

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 30 of 1994
(Decision No. 95033)

Participants:

SEXTON TRADING COMPANY PTY LTD
Applicant

- and -

SOUTH COAST REGIONAL HEALTH AUTHORITY
Respondent

- and

T K CROW FURNISHINGS PTY LTD
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - matter in issue comprising tender prices submitted by the successful tenderer for a contract to supply goods to the respondent - information concerns the business or commercial affairs of the third party - whether disclosure could reasonably be expected to have an adverse effect on those affairs - whether disclosure could reasonably be expected to prejudice the future supply of such information to government - application of s.45(1)(c) of the *Freedom of Information Act 1992* Qld

Freedom of Information Act 1992 Qld s.45(1)(c)

Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491
Maddock Lonie and Chisholm (a firm) and Department of State Services, Re
(Information Commissioner, WA, Decision Ref: D01595, 2 June 1995, unreported)

DECISION

I set aside the decision under review, being the internal review decision made on behalf of the respondent by Mr J Youngman on 31 January 1994. In substitution for it, I decide that the applicant has (in accordance with s.21 of the Freedom of Information Act 1992 Qld) a right to be given access to the documents identified by the respondent as falling within the terms of the applicant's FOI access application dated 22 November 1993.

Date of Decision: 18 December 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

Participants:

SEXTON TRADING COMPANY PTY LTD
Applicant

- and

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Third Party

REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's decision to refuse it access to the prices quoted by the successful tenderer for a standing offer arrangement for the supply to the respondent of curtains and blinds. The applicant was an unsuccessful tenderer. The third party was the successful tenderer.
2. On 22 November 1993, the applicant applied to the South Coast Regional Health Authority (the Authority) under the *Freedom of Information Act 1992* Qld (the FOI Act) for access to:

Prices tendered by successful tenderer of Tender no. GC-93/94 for South Coast Regional Health Authority for supply and installation of curtains, privacy curtains, holland blinds, vertical blinds, slimline blinds and curtain tracks. Tenders were required to be submitted by 29 October 1993.

As an unsuccessful tenderer, our company requires this information to allow us to ascertain whether in future we would be able to meet or beat the margins involved while still maintaining margins required by Directors of this company.

3. By letter dated 6 January 1994, Ms Sally Heffernan, on behalf of the respondent, decided to refuse access to the nine folios containing the prices to which the applicant sought access, on the basis that they comprised exempt matter under s.45(1)(c) of the FOI Act. An application for internal review, dated 19 January 1994, resulted in Ms Heffernan's decision being affirmed by the Authority's Regional Director, Mr J Youngman, on 31 January 1994. By letter dated 10 February 1994, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Youngman's decision.

4. At my invitation, T K Crow Furnishings Pty Ltd applied under s.78 of the FOI Act to be a participant in the review, and its application was granted.

The external review process

5. The documents in issue have been obtained and examined. They comprise nine pages of prices quoted by the third party for the supply and installation of curtains, privacy curtains, holland blinds, vertical blinds, slimline blinds and curtain tracks of various widths and drops.
6. The applicant has presented its case essentially on the basis that it has been denied access to information which, if relevant Queensland government policy had been followed, should have been published and/or routinely disclosed to the applicant (as an unsuccessful tenderer) on request. In its application for external review, the applicant submitted:

[We are asking for] prices only as supplied by the successful tenderer. If, as we are informed should have happened, this contract had been put out as a "Standing Offer Arrangement" and processed accordingly by Queensland Purchasing and Sales, the information we are requiring would have been published in the Queensland Government Procurement Gazette listing name of successful supplier, brief description of goods/services offered and value of contract. ...

We are not requesting any information whatever on the business and commercial affairs, including "detailed pricing structure" of the successful tenderer but merely the prices quoted on this offer as normally listed in the Procurement Gazette for a Standing Offer Arrangement which allows for "open and effective" tendering as per the State Purchasing Council guidelines (enclosed).

... The prices requested should be public information as public monies are being spent and should be subject to public scrutiny. Quite simply we argue that this should have been a Standing Offer Arrangement and request that you should view it accordingly.

...

