

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 98006
Application S 194/96

Participants:

VYNQUE PTY LTD
Applicant

DEPARTMENT OF PRIMARY INDUSTRIES
Respondent

MARIO URZI SAND & GRAVEL
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents recording information relating to terms of sale set by the respondent for the extraction by a commercial operator of sand and gravel from the Fitzroy River - whether disclosure could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the respondent or the commercial operator - consideration of public interest factors for and against disclosure - application of s.45(1)(c) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.45(1), s.45(1)(c), s.78
Freedom of Information Act 1982 Cth

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491
Pemberton and The University of Queensland, Re (1994) 2 QAR 293

DECISION

I vary the decision under review (which is identified in paragraph 4 of my accompanying reasons for decision) by finding that the information which is identified in paragraph 7 of my accompanying reasons for decision, is not exempt matter under the *Freedom of Information Act 1992* Qld.

Date of decision: 24 June 1998

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. On 28 August 1996, John Williams & Associates (a firm of solicitors) lodged with the Department of Primary Industries (the Department) an application for access to documents under the *Freedom of Information Act 1992 Qld* (the FOI Act), on behalf of its client, Vynque Pty Ltd, which is the registered leaseholder of a special lease of land in the Rockhampton district. The applicant's land fronts on to the Fitzroy River and parts of it have, for many years, been used as a sand and gravel quarry, administered by the Department. For a number of years, Mario Urzi Sand and Gravel has removed quarry material from the land under Sales Permits issued by the Department. In order to obtain access to the extraction site, Mr Urzi must cross the applicant's land. It appears that a dispute has arisen between the applicant and Mr Urzi, regarding access to the extraction site.
2. The applicant's FOI access application sought access to the following documents, relating to the operation of the extraction site by Mr Urzi:
 - Copies of the current, and two preceding, extraction permits for special lease no. 35/51660 (lot 93 on Plan LN801012)
 - Copies of the applications for the current and immediately preceding extraction permits
 - Copies of correspondence and file notes relating to the current extraction permit

- Documents relating to compliance with, and copies of notices given under, the current extraction permit
 - Information, correspondence and file notes relating to access to lot 93 on Plan LN801012 and documents relating to the possible resumption of all or part of lot 93 on Plan LN801012
 - Environmental documents relating to lot 93 on Plan LN801012, to lot 197 on Plan LN1890, and to lot 67 on Plan LN1741
 - The names of forestry personnel having administrative responsibility for special lease no. 35/51160 and the extraction permits covering that special lease.
3. By letter dated 16 October 1996, Mr N O'Brien of the Department advised the applicant that he had located a number of files and documents containing information responsive to the terms of the FOI access application. Mr O'Brien advised the applicant that he had decided to refuse access to all documents located on files F1 and F6, on the basis that they contained exempt matter under s.45(1)(c) of the FOI Act, and to grant access to all documents in F2, F3, F4 and F5, which were responsive to the terms of the FOI access application.
 4. By letter dated 6 November 1996, the applicant applied to the Department for internal review of Mr O'Brien's decision to refuse access to the documents located on files F1 and F6. The internal review was conducted by Mr J R Dulley who decided to vary Mr O'Brien's decision. Mr Dulley decided to grant access in full to 38 of the 73 documents located on file F1, and to grant access to a further 5 documents from that file, subject to the deletion of segments of matter which he decided comprised exempt matter under s.45(1)(c) of the FOI Act. Mr Dulley decided to refuse access to the remaining 30 documents located on file F1, and to the single document located on file F6, on the ground that they comprised exempt matter under s.45(1)(c) of the FOI Act.
 5. By letter dated 16 December 1996, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Dulley's decision. In the application for review, the applicant took the opportunity to set out detailed reasons as to why it required access to the matter in issue, including the fact that it was concerned that the terms of the Sales Permit were being exceeded, causing environmental damage to the surrounding area. The applicant also stated that the Department was considering partial resumption of its land, in order to ensure a permanent right of access to the extraction site.

External review process

6. The documents in issue were obtained and examined. Mr Urzi was advised of the external review application, and he applied for, and was granted, status as a participant in the review, in accordance with s.78 of the FOI Act.
7. As a result of concessions made through negotiation with the participants, additional matter was disclosed to the applicant during the course of the review. The applicant eventually agreed to confine the scope of the matter in issue, to which access is still sought, to those segments of the documents in issue which contain figures showing the total amounts of material permitted by the Department to be extracted by Mr Urzi over the life of the Sales Permits, the minimum amounts of material required by the Department to be extracted

annually, and the actual amounts extracted by Mr Urzi. Those amounts are recorded in folios 3, 5, 6, 8, 11-13, 17, 22, 26, 28-30, 32, 36-39, 43, 44, 65, 67, 69 and 74. They are claimed by both the Department and by Mr Urzi to be exempt matter under s.45(1)(c) of the FOI Act.

