

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 97018
Application L 14/97

Participants:

RUSSELL B CURTIN
Applicant

PINE RIVERS SHIRE COUNCIL
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - matter in issue comprising the names of persons licensed by the respondent to carry on business as itinerant food vendors, and the registration numbers of the vehicles from which they are licensed to carry on that business - whether the matter in issue comprises information concerning the personal affairs of the licensees - application of s.44(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether disclosure of the matter in issue could reasonably be expected to endanger the safety of a vehicle - application of s.42(1)(g) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - refusal of access - whether the matter in issue has a commercial value to the licensees which could reasonably be expected to be diminished by disclosure - application of s.45(1)(b) of the *Freedom of Information Act 1992* Qld - whether disclosure of the matter in issue could reasonably be expected to have an adverse effect on the business affairs of the licensees, or to prejudice the future supply of like information to government - observations on the public interest in disclosing information which would assist the efficacious operation of a scheme for regulating private sector business activity in the interests of public health and safety - application of s.45(1)(c) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.21, s.42(1)(g), s.44(1), s.45(1)(b), s.45(1)(b)(ii), s.45(1)(c), s.51

Food Hygiene Regulation 1989 Qld s.61

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279

Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491

Colakovski v Australian Telecommunications Corporation (1991) 100 ALR 111

Commissioner of Police v The District Court of New South Wales and Perrin
(1993) 31 NSWLR 606

News Corporation Limited v National Companies and Securities Commission
(1984) 52 ALR 277

Stewart and Department of Transport, Re (1993) 1 QAR 227

DECISION

1. I set aside the decision under review (being the decision made on behalf of the respondent on 9 April 1997 by Mr John W Mathews).
2. In substitution for it, I decide that the matter remaining in issue, comprising the names of the five third parties, and the registration numbers of the vehicles from which they are licensed by the respondent to carry on business as itinerant food vendors, is not exempt matter under the *Freedom of Information Act 1992 Qld*, and accordingly the applicant has a right to be given access to it, pursuant to s.21 of the *Freedom of Information Act 1992 Qld*.

Date of decision: 18 December 1997

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to the names of operators who are licensed as itinerant food vendors in the Pine Rivers Shire, and the registered numbers of the vehicles from which they are licensed to operate. Although the Pine Rivers Shire Council (the Council) initially refused access to that information, the Council changed its position during the course of my review, and no longer opposes disclosure of that information. Several of the relevant licensed operators have also consented to disclosure to Mr Curtin of the relevant information concerning themselves, but three of the licensed operators object to disclosure, and two have not responded to my attempts to contact them.
2. By application to the Council dated 12 February 1997, Mr Curtin sought access under the FOI Act to "*names & addresses & registration numbers of all the registered pie-vans (itinerants) operating in [the Pine Rivers Shire].*" Mr Curtin subsequently authorised the Council to disclose, to the licensed itinerant food vendors contacted by the Council pursuant to s.51 of the FOI Act, the nature of his interest as the registered owner of the Fountain Take-Away in the Brendale Shopping Centre. The initial decision on behalf of the Council was made on 11 March 1997 by Mr R Garske, who refused access to the requested information, relying on s.42(1)(g) and s.45(1)(b) of the FOI Act. By letter dated 18 March 1997, Mr Curtin applied for internal review of that decision. In his internal review decision dated 9 April 1997, Mr John W Mathews, Chief Executive Officer of the Council, refused Mr Curtin access to the requested information, relying on s.44(1) of the FOI Act. By letter dated 14 April 1997, Mr Curtin applied to me for review, under Part 5 of the FOI Act, of Mr Mathews' decision.

External review process

3. Copies of the documents containing the matter in issue were obtained and examined, together with copies of correspondence between the Council and licensed itinerant food vendors, recording consultations undertaken pursuant to s.51 of the FOI Act.
4. Under Part 10 of the *Food Hygiene Regulation 1989* Qld, certain types of food vendors (including those dealt with in this case) must be licensed, and vehicles from which food is sold must be registered. Section 61 of the *Food Hygiene Regulation* provides that local authorities must maintain a register of licences and registrations. The matter in issue appears in a register of licensed itinerant food vendors maintained by the Council's Health and Environment Protection Unit. The register records the licence number, name and address of each licensed operator, and the registration number(s) of the vehicle(s) from which each one is licensed to operate.
5. Pursuant to the Council's obligations under the *Food Hygiene Regulation*, the Council's Health and Environment Protection Unit has published specifications for vehicles involved in food vending. Until 27 May 1997, paragraph 3.15 of the relevant specifications had provided:

The Vendor's Name and Address is to be conspicuously and legibly inscribed upon the exterior of the vehicle.
6. Following concerns about safety expressed by female licensed operators, that provision was amended by Council on 27 May 1997, so that it now provides:

The Vendor's Name and Council allocated Licence Number is to be conspicuously and legibly inscribed upon the exterior of the vehicle.
7. Having regard to the concerns about personal safety expressed by some female licensed operators, Mr Curtin agreed not to pursue access to the residential addresses of licensed operators, and that information is no longer in issue. Mr Curtin also indicated that he did not wish to pursue access to information from the Council register concerning itinerant ice-cream vendors, and that information is also no longer in issue.
8. By letters dated 6 May 1997, I conveyed to the Council, and the licensed operators whose details remained in issue, my preliminary view that the matter in issue did not qualify for exemption under s.44(1) of the FOI Act. I also discussed the possible application of s.45(1)(c) of the FOI Act, but indicated that it was my preliminary view that the matter in issue did not qualify for exemption under that provision. I invited the Council, and the licensed operators, in the event that they did not accept my preliminary views, to lodge written submissions and/or evidence in support of a case that the matter in issue is exempt matter under the FOI Act.
9. By letter dated 8 May 1997, the Council stated that it accepted my preliminary views. A number of the licensed operators objected to disclosure of the matter in issue concerning them, though, once Mr Curtin indicated that he did not wish to pursue access to residential addresses, several of them consented to disclosure of their names and the registration numbers of the vehicles from which they were licensed to operate. I have authorised the Council to give Mr Curtin access to the information covered by those consents, and that information is no longer in issue in this review. Thus, the matter in issue has been reduced to the names of five licensed operators, and the registration numbers of the vehicles from which they are licensed to operate. (I will refer to the five licensed operators as the third parties.) Three of the third parties have objected to disclosure of the matter in issue concerning them, but have not lodged any submissions dealing

