

Watkins Pacific Limited and Queensland Rail

(S 99/95, 6 March 1998, 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.-4. These paragraphs deleted.

REASONS FOR DECISION

Background

5. This is a 'reverse FOI' application by Watkins Pacific Ltd (Watpac), objecting to a decision by Queensland Rail to grant the Gold Coast Bulletin access under the FOI Act to parts of a report by Weathered Howe, consulting engineers, who had been retained by Queensland Rail to investigate allegations against Watpac of unsafe construction practices on a segment of the Beenleigh-Robina railway line.
6. By letter dated 17 January 1994, Mr David Smith made application to Queensland Rail, on behalf of the publisher of the Gold Coast Bulletin (Gold Coast Publications Pty Ltd), for access to documents under the FOI Act, in the following terms:

Could Queensland Rail please provide correspondence and reports between Queensland Rail and engineers Weathered Howe in reference to the commissioned independent investigation of allegations regarding safety and quality of the 12 km section of the rail line between Ormeau and Coomera.

There is a very strong public interest aspect of this request. The subject was raised in Parliament late last year, with allegations the quality and safety of construction of a section of the line may have been compromised.

At the time, Opposition transport spokesman Vaughan Johnson warned of a possible "scandal" and possible "fraudulent practices".

Queensland Rail less than two weeks later ordered an independent probe into the allegations, Gold Coast engineers Weathered Howe being commissioned to complete the study.

Queensland Rail predicts up to five million passengers a year will use the rail link after its opening later this year.

It is obviously in the public interest that the complete, and unabridged, Weathered Howe report is made available to the Gold Coast Bulletin.

7. Queensland Rail identified a lengthy report from Weathered Howe, and a number of associated documents, as falling within the terms of the access application. Pursuant to s.51 of the FOI Act, Queensland Rail consulted Watpac, as the contractor responsible for the construction of the relevant segment of the rail line. Watpac objected to disclosure of the documents on the basis that they were exempt under s.45(1)(c) of the FOI Act.
8. The initial decision in response to the FOI access application was made on behalf of Queensland Rail by Mr P Carden, FOI Co-ordinator, and communicated to Watpac and the Gold Coast Bulletin by letters dated 23 March and 24 March 1995, respectively. Mr Carden decided that the substantive sections of the Weathered Howe report, entitled "Summaries and Conclusions", "Standard of Work Overall and Areas of Concern", and "Quality Assurance Comments", plus a number of appendices to the report, were exempt matter under s.45(1)(c).
Mr Carden also decided that a small amount of other matter was exempt under s.44(1) or s.46(1)(b) of the FOI Act. He decided that the balance of the report and its appendices were not exempt matter, and should be disclosed to the Gold Coast Bulletin.
9. By letter dated 18 April 1995, Watpac, through its solicitors, sought internal review of Mr Carden's decision, with respect to the matter which Mr Carden had decided was not exempt matter. In his internal review decision dated 2 May 1995, Mr K Buckley, FOI Internal Review Officer, affirmed Mr Carden's decision that certain matter was not exempt matter, and should be disclosed to the Gold Coast Bulletin. Solicitors for Watpac then applied to me for external review, under Part 5 of the FOI Act, of Mr Buckley's decision.
10. The Gold Coast Bulletin did not seek internal review of Mr Carden's decision that certain matter described above was exempt matter under s.45(1)(c), s.44(1) and s.46(1)(b), and accordingly the correctness of that part of Mr Carden's decision is not an issue which I have jurisdiction to determine in this external review.

