OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 99009
Application L 24/98

Participants:

RAY WEBBER
Applicant

TOOWOOMBA CITY COUNCIL
Respondent

INTERNATIONAL GENERATING COMPANY LTD
NORMANDY PACIFIC ENERGY LIMITED
Third Parties

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to agreement by respondent agency to sell waste water to developers of a proposed power station - whether documents contain information which has a commercial value to the agency or the developers - 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.

FREEDOM OF INFORMATION - refusal of access - whether documents contain information concerning the business, commercial or financial affairs of the agency or the developers - whether disclosure could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the agency or the developers - 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 Act 1992 Qld s.45(1)(b), s.45(1)(c)(i), s.45(1)(c)(ii), s.51, s.77(1), s.78
Freedom of Information Act 1982 Cth

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Brown and Minister for Administrative Services, Re (1990) 21 ALD 526
Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491
Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (1993) 1 QAR 60

DECISION

I set aside the decision under review (being the decision made on behalf of the respondent by Mr I Farr on 26 June 1998). In substitution for it, I decide that none of the matter remaining in issue (which is identified in paragraph 18 of my accompanying reasons for decision) qualifies for exemption from disclosure under the *Freedom of Information Act 1992* Qld, and that the applicant therefore has a right to be given access to it under the *Freedom of Information Act 1992* Qld.

Date of decision: 4 November 1999

.....
F N ALBIETZ
INFORMATION COMMISSIONER

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 99009
Application L 24/98

Participants:

RAY WEBBER
Applicant

TOOWOOMBA CITY COUNCIL
Respondent

INTERNATIONAL GENERATING COMPANY LTD
NORMANDY PACIFIC ENERGY LIMITED
Third Parties

REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse him access to documents concerning an agreement by the Toowoomba City Council ("the Council") to sell waste water for use by the developers of a proposed power station at Millmerran. The documents were claimed to be exempt under s.45(1)(b) and s.45(1)(c) of the *Freedom of Information Act 1992* Qld (the FOI Act).

2. By letter dated 26 March 1998, the applicant applied to the Council for access under the FOI Act to the following:

    1. *Water Supply Agreement – The report pertaining to this matter was presented to Council on 25 September 1997 by the Director of Engineering Services, Peter Taylor, and a copy of that Water Supply Agreement.*
    2. *Correspondence between Intergen and the Toowoomba City Council – between the parties from 25 September 1997 to the present date, 26 March 1998.*
    3. *A copy of any new or amended Water Supply Agreement between the parties arranged between those dates.*

> *4. Toowoomba City Council made an application to the Department of Local Government Minister, Di McCauley, relative to this matter. The approval was denied. I require copy of documents relative to the application to waive the tendering requirement and the Minister's replying correspondence.*

3. The documents to which the applicant sought access relate to a proposal by International Generating Company Ltd ("Intergen") and Normandy Pacific Energy Ltd ("Normandy Pacific") to build a coal-fired power station and associated infrastructure at Millmerran in Queensland. As part of that proposal, Intergen and Normandy Pacific entered into a "Water Supply Option Agreement" with the Council, whereby if the Queensland government gave approval for the Millmerran Power Station to be built, Intergen and Normandy Pacific would have the option of buying from the Council, for the purposes of supplying water to the power station, treated waste water from the Council's sewerage treatment works.

4. By letter dated 22 April 1998, Mr R G Howe of the Council advised the applicant that he had decided to give the applicant full access to certain documents falling within item 4 of his FOI access application, and partial access to a letter dated 5 December 1997 from the Council to the Honourable Di McCauley MLA (the then Minister for Local Government and Planning), which also fell within item 4 of the FOI access application, but that in respect of the balance of the documents which fell within the terms of the applicant's FOI access application (Mr Howe did not identify any of those documents in his decision, apart from the Water Supply Option Agreement) he had decided that such documents were exempt from disclosure to the applicant under s.45(1)(b) and/or s.45(1)(c) of the FOI Act.

5. By letter dated 28 April 1998, the applicant applied for internal review of Mr Howe's decision. He raised a number of issues in support of his contention that disclosure of the documents in issue was in the public interest. He also included a number of newspaper clippings which discussed the Millmerran project, in order to demonstrate both the public interest in the project, and the fact that certain of the basic terms of the Water Supply Option Agreement were already in the public domain.

