 159 and 164).

24. The total cash grant given to the third party by the Department was divided into two parts: funds for establishment costs (e.g., plant or equipment fit out costs, relocation of plant and equipment, and relocation of staff), and funds for building a sewer link to the site of the third party's new premises at Lytton. The dollar amounts in issue take various forms – references to

the amount of the total cash grant; references to the amount of the cash grant plus GST; references to the amount paid towards establishments costs; references to the amount paid towards the sewer link, *et cetera*.

25. I should note that, in respect of folios 6a, 10, 11, 47, 48 and 50, there is other matter in issue in those folios additional to references to the amount of the grant. The Department was asked on two occasions during the course of the review to give consideration to withdrawing its claim for exemption over what I shall refer to as the "peripheral" matter in issue in those folios, on the basis that such matter was not sensitive and, at least in respect of some of it, that it had already been disclosed to the applicant in a similar format in other documents. For example, folios 6a and 47 are duplicates, and comprise a bank guarantee which the third party provided to the Department to secure repayment of the grant in certain circumstances. The third party does not object to the disclosure to the applicant of the guarantee, but the Department claims that the guarantee is wholly exempt from disclosure under the FOI Act. Apart from the reference in the guarantee to the amount of the grant, I do not consider that any other information in the document could be regarded as sensitive. At least part of the guarantee comprises pro-forma statements found in most, if not all, bank guarantees. Folio 11 is a pro-forma tax invoice which contains no sensitive information apart from references to the amount of the grant, yet the Department claims that it is wholly exempt from disclosure. The Department has provided no submissions in support of its claim for exemption over the specific "peripheral" matter in issue in any of folios 6a, 10, 11, 47, 48 and 50.

Category 2 matter

26. The category 2 matter comprises claims for reimbursement (out of grant monies) that were submitted to the Department by the third party. They contain details of invoices from subcontractors evidencing the way in which the grant was spent by the third party (parts of folios 13 and 62).

27. The applicant withdrew his application for access to the identities of the subcontractors referred to in these folios, and accordingly, that matter is no longer in issue in this review.

Category 3 matter

28. The category 3 matter comprises internal documents of the third party and other references to the third party's business affairs (folio 34 – which is duplicated in folios 43 and 96 - in full, and parts of folios 51 and 119).

Category 4 matter

29. The category 4 matter comprises a memorandum dated 10 December 1999 from Mr Strano to the Department's Director-General (folios 160-161, duplicated in folios 162-163).

30. I will use the categories described above when discussing the application to the matter in issue of the various exemption provisions relied upon by the participants.

31. The Department objects to disclosure of all of the matter in issue and claims that it is exempt from disclosure under s.45(1)(b), s.45(1)(c), s.46(1)(a) and/or s.49 of the FOI Act. The third party objects only to the disclosure of the matter in issue in folio 34 (and its duplicates), and folios 51 and 160-163, claiming that the relevant matter qualifies for exemption under s.45(1)(b) or s.45(1)(c) of the FOI Act.

Section 45(1) of the FOI Act – general observations

32. Section 45(1)(b) and s.45(1)(c) of the FOI Act provide:

> ***45.(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*
>
> *(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.*

33. Commissioner Albietz considered the application of s.45(1) of the FOI Act in some detail in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491. He observed that s.45(1) is the primary vehicle for reconciling the main objects of the FOI Act (i.e., promoting open and accountable government administration, and fostering informed public participation in the processes of government) with legitimate concerns for the protection from disclosure of commercially sensitive information. Its basic object is to provide a means whereby the general right of access to documents in the possession or control of government agencies can be prevented from causing unwarranted commercial disadvantage to:

> (i) persons carrying on commercial activity who supply information to government or about whom government collects information; or
> (ii) agencies which carry on commercial activities.

34. In *Re Cannon* (at p.516, paragraph 66), Commissioner Albietz discussed the relationship between s.45(1)(a), s.45(1)(b) and s.45(1)(c):

> *Just as the words of s.45(1)(b) exclude trade secrets from its sphere of operation, the s.45(1)(c) exemption is so worded (see paragraph 25 above) that it applies only to information other than trade secrets or information mentioned in s.45(1)(b). This means that particular information cannot ordinarily be exempt under more than one of the s.45(1)(a), s.45(1)(b) or s.45(1)(c) exemptions. (However, an agency or other participant may wish to argue on a review under Part 5 of the FOI Act that information is exempt under one of those provisions, and put arguments in the alternative as to which is applicable). Whereas both s.45(1)(a) and (b) require that the information in*

issue must have an intrinsic commercial value to be eligible for exemption, information need not be valuable in itself to qualify for exemption under s.45(1)(c). Thus, where information about a business has no commercial value in itself, but would, if disclosed, damage that business, s.45(1)(c) is the only one of the exemptions in s.45(1) that might be applicable. For information to be exempt under s.45(1)(c) it must satisfy the cumulative requirements of s.45(1)(c)(i) and s.45(1)(c)(ii), and it must then survive the application of the public interest balancing test incorporated within s.45(1)(c).

35. The requirements for exemption under both s.45(1)(b) and s.45(1)(c) turn in large measure on the test imported by the phrase *"could reasonably be expected to"*. This phrase requires a reasonably based expectation, namely, an expectation for which real and substantial grounds exist. A mere possibility, speculation or conjecture is not enough. In this context, *"expect"* means to regard as likely to happen. (See *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, at pp.339-341, paragraphs 154-160, and the Federal Court decisions referred to there).

Application of s.45(1)(b) of the FOI Act

(a) Requirements for exemption under s.45(1)(b)

36. Commissioner Albietz explained the correct approach to the interpretation and application of s.45(1)(b) of the FOI Act at pp.511-516 (paragraphs 50-65) of *Re Cannon*, including (at paragraphs 51-60) the meaning of "commercial value" in s.45(1)(b). He said 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 s.45(1)(b) of the FOI Act. The primary meaning is that information has a commercial value to an agency or person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged. The information may be valuable because it is important or essential to the profitability or viability of a continuing business operation, or a pending "one-off" commercial transaction.

37. The second meaning is that information has a commercial value to an agency or person if a genuine arms-length buyer is prepared to pay to obtain that information from that agency or person, such that the market value of the information would be destroyed or diminished if it could be obtained under the FOI Act from a government agency which has possession of it. Commissioner Albietz noted in that regard that he was not referring to transactions in the nature of industrial espionage or the like, but rather to the existence of a legitimate market in which an agency or person could sell particular information to a genuine arms-length buyer.

38. The information in question must have a commercial value to an agency or another person at the time that an authorised decision-maker under the FOI Act comes to apply s.45(1)(b), i.e., information which was once valuable may become aged or out-of-date such that it has no remaining commercial value (see *Re Brown and Minister for Administrative Services* (1990) 21 ALD 526, at p.533, paragraph 22). Information which is publicly available has no commercial value which can be destroyed or diminished by disclosure under the FOI Act.

39. Establishing that disclosure of the matter in issue would disclose information that has a commercial value to an agency or another person is the first element of the test for exemption under s.45(1)(b). It must then be established that disclosure of that information could reasonably be expected to destroy or diminish its commercial value.

(b) Submissions of the participants

(i) The Department

40. The Department's submissions regarding the application to the matter in issue of s.45(1)(b) of the FOI Act can be summarised as follows:

- all of the matter in issue was generated for the purposes of the grant and is commercial in nature;
- the matter in issue has an intrinsic commercial value to the Department in its continuing business operations in that it allows the Department to set a benchmark or precedent for its grants program both in a general sense and in the specific industry;
- a crucial element in assessing incentives for future projects is the amount and details of prior incentive grants, both in the particular industry (such as food processing) and generally;
- even after an agreement has been finalised, the matter in issue is still of practical use to the Department in connection with its ongoing commercial role and functions, and therefore continues to have commercial value;
- the measure of this value also emanates from, and is evidenced by, the fact that neither Queensland nor its major investment location competitors (i.e., other State and Territory governments) currently disclose this type of information;
- the commercial context within which the Department operates is demonstrated by the fact that competition within the eastern seaboard mainland States of Australia for the attraction of investment is "real and vigorous";
- the attraction of industry and investment to Queensland, in competition with other States and nations, is itself a commercial activity on the part of the Department;
- disclosure of the matter in issue would lead to the Department's interests being disadvantaged in respect of the profitability or viability of its continuing business operations because:
  - potential recipients would be better placed in negotiating future grants with the Department, and competitors would be better placed in seeking to attract business to their own States through grants;
  - it would reveal to competitors the approach to any potential investment that is likely to be adopted in Queensland, and undermine the competitive strategies of the Department;
  - it would make the process less cost effective for the Department if "grant shopping" became a feature of industry assistance;
  - it would sour existing relations between companies and the State and discourage future commercial arrangements with the private sector;
- although the matter in issue relates to a one-off transaction, there is still a distinct possibility that disclosure may expose the Department to commercial disadvantage; and
- the sensitivity and value of the matter in issue is demonstrated by the fact that the Financial Assistance Agreement executed by the parties contains a confidentiality clause.

(Department's submissions dated 30 September 2002)

41. In his statutory declaration dated 30 September 2002, Mr Strano of the Department explained the context in which the Department discharges its functions, including its administration of the QIIS:

> *11. The agency discharges its functions in a traditional commercial manner through the maintenance and publication of Statements of Financial Performance, Financial Position, Cash Flows, and Statements of Outputs/Major Activities.*
>
> *12. Successful applicants for grants enter into standard commercial contracts with the State. These contracts are for consideration, impose mutual commercial obligations and provide for consequences, including the repayment of the whole, or part of, the grant upon default.*
>
> *13. The role of the agency is analogous to that of a merchant bank. Whilst Queensland has chosen to pursue industry attraction and facilitation programs through a departmental structure, other jurisdictions utilise corporations on behalf of the State. For example, in South Australia, the task is undertaken by the South Australian Economic Development Authority.*

(ii) The third party

42. In their letter dated 29 October 2003, the third party's solicitors simply submitted that the matter in respect of which the third party objected to disclosure (folio 34 and its duplicates, folio 51 and folios 160-163) qualified for exemption under s.45(1)(b) of the FOI Act because it has a commercial value to the third party and its disclosure could reasonably be expected to destroy or diminish that commercial value.

(iii) The applicant

43. The bulk of the submissions made by or on behalf of the applicant were directed to the application to the matter in issue of s.45(1)(c) of the FOI Act and, in particular, to the public interest balancing test which is contained in s.45(1)(c). As regards the application of s.45(1)(b), the applicant simply stated in his letter dated 5 November 2002:

> *…It is my understanding that …* [the third party] *has made public admissions in the media as to an amount of $250,000 being provided by the Beattie Government as the amount of the investment incentive grant.*
>
> *…I submit that as this information is already in the public domain no claim of commercial sensitivity attaching to this information can legitimately be held.*

(c) Application of s.45(1)(b) to the matter in issue

(i) General observations

44. In my view, the evidence and submissions of the Department have incorrectly attempted to portray a traditional governmental function (i.e., the grant of public monies to a private business operator in order to stimulate desirable economic activity within the boundaries of the government's jurisdiction) as a commercial activity of the kind for which s.45(1)(b) (and s.45(1)(c)) of the FOI Act were designed to extend a measure of protection: see paragraph 33 above.

45. To that end, Mr Strano has attested (in paragraph 11 of his statutory declaration dated 30 September 2002) that his agency discharges its functions in a traditional commercial manner through the maintenance and publication of statements of financial performance, financial position, cash flows, and statements of outputs/major activities. However, all of those things would be true of nearly all Queensland government agencies. Mr Strano also asserts that the role of his agency is analogous to that of a merchant bank; however, the analogy is not an apt one. The funds advanced to the third party were obtained from consolidated revenue. The return that the Department was seeking on this investment was not repayment of a loan with commercial interest, but a stimulus to economic activity in Queensland.

46. The Department was acting on behalf of the electors/taxpayers of Queensland in advancing their money to the third party as an incentive to maintain and expand its food processing operations in Queensland. In return, the third party promised to meet certain performance criteria (including a minimum amount of new capital expenditure by a certain date on a new facility in Queensland, and the maintenance of existing job numbers plus the creation of a minimum number of new jobs at the new facility), and also bound itself to repay the amount of the financial assistance grant if the performance criteria were not achieved.

47. Governments of all political persuasions in Australia have engaged in micro-economic management of a similar kind for many decades. In recent years, it has achieved more prominence as State governments have sought to compete with each other to offer better deals with their taxpayers' money to induce major events staged by private enterprise (such as Grand Prix motor racing), or major business operators seeking to establish in Australia for the first time (such as Virgin airlines), to locate in their territory. The publicity attendant upon political leaders seeking to maximise political capital with their electorates by highlighting their successes in these endeavours, has prompted not only Opposition politicians and competitors of the businesses which have obtained grants, but also economists and concerned citizens, to seek detailed explanation and analysis of the costs and benefits of these endeavours.

48. As Commissioner Albietz observed in *Re Cannon* at paragraph 34, the basic object of s.45(1) is to provide a ground for withholding information, if its disclosure could reasonably be expected to cause unwarranted commercial disadvantage to private sector business operators, or to government agencies which carry on commercial activities.

49. In *Re Johnson and Queensland Transport; Department of Public Works (Third Party)* (2004) 6 QAR 307 at paragraphs 56-57, I rejected a submission that the Infrastructure and Major Projects Division of the Department of Public Works, in discharging project management duties allocated to it by government and funded out of consolidated revenue, had "business or commercial affairs", according to the proper meaning of those terms in the context of s.45(1)(c) of the FOI Act. Section 45(1)(b) was not relied on by the Department of Public Works in *Re Johnson*, and therefore was not mentioned in my discussion of the issue at paragraphs 50-57. However, I consider that that discussion is also relevant to s.45(1)(b) because, in my view, information cannot have commercial value to an agency if the agency does not have commercial affairs (except in the possible event referred to in paragraph 54 of *Re Cannon* where information has commercial value in the context of a pending, "one-off" commercial transaction). At paragraphs 50-51 of *Re Johnson*, I said:

> *50. … I consider that Parliament's intention in enacting the s.45(1)(c) exemption was to provide a means by which the general right of access to documents in the possession or control of government agencies could be prevented from causing unwarranted commercial disadvantage to:*

> *(a) individuals who offer professional services to the public on a fee for service basis (see Re Pope and Queensland Health (1994) 1 QAR 616 at p.625, paragraph 29);*
>
> *(b) private sector business operators (whether they be individuals, partnerships, or corporations); and*
>
> *(c) government agencies which function on a business model to generate income from the provision of goods or services.*
>
> *51. Subject to the possible reservation mentioned in paragraph 54, I consider that an agency will have business or commercial affairs within the terms of s.45(1)(c) if, and only to the extent that, it is engaged in a business undertaking carried on in an organised way for the purpose of generating income or profits, or is otherwise engaged in an ongoing operation involving the provision of goods or services for the purpose of generating income or profits.*

50. In this case, the activities of the Department in administering the QIIS and otherwise providing incentive assistance to attract major/strategic projects, do not answer either of the descriptions in the last quoted paragraph.

51. When properly analysed, the nature of the transaction between the State of Queensland and the third party involved an advance of public monies in return for the third party agreeing to engage in certain capital expenditure and economic activity for the benefit of the Queensland economy, and also agreeing to repay the advance of public funds if it did not do so. This was not a commercial activity on the part of the Department. It did not involve the purchase or sale of goods and services. It was a traditional governmental activity, although it had a commercial appearance as the result of the execution of a formal agreement between the State of Queensland and the third party, which included the sort of terms usually to be found in commercial agreements. In that agreement, the third party bound itself to do, by certain dates, the things which the investment incentive schemes administered by the Department seek to achieve by way of stimulus/benefit to the Queensland economy, and bound itself to repay the financial assistance grant if it did not do those things.

