

Walkden and Department of State Development

(S 110/98, 7 March 2000, Information Commissioner)

(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. By letter dated 17 April 1998, the applicant, Ms J Walkden, applied under the FOI Act for access to documents held by the Department of State Development (the Department) relating to the Nelly Bay Harbour development on Magnetic Island, North Queensland (the Development).
6. By letter dated 16 June 1998, Ms J Atkinson of the Department informed the applicant of her decision granting access to a large number of documents, but refusing access to other documents and parts of documents on various grounds. By letter dated 19 June 1998, the applicant applied for internal review of Ms Atkinson's decision.
7. As no internal review was carried out within the timeframe prescribed by the FOI Act, the applicant applied to me (by letter dated 23 July 1998) for review, under Part 5 of the FOI Act, of the Department's deemed affirmation of Ms Atkinson's decision (see s.52(6) of the FOI Act).

External review process

8. The documents in issue were obtained and examined. There followed a round of consultations with the Department, the Department of the Premier and Cabinet, and other third parties, including Nelly Bay Harbour Pty Ltd (NBH) and Nelly Bay Harbour Developments Pty Ltd (NBHD). As a result of those consultations, further matter was disclosed to the applicant. The applicant also made concessions which narrowed the scope of the matter remaining in issue, so that my decision need only deal with one document.
9. That document is a Share Allotment and Unit Sales Agreement (the Agreement) between Curtain Bros (Qld) Pty Ltd (Curtain Bros), NBH, NBHD, and a number of other individuals and companies (folios 63-85 on file E301K). The Agreement was designed to regulate the basis on which Curtain Bros would take an interest in the Development. By memorandum dated 30 June 1999, Ms Claire Single of the Department set out her understanding of the origins of the Agreement, and the way in which a copy of the Agreement came into the hands of the Department:

Mr Mike Hefferan, Mr John Okely and I met on a 'without prejudice' basis with ... the nominated representatives of NBH on 17 October 1997. At that meeting, the proposed new structure of the company (NBH) was described to us Following the meeting, the Department of Economic Development and Trade wrote (by letter dated 20 October 1999) to the Directors of NBH ... to confirm the discussions and requested, among other things, that the company provide executed documentation to confirm the changes in the structure of NBH.

By letter dated 21 October 1997, ... addressed to the Department of the Premier and Cabinet, [a representative of NBH] advised that NBH had been restructured to accommodate [Curtain Bros] The letter further advised that an Agreement documenting this change was available for inspection at Corrs Chambers Westgarth.

On 24 October 1997, Mike Hefferan and I met with Messrs Barry Dunphy, Steve Marton and Chris Murdoch of Crown Law to discuss the preparation of options for inclusion in a Cabinet Submission regarding the Nelly Bay Harbour project. At the meeting consideration was given to [the] letter of 22 October which provided a revised proposal for the project. Crown Law officers offered to view and/or obtain the Agreement from Messrs Corrs Chambers Westgarth. Crown Law officers subsequently obtained a copy of the Agreement by facsimile and provided it to this Department.

[A copy of Ms Single's memorandum has been provided to each of the third parties involved in this review and none has disputed the explanation.]

10. Ms Atkinson's initial decision was that the Agreement was exempt under s.43(1) and s.45(1)(c) of the FOI Act. The Department subsequently withdrew any reliance on s.43(1). In July 1999, I informed the Department, and each of the individuals and companies which were parties to the Agreement (the third parties), of my review and of my preliminary view that the Agreement was not exempt from disclosure to the applicant under s.45(1)(c) of the FOI Act. I invited written submissions from each, should they wish to contest my preliminary view.
11. The Department did not make further submissions, but submissions were received from several of the third parties who objected to the disclosure of the Agreement. One third party raised the possible application of s.44(1) of the FOI Act, in addition to s.45(1)(c). By letter dated 16 November 1999, I provided the applicant with a summary of the submissions put forward by the third parties, and invited her to provide a further submission following consideration of this information. The applicant provided a further submission dated 23 November 1999, which was passed on to the third parties for consideration and comment. Some third parties then provided further brief submissions.
12. In making my decision, I have considered the contents of the Agreement itself, the matters raised in the applicant's FOI access application and in her applications for internal and

external review, the reasons for decision given by Ms Atkinson, and all of the submissions subsequently lodged by the applicant and the third parties, as detailed above.