External review process

11. I obtained and perused a copy of the entire Weathered Howe report and supporting documents. The Gold Coast Bulletin was consulted and confirmed that it wished to pursue access to the matter in issue, and to become a participant in these proceedings. As noted above, the substantive parts of the Weathered Howe report are not in issue in this external review, and have not been provided to the Gold Coast Bulletin. Concessions made by the Gold Coast Bulletin in the course of this external review have further limited the scope of the review, to the extent that the matter remaining in issue is:

Description	Folios
Covering letter from Weathered Howe forwarding report	304-5
Cover pages of Report and table of contents	299-303

Description	Folios
Section 1.0 - Introduction (two paragraphs)	298
Section 2.0 - Assessment Brief (brief description of purpose of consultancy, details of work and timing of reports.)	297-8
Appendix 3 - Watpac summary of the Davis relationship (the only matter in issue from this Appendix is a facsimile cover sheet with a simple two line message forwarding the summary. The summary itself is not in issue)	265-6
Appendix 4 - Queensland Rail letter securing services of Weathered Howe with 3 page attachment setting out background, purpose of consultancy and other details of consultancy.	257-62
Appendix 5 - Various documents recording allegations made by representatives of Roy Davis Contracting (part of folio 253 is not in issue)	241-56
Appendix 6 - Note of a telephone conversation with a representative of Roy Davis Contracting	238-40
Appendix 7 - Statutory declaration by a representative of Roy Davis Contracting and attached photographs	235-6
Appendix 8 - Statutory declaration by a representative of Roy Davis Contracting	233-4
Appendix 9 - Notes of meeting between Weathered Howe and Queensland Rail on progress of consultancy	230-32
Appendix 10 - Letter from a representative of Roy Davis Contracting	228-9
Appendix 11 - Notes of site inspections with Queensland Rail officers (part of folio 225 is not in issue)	221-27
Appendix 12 - Requests for information to Queensland Rail from Weathered Howe	216-20
Appendix 13 - Detailed Report Civil 2 (parts of the report dealing with adequacy of level of inspection of Queensland Rail officers are in issue. Balance is not in issue).	208-12

12. Some of the matter which remains in issue is merely administrative information relating to the commissioning and creation of the report. Other matter relates to the adequacy of supervision, by Queensland Rail officers, of construction work undertaken by Watpac. However, the bulk of the matter remaining in issue sets out the criticisms and concerns expressed about unsafe construction practices, which had given rise to the commissioning of the report, or which were made known to Weathered Howe in the course of its investigations. Weathered Howe's assessment of the validity of those concerns is

contained in the substantive part of the report, which, however, is not in issue in this external review for the reason explained in paragraph 10 above.

13. By letter dated 19 February 1997, the solicitors for Watpac were provided with a copy of my decision in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 and invited to lodge a written submission and/or evidence in support of Watpac's contention that the matter in issue was exempt under s.45(1)(c) of the FOI Act. Despite being accorded a number of opportunities to provide a submission or evidence in support of its contentions, Watpac has lodged no material with me. In this context, it is worth repeating the comments which I published for the benefit of 'reverse FOI' applicants in *Re Pope and Queensland Health* (1994) 1 QAR 616 at pp.621-622 (paragraph 17):

Section 81 of the FOI Act provides that in a review under Part 5 of the FOI Act, the agency which made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant. In the present case, therefore, the formal onus remains on Queensland Health to justify its decision that the Seawright Report is not exempt under s.45(1)(c). Queensland Health can discharge this onus, however, by demonstrating that any one of the three elements which must be established to found a valid claim for exemption under s.45(1)(c) cannot be made out. Thus, the applicant in a 'reverse-FOI' case, while carrying no formal legal onus, must nevertheless, in practical terms, be careful to ensure that there is material before the Information Commissioner from which I am able to be satisfied that all elements of the exemption provision relied upon (in this case the three elements of s.45(1)(c)) are established.

Application of 45(1)(c) of the FOI Act

14. Section 45(1)(c) of the FOI Act provides:

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.

15. 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) if I am satisfied that:

- (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; 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 another person, which the information in issue concerns; or
 - (ii) prejudice to the future supply of such information to government;

unless I am also satisfied that disclosure of the matter in issue would, on balance, be in the public interest.