52. The Department's submissions place reliance on the decision of the Victorian Civil and Administrative Tribunal (VCAT) in *Re Bracks and Department of State Development* [1998] VCAT 579 (15 January 1999) which expressed an opposite view to the one I have stated above, on a similar kind of transaction involving the Victorian Department of State Development (the VDSD). The nature of the agreement for financial assistance in that case was described (at paragraph 25 of the tribunal's decision) as an agreement whereby the Minister undertook to make a grant upon various terms and conditions, being performance conditions imposed upon Rangedale Abattoirs Pty Ltd to employ a required number of persons, expend a required amount of money in the project, and repay the grant in event of default.

53. The tribunal observed at paragraph 28(a):

> *… in my view, there can be little more commercial in nature than advancing monies upon condition that the recipient discharge obligations imposed upon it in consideration of the advance, the provision for reimbursement of the sum advanced with interest in the event of default with an ancillary agreement in the form of a guarantee from the recipient's parent company; ….*

The tribunal also referred to the VDSD being in competition with its counterpart Departments in other states and overseas, and to the overall object of the grant being to promote widespread commercial activity, in support of a finding that the VDSD was at the relevant time "an agency engaged in trade and commerce" within the meaning of s.34(4)(a)(ii) of the *Freedom of Information Act 1982* Vic (the Victorian FOI Act).

54. The VCAT's decision in *Re Bracks* can be distinguished having regard to material differences between the language of, and test for exemption under, s.34(4)(a)(ii) of the Victorian FOI Act compared to s.45(1)(b) of the FOI Act. Regardless of those differences, I cannot agree with the finding that the VDSD was an agency engaged in trade or commerce, or the implicit finding that the information in issue was information of a business or commercial nature so far as the VDSD was concerned. It was certainly information of a business or financial nature so far as Rangedale Abattoirs was concerned, and may have included some information of a financial nature so far as the VDSD was concerned.

55. In my view, the tribunal was unduly swayed by the commercial trappings of the agreement for advance of the grant monies, and failed to properly characterise the nature of the activity in which the VDSD was engaged. To characterise the function of the VDSD (in making grants of public monies to stimulate private sector business activity in Victoria) as itself engaging in trade or commerce does not, in my view, accord with the natural and ordinary meaning of those words. The fact that the overall objective of grants schemes of this kind is to promote commercial activity does not mean that, in making a grant of public monies for that purpose, the VDSD was itself engaging in trade or commerce.

56. The fact that State governments sometimes compete with each other in offering inducements to business operators does not, in itself, transform a traditional governmental activity into a commercial activity. State governments sometimes talk about competition to offer a low-tax environment to business, but it could not be suggested that setting the rates of state taxes and other imposts at a level that is optimal to attract new business investment in the State is a commercial activity rather than a governmental activity, even if its aim is to attract greater commercial activity in the State.

57. The s.45(1)(b) exemption in the Queensland FOI Act requires the Department in the present case to establish that the matter in issue has a commercial value to the Department, that could reasonably be expected to be diminished by its disclosure. The test is different to that of the exemption provision under consideration in *Re Bracks*, although I consider that information can only have a commercial value to the Department if it is engaged in commerce. In my view, the Department's contentions, and its reliance on *Re Bracks*, are mistaken. The better view is that stated by Drummond J of the Federal Court of Australia in *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development and Training Centre Pty Ltd* [2001] FCA 382, 4 April 2001, (2002) 66 ALD 514. The information in issue in that case comprised segments of the appellant's Tender Assessment Operations Manual that were used for assessing the financial viability of tenderers who sought contracts from the appellant to supply employment services to the public (the employment services were of a kind previously provided to the public by the appellant's staff). Drummond J considered the application of s.43(1)(a) and s.43(1)(b) of the *Freedom of Information Act 1982* Cth (the Commonwealth FOI Act), which are, for practical purposes, materially identical to s.45(1)(a) and s.45(1)(b) of the Queensland FOI Act.

58. At paragraph 58 of his judgment, Drummond J observed:

> *58. … I accept … that s.43(1)(b) is designed to extend exemption from disclosure to information having commercial value but which does not qualify as a trade secret. …But, to attract the exemption here in question, the information must not merely have value to the department, that value must be able to be described as commercial in character. That and the fact that this exemption is an extension of the exemption provided for in respect of trade secrets suggests that the information must have value to the department in respect of those of its activities which can be said to bear a commercial, as opposed to an administrative or governmental character. … Information could, I think, have a commercial value within the subsection though it might not be capable of being exchanged for money or moneys' worth if it was still of use to the government agency in activities of the agency that were of a commercial, as distinct from a governmental character.*
>
> *59. But for the reasons given for holding that the information, in so far as it may qualify as secret nevertheless cannot qualify as a trade secret, this information, whatever value it may have to the department, cannot be said to have a value commercial in character.*
>
> *60. On the proper construction of this provision, the only conclusion open on the material before the tribunal, there being no disputed facts, is that the information in question did not have any commercial value to the department because it was of use only in respect of the performance by the department of its governmental functions.*

59. The following passages indicate the nature of the reasons, given earlier in his judgment, which support Drummond J's finding at paragraph 59 (quoted above):

> *50. Cooper J* [in *Team Employment Training Network Pty Ltd v Secretary, Department of Employment, Workplace Relations and Small Business* [1999] FCA 1792], *correctly in my respectful submission, recognised that there is a distinction between government functions and trading or commercial functions and that distinction holds true even though government may deliver its governmental functions to interested members of the public in a commercial format, eg, by outsourcing them to private service providers. If it adopts that method of governmental service delivery, it is still engaged in a function of government, not in a business or trade activity. Repeatedly outsourcing the delivery of government services does not change the character of what the department does from a governmental to a business or commercial function.*
>
> *51. 'Job network' may well involve the privatisation of the provision of services to the unemployed that have traditionally been the province of government as one of its welfare or social security functions. But so describing the process of transferring, under contracts with the department, the immediate responsibility for delivery of such services to the unemployed from a government department to private organisations does not mean that the department, in letting those contracts, is any the less engaged in governmental, that is, non-commercial, functions than was the case when it provided those services directly to the unemployed via its own public servants. …*

> *52. … The tribunal was correct in not examining the tender process divorced from the scheme of which it was but part in determining whether the department's tendering activities had a commercial or business character. The fallacy in the argument is that it would be enough to exempt government documents from disclosure under the Freedom of Information Act, as containing trade secrets of the government agency concerned, if the particular circumstances in which the documents were brought into existence by the agency, divorced entirely from the process in which that occurred, could be said to look like an activity carried on somewhere in the commercial sector.*

60. The last sentence of the quoted passage reinforces the point I have made above, i.e., that it would be a mistake to characterise the nature of the activity engaged in by the Department in this case as a commercial activity rather than a governmental activity, by paying undue regard to the form of the agreement between the State of Queensland and the third party relating to the grant of financial assistance from public funds.

61. There was an appeal against Drummond J's decision, which was upheld on an aspect of his findings in respect of other grounds of exemption. However, Drummond J's observations in respect of s.43(1)(a) and s.43(1)(b) of the Commonwealth FOI Act were endorsed by a Full Court of Federal Court of Australia (Tamberlin, Mansfield and Emmett JJ) in *Secretary, Department of Workplace Relations & Small Business v The Staff Development & Training Centre Pty Ltd* [2001] FCA 1375 (28 September 2001) at paragraph 29.

62. For the reasons explained at paragraphs 44-61 above, I consider that, in administering the QIIS and other incentive schemes, and in negotiating and concluding an agreement with the third party for a grant of financial assistance, the Department was not engaged in business or commercial activities, but in governmental activities. I find that whatever value any of the matter in issue has for the Department in terms of its administration of the QIIS and other arrangements for providing incentive assistance to attract major/strategic projects, it cannot properly be characterised as having commercial value as that term is used in s.45(1)(b) of the FOI Act. On that basis, I find that none of the matter in issue qualifies for exemption under s.45(1)(b) on the ground that it has a commercial value to the Department that could reasonably be expected to be diminished by its disclosure.

63. In my view, the Department's reliance on s.45(1)(b) (and indeed s.45(1)(c) to the extent that reliance was predicated on the Department having business or commercial affairs) was misconceived, for the reasons I have indicated above. The Department's submissions emphasised the competitive element of its activities in administering the relevant incentive schemes; e.g.: "The attraction of industry and investment to Queensland, in competition with other States and nations is itself a commercial activity on the part of the agency". In my view, the element of competition between governments in offering taxpayer-funded incentives to attract industry and investment does not alter the fundamental character of the activity from a governmental activity to a commercial activity.

64. The exemption provisions appropriate to the nature of the case presented on behalf of the Department are s.49 (detriment to the financial interests of the State or an agency), which was relied on by the Department in the alternative, and s.47(1)(a) (detriment to the ability of government to manage the economy of the State), which was not relied upon in the Department's submissions.

65. Nevertheless, since I am obliged to consider the third party's case for exemption under s.45(1)(b), I will also consider the Department's case for exemption under s.45(1)(b) on the assumption, contrary to my finding at paragraph 62 above, that the Department's administration of the relevant incentive schemes constituted its business or commercial affairs.

(ii) Category 1 matter

66. As noted at paragraphs 23-24 above, the category 1 matter consists merely of references to the dollar amount of the third party's grant, and some peripheral matter. The third party does not claim exemption in respect of the category 1 matter. The offer of financial assistance was made to the third party nearly four years ago, and the Financial Assistance Agreement between the third party and the Department was executed more than three years ago. In its submissions, the Department acknowledged that the matter in issue concerned a one-off commercial transaction (which has long since been finalised), but argued that the matter in issue had a continuing intrinsic commercial value to the Department.

67. As noted at paragraphs 36-37 above, "commercial value" in the context of s.45(1)(b) of the FOI Act has two meanings. As to the second meaning, the Department has not sought to argue that there exist genuine, arms-length buyers prepared to pay the third party (or the Department) to obtain information regarding the amount of the grant.

68. As to the first meaning, I must be satisfied that the matter in issue is valuable for the purposes of carrying on the commercial activity in which I am prepared to assume, for present purposes (contrary to my finding at paragraph 62 above), the Department was engaged.

69. The Department has submitted that the category 1 matter has intrinsic commercial value because it allows the Department to set a benchmark or precedent for its grants scheme both in a general sense, and in the specific industry. It has argued that a crucial element in assessing other projects seeking grants is the amount and details of prior grants, both in the particular industry (i.e., food processing), and generally.

70. However, I consider that whatever value the category 1 matter (and also what I have described at paragraph 25 as the peripheral matter) might still have for the Department in terms of its administration of the relevant incentive schemes (i.e., in assessing other projects seeking grants), its value in that regard does not depend upon the information being kept secret, and I find that its value could not be diminished by disclosure of that information at this stage.

71. The real nub of the Department's case for keeping the information secret is that, in an environment of competition with the New South Wales, Victorian and overseas governments to attract industry and investment through financial assistance grants, disclosure of the amounts of grants paid to specific businesses would set benchmarks for comparable claims in comparable industries, that:

(a) could be used by other applicants for assistance to assess a starting point for negotiations over an appropriate grant figure, and to that extent weaken the Department's negotiating position;
(b) enable competitor governments to assess the likely terms on which grant assistance would be offered by the Department, and tailor their offers to outbid Queensland on projects; and
(c) this would in turn encourage forum shopping by business operators to get the best deal available.

72. In my view, those arguments are more appropriate to be assessed under the tests for exemption in:

    (a) s.47(1)(a) – substantial adverse effect on the ability of government to manage the economy of the State;
    (b) s.49 – substantial adverse effect on the financial interests of the State or an agency; or
    (c) perhaps even s.45(1)(c) – adverse effect on the financial affairs of an agency.

73. The Department was entitled to put its argument for exemption in the alternative, in terms of both s.45(1)(b) and s.45(1)(c), although having regard to the terms of s.45(1), the matter in issue could only qualify for exemption under one or the other: see *Re Cannon* at paragraph 66 (reproduced at paragraph 34 above). However, in my view, the arguments I have summarised at paragraph 71 above do not flow from any intrinsic commercial value attaching to the category 1 matter and the peripheral matter.

74. For the reasons stated in paragraphs 70 and 73, I am not satisfied that disclosure of the category 1 matter and the peripheral matter could reasonably be expected to diminish any commercial value that that matter has to the Department, and I find that it does not qualify for exemption under s.45(1)(b) of the FOI Act.

75. As to the applicant's claim that the Managing Director of the third party publicly disclosed the amount of the grant in a radio interview, such that it cannot be claimed that the grant has any current commercial value or sensitivity, I have reviewed the transcript of the interview in question, and I am satisfied that the specific amount of the grant was not publicly disclosed in that forum.

(iii) Category 2 matter

76. Folios 13 and 62 consist of claims for reimbursement made by the third party to the Department in connection with costs paid for the construction of the sewer link, and parts of the third party's establishment costs. Each folio contains a description of the nature of the cost/work, together with the name of the subcontractor who performed the work (the applicant does not seek access to the identities of subcontractors), as well as invoice numbers, dates, amounts of invoices, cheque numbers, dates of cheques, and total amount paid to the relevant contractor. The amount of the invoices is also totalled, and a statement is made about the amount of reimbursement sought by the third party. Folio 62 contains some handwritten comments regarding the claim for reimbursement *vis-à-vis* the amount of the grant.

77. There is no material before me to support a finding that the individual amounts of the invoices, or the total of those invoices, or any other information concerning their payment, such as cheque numbers and dates *et cetera*, have a current commercial value within the meaning of s.45(1)(b) of the FOI Act. The invoices relate to work performed and paid for more than three years ago. I note that the third party no longer objects to disclosure of folios 13 and 62. I am satisfied that the information in those folios has no commercial value to the continuing business or commercial operations of the Department, the third party or any other person or company.

78. As I noted, both of the folios in question also contain references to the amount of reimbursement sought by the third party, which is linked to the amount of the third party's grant. Presumably, that is why the Department maintains an objection to disclosure. Folio 62 also contains handwritten notes which refer to the amount of the grant dedicated to the third party's establishment costs. For the reasons stated at paragraphs 62 and 74 above, I am not satisfied that that information has a current commercial value which could reasonably be expected to be diminished by its disclosure under the FOI Act.

79. I find that the category 2 matter does not qualify for exemption under s.45(1)(b) of the FOI Act.

(iv) Category 3 matter

80. Folios 34, 43 and 96 are copies of the third party's internal capital expenditure requests relating to the development of its premises at Lytton. Reference is made to the requested and budgeted capital expenditure amount, the project description and rationale, key assumptions, the financial implications of the development, the internal rate of return, and the year one earnings before interest and tax. Included in the summary of the financial implications is a reference to the amount of the grant.

81. The third party has not provided any submissions which specifically address the application to this information of s.45(1)(b) of the FOI Act. There is nothing before me to suggest that the information in question satisfies either of the meanings of "commercial value" discussed at paragraphs 36-37 above. There is no evidence of the existence of genuine, arms-length buyers prepared to pay to obtain a copy of the information, nor am I satisfied that the information itself is important to the profitability or viability of the third party's continuing business operations. The information relates to the financial implications of a specific project undertaken more than three years ago.

82. As to the reference to the amount of the grant which is contained on folios 34, 43 and 96, I rely on the findings made at paragraphs 62 and 74 above regarding the application of s.45(1)(b) to that information.

