

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 98002

Applications L 6/96 and L 24/97

Participants:

QUEENSLAND COMMUNITY NEWSPAPERS PTY LTD
Applicant

REDLAND SHIRE COUNCIL
Respondent

CIVIC PROJECTS (RABY BAY) PTY LTD
SINCLAIR KNIGHT MERZ
COFFEY PARTNERS INTERNATIONAL PTY LTD
Third Parties

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - geotechnical reports relating to canal wall stability at Raby Bay Canal Estate - whether information concerning the business, professional, commercial or financial affairs of any person - whether disclosure could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the estate developer or contractors - whether disclosure would, on balance, be in the public interest - application of s.45(1)(c) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether reports contain 'deliberative process matter' within the terms of s.41(1)(a) of the *Freedom of Information Act 1992* Qld - whether reports merely consist of factual or statistical matter, or expert opinion and analysis, within the terms of s.41(2)(b) and (c) of the *Freedom of Information Act 1992* Qld - application of public interest balancing test in s.41(1)(b) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether disclosure of reports could reasonably be expected to prejudice the impartial adjudication of a case - application of s.42(1)(d) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.41(1)(a), s.41(1)(b), s.41(2)(b), s.41(2)(c), s.42(1)(d),
s.45(1)(c), s.45(1)(c)(i), s.45(1)(c)(ii), s.51, s.74(1)(b), s.87

Freedom of Information Act 1989 NSW s.32(1)(c)

Canals Act 1958 Qld s.11

Local Government (Planning and Environment) Act 1990 Qld Part 5

Accident Compensation Commission v Croom [1991] 2 VR 322
Cairns Port Authority and Department of Lands, Re (1994) 1 QAR 663
Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491
Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re
(1993) 1 QAR 60
*Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and
Trade Development, Re* (1993) 1 QAR 123
Pemberton and The University of Queensland, Re (1994) 2 QAR 293
Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 36 FCR 111;108 ALR 163
Trustees of the De La Salle Brothers and Queensland Corrective Services Commission, Re
(Information Commissioner Qld, Decision No. 96004, 4 April 1996, unreported)
Uksi and Redcliffe City Council, Re (1995) 2 QAR 629
*Wittingslow Amusements Group v Director-General of the Environment Protection
Authority of New South Wales* (Supreme Court of New South Wales, Equity Division,
No 1963 of 1993, Powell J, 23 April 1993, unreported)

DECISION

1. In application for review no. L 6/96, I set aside the decision under review (which is identified at paragraph 4 of my accompanying reasons for decision). In substitution for it, I decide that the matter in issue (a two volume report by Sherwood Geotechnical and Research Services dated October 1995 and titled "Review of Revetment Stability - Raby Bay Canal Estate") is not exempt matter under the Freedom of Information Act 1992 Qld, and the applicant has a legal right to be given access to it in accordance with s.21 of the Freedom of Information Act 1992 Qld.

2. In application for review no. L 24/97, I set aside the decision under review (which is identified at paragraph 6 of my accompanying reasons for decision). In substitution for it, I decide that the matter in issue (a supplementary report by Sherwood Geotechnical and Research Services, titled "Raby Bay Canal Development - Stage 15 Quality Control Documentation - Geotechnical Review", and facsimile cover sheet dated 24 March 1996) is not exempt matter under the Freedom of Information Act 1992 Qld, and the applicant has a legal right to be given access to it, in accordance with s.21 of the Freedom of Information Act 1992 Qld.

Date of decision: 25 March 1998

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant, the proprietor of the *Redland Times* newspaper, applied to me for review of decisions by the Redland Shire Council (the Council) to refuse the applicant access, under the *Freedom of Information Act 1992 Qld* (the FOI Act), to the contents of reports by a firm of geotechnical consultants, which had been commissioned by the Council to investigate and report on revetment (canal wall) stability problems being experienced at the Raby Bay Canal Estate in the Redland Shire. During the course of the review, the Council reconsidered its initial refusal of access, and adopted the position that disclosure of most of the matter in issue would, on balance, be in the public interest. However, objection to disclosure of the reports has been maintained by the third parties, chiefly Civic Projects (Raby Bay) Pty Ltd, the developer of the Raby Bay Canal Estate.
2. By letter dated 12 December 1995, the applicant applied to the Council for access, under the FOI Act, to a two volume report ("the main report") compiled in October 1995 by Sherwood Geotechnical and Research Services ("Sherwood Geotechnical"), entitled "Review of Revetment Stability - Raby Bay Canal Estate". Volume one consists of the report itself and volume two consists of appendices to the report. The Council commissioned the review because of concerns about the continuing evidence of revetment movements at the Estate, uncertainty about the long-term stability of areas of fissured clay within the Estate, and concerns about the potential costs of rectification work that may be required in the future.

The review by Sherwood Geotechnical commenced in early July 1995 and finished in October 1995.

3. In the course of processing the applicant's FOI access application, the Council consulted, pursuant to s.51 of the FOI Act, with Civic Projects (Raby Bay) Pty Ltd ("Civic Projects") and Sinclair Knight Merz ("SKM") as to whether those organisations objected to disclosure of the main report. Civic Projects was the developer of the Raby Bay Canal Estate. SKM was the supervising engineer for the development of the Estate between approximately 1986 and 1995. Both organisations objected to disclosure of the main report, contending that it comprised exempt matter under the FOI Act. Civic Projects relied upon s.41(1) and s.45(1)(c) of the FOI Act, while SKM relied upon s.45(1)(c) alone.
4. In his decision on behalf of the Council dated 7 February 1996, Mr Bruce Callow refused access to the main report on the basis that it comprised exempt matter under s.45(1)(c) of the FOI Act. By letter dated 29 February 1996, the applicant applied for internal review of Mr Callow's decision. In his internal review decision dated 14 March 1996, the Council's Director of Corporate Services, Mr Ken Jones, affirmed Mr Callow's decision. By letter dated 5 April 1996, the applicant applied to me for review, under Part 5 of the FOI Act, of Mr Jones' decision (my file reference number for this review is L 6/96).
5. During the course of the review, I learned that Sherwood Geotechnical had also produced a short supplementary report, titled "Raby Bay Canal Development - Stage 15 Quality Control Documentation - Geotechnical Review" ("the addendum"). The addendum, which comprises a five page report with a fax cover sheet dated 24 March 1996, was produced by Sherwood Geotechnical at the request of the Council. The Council had been asked by Civic Projects to seal the plans for Stage 15 of the Raby Bay development. SKM had produced quality control documentation in relation to Stage 15 which had not been available at the time the main report was produced. The Council asked Sherwood Geotechnical to review the quality control documentation and report its recommendations to the Council regarding the suitability and stability of the Stage 15 works. The addendum contains those recommendations. The chief author of both the main report and the addendum, Dr John Simmons of Sherwood Geotechnical, has advised my office that he also took the opportunity, when writing the addendum, to re-express some of the information contained in the main report which he did not consider was presented clearly enough to express the points that he intended to make. He stated that he also took into account the comments made about the main report at a meeting he attended with representatives of the Council and interested parties (including Civic Projects and SKM) after interested parties had been given the opportunity to review the main report.
6. The addendum did not come into existence until after the making of the decision under review in application for review no. L 6/96. When the applicant learned of the existence of the addendum, it lodged a fresh FOI access application with the Council on 19 June 1997, seeking access to the addendum. Mr Callow of the respondent again consulted with Civic Projects and SKM regarding their views on release of the addendum. Civic Projects objected, citing the same reasons it had given in support of its objection to release of the main report, but SKM did not respond. By letter dated 18 August 1997, Mr Callow informed the applicant that he had decided to refuse access to the addendum, claiming that it was exempt from disclosure under s.45(1)(c) of the FOI Act. On 3 September 1997, Mr Jones affirmed that decision on internal review. The applicant then applied to me (by letter dated 19 September 1997) for review, under Part 5 of the FOI Act, of Mr Jones' decision dated 3 September 1997 (my file reference number for this review is L 24/97).

