

## **Gist and Department of Transport**

(S 126/96, 14 February 1997, Information Commissioner Albietz)

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

1. - 5. [These paragraphs removed.]

### **REASONS FOR DECISION**

#### **Background**

6. This is a 'reverse FOI' application by Mr Gist's company, Willjoy Pty Ltd, (the applicant) which objects to the decision of the Department of Transport (the Department) to give the initial FOI access applicant, Standard White Cabs Ltd, access under the FOI Act to information relating to the applicant's successful tender for a taxi licence in the Townsville/Thuringowa taxi service area. The matter in issue comprises the tender price submitted by the applicant, and some calculations made by the Department in evaluating the tender. The documents on which that matter is contained have been released to Standard White Cabs Ltd, subject to the deletion of the matter in issue, and some additional matter which concerns the personal affairs of Mr Gist and which is not matter in issue in this external review.
7. In response to the FOI access application lodged by Standard White Cabs Ltd, Mr G J Healey of the Department decided, on 21 June 1996, that Standard White Cabs Ltd was entitled to have access to the requested documents, subject to deletion of information concerning Mr Gist's personal affairs, which Mr Healey decided was exempt matter under s.44(1) of the FOI Act.
8. By way of a faxed application dated 18 July 1996, the applicant sought internal review of Mr Healey's decision. No additional evidence or material was placed before the Department, by the applicant, in support of the contention that the matter in issue was exempt from disclosure under the FOI Act.
9. By letter dated 1 August 1996, the applicant was advised of the outcome of the Department's internal review. The internal review decision of Mr W J Rodiger, Director (Legal and Legislation), affirmed Mr Healey's decision.
10. Mr Rodiger stated that, in his view, the only exemption provision which might potentially apply to the applicant's case was s.45 of the FOI Act. Specifically, he identified s.45(1)(b) and s.45(1)(c), but he found in relation to s.45(1)(b) that he was *"...not convinced... that the commercial value of the information could reasonably be expected to be destroyed or diminished as a result of disclosure of the information."* Likewise, concerning the application of s.45(1)(c), he found that disclosure of the

tender amount would not adversely affect the applicant's business affairs, as the tender process was finalised and could not be reversed.

### **External Review Process**

11. The documents in issue in this external review were obtained from the Department and examined.
12. By letter dated 14 January 1997, I informed the applicant that it was my preliminary view that the decision under review was correct, that is, that the matter in issue was not exempt matter under either s.45(1)(b) or s.45(1)(c) of the FOI Act, and that no other exemption provisions under the FOI Act applied to the matter in issue. I invited the applicant to provide me with any written submission or evidence upon which reliance might be placed in support of a case that the matter in issue was exempt matter under the provisions of the FOI Act. I directed that the applicant lodge any such written submission or evidence no later than 10 February 1997. No such material, nor a response of any kind, has been received from the applicant.

### **Application of s.45(1)(b) and s.45(1)(c)**

13. 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.*

14. These provisions of the FOI Act were analysed and explained in my reasons for decision in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491. As I stated at p.516 (paragraph 66) of my reasons for decision in *Re Cannon*, the s.45(1)(c) exemption is worded in such a way that it applies only to information other than trade secrets, or information mentioned in s.45(1)(b). Therefore, particular information cannot be exempt under both s.45(1)(b) and s.45(1)(c), although it is open for a participant in an external review to argue that information is exempt under one of those provisions, and to put arguments in the alternative as to which is applicable.

#### **Application of s.45(1)(b)**

15. In relation to s.45(1)(b), at p. 511 (paragraph 51) of *Re Cannon*, I stated that the first requirement of its application is that the matter in issue must comprise information which itself has a commercial value to an agency or other person. At p.513 (paragraphs 54-55) of *Re Cannon*, I discussed the two possible interpretations of the phrase "commercial value" in the context of s.45(1)(b); namely, that information has a commercial value to an agency or other person if:
  - (a) 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); or
  - (b) a genuine arms length buyer is prepared to pay to obtain that information from that agency or person.
16. In this regard, the agency or third party may have to explain the commercial context in which it operates and the significance of the information in that context. Also, in order to establish the *prima facie* exemption of the matter in issue, the applicant in this case would have to satisfy me that there is a reasonable basis for an expectation that the commercial value of the information in issue would be destroyed or diminished by its disclosure.
17. This means that, even if it can be established that the matter in issue comprises information which itself has a commercial value to an applicant, the person seeking to prevent disclosure must also establish that disclosure of the information in question could reasonably be expected to destroy or diminish its commercial value (see the discussion at pp 516-517 (paragraphs 61-65) of *Re Cannon*).
18. The meaning of the phrase "could reasonably be expected to" was explained in my decision in *Re Cannon* at p. 515 (paragraphs 62-63). This phrase calls for the decision-maker applying s.45(1)(b) to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible and expectations that are reasonably based, i.e., expectations for the occurrence of which real and substantial grounds exist.

19. In this particular case, the tender process has been finalised and the applicant's tender was successful. On that basis, I am unable to see any possibility that information as to the tender amount could destroy or diminish the commercial value of the information. The tender price in this case was specific to the tender, and may have no bearing on future tenders. Furthermore, it is the Department's policy to publish the name of successful tenderers and the tender price.

**Application of s.45(1)(c)**

20. At pp 516-523 (paragraphs 66-88) of my decision in *Re Cannon*, I discussed and analysed the requirements of s.45(1)(c).
21. Whereas both s.45(1)(a) and s.45(1)(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). Therefore, where information has no commercial value in itself, but would, if disclosed, have an adverse effect on business affairs, 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 (ii), and it must then survive the application of the public interest balancing test incorporated in s.45(1)(c).
22. In relation to the first of the three constituent elements discussed above, I accept that the disclosure of the matter in issue would disclose information concerning the applicant's business or commercial affairs, within the terms of s.45(1)(c)(i) of the FOI Act.
23. Under s.45(1)(c)(ii), in the context of this matter, it must be demonstrated that disclosure of the matter in issue could reasonably be expected to have an adverse effect on the business or commercial affairs with which the information in issue is concerned, or to prejudice the future supply of such information to government.
24. The facts of this case are quite similar to my earlier decision in *Re Sexton Trading Company Pty Ltd and South Coast Regional Health Authority* (Information Commissioner Qld, Decision No. 95033, 18 December 1995, unreported). In the circumstances of that case, I found that tender prices submitted by the successful tenderer for a contract to supply goods to a government agency, did not comprise exempt matter under s.45(1)(c) of the FOI Act. In that case, the government agency also had a policy of publishing successful tenderers, and tender prices.
25. In relation to this particular case, as the tender process has been finalised and the applicant's tender was successful, I do not think there is any reasonable basis for expecting that disclosure of the tender amount to the applicant for access would have an adverse effect on the applicant's business or commercial affairs. The applicant has been awarded the tender, and it is the Department's policy to publish the identity and price of the successful tenderer. Moreover, in light of this policy, I have difficulty in seeing how it could be argued that disclosure of the matter in issue could reasonably be expected to

prejudice the future supply of like information to government. It is demonstrably the case that, in the face of a government policy which stipulates that the tender prices of successful government tenders will be published, businesses continue to tender for government contracts (see also paragraph 14 of *Re Sexton*).

26. Further, I accept that there is a public interest in disclosing the tender amounts of successful tenders to the public to encourage competitiveness, and to ensure the efficient supply of products and services to government agencies.

### **Decision**

27. I therefore find that the matter in issue is not exempt matter under s.45(1)(b) or s.45(1)(c) of the FOI Act, and I affirm the decision under review.