83. The matter in issue on folio 51 comprises one sentence which refers to plans for a subsidiary of the third party. Again, there is nothing before me to satisfy me that that information has a current commercial value which could reasonably be expected to be diminished by its disclosure under the FOI Act. Similarly, I am not satisfied that the matter in issue on folio 119 (again, a document which is over three years old) which refers to the third party's financial position with respect to its lease of the premises at Lytton (as well as a reference to the amount of the grant), has a current commercial value such as to qualify for exemption under s.45(1)(b) of the FOI Act. The third party does not object to disclosure of folio 119, and it is difficult to understand why the Department should be concerned about its disclosure, apart from the reference in the last line to the grant amount (as to which my findings at paragraphs 62 and 74 above also apply).

84. I find that the category 3 matter does not qualify for exemption under s.45(1)(b) of the FOI Act.

(v) Category 4 matter

85. Folios 160-163 comprise duplicates of a memorandum, dated 10 December 1999, from Mr Strano to the Director-General of the Department, seeking approval to offer a grant to the third party. The memorandum contains a general discussion of the third party's business, and the issues associated with the grant, as well as funding implications. The specific amount of the grant is also referred to, and I repeat my findings at paragraphs 62 and 74 above regarding that information.

86. The submissions lodged by the third party and the Department do not specifically address the application of s.45(1)(b) to the information contained in the memorandum. Accordingly, there is nothing before me to suggest that the information in question satisfies either of the relevant meanings of "commercial value". There is no evidence of the existence of genuine, arms-

length buyers prepared to pay to obtain a copy of the information, nor am I satisfied that the information itself is important to the profitability or viability of the continuing business or commercial activities of the third party. The memorandum was written in December 1999 and any commercial sensitivity it may once have had for the third party has now dissipated. I also note that the contents of paragraphs 4-6 of the memorandum have effectively been disclosed in the Auditor-General's report No.3, 2002-03 at p.37. If the category 4 matter has any continuing value to the Department for the administration of the relevant incentive schemes, I am not satisfied (for the same reasons stated at paragraphs 70 and 73 above in respect of the category 1 matter) that its disclosure under the FOI Act could reasonably be expected to diminish any value it may still have in that regard.

87. I find that the category 4 matter does not qualify for exemption under s.45(1)(b) of the FOI Act.

(d) Summary of findings

88. In summary, I have found that none of the matter in issue qualifies for exemption under s.45(1)(b) of the FOI Act.

Application of s.45(1)(c), s.47(1)(a) and s.49 of the FOI Act

(a) s.45(1)(c) – general observations

89. The correct approach to the interpretation and application of s.45(1)(c) is explained in *Re Cannon* at pp.516-523 (paragraphs 66-88). In summary, matter will be exempt under s.45(1)(c) of the FOI Act if:

(a) the matter in issue is properly to be characterised as information concerning the business, professional, commercial or financial affairs of an agency or another person (s.45(1)(c)(i)); and

(b) disclosure of the matter in issue could reasonably be expected to have either of the prejudicial effects contemplated by s.45(1)(c)(ii), namely:

(i) an adverse effect on the business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns; or

(ii) prejudice to the future supply of such information to government;

unless disclosure of the matter in issue would, on balance, be in the public interest.

Information concerning business, commercial or financial affairs

90. The correct approach to the characterisation test required by s.45(1)(c)(i) of the FOI Act is explained in *Re Cannon* at pp.516-520 (paragraphs 67-77). The word "concerning" as used in the context of s.45(1)(c) means "about, regarding". It is not sufficient that the matter in issue has some connection with the business, commercial or financial affairs of the relevant business operator. The matter in issue must itself comprise information about those business, commercial or financial affairs, in order to satisfy this requirement.

91. For the reasons explained at paragraphs 44-62 above, I do not accept that the Department has business or commercial affairs as those terms are used in the context of s.45(1)(c) of the FOI Act. I find that none of the matter in issue comprises information concerning the business or commercial affairs of the Department, and accordingly none of it can qualify for exemption under s.45(1)(c) on that basis.

92. It is arguable that the category 1 matter is information concerning the financial affairs of the Department – it represents the amount of a financial assistance grant from public funds which the Department had authority to administer. In *Re Cannon* at p.519 (paragraph 76), in remarks that were not essential to his decision in that case, Commissioner Albietz expressed the view that the term "financial affairs" of an agency is broad enough to cover the finances of government agencies which do not carry on a function of supplying goods or services on a commercial basis.

93. As indicated in *Re Johnson* at p.325 (paragraphs 54-55), I have reservations about that approach. I agree with Commissioner Albietz's observation at p.520 (paragraph 81) of *Re Cannon* that the common link between the words "business", "professional", "commercial" and "financial" in s.45(1)(c) is to activities carried on for the purpose of generating income or profits, and I consider that Parliament intended the s.45(1)(c) exemption to be confined to business operators and government agencies engaged in activities carried on for that purpose. In my view, the ambit of the application of the s.45(1)(c) exemption should be confined in the way I indicated in *Re Johnson* at p.324 (paragraphs 50-51). That is, in respect of its application to agencies, s.45(1)(c) should apply only to the extent that an agency is engaged in a business undertaking carried on in an organised way for the purpose of generating income or profits, or is otherwise involved in an ongoing operation involving the provision of goods or services for the purpose of generating income or profits.

94. Such a construction would not leave other agencies without protection from disclosure of information that could reasonably be expected to prejudice their financial interests. The s.49 exemption would be available if disclosure could reasonably be expected to have a substantial adverse effect on the financial interests of the agency. In *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 at pp.724-725 (paragraph 150), Commissioner Albietz explained that, in employing the phrase "substantial adverse effect" in s.49, Parliament must have intended the adjective "substantial" to be used in the sense of grave, weighty, significant or serious. The requirement in s.49 to demonstrate a reasonable basis for expecting a substantial adverse effect strikes a more appropriate balance in the case of 'non-commercial' agencies, having regard to the fundamental importance of public accountability for an agency's management of finances provided to it from public funds. The lesser requirement in s.45(1)(c) of demonstrating a reasonable basis for expecting an adverse effect (rather than a substantial adverse effect) on financial affairs is more appropriate to agency activities of the kind described in paragraph 93 above.

95. At paragraph 64 above, I indicated that s.47(1)(a) and s.49 were the appropriate exemption provisions for the Department to rely on in respect of the prejudice to the interests of the Department or the State which the Department apprehends will follow from disclosure of the matter in issue. However, as I must consider the third party's exemption claims under s.45(1)(c), I will consider whether disclosure of the matter in issue could reasonably be expected to have an adverse effect on the financial affairs of the Department.

96. It will be convenient to consider that question concurrently with the application to the matter in issue of s.47(1)(a) and s.49, since the elements of those exemption provisions have much in common with s.45(1)(c).

(b) Application of s.45(1)(c), s.47(1)(a) and s.49 to the matter in issue

97. Section 45(1)(c) is set out at paragraph 32 above. Section 47(1)(a) of the FOI Act provides:

> ***47.(1)*** *Matter is exempt matter if its disclosure could reasonably be expected—*
>
> *(a) to have a substantial adverse effect on the ability of government to manage the economy of the State; …*
>
> …
>
> *unless its disclosure would, on balance, be in the public interest.*

(I note that s.47(1)(b) has no application in the present case because the matter in issue does not concern proposed action or inaction of the government for the purpose of managing the economy of the State.)

98. Section 49 of the FOI Act provides:

> ***49.*** *Matter is exempt matter if its disclosure could reasonably be expected to have a substantial adverse effect on the financial or property interests of the State or an agency unless its disclosure would, on balance, be in the public interest.*

99. Each exemption provision turns on the existence of a reasonable basis for expecting that disclosure of the matter in issue could have:

- an adverse effect on the financial affairs of any agency (s.45(1)(c));
- a substantial adverse effect on the ability of government to manage the economy of the State (s.47(1)(a)); or
- a substantial adverse effect on the financial interests of the State or an agency (s.49);

and each exemption provision is qualified by a public interest balancing test.

(i) Application of s.45(1)(c), s.47(1)(a) and s.49 to the category 1 matter

100. I note that the Department specifically stated (at paragraph 89 of its submissions dated 30 September 2002) that it did not seek to rely on the second limb of s.45(1)(c)(ii), i.e., prejudice to the future supply of like information to government.

Adverse effect/substantial adverse effect

101. The third party does not oppose disclosure of the category 1 matter. The applicant's submissions focussed on the application of the public interest balancing test.

102. The Department's submissions in respect of this element of s.45(1)(c) and s.49 are substantially the same as its submissions in respect of s.45(1)(b) (as I indicated at paragraph 73 above, the Department was entitled to address the application of s.45(1)(b) and s.45(1)(c) in the alternative). The Department did not specifically address the application of s.47(1)(a). I will address it because I consider that the relevant activity in which the Department was engaged related to the micromanagement of the Queensland economy, and did not involve the Department engaging in business or commercial activities.

103. The Department's case on the adverse effect issue in s.45(1)(c) can be summarised as follows:

- if the details of assistance packages such as the one in issue were to be made public, potential recipients and the Department's counterparts in other States would be better placed in negotiating future grants, and interstate and international competitors would be in a better position to attract businesses away from Queensland through incentives;
- this would seriously disadvantage the Department in achieving its objective of increased economic activity within the State and have a generalised adverse effect on the cost effectiveness of its operations and overall performance;
- disclosure would seriously impact on the effectiveness of the grants scheme, seriously compromise the integrity of the Department's dealings with grant applicants, and reduce industry and public confidence in the Department's ability to administer the scheme in the most cost effective and beneficial way for the State.

104. The Department submitted that disclosure could reasonably be expected to have a substantial adverse effect on the financial interests of the Department or the State (in terms of s.49 of the FOI Act) because:

- disclosure would set a public benchmark for other agencies and applicants;
- benchmark amounts would be used by potential investors as a starting point and would weaken the State's negotiating position;
- governments need to be able to take a strategic and case by case approach to investment;
- some companies would be discouraged from investing in Queensland or, alternatively, the program would become less financially effective because of the consequential increase to the cost of maintaining industry support to achieve the same outcomes;
- disclosure would give Queensland's competitors a commercial advantage, and they would use the information to gain insight into the Department's methodologies, strategies, processes and priorities;
- the cumulative effect of these factors would lead to a substantial adverse impact upon and diminution of the State's level of economic activity and growth, employment opportunities *et cetera*, and the Department's role as the facilitator and guide of the State's economic development would be substantially and adversely undermined; and
- the Department would lose the effectiveness of crucial measures in its assessment of future proposals.

105. One of the difficulties with the Department's case is that it is presented as a 'class claim' for exemption of the amounts of all grants of financial assistance, whereas the only grant amount in issue is the amount of the grant paid to the third party pursuant to the Financial Assistant Agreement executed in February 2001. In *Re Fewster and Department of Prime Minister and Cabinet (No. 2)* (1987) 13 ALD 139 at p.141, Deputy President Todd referred to the principle against acceptance of 'class claims' that has been applied by the Commonwealth Administrative Appeals Tribunal when evaluating exemption claims under the Commonwealth FOI Act. He referred to it as:

> *… the principle that, in the absence of an ability to secure exemption under a particular class (such as Cabinet documents), it is the information in the particular document that counts… .*

106. I am not satisfied that there is a reasonable basis for expecting that disclosure, some three years later, of the amount of the grant paid to the third party, could have any of the prejudicial consequences asserted in the Department's evidence and submissions.

107. That grant was to assist a food processing business already operating in Queensland to relocate its operations within Queensland, in a project that would involve a certain amount of capital expenditure and a modest expansion of its workforce. There does appear to have been some threat of the third party considering an option of abandoning its Brisbane operations in favour of an interstate site. Whether that was a serious threat or merely a negotiating tactic was one of several variables the Department had to assess in light of its knowledge of the comparative costs and advantages to a particular business of relocating an existing Queensland business operation interstate. However, in my view, the element of prejudice to the Department through conferring some competitive advantage on other governments seeking to attract footloose industries is not likely to be substantial in most instances where relocation and expansion within Queensland of an existing business operation of modest size is in contemplation.

108. The Department's evidence and submissions did not explain precisely how disclosure of the amount of the grant could enable other grant applicants, and competitor governments, to assess benchmarks. Presumably, the amount of the grant would be assessed against the information which the Department does publish (for example, in terms of job targets and capital investment promised by the recipient of the grant), to infer that, in return for that amount of capital investment in Queensland, and that number of new jobs created, the Queensland government would be prepared to offer that amount of financial assistance.

109. In practical terms, however, there would be many more potential variables that could affect the amount of grant assistance that the Department would be prepared to pay in particular cases. These could include:

- premiums to attract particular industry sectors (e.g., aviation support, bio-technology) with a highly skilled labour force, or reputable foreign businesses seeking to establish headquarters in Australia;
- premiums to attract investment of particular strategic importance to the economy of the State, or investment that boosts development and employment in regions of Queensland that are in particular need;
- the amount of funding available to the grants scheme from consolidated revenue; and
- the extent to which the Department is prepared to compete with offers of assistance from other governments.

110. Let us assume that disclosure of the matter in issue enabled another grant applicant to approach the Department with the proposition that its project involves *x* times the amount of capital expenditure, and *x* times the number of new jobs created, as the third party's project, and therefore it is deserving of *x* times the amount of the grant given to the third party. I cannot see how such an approach by a grant applicant could somehow bind the Department to proceed with subsequent negotiations in a way that meant that the financial interests of the Department or the State, or the ability of government to manage the economy of the State, could be adversely affected. The Department would be neither morally nor legally obliged to accept the grant applicant's position, nor even to treat it as a starting point for negotiations. The Department would make its own detailed assessment of the particular project in deciding an appropriate amount of financial incentive grant, and negotiations would proceed by reference to that detailed assessment.

111. I cannot see how discussion of comparative grants would likely be more than a transitory sidetrack in negotiations over a new specific project. Moreover, I consider that it is mere speculation for the Department to assert that some companies would be discouraged from investing in Queensland merely because they could not obtain grants which they considered

comparable (presumably on some kind of *pro rata* basis) to the grant obtained by the third party in the instant case. If the issue of comparability were raised by a grant applicant, it would be open to the Department to explain why the cases were not comparable.

112. There has been no indication in the Department's evidence and submissions that pre-contractual negotiations over the amount of a grant of financial assistance are conducted on a basis that binds the applicant for a grant not to disclose to another government the amount of the latest grant offer from the Department. Even if that were the case, it would be difficult to prevent a forum-shopping grant applicant from indicating to another government (without revealing the details of Queensland's offer) that it would have to make a better offer to induce acceptance in preference to Queensland's offer (*cf.* the behaviour referred to at the end of paragraph 121 below).

113. This is another reason why I have difficulty accepting that disclosure of the matter in issue could reasonably be expected to have the adverse effects asserted by the Department, in terms of allowing other governments to outbid Queensland on projects through obtaining knowledge of the incentives that Queensland might offer to attract a project. Even assuming that disclosure of the particular matter in issue could enable another government to assess how Queensland would be likely to arrive at an initial offer to attract a new business project, that could only have an adverse effect if it enabled the other government to outbid Queensland in circumstances where a forum-shopping grant applicant offered each interested government one chance to submit its best offer to attract the grant applicant's project. Such a case could occur but, ordinarily, a private sector business operator would negotiate as extensively as the respective governments would permit (and the significance to it of the project warranted), in order to find out how far each government would go to attract its business. The amount of each package would then be factored into the grant applicant's assessment of a range of other business factors to determine which base of operations would be most beneficial for its business plans. Any number of other factors could carry greater weight in reaching that decision than the amount of grant assistance on offer, and the government that made the second or third best offer might secure the project. Indeed, the business operator might know in advance what its preferred location is, and still seek to play off one government against another to get the best possible deal from the government of its location of choice.