... we feel the denial of access to this information contravenes our ability to assess, as a tenderer, whether all principles of State Purchasing Council's guidelines have been adhered to as they have been in the case of this company.

7. On pursuing further inquiries in respect of the matters raised in the application for external review, I became aware that the applicant had complained to the State Purchasing Council about the respondent's refusal to supply the requested information in accordance with State Purchasing Council guidelines, and about other alleged irregularities in the processing of the relevant tender. The State Purchasing Council does not have the regulatory authority to alter or rescind an agency's contractual arrangements. It investigates complaints by suppliers with the aim of achieving improved practices for future activities. The State Purchasing Council was of the view that the respondent had not complied fully with the State Purchasing Policy in letting and processing the relevant tender in the instant case. A representative of the State Purchasing Council, Mr Bob Orchard, was invited to attend a meeting of all the participants in this case, which had been arranged by my office with a view to exploring the prospects of a negotiated resolution. The meeting was held on 27 October 1994, and was attended by Mr Orchard, Ms Heffernan representing the respondent, the General Manager of the

applicant, Mr Peter Spooner, and the principal of T K Crow Furnishings Pty Ltd, Mr Paul Griffin.

8. Mr Orchard was able to clarify, for the benefit of all participants, relevant aspects of the State Purchasing Policy and guidelines. For instance, the respondent had expressed concern at its inability to apply relevant guidelines which referred to publication of the total price of the successful tenderer, in circumstances where the tender documents contained no total price, but more than 1000 quoted prices for the supply of specified items. Mr Orchard explained to all the participants that, in his opinion, if the State Purchasing Policy and guidelines had been followed by the respondent, then all of the pricing information in issue in this case should have been published in the Queensland Procurement Gazette, and should have been routinely supplied to the applicant (as an unsuccessful tenderer) on request.
9. However, this does not mean that the resolution of this case is as straightforward as contended by the applicant in the submission set out at paragraph 6 above (for reasons explained at paragraphs 19-20 below). The third party contends that, having responded to a tender document that contained no notice or conditions suggesting that tendered prices were subject to publication or disclosure, it is entitled to contest disclosure of what it regards as sensitive commercial information, the disclosure of which would unfairly advantage its competitors.
10. A negotiated resolution of this dispute could not be achieved at the meeting on 27 October 1994. I subsequently wrote to the respondent and the third party, identifying the issues for determination in this review and conveying some preliminary views in respect of them, while also inviting the lodgment of evidence and submissions to support a case that the matter in issue is exempt matter under the FOI Act. The respondent informed me in reply that, given the passage of time since the tender prices in issue were submitted, it considered that their disclosure could no longer have an "adverse effect" as contemplated by s.45(1)(c)(ii) of the FOI Act, and that the respondent now had no objection to the disclosure of the matter in issue to the applicant. The third party, however, pressed its case that the matter in issue is exempt under s.45(1)(c), lodging a written submission. The third party's submission was forwarded to the applicant, which lodged a short response.

Application of s.45(1)(c)

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

45.(1) Matter is exempt matter if -

...

(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.

I analysed the requirements of s.45(1)(c) in some detail in *Re Cannon and Australian Quality*

Egg Farms Limited (1994) 1 QAR 491 at pp.516-523; paragraphs 66-88.