16. The only material before me which states grounds for Watpac's objection to disclosure, is a letter dated 15 March 1995 from Watpac's solicitors in response to s.51 consultation by Queensland Rail:

- (a) *In the compilation of the reports and correspondence, due regard was not had to the rule of natural justice, in that the reports and correspondence contained hearsay evidence, were subjective in their analyses, and Watpac was not afforded the opportunity to make submissions in its own defence.*
- (b) *The report was commissioned by Q Rail in response to allegations made by a Subcontractor, which have been determined to be vexatious.*
- (c) *The report covers a review of fitness for purpose, public safety, as well as a wide range of other matters relating to construction supervision. The report confirms there are no areas of concern in relation to the works being fit for the purpose or safety to the public. The report makes unanswered allegations relating to construction practice which may be extremely detrimental to Watpac.*
- (d) *The allegations by the Subcontractor appear to have been made to secure a commercial settlement of litigation between the Subcontractor and Watpac. Both Watpac and Q Rail have been subjected to pressure from the Subcontractor through media releases and coverage.*

- (e) *The contents of the reports and correspondence are such, that selective releasing of the parts of the report which exacerbate media pressure on both Q Rail and Watpac, may prejudice the proper outcome of the current legal proceedings.*

Business, commercial or financial affairs?

17. In interpreting this requirement, I have adopted a confined approach to the construction of the term "*concerning the business, ... commercial or financial affairs of ... another person*", which accords with the approach taken by Powell J of the NSW Supreme Court in *Wittingslow Amusements Group v Director-General of the Environment Protection Authority of NSW* (Supreme Court of NSW, Equity Division, No. 1963 of 1993, Powell J, 23 April 1993, unreported). The relevant passage from Powell J's decision is reproduced in *Re Cannon* at p.518, paragraph 72. A similar approach has also been adopted by Victorian judges (see the cases analysed in *Re Cannon* at pages 517-518, paragraphs 69-71). It is not sufficient that the matter in issue has some connection with a business, or has been provided to an agency by a business, or will be used by a business in the course of undertaking business operations. The matter in issue must itself be information about business, commercial or financial affairs, in order to satisfy this requirement.
18. As I have noted above, some of the matter in issue is simply administrative information, or information about how Weathered Howe went about preparing the report. Other information relates to the quality of supervision by Queensland Rail officers. I am not satisfied that matter of that kind satisfies the initial requirement for exemption imposed by s.45(1)(c)(i). Other examples could be given. However, in light of the findings I have made below in relation to the other requirements for exemption under s.45(1)(c), I will refrain from adding to the length of this decision by attempting to identify in detail all matter which does or does not meet the requirement for exemption imposed by s.45(1)(c)(i) of the FOI Act.

Adverse effect on business, commercial or financial affairs?

19. Watpac has not argued that disclosure of the matter in issue could reasonably be expected to prejudice the future supply of such information to government, and I can see no reasonable basis for such a claim. I will therefore consider whether disclosure of the matter in issue could reasonably be expected to have an adverse effect on Watpac's business, commercial or financial affairs.
20. 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 (the Commonwealth FOI Act), 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. Those observations are also relevant here. 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).

21. Watpac has made a briefly-stated claim, in broad terms, that disclosure could be expected to prejudice its affairs, but has not backed up its claim with any evidence, or with specific submissions explaining how the disclosure of particular matter in issue could reasonably be expected to prejudice its relevant affairs.
22. There is no doubt that the matter in issue contains criticisms or concerns raised about particular aspects of Watpac's construction practices in relation to the rail line. The validity of those criticisms/concerns was assessed in segments of the report which are not in issue in this external review. However, the contents of the report itself make it clear that the criticisms/concerns have already been the subject of considerable attention both in the media and in Parliament (see, for example, Appendix 2). Given the extent of public attention which had already been drawn to them by the time of the relevant FOI access application, it is doubtful that disclosure under the FOI Act of another statement of the concerns (even if in more detail than originally made public) could reasonably have been expected to prejudice the business, commercial or financial affairs of Watpac - disclosure of the matter in issue under the FOI Act would not be likely to have occasioned any significant escalation in the concerns which people might have had on first hearing of the criticisms.
23. But, in any event, there has been a considerable lapse of time since the criticism/concerns first came to public attention. In that time, they have been assessed by independent expert engineers, and the rail line has been completed and has operated safely. Given the nature of the concerns expressed, the passage of time and the successful operation of the rail line, I consider that if any adverse effect on the business, commercial, or financial affairs of Watpac could reasonably be expected to follow as a consequence of the disclosure now of the matter in issue, any such adverse effect would be minimal.