8. Each of the participants has lodged written submissions and/or evidence in support of its case. That material relates not only to extraction amounts but also to other matter (particularly financial information and royalty rate information) which was in issue before the applicant's concession referred to in the preceding paragraph. I have taken into account those parts of the submissions and evidence (and of the correspondence generated in response to the initial access application and the internal review application made to the Department) which are relevant to the matter which now remains in issue.
9. The material provided by the applicant comprises letters from John Williams & Associates dated 16 December 1996, 1 April 1997 and 2 July 1997. The material provided by the Department comprises letters from Mr O'Brien dated 12 March 1997 and 30 May 1997, and statutory declarations by Raymond Francis Robinson dated 28 February 1997 and 28 May 1997. The material provided by Mr Urzi comprises two letters dated 14 February 1997, and a statutory declaration by Mr Urzi dated 21 May 1997.
10. That material was exchanged between the participants, to enable each to respond to the various issues raised. The relevant submissions of the participants are summarised at paragraphs 17-19 below.

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

11. Section 45(1) of the FOI Act received detailed consideration in my decision in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, where 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. The basic object of s.45(1) 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 activities who supply information to government, or about whom government collects information; and
 - (ii) agencies which carry on commercial activities.
12. The Department and Mr Urzi have based their respective cases for exemption on s.45(1)(c) which 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.

13. 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.

14. 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 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).

15. The common link between the words "business, professional, commercial or financial" in s.45(1)(c)(i) is to activities carried on for the purpose of generating income or profits. Thus, an adverse effect under s.45(1)(c)(ii) will almost invariably be pecuniary in nature, whether directly or indirectly (see p.520, paragraphs 81 and 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.

Evidence submitted by the participants

16. In letters to the Department and to Mr Urzi dated 14 April 1997, the Deputy Information Commissioner advised that he was unable to identify what adverse impact would be caused to either the Department's or Mr Urzi's business, commercial or financial affairs, by disclosure to the applicant of the extraction amount information alone, without any accompanying financial or royalty rate details. The evidence submitted by Mr Urzi and by the Department in response did not deal specifically with extraction amount information, but rather with the adverse effects which each contended would be caused by disclosure of the extraction amount information, in combination with the financial and royalty rate information. In their submissions, both the Department and Mr Urzi attached particular significance to the fact that the applicant is also involved in the sand and gravel extraction business, and should be regarded as being in direct competition with Mr Urzi.
17. The key points raised by Mr Urzi, which apply to the extraction amount information, are:
 - Release of the information will provide the applicant with a better insight into Mr Urzi's extraction operation, particularly in relation to the output of his equipment, efficiency of his operations, and the gross dollar value of his permit.
 - The applicant can observe Mr Urzi's extraction operation from its land, and obtain information in relation to labour resources, equipment used, methods of extraction and general operational techniques. Mr Urzi submitted that, while he could not prevent the applicant from doing this, the release of any additional information would be detrimental to Mr Urzi's business, when used in conjunction with the information already accessible to the applicant.
 - It is likely that the Sales Permit held by Mr Urzi will be opened to public tender in 1998, and that the applicant will compete with Mr Urzi for the award of the contract. Knowledge by the applicant of the current details of Mr Urzi's permit will place Mr Urzi at a disadvantage in the tendering process.
 - The applicant's suggestion that the extraction operations may be causing permanent environmental damage is not supported by any study or documentary evidence. Mr Urzi submitted that if the applicant genuinely held such concerns, it would be a more appropriate course for the applicant to request that an independent and confidential environmental impact study be performed.
18. The key points raised by the Department in support of its contention that the extraction amount information comprises exempt matter under s.45(1)(c) are:
 - It is normal operating policy for the Department to keep confidential the details of Sales Permits, and only to release such data in statistical format where the individual's business is

not identifiable. The ability of the Department to conduct future successful commercial negotiations with all clients depends upon its reputation for respecting confidentiality.