114. These are the kind of variables that the Department (and other governments) have to assess in deciding how much taxpayers' money they are prepared to offer to attract a particular project. No doubt there are elements of a poker game when several governments are competing to attract a desirable business that is new to Australia and seeking the best available incentive package to influence the location of its headquarters. Difficult judgments are no doubt involved in assessing how high it is necessary or appropriate to go to make a competitive or winning bid. However, a government cannot responsibly be prepared to pay whatever it takes to secure the investment project if the cost to taxpayers would be disproportionate to the economic benefits liable to be obtained.

115. There could be a case for secrecy for an appropriate period of time in respect of the amount of grant offered, and details of how it was assessed, in some cases of the kind referred to in the preceding paragraph.

116. However, the present case is not such a case. The precedent value of the grant in issue before me, even for assessing benchmarks in the food processing industry, is limited by the factors referred to in paragraph 107 above. There does not appear (from the documents examined in the course of this review) to have been an interstate bidding war for this aspect of the third party's business, and no particular or unique incentives were offered to the third party by the Department: just a one-off cash grant made more than three years ago for a very

specific project. I have also explained my reservations as to whether any benchmarks that are capable of being assessed by future grant applicants and by other governments through disclosure of the matter in issue could be employed in a way that could reasonably be expected to have an adverse effect on the financial interests of the Department or the State, or on the ability of government to manage the economy of the State.

117. The Department's submissions treat the question of disclosure of the amount of the grant to the third party as if it were a precedent for all other grant amounts, with the consequence that disclosure of all grant amounts would then enable future grant applicants and other governments to work out comprehensive benchmarks. However, the terms of the relevant exemption provisions require assessment of the reasonably apprehended effects of disclosure of the particular matter in issue. Each case must turn on its own merits. The individual circumstances of each grant must be considered, such as the time that has passed since the grant was made, whether other states were competing to attract the project, and whether the grant was site-specific or otherwise unique in its circumstances such as to have limited general application or precedent value. I do not accept that a blanket approach to exemption (or, for that matter, disclosure) can be taken with respect to all grants.

118. The age of the matter in issue will often be significant. In his statutory declaration dated 30 September 2002, Mr Strano asserted that secrecy for a period of about 5 years was necessary. Whatever the position might be with other cases, I do not accept that a 5 year period of secrecy is necessary in respect of the matter in issue in this review. Even as of the time the Department made its decision in response to the applicant's FOI access application, i.e., June 2002, I do not consider that it was reasonable to expect that disclosure of the amount of the grant awarded to the third party could have an adverse effect on the Department's financial affairs, or an adverse effect of the kind contemplated by s.47(1)(a) or s.49 of the FOI Act. This review has consumed further time since then. I am required to assess the application of exemption provisions according to the material facts and circumstances that apply at the time I come to make a decision: see *Re Woodyatt and Minister for Corrective Services* (1995) 2 QAR 383 at p.328 (paragraph 35) and the cases there cited.

119. I am not satisfied that disclosure of the category 1 matter, or the peripheral matter (see paragraph 25 above), at this point in time could reasonably be expected to have:

(a) an adverse effect on the financial affairs of the Department; or
(b) a substantial adverse effect on the financial interests of the Department or of the State; or
(c) a substantial adverse effect on the ability of government to manage the economy of the State.

120. Therefore, I find that the category 1 matter and the peripheral matter does not qualify for exemption from disclosure under s.45(1)(c), s.47(1)(a) or s.49 of the FOI Act.

121. Before leaving this issue, I should note that the climate of competition between Australian States to offer financial incentives to attract business investment has undergone a significant shift since Mr Strano gave the evidence in his statutory declaration dated 30 September 2002. On 5 September 2003, the Treasurers of New South Wales, Victoria, South Australia, Western Australia, Tasmania and the Australian Capital Territory signed the Interstate Investment Co-operation Agreement. A media release issued by the South Australian Treasurer on 5 September 2003 stated that the partners in the agreement would be exchanging information to stop companies trying to play one State or Territory off against another. The agreement includes protocols to avoid offering financial and other investment

incentives to companies relocating from elsewhere in Australia – a situation which does not bring any national economic benefit. According to the media release, Victoria had already exchanged information with New South Wales on 30 projects since 2001, and companies had been caught out overstating the incentives offered by the potential 'rival' location (with estimated savings to taxpayers of around $20 million).

122. In an answer to a Question on Notice to the ACT Chief Minister about the agreement, *Hansard* of 27 November 2003 for the ACT Parliament records the ACT Chief Minister describing the Interstate Investment Co-operation Agreement as a three-year agreement to:

- co-operate wherever possible to minimise incentives when it is clear that new projects and major investments are committed to Australia; and
- co-operate in any case involving a potentially footloose investment where there is no national economic benefit with a view to declining to offer any financial incentive.

123. An article by Robert Skeffington in Business Review Weekly of 4 November 2003 (Vol 25, no. 42) quotes the Victorian Treasurer, John Brumby, as saying that States are entitled to compete for genuinely new investment, and this competition should be encouraged, with the exchange of information between the States ensuring that taxpayers are not disadvantaged. What is to be avoided is poaching, where a company is attracted from one State to another. Mr Brumby said this provided no net advantages to Australia, and he was confident that those sorts of deals were coming to an end.

124. I have not sought to take this development into account in evaluating the Department's case that adverse effects could reasonably be expected to follow from disclosure of the matter in issue. Queensland and the Northern Territory have not signed the Interstate Investment Co-operation Agreement, which leaves the signatories free to compete with Queensland in investment attraction, as they did before.

(ii) Application of s.45(1)(c) to the category 2 matter

125. These documents also contain references to the amount of the grant. My findings at paragraphs 119-120 above apply to those references. Otherwise, no claim is made that the category 2 matter (claims for reimbursement containing details of invoices from subcontractors evidencing the way in which the grant was spent by the third party) qualifies for exemption under s.47 or s.49 of the FOI Act. The third party does not claim exemption in respect of the category 2 matter.

126. The subcontractors' identities in the invoices are not in issue. I do not consider that disclosure of the amounts that were paid to those subcontractors in 2000 and 2001 in connection with the third party's relocation to Lytton, could reasonably have been expected to have an adverse effect on the business, commercial or financial affairs of the third party or the subcontractors, or on the financial affairs of the Department, even at the time the Department made the decision under review (in June 2002). I am not satisfied that disclosure of the category 2 matter at this stage could reasonably be expected to have any of those adverse effects.

127. Details of invoices had to be submitted to the Department to support the third party's claim for reimbursement out of grant monies. Accordingly, there is no reasonable basis for expecting that disclosure could prejudice the future supply of like information, in terms of the second limb of s.45(1)(c)(ii) of the FOI Act.

128. I find that the category 2 matter does not qualify for exemption under s.45(1)(c) of the FOI Act.

(iii) Application of s.45(1)(c) to the category 3 matter

129. No claim is made that the category 3 matter (internal documents of the third party and other references to the third party's business affairs) qualifies for exemption under s.47 or s.49 of the FOI Act. My findings at paragraphs 119-120 above also apply to the references in these documents to the amount of the grant.

130. Neither the third party nor the Department has specifically explained in evidence or submissions how disclosure of the rest of the category 3 matter could reasonably be expected to have a relevant adverse effect under s.45(1)(c)(ii) of the FOI Act. None of that matter can properly be characterised as information concerning the Department's financial affairs. It comprises assessments by the third party of the capital expenditure required, and associated financial implications and difficulties in undertaking the relocation project, and the lease of the new premises. It is information of a kind that may well have had some commercial sensitivity as against competitors, or entities with which the third party was negotiating commercial contracts relevant to the relocation of its Bulimba operations, around the time the documents in question were created (June – July 2000, and in one instance May 2001). However, I consider that any commercial sensitivity that may once have attached to the category 3 matter has now dissipated, such that its disclosure could not now reasonably be expected to have an adverse effect on the third party's business, commercial or financial affairs.

131. The third party also relied on the second limb of s.45(1)(c)(ii), asserting that disclosure could reasonably be expected to prejudice the future supply of like information to government. Whether or not the third party would refrain from providing similar information in the future is not the relevant test. The issue is whether it is reasonable to expect that a substantial number of organisations would so refrain. I note Commissioner Albietz's comments in *Re "B"* at paragraph 161:

> *Where persons are under an obligation to continue to supply such ... information (e.g. for government employees, as an incident of their employment; or where there is a statutory power to compel the disclosure of the information) or persons must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information) then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information. In my opinion, the test is not to be applied by reference to whether the particular [supplier] whose ... information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of the sources available or likely to be available to an agency.*
>
> (my underlining)

132. I am not satisfied that disclosure of the category 3 matter could reasonably be expected to prejudice the future supply to government of like information in support of an application for a grant of financial assistance.

133. I find that the category 3 matter does not qualify for exemption under s.45(1)(c).

(iv) Application of s.45(1)(c), s.47(1)(a) and s.49 to the category 4 matter

134. My findings at paragraphs 119-120 above also apply to the references in these documents to the amount of the grant.

135. Neither the third party nor the Department has specifically explained in evidence or submissions how disclosure of the rest of the information contained in the memorandum dated 10 December 1999 from Mr Strano to the Department's Director-General could reasonably be expected to have any of the relevant adverse effects contemplated by s.45(1)(c)(ii), s.47(1)(a) or s.49 of the FOI Act. (I also noted at paragraph 86 above that some of the matter in issue from this memorandum has been disclosed in a report by the Auditor-General). The memorandum contains Mr Strano's initial recommendation for payment of a grant to the third party (the offer of a grant was subsequently withdrawn and then reinstated: see paragraph 7 above).

136. The memorandum sets out some general information about the third party's business, which is mostly information in the public domain, and then briefly explains the justification for offering a financial assistance grant. I consider that any commercial sensitivity that may once have attached to the information regarding the third party's business position in December 1999 had dissipated by the time the third party had committed to the Lytton relocation project, and certainly by the time the Department made the decision under review in June 2002. I am not satisfied that its disclosure now under the FOI Act could reasonably be expected to have an adverse effect on the third party's business, commercial or financial affairs.

137. The memorandum explains why the Department considered it appropriate to offer a grant of financial assistance to the third party for the Lytton relocation project. For the same reasons explained at paragraphs 106-118 above in respect of the category 1 matter, I am not satisfied that disclosure of that information at this point in time could reasonably be expected to have:

(a) an adverse effect on the financial affairs of the Department; or
(b) a substantial adverse effect on the ability of government to manage the economy of the State; or
(c) a substantial adverse effect on the financial interests of the Department or the State.

138. I find that the category 4 matter does not qualify for exemption under s.45(1)(c), s.47(1)(a) or s.49 of the FOI Act.

(v) Public interest balancing test

139. My findings above mean that it is not strictly necessary to consider the application of the public interest balancing tests contained in s.45(1)(c), s.47 and s.49 of the FOI Act. However, given that both the applicant and the Department have provided extensive submissions on that issue, I will address it.

Submissions of participants

140. While the Department accepted that there is a public interest in scrutinising the way in which public funds are distributed by way of financial assistance for business enterprises, it submitted that the question for consideration was what form and level of disclosure would achieve a proper scrutiny of the grants system. The Department argued that disclosure of the matter in issue was not necessary because sufficient information regarding the award of grants is already disclosed, in the following forms, which permits appropriate public scrutiny of the financial assistance granted to the third party:

- publication in the Department's Annual Report of the type of assistance granted to each recipient (e.g., training assistance, payroll tax concessions, relocation assistance, *et cetera*);

- publication of the contract document, allowing public scrutiny of its terms, including enforcement clauses and performance milestones;
- CMC investigations and reports, the Auditor-General's inspections and reports, the annual audit of the Department, and Public Accounts Committee hearings;
- the CMC's specific investigation into the circumstances surrounding the grant to the third party (which found that there was nothing to suggest any improper use of public funds); and
- the Auditor-General's numerous reviews of the system of incentive grants (three reviews in four years), including his review of the specific grant to the third party which is the subject of this review.

(Department's submissions dated 30 September 2002 and the statutory declaration of Mr Strano dated 30 September 2002.)

141. Following publication by the Auditor-General of his report No.3 of 2002-03, which dealt specifically with the circumstances surrounding the grant to the third party, and the publication of the report of the Public Accounts Committee of the Queensland Parliament dated November 2002 (Report No. 61: *"Commercial-in-confidence arrangements"*), the Department lodged further submissions (dated 20 December 2002) dealing with both of those reports. The Department's submissions regarding the Auditor-General's report can be summarised as follows:

- the Auditor-General's report contained 8 recommendations directed at further enhancing the management systems, procedures, processes and public reporting practices adopted by the Department;
- with the exception of recommendation 8, the Department has accepted the recommendations and has commenced to implement the more substantive improvements to the formal processes governing the QIIS;
- in recommendation 8, the Auditor-General recommended that the Department disclose the number and aggregate amount of incentive packages provided, stratified within bands according to value;
- the fact that the Auditor-General did not propose disclosure of the dollar amount of individual grant sums and particulars can be taken as a tacit acknowledgement that the public interest does not require this level of disclosure wherever there is a need to safeguard the State's commercial/financial interests;
- the Department considered the issue of likely detriment to existing Queensland businesses in offering incentives to the third party; and
- the publication of the Auditor-General's report has addressed all of the issues of concern raised by the applicant.

142. The Department also referred to the publication of a report on 30 May 2002 by the Victorian Auditor-General, where the Auditor-General observed that the Victorian government's refusal to disclose the amount of individual investment grants was supported by the decision in *Re Bracks and Department of State Development*. However, the Auditor-General recommended that, once the negotiation phase had been concluded, the public should be informed of the *"expected outcomes and milestones against which the incentive package is to be monitored and the actual outcomes in future years"*. The Department submitted that its level of disclosure exceeded that recommended by the Victorian Auditor-General.

143. As regards the Public Accounts Committee report, the Department submitted that:

- the basic premise of the report is that information required to assess government financial management should be readily available to the public unless it is in the public interest to withhold it;
- the Department accepts that information should be made public unless there is a justifiable commercial or legal reason for it not to be;
- the Department accepts the Report's recommendation that access to information should not be restricted without clearly identifying the pertinent elements of the public interest and sufficiently justifying non-disclosure; and
- the report is concerned mainly with the use of "commercial-in-confidence" provisions by government, and its relevance regarding the application of specific exemption provisions contained in the FOI Act is limited.

144. In his statutory declaration dated 30 September 2002, Mr Strano submitted that the commercial lifespan or usefulness of the matter in issue was about five years. He submitted that, from his experience, disclosure of the information at an earlier time would:

- destroy the confidentiality and integrity of the investment facility strategies;
- destroy the confidentiality and integrity of the information; and
- adversely affect the agency in the proper conduct of its affairs.