7. Since applications for review L 6/96 and L 24/97 have similar participants and raise common issues, I have decided to deal with them together.

External review process

8. A copy of the main report was obtained from the respondent and examined. By letters dated 23 October 1996, the solicitors for Civic Projects and SKM, and the President of the Raby Bay Ratepayers' Association, were informed of my review and invited to apply to participate in the review. Both Civic Projects and SKM applied for, and were granted, status as participants in the review; however, the Raby Bay Ratepayers' Association did not respond.
9. The Deputy Information Commissioner wrote to the Council on 15 November 1996, and to the solicitors acting for Civic Projects and for SKM on 19 November 1996, to communicate the preliminary views he had formed on the issues raised for determination in this review, following his preliminary assessment of the main report. The Deputy Information Commissioner expressed the view that substantial segments of the main report could not qualify for exemption under the exemption provisions relied upon by the Council and the third parties. He requested that each of the participants reconsider the contents of the main report in detail, in light of the views he had expressed, and specify which, if any, parts of the main report it was prepared to agree to release to the applicant. The Deputy Information Commissioner also invited each of those participants to lodge a written submission and/or evidence in support of its case for exemption, in respect of any parts of the main report which it still wished to contend were exempt from disclosure to the applicant.
10. By letter dated 6 January 1997, the Council advised that it had reconsidered its position in light of the preliminary views expressed by the Deputy Information Commissioner, and wished to contend that only one sentence (appearing on page 27) in volume one of the main report was exempt from disclosure to the applicant under s.45(1)(c) of the FOI Act. The Council also identified five other parties who were involved in various aspects of the development of the Raby Bay Canal Estate, with whom it considered I should consult under s.74(1)(b) of the FOI Act, regarding release of the main report. (Letters were forwarded to those five parties on 13 January 1997, informing them of the review and inviting them to apply to participate. Coffey Partners International Pty Ltd was the only one to reply, and it applied to be a participant in the review. I wrote to that firm on 12 March 1997, granting it status as a participant in the review, communicating my preliminary view that the main report probably did not qualify for exemption under the FOI Act, and inviting it to lodge evidence and written submissions in support of any case for exemption it wished to make. By letter dated 30 April 1997, Coffey Partners International advised me that it did not wish to make a submission in response to my preliminary view.)
11. By letter dated 13 January 1997, the solicitors for SKM informed me that their client "*maintain[ed] all objections which it has raised previously with respect to the above application for access but that it will not be participating further in this review*".
12. By letter dated 21 January 1997, the solicitors for Civic Projects informed me that their client wished to rely on s.42(1)(d) of the FOI Act (in addition to s.41(1) and s.45(1)(c) of the FOI Act) in claiming that the main report was exempt from disclosure. That letter contained a written submission in support of the claims for exemption made by Civic Projects. While maintaining the general position that the main report must be considered as a whole, and that it was not possible to separate the contentious parts from the non-contentious parts, Civic Projects' solicitors nevertheless provided me with a copy of volume one of the main report,

marked up in red ink to indicate those specific parts which Civic Projects contended comprised information of an anecdotal or speculative nature, or information giving a negative impression of Civic Projects or the Raby Bay Canal Estate development. Civic Projects' solicitors contended that this information comprised exempt matter under the FOI Act. The solicitors further contended that the whole of volume two of the main report (containing appendices), and of the addendum, comprised exempt matter under the FOI Act.

13. An issue then arose in respect of parts of Civic Projects' written submission which it asserted should not be disclosed to the applicant, for response. It is my usual practice in the conduct of a review to give the participants the opportunity to respond to each other's written submissions and formal evidence. I advise the participants of this at the time I invite their written submissions and/or evidence, and request that, if they wish to include material which for good reason needs to be kept confidential from any of the other participants, they clearly identify that material and explain why they consider it should be kept confidential. If I accept that the material should be kept confidential, it is deleted from the copies of the written submission and/or evidence provided to the other participant(s). (Any matter in issue, which an agency has decided is exempt matter, must also be deleted from copies of written submissions or evidence provided to the applicant for access, in order to comply with s.87 of the FOI Act.) The question of deletions to Civic Projects' written submission was eventually resolved, with the bulk of it being disclosed to the applicant, such that I was satisfied that the applicant had sufficient information to be able to assess and, if necessary, challenge the reasoning behind the claims for exemption made by Civic Projects.
14. In a telephone conversation with one of my officers on 7 April 1997, the editor of the *Redland Times*, Mr Hurst, advised that the applicant did not wish to respond to Civic Projects' submission, but continued to rely upon the points raised in correspondence with the Council, and in the application for external review. Mr Hurst did, however, write to my office several weeks later to advise that he wished to provide evidence that the revetment stability problems being experienced at Raby Bay were a matter of public interest. He enclosed a copy of an article from the *Bayside Bulletin* of 13 May 1997 (the *Bayside Bulletin* is also owned by the applicant) reporting on a Council meeting at which several Redland Shire councillors had apparently expressed concerns regarding the estimated costs involved in the future repair and restoration of revetments in the Raby Bay Canal Estate.
15. On 15 May 1997, the Deputy Information Commissioner wrote to Dr John Simmons, the principal of Sherwood Geotechnical, and chief author of the reports, informing him of the review and providing him with a copy of the submission lodged by the solicitors for Civic Projects. Dr Simmons was invited to respond to the issues raised by Civic Projects and to comment on any other matter which he considered to be relevant to the review. In the event that he considered he had sufficient interest to apply to be a participant in the review, Dr Simmons was invited to do so. Dr Simmons responded by letter dated 6 June 1997, a copy of which I later provided to the participants. I have discussed in more detail below, the points raised by Dr Simmons. Dr Simmons did not wish to apply on behalf of Sherwood Geotechnical to be a participant in the review.
16. Following receipt of the application for external review in respect of the addendum, the Council and Civic Projects were informed by letters dated 17 October 1997 that, given the connection in subject matter between the main report and the addendum, together with the similarity of issues for my determination in each external review, I proposed to deal with both the main report and the addendum in the same decision. They were also informed that I proposed to prepare my reasons for decision on the basis of the material already provided

to me by the participants, unless I was informed by a participant that it wished to have the opportunity to lodge additional submissions or evidence. None of the participants sought an opportunity to lodge additional submissions or evidence. For the sake of simplicity, except where it is necessary to make a distinction, I will refer to the matter in issue in the two applications for review, i.e., the main report and the addendum, as simply "the Report".