6. Mr Ian Farr, Chief Executive Officer of the Council, conducted the internal review. By letter dated 26 June 1998, he advised the applicant that he had consulted with Intergen and Normandy Pacific regarding disclosure of the documents in issue and that both had objected to disclosure of the documents on the grounds that they were confidential and contained commercially sensitive information. Mr Farr affirmed Mr Howe's decision that the matter in issue was exempt from disclosure under s.45(1)(b) and s.45(1)(c) of the FOI Act. On 1 August 1998, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Farr's decision.

External review process

7. Copies of the matter in issue were obtained and examined. In respect of the report of the Director of Engineering Services to which the applicant had requested access, Mr Howe advised that the Director had provided his report orally to a meeting of the Council on 25 September 1997. Mr Howe provided a copy of the relevant Minutes of Meeting which, he stated, the applicant had already seen. On the basis of Mr Howe's advice, the applicant advised that he no longer wished to pursue access to the report.

8. In respect of item 2 of the applicant's FOI access application, Mr Howe stated that he had identified only one letter falling within the terms of the applicant's request - a letter from Intergen to the Council dated 28 January 1998.

9. Accordingly, the matter in issue which was provided to me for review consisted of the Water Supply Option Agreement dated 20 November 1997 entered into by the Council, Intergen and Normandy Pacific, Intergen's letter to the Council dated 28 January 1998, and parts of the Council's letter to the Honourable Di McCauley MLA dated 5 December 1997. Those parts of the letter to the Honourable Di McCauley MLA which were in issue comprised a discussion of the methodology used by the Council in negotiating a price for the sale of the waste water.

10. By letters dated 25 August 1998, the Assistant Information Commissioner advised Intergen and Normandy Pacific of my review and sought their advice as to whether or not they continued to object to disclosure of the Water Supply Option Agreement and Intergen's letter to the Council dated 28 January 1998. The Managing Director of Intergen, Mr Chris Colbert, responded by advising that Intergen continued to object to disclosure. He further contended that the applicant's application for review was vexatious and without substance, and that I should exercise my discretion under s.77(1) of the FOI Act to refuse to review the Council's decision. He provided no information or evidence in support of that contention. In the event that I should decide to review the Council's decision, however, Mr Colbert stated that Intergen applied to become a participant in my review, pursuant to s.78 of the FOI Act. By facsimile letter dated 8 September 1998, Mr David Lyne of Normandy Pacific responded in identical terms.

11. On 21 September 1998, I wrote to the Council, Intergen and Normandy Pacific to express my preliminary view that none of the matter in issue qualified for exemption from disclosure under the FOI Act. In the event that they did not accept my preliminary view in that regard, I invited each of the parties to lodge written submissions and/or evidence in support of their respective claims for exemption. I further advised Intergen and Normandy Pacific that there was no evidence before me to suggest that the applicant's application for review was frivolous, vexatious, misconceived or lacking in substance, such that I should exercise my discretion to refuse to conduct this review under s.77(1) of the FOI Act.

12. The Council lodged a brief written submission dated 14 October 1999. Intergen's solicitors, Messrs Freehill, Hollingdale & Page, provided written submissions on 6 November 1998. They advised that Intergen was prepared to withdraw its claim for exemption in respect of its letter to the Council dated 28 January 1998, but that it continued to claim that the whole of the Water Supply Option Agreement was exempt from disclosure. Having made that blanket claim, Intergen's solicitors went on to identify particular words and clauses contained in the Agreement which, it contended, must be omitted "in order to prevent irreparable commercial harm to our client". Mr Lyne of Normandy Pacific initially stated that he intended to lodge written submissions in support of his company's case, but later confirmed that Normandy Pacific would not, in fact, lodge any material on its own account, but would adopt the same position taken by Intergen and would rely on the arguments presented by Intergen.