- Extraction and royalty rate amounts differ from permit holder to permit holder. The amounts are commercially sensitive to the Department and the permit holder. In this instance, it is in the public interest to ensure that the commercial activities of government, which are in direct competition with the private sector, are not unduly subjected to scrutiny when the commercial activities of its competitors are not.
- The Department's commercial activities in relation to extraction permits revolve around "market price". If there is a demand for a permit, the Department seeks tenders from operators in the extraction market. Tenderers submit details of extraction, financial and royalty rate amounts, and quite often, there is disparity between tenderers in these amounts. The tender is then awarded on the basis of "market value". This ensures market prices are paid for extracting a public resource.
- If an operator gains knowledge of the permit terms previously accepted by the Department, it has an advantage in future dealings with the Department and may not offer reasonable terms that have been assessed by reference to current market conditions.
- In regard to the public interest in releasing information which discloses the terms which the Department sets or receives for the sale of a public resource, this information is well documented and able to be scrutinised through publication of documents such as the Department's Annual Report, and via auditing procedures.
- The extraction amount information is not pecuniary in nature, but it would be the Department's normal procedure to consider such details as the business only of the Department and Mr Urzi. The applicant has stated that its intention is to use the extraction amount data to ascertain if Mr Urzi is abiding by the sale conditions imposed by the extraction permit, presumably by comparison to a survey of the site. As a lessee, this would perhaps be the applicant's right, but as a competitor, the information could be used in such a way as to damage the commercial interests of Mr Urzi. As a lessee, the applicant would be consulted as per current normal procedures, whenever a new sale is proposed or the sale quantity is to exceed earlier approvals. The purpose of such consultation would be to minimise any adverse impacts on the grazing enterprise, rather than to seek the lessee's approval, and would not include details of monthly removals. Should the lessee object, there is a procedure to handle the matter, leading ultimately to Ministerial decision if the dispute is not resolved. The Department submitted that a lessee's interests are adequately protected by this procedure.

19. The key points raised by the applicant in support of the disclosure of the matter in issue are:

- The applicant believes that Mr Urzi is not complying with the terms of his permit and that the Department is not adequately monitoring the situation. It is in the public interest to ensure that both Mr Urzi and the Department are abiding by the terms of the permit and that the Department is properly discharging its public duties, particularly as the sale of a public resource is involved.
- The applicant believes that Mr Urzi's extraction operations may be causing lasting environmental damage to the area. The applicant, as the registered leaseholder of the land subject to the permit, has an interest in assessing whether such environmental damage is, in fact, being caused. The applicant further contends that there has been a degradation of its lease due to the extraction operations, that the value of the lease has been diminished significantly, and that, on a visual inspection, the applicant's right of enjoyment of the land has also been significantly diminished.

- The applicant has an interest in assessing the viability of the extraction site, as it is proposed by the Department to resume part of its land in order to preserve a permanent right of access to the extraction site.
- Disclosure of extraction amount information cannot, contrary to Mr Urzi's submission, disclose output of equipment or the efficiency of Mr Urzi's extraction operation. It would be necessary for the applicant to observe the entire extraction process over the entire period of Mr Urzi's permit in order to obtain any information that could be prejudicial to Mr Urzi's operation.
- Access is not being sought to details of a competitive tender. The applicant is seeking access to details of a non-competitive process, which will have little influence on any future competitive process.
- Access to extraction amount information is essential in order to assess whether there has been compliance with extraction guidelines.

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

Business, commercial or financial affairs

20. I am satisfied that the first requirement for exemption under s.45(1)(c) has been met, in that the matter in issue concerns the business, commercial or financial affairs of the Department and Mr Urzi.

Adverse effect on those affairs

21. Turning to the second requirement for exemption under s.45(1)(c), there has (in my view, correctly) been no suggestion by the Department or by Mr Urzi that disclosure of the matter in issue could reasonably be expected to prejudice the future supply of like information to government. Accordingly, my decision regarding the second requirement for exemption under s.45(1)(c) will deal only with the first limb of s.45(1)(c)(ii).
22. Having reviewed the submissions of the participants, I am not satisfied that disclosure of information relating to the amounts of material permitted or required to be extracted, and actually extracted, from the site by Mr Urzi, could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of either the Department or Mr Urzi. This is particularly true of the bulk of the matter in issue which, it must be remembered, does not relate to details of the current permit under which Mr Urzi is operating, but rather to details of past permits, dating back to 1990. I do not consider that any commercial sensitivity attaches to this information, and I see no reasonable basis for expecting its disclosure to have an adverse effect on the business, commercial or financial affairs of either the Department or Mr Urzi.
23. Even in respect of the matter in issue comprising extraction amount information from Mr Urzi's most recent permits, I am not satisfied that disclosure could reasonably be expected to provide the applicant with a better insight into Mr Urzi's extraction operations, such as to cause Mr Urzi detriment. While I acknowledge that the site in question may be opened to a public tender process in 1998, and that the applicant may compete with Mr Urzi for the award of the permit, I am not satisfied that there is a reasonable basis for expecting that the applicant could use the matter in issue (without the accompanying financial and royalty rate information) to its advantage in the lodging of a tender, and to Mr Urzi's, or the Department's, detriment.