145. The Department therefore submitted that premature disclosure of the matter in issue would not be in the public interest. It further argued that debate as to the transparency of the grants scheme generally, or this particular grant, was not likely to be advanced in any real sense by disclosure of the matter in issue:

> *111. Accordingly, the balance of public interest requires the release of "sufficient information" but not "commercially sensitive" information the release of which can be reasonably expected to cause serious commercial harm to the agency. The subject information clearly qualifies on this account, for not only is there sufficient public information to allow for public scrutiny and accountability of government, but the commercial harm which would follow from the release of the balance of the information would be serious.*
>
> (Department's submissions dated 30 September 2002)

146. The applicant submitted that:

- admissions by the Queensland government that it failed to comply with the QIIS mandatory criteria in awarding financial assistance to the third party have undermined public confidence in the transparency and legitimacy of the grants scheme;
- existing Queensland businesses suffered detriment as a result of the grant to the third party;
- Queensland taxpayers must be provided with sufficient evidence to assess the benefits that accompany the granting of industry assistance;
- disclosure of the matter in issue would enhance the Queensland government's accountability to Queensland taxpayers;
- the Auditor-General has called for an overhaul of commercial-in-confidence arrangements to ensure that government departments are more open to public scrutiny, and has recommended that any stipulation for confidential treatment of information be reviewed once a contract has been signed, in the interests of accountability and the public interest;

- *"the Opposition acknowledges and accepts the need for negotiations between government and a private sector enterprise to be held in a regime of privacy or secrecy. However, the Opposition firmly believes that once the government decides to provide a financial incentive or grant to a private sector organisation, and the arrangement has been accepted by all parties, the amount provided, and the reasons for its provision, should be made public. The government after all is the custodian of taxpayers' money, and consequently, the taxpayer or public have the right to know how their funds have been allocated and the purpose of the allocation."*

(Applicant's application for internal review dated 19 June 2002, and letters dated 5 November 2002 and 17 February 2003)

Discussion

147. The Department acknowledged that there is a strong public interest in scrutinising the way in which public funds are distributed in the form of financial assistance for business enterprises. However, it argued that there is already sufficient information in the public domain to allow that scrutiny to take place, and that disclosure of the matter in issue would not contribute to the debate about the transparency of the QIIS.

148. I note that, in this case, both the CMC and the Auditor-General have investigated the circumstances surrounding the grant to the third party (although, as far as I am aware, the CMC only investigated whether or not the Premier's brother was involved with the third party), and found no evidence of corruption or inappropriate relationships between the State government and the third party. However, both have criticised aspects of the QIIS and made recommendations for the improvement of its administration by the Department (the CMC's recommendations were made in the course of its investigation into financial assistance given by the Department to Cutting Edge Post Pty Ltd). There has also been criticism of grants schemes generally from many other organisations, and questions raised as to whether such schemes give value for money.

149. I consider that there are significant public interest considerations which weigh heavily in favour of disclosure of most of the matter in issue. Many of those considerations are identified and discussed in detail by various bodies which have analysed and reviewed grants schemes generally, or the incentive schemes administered by the Department in particular. The most pertinent are set out in the following paragraphs.

- Productivity Commission

150. In a speech to the Committee for Economic Development of Australia in November 2002 (*"Inter-State bidding wars: calling a truce"*) Mr Gary Banks, Chairman of the Productivity Commission, discussed the phenomenon in Australia of competition between State and Territory governments to offer financial inducements to attract major events and investment projects. (The third party was mentioned as a company that had sought and obtained financial incentives from several States.) Mr Banks said (at p.3):

> *… the facts are that these sorts of deals are difficult to justify on economic grounds. Moreover, the processes for clinching them are even harder to justify against principles of good government.*
>
> *In practice, it is difficult to assess the details of the claims made about particular assistance packages because governments generally keep the analysis and budgetary costs of the assistance to themselves. This raises its*

own problems in terms of transparency, accountability and due process. At the extreme, it opens the door to suspicions of nepotism or even corruption. More generally, when public scrutiny is hindered, there is more risk that an ethos of "can do" managerialism will swamp more cool-headed "should we do" decision-making.

Indeed, on a number of occasions when the books have been opened up, it has turned out that the benefits had been significantly oversold, while the costs had been not only understated but often not understood.

For these and other reasons, the purported gains for the State are often illusory, and even when they are positive there will often be negative outcomes nationally.

151. Mr Banks recognised that State and Territory governments have a critical role to play in the development of wealth-creating businesses and industries in Australia and that competition between States on "economic fundamentals", such as the cost of essential services, business registration fees and payroll taxes *et cetera*, is an important benefit of a federal polity. However, he questioned whether competition between States regarding the provision of direct financial assistance to the business community really provided economic benefits to the community, or just amounted to "business welfare". He said that a threshold issue is the extent to which financial assistance really makes a difference in persuading a business to establish its operations within a particular State (at pp.6-7):

An extensive empirical literature indicates that the real drivers of firms' investment location decisions lie elsewhere. For example, a firm considering building an alumina plant in Malaysia or Australia will weigh-up many social, economic and political factors. These include transport and energy costs, infrastructure quality and reliability, regulatory requirements, workforce skills, proximity to key markets and, not least right now, political and social stability. These factors generally overshadow even general policy settings such as company tax rates, let alone specific government inducements. In a recent [Productivity Commission] *survey of Australia's top 300 firms … a large majority of firms considered commercial or market-related factors to be more important overall than government policies in their locational decisions. Among government policies, the stand-out influence on decision-making was corporate taxation. This highlights the importance of all governments focussing on the economic fundamentals.*

It also underlines the strong possibility that the provision of investment incentives might have little influence on a firm's ultimate decision, wasting taxpayers' money on firms who would have located in the jurisdiction without a subsidy. Government officials need detailed information to assess the merits of a project and to differentiate between the marginal investor and those who will invest anyway. Businesses have incentives to engage in strategic behaviour to secure the maximum incentives available – overstating both the benefits to the State and the level of assistance necessary to secure them. Government officials are generally at a disadvantage in such games.

As Australia's States and Territories could be said to be broadly comparable in terms of the economic fundamentals, investment incentives offered by Governments are more likely to "tip the balance" for investment that is

> *footloose* within *Australia. For example, while Richard Branson's decision to enter Australian skies was facilitated primarily by the Commonwealth Government's relaxation of foreign investment restrictions in 1999, the inducements offered by different State Governments may well have influenced his decision of where within Australia to headquarter Virgin Blue.*
>
> *But this does not end the matter. A footloose firm need not stop being footloose simply because an initial inducement has been accepted. Once the inducement ends, the business again has the option of relocating, unless a further inducement is provided to remain. The trans-Australian travels of the Berri Fruit Juice company are testimony to this. Hence, the cost to the taxpayer can be ongoing, or the investment can be "lost". While some States may win, at least initially, such bidding wars can become negative-sum games, with Australia the poorer as a result.*

152. Mr Banks challenged the claim that the provision of industry assistance necessarily results in net benefits for levels of employment in the State economy (see the discussion at pp.7-8 of his speech). While he accepted that, if State inducements succeed, there will be employment associated with the new activity, that is only the start of the matter. Mr Banks observed that, in general, the subsidised project will draw capital and labour, particularly skilled labour, from other local firms. This will mean either that the wage rates of such employees increase, raising the costs of other firms within the local economy; or that some other potential projects will be stymied. At the extreme, there may be little or no change in employment in the local economy – that is, old jobs will be "crowded out" by the new ones. Where the induced projects are more capital-intensive than those displaced, total employment in theory could fall. For that reason, the Commonwealth Department of Finance and, at the State level, bodies such as the NSW Treasury and the ACT Auditor-General, have indicated that those agencies preparing cost-benefit assessments for the provision of industry assistance should not, as a general rule, count employment gains among the benefits of particular projects. Aggregate employment, according to Mr Banks, is related principally to aggregate economic activity and regulation that affects the labour market directly, not industry assistance.

153. I have quoted Mr Banks' speech at length because, in arguing in favour of "opening up the books", Mr Banks addressed arguments of the kind which the Department has put forward in this case in favour of non-disclosure of the matter in issue (at pp.11-13):

> *… claims of economic benefit from selective industry assistance are often poorly founded. They generally arise from a restricted consideration of the linkages in an economy, and what those linkages and associated multipliers mean for policy. They focus on the direct impacts of an assisted project, often without considering the indirect economic effects or the opportunity costs of the assistance and resources expended on the project.*
>
> *It is of course possible for a State to 'win' on some individual projects. The Commission's modelling in 1996 suggested that Victoria could indeed gain some net economic benefit from the relocation of the Grand Prix (depending on the size of the inducement paid, which had not been disclosed).*
>
> …
>
> *The scope for misunderstandings about the benefits and costs of selective assistance, and the risks in its provision, highlight the need for careful analysis and transparent evaluation of assistance packages. Public scrutiny is desirable*

to test the assumptions, methodologies and claims made for projects, and to allow those who might be adversely affected to have their concerns considered too. Without public disclosure, a 'can do' mentality within agencies 'responsible' for business is more likely to neglect a robust examination of the costs and benefits of assistance.

…

One argument made for non-disclosure is a need to protect information that the recipient considers commercially sensitive. However, it is not clear how disclosing the size of the assistance provided to a firm, or the reasons for providing it, could be used by competitors in the marketplace. Some aspects of the analysis of the firm's commercial operations or prospects, which may have some value to its competitors or customers, may be of a potentially damaging nature if released. However, even this can be overstated. When private businesses are receiving tax-payers' money, the presumption should be that tax-payers are entitled to know the details. Otherwise, as the Victorian Auditor General has commented:

> … the [lack] of information on public expenditure undermines public confidence in the integrity of the process and creates suspicion of corruption and waste. Indeed, if there is widespread public support for the provision of assistance to industry, then this can only be enhanced by the provision of reliable information.

The more credible or logical argument mounted for non-disclosure is to strengthen the position of the Government in subsequent negotiations with other firms, by denying them knowledge of how much the Government is willing to pay for particular types of projects or investment commitments. Non-disclosure, it is argued, can also prevent or minimise the "me-too" factor. The Victorian Auditor-General, in agreeing to limits on disclosure in his recent report, accepted the Government's argument that disclosure would affect the State's negotiating position and could escalate the costs of investment attraction programs.

While there may be some logic in this position, in my view there are stronger reasons in favour of full public disclosure. These include the misconceptions about the merits of selective assistance that I have already mentioned, together with evidence of poor process and analysis, and ill-advised assistance packages being offered in some cases. It is, in any case, questionable whether secrecy does facilitate the minimisation of government outlays. Rent-seeking could arguably be greater *when undefined pots of money appear to be up for grabs.*

Non-disclosure allows poor analysis of the effects of incentives to go unchallenged. [The subsidising of the V8 Super Car series in Canberra was given as an example. When that event was reviewed by the ACT Auditor General, it was found that the ACT Government's financial analysis was deficient]. *… Indeed, contrary to public proclamations at the time, subsidising the race actually yielded a* net loss *to the ACT community of more than $11 million over three years. It was only after this was exposed publicly that the event was abandoned. …*

> *The general lack of transparency means that we cannot be sure how widespread the problems are in this country. Thus many agencies and parliamentary committees* [identified at pp.14 and 15 of his speech] *have called for greater transparency in industry assistance in several jurisdictions. They have also recommended sensible reforms to the administration, evaluation and monitoring of assistance programs. …*

154. Mr Banks called for an end to interstate bidding wars. He urged all state and territory governments to undertake hard-headed, independent reviews of their programs to determine what, in retrospect, they had really achieved, and to take a broader view of the inter-jurisdictional repercussions. He said (at p.17):

> *If governments can agree to a truce on inter-State bidding wars and other selective corporate support, they can then concentrate their forces on a much more worthy and productive battle; improving further their economic governance, tax regimes, infrastructure and other service delivery. These are the real mainstays of the contribution of State and Territory Governments to economic performance in the long term.*

155. As noted at paragraphs 121-123 above, all States except Queensland and the Northern Territory have signed a three year agreement to eliminate unnecessary bidding wars where there is no new investment for Australia. When the agreement was announced, Victorian Treasurer John Brumby said:

> *The bottom line is that the states were wasting significant amounts of taxpayers' funds in unproductive bidding wars. The net effect was no new national employment, or exports – it was just taxpayers subsidising the shuffling of chairs.*

156. South Australia's Treasurer, Kevin Foley, said:

> *We're sending a very clear message to business in Australia, that the days of corporate welfare in this nation are over. The days of rent seekers, that is, companies that would hawk themselves from state to state looking for the most gullible of the states, are over.*
>
> (ABC On-Line article 5 September 2003)

- Public Accounts Committee

157. The Public Accounts Committee of the Queensland Parliament published its report on *"Commercial-in-confidence arrangements"* (Report no. 61) in November 2002, after conducting an extensive public inquiry into the use by government of commercial-in-confidence arrangements. That inquiry was commenced following review by the Committee of the Auditor-General's Report No.2 2000-2001. The focus of the inquiry was to develop a set of principles which would have application across all public sector entities in Queensland. In summary, the Committee was of the view that a full review of commercial-in-confidence arrangements is needed, and made the following specific recommendations:

1. Information should be publicly available

- *The general principle is that information should be made public unless there is a justifiable commercial or legal reason for it not to be.*
- *Contracts that include commercial-in-confidence provisions should be publicly identified together with a specification of which provisions have been withheld from public scrutiny.*
- *The party requesting commercial-in-confidence should be identified, should justify that position and demonstrate how its commercial interests may be harmed by disclosure.*
- *Taxpayers should not have to rely on provisions in the Freedom of Information Act to access information for the purpose of scrutinising government financial management.*

2. Accountability and public interest should prevail

- *The information is needed for public accountability and public interest should take precedence.*
- *Agencies should report on how the public interest is served when information is classified as commercial-in-confidence.*
- *Agencies should identify alternative accountability mechanisms if information is classified as commercial-in-confidence.*
- *Performance milestones for incentive packages should be published annually together with each organisation's progress in achieving them in each period covered by the arrangement.*

3. Commercial sensitivity decays with time

- *Agencies should develop a protocol for a method of public disclosure and a time period within which this must take place, for example, publication on the agency's website within 30 days of signing.*
- *The duration of commercial-in-confidence provisions should be explicitly considered when a contract is being written.*
- *The time period that the information is deemed commercial-in-confidence should be disclosed together with an explanation for the time period chosen.*
- *Contracts that are commercial-in-confidence should be subject to regular review to ensure the conditions justifying confidentiality remain valid.*

158. At pages 13 and 14 of its report, after referring to evidence given to the Committee by various government employees (including Mr Strano of the Department) the Committee specifically commented as follows:

> *The committee is aware that it is current Government policy to withhold the value of individual incentive packages from public disclosure on the basis that it may undermine its future bargaining position in relation to other jurisdictions, thus damaging the capacity of the Government to compete for investment in the future. However, given the arguments advanced by State Development, the committee remains unconvinced that disclosing the amount of incentives paid to a particular company will necessarily result in the need to offer a greater amount to another company or interest.*
>
> …

> *The committee examined the issue of how the public could judge the appropriateness of decisions to provide funding if it is not disclosed. A satisfactory answer was not forthcoming. The committee was advised that reporting involves the total amount of assistance and the broad parameters of the outcomes in terms of jobs and what has been achieved. The committee considers that the provision of incentives is no different to other types of contracts with respect to assessment of performance.*

159. However, the State government rejected the Committee's findings and recommendations. The Premier stated that any change to the policy of non-disclosure would jeopardise Queensland's competitive position:

> *A fundamental principle is that any information that would undermine a company's competitive position or undermine public sector agencies' ability to negotiate the best deal for Queensland taxpayers will not be publicly released.*
>
> (See *Hansard*, 3 December 2002, at p.5186)

- Auditor-General

160. The issue of disclosure of incentive package details administered by the Department was raised by the Auditor-General in Report No.2 2000-2001. He made a number of recommendations to enhance the public disclosure of information which would assist in scrutinising such packages. The Department adopted some of those recommendations, agreeing to include in its Annual Report information about:

- general elements (training assistance, payroll tax deductions, relocation assistance) of each attraction package;
- performance criteria required of the recipient including details of job targets and capital investment associated with the development;
- recipient's accountability framework in the form of security provisions (unconditional bank guarantee or equivalent) required in order to safeguard the State in the event that performance criteria are not attained; and
- the total aggregate value of the financial incentives offered and paid out in a particular year.