13. The Assistant Information Commissioner informed the Council of Intergen's position and asked the Council to advise whether or not it was prepared to withdraw its claim for exemption in respect of Intergen's letter to the Council (with the exception of a reference in that letter to the Council's bank account details, which reference I considered qualified for

exemption under the FOI Act). Mr Howe responded by advising that the Council would, in light of Intergen's position, withdraw its claim for exemption in respect of the letter. The Assistant Information Commissioner therefore authorised disclosure of the letter to the applicant (with the exception of the reference to the Council's bank account details) and that letter is no longer in issue in this review (the applicant having confirmed that he did not wish to pursue access to the bank account details). The Council also advised that it was not prepared to review its claim for exemption in relation to those parts of the letter dated 5 December 1997 to the Honourable Di McCauley MLA which were in issue, until disclosure or otherwise of the Water Supply Option Agreement "had been finally determined". It contended that the matter in issue in the letter was closely associated with the matter contained in the Water Supply Option Agreement and that they should therefore be considered together.

14. Intergen's solicitors were then contacted in order to discuss their client's position regarding the Water Supply Option Agreement. It was my view that it was not realistic for them to continue to argue that the whole Agreement was exempt from disclosure, while at the same time identifying only parts of the Agreement which they contended satisfied the requirements for exemption under s.45(1)(b) and/or s.45(1)(c) of the FOI Act. Intergen's solicitors were therefore advised that a copy of the Agreement, marked up to identify the particular information which Intergen claimed was exempt, would be forwarded to the Council and the Council would be requested to advise whether it would be prepared to withdraw its claim for exemption in respect of the remainder of the Agreement.

15. The Council advised that it did not object to disclosure of the remainder of the Agreement. Intergen confirmed that it was prepared formally to withdraw its claim for exemption in respect of those parts of the Agreement, and accordingly, the Council was authorised to give the applicant partial access to the Agreement. The applicant was asked to advise whether or not he wished to continue to pursue access to those parts of the Agreement which remained in issue.

16. By letter dated 29 January 1999, the applicant advised that he wished to continue to pursue access to certain parts of the Water Supply Option Agreement. He enclosed a copy of the Agreement (with deletions) to which he had been given access, and on which he had identified those segments of (deleted) information in respect of which he wished to continue to pursue access.

17. At this stage of the review, it was drawn to my attention by the Council that the Water Supply Option Agreement which was in issue had in fact been superseded by a new agreement for the supply of waste water which had been entered into by Intergen, Normandy Pacific and the Council. Despite that fact, the Council and Intergen still would not withdraw their claims for exemption in respect of the Agreement, nor would the applicant withdraw his FOI access application. The new agreement is not in issue in this review as it does not fall within the terms of item 3 of the applicant's FOI access application.

18. On 8 February 1999, the Deputy Information Commissioner wrote to both the Council, and Intergen's solicitors, to advise them of the particular parts of the Agreement to which the applicant still wished to pursue access, and which (together with those parts of the letter dated 5 December 1997 from the Council to the Honourable Di McCauley MLA which the Council decided were exempt from disclosure) comprise the matter remaining in issue in this review. The Deputy Information Commissioner also advised both Intergen's solicitors and the Council of his preliminary view that those parts of the Agreement which remained

in issue did not qualify for exemption under the FOI Act. The Council responded by advising that its objection to the release of the Agreement (and to the relevant parts of the Council's letter to the Honourable Di McCauley MLA) "was based on Intergen's claim". It further advised that "if, and to the extent that, Intergen agree to the release of further details, Council will concur".

19. I take this opportunity to observe that the Council's position as stated above does not accord with its legal obligations as an agency subject to the application of the FOI Act. An agency which receives a valid access application under the FOI Act has a legal duty to examine the matter which falls within the terms of the access application, and to decide for itself whether or not that matter satisfies the requirements of one or more of the exemption provisions contained in Part 3, Division 2 of the FOI Act. While an agency has an obligation to consult, under s.51 of the FOI Act, with a party to whom disclosure of the matter in issue may be of substantial concern, an objection to disclosure by the consulted party should not, of itself, be the basis of a claim for exemption by the agency. It is clear that the agency must take account of any such objection by a party consulted under s.51 of the FOI Act, and of the grounds which are raised in support of it, but the agency must decide for itself, taking account of all relevant information available to it, whether or not the matter in issue satisfies the requirements for exemption under one or more of the exemption provisions contained in the FOI Act. If, contrary to a third party's objection, an agency decides that matter to which access has been requested is not exempt matter under the FOI Act, that third party has certain rights of review available to it which are set out in the FOI Act.