Application of s.44(1) of the FOI Act

13. Section 44(1) of the FOI Act provides:

44.(1) Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.

14. In applying s.44(1) of the FOI Act, one must first consider whether disclosure of the matter in issue would disclose information that is properly to be characterised as information concerning the personal affairs of a person. If that requirement is satisfied, a *prima facie* public interest favouring non-disclosure is established, and the matter in issue will be exempt, unless there exist public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

Personal affairs matter

15. In *Re Stewart and Department of Transport* (1993) 1 QAR 227, I identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act (see pp.256-257, paragraphs 79-114, of *Re Stewart*). In particular, I said that information concerns the "personal affairs of a person" if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

1. family and marital relationships;
2. health or ill health;
3. relationships and emotional ties with other people; and
4. domestic responsibilities or financial obligations.

Whether or not matter contained in a document comprises information concerning an individual's personal affairs is essentially a question of fact, to be determined according to the proper characterisation of the information in question.

16. The agreement contains the names, Australian Company Numbers (ACNs), and addresses, of eight companies. NBH is one of those companies and is identified as the developer in the Environmental Assessment Report (produced by Environment Australia and the Environmental Protection Agency, and dated May 1999). NBHD is also obviously associated with the Development. In addition, Curtain Bros is listed as a Class A shareholder of NBH by the Australian Securities and Investments Commission (ASIC)

and has been linked with the Development in newspaper reports. The three individual parties to the Agreement are also named as shareholders or office holders of NBH on the ASIC register. The applicant is aware of the identities of the companies and individuals referred to above. One of the individuals agreed to the release of his name to the applicant, but the others have claimed that their names, and the names of associated companies, should not be disclosed as this information concerns their personal affairs. The names of some other individuals appear as signatories for companies which are parties to the Agreement. They too object to disclosure.

17. In *Re Pearce and Qld Rural Adjustment Authority; Various Landholders, Third Parties* (Information Commissioner Qld, Decision No. 99008, 4 November 1999, unreported, at paragraphs 24-25), I stated:

24. *For the reasons explained in Re Stewart at pp.237-239 (paragraphs 20-27), and in the Federal Court judgments there cited, I am satisfied that -*

....

(b) the word "person" appearing in conjunction with the phrase "personal affairs" refers only to natural persons, not to corporations, and that corporations are not capable of having personal affairs for the purposes of the FOI Act.

25. *It follows from (b) above that, in relation to those third parties which are corporations, I am satisfied (for the reasons set out in paragraph 21 of Re Stewart) that the matter in issue which comprises the names of corporations cannot properly be characterised as information concerning the "personal affairs of a person".*

18. Accordingly, I find that the companies named in the Agreement do not have personal affairs capable of qualifying for exemption under s.44(1) of the FOI Act.
19. With regard to the names of individuals contained in the Agreement, as I stated in *Re Pearce* (at paragraph 23), while the disclosure of a person's name, in the abstract, would not ordinarily be a disclosure of information concerning that person's personal affairs, disclosure of that name in the context in which it appears may disclose information concerning the person's personal affairs (or it may not - there is always a question of the proper characterisation of the matter in issue, in its context, which must be addressed in each particular case).
20. One of the third parties named in the agreement claimed that:

The disclosure of my name, my wife's name and my company name will disclose information concerning our personal affairs and there can be no question that disclosure is in the public interest. ... A search of public records available will show the structure of the preferred developer and its shareholders. I am not a shareholder in the preferred developer because I value my anonymity.

21. In *Re Stewart* (at paragraphs 26-27), I said:

26. ... *Even allowing that matter in a document may be exempt under more than one of the exemption provisions in Part 3, Division 2 of the FOI Act, the drafting of these provisions indicates that the kinds of affairs of a person dealt with in s.45(1)(c) were not intended to overlap with the kinds of affairs of a person dealt with in s.44(1).*

27. *I accept, therefore, that in the Queensland FOI Act the phrase "personal affairs of a person" and its relevant variations, does not include the business or professional affairs of a person.*

22. It is clear from the context in which the names of the individual third parties appear in the Agreement that the only information about them that would be revealed by disclosure of their names is the fact that they (or the companies with which they are associated) hold a stake in the Development. In my opinion, that information cannot be properly characterised as information concerning a private aspect of the lives of those individuals. Rather, it is information concerning their business or commercial affairs.