12. In this case, there is no doubt that the matter in issue concerns the business or commercial affairs of the third party and that s.45(1)(c)(i) is satisfied.
13. The correct approach to the application of the phrase "could reasonably be expected to" in s.45(1)(c)(ii) is explained in *Re Cannon* at p.515; paragraphs 62-63. Those words call for a decision-maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations that are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.
14. In my opinion, there is no reasonable basis for an expectation that disclosure of the matter in issue would prejudice the future supply of such information to government. Where persons must disclose certain 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: see *Re Cannon* at p.521; paragraph 85. Pursuant to the State Purchasing Policy and guidelines, prices submitted by a successful tenderer are ordinarily disclosed, and there is no shortage of suppliers willing to tender for government contracts on that basis.
15. The third party submits, however, that disclosure of the matter in issue could reasonably be expected to have an adverse effect on its business or commercial affairs, and that s.45(1)(c)(ii) is satisfied in that respect.
16. It is generally accepted that pricing information has a degree of commercial sensitivity for suppliers of goods and services operating in a competitive market. The degree of commercial sensitivity may be greater or lesser according to the nature and detail of the pricing information, whether it is current or merely historical, the nature and custom of the particular market, and no doubt a variety of other circumstances which may affect its sensitivity in any particular case. In certain markets, for instance, suppliers routinely publish their prices to the world at large or to prospective customers on request, and consumers routinely compare prices offered by different supplies of comparable goods and services. Speaking generally, the total price at which a supplier is prepared to offer particular items would be considered less sensitive than details of the supplier's pricing structure, e.g. detailed descriptions of the component elements of a tender price. Thus in *Re Maddock Lonie and Chisholm (a firm) and Department of State Services* (Information Commissioner, WA, Decision Ref: D01595, 2 June 1995, unreported), the Western Australian Information Commissioner held (in circumstances where the long-standing practice in regard to State Government tenders was that names and prices of successful tenderers were published in the Government Gazette) that disclosure of the prices offered by unsuccessful tenderers did not qualify for exemption under cl.4(3) of Schedule 1 to the *Freedom of Information Act 1992* WA (which is, for practical purposes, identical to s.45(1)(c) of the Queensland FOI Act) but that detailed descriptions of the manner in which tender prices were calculated (disclosing a company's margins, costs and approach to tendering) did qualify for exemption under that provision: see paragraphs 33, 43 and 46 of *Re Maddock Lonie and Chisholm*.
17. The applicant contends that the usual State Purchasing Policy and guidelines set the standard which should be applied to this case and that the matter in issue should be disclosed. The relevant policy guidelines at the time of the respondent's tender were contained in a policy document prepared by the Administrative Services Department (of which Queensland Purchasing and Sales is a business unit) titled "Public Disclosure of Information with Respect to Offers" (May 1993), from which the following extracts are pertinent:

1. **POLICY**

This policy has been developed to ensure that no doubt exists as to the type of information which may be disclosed with respect to offer documents submitted by an offeror in response to an invitation issued by a Business Unit (including Corporate Services) of the Department.

The policy attempts to balance the principles of openness and accountability of Government with the need to protect information held by government about the business affairs of an individual or organisation. The policy is closely linked with, but is in addition to the rights and obligations of the Government under the Freedom of Information Act.

...

3. **ISSUING INVITATIONS AND OPENING OFFERS**

Invitations for offers are to be issued by Business Units in accordance with the State Purchasing Policy.

Offers may be opened publicly at the discretion of the Business Unit issuing the invitation. All members of the public may attend a public opening. No restriction is to be placed on attendees.

4. **DISCLOSURE OF INFORMATION**

The disclosure of information supplied by an offeror in response to an invitation may take place in the circumstances as set out below.

...

4.2 **Non-public opening of offers**

Oral invitation with oral or written offer

When an oral or written offer is received in response to an oral invitation issued in accordance with the State Purchasing Policy, the name of the successful offeror and the total price may be disclosed in any manner at the option of the Business Unit issuing the invitation but must be disclosed upon request.

Written invitation with written offer

When written offers are received from a supplier of goods and/or services in response to a written invitation and the offer is not to be opened publicly, the name of offerors and the total price (when required in the offer documents) may be disclosed after opening at the option of the Business Unit issuing the invitation.

Upon acceptance of an offer, the name of the successful offeror and the total price (when required in the offer documents) must be disclosed upon request.

Information provided by the offeror on the "additional information available for disclosure" page, as described at paragraph 5.5, may be disclosed at the option of the Business Unit issuing the invitation.

It is recommended that the name of the successful offeror and the total price or estimate contract value be published in the Procurement Gazette in accordance with Ministerial guidelines.

4.3 Public opening of offers

When written offers are received in response to a written invitation and the offer is opened publicly, the name of offerors and the total price (when required in the offer documentation) must be disclosed upon opening.

Information provided by an offeror on the "additional information available for disclosure" page in the offer documentation, as described at paragraph 5.5, may be disclosed upon opening.