20. On 24 March 1999, Intergen's solicitors provided further written submissions in support of Intergen's claims for exemption. Mr Colbert also provided a statutory declaration in which he explained the background to the Millmerran project and stated that there were five other power station projects either underway, or in the development stage, in southern Queensland. He contended that those other projects were essentially in competition with his company's proposal and that, unless and until the Millmerran project received final approval, disclosure of the matter in issue would cause Intergen commercial harm.

21. On the basis of Intergen's submission that the commercial sensitivity of the matter in issue would continue until the Millmerran project was approved by the Queensland government, the applicant agreed to place his external review application in abeyance until a final decision regarding the project was made. (Such a decision was expected, at that stage, by 30 June 1999.) Intergen's solicitors conceded that it was likely that their client's objection to disclosure of the matter in issue would fall away if the project were approved, and their advice in that regard was confirmed by the Deputy Information Commissioner in his letter to them dated 11 June 1999. However, despite that concession, when Intergen's solicitors finally confirmed on 27 August 1999 that the Millmerran project had received final approval from the Queensland government, they also advised that their client did not agree to withdraw its objection to disclosure of the matter in issue.

22. Upon being advised of Intergen's position and being provided with copies of Intergen's submissions in support of its case, the applicant advised that he did not wish to lodge submissions or evidence in reply, but that he simply required me to proceed to determine whether or not the matter in issue qualified for exemption under the FOI Act.

Application of relevant exemption provisions

23. Sections 45(1)(b) and (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.*

24. In my decision in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, I discussed the relationship between s.45(1)(b) and s.45(1)(c) of the FOI Act (at p.516, paragraph 66):

> *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).*

25. I considered the application of s.45(1) in some detail in *Re Cannon*. I stated 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.

26. Both s.45(1)(b) and (c) include the phrase "could reasonably be expected to". In my reasons for decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at pp.339-341 (paragraphs 154-160), I analysed the meaning of the phrase "could reasonably be expected to", by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the *Freedom of Information Act 1982* Cth. In particular, I said in *Re "B"* (at pp.340-341, paragraph 160):

> *The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.*

The ordinary meaning of the word "expect" which is appropriate to its context in the phrase "could reasonably be expected to" accords with these dictionary meanings: "to regard as probable or likely" (Collins English Dictionary, Third Aust. ed); "regard as likely to happen; anticipate the occurrence ... of" (Macquarie Dictionary, 2nd ed); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).

Section 45(1)(b)

Commercial Value

27. I discussed the application of s.45(1)(b) at pp.511-516, paragraphs 50-65, of *Re Cannon*. The first requirement for the application of s.45(1)(b) is that the matter in issue must comprise information which has a commercial value to an agency or another person. There are two meanings of the phrase "commercial value" which are appropriate to the context in which the phrase is used in s.45(1)(b). The first and 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. 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.

28. The information in question must have a commercial value to an agency or another person at the time that an FOI decision-maker comes to apply s.45(1)(b), i.e., information which is aged or out-of-date has no remaining commercial value (see *Re Brown and Minister for Administrative Services* (1990) 21 ALD 526, at p.533, paragraph 22).

29. I remain doubtful that any of the matter in issue could ever have been said to have a commercial value within the meaning of that phrase as discussed above. In my letter dated 21 September 1998, I expressed the preliminary view that the only matter which I considered could reasonably be argued to have commercial sensitivity was the reference in the Water Supply Option Agreement to the price per megalitre which the Council was prepared to accept for the sale of it waste water, but that any commercial sensitivity that may have attached to that information appeared to have been negated by media reports which disclosed the income which the Council would receive as a result of the Water Supply Option Agreement (thereby allowing any interested member of the public to calculate an accurate estimate of the price). In any event, now that the Water Supply Option Agreement which is in issue has been superseded by a new agreement, and the Millmerran Power Project has been approved (with Intergen's and Normandy Pacific's rights in that respect secured), I am not satisfied that any of the matter in issue has a current commercial value, which could reasonably be expected to be diminished by its disclosure.