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

17. 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.

18. I analysed and explained the elements of s.45(1)(c) at paragraphs 66-88 of my decision in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491. Matter will be exempt from disclosure under s.45(1)(c) if I am satisfied that:

(a) the matter in issue is properly to be characterised as information concerning the business, professional, commercial or financial affairs of an agency or another person (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 I am satisfied that disclosure of the matter in issue would, on balance, be in the public interest.

Does the matter in issue concern the business, professional, commercial or financial affairs of any person?

19. I note that no suggestion has been made by the Council (or any other participant) that there is any information concerning the business, commercial or financial affairs of the Council which requires protection under s.45(1)(c). While SKM made no submissions in the course of this external review, its solicitors had written to the Council on 29 January 1996, submitting that

the Report concerned SKM's business affairs and expressing SKM's concern that disclosure of the Report could reasonably be expected to have an adverse effect on its business affairs. SKM considered that, as supervising engineer of a large portion of the development, dissemination through the media of adverse references contained in the Report could result in damage to its financial interests and professional standing. They indicated that SKM was involved in similar canal developments in Queensland and submitted that disclosure would be likely to adversely impact on its future ability to successfully procure other work of a similar nature.

20. In their submission dated 21 January 1997, the solicitors for Civic Projects addressed the requirements of s.45(1)(c)(i) of the FOI Act as follows:

The [Report] concern [s] the design and construction of land in the Raby Bay estate and the factors which impact on that land. Our client is engaged solely in the design and construction of, and subsequent sale of lots in, the Raby Bay estate. Every matter or issue which relates to the construction, development and future of the estate concerns the developer of the estate.

The reports are therefore about or concerning the commercial or business affairs of our client; passages which refer specifically or implicitly to our client as opposed to the estate are mere reinforcement of the well-known connection between our client and the estate.

21. The submission also sought to obtain support from my findings in *Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663 on the application of s.45(1)(c)(i) of the FOI Act to the documents in issue in that case. Those documents were draft and final valuation reports on a parcel of land owned by the Cairns Port Authority, which reports had been prepared for the purpose of enabling assessment of the rent payable under a commercial lease in respect of that land. The documents in issue concerned the business, commercial or financial affairs of the Cairns Port Authority, which was in the business of leasing commercial property. I also decided, however, that information in the documents in issue about the market for commercial land in Cairns generally, although having some connection with the business or commercial affairs of the Cairns Port Authority and perhaps therefore very close to the borderline, was not information concerning the business, commercial or financial affairs of the Cairns Port Authority. In the present case, the solicitors for Civic Projects submitted:

We acknowledge that some of the background information [in the main report], such as theory regarding fissuring of clays, could similarly be considered as "very close to the borderline". ... However, a large amount of the report falls into the first limb of the section 45(1)(c) exemption on the basis of the analysis in [Re Cairns Port Authority].

The reports in this case are about the land developed by our client for commercial purposes. While construction of the estate is complete, our client's commercial affairs are by no means complete. ... incomplete and unsold sales in the estate remain to be finalised. This most significant factor ... [highlights] a comparable connection between our client and the land the subject of the report as was made in [Re Cairns Port Authority].

22. I note the concession that some of the background information in the main report may not concern the business, commercial or financial affairs of Civic Projects. However, I consider that the vast majority of information in the report does not concern the business, commercial or financial affairs of Civic Projects, according to the confined approach to the construction of the words "concerning the business, professional, commercial or financial affairs of ... another person" in s.32(1)(c) of the *Freedom of Information Act 1989* NSW adopted by Powell J of the New South Wales Supreme Court in *Wittingslow Amusements Group v Director-General of the Environment Protection Authority of New South Wales* (Supreme Ct of NSW, Equity Division, No. 1963 of 1993, Powell J, 23 April 1993, unreported) at pp.30-31. In that case, Powell J endorsed the approach taken by Victorian judges in *Accident Compensation Commission v Croom* [1991] 2 VR 322. (The relevant cases are analysed in *Re Cannon* at pp.516-518, and in *Re Cairns Port Authority* at pp.698-699.) It is not sufficient that the information in issue is derived from a business, or has a connection with a business, or will be used by a business in the course of undertaking its business operations.

As I explained in *Re Cannon* at p.516 (paragraph 67) and in *Re Cairns Port Authority* at p.698 (paragraph 81), the word "concerned" in s.45(1)(c)(i) of the FOI Act is used in its primary (and narrower) dictionary meaning of "about, regarding", as opposed to a broader meaning equivalent to "relating to" or "connected with". The matter in issue must itself be information about business, professional, commercial or financial affairs, in order to satisfy the first element of the test for exemption under s.45(1)(c) of the FOI Act.

23. I consider that Civic Projects is mistaken in asserting that because the Report is about land developed by it for commercial purposes, the matter in the Report is matter concerning the business, commercial or financial affairs of Civic Projects. The Report is a geotechnical analysis of problems experienced with land developed by Civic Projects for sale, but (except for some passages) it is not about Civic Projects' business affairs in developing that land for sale, and/or selling it. The comparatively brief reports in issue in *Re Cairns Port Authority* concerned the business/commercial affairs of the Cairns Port Authority because they concerned the valuation of land subject to a commercial lease, for the purpose of assessing the rent payable under the terms of the lease. However, information about the general market for commercial land in Cairns, which affected the valuations, was not information concerning the business/commercial affairs of the Cairns Port Authority for the purposes of s.45(1)(c)(i) of the FOI Act. Similarly, most of the geotechnical information/analysis in the Report is not information concerning the business, commercial or financial affairs of Civic Projects. The vast majority of the information in the Report is more akin to the technical information in the noise impact assessment report that was in issue in the *Wittingslow Amusement Group* case. That report undoubtedly had a connection with the business/commercial affairs of the company which commissioned it, in furtherance of its plans for the redevelopment of the old Luna Park site on Sydney Harbour. However, Powell J held that the information in the report did not concern the business, professional, commercial or financial affairs of any person (at pp.30-31):

... the report is, in substance, a forecast as to the likely acoustic impact of an amusement park, not yet in operation, but to operate which Wittingslow has already been selected as the successful tenderer, together with some suggestions as to how any potential noise nuisance might be ameliorated; ...

Can it, however, be said that the report contains information concerning the business, professional, commercial or financial affairs of any person? Since, as I have already noted, the redeveloped site is far from operational, and since the material contained in the report is limited to that which I have set

out above, there being nothing in the report dealing with such matters as, the cost of acquiring, and installing, and modifying, the proposed "rides" and other amusements, or the cost of operating the proposed "rides" and other amusements, and the profits likely to arise therefrom, it is, in my view, impossible to categorise the information in the report as information relating to the business - whether present or projected - or relating to the professional commercial or financial affairs of any person - on the contrary, the information is information as to the likely acoustic impact on the neighbourhood of an amusement park of the type presently proposed operating on the site (see, for example, Accident Compensation Commission v Croom (supra)).