23. One third party contended that the company with which he was associated was a "family investment vehicle", and that disclosing the name of the company would allow the applicant to make searches of public registers to establish what other assets his family held. To the extent that such information is already available to public access, that is not a strong argument for establishing a privacy interest in terms of s.44(1). In any event, it does not make the name of an "investment" company, his or her family's personal affairs. The Agreement clearly relates to a significant financial transaction and was provided to the Department in order to further a major development proposal. I find that all signatures appearing in the Agreement are exempt matter under s.44(1) of the FOI Act (see *Re Corkin and Department of Immigration and Ethnic Affairs* (1984) 2 AAR 214, endorsed in *Re Stewart* at p.257, paragraph 80), there being no public interest in disclosure of the signatures *per se*. Otherwise, I find that disclosure of the Agreement would not disclose any information which can properly be characterised as information concerning the personal affairs of any individual. It therefore does not qualify for exemption under s.44(1) of the FOI Act.

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

24. The Department and the third parties claim that the matter in issue is exempt from disclosure under s.45(1)(c) of the FOI Act, 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.

25. The correct approach to the interpretation and application of s.45(1)(c) is explained in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 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

- 26. I decided in *Re Cannon* at p.516, paragraph 67, that the word "concerning", as it is used in the context of s.45(1)(c), means "about, regarding". It is not sufficient for the matter in issue merely to have some connection with the business, commercial or financial affairs of (in this case) the third parties. The matter in issue must itself comprise information about the individual's or company's business, commercial or financial affairs.
- 27. I consider that the matter in issue does concern the business affairs of the individuals and the companies named in the agreement, in that it relates directly to a commercial transaction to which they are all party.

Prejudicial effect under s.45(1)(c)(ii)

- 28. Section 45(1)(c)(ii) includes the phrase "*could reasonably be expected to*". 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.

29. 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 Concise Dictionary, 3rd Rev. ed 1998); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).
30. In my letter to the applicant dated 16 November 1999, I summarised the arguments put forward by the third parties in respect of this element of s.45(1)(c) as follows:
 5. *the disclosure of the information in question would have an adverse effect on the third party's business, professional, commercial and financial affairs;*
 6. *the Agreement discloses the identity of the parties involved in the Nelly Bay project and the basis on which a third party proposes to acquire an interest in those parties;*
 7. *the Agreement is subject to a number of pre-conditions being met and clients, and other parties to the Agreement, are currently involved in sensitive negotiations with the State and Federal Governments for the issue of the necessary approvals to allow this project to proceed. The third party is attempting to satisfy various pre-conditions to these approvals being granted and is concerned that you (as a long-standing objector to the development) will use the information to delay the project and that this would upset the delicate state of the current negotiations with the Queensland Government;*
 8. *a third party objects to the disclosure of the purchase price as it is considered that this is a matter that should remain private between the parties and that it is not of public interest. The third party claims that it is a strictly commercial fact and not one which should be open to public scrutiny;*
 9. *it is claimed that the matter in issue relates to the private internal dealing in a proprietary limited company and was only provided to the government on a commercial-in-confidence basis. This third party claims that if the matter in issue can be accessed by the public at large then this will alter any dealings with the government in the future.*

