Wickham Gensol (Aust) Pty Ltd and Gold Coast City Council

(L 2/99, 2 August 1999, 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. This is a 'reverse FOI' application by Wickham Gensol (Australia) Pty Ltd (the applicant), which objects to the decision of the Gold Coast City Council (the Council) to give the initial access applicant, Fleetwash Industrial Systems Pty Ltd (Fleetwash), access under the FOI Act to one paragraph of a facsimile transmission from the applicant to the Council concerning a tender for construction of a truck wheel wash device. The applicant contends that the paragraph is exempt matter under s.45(1)(c) of the FOI Act.

6. By letter dated 11 September 1998, Fleetwash applied to the Council for access to a "*copy of a letter addressed to Council from* [the applicant] *concerning Fleetwash*". The applicant was consulted under s.51 of the FOI Act and objected to disclosure of matter on the basis that it was exempt matter under s.45(1)(b) or s.45(1)(c) of the FOI Act.

7. The initial decision was made on behalf of the Council by Ms B Webber. Ms Webber determined that only one paragraph of a facsimile transmission dated 17 February 1998 (the sixth paragraph on the first page) fell within the terms of the access application. Fleetwash has not sought to challenge this aspect of Ms Webber's decision, so the only matter in issue in this external review is that paragraph. Ms Webber determined that the paragraph was not exempt from disclosure to Fleetwash.

8. By letter dated 7 December 1998, solicitors acting for the applicant sought internal review, contending that the document did not fall within the terms of the relevant FOI access application, that it was not practicable under s.32 of the FOI Act to provide a copy of the document subject to deletion of all other paragraphs, and that the matter was irrelevant as it related to a tender which was not proceeded with. By letter dated 18 December 1998, Mr Beynon of the Council affirmed Ms Webber's decision that access should be given to the paragraph in issue.

9. By letter dated 20 January 1999, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Beynon's decision.

External review process

10. A copy of the document containing the paragraph in issue was obtained and examined. It is a facsimile transmission dated 17 February 1998 from the applicant to the Council. The document was sent after the opening of tenders for a contract for construction of a truck wheel wash device. It expressed a number of concerns relevant to the tender process. The paragraph in issue is the only paragraph in which Fleetwash is named. Fleetwash was informed of my review, and it applied for, and was granted, status as a participant in the review.

11. By letter dated 15 March 1999, I wrote to the applicant expressing my preliminary view that the paragraph in issue fell within the terms of the relevant FOI access application, that s.32 did not apply in the circumstances of the present case, and that the paragraph in issue did not qualify for exemption under s.45(1)(b) or s.45(1)(c) of the FOI Act. The applicant responded by letter dated 1 April 1999, indicating acceptance of my preliminary view that the paragraph in issue fell within the terms of the relevant FOI access application, and my preliminary view in respect of the application of s.32 of the FOI Act. The applicant did not specifically address the application of s.45(1)(b) of the FOI Act, but went on to make submissions that the paragraph in issue is exempt matter under s.45(1)(c) of the FOI Act. I will therefore proceed on the basis that the only claim for exemption pressed by the applicant is based on s.45(1)(c) of the FOI Act. In any event, I am not satisfied that the information contained in the paragraph in issue has a commercial value to the applicant in either of the senses explained in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at p.513 (paragraphs 54-55), which could reasonably be expected to be diminished by its disclosure. The information contained in the paragraph in issue does not qualify for exemption under s.45(1)(b) of the FOI Act.

12. I am constrained in the way I can describe and discuss the matter in issue, so as to explain my reasons for decision, by the need to avoid disclosing the very matter in issue (so as to preserve the efficacy of the applicant's legal rights to challenge my decision for legal error in proceedings under the *Judicial Review Act 1991* Qld). I will, however, attempt to express as fully as I can my reasons for decision, given that restriction.

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

Interpretation of the provision

13. 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.

14. 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.

Meaning of "could reasonably be expected to …"

15. 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.

16. 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).