24. Similarly, the vast majority of the information in the Report concerns a geotechnical assessment of fissured clays in the Raby Bay Canal Estate, with forecasts of the probable future extent of revetment problems that may require remedial work by the Council, including an assessment of the likely costs of remedial work in 1995 dollar values. It is not information concerning the business, professional, commercial or financial affairs of Civic Projects or other participants. Thus, for example, I am not satisfied that parts of the Report dealing with background information (such as the conduct of the review itself and the methodology used), an historical review of fissuring of clays, ground movements in engineered fill *et cetera*, and most of the appendices in volume two of the main report, comprise information concerning the business, professional, commercial or financial affairs of any of the third party participants.
25. I am prepared to accept, however, that there are segments of matter in the Report which do concern the business, professional, commercial or financial affairs of one or more of the third parties, and of other contractors who provided services during the development of the Raby Bay Canal Estate. Passages which directly, or by necessary implication, comment on aspects of the performance of construction activity at the Estate, or its supervision, (one example of which is the passage on p.47 of the main report which was quoted in a letter to my office from the Council, dated 6 January 1997) are properly to be characterised as information concerning the business, professional or commercial affairs of one or more of the third parties (or other contractors) who were responsible for that work in the course of undertaking their business or professional activities. Rarely are the responsible parties named in such passages (one exception is parts 3 and 4 of the addendum, where Sherwood Geotechnical was asked to review, and report to the Council on, the quality control documentation for Stage 15 of the development, prepared by SKM and Coffey Partners). However, I accept that a large number of persons with an interest in the estate and the contents of the Report would be aware, or could readily ascertain, that, for example, Civic Projects was the developer of the estate, and SKM was the supervising engineer during most of the development stages.
26. In view of the conclusion I have reached on the application of the public interest balancing test incorporated in s.45(1)(c) of the FOI Act (see paragraphs 41 and 52 below), it is not necessary for me to specify the passages of the Report which I consider satisfy the requirements of s.45(1)(c)(i) of the FOI Act.

Could disclosure be reasonably expected to have an adverse effect on business, professional, commercial or financial affairs?

27. There has (in my view, correctly) been no suggestion that disclosure of any part of the Report could reasonably be expected to prejudice the future supply of like information to government, so my comments on the second requirement to establish exemption under s.45(1)(c) relate to the first limb of s.45(1)(c)(ii) only. In that regard, I must be satisfied that disclosure of those parts of the Report which concern the business, professional, commercial or financial affairs of the third parties or other contractors, could reasonably be expected to have an adverse effect on those affairs which the information in issue concerns.
28. I explained the nature of the test imposed by words "could reasonably be expected to" in s.45(1)(c)(ii) at p.515 (paragraphs 62-63) of *Re Cannon*:

... 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 "expected" 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).

29. I observed in *Re Cannon*, at p.521 (paragraph 83), that where the information in issue is already in the public domain, or is common knowledge in the relevant industry, it would be difficult to show that disclosure of the information could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the person or company whom the information concerns.
30. One submission made by Civic Projects is that disclosure could be expected to discourage potential purchasers of Estate land not yet sold by Civic Projects. Civic Projects gave an estimate of the value of the unsold land. Its solicitors initially claimed that the bulk of their submission on this point was confidential, and not to be disclosed to the applicant, particularly their estimate of the value of the unsold land. Eventually it was agreed that the applicant could at least be informed that this part of Civic Projects' submission discussed the possible adverse effects which Civic Projects considered release of the Report could have on future sales at Raby Bay.
31. In his letters to the solicitors for Civic Projects and SKM, dated 19 November 1996, the Deputy Information Commissioner had expressed the preliminary view that there were insufficient grounds to give rise to a reasonably based expectation (as opposed to mere speculation) that the disclosure of the Report would have an adverse effect on the business, professional, commercial or financial affairs of Civic Projects, or SKM. The Deputy Information Commissioner referred, by way of example, to several passages from the Report which he considered created a relatively positive impression of the Raby Bay development, predicting that future revetment problems were not likely to be extensive or severe.

The Deputy Information Commissioner also indicated that it was clear that the revetment problems at Raby Bay were a matter of public knowledge and had received significant media coverage. Given the many positive statements contained in the Report, the Deputy Information Commissioner expressed the preliminary view that it was more likely that public concern already generated about land at Raby Bay and the activities of Civic Projects, or SKM, would be eased by giving the public access to the Report, rather than having an adverse effect on the business, professional, commercial or financial affairs of Civic Projects or SKM.

32. In response, Civic Projects' solicitors quoted a number of passages from the Report which they considered created a negative impression of either Civic Projects or the Estate itself. While acknowledging that the revetment problems had been reported in the media, Civic Projects' solicitors argued that there was much information contained in the Report which was not in the public domain and that release of that information would not serve to ease any public concern about land at Raby Bay, given the number of negative comments in the Report. The Council, on the other hand, identified only one sentence, appearing on p.27 of volume one of the main report, which it considered could reasonably be expected to have any adverse effect on the business, professional, commercial or financial affairs of the third parties or other contractors. (The Council observed, correctly in my view, that that passage conveyed a general observation, rather than a specific criticism or negative comment about construction procedures at the Raby Bay Canal Estate. The Council seemed to believe, however, that there were reasonable grounds for expecting the passage to be misinterpreted. I am not satisfied of that, but in any event my findings at paragraphs 41 and 52 below would also apply to that passage.)
33. According to the Report, Civic Projects had reached the final stage (Stage 15) of development at Raby Bay by March 1996. The main report deals with all stages undertaken to that point, while the addendum deals with Stage 15. Given the positive terms in which the addendum is expressed (for example, noting improved design practices and construction standards, from experience gained by assessing problems that occurred with earlier stages of the development), I am not satisfied that disclosure of the Report could reasonably be expected to have an adverse effect on sales of Stage 15 land (if, indeed, any remains to be sold by the date of publication of these reasons for decision). While previous public debate and discussion of the problems experienced at Raby Bay may have had an adverse effect on sales of Stage 15 land, disclosure of the Report would, in my view, be more likely to lessen the concern of potential purchasers of that land.
34. Of the passages in the Report which comply with the requirements of s.45(1)(c)(i) of the FOI Act (i.e., those referred to in paragraph 25 above), some contain negative comment (e.g., criticism of certain construction methods and practices used in the early stages of building the canal walls), although, in my assessment, the majority comprise neutral or positive comment. Nevertheless, there are some passages which, if read in isolation, could reasonably be expected to have an adverse effect on the business or professional reputation of Civic Projects or SKM. Those passages would therefore satisfy the test for *prima facie* exemption under s.45(1)(c) of the FOI Act, subject to the application of the public interest balancing test incorporated in s.45(1)(c). In view of the conclusions reached at paragraphs 41 and 52 below, I need not specify those passages. I should say, however, that the Report acknowledges the difficulties (peculiar to the Raby Bay site) faced during construction, and, in light of some generally positive/optimistic conclusions expressed in the Report (indicating for example, that design practices and construction standards had improved with the benefit of experience), I consider that disclosure of the whole Report should ensure that any adverse effect on the business or professional reputation of Civic Projects or SKM would be minimal.