- Adverse affect on business *et cetera*, affairs

31. The submissions of the third parties largely focused on the potential effect of disclosure of their identities to the applicant. The identities of Curtain Bros, NBH, NBHD, and the three individuals who are parties to the Agreement are already well known to the applicant and easily ascertainable from ASIC registers. That leaves the five companies which have not been disclosed, and signatories to the Agreement (other than the three individual parties) on their behalf. Matter which would identify those companies and individuals does, however, make up only a small part of the Agreement.
32. The body of the Agreement itself consists largely of standard or slightly adapted legal provisions. They deal with such issues as how to effect notices, time, service of process, waiver, variation, *et cetera*. The third parties have not explained how disclosure of matter of this kind could reasonably be expected to have an adverse effect on the business affairs of any of them. Some clauses are more specific to the Agreement. For example, there are clauses which outline the internal arrangements for the Development structure, the purchase price is stated, and a number of conditions precedent to the Agreement are stated. However, these features are very much specific to the Agreement and I am unable to see how disclosure to the applicant, or to a competitor of the parties to the Agreement, or to any other person, could reasonably be expected to adversely affect any of the third parties in respect of this Development or in any future business dealings. I find that disclosure of matter in the Agreement that does not identify individuals or companies could not reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of any person, and I find that that matter does not qualify for exemption under s.45(1)(c) of the FOI Act.
33. Turning to the names of the five companies and their office holders, the main argument of the third parties appears to be that the applicant will be able to trace the names of those associated with the project and publish details of their association with the Development and with any other business activities they conduct. With regard to the individual parties to the Agreement, the applicant is clearly already able to make searches through ASIC which would identify any companies in which they have an interest. This would include three of the five companies. That information is already publicly accessible by the applicant and I do not consider that disclosure of it to the applicant in another form could reasonably be expected to give rise to any adverse effect of the type contended for by the third parties.
34. There are, however, two companies with respect to which there is no evidence before me that the individual parties to the Agreement have an interest. I will proceed on the basis that disclosure of the names of those two companies, and their named office holders, would inform the applicant of the names of interested parties of which she is not already aware, and cannot obtain the information merely by searching a public register. However, despite my request for specific information in relation to their claim, the third parties have not provided evidence in support of it, other than to point to the website of the applicant. I have no doubt that the applicant is opposed to the Development. She may well also have published business information about individuals associated with the development on her website. However, there is nothing before me to suggest that any use to which she

has put information already obtained by her about the business activities of people known to be involved in the Development, has adversely affected the progress of the Development or any other business activities of those people. I acknowledge that the applicant has gone to considerable lengths to oppose development in the area over a number of years. However, there is nothing before me to show that the mere disclosure of the names of people involved in the Development has in any way hindered the approval of the Development, or adversely affected the business affairs of those involved, or could reasonably be expected to do so in the future.

35. I find that disclosure of the Agreement could not reasonably be expected to have an adverse effect on the business, commercial or financial affairs of any person.

Prejudice to future supply of information

36. At p.521, paragraph 85 of *Re Cannon*, I said:

85. *The second kind of prejudice contemplated by s.45(1)(c)(ii) focuses not on the protection of the legitimate commercial interests of agencies and private sector business undertakings, but on protecting the continued supply to government of information (of the kind referred to in s.45(1)(c)(i)) which it is necessary for the government to have to undertake the functions expected and required of it in the public interest (including those functions identified in paragraph 28 above). The words "prejudice the future supply of such information" also appear in s.46(1)(b) of the FOI Act, and what I said about those words in Re "B" and Brisbane North Regional Health Authority (at paragraph 161) is also apposite in the context of s.45(1)(c)(ii):*

Where persons are under an obligation to continue to supply such ... information (e.g. for government employees, as an incident of their employment; or where there is a statutory power to compel the disclosure of the information) or persons must disclose 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. In my opinion, the test is not to be applied by reference to whether the particular [supplier] whose ... information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of the sources available or likely to be available to an agency.

37. In *Re Swickers Kingaroy Bacon Factory Pty Ltd and Department of Primary Industries and Another* (1998) 4 QAR 498 (at p.514, paragraph 60):

... I do not accept that disclosure of the documents in issue (subject to deletion of matter which I have found to be exempt under s.46(1)(a) of the FOI Act) could reasonably be expected to cause a significant number of proponents of development to refrain, in the future, from applying for necessary approvals, and supplying such information as is necessary to obtain those approvals. Developers will continue to supply necessary information when they are obliged to do so, and when it is in their commercial interests to do so.

38. In this case, the Agreement was provided to the Department to support the developer's proposal. The release of such information to the applicant would not, in my opinion, prejudice the future supply of information by developers who wish to pursue a commercial opportunity. I therefore consider that the matter in issue could not reasonably be expected to prejudice the future supply of like information to government.
39. I find that the Agreement does not qualify for exemption under s.45(1)(c) of the FOI Act.

DECISION

40. I vary the decision under review (being the decision which the Department is deemed to have made on internal review, affirming Ms Atkinson's decision of 16 June 1998) by finding that the Agreement (with the exception of the signatures of individuals contained in the Agreement, which signatures are exempt matter under s.44(1) of the FOI Act) is not exempt from disclosure under the FOI Act.