17. The preceding paragraph was set out in my letter to the applicant dated 15 March 1999, to which the applicant responded:

> *... We respectfully submit that your comments in this respect in* [Re "B"], *namely the need for "expectations which are reasonably based" are not an accurate statement of the law. In the case of* Searle Australia Pty Limited v Public Interest Advocacy Centre *(1992) 26 FCR 111, the Federal Court held (at 123) that the relevant consideration is not whether there is a reasonable basis for the claim that disclosure would have an adverse impact on the business, professional, commercial or financial affairs of our client. Instead, the question is whether such an effect could be* reasonably expected.
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> *Disclosure of the subject material may reasonably be expected to have an adverse impact on the business, professional, commercial or financial affairs of our client in the manner canvassed by the Court in* Searle Australia Pty Limited v Public Interest Advocacy Centre. … *Following* Searle Australia Pty Limited v Public Interest Advocacy Centre, *the point of reference is clearly the "reasonable person" and not any other (necessarily limited) understanding of our client's business and legal affairs.*
>
> *Once again, we submit that our client's concerns are reasonable in the circumstances.*

18. With respect, the test is not whether the applicant's concerns are reasonable, but whether an adverse effect on the applicant's business, commercial or financial affairs could reasonably be expected to follow as a consequence of disclosure of the matter in issue. That question requires objective assessment by the authorised decision-maker under the FOI Act, based on all relevant material available to the decision-maker: see *State of Queensland v Albietz* [1995] 1 Qd R 215 at p.220.

19. I discussed *Searle Pty Ltd v Public Interest Advocacy Centre* in *Re "B"* at p.340, paragraphs 158-159:

> *158. The most recent Federal Court decision on point is* Searle's case, *in which a Full Court of the Federal Court (Davies, Wilcox and Einfeld JJ) was asked to consider whether there was a fundamental difference in principle between the test proposed in the joint judgment of Bowen CJ and Beaumont J in* Attorney-General v Cockcroft *and the test proposed by Sheppard J in that case. The Full Court in* Searle Australia Pty Ltd v PIAC *stated:*
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> *"Their Honours [Bowen CJ and Beaumont J] did not suggest ... that it was sufficient that there be a possibility not irrational, absurd or ridiculous that the specified consequence would occur. Their Honours specifically rejected that*

approach, saying that the words 'could reasonably be expected' meant what they said. The practical application of their Honours' view will not necessarily lead to a result different from that proposed by Sheppard J.

> In the application of s.43(1)(b), there would ordinarily be material before the decision-maker which would show whether or not the commercial value of the information would be or could reasonably be expected to be destroyed or diminished if the information were disclosed. It would be for the decision-maker to determine whether, if there were an expectation that this would occur, the expectation was reasonable."

159. The Full Court went on in that case to state that the issue which the decision-maker must determine is not the reasonableness of the claim for exemption, but rather the reasonableness of expecting a particular consequence to flow from disclosure:

"However, the question under s.43(1)(b) is not whether there is a 'reasonable' basis for a claim for exemption but whether the commercial value of the information could reasonably be expected to be destroyed or diminished if it were disclosed. These two questions are different. The decision-maker is concerned, not with the reasonableness of the claimant's behaviour, but with the effect of disclosure."

20. I do not consider that the submission of the applicant has correctly identified the distinction made by the Full Court in *Searle*. That distinction was between a reasonable expectation of exemption and a reasonable expectation of the particular prejudice specified in the relevant exemption provision (in this case, of an adverse effect on business, commercial or financial affairs). The test is clearly an objective one (see *State of Queensland v Albietz* at p.220). In my view, for an expectation to be a reasonable one, it must be based on reasonable grounds. I cannot see that an objectively reasonable expectation can exist without there being reasonable grounds for such an expectation. I consider that my statement of the test at paragraphs 15 and 16 above is accurate. I note that the test was stated in identical terms in my decision in *Re Murphy and Queensland Treasury & Ors* (1995) 2 QAR 744 at p.760 (paragraph 44), and no fault was alleged, or found, in respect of it in the judicial review application concerning my decision, which was dismissed by de Jersey J (as he then was): see *State of Queensland v Albietz.*

Application to the paragraph in issue

21. In its submission dated 1 April 1999, the applicant contended that "*the subject material contains information relating to strategies adopted by* [it] *in an attempt to sustain the long term viability of its commercial operations*". It argued that it is liable to incur commercial disadvantage from disclosure of the information to Fleetwash, such information having been provided in confidence in the process of submitting a tender to the Council. The applicant contended that it is irrelevant that the potential commercial

disadvantage may not be readily quantifiable, and pointed to paragraph 23 of my decision in *Re Cannon*, as suggesting that there is no requirement that the adverse effect be pecuniary in nature.