Public interest balancing test

35. The nature of the public interest balancing test incorporated in s.45(1)(c) of the FOI Act, and the correct approach to its application, were explained in *Re Cannon* at pp.522-523, paragraph 87.
36. In addressing the public interest balancing test in their written submission, the solicitors for Civic Projects raised the following issues:
- (a) The revetment problems in the Raby Bay Canal Estate concern only the residents of Raby Bay, and the issues have been addressed. The maintenance of canals at Raby Bay is funded by a canal levy which is levied on residents of the Estate only. Other residents of the Redland Shire are not affected by this levy. The canal levy was augmented late in 1996 by a \$1.5 million bond provided by Civic Projects. A Bond Agreement was entered into between Civic Projects and the respondent which provides for utilisation of the bond money in the event of "canal bank failure" as defined in the Bond Agreement. The Agreement was entered into without any admission of liability by Civic Projects. On the basis of these factors, Civic Projects asserts that there is no public interest to be served by disclosure of the Report, either to the residents of Raby Bay or the residents of Redland Shire.
 - (b) The Report is too technical to contribute to an informed public debate and contains information which is beyond the comprehension of lay persons. Its technical content renders the Report liable to be quoted out of context.
 - (c) The rights of individual lot owners in the Estate require protection. Specific lots have been identified in the Report, in connection with comments on revetment failure. Disclosure of this information could have an adverse effect on the property values of those lots.

It was also contended that disclosure of the main report alone would not contribute to informed public debate because the addendum to the main report acknowledged that the authors did not have the benefit of certain information when preparing the main report. That submission was made at a time when only the main report was in issue. I no longer regard it as having any substance, now that the addendum is also in issue.

37. The key points raised by the Report's chief author, Dr Simmons, in his letter dated 6 June 1997, which have relevance to the application of the public interest balancing test, are as follows:

... On one hand I believe that the Redland Shire Council represents the community's interests, and that the majority of what is written in the ... report is (in my opinion) of public interest. On the other hand, the report contains many judgements drawn from complex and sometimes subjective information. Civic Projects was the organisation that took on the risks and responsibilities of creating the estate, and I certainly respect their business rights. Their business includes creation of expectations in the wider community, and the Council's task is to ensure that appropriate standards are applied. The Raby Bay Canal Estate is also a very large and complex entity. Prior to and following submission of the report I was aware that elements in the report

could be taken out of context, mixed with predisposed opinions, and used to argue viewpoints which I would judge to be neither fair nor helpful to community interests or to Civic Projects' interests.

I maintain the approach that I took in writing the report in the first place: I had a job to do that involved the necessity to make complex judgements often involving opinions and implications and not mere facts. I would prefer that the report was not released at all, since it was not written with the intention of full public disclosure of technical issues and opinions. I accept that there is a reasonable expectation that the public be informed about the contents of the report in a balanced manner that reflects the uncertainties that exist. I remain very concerned that public disclosure of the ... report could result in selective editing based on uninformed or intentional predispositions. The report could thus be used not to illuminate the difficult management issues faced by the Council, but to support the sectarian viewpoints of one or other group within the community.

...

[Civic Projects'] submission emphasises the negative implications of the report for their client, but the report also includes many positive implications. The Redland Shire Council has a procedure in place by which interested parties may review the report in Council offices. In my opinion, this satisfies the public interest aspect of the report, given the ongoing legal situation involving certain residents, Council, and Civic Projects.

I do not support disclosure of the cost information in the original report or the addendum, since such costs are necessarily subjective and related to probabilities in respect of time and place that are unlikely to be sufficiently accurate for specific local situations. I would prefer that the report was not released at all, given the circumstances including the time that has now elapsed. The report is the Council's property and their position to argue. For this reason I see no reason to apply to be a participant in the review.

38. I find Dr Simmons' comment, that the Report was not written with the intention of public disclosure of technical issues and opinions, difficult to reconcile with indications in the Report itself (e.g., the second paragraph on page 12 of the main report) that the authors understood (and had catered for the fact) that the Report would be available to non-technical readers, principally members of the Raby Bay Ratepayers' Association, and Dr Simmons' acknowledgment in the second last paragraph quoted above that the Report was available for review by interested parties. I have confirmed with the Council that it has a procedure in place whereby residents of the Raby Bay Canal Estate, and intending purchasers of land in the Estate, are permitted on request to inspect the Report in the Council's offices. That arrangement does not extend to other members of the public.
39. The fears expressed by Dr Simmons about selective editing of the Report, and use of passages out of context to support pre-disposed viewpoints, without conveying the balanced exposition of issues which the Report presents (there are some indications in the material before me that similar fears are shared by the third parties), are indicative of distrust in some sectors of the community about the propensity of elements of the media to simplify and sensationalise issues, accentuating any aspect of conflict that can be found in a story.

Nevertheless, it would not be proper for me to assess the application of exemption provisions in the FOI Act by taking into account speculation as to the possibilities of selective editing in any re-publication, by an applicant for access, of matter obtained under the FOI Act. The exemption provisions in the FOI Act require me to assess the consequences of disclosure under the FOI Act of the matter in issue. The consequences of disclosure are ordinarily to be assessed as if disclosure were to any interested member of the public, or, as is sometimes said, 'to the world at large'. Thus, in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163 at p.179, a Full Court of the Federal Court of Australia said: *Disclosure under the FOI Act is, of course, disclosure to the public, and the particulars and personality of the applicant are of no significance.* (Exceptions to the ordinary approach may be indicated by the specific terms of a particular exemption provision, and the nature of its sphere of operation, as explained in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.369-370 (paragraphs 168-169). Exceptions to the ordinary approach may also be indicated in situations where it is proper to apply s.6 of the FOI Act, and/or the principles explained in *Re Pemberton* at p.368 (paragraph 164) and pp.370-377 (paragraphs 170-193), so as to permit account to be taken of a special interest which the particular applicant for access has (over and above the interest of the general public) in obtaining access to particular information. None of those exceptions is relevant in the present case.)

40. In its application for internal review dated 29 February 1996, and in its application for external review dated 5 April 1996, the applicant has raised the following public interest considerations in support of disclosure of the Report:

- The release of the Report is in the public interest because it may reveal the future liability for compensation, which is a potential burden on all of the Council's ratepayers, in the event of land owners in the Raby Bay Canal Estate taking action against the Council.
- The release of the Report is essential to protect the public interest regardless of what impact its disclosure would have on the business or professional interests of any organisation, individual or business.
- Failure to disclose the Report will result in a continuation of the rumours that circulate about slippage of land in the Raby Bay Canal Estate - the disclosure of the Report could be used to dispel these rumours.
- Release of the Report is in the public interest of future residents of the Raby Bay Canal Estate. They deserve to know what has been revealed through an independent investigation.
- It is nonsense to suggest that the disclosure of the Report may have an adverse effect on the interests of the property owners within the Raby Bay Canal Estate and surrounding areas. To the contrary, the disclosure will provide peace of mind for residents and potential residents by either revealing that there is no need for concern, or by alerting them to future problems and allowing them to take remedial action now, rather than when faults occur.
- On balance, the release of the Report is in the public interest because a greater public interest would be served by its disclosure than by denying access.