24. Further, I am not satisfied that disclosure of the matter in issue could, in light of the applicant's ability to observe Mr Urzi's extraction operation, be reasonably expected to have an adverse effect on Mr Urzi's business, commercial or financial affairs. I am not satisfied that knowledge merely of the amount of material which Mr Urzi is permitted or required to extract, and actually extracts, could reasonably be expected to cause detriment to Mr Urzi's business.
25. With respect to the Department's commercial/financial interests, I am not satisfied that disclosure of the matter in issue could reasonably be expected to have an adverse effect on the Department's ability to conduct future successful commercial negotiations with its clients. The Department is obliged to act responsibly in calculating the minimum and maximum amount of material permitted to be extracted from a particular site, by reference to a number of relevant factors, which may vary from site to site, but which would include such things as the physical location of the site, whether the deposit is a renewable resource, and the environmental impact of the extraction operation on the surrounding area. I do not consider that any commercial sensitivity would attach to such a calculation. Nor can I see what disadvantage could flow if a potential bidder gains knowledge only of the minimum and maximum amounts of material currently permitted to be extracted from the site, or amounts actually extracted in the past.
26. I am unable to identify any adverse effect which disclosure of the matter remaining in issue could reasonably be expected to have on the business, commercial or financial affairs of either the Department or Mr Urzi. Accordingly, I find that the second requirement for exemption under s.45(1)(c) has not been satisfied, and that the matter remaining in issue does not qualify for exemption under s.45(1)(c) of the FOI Act.

Public interest balancing test

27. In light of the above finding, it is not strictly necessary for me to consider the application of the public interest balancing test incorporated in s.45(1)(c), but I think it will be useful to discuss the competing public interest considerations.
28. I consider that there is a strong public interest in scrutinising the Department's dealings with Mr Urzi, to ensure that they have a proper commercial basis, and that the Department is properly monitoring the extraction operations and discharging its public duties with respect to its responsibility for the management of a public resource. The minimum and maximum amounts permitted to be extracted show the obligations placed on Mr Urzi by the Department. The maximum amount acts to safeguard a public resource for the future. The minimum amount ensures that the public obtains a reasonable return on that resource for the term of the Sales Permit. Disclosure of this information would allow any interested members of the public to assess whether the Department is setting appropriate terms for the use of this resource, taking into account financial returns, long term management of the resource and general environmental issues.
29. Likewise, disclosure of the information about actual extractions would allow any interested member of the public to monitor whether Mr Urzi has complied, and is complying, with the terms of his Sales Permits. It would place in context the efforts of the Department to monitor compliance, and would ensure that the public interest in the responsible management of a public resource is being safeguarded.

30. Both the Department and Mr Urzi contend that the extraction site's resources are regularly renewed by flooding of the Fitzroy river. The applicant disputes this. Even Mr Urzi has acknowledged (in his letter dated 14 February 1997) that a flood in 1991 carried away a substantial amount of sand. Disclosure of the extraction amount information would assist more informed debate about environmental and resource management issues.
31. Further, in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.368-377 (paragraphs 164-193), I reviewed caselaw which establishes that, in an appropriate case, there may be a public interest in a particular applicant having access to particular information which affects or concerns that applicant to such a degree as to give rise to a justifiable "need to know" which is more compelling than for other members of the public. The principle analysed in *Re Pemberton* applies to the applicant in this case. As a registered leaseholder of the land in question, the applicant has an interest in ensuring that its rights of use are not affected by any use of the extraction site which exceeds that permitted by the Sales Permit. The applicant is in a unique position to monitor compliance with the terms of the permit (if made aware of them) and so augment the functions of the Department in that regard. Disclosure of the information would also allow the applicant to enter into informed discussions with the Department regarding the terms of any future permits which may affect the applicant's land.
32. In addition, it appears that the Department is considering a partial resumption of the applicant's land, in order to ensure a permanent right of access to the extraction site. The Department obviously considers the site a valuable resource, justifying its continued use. The applicant, however, wishes to be given the opportunity to make its own assessment of the viability of the site, in terms of the amount of material being extracted, or capable of being extracted, from the site, in order to allow the applicant to enter into informed discussions with the Department regarding the prospect of resumption. I consider that there is a public interest in a person whose interest in property may be subject to resumption, being given access to information concerning the basis for resumption.
33. Even if I had found that the matter in issue satisfied the requirements of s.45(1)(c)(ii), the public interest considerations discussed would, in my opinion, have warranted a finding that disclosure to the applicant of the matter which remains in issue would, on balance, be in the public interest.

Conclusion

34. For the foregoing reasons, I decide to vary the decision under review by finding that the matter which remains in issue (described in paragraph 7 above) is not exempt matter under the FOI Act.

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F N ALBIETZ
INFORMATION COMMISSIONER