

Gazaford Pty Ltd and Department of Primary Industries

(S 86/00, 27 February 2001, 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.-2. These paragraphs deleted.

REASONS FOR DECISION

Background

3. This is a 'reverse FOI' application by Gazaford Pty Ltd (Gazaford), which objects to the disclosure, under the FOI Act, of certain documents held by the Department of Primary Industries (the DPI) relating to the DPI's regulation of a commercial prawn farm operated by Gazaford.
4. By application dated 6 October 1999, the FOI access applicant (----) applied to the DPI for access to *"all documents relating to prawn farm at Lot 102 Melcers Rd"*.
5. In accordance with s.51 of the FOI Act, the DPI consulted with the owner of the prawn farm, Gazaford, regarding whether or not Gazaford objected to the disclosure of the 1,200 folios which the DPI had identified as falling within the terms of [the access applicant's] FOI access application. Gazaford advised that it objected to disclosure of all of the folios in question.
6. In his decision dated 16 February 2000, Mr Neil O'Brien of the DPI informed Gazaford that he had decided to grant access to the 1,200 folios in issue, subject to the deletion from those folios of all information relating to the survival rate, growth rate, and expected harvest and production figures of the farm since Gazaford took over its operation in mid-1998.
7. By letter dated 14 March 2000, Gazaford's solicitors requested an internal review of [the access applicant's] decision. Mr Bruce Mayne of the DPI conducted the internal review and, by letter dated 27 March 2000, advised Gazaford that he had decided to affirm [the access applicant's] decision.
8. By letter dated 20 April 2000, Gazaford applied to me for review, under Part 5 of the FOI Act, of Mr Mayne's decision.

External review process

9. Copies of the matter in issue were obtained and examined. The Deputy Information Commissioner wrote to [the access applicant] to advise him of my review, and to invite

him to apply to become a participant in the review. [The access applicant] subsequently applied for, and was granted, status as a participant in accordance with s.78 of the FOI Act. He also helpfully indicated that the information that was of particular interest to him was that which related to alleged water seepage from the aquaculture ponds located on the prawn farm.

10. A schedule containing a description of the 1,200 folios in issue was prepared by my office and sent to [the access applicant] on 10 July 2000. In light of the specific information which [the access applicant] had identified as being of interest to him, he was asked to identify any folios on the schedule in relation to which he did not wish to seek access. By letter dated 20 July 2000, [the access applicant] identified those folios in respect of which he wished to continue to pursue access. This information was relayed to Gazaford, with a request that Gazaford indicate whether or not it maintained its objection to the disclosure of all or some of the folios in question.
11. By letter dated 25 August 2000, Gazaford advised that it was prepared to withdraw its objection to the disclosure of some folios, but that it maintained its objection to disclosure in respect of others. The Deputy Information Commissioner authorised the DPI to give [the access applicant] access to those folios in respect of which Gazaford had withdrawn its objection to disclosure, and those folios are no longer in issue in this review.
12. During telephone conversations between a member of my staff and Gazaford's solicitors, it was established that Gazaford's objection to the disclosure of the folios remaining in issue was on the basis that those folios qualified for exemption from disclosure under s.45(1)(b) or s.45(1)(c) of the FOI Act. By letter dated 15 November 2000, the Deputy Information Commissioner communicated to Gazaford his preliminary view that the folios in question did not qualify for exemption under s.45(1)(b) or s.45(1)(c) of the FOI Act. Gazaford responded by advising that it did not accept the Deputy Information Commissioner's preliminary view. Gazaford withdrew its reliance upon s.45(1)(b) of the FOI Act, but provided written submissions dated 4 December 2000 in support of its contention that the folios remaining in issue qualified for exemption under s.45(1)(c) of the FOI Act.
13. A copy of Gazaford's submissions was sent to [the access applicant] and he was invited to respond if he so wished. However, in the meantime, Gazaford advised (by letter dated 11 January 2001) that it was prepared to withdraw its objection to the disclosure of some further folios. ([The access applicant] was given access to those folios and they are no longer in issue in this review.) Gazaford also included in its letter, dated 11 January 2001, further written submissions in support of its contention that the folios now remaining in issue qualified for exemption under s.45(1)(c) of the FOI Act. Again, a copy of those submissions was provided to [the access applicant]; however, he chose not to lodge any material in response.
14. It was not possible to negotiate any further concessions from either party regarding the folios remaining in issue (which are identified in the enclosed schedule)*, and hence it is

necessary for me to make a formal decision regarding those folios and whether or not they qualify for exemption under the FOI Act. In making my decision, I have taken into account the following:

1. [the access applicant's] FOI access application dated 6 October 1999;
2. Mr Neil O'Brien's decision on behalf of the DPI dated 16 February 2000;
3. Gazaford's application for internal review dated 14 March 2000;
4. Mr Bruce Mayne's internal review decision on behalf of the DPI dated 27 March 2000;
5. Gazaford's application for external review dated 20 April 2000;
6. correspondence/submissions from Gazaford dated 3 August 2000, 4 December 2000 and 11 January 2001; and
7. the contents of the matter in issue.