The information may be posted on a notice board at the option of the Business Unit issuing the invitation.

All the abovementioned information must be made available upon request. The information may be made available in writing or by verbal communication at the discretion of the Business Unit issuing the invitation.

Upon acceptance of an offer, the name of the successful offeror and the total price (when required in the offer documents) must be disclosed upon request.

It is recommended that the name of the successful offeror and the total price or estimated contract value be published in the Procurement Gazette in accordance with Ministerial guidelines.

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5. DOCUMENTATION TO OFFERORS

5.1 Format

When invitations are extended, the invitation must state clearly in what format the offer is required.

5.2 Details of opening

The invitation must state clearly if offers will be opened publicly.

5.3 Details of selection criteria

Invitation documents must specify selection criteria in respect of the offers received, particularly where selection criteria extend beyond total

price, such as time, delivery and Australian content.

5.4 Details of release of name of offeror and total price

When offers are to be opened publicly, invitation documents must contain a clause stating that it is a condition of offer that the name of the offeror and the total price (when required in the offer documents) will be subject to public disclosure -

- (i) *upon opening of the offers; and*
- (ii) *upon acceptance of an offer.*

5.5 Additional information available for disclosure

When additional information is required by a Business Unit, other than the name of the offeror and the total price (eg. trade and/or settlement discounts, composition or build up of offered prices) and that additional information is required to be publicly disclosed in any circumstance, a separate page must be provided to offerors for the supply of the required information. This page must state the type of information and in what format such additional information is required. The head of the page must clearly indicate as follows:

***"INFORMATION CONTAINED ON THIS PAGE IS
AVAILABLE FOR PUBLIC DISCLOSURE"***

The page may contain any information required by the Business Unit to be disclosed and is not restricted to monetary figures.

The offeror must be notified at the time of the invitation and be given the opportunity to provide such information "in confidence" (ie. by not completing the relevant page and providing the required information under separate attached letter).

Where it is essential that information other than the total price and the name of the offeror be released, the offer documents must clearly express that the offer may not be considered if this information is not made available for release.

5.6 Implications of the FOI Act

The invitation documents must clearly state the implications of the FOI Act by inclusion of the following paragraph in all documentation to offerors.

"Offerors are advised that information provided in offer documents may be subject to disclosure resulting from an application made under the Freedom of Information Act 1992."

An information sheet concerning FOI, as prepared by the FOI Co-ordinator, must be distributed with the offer documents.

5. GUIDELINES FOR COUNSELLING UNSUCCESSFUL OFFERORS

It must be made clear to those being counselled that the session is an information session to provide assistance for future activity. It is not a forum to debate the evaluation processes.

At no time is the unsuccessful offeror to be given any material that is considered to be (or claimed by any offeror to be) confidential commercial information or any pricing information other than that disclosed in offers and acknowledged by offerors to be available for public disclosure. Evaluation reports and information may be provided to unsuccessful offerors only when those reports and information contain no material relating to the business affairs of another offeror.