Public interest balancing test

24. The construction of a rail line of the size of the Beenleigh-Robina rail line is a significant public undertaking. There is a significant public interest in Queensland Rail being held accountable to the public of Queensland for its part in procuring and supervising work carried out on the rail line. There is also a significant public interest in allowing

members of the public access to matter which will enable them to assess whether this significant commuter and tourism facility has been properly constructed and is safe to serve the community.

25. In my view, these public interest considerations favour disclosure both of the criticisms and concerns raised about safety aspects of some of Watpac's construction practices, and of the steps taken by or on behalf of Queensland Rail with a view to establishing whether or not the criticisms and concerns had any substance, and to assure the quality and safety of the construction work being undertaken on behalf of Queensland Rail. (In that regard, it is unfortunate, in my opinion, that the Gold Coast Bulletin did not pursue access to those segments of the report which detail Weathered Howe's assessment of the validity of the criticisms and concerns raised about unsafe construction practices.)
26. Arguably, it may not have been appropriate to disclose the criticisms made about the safety of particular aspects of Watpac's construction practices, thereby risking prejudice to Watpac's business reputation, until it was established by investigation that the criticisms had substance. However, once the criticisms (albeit in a less detailed version than appears in the matter in issue) became a matter of public record after being raised in the Legislative Assembly (see Hansard, 16 November 1994, pp.10422-10423), the Queensland public was confronted with a significant issue of public safety, in respect of a major item of public infrastructure, which was ultimately intended to attract usage by the public in substantial numbers. From that point in time, I consider that the balance of the public interest, has favoured disclosure of the detail of the criticisms and concerns about safety aspects of Watpac's construction processes, so as to enable the public to assess whether the sources of the criticism were credible (including in terms of their knowledge of relevant facts and their relevant expertise) or perhaps motivated by self-interest, and to assess the nature and extent of any potential threat to public safety, with a view to ultimately holding Queensland Rail accountable for taking steps to assure the quality and safety of the construction work being undertaken for it on behalf of the Queensland public.
27. I also consider that the public interest in accountability of government agencies for the performance of their functions favours disclosure of the matter in issue which concerns the supervision, and quality assurance practices, of Queensland Rail officers in respect of the Watpac construction contracts (although the extent to which any of that matter could be properly said to concern the business, commercial or financial affairs of Watpac would, in any event, be extremely limited: see paragraph 18 above).
28. In light of the view I have stated at paragraph 23 above (i.e., that any adverse effect on the business, commercial or financial affairs of Watpac, that could reasonably be expected in consequence of disclosure of the matter in issue, would be minimal), I consider that the public interest considerations which tell in favour of disclosure of the matter in issue carry such weight as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest. I therefore find that none of the matter in issue is exempt matter under s.45(1)(c) of the FOI Act.

Access to entire report

29. Given my findings and comments above, I would respectfully suggest that the interests of both Queensland Rail and Watpac (as well as the interest of the Queensland public in being more fully informed) might best be served if Queensland Rail were to elect to now disclose the Weathered Howe report in its entirety. To do so would give a properly balanced view of the safety concerns that have been raised, and the expert opinion offered by Weathered Howe in assessing the validity of those concerns. Queensland Rail is able to take such action either in the exercise of the discretion conferred on it by s.28(1) of the FOI Act (see *Re Norman and Mulgrave Shire Council* (1994) 1 QAR 574 at p.577, paragraph 13), or pursuant to the discretion reserved to it by s.14 of the FOI Act, to disclose information otherwise than under the FOI Act. However, that is an issue for Queensland Rail to consider, as I have no jurisdiction to make a decision concerning those parts of the Weathered Howe report which are not in issue in the present review for the reason explained at paragraph 10 above.

DECISION

30. I affirm the decision under review (being the decision made by Mr K Buckley on behalf of the respondent on 2 May 1995) that the matter in issue (more fully described at paragraph 11 above) is not exempt matter under the FOI Act, and that the Gold Coast Bulletin has a right to be given access to it under the FOI Act.