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

15. 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.

16. I explained the correct approach to the interpretation and application of s.45(1)(c) of the FOI Act 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, professional, commercial or financial affairs

- 17. I decided in *Re Cannon* at p.516, paragraph 67, that the word "concerning", as it is used in 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 prawn farm. The matter in issue must itself comprise information about its business, commercial or financial affairs. Support for this strict interpretation of "concerning" can be found in *Accident Compensation v Croom* [1991] 2 VR 322 and *Wittingslow Amusements Group v The Director-General of the Environmental Protection Authority of New South Wales* (Supreme Court of New South Wales, Equity Division, No. 1963 of 1993, Powell J, 23 April 1993, unreported), the relevant passages from which are set out in *Re Cannon* at pp.517-158.
- 18. In this case, the matter in issue relates, primarily, to alleged saltwater seepage from the prawn farm's aquaculture ponds to the underground freshwater aquifer. It includes correspondence between the DPI and the Department of Natural Resources and both the former and current owners of the prawn farm, internal departmental correspondence, and water analysis results.
- 19. I am satisfied that the matter in issue comprises information concerning the business or commercial affairs of Gazaford, and/or the previous licence holders/owners of the prawn farm.

Adverse effect

- 20. The common link between the words "business, professional, commercial or financial" in s.45(1)(c) is to activities carried on for the purpose of generating income or profits. Thus, an adverse effect under s.45(1)(c) will almost invariably be pecuniary in nature, whether directly or indirectly (see p.520, paragraphs 81-82, of *Re Cannon*). At p.521, paragraph 84, of *Re Cannon*, I stated:
 - 1. *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.

21. 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.

22. 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).
23. Gazaford made the following submissions in respect of this second requirement for exemption under s.45(1)(c):
8. that it would be premature and prejudicial to Gazaford to release the matter in issue because it is of a preliminary nature, and a determination has not yet been made by the DPI and the Department of Natural Resources regarding the issue of water seepage from the farm's aquaculture ponds;
 9. that Gazaford's competitiveness within the prawn supply market, both within Australia and internationally, could be affected by adverse environmental allegations;
 10. that [the access applicant] has been "waging war" upon the prawn farm since its establishment and has made numerous complaints to government authorities and the press regarding the farm's operations; and that it is reasonable to expect that he will use the information in issue in an attempt to damage Gazaford's business and/or to bring legal action against Gazaford.

24. Firstly, I do not accept that the matter in issue can properly be regarded as being of a preliminary nature. Even if it could, I do not accept that, simply because of that preliminary nature, its disclosure could reasonably be expected to have an adverse effect on Gazaford's business or commercial affairs. The matter in issue catalogues the development of the water seepage/groundwater salinity levels issue from its outset to the time of the making of [the access applicant's] FOI access application. The initial aquaculture licence was granted subject to conditions that included a monitoring of possible water leakage from the ponds and a reporting of test results to the DPI, and those conditions continue to attach to Gazaford's licence. Gazaford itself has acknowledged that most of the matter in issue relates to the monitoring of salinity levels. To that extent, it may be in the nature of "raw data" but, nonetheless, I cannot see the prejudice to Gazaford in releasing such data when it pertains to what has always been a condition attached to the aquaculture licence. There is nothing before me to suggest that the DPI intends, or is required, to make some kind of finding or determination about the salinity issue. Rather, it is a matter of ongoing monitoring.
25. Gazaford submitted that its business *"is highly sensitive to adverse environmental allegations"*. However, it also went on to state, with reference to the issue of salinity levels in the groundwater that, if the levels are rising (which Gazaford denies), *"there is absolutely no evidence that this is as a result of [Gazaford's] operation"*. Given Gazaford's position in that regard, it is difficult to see why Gazaford should object to disclosure of the matter in issue. Moreover, Gazaford has provided no evidence to suggest that its business has been adversely affected to date as the result of any adverse publicity generated by [the access applicant]. I am not satisfied on the material before me that disclosure of the matter in issue could reasonably be expected to have an adverse effect on the ability of Gazaford to compete with other businesses supplying live prawns to the Japanese market.
26. During the course of this review, Gazaford's aquaculture licence was renewed by the DPI. (I am unaware of the terms or conditions of renewal, if any.) Accordingly, despite the *"constant barrage of complaints by [the access applicant] published in the local newspaper"*, the farm continues to operate. The antagonism that exists between [the access applicant] and Gazaford (and existed with the farm's previous owner) with regard to the farm's operations is well known within the Bundaberg area. I consider that it is mere speculation to suggest that [the access applicant] will use the particular matter in issue to try to harm the farm's operations but, even if he were to attempt to do that, I am unable to identify a specific adverse effect on Gazaford's business or commercial affairs which could reasonably be expected to be caused by disclosure, given that the DPI has given approval for the farm to continue to operate. As I have said, Gazaford has provided no evidence to suggest that its business has been adversely affected to date as the result of any adverse publicity generated by [the access applicant], for example, that it has lost customers in the Japanese market in which it operates, due to environmental concerns.
27. Similarly, Gazaford has expressed concern that [the access applicant] intends to use the matter in issue to bring legal action against Gazaford. Again, in my view, this amounts to mere speculation or conjecture, rather than a reasonably based expectation.