30. In its submission dated 23 March 1999, Intergen's solicitors accepted that any commercial sensitivity in the matter in issue would pass once approval of the Millmerran project was granted. They stated:

> *As we have noted above, the information should not be prevented from disclosure for all time.*
>
> *The information however must be kept commercially confidential until such time as our client succeeds in its development of the power station.*

31. I find that none of the matter in issue qualifies for exemption under s.45(1)(b) of the FOI Act.

Section 45(1)(c)

32. 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.

Business, commercial or financial affairs

33. I decided in *Re Cannon* at p.516, paragraph 67, that the word "concerning", as it is used in 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 Intergen, Normandy Pacific or the Council. The matter in issue must itself comprise information about those business, commercial or financial affairs, in order to satisfy this requirement.

34. I am not satisfied that all of the matter in issue directly concerns the business, commercial, or financial affairs of Intergen, Normandy Pacific or the Council. For example, parts of the letter dated 5 December 1997 from the Council to the Honourable Di McCauley MLA which are in issue, refer to studies into waste water recycling. I do not consider that such information can properly be characterised as information concerning the Council's business, commercial or financial affairs. However, given the findings which I have reached below, it is not necessary for me to identify specifically the matter in issue which I consider does and does not satisfy this first requirement for exemption under s.45(1)(c) of the FOI Act.

Adverse effect

35. There has (in my view, correctly) been no suggestion that disclosure of any part of the matter in issue could reasonably be expected to prejudice the future supply of like information to government, so my comments on the second requirement to establish exemption under s.45(1)(c) relate to the first limb only of s.45(1)(c)(ii).

36. The common link between the words "business, professional, commercial or financial" in s.45(1)(c) is to activities carried on for the purpose of generating income or profits. Thus, an adverse effect under s.45(1)(c) will almost invariably be pecuniary in nature, whether directly or indirectly (see p.520, paragraphs 81-82, of *Re Cannon*). At p.521, paragraph 84, of *Re Cannon*, I stated:

> *84. In most instances, the question of whether disclosure of information could reasonably be expected to have an adverse effect will turn on whether the information is capable of causing competitive harm to the relevant agency, corporation or person. Since the effects of disclosure of information under the FOI Act are, with few exceptions, to be evaluated as if disclosure were being made to any person, it is convenient to adopt the yardstick of evaluating the effects of disclosure to a competitor of the agency which, or person whom, the information in issue concerns. (This yardstick is also appropriate when considering the application of s.45(1)(b).) A relevant factor in this regard would be whether the agency or other person enjoys a monopoly position for the supply of particular goods or services in the relevant market (in which case it may be difficult to show that an adverse effect on the relevant business, commercial or financial affairs could reasonably be expected), or whether it operates in a commercially competitive environment in the relevant market.*

37. Intergen's arguments with respect to this limb of s.45(1)(c) were again based on the fact that the Millmerran project had not been approved, and that there were at least five other projects in southern Queensland competing with Millmerran for government approval. Intergen argued that disclosure of the matter in issue would have an adverse effect on its business,

financial and commercial affairs as it would enable its competitors to calculate exactly how much water it had been able to negotiate access to, the quality thereof, and at what price. In his statutory declaration dated 23 March 1999, Mr Colbert went on to state:

> *The potential harm will continue at least until such time as our project has achieved financial close and is effectively a "done deal".*

38. Again, Intergen itself appeared to accept that its submissions in support of exemption of the matter in issue were applicable only until such time as the Millmerran project received approval. Even before approval of the project had been granted, I was doubtful that disclosure of the matter in issue could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of either Intergen, Normandy Pacific or the Council, particularly given that the Water Supply Option Agreement had been executed and the parties' rights in that respect secured, according to the terms of the Agreement. Furthermore, I was of the view that the Agreement was so site-specific and job-specific as to have no general relevance to any future tenders for the construction of power projects in which Intergen might be involved. I advised the parties that I had difficulty in seeing how a competitor could extract anything of value from the matter in issue which it could then use to Intergen's disadvantage in a future tendering process.

39. In any event, given that the Millmerran project has now been approved, I am unable to identify any adverse effect which disclosure of the matter in issue could reasonably be expected to have on the business, commercial or financial affairs of Intergen, Normandy Pacific or the Council.