- Since the original decision to deny access was made, there has been considerable media coverage of the matters covered by the Report. Issues related to slippages at Raby Bay have been canvassed by the applicant on a number of occasions, including front page stories. The matters have been reported in the nationally circulating *The Australian*, on ABC radio 4QR, and at least one news story and one feature article in *The Courier-Mail*.
 - On the date of the first application for review (5 April 1996), the Council was considering a proposal whereby Civic Projects would lodge an unconditional bond of \$1.5 million to be used if any walls needed repair. This was despite the developer saying that it did not agree with the findings of the geotechnical study which was understood to have recommended that \$750,000 be put aside for repairs. Given that aspects of the Report have become subject to discussion and dispute, it is surely reasonable that the public has access to the Report.
41. I consider that most of the points raised by the applicant have validity. In general, I consider that any public interest in protecting the third parties from adverse effects on their business, professional, commercial or financial affairs, together with other public interest considerations claimed by the third parties to tell against disclosure of the Report, are overwhelmed by the weight of public interest considerations which tell in favour of disclosure of the Report (including those passages in the Report which I accept satisfy the requirements of both s.45(1)(c)(i) and s.45(1)(c)(ii) of the FOI Act).
42. It is clear that the extent of the problems that have been experienced with revetment stability in the Raby Bay Canal Estate have caused legitimate and ongoing concern for residents of the Estate. The Council saw fit to commission, from public funds it controlled, an independent, expert report on the nature of the problems, and the extent to which they are liable to continue to manifest themselves in future years in damage requiring remedial work, and the extent of the budget provision the Council should make for the costs of remedial work (see s.11 of the *Canals Act 1958 Qld*). I consider that there is a genuine public interest in information of this kind being made available to any interested member of the public.
43. I do not accept the first point made on behalf of Civic Projects at paragraph 36 above to the effect that financial arrangements already in place mean that the Council's potential financial liabilities have been addressed and are of no public interest. There will ordinarily be a strong public interest favouring disclosure of information concerning the extent of potentially major financial liabilities of a local authority (or information concerning the likelihood of the potential liability crystallising) which may ultimately have to be borne in some measure by the authority's ratepayers, and I can see nothing in the circumstances of this case which would warrant a different finding. Because any expert assessment of the extent of the problem is necessarily operating in the realm of predictive opinion, based on expert analysis of relevant information (including information about problems already experienced) available as of a particular point in time, I do not see how the Council or Civic Projects could be entirely confident that adequate provision has already been made for potential future liabilities. (I note that some Redland Shire Councillors have expressed concern in public meetings of the Council that the \$1.5 million bond given by Civic Projects may prove insufficient for rectification of revetment problems: *Bayside Bulletin*, 13 May 1997, page 5, "Canal Wall Costs Worry Council". Moreover, at least 17 property owners at Raby Bay have issued Supreme Court writs against both Civic Projects and the Council, alleging negligence in respect of revetment failures. The Council faces potential liability in damages and legal costs if litigation against it is pursued.) It is nevertheless important in my view that information be available to the public of the best estimates that experts are able to make on this and other issues covered in the Report.

44. Much of the concern of the third parties over disclosure of the Report appears to stem from the fact that material perceived as adverse to them or their interests is disputed by their own experts. Disagreements between experts are nothing novel, especially where they are necessarily operating in the realm of predictive opinion. However, there has been a degree of scepticism among Raby Bay residents about expert opinions offered on behalf of the organisations engaged in the development/construction work on the Raby Bay Canal Estate which subsequently experienced revetment stability problems. It is apparent from the background segments of the Report that the Council saw a need to commission an independent expert, free of any adverse perceptions through prior association with the conduct of the development/construction work on the Estate, to undertake the assessments described above.
45. It is clear that there already has been significant media coverage of the issues which are the subject of the Report, resulting in much public interest and debate in the Redland Shire and the Raby Bay Canal Estate in particular, and in the circulation of stories and rumours regarding land slippages at Raby Bay, their cause, their magnitude and frequency, the costs of rectification, who will bear those costs, and the possible impact on the Redland Shire generally. I consider that disclosure of the Report, containing expert assessments by an independent firm of geotechnical consultants, would provide a sound and rational reference point for informed public debate. The third parties would be free to contribute the assessments of their own experts to such a debate. Disclosure of the Report would enable interested members of the public to gain an understanding of the technical aspects of the problems experienced at Raby Bay, what has been done to overcome them, and the recommendations for future management of the problems, including an estimate of the rectification costs involved.
46. I note the arguments made on behalf of Civic Projects regarding the technical content of the Report and the alleged inability of lay persons to fully comprehend it. I do not accept those arguments as valid reasons for denying the public access to the Report. If the problems experienced with revetment stability at the Raby Bay Canal Estate are technical in nature, and to describe the nature of the problems and methods of dealing with them requires technical explanations, then interested members of the public can only be properly informed by disclosure of technical information. The authors of the Report have indicated (in the second paragraph on p.12 of the main report) that they have endeavoured to make some concessions for an anticipated non-technical readership. Any interested member of the public having difficulty in understanding technical aspects of the Report is free to seek expert assistance. I see no justification for withholding that opportunity from interested members of the public, because Civic Projects believes it is in a position to judge what technical information should be withheld from the public for fear of confusing it.
47. I can see no manageable standard that could be applied, if contentions of the kind advanced on behalf of Civic Projects were accepted as valid. Much technical, and indeed non-technical, information that is published by governments is confusing and difficult to comprehend for substantial segments of the community. (Anyone who has attempted to read unabridged Commonwealth or State government Budget Papers will understand what I mean.) The democratic values of open government are nevertheless served by making such information available to interested members of the public, including those who might need to seek assistance in interpreting it. I do not accept that the fact that even a vast majority of the public may find a technical document confusing or difficult to comprehend is sufficient reason, in itself, to indicate that disclosure of the document would be contrary to the public interest, or to indicate that its disclosure would not be in the public interest.