161. The Department's annual report for 2000-01 was the first year this information was included. While the Auditor-General commended the additional disclosure, he stated that it was:

> *…the minimum acceptable standard which will provide some measure of accountability to facilitate parliamentary and public scrutiny while allowing the government to retain flexibility in future incentive negotiations.*
>
> (Auditor-General's submission to the Public Accounts Committee)

162. Greater disclosure of incentive package details was again recommended by the Auditor-General in his report (No.3, 2002-03) which examined the QIIS incentive arrangements. Recommendation 8 provided:

> *While recommending the need to safeguard the commercial/financial interest of the State, I continue to advocate greater disclosure in the public interest. I recommend that* [the Department] *enhance current disclosure to also disclose in its Annual Report the number and aggregate amount of incentive packages provided to proponents stratified within bands according to value.*

163. The Department rejected this recommendation, again relying on the argument that no other states published this type of information, and that such disclosure could undermine the Department's future bargaining position in relation to other jurisdictions, thus damaging the capacity of the Queensland Government to compete for investment in the future.

164. As to one of the specific issues which had been referred to him for investigation by the Opposition, namely, whether the Department had undertaken an assessment of the likely detriment to existing Queensland businesses before awarding the grant to the third party, the Auditor-General stated:

> *On the issue of likely detriment to existing Queensland businesses, QAO was unable to sight formal documentary evidence to support that an impact assessment was conducted by* [the Department] *prior to approval of the incentive package. I also note that as the incentive assistance provided to* [the third party] *was approved on the basis that it was a Major/Strategic project, the question as to whether the project satisfied the criteria for QIIS-eligible projects was not considered, as it was not a requirement for assessment of Major/Strategic projects at that time.*
>
> *Accordingly, I have recommended that a "detriment of Queensland industry" test should occur in all cases involving the provision of incentives (Recommendation 4)…*

165. The Auditor-General stated in his report that his officers had sighted an undated folio in the Department's file which indicated that the project would have no detriment to existing business. However, that statement appears to be contradicted by other information on the Department's file. As the Auditor-General noted on page 37 of his report, a Departmental assessment dated 10 December 1999 stated that the third party was not QIIS-eligible due to the following reasons:

- the low number of new jobs; and
- likely detriment to existing businesses serving the fruit juice market in Queensland.

166. The Auditor-General also noted the apparent confusion within the Department regarding which eligibility criteria were to be used in assessing Major/Strategic projects. He noted an absence of detailed procedures for the assessment of Major/Strategic projects against the criteria reproduced at paragraph 5 above. He said that, in essence, those projects were assessed by the Department using the criteria for QIIS-eligible projects. Even then, there was confusion regarding which were current eligibility criteria for QIIS projects. For example, there appears to have been an assessment made about how many new jobs the third party's project would create, yet that criterion was removed from the QIIS eligibility criteria following a variation to the scheme in August 1999.

Findings

167. I do not accept the Department's contention that it is not necessary to know the amount of the third party's grant in order to be able to scrutinise its administration of the relevant incentive scheme in this instance and to participate in an informed debate about the costs and benefits of that grant of public monies. I consider that the dollar amount of a grant is a vital piece of information in conducting an assessment or analysis of an incentive package. Its disclosure would allow experts to assess, and contribute to informed public debate about, whether the grant represented value for money for Queensland taxpayers in terms of its return for the

Queensland economy. In my view, there is a strong public interest in enhancing the accountability of the Department in respect of its administration of financial incentive grants to industry, which weighs in favour of disclosure of the matter in issue, and the category 1 matter in particular.

168. I acknowledge that it is necessary to balance the public interest in ensuring that government agencies are able to operate as effectively as possible, with the public interest in ensuring political and financial accountability. In this instance, I have decided that there are no reasonably apprehended adverse effects from disclosure of the matter in issue which need to be weighed against the public interest considerations favouring disclosure. It follows that I have assessed the case for non-disclosure of the particular matter in issue based on the interests of the effective administration by the Department of the relevant incentive schemes, as a weak one. Even if the matter in issue had technically satisfied the preliminary tests for exemption under s.45(1)(c), s.47(1)(a) or s.49, I consider that the balance of public interest would overwhelmingly have favoured its disclosure. That is not to say that the balance of public interest might not favour withholding, for an appropriate length of time, details of a different grant, made under different circumstances.

169. I also note that, in this instance, there have been public claims that existing fruit juice businesses suffered detriment as a result of the grant made to the third party and its relocation to Lytton. The Auditor-General stated that, from his review of the relevant guidelines existing at the time of the grant, an assessment of likely detriment was not an eligibility criterion in respect of a grant of assistance to a Major/Strategic project. The Department stated in its submissions that such an assessment had, in fact, been carried out. The problem is, however, that some of the Department's own documents contradict the outcome of the assessment in that they state that the third party's project was not QIIS-eligible because of the likely detriment to existing businesses serving the fruit juice market in Queensland (see paragraphs 164-166 above). Furthermore, there appears to have been confusion within the Department about which set of criteria was to be applied to the third party's project in assessing its eligibility for a grant.

170. In those circumstances, I consider that there is a public interest in allowing taxpayers generally, and the third party's competitors in particular, to scrutinise the terms of the third party's grant, and why the Department assessed it as representing a good investment decision for Queensland. Disclosure of the category 1 matter and the category 4 matter in particular would further that public interest.

171. Disclosure of the category 2 matter would merely confirm expenditure of the grant in the manner anticipated by the Department. Disclosure of folios 34, 43 and 96 from the category 3 matter would assist to confirm the third party's commitment to the levels of capital expenditure that were expected in return for the grant. Disclosure of folios 51 and 119 from the category 3 matter, on the other hand, would not appear to be capable of enhancing the accountability of the Department, or allowing the community to have a better understanding of why the grant was awarded and whether it represented value for money in terms of its return for the Queensland economy.

172. I accept that the public interest may not weigh in favour of disclosure where commercial information communicated by business operators in support of applications for grants is of such a character that it possesses genuine and current commercial sensitivity, such that the competitors of the grant applicant could make use of the information to the commercial detriment of the grant applicant Similarly, I accept that, in some circumstances, premature disclosure of information concerning incentive packages offered by the Department may not be in the public interest. However, I consider that, once a deal has been finalised, there are strong

public interest considerations favouring disclosure of relevant details of the financial assistance agreement (including the total amount of the grant) within a reasonable period of time. As I have made clear above, in my discussion of the application of s.45(1)(b) and s.45(1)(c) of the FOI Act, I consider that the matter in issue in this review has aged to such an extent as to erode any commercial sensitivity that it might once have had for the third party. However, it does not appear that the Department conducts any regular review of grants-related information with a view to disclosing that which could no longer harm any relevant public or private interests.

173. In assessing the competing public interest considerations, I consider that the general criticisms which have been levelled at industry incentive schemes warrant bringing a greater transparency and accountability to selective industry assistance. That will, in turn, enhance levels of probity and propriety, allow experts to carry out independent analysis of the claimed economic benefits of assistance packages, and promote greater public trust and confidence in the process and outcomes achieved. As the Chairman of the Productivity Commission argued (see paragraph 153 above), non-disclosure allows any substandard analysis by government officials of the positive or negative effects of incentives advanced from public funds to go unchallenged.

174. I acknowledge that there are other processes of accountability in place in relation to the Department's administration of the relevant incentive schemes. However, I do not consider that that lessens, to any significant extent, the public interest in enhancing the accountability of the Department for its administration of the scheme, by way of providing interested members of the public with information which better allows them to scrutinise grants, including the reasons why they were made, whether they satisfied the published criteria and the key performance conditions, and to judge whether they represented value for money. I consider that disclosure of the matter in issue in this case would enhance those public interest considerations. As Commissioner Albietz noted in *Re Director-General, Department of Families, Youth and Community Care and Department of Education* (1997) 3 QAR 459 at 464:

> *I do not accept that the existence of other accountability mechanisms can be used as a basis for any significant diminution of the public interest in disclosure of information under the FOI Act in order to promote the accountability of government agencies. The FOI Act was intended to enhance the accountability of government (among other key objects) by allowing any interested member of the community to obtain access to information held by government (subject to the exceptions and exemptions provided for in the FOI Act itself). The FOI Act was not introduced to act as an accountability measure of last resort, when other avenues of accountability are inadequate. The FOI Act gives a right to members of the community which is in addition to, and not an alternative for, other existing rights. Indeed, applications are frequently made under the FOI Act to enable members of the community to arm themselves with the information necessary to afford a meaningful opportunity to pursue some of the other accountability mechanisms referred to by the applicant.*

175. Accordingly, even if I had been satisfied that the matter in issue met the preliminary requirements for exemption under s.45(1)(c)(ii), s.47(1)(a) or s.49 of the FOI Act, I consider that there are significant public interest considerations favouring disclosure of the matter in issue (with the exception of folios 51 and 119 – see paragraph 171 above) which would have warranted a finding that disclosure of the relevant matter in issue would, on balance, be in the public interest.

(c) Summary of findings

176. For the foregoing reasons, I find that none of the matter in issue qualifies for exemption under s.45(1)(c), s.47(1)(a) or s.49 of the FOI Act.

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

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

> ***46.(1)*** *Matter is exempt if—*
>
> *(a) its disclosure would found an action for breach of confidence; …*

178. The correct approach to the interpretation and application of s.46(1) of the FOI Act was explained by Commissioner Albietz in *Re "B"*. The test for exemption under s.46(1)(a) must be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, with appropriate standing to bring an action to enforce an obligation of confidence claimed to bind the respondent agency not to disclose the information in issue. At paragraph 43 of *Re "B"*, Commissioner Albietz said that an action for breach of confidence may be based on a contractual or an equitable obligation of confidence. The Department's submissions invoke primary reliance on a contractual obligation of confidence. An equitable obligation of confidence was relied upon in the alternative.

179. At paragraph 45 of *Re "B"*, Commissioner Albietz said:

> *In the context of s.46(1)(a) the word "confidence" must be taken to be used in its technical, legal sense, thus:*
>
> > "A confidence is formed whenever one party ('the confider') imparts to another ('the confidant') private or secret matters on the express or implied understanding that the communication is for a restricted purpose." *(F Gurry "Breach of Confidence" in P Finn (Ed.) Essays in Equity; Law Book Company, 1985, p.111.)*
>
> *My references to a cause of action for breach of a contractual obligation of confidence must be understood in this sense. A contractual term requiring that certain information be kept secret will not necessarily equate to a contractual obligation of confidence: an issue may arise as to whether an action for breach of the contractual term would satisfy the description of an "action for breach of confidence" (so as to fall within the scope of s.46(1)(a) of the FOI Act). An express contractual obligation of confidence ordinarily arises in circumstances where the parties to a disclosure of confidential information wish to define clearly their respective rights and obligations with respect to the use of the confidential information, thereby enabling the parties to anticipate their obligations with certainty. A mere promise to keep certain information secret, unsupported by consideration, is incapable of amounting to a contractual obligation of confidence, and its effectiveness as a binding obligation would depend on the application of the equitable principles discussed in more detail below.*

180. After referring to this passage in its submission dated 30 September 2002, the Department argued:

> *119. The contract between the parties contains a number of provisions which impose mutual obligations of confidence on the agency and on the company. Under clause 22.1, the* [Department] *agreed to treat all "commercial intelligence" arising from the Project, which is not already in the public domain, as confidential.*
>
> …
>
> *125. Clause 22 was the subject of negotiation between the agency and the company's lawyers. This was not simply a case of the parties adopting a standard form of contract. They directed their minds to the particular issue, made relevant comments, negotiated and in the end, agreed on the form of words to be found in Clause 22. This process evidences an obvious intention by the parties to define clearly their respective rights and obligations with respect to the use of the confidential information, thereby enabling them to anticipate their obligations with certainty as foreshadowed in* Re "B".
>
> *126. Further, the mutual obligations were supported by consideration moving from party to party, namely, the performance of the project development by the* [third party] *and the grant of financial assistance offered by the* [Department] *and accepted by the* [third party].

181. The parties to the Financial Assistance Agreement (the Agreement), which is annexure 'D' to Mr Strano's statutory declaration dated 30 September 2002, are the State of Queensland and the third party. Clause 22 of the Agreement provides:

> ***22. Confidentiality/Publicity***
>
> *1.0 Subject to clauses 22.2 and 22.3, the Department will treat all commercial intelligence arising from the Project, which is not already in the public domain, as confidential.*
>
> *2.0 The Department reserves the right to disclose to any person (including without limitation by Public Communication) the name of the Grantee, details of the Financial Assistance and the Project.*
>
> *3.0 Clause 22.1 does not apply to disclosure by the Department:*
> *( ) if required by law;*
> *( ) to its employees or advisors in relation to the Project;*
> *( ) consented to in writing by the Grantee (such consent not to be unreasonably withheld).*
>
> *4.0 (a) Subject to paragraph (b), the Grantee must not disclose to any person, and must ensure that any other Group Entity does not disclose to any person, (including without limitation by Public Communication) any information in relation to or in connection with the Financial Assistance without the Department's prior written approval (which may be withheld in the Department's discretion).*

> *(b) For the purposes of paragraph (a) the expression "person" includes (without limitation) any existing or prospective shareholder, investor, financier or customer or any other government body or authority but excludes any adviser owing a duty of confidence to the Grantee in connection with the information.*
>
> *(c) Paragraph (a) does not apply to disclosure by the Grantee*
>
> *( ) if required by law or to comply with the listing rules of any relevant stock exchange;*
> *( ) to its employees who accept a duty of confidence in relation to the information or advisors in relation to the Project who owe a duty of confidence to the Grantee in connection with the information;*
> *( ) consented to in writing by the Department (which may be given or withheld in the Department's discretion).*

182. The Department submitted that the dollar amount of the grant, and its various components, would form part of "commercial intelligence" under clause 22.1, as would all of the other matter in issue. It also submitted that the matter in issue is "information in relation to or in connection with the Financial Assistance" under clause 22.4.

183. It can be seen that clause 22.1 imposes an obligation on the Department to treat as confidential all commercial intelligence arising from the project which is not already in the public domain, subject to the exceptions specifically provided for in clause 22.2 and clause 22.3. By clause 22.4, a separate obligation of confidence is imposed on the third party in respect of any information in relation to or in connection with the Financial Assistance. "Financial Assistance" is a term defined in the Agreement, which for present purposes can be taken to mean the amount of the grant to the third party.

184. The term "commercial intelligence" is not defined. It could be taken to refer simply to information of a commercial nature. However, that would be too broad an interpretation in the context of a contractual clause intended to impose an obligation of confidence. I consider that the term "commercial intelligence" was intended to refer to information of a commercial nature which has commercial value or sensitivity to the third party, and which comes into the possession of the Department through its dealings with the third party in respect of the project.

(a) Category 1 matter

185. Clause 22.2 quite properly reserves to the Department the right to disclose to any person the name of the third party, details of the financial assistance, and details of the project. Such a reservation is appropriate having regard to the accountability obligations of a government agency administering a scheme or program funded from consolidated revenue.

186. In light of this unilateral and unconditional right, disclosure of the category 1 matter by the Department under the FOI Act could not found an action by the third party for breach of a contractual obligation of confidence owed by the Department (the third party being the only plaintiff with standing to sue for a breach of clause 22 of the Agreement).