40. I find that none of the matter in issue satisfies the test for exemption posed by s.45(1)(c)(ii) of the FOI Act, and hence that the matter in issue does not qualify for exemption under s.45(1)(c) of the FOI Act.

Public interest balancing test

41. If I had been persuaded that some or all of the matter in issue satisfied the requirements of s.45(1)(c)(i) and (ii), so as to establish a *prima facie* public interest consideration favouring non-disclosure, it would then have been necessary for me to consider whether there were public interest considerations favouring disclosure of the matter in issue which, on balance, outweighed the public interest in protecting the business, commercial or financial affairs of Intergen, Normandy Pacific or the Council from the apprehended adverse effects of disclosure. Since I have found that the second requirement for exemption under s.45(1)(c) is not satisfied in respect of the matter in issue, it is not strictly necessary for me to discuss the public interest balancing test. However, I will make some brief comments on the issue.

42. I consider that there is a public interest in enhancing the accountability of the Council in respect of its decision to enter into the Water Supply Option Agreement on behalf of (in effect) its ratepayers. Government agencies perform their functions on behalf of members of the public, and there is a public interest in the community being able to scrutinise the actions taken on its behalf. In *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, I said (at p.73; paragraph 37):

> *37. The information which public officials, both elected and appointed, acquire or generate in office is not acquired or generated for their own benefit, but for purposes related to the legitimate discharge of their duties of office, and ultimately for the service of the public for whose*

> *benefit the institutions of government exist, and who ultimately (through one kind of impost or another) fund the institutions of government and the salaries of officials.*

43. The applicant submitted as follows in respect of the information in issue concerning the contract price per megalitre for waste water:

> *The cost of the water being sold by* [the Council] *is a figure that must be revealed to the ratepayers. It has been publicly stated by the Mayor and should not be covered up.*

44. I consider that the applicant has raised a valid point. The Council has entered into an agreement to sell what is effectively a community asset - waste water. In my view, there is a strong public interest in disclosing to the community the price obtained for that asset, how that price was reached, and under what terms the water will be supplied, so as to allow the community to assess whether the agreement that was reached on its behalf was fair and reasonable in all the circumstances.

45. In discussing the public interest balancing test in its submission dated 23 March 1999, Intergen's solicitors stated:

> *Until such time as our client in fact achieves financial close and commences construction of the power station, the ratepayers' water will not in fact be being used and as such there is merely an agreement reached in respect of what may happen to the water when and if our client succeeds with the Millmerran proposal.*
>
> *We submit that there is a limited public interest in the community being able to scrutinise the actions of the Council in respect of such an agreement which may or may not ever take effect.*
>
> *In terms of the public interest balancing test, we would have thought it is also in the public interest to protect the information from disclosure until such time as its disclosure will not harm the public interest by ensuring that the Toowoomba City Council receives a substantial sum of money for the use of the water.*
>
> …
>
> *If the water was in fact being utilised by our client at this point in time, or there was certainty that the water would in fact actually be being used in the future, then the Applicant's argument may have some merit.*
>
> *However, until such time as our client can conclude a deal to proceed with the power station, the water of the Toowoomba City Council will continue to be dealt with in a manner unrelated to the terms of the Agreement and without any practical relevance to the Agreement.*

46. This argument is somewhat disingenuous in so far as it suggests that ratepayers have no cause for concern about something that may or may not happen. If a Council will be bound to honour an Agreement, upon the occurrence of a certain event, surely there is a public interest in public scrutiny of the obligations that will apply if and when that event occurs.

47. I note that the submissions made on behalf of Intergen at least conceded the public interest in public scrutiny of the Agreement, once it was clear that the Agreement would become operative.

48. If the Council or Intergen had been able to establish that the requirements of s.45(1)(c)(i) and (ii) of the FOI Act were satisfied in respect of the matter in issue, I consider that there would have been strong public interest considerations favouring disclosure of the matter in issue, that it would have been necessary to take into account in applying the public interest balancing test incorporated in s.45(1)(c).

Conclusion

49. I set aside the decision under review. In substitution for it, I decide that none of the matter remaining in issue qualifies for exemption from disclosure under the FOI Act, and that the applicant therefore has a right to be given access to it under the FOI Act.

.....
F N ALBIETZ
INFORMATION COMMISSIONER