48. Nor do I accept the contention by Civic Projects that the Report is so technical as to be even more liable than non-technical reports to be quoted out of context. I am not satisfied that the Report has any greater potential for selective editing or misrepresentation than any other report of moderate length or complexity on a topic in which different stakeholders have conflicting interests. If the public were to be denied access to any report answering that description, on the ground of its potential for being misrepresented by quoting out of context, there would be a substantial diminution in the flow of information to the public on issues of significant public importance that are being addressed through political/governmental processes. Opportunities for informed public debate allow for misrepresentations to be corrected.
49. I consider that there is a significant public interest in enhancing the accountability of the Council in respect of the performance of its functions in approving and supervising the construction work on the development of the Raby Bay Canal Estate (see Part 5 of the *Local Government (Planning and Environment) Act 1990* Qld), particularly considering the possible financial implications for the Council and its ratepayers. Government agencies perform their functions for the service of the public (who, ultimately, by one form of impost or another, fund the operations of government) and there is a strong public interest in the community being able to obtain access to details of the Estate's development, and an analysis of the problems encountered there, and their cause and prognosis.
50. The prospect that disclosure of the Report might adversely affect the property values of some lot owners on the Raby Bay Canal Estate (as contended by Civic Projects) does not, in my opinion, support a finding that disclosure of the Report would not be in the public interest. I can see no reason to elevate the interests of such lot holders over the interests of prospective purchasers in having access to information that might affect the value of properties in the Estate. A prospective purchaser of real estate is entitled to know that a property is, for example, designated as liable for resumption if and when a decision is made to approve construction of a proposed new freeway. Why would the public interest favour suppression of information, from prospective purchasers of canal front property, about problems already experienced, or potential problems, with revetment stability? It can equally be argued that it is in the public interest that potential residents of, and investors in, the Estate, should be entitled to have access to the results of an independent investigation into the revetment problems to allow them to assess their potential investment. (As I noted above, at least 17 residents have commenced legal action against Civic Projects and the Council. They are no doubt named in the Supreme Court writs which have been issued, and their properties identified. In pursuing legal action against Civic Projects and the Council, those property owners, at least, have placed their identities, and details of their properties, on the public record.)
51. Dr Simmons advised that he did not support disclosure of the cost information contained in the Report, given its subjective nature and the time which has elapsed since writing the Report. I am not satisfied that those are sufficient grounds for refusing access to the cost information contained in the Report. I consider that Dr Simmons was giving his expert opinion in estimating possible rectification costs, and I can see no reason to differentiate between this type of information and other information contained in the Report which was necessarily in the nature of predictive opinion based on expert analysis of the relevant evidence available at the time of making the Report. I consider that there is a strong public interest in allowing access to an independent expert's assessment of possible rectification costs, given the concern and debate in the Redland Shire as to whether the \$1.5 million bond provided by Civic Projects will be sufficient. As for the age of this information, I am satisfied that it should be apparent to any reasonable reader of the Report that the information/opinions expressed in the Report were those formed by the authors at

the time the Report was written, based on information available at that time, and any material change in circumstances that has occurred since that time might affect some assessments or conclusions expressed in the Report.

52. I am satisfied that the public interest considerations favouring disclosure of the Report are of such substantial weight as to overwhelm those considerations said to tell against disclosure, including the public interest consideration (inherent in the satisfaction of the test for *prima facie* exemption under s.45(1)(c)) telling against disclosure of those passages in the Report which satisfy the requirements of both s.45(1)(c)(i) and s.45(1)(c)(ii) of the FOI Act. I find that the public interest considerations favouring disclosure of the Report are such as to warrant a finding that disclosure of the whole of the Report would, on balance, be in the public interest. I therefore find that no part of the Report qualifies for exemption under s.45(1)(c) of the FOI Act.

Application of s.41 of the FOI Act

53. The solicitors for Civic Projects have argued that the Report is exempt matter under s.41 of the FOI Act. Section 41(1) and s.41(2) of the FOI Act provide:

41.(1) Matter is exempt matter if its disclosure—

(a) would disclose—

(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) a consultation or deliberation that has taken place;

in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and

(b) would, on balance, be contrary to the public interest.

(2) Matter is not exempt under subsection (1) if it merely consists of—

(a) matter that appears in an agency's policy document; or

(b) factual or statistical matter; or

(c) expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.

54. A detailed analysis of s.41 of the FOI Act can be found in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.66-72, where, at p.68 (paragraphs 21-22), I said:

21. Thus, for matter in a document to fall within s.41(1), there must be a positive answer to two questions:

(a) would disclosure of the matter disclose any opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, the deliberative processes involved in the functions of government? and

(b) *would disclosure, on balance, be contrary to the public interest?*

22. *The fact that a document falls within s.41(1)(a) (i.e., that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest. ...*

55. An applicant for access is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; an applicant is entitled to access unless an agency (or a third party opposing disclosure) can establish that disclosure of the relevant deliberative process matter would be contrary to the public interest. In *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (Information Commissioner Qld, Decision No. 96004, 4 April 1996, unreported), I said (at paragraph 34):

The correct approach to the application of s.41(1)(b) of the FOI Act was analysed at length in my reasons for decision in Re Eccleston, where I indicated (see p.110; paragraph 140) that an agency or Minister seeking to rely on s.41(1) needs to establish that specific and tangible harm to an identifiable public interest (or interests) would result from disclosure of the particular deliberative process matter in issue. It must further be established that the harm is of sufficient gravity when weighed against competing public interest considerations which favour disclosure of the matter in issue, that it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.

56. While I accept that the Report was obtained by the Council for the purposes of deliberative processes to be undertaken by the Council, I consider that virtually all of it comprises matter excluded from eligibility for exemption under s.41(1), either by the operation of—

- s.41(2)(b), because it merely consists of factual or statistical matter, according to the principles discussed in *Re Eccleston* at p.71 (paragraphs 31-32), and more fully explained in *Re Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 at pp.144-147 (paragraphs 49-58); or
- s.41(2)(c), because it merely consists of expert opinion or analysis (see *Re Cairns Port Authority* at pp.687-688, paragraphs 48-50).

57. In *Re Cairns Port Authority*, I found that a relevant indicator which will determine whether a person is recognised as an expert, is whether the person would be accepted by a court as qualified to give expert opinion evidence (in the relevant field of knowledge) on an issue requiring resolution by a court. I consider that the authors of the Report would satisfy that test.

58. The written submission lodged on behalf of Civic Projects argued as follows, regarding the application of s.41(2) to the Report:

For matter to fall outside the exemption in section 41(1) of the Act, it must "merely" consist of expert opinion or analysis by an appropriately recognised expert. In [Re Eccleston], the Information Commissioner pointed out that:

"The use of the word 'merely' in section 41(2), however, indicates that if, for example, factual or statistical matter is inextricably intertwined with matter expressing an opinion, advice or recommendation obtained for the purposes of a deliberative process - it may still be exempt under section 41, provided section 41(1)(b) is satisfied."

Your preliminary view suggests that an opinion expressed by an expert is, ipso facto, expert opinion for the purposes of the section. We submit that a distinction may be made between what is 'merely' expert opinion and what is mere opinion. That is, there is a point at which the opinion of someone who is an expert, becomes speculation. We suggest that an indication of what that point is can be understood by analogy with the law on admissibility of expert evidence in court, just as the test of 'who is an expert' for the purposes of this section has been answered in terms of whether such a person would be accepted to give expert evidence in the matter in a court of law.

A witness in court is permitted to state an opinion on matters about which that witness is an expert. This includes opinion based on the research of others (although this other research must itself be proved). Experts can draw inferences from facts because it is recognised that the court is not always able to draw proper inferences from facts without the appropriate expertise.

It is the role of the court to assess that opinion by observing the facts and observing the logic applied in reaching the expert's opinion. However, cases demonstrate that the opinion of an expert (and not 'expert opinion') can be mere speculation and inadmissible. If, for example, an expert gives an opinion as to the cause of a state of affairs of which the expert has no first hand knowledge and that opinion is negative, but that state of affairs could also have been caused by other non-negative reasons, the negative inference is speculative only.

The highlighted reports point out statements which are speculative. While the authors of the reports have given opinions, on this test, some opinion is 'expert opinion' and some is properly categorised as mere opinion.

Following this reasoning, anecdotal evidence is not expert evidence and opinion based on anecdotal evidence is not expert opinion as the anecdote is not proven.