187. As submitted in paragraph 125 of the Department's written submission (quoted at paragraph 180 above), clause 22 was intended by the parties to define clearly their respective rights and obligations with respect to the use of confidential information. In those circumstances, it seems unnecessary to consider the Department's alternative submission based on an equitable obligation of confidence. The learned authors of Meagher, Gummow and Lehane, *Equity: Doctrine and Remedies*, 4th ed, 2002, (who, with Mr Justice Heydon as an editor of the latest edition, now include two High Court judges, and a judge of the NSW Court of Appeal) have expressed the view (at p.1112) that:

> *Where there is a contract then it is to the contract that the court should look to see from express words or necessary implication what the obligations of the parties are, and the introduction of equitable concepts should be resisted:* Vokes v Heather *(1945) 62 RPC 135 at 142;* Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd *[1979] VR 167 at p.191*.

188. However, the authors acknowledged that a number of cases have treated equitable principles as if they overlapped or were concurrent with the common law, so I will briefly address the Department's reliance, in the alternative, on an equitable obligation of confidence. The five cumulative requirements which must be established to found an action in equity for breach of confidence are:

(a) it must be possible to specifically identify the information, in order to establish that it is secret, rather than generally available information (see *Re "B"* at pp.303-304, paragraphs 60-63);

(b) the information in issue must have "the necessary quality of confidence"; i.e., the information must not be trivial or useless information, and it must have a degree of secrecy sufficient for it to be the subject of an obligation of conscience (see *Re "B"* at pp.304-310, paragraphs 64-75);

(c) the information must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it (see *Re "B"* at pp.311-322, paragraphs 76-102);

(d) disclosure to the applicant for access would constitute an unauthorised use of the confidential information (see *Re "B"* at pp.322-324, paragraphs 103-106); and

(e) would be likely to cause detriment to the confider of the confidential information (see *Re "B"* at pp.325-330, paragraphs 107-118).

189. As to requirement (c), I can see nothing in the relevant circumstances that could warrant a finding that there exists a concurrent equitable obligation of confidence binding the Department in terms that are in any way materially different to the terms of clause 22 of the Agreement, i.e., any concurrent equitable obligation would also be subject to a condition permitting the Department to disclose the identity of the third party, details of the financial assistance, and details of the grant (and would also be subject to conditions equivalent to those specified in clause 22.3 of the Agreement).

190. I should also note that, for reasons explained in the addendum to my reasons for decision, I am satisfied that the amount of the grant does not have the necessary quality of confidence to satisfy requirement (b) from paragraph 188 above. Moreover, if the Department were relying

only on an equitable obligation of confidence, then the fact that the third party no longer objects to disclosure of the amount of the grant would mean that its disclosure under the FOI Act would not constitute a use that was not authorised by the putative plaintiff in the hypothetical action for breach of confidence: see requirement (d) from paragraph 188 above.

191. In addition, in an action for breach of confidence concerning information supplied to government, it has been established that Australian law will recognise a public interest exception, on the basis that an obligation of confidence claimed to apply in respect of information supplied to government will necessarily be subject to the public's legitimate interest in obtaining information about the affairs of government: see *Esso Australia Resources Ltd & Ors v Plowman & Ors* (1995) 183 CLR 10, *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662, and Commissioner Albietz's comments in *Re Cardwell Properties Pty Ltd & Williams and Department of the Premier, Economic and Trade Development* (1995) 2 QAR 671, at pp.693-698 (paragraphs 51-60). I have explained at paragraphs 167-173 above why I consider that there are strong public interest considerations favouring disclosure of the category 1 matter in the interests of proper accountability for the administration by the Department of the relevant incentive scheme in this instance.

192. The Department also made (at paragraphs 140-146 of its written submission dated 30 September 2002) a misconceived submission invoking s.46(1)(a) on the basis that an obligation of confidence is owed to the Department in relation to confidential information imparted to the third party (i.e., the amount of the grant and particulars of the grant). However, there is no suggestion that any of the matter in issue will be disclosed to the applicant by the third party. The applicant has made an access application to the Department under the FOI Act. Disclosure of information by the Department under the FOI Act is the only disclosure in contemplation, and the only relevant obligation of confidence is one owed by the Department to a plaintiff with standing to bring a hypothetical action for breach of confidence in respect of disclosure by the Department.

193. For the foregoing reasons, I am satisfied that disclosure of the category 1 matter would not found an action for breach of confidence. I find that the category 1 matter does not qualify for exemption under s.46(1)(a) of the FOI Act.

(b) Category 2 matter

194. The category 2 matter comprises claims for reimbursement (out of grant monies) for sums expended on individual items involved in relocation of the third party's business operation to the Lytton Industrial estate. The category 2 matter discloses the total amount of reimbursement sought, being the total amount of the grant (to which my findings above in respect of the category 1 matter also apply). Otherwise, the category 2 matter merely discloses the cost of individual work items in establishing the new premises. In the latter regard, I am satisfied that the information is too innocuous to qualify as information of commercial value or sensitivity to the third party, which could be regarded as "commercial intelligence" warranting confidential treatment by the Department in accordance with clause 22.1 of the Agreement.

195. In any event, the category 2 matter answers the description of "details of the Financial Assistance" in clause 22.2 of the Agreement. Accordingly, for the same reasons explained at paragraphs 185-190 above in respect of the category 1 matter, its disclosure would not found an action for breach of a contractual obligation of confidence or an equitable obligation of confidence. I find that the category 2 matter does not qualify for exemption under s.46(1)(a) of the FOI Act.

(c) Category 3 matter

196. The category 3 matter comprised information of some commercial sensitivity to the third party when it was first communicated to the Department some three to four years ago. Accordingly, the Department would have been obliged to accord it confidential treatment in accordance with clause 22.1 of the Agreement.

197. With the passage of time, however, I consider that the category 3 matter has lost the commercial sensitivity it once had for the third party. That is why I found it did not qualify for exemption under s.45(1)(b) or s.45(1)(c) of the FOI Act (and I note that the third party no longer objects to disclosure of folio 119). That would also mean that it lacks the necessary quality of confidence to satisfy requirement (b) to found an action in equity for breach of confidence (see paragraph 188 above), in accordance with the principle explained in *Re "B"* at p.307, paragraph 71(i).

198. However, the third party is entitled to rely on clause 22.1 of the Agreement, which imposes a continuing obligation on the Department to accord the category 3 matter confidential treatment. (Indeed, according to clause 12.2 of the Agreement, clause 22 continues to operate with full effect, despite any termination of the Agreement: seemingly, in perpetuity. In my view, such a clause inappropriately fetters accountability for the administration of financial incentive schemes, and demonstrates the importance of the recommendations of the Public Accounts Committee at point 3 of the passage reproduced at paragraph 157 above.)

199. The public interest exception referred to at paragraph 191 above applies in respect of contractual obligations of confidence as well as equitable obligations of confidence. In *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1, Finn J of the Federal Court of Australia said (at p.89):

> *Parties who contract with government agencies must, in matters of confidentiality, be taken to have done so subject to such lawful rights of access to information in the agency's hands as our laws and system of government confer on others.*

200. Earlier (on p.88), Finn J had remarked that:

> [The respondent Commonwealth agency], *no less than the Minister, operated in the constitutional environment of responsible government. This necessarily entails that it was accountable in some measure to the public: see* Esso Australia Resources Ltd v Plowman *(1995) 183 CLR 10 at 37-38 per Brennan J.*

201. As I explained at paragraph 171 above, disclosure of the information in folios 34, 43 and 96 would further the public interest to the extent of confirming the third party's commitment to the capital expenditure it agreed to undertake in return for the grant. However, I cannot say that disclosure of those folios would be particularly significant in public interest terms. I also noted at paragraph 171 above that disclosure of folios 51 and 119 would serve no public interest purpose. In *Esso v Plowman*, Brennan J made comments (quoted in *Re Cardwell Properties Pty Ltd* at p.695, paragraph 55) to the effect that a government agency's duty to convey information to the public in an appropriate way to give an account of its functions, is unlikely to require the revelation of every document or piece of information communicated to the agency in confidence: it may be possible to respect the

commercial sensitivity of information contained in particular documents while discharging the duty to the public and, where that is possible, the general obligation of confidentiality should be respected.

202. Although I do not consider that the category 3 matter now retains any commercial sensitivity, the third party has maintained an objection to its disclosure throughout my review, and it has not ceased to be secret/inaccessible information. Disclosure of the category 3 matter would breach clause 22.1 of the Agreement, and I do not consider that there would be sufficient justification to apply the public interest exception to the category 3 matter.

203. Accordingly, I find that disclosure of the category 3 matter would found an action for breach of a contractual obligation of confidence, and that the category 3 matter is exempt matter unde s.46(1)(a) of the FOI Act.

(d) Category 4 matter

204. The category 4 matter consists of two copies of a memorandum dated 10 December 1999 from Mr Strano to his Director-General, containing the initial recommendation for a grant to the third party to assist relocation of its Bulimba operations to the Lytton industrial estate.

205. Paragraphs 1 and 6-13 explain Mr Strano's reasons for recommending a grant. Those paragraphs contain no information which could arguably be subject to a contractual or equitable obligation of confidence owed by the Department to the third party. (I have noted above that the contents of paragraph 6 of this memorandum have been disclosed in a report by the Auditor General.)

206. Paragraphs 2 and 3 of the memorandum contain general information about the third party's business operations, of a kind that would be available from sources in the public domain. That information would not have been obtained by the Department from its dealings with the third party in respect of the Lytton relocation project. The information in paragraphs 2 and 3 therefore is not "commercial intelligence arising from the project", in terms of clause 22.1 of the Agreement.

207. The information in paragraphs 4 and 5 of the memorandum would answer the description of "commercial intelligence arising from the project", subject to the technicality that it relates to an initial grant application that was withdrawn, before being resubmitted some three months later (see paragraph 7 above).

208. Like the category 3 matter, I do not consider that the information in paragraphs 4 and 5 retains any commercial sensitivity for the third party. (Indeed, that information has effectively been disclosed on p.37 of the Auditor-General's Report No. 3, 2002-03.) However, unlike the category 3 matter, disclosure of that information (and indeed disclosure of the memorandum as a whole) would be valuable in furthering the public interest in accountability of the Department for its administration of the relevant grant scheme in this instance (see my comments at paragraph 170 above).

209. If the information in paragraphs 4 and 5 of the memorandum is "commercial intelligence arising from the Project" in terms of clause 22.1 of the Agreement, I consider that it falls within the public interest exception recognised in the cases cited at paragraphs 191 and 199-200 above, and on that basis its disclosure would not found an action for breach of confidence.

210. I find that disclosure of the category 4 matter would not found an action for breach of confidence, and that the category 4 matter does not qualify for exemption under s.46(1)(a) of the FOI Act.

(e) Summary of findings

211. For the foregoing reasons, I find that the category 3 matter is exempt matter under s.46(1)(a) of the FOI Act, but that none of the other matter in issue qualifies for exemption under s.46(1)(a).

Addendum

212. It will be sufficient for the purposes of this part of my reasons for decision to record that I am satisfied, for the reasons which are explained fully in the addendum, that the category 1 matter is readily ascertainable from records in the public domain. That constitutes an additional ground for finding that that particular information does not qualify for exemption under s.45(1)(b), s.45(1)(c), s.46(1)(a), s.47(1)(a) or s.49 of the FOI Act.

Conclusion

213. For the foregoing reasons, I set aside the decision under review (identified at paragraphs 12-13 above). In substitution for it, I decide that the category 3 matter (identified in paragraph 28 above) is exempt matter under s.46(1)(a) of the FOI Act, but that the rest of the matter in issue (identified at paragraphs 23-27 and 29 above, and in the schedule attached to these reasons for decision) does not qualify for exemption from disclosure to the applicant under the FOI Act.

…….
D J BEVAN
INFORMATION COMMISSIONER

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 04/2004
Application S 105/02

Participants:

JEFF SEENEY MP
Applicant

DEPARTMENT OF STATE DEVELOPMENT
Respondent

BERRI LIMITED
Third Party

ADDENDUM TO REASONS FOR DECISION

A1. I refer to paragraphs 18 to 20 of my reasons for decision in this review dated 29 June 2004. This addendum forms part of my reasons for decision. However, in accordance with s.87(1) of the FOI Act, this addendum will be made available only to the Department, the third party, and their respective legal representatives. This addendum will be disclosed to the applicant, and otherwise published in accordance with s.89(5) of the FOI Act, in the event that the Department does not initiate judicial review proceedings in respect of this aspect of my decision, or in the event that judicial review proceedings do not result in this aspect of my decision being overturned.

Whether the category 1 matter can be readily ascertained from records available in the public domain

A2. As noted at paragraph 18 of my reasons for decision, by letter dated 10 October 2003, the Deputy Information Commissioner informed Crown Law (as solicitors for the Department) of his preliminary view, based upon an examination of the third party's published financial statements, that the amount of the grant of financial assistance to the third party had effectively become information in the public domain, and therefore could not qualify for exemption under the various exemption provisions relied upon by the Department.

A3. In his letter to Crown Law, the Deputy Information Commissioner said:

> *I **enclose** copies of relevant extracts from Berri's published financial accounts (obtained from ASIC) for the years ended 30 June 2000, 30 June 2001 and 30 June 2002. In my preliminary view, the highlighted information on those extracts indicates that Berri has effectively disclosed, in*

those accounts, the amount of the $250,000 grant, which comprises part of the matter in issue in this review.

I note that the amount of the establishment cost portion of the grant ($110,000) is disclosed (though not the amount of the sewerage link portion ($140,000)), in Berri's 2001 accounts under the heading "government grants".

However, more significantly, under the heading "Indemnities", it is recorded that Berri had a potential liability as at 30 June 2001 (the $250,000 grant having been approved in the financial year ended 30 June 2001) of $550,000 in respect of government grants relating to two of its Queensland sites. When this is contrasted with the previous year's accounts, which show that Berri had a potential liability of $300,000 in respect of a government grant relating to one of its Queensland sites, it can readily be ascertained that an amount of $250,000 was granted to Berri in the financial year ended 30 June 2001, in respect of one additional Queensland site. Given the amount of material on the public record in newspaper reports, in Hansard*, and in the Auditor-General's report (No.3, 2002-03), concerning the controversy over the grant made to Berri during the financial year ended 30 June 2001, it can be readily deduced that the increase in Berri's potential indemnity liability for government grants for Queensland sites (from $300,000 for one site at 30 June 2000, to $550,000 for two sites at 30 June 2001) relates to the Queensland government grant of $250,000 in relation to Berri's second site at Lytton.*

Consequence for application of exemption provisions

In my preliminary view, information that is readily ascertainable from records in the public domain would not qualify for exemption under s.45(1), s.46(1) or s.49 of the FOI Act.

Under s.45(1)(b), information which is publicly available has no commercial value which can be destroyed or diminished by its disclosure under the FOI Act. Under s.45(1)(c), if information is available in the public domain, it could not be reasonable to expect that its disclosure under the FOI Act could have an adverse effect on the business, commercial or financial affairs of the Department (and I note that Berri makes no claim that disclosure of the amount of the grant would have an adverse effect on its business, commercial or financial affairs). Similarly, under s.49, it could not be reasonable to expect that disclosure, under the FOI Act, of information which is available in the public domain, could have a substantial adverse effect on the financial or property interests of the State or an agency.

Under either s.46(1)(a) or (b), it is a requirement for exemption that the matter in issue must comprise information of a confidential nature. Confidentiality can be lost with the passage of time. If information can be ascertained from records available to the public, it will not satisfy the primary requirement for exemption under s.46(1)(a) or (b) of the FOI Act.

A4. The Department did not accept the Deputy Information Commissioner's preliminary view and lodged submissions and evidence in support of its continued objection to disclosure of the amount of the grant, by way of a written submission from Crown Law dated 28 November 2003, and a statutory declaration dated 9 December 2003 by Mr John Strano of the Department.