22. The applicant also contended that the disclosure of only the paragraph in issue would lead to the paragraph being read out of context, and would be misleading to Fleetwash and detrimental to the applicant's interests. It also pointed to comment by Powell J in *Wittingslow Amusement Group Pty Ltd v Director-General of the Environment Protection Agency of New South Wales* (unreported, 23 April 1993, SC NSW (Eq), No. 1963 of 1993) concerning the protection of commercially sensitive or commercially valuable information.

Concerning business, commercial or financial affairs

23. I am satisfied that the information contained in the paragraph in issue concerns the business, commercial or financial affairs of the applicant. It refers to rights held, and action taken, by the applicant in the course of its business.

Adverse effect on those affairs

24. The paragraph in issue is only four lines long. The first two lines simply record action that has previously been taken by the applicant, most of which would be a matter of public record and all of which would be well known to Fleetwash. I am not satisfied that disclosure of any information in the first two lines could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the applicant.

25. The last two lines contain some conjecture as to the possible knowledge and actions of Fleetwash which might touch on the business of the applicant.

26. The document containing the paragraph in issue is now more than 17 months old. The applicant has indicated that the tender process did not proceed, so there could be no suggestion that disclosure of the paragraph in issue could reasonably be expected to have an adverse effect on the applicant in respect of that tender. I do not accept that disclosure of the paragraph alone could reasonably be expected to mislead Fleetwash, or that disclosing the paragraph outside the context of the balance of the document could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the applicant. (In any event, the applicant would be free to provide Fleetwash with so much of the balance of the document as it considered necessary to provide context to the paragraph in issue.)

27. I accept that the paragraph in issue discloses a strategy that might be adopted by the applicant in relation to Fleetwash. However, it is a strategy that would appear to me to be obvious to Fleetwash, given the past interaction between the applicant and Fleetwash. Even if Fleetwash were not aware of this potential strategy, it seems likely to me that disclosure of the matter in issue could, far from prejudicing the strategy, be expected to bolster it by inhibiting any conduct that Fleetwash considered might attract action by the

applicant against Fleetwash. I am not satisfied that disclosure of the paragraph in issue could reasonably be expected to lead Fleetwash to take action which would reduce the effectiveness of the strategy. Indeed, if the strategy has not been adopted after some 17 months, I cannot see any reasonable basis for expecting that disclosure of the matter in issue at this stage would make any difference to its effectiveness.

28. I therefore find that disclosure of the matter in issue could not reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the applicant. The applicant has not suggested, and I do not accept that, disclosure of the paragraph in issue could reasonably be expected to prejudice the future supply of such information to government. The applicant was clearly using the information in issue to attempt to persuade the Council as to the relative merits of its tender. I do not accept that a significant number of tenderers could reasonably be expected in the future to refrain from providing such information for the purposes of persuading government officers to accept their tenders.

29. I therefore find that the paragraph does not satisfy the requirement for exemption posed by s.45(1)(c)(ii), and I find that it does not qualify for exemption under s.45(1)(c) of the FOI Act.

Public interest balancing test

30. Given my finding above, I do not consider it necessary to deal with the public interest balancing test incorporated in s.45(1)(c) of the FOI Act.

DECISION

31. I affirm the decision under review (being the decision of Mr Beynon on behalf of the Council dated 18 December 1998) that the sixth paragraph in the facsimile transmission dated 17 February 1998 from the applicant to the respondent is not exempt from disclosure to Fleetwash under the FOI Act.