The report highlights statements and opinions which are anecdotal and based on anecdotal evidence. These statements are exempt.

59. In my view, the above submission manifests a sophistry which is at odds with what one finds on a 'common sense' reading of the Report. It is clear that the authors of the Report collected some information, e.g., photographs, written records, *et cetera*, from Raby Bay residents who had experienced problems with revetment wall stability, and took this information into account in formulating the Report. (In most cases, this information was supplemented or authenticated by the authors' own inspections.) I can see nothing untoward in that; it must have been material relevant to the nature of the exercise that Sherwood Geotechnical was undertaking, and I can see no warrant for the attempt to pejoratively dismiss it as "anecdotal evidence", and to dismiss any expert analysis which had regard to it as "mere opinion". It is clear that the authors used expert knowledge to analyse that information, together with other relevant information, and to draw conclusions from it, and in

turn, to formulate opinions based upon that information. That is expert analysis falling within the terms of s.41(2)(c) of the FOI Act. The mere fact that one expert may disagree with conclusions drawn by another, or that an expert has made an error in drawing a conclusion, does not mean that the disputed or erroneous material should not still be properly characterised as expert opinion or analysis, within the terms of s.41(2)(c) of the FOI Act.

60. The analogy, suggested in the submission on behalf of Civic Projects, with expert evidence in court proceedings, is not helpful. Section 41(2)(c) of the FOI Act does not require an analysis of the rules of evidence in order to determine whether matter is expert opinion or analysis. There is no requirement that an expert follow the rules of evidence in gathering material for the purposes of formulating an expert opinion.
61. As to Civic Projects' assertion that parts of the Report are speculative, I consider it clear that a substantial part of the exercise that Sherwood Geotechnical was asked to undertake required it to give predictive opinions based on expert analysis of the available relevant information. I do not consider that some speculative material in the Report is any the less entitled to be properly characterised as expert opinion or analysis. Sherwood Geotechnical reviewed all material and information available, and where there were gaps in the information, or it was considered to be unreliable, used expert knowledge to reconstruct what was considered to be the likely scenario. It obviously was particularly difficult to analyse the cause of revetment movements where repair work had already been completed, and it may have been necessary for the authors to speculate as to some of the contributing factors. Nevertheless, the authors were giving their expert opinion in so speculating.
62. Even if I were satisfied that all of the Report fell within the terms of s.41(1)(a), and that none of it was excluded by s.41(2), it would still be necessary to determine whether disclosure of the Report would, on balance, be contrary to the public interest, that being the test for exemption imposed by s.41(1)(b) of the FOI Act. Having regard to the public interest considerations addressed at paragraphs 40-52 above, and consistently with the view there expressed that, on balance, the relevant public interest considerations overwhelmingly favour disclosure of the Report, I find that disclosure of the Report would not, on balance, be contrary to the public interest, and that no part of the Report is exempt matter under s.41(1) of the FOI Act.

Application of s.42(1)(d) of the FOI Act

63. The solicitors for Civic Projects have argued that the Report is exempt matter under s.42(1)(d) of the FOI Act, which provides:

42.(1) Matter is exempt matter if its disclosure could reasonably be expected to—

...

(d) prejudice a person's fair trial or the impartial adjudication of a case;

...

64. I have explained, at paragraph 28 above, the nature of the test imposed by the phrase "could reasonably be expected to". I made some brief observations on the meaning of the words "a person's fair trial" and "impartial adjudication of a case" in *Re Uksi and Redcliffe City Council* (1995) 2 QAR 629 at p.640 (paragraphs 34 and 35):

34. *I think it is fairly clear, according to their natural meaning, that the words "a person's fair trial" in s.42(1)(d) do not refer to a civil suit between parties, but to the trial of a person charged with a criminal offence. ...*

35. *The words "impartial adjudication of a case" are broad enough to refer to any kind of case, involving a dispute between parties, which is to be formally adjudicated by an impartial decision-maker. ...*

65. Civic Projects' solicitors submitted as follows regarding the application of s.42(1)(d) to the Report:

Legal action has been commenced against our client in the Supreme Court by a number of owners of lots in stage 12 and 13 of the estate. ... The writs have requested jury trials. Our client is particularly concerned that release of the reports, especially if selectively quoted in the media, could prejudice the outcome of those actions which our client is vigorously defending. We submit that the test of "reasonable expectation" is satisfied for the same reasons as set out in the context of reasonable expectations of an adverse effect on our client's business affairs.

66. The words "impartial adjudication of a case" in s.42(1)(d) would certainly apply to the legal actions which have been commenced against Civic Projects and the Council. However, I am unable to see any basis for an expectation (which is reasonable and not merely speculative) that disclosure of the Report could prejudice the impartial adjudication of those cases. Civic Projects is in fact submitting that the applicant's newspapers, or other media outlets, could reasonably be expected to selectively quote from the Report, so as to give a negative impression of the Raby Bay development and the extent of its revetment problems, and further, that any such negative impression could reasonably be expected to unduly influence a Judge or jury appointed to decide the case. That is mere speculation.

67. Any potential juror liable to be influenced by stories published in the applicant's newspapers is already likely to be aware of controversy and rumours concerning revetment problems in the Raby Bay Canal Estate. As I have said, I consider that the Report contains many positive statements. The chief author of the Report, Dr Simmons, is of the same view. I consider that such statements would go some way to easing public concern regarding Raby Bay's revetments and that the release of the Report would assist in dispelling some of the rumours which appear to be circulating regarding revetment stability. Any "criticisms" as such, which are contained in the Report, are not directed specifically at any party.

68. I note that the plaintiffs in the Supreme Court actions are all landowners at Raby Bay who are permitted access to the Report under the Council's informal inspection arrangements (see paragraph 38 above). The Report may be raised as relevant during any trial, with the various parties seeking to rely upon those parts of the Report which support their case, and seeking to refute those parts of the Report which do not. Despite what may be reported in the media in the interim regarding Raby Bay, whether it be positive or negative, all parties would have the

opportunity during the trial to dissect the Report thoroughly, obtain oral evidence from Dr Simmons or other experts with differing views, and to persuade the adjudicator, whether it be Judge or jury, of the correctness or otherwise of the Report's findings.

69. Moreover, I regard the prospect of the impartial adjudication of the Supreme Court actions being prejudiced because sufficient jurors could not be obtained, from the entire catchment area of the Supreme Court sitting at Brisbane, who were not unduly influenced by reporting of the contents of the Report in the *Redland Times* or the *Bayside Bulletin*, as being so remote that it should rightly be dismissed as fanciful.
70. I therefore am not satisfied that disclosure of the Report could reasonably be expected to prejudice the impartial adjudication of a case. I find that the Report is not exempt matter under s.42(1)(d) of the FOI Act.

Conclusion

71. I set aside the decisions under review, being the decisions of Mr K Jones dated 14 March 1996 (in respect of the main report) and 3 September 1997 (in respect of the addendum). In substitution for those decisions, I find that the main report and the addendum are not exempt matter under the FOI Act, and that the applicant has a legal right to be given access to them, in accordance with s.21 of the FOI Act.

.....
 F N ALBIETZ
INFORMATION COMMISSIONER