A5. The Department's submissions and evidence essentially focussed on two contentions:

(a) that the delay in giving my decision in this matter was unreasonable and had prejudiced the Department's claims for exemption; and

(b) the information contained in the third party's financial statements did not amount to public disclosure of the grant sum, nor the destruction of its commercial or confidential character.

Alleged delay

A6. In this regard, Crown Law submitted:

> *0. It would not be reasonable for a decision to be delayed for in excess of 12 months to allow for all available public records to be mined for evidence to make out an applicant's case. It would also not be reasonable to then rely on that evidence, couple it with unspecified material in other public records of varying degrees of reliability (newspaper reports,* Hansard *and an Auditor-General's report), to then deny a claim for exemption on the basis that the information was already in the public domain. Nor would it be reasonable, in those circumstances, to rely on the passage of time to conclude that the confidential character of the information had been destroyed. This would, it is submitted, constitute disclosure by delay and amount to legal error on the part of the decision maker. …*

A7. I do not accept the Department's contention that the referral by the Deputy Information Commissioner to information contained in the third party's published financial statements has somehow resulted in prejudice to the Department's claims for exemption. The financial statements upon which the Deputy Information Commissioner primarily relied in forming his preliminary view were those for the years ending 30 June 2000 and 30 June 2001. The latest of them was lodged with ASIC by the third party on 8 July 2002. Accordingly, the information upon which the Deputy Information Commissioner relied in forming the preliminary view conveyed in his letter dated 10 October 2003 had been in the public domain since approximately July 2002, i.e., prior to the Department lodging its submissions and evidence in this review.

A8. In September 2003, the staff responsible for managing the preparatory stages of this review sought a meeting with me to brief me on the issues requiring determination, and to seek my instructions for the preparation of draft reasons for decision. During the discussions at that meeting, it was noted that the Department had required the third party to provide an unconditional bank guarantee to secure repayment of the amount of the grant in the event that the project did not proceed or key performance criteria were not satisfied. A staff member suggested that a contingent liability of that kind would probably be disclosed in the published accounts of a public company such as the third party. I directed that inquiries be made in that regard. Examination of the third party's financial statements, which are available to any interested member of the public through the Australian Securities and Investment Commission (ASIC), confirmed that the accounts effectively disclosed the amount of the third party's contingent liability to the State of Queensland under the bank guarantee that the third party was obliged to provide pursuant to the Financial Assistance Agreement executed during the financial year ended 30 June 2001.

A9. As soon as this came to my officers' attention, the Department was informed and invited to make submissions in response. There was certainly no delay of 12 months to allow my officers

to "mine" all available public records for evidence to "make out the applicant's case". I have difficulty seeing on what basis it could be argued that bringing to the Department's attention, relevant information to which it apparently had not alerted itself when preparing its submissions and evidence, somehow amounted to unfair treatment of the Department.

A10. The Department has argued that all of the exemption provisions upon which it relies are temporally based and that alleged delay in giving my decision has undermined its legitimate claims for exemption. Obviously, temporally based exemptions will be affected by the effluxion of time. That is not unusual in decision-making under the FOI Act. I have expressed the opinion above (at paragraph 118 of my accompanying reasons for decision) that the Department's key exemption claims in respect of the category 1 matter were not well founded at the time it made the decision under review. Therefore, it is the Department that has had the benefit of the category 1 matter being withheld from the applicant during the time taken to deal with the complexities of the case presented by the Department (as well as competing priorities in the workload of my office).

A11. In any event, it is well-established that, in deciding whether requested information qualifies for exemption under the FOI Act, FOI decision-makers must take account of the relevant facts and circumstances existing at the time they come to make their decisions. If the Department had yesterday received from, say, a competitor of the third party, an application for access to the same documents now in issue, the Department could not merely rely on the decision it made in June 2002. It would be obliged to evaluate the tests for exemption in light of the current commercial sensitivity of the matter in issue.

A12. In making my decision in this matter, and applying the relevant exemption provisions to the matter in issue, I must take account of the current material facts and circumstances, including issues such as the current age of the information in issue, its current level of sensitivity, and whether it is currently in the public domain, *et cetera:* see *Commonwealth v Esber* (1990) 101 ALR 35 at p.37, quoting with approval *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934 at pp.943-4.

Public disclosure of the amount of the grant awarded to the third party

A13. Crown Law has argued that it would not be possible for an ordinary member of the public, not in the possession of the specific information available to my office, to discern the amount of the grant from the information contained in the third party's financial statements. At paragraphs 30 to 35 of its submissions dated 28 November 2003, Crown Law stated:

1. *It is the publication and accessibility to the public of **all** of the details of the information, which will destroy confidentiality.*

2. *Gurrie* [Frances Gurrie: "Breach of Confidence", Oxford University Press, 1984] *notes that:*

> The courts have been able to distinguish between component parts of which information is composed, on the one hand, and the information assembled as a discrete entity, separate from its component parts, on the other. The test of inaccessibility is applied only to the information considered as a discrete entity, independent of its component parts.

3. *Dean, in his text,* Law of Trade Secrets and Personal Secrets *supports this view. He states that information will be in the public domain where "it can be learnt without a great deal of labour and calculation". He continues:*

> It is not only the extent to which the information is available to those from whom the plaintiff would seek to deny access, **but whether what is disclosed is sufficient to reveal the entire secret. Consequently, if important details are kept secret, this may be enough to continue protection.**
>
> [Crown Law's emphasis]

4. *In its Notes to Financial Statements under the heading "Contingent Liabilities" for the year ended 30 June 2000, the company discloses that its potential liability arising on government grants if employee numbers are not maintained at one of its Queensland sites is $300,000. In the following 2 years the Contingent Liability for two of its sites in Queensland is $550,000. However this information does not discriminate between the two sites. The Applicant's FOI request is confined to the Lytton site. This information on its own, without more, is not sufficient to constitute disclosure. There is no evidence to suggest three crucial matters in the factual matrix, namely that the $250,000 represents just one grant, that the grant was for the Lytton site and that this sum is responsive to the FOI request. Indeed if this figure is contextualised with the $110,000 on the previous page it appears to have been part of a number of government grants. It follows that the grant sum cannot be learnt without a great deal of labour, calculation and assumption.*

5. *A proper assessment of audience is essential in reaching a conclusion that the grant sum is in the public domain. The relevant audience is the Applicant and the public, not those in a position to hold special knowledge of the matter.*

6. *The Deputy Information Commissioner's reasoning process in coming to this conclusion presents evidentiary difficulties. His conclusions require a process of subtle deduction, assumption and inference more akin to the investigative process, not the adjudicative process. For example the raw data coupled with the unspecified material on the public record requires a leap of reasoning to reach the conclusion that the differential amount of $250,000 relates to only one grant, only to the Lytton plant and then only to the FOI request.*

A14. I do not accept the Department's contention that it is only because of special knowledge possessed in my capacity as Information Commissioner that I am able to discern the amount of the grant from the third party's published financial statements. I also note that the Information Commissioner is conferred with investigative, as well as review, functions: see s.71(1) of the FOI Act.

A15. The relevant extracts from the relevant financial statements are:

Year ended 30 June 2000

…

NOTE 22

CONTINGENT LIABILITIES		***The Company***
…	***2000***	***1999***
	$000	***$000***
INDEMNITIES		
…		
Potential liability arising on government grants if certain employee numbers are not maintained at one of Berri Limited's Queensland sites	*300*	*–*

Year ended 30 June 2001

…

NOTE 24

CONTINGENT LIABILITIES		***The Company***
…	***2001***	***2000***
	$000	***$000***
INDEMNITIES		
…		
Potential liability arising on government grants if certain employee numbers are not maintained at two of Berri Limited's Queensland sites	*550*	*300*

(It is also interesting to note that, immediately preceding these entries in the respective financial statements, are entries disclosing the third party's potential liability arising on government grants from the South Australian and Victorian governments.)

A16. Examination of the quoted extracts discloses that the third party had no contingent liabilities in respect of government grants for Queensland sites for the financial year ended 30 June 1999. The third party became subject to a contingent liability of $300,000 in respect of one of its Queensland sites in the financial year ended 30 June 2000 (see paragraph A20 below). By 30 June 2001, the third party had become subject to a total contingent liability of $550,000 in respect of two Queensland sites.

A17. It is a matter of public record that the agreement for a grant to the third party to relocate its Bulimba operations to the Lytton Industrial Estate was executed in the financial year ended 30 June 2001, and that that was the only financial assistance grant to the third party from the Department during the financial year ended 30 June 2001 (see p.37 of the Auditor General's Report No. 3, 2002-3; *Hansard*, Question on Notice No. 338, asked by the applicant on 16 April 2002).

A18. It is also a matter of public record that:

(a) the financial assistance agreements which the Department requires grant recipients to sign, oblige the grant recipient to provide an unconditional bank guarantee to secure repayment of the total amount of the grant in the event that agreed performance criteria are not met (see p.31 of, and p.2 of Appendix D to, the Auditor-General's Report No. 3, 2002-03; and paragraphs 28 and 31 of Mr Strano's statutory declaration dated 30 September 2002); and

(b) in respect of the Lytton relocation grant, those performance criteria included maintenance of a certain number of employees (see *Hansard*, 9 July 2002, at p.89: transcript of Estimates Committee A, response by the Minister for State Development to a question from Mr Choi MP; and paragraphs 28 and 31 of Mr Strano's statutory declaration dated 30 September 2002).

A19. That is sufficient information for any interested person to ascertain that a grant of $250,000 was made to the third party in the financial year ended 30 June 2001 to relocate its Bulimba operations to the Lytton Industrial Estate. The Department's submissions at paragraphs 33 and 35 (quoted at paragraph A13 above) are simply not factually correct. Moreover, it does not matter that not every person in the community would be capable of understanding the financial statements of a public company. They are nevertheless public records, available to any person interested in finding out the amount of the relevant grant. In *Re "B"* at p.310 (paragraph 73), Commissioner Albietz gave some illustrations of routes by which it is generally accepted that information enters the public domain, or becomes a matter of public record. They included by tabling in Parliament or becoming part of the *Hansard* record of Parliament's proceedings, or by being available for public access under a statutory scheme (whether or not a fee is payable for access) as in the case of information required to be lodged by corporations with the Australian Securities Commission (a predecessor of ASIC).

A20. There is also information on the public record about the contingent liability of $300,000 disclosed in the third party's financial statements for the year ended 30 June 2000. In that financial year, Tropico Fruits Pty Ltd (a wholly-owned subsidiary of the third party) received a QIIS grant in connection with the expansion of its factory at Palmwoods on the Sunshine Coast. The agreement between Tropico and the State of Queensland provided that Tropico was to re-pay the amount of the grant in the event that certain performance criteria were not met, including the employment of a specified number of employees at the Palmwoods facility by 1 July 2000, 1 July 2001 and 1 July 2002 (see Question on Notice No. 261, 10 April 2002; Question on Notice No. 338, 16 April 2002; and page 94 of Estimates Committee A – State Development, 9 July 2002 – all of these were responses to questions asked by the applicant).

A21. I am satisfied that the category 1 matter in issue in this review can be ascertained by the applicant, or by any interested person, from records in the public domain, without undue "labour, calculation or assumption" (as submitted by Crown Law).

Application of the relevant exemption provisions

A22. I have discussed in detail, in my reasons for decision, the requirements for exemption under s.45(1)(b), s.45(1)(c), s.46(1)(a), s.47(1)(a) and s.49 of the FOI Act.

A23. Since the cash amount of the grant to the third party can be readily ascertained from sources available in the public domain, I find that references in the matter in issue to the amount of the

grant do not qualify for exemption under any of those exemption provisions for the following reasons:

- under s.45(1)(b), information which is publicly available has no commercial value which can be diminished by its disclosure under the FOI Act;
- under s.45(1)(c), if information is available in the public domain, it is not reasonable to expect that its disclosure under the FOI Act could have an adverse effect on the financial affairs of the Department;
- similarly, under s.47(1)(a) and s.49, it would not be reasonable to expect that disclosure, under the FOI Act, of information which is available in the public domain, could have a substantial adverse effect on the ability of government to manage the economy of the State, or on the financial interests of the State or the Department; and
- under s.46(1)(a), information that can be readily ascertained from records available to the public cannot satisfy the primary requirement to found an action for breach of confidence, and would in any event be excluded from the ambit of the obligation of confidence imposed on the Department by the terms of clause 22.1 of the Financial Assistance Agreement between the State of Queensland and the third party.

Findings

A24. For the reasons explained above, I am satisfied that the matter in issue in this review which comprises references to the amount of the cash grant paid to the third party by the Department can readily be ascertained from publicly available records. On that additional ground, I find that that information cannot qualify for exemption under s.45(1)(b), s.45(1)(c), s.46(1)(a), s.47(1)(a) or s.49 of the FOI Act.

……
D J BEVAN
INFORMATION COMMISSIONER

Date: 29 June 2004

SCHEDULE OF MATTER IN ISSUE

Category 1 matter:

Folio No.	Description	Date	Whole or part
4	Extract from comments made in relation to draft Financial Assistance Agreement	Undated	Part
5	Letter from Berri Limited to State Development	28/02/01	Part
6	Briefing Note by Director, Investment Support	31/01/02	Part
6a	Bank Guarantee	28/02/01	Whole
10	Fax from State Development to Berri Limited	05/12/00	Part
11	State Development Tax Invoice	30/10/01	Whole
11a	Draft response to question on notice	Undated	Part
12	Berri Limited Tax Invoice	03/12/01	Part
36	Draft Schedule B to Financial Assistance Agreement	Undated	Part
45	Schedule B to Financial Assistance Agreement	Undated	Part
47	Duplicate of folio 6a		Whole
48	State Development File Note by Project Manager	09/10/01	Part
49	Letter from State Development to Berri Limited	28/05/01	Part
50	State Development Invoice and copy of cheque	28/05/01	Whole
53	State Development Briefing Note by Director, Investment Support	15/05/01	Part
54	Duplicate of folio 45		Part
55	State Development Grants Fund Reservation	18/05/01	Part
56	Expenditure Voucher		Part
58	Berri Limited Tax Invoice	30/04/01	Part
59	Facsimile from Berri Limited to State Development	30/04/01	Part
60	Memorandum from State Development to Deputy Premier	29/01/01	Part
75	Duplicate of folio 45		Part
94	Memorandum from Australia TradeCoast Task Force to State Development	16/10/00	Part
108	Letter from State Development to Berri Limited	28/07/00	Part
109	File copy of folio 108 (unsigned)		Part
118	State Development File Note by Project Manager	19/07/00	Part
147	Letter from Berri Limited to State Development	Undated	Part
154	Draft letter from State Development to Berri Limited	20/03/00	Part
159	Letter from State Development to Berri Limited	Undated	Part
164	File copy of folio 159 (unsigned)		Part

Category 2 matter:

Folio No.	Description	Date	Whole or part
13	State Development Establishment Grant – Claim for Reimbursement	03/12/01	Part
62	State Development Establishment Grant – Claim for Reimbursement	27/04/01	Part

Category 3 matter:

Folio No.	Description	Date	Whole or part
34	Berri Limited Capital Expenditure Request	21/06/00	Whole
43	Duplicate of folio 34		Whole
96	Duplicate of folio 34		Whole
51	Email from Donn Berghofer to John Strano	22/05/01	Part
119	Handwritten notes	Undated	Part

Category 4 matter:

Folio No.	Description	Date	Whole or part
160-161	Memorandum from Executive Director, Investment Division to Director-General of State Development	10/12/99	Whole
162-163	Duplicate of folios 160-161		Whole