18. If a supplier submitted a tender in response to tender invitation documents prepared in accordance with Part 5 of the guidelines set out above, the question of access under the FOI Act to pricing information of the kind in issue need not ever arise - access should be provided administratively. Moreover, a supplier who had tendered on such a basis would have extreme difficulty in establishing exemption under s.45(1)(c) for pricing information of the kind in issue, if it were sought by application for access under the FOI Act.
19. However, the third party's claim referred to in paragraph 9 above appears to be justified. The respondent has, at my request, supplied me with a copy of the tender invitation documents issued in respect of tender no. GC-93/94, and they contain no statements of the kind recommended in Part 5 of the guidelines set out above, indeed no statements of any kind which bear on disclosure of information submitted by tenderers.
20. There is some material before me which indicates that the third party had submitted tenders for other state government contracts and had been the successful tenderer on some other occasions. The third party may well have been aware, then, of the usual policy of publication of the names of, and prices submitted by, successful tenderers. The third party has argued, however, that it was entitled to take the respondent's tender invitation documents at face value, and that it may not have wished to submit a tender if it had been apparent that its pricing information may be disclosed to competitors, thereby disadvantaging it in competition for contracts to supply non-government institutions.
21. Although the documents in issue contain prices for a substantial number of items, each price represents the total price offered for each item. The documents in issue do not contain any indication of the component elements of the tender price for each item - there is nothing which directly discloses the third party's margins or, for instance, the costs at which the third party can obtain materials from its suppliers.
22. In my letter to the third party inviting evidence and submissions, I said that the arguments it had submitted, to that time, had not yet persuaded me that disclosure of the documents in issue could reasonably be expected to have an adverse effect on its business or commercial affairs.
I suggested that the third party may wish to explain to me how it asserted that a competitor with access to the information in issue could calculate the third party's profit margins, or otherwise obtain information which would be to the competitor's commercial advantage or the third party's commercial disadvantage in future commercial dealings.
23. The third party responded to my suggestion in its written submission. The third party asserted that in large 'one-off' contracts, there are more possibilities for variations in fabric and manufacturing costs that can affect total price, and there is generally less concern at the disclosure of total price for a large 'one-off' contract. However, a standing order arrangement for small to medium size jobs, such as that in the relevant tender in this case, requires a

pricing schedule of rates calculated to cover the "normal day to day type jobs". The third party's submission contained a sample calculation, based on hypothetical figures, as to how a competitor with access to the tender prices, could calculate the third party's profit margin. The third party's approach in this regard was based on a number of propositions, some of which

I find difficult to accept. The third party submitted that there are only three pricing factors with curtains: (1) fabric cost, (2) manufacturing cost, and (3) profit margin. The third party submitted that all tenderers know the wholesale fabric cost per metre, that manufacturing costs vary slightly (maybe 5% depending on the workroom production at the time), and the profit margin is required to cover all other operating expenditure. Elsewhere in its submissions, however, the third party stated that as a major manufacturer it was also a major purchaser, and buying goods in large quantities allowed it to negotiate with its suppliers and therefore pass on to its clients the benefits. A number of other variables which must exist in respect of manufacturing costs and "all other operating expenditure" were glossed over.

24. In the example given in the third party's submission, its profit margin would be calculated by dividing its tender price by the allegedly standard wholesale fabric costs. The competitor's profit margin would be calculated by dividing the competitor's tender price by the same allegedly standard wholesale fabric cost. From this, the third party extrapolated:

Competitor A, due to large overheads has to margin a minimum of 41%. He knows that to survive he has to better 35%. The only way to maintain the 41% and still exist is to lower his Quality standard, provide cheaper manufacturing and lesser quality fabrics.

...

Astute business people in all industries, including commercial curtain manufacturing, adjust the profit margin to suit the situation. I agree with your comment that the nature of our business is competitive and that there will always be an incentive for competitors to tender at the lowest price they can afford whilst remaining profitable, but it would disadvantage us if our competitors knew our base margin when we can only estimate theirs'. Something would have to suffer, and I don't believe it to be in the public interest if taxes are being spent on goods and services purchased for the lowest price at the expense of quality.

25. I must say that I find the third party's submission wholly unconvincing. It seems to be saying that, assuming virtually identical material and manufacturing costs (a large assumption in itself), if the competitor knows the third party's tender price, it can work out the third party's gross profit margin, but if the third party does not know the competitor's tender price (even though knowing it was higher) the third party can only guess at the competitor's gross profit margin. Really, in essence, this amounts to little more than saying that if a competitor knows how much lower than its own was the third party's tender price, then the competitor may try to undercut the third party in the future. On that analysis, the matter in issue has, with the effluxion of time, long since reached the stage where it no longer has any current commercial sensitivity and, in my opinion, its disclosure could not reasonably be expected to have an adverse effect on the business or commercial affairs of the third party.
26. I find that the matter in issue is not exempt matter under s.45(1)(c) of the FOI Act.

Conclusion

27. I set aside the decision under review and in substitution for it, I decide that the applicant has

(in accordance with s.21 of the FOI Act) a right to be given access under the FOI Act to the documents in issue.

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F N ALBIETZ

INFORMATION COMMISSIONER