28. On the material put forward in support of Gazaford's case, I am not satisfied that disclosure of the matter remaining in issue could reasonably be expected to have an adverse effect on Gazaford's business, commercial or financial affairs.

Prejudice to the future supply

29. In *Re "B"* (at p.341, paragraph 161) I said:

Where persons are under an obligation to continue to supply such confidential 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 confider whose confidential 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.

30. I find that disclosure of the matter in issue could not reasonably be expected to prejudice the future supply of like information to government. The bulk of the matter in issue was required to be supplied/collected in order to demonstrate compliance with the aquaculture licence conditions/requirements for the prawn farm.

Public interest balancing test

31. If I had found that the matter in issue (or parts of it) satisfied the requirements for exemption imposed by s.45(1)(c)(i) and (ii), that would establish a *prima facie* public interest consideration favouring non-disclosure. It would then be necessary for me to consider whether there are public interest considerations favouring disclosure of the matter in issue which, on balance, outweigh the public interest in protecting the business or commercial affairs of Gazaford from an apprehended adverse effect.
32. Given that I have found that the matter in issue does not satisfy the requirements for exemption under s.45(1)(c)(ii), it is not strictly necessary for me to consider the public interest balancing test incorporated in s.45(1)(c). However, I will do so briefly for the sake of completeness.
33. I concur with the view expressed by the Deputy Information Commissioner in his letter to Gazaford dated 15 November 2000 that there is clearly a public interest consideration favouring disclosure to a neighbouring landholder of information concerning the monitoring of the environmental effects of farming activities that could potentially impact on

neighbouring landholders: see, generally, *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.368-377.

34. I consider that there is significant public interest in enhancing the accountability of the DPI in respect of the performance of its functions in monitoring the compliance by Gazaford of the conditions attached to its licence. Government agencies perform their regulatory functions for the benefit of the public, and there is a public interest in the community being able to scrutinise the conditions which the DPI imposes on farming activities, and the measures taken to ensure that those activities do not cause lasting environmental damage, or disturb unnecessarily or unfairly the activities of surrounding landowners and their rights to enjoyment of their land (see *Re Cardwell Properties Pty Ltd & Williams and Department of the Premier, Economic Trade and Development* (1995) 2 QAR 671 at pp.684-685, paragraphs 25-29, *Re Swickers Kingaroy Bacon Factory Pty Ltd and Department of Primary Industries* (1998) 4 QAR 498 at p.517, paragraph 73).

35. Although acknowledging the public interest in ensuring that the terms of its licence are complied with, Gazaford submitted:

... Our client has complied with those terms. Our client has conducted monitoring in accordance with the terms of the licence and the data has in turn been monitored by the DPI. However, it is not in the public interest that the raw data which is being obtained at [Gazaford's] expense should be released. The potential adverse effect upon [Gazaford's] business far outweighs any public interest in the actual recorded data.

36. I do not accept Gazaford's submission. The raw data to which Gazaford refers forms an integral part of the environmental monitoring undertaken by the DPI (and the Department of Natural Resources), and there is a strong public interest consideration which favours that data being open to public scrutiny. I do not accept that the public interest is satisfied by a simple statement that the requirements of the licence have been complied with, without supporting information. Moreover, the fact that Gazaford may have incurred expenses in complying with the terms of its licence is not a public interest consideration weighing against disclosure of the matter in issue. Gazaford has obtained a significant commercial benefit through the grant of its licence.

37. Accordingly, even if I had been persuaded that disclosure of the matter in issue could reasonably be expected to have an adverse effect on Gazaford's business or commercial affairs, I consider that the public interest considerations favouring disclosure of the matter in issue would outweigh any public interest considerations telling against disclosure, and warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

DECISION

38. For the reasons given above, I affirm the decision under review (being the decision dated 27 March 2000 by Mr Bruce Mayne on behalf of the DPI). I find that the matter remaining in

issue (which is identified in the enclosed schedule)* is not exempt from disclosure under s.45(1)(c) of the FOI Act.

* Schedule not included