with the application of particular exemptions in the FOI Act to the matter in issue. No response has been received to my correspondence addressed to the other two third parties.

10. In a letter to me, one of the third parties strongly opposed Mr Curtin obtaining their details from the Council register, stating that Mr Curtin was an "opposition business person" in the Shire, and that they had been told that Mr Curtin was a tax inspector. Two of the third parties, in telephone conversations with a member of my staff, communicated their objections to disclosure. One said that his/her business was being sold, and that he/she did not want Mr Curtin to have access to any of the information. The other expressed concern about the risk to the security of vendors, particularly female vendors, by disclosure of the matter in issue. One of the third parties is listed under a company name, while another is listed under a business name.
11. The third parties have not supported their objections to disclosure by attempting to make out a case that the matter in issue is exempt matter under the FOI Act. I will briefly address the exemption provisions referred to in the Council's decisions, and in my correspondence with the licensed operators. I do not consider that any other exemption provisions in Part 3, Division 2 of the FOI Act are even arguably applicable to the matter in issue.

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

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

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

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

Personal affairs matter

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

- family and marital relationships;
- health and ill health;
- relationships and emotional ties with other people; and
- domestic responsibilities and financial obligations.

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

15. At pp.259-261 (paragraphs 86-90) of *Re Stewart*, I noted that a person's name, address and telephone number were matters which fell within the grey area, rather than within the core meaning, of the phrase "personal affairs of a person". I stated that such information must be characterised according to the particular context in which it appears. In that regard, I quoted the following passage from Lockhart J, sitting as a member of a Full Court of the Federal Court of Australia in *Colakovski v Australian Telecommunications Corporation* (1991) 100 ALR 111 (at p.119):

There is a real question as to whether the name and telephone number can answer the description of 'information relating to the personal affairs' of that person under s.41(1). Viewed as an abstract conception, I would be inclined to the view that it could not, but questions are not considered by courts in the abstract.

16. Further, I expressed agreement with the decision of the New South Wales Court of Appeal in *Commissioner of Police v The District Court of New South Wales and Perrin* (1993) 31 NSWLR 606, that an individual's name alone does not ordinarily fall within the meaning of the phrase "personal affairs". In particular, at paragraph 88 of *Re Stewart*, I quoted the following comments of Mahoney JA:

A person's name would not, I think, ordinarily be, as such, part of his personal affairs. It is that by which, not merely privately, but generally, he is known.

17. In *Re Stewart* (at pp.238-239, paragraphs 23-27), I also indicated that "personal affairs" are to be distinguished from "business affairs", which are dealt with in s.45(1)(c) of the FOI Act. There I indicated that many members of the community might be surprised about this dichotomy, particularly those who run their own business, and who, in conversational language, might be inclined to regard matters pertaining to their own business as their personal affairs. Later, I noted that the drafting of s.44(1) and s.45(1)(c) indicates that the kinds of affairs of a person dealt with in the latter provision were not intended to overlap with the kinds of affairs of a person dealt with in s.44(1). At p.258, paragraph 82, I said:

82. I have already indicated my view (at paragraphs 21 and 27 above) that corporations do not have personal affairs for the purposes of the FOI Act, and that information concerning a person's business or professional affairs is not information concerning the personal affairs of that person.

18. One of the third parties is a corporation. In accordance with my comments in the above paragraph (see also *Re Stewart* at p.237, paragraph 21) and the decision of a Full Court of the Federal Court of Australia in *News Corporation Limited v National Companies and Securities Commission* (1984) 52 ALR 277, I regard it as settled law that a corporation cannot have "personal affairs" for the purposes of s.44(1) of the FOI Act. I find that the name of the third party which is a corporation, and the registration number(s) of the vehicle(s) from which it is licensed to operate as an itinerant food vendor in the Pine Rivers Shire, cannot be characterised as information concerning its personal affairs, within s.44(1) of the FOI Act.

19. At p.264 (paragraph 103) of *Re Stewart*, I stated that for matter to relate to "business affairs" in the requisite sense, it should ordinarily relate to the affairs of a business undertaking which is carried on in an organised way (whether it be full time or only intermittent) with the purpose of obtaining profits or gains. I am satisfied that the matter remaining in issue appears in the relevant Council register in the context of the regulation, pursuant to Part 10 of the *Food and Hygiene Regulation*, of the business activities of the third parties. The names identify persons carrying on business as licensed itinerant food vendors, and the registration numbers identify vehicles from which they are licensed to carry on that business. The matter in issue relates to the business affairs of the third parties. It does not concern their personal affairs, within the meaning of s.44(1) of the FOI Act.
20. I therefore find that none of the matter in issue can be properly characterised as information concerning the personal affairs of any of the third parties, and it cannot therefore qualify for exemption under s.44(1) of the FOI Act.

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

21. Section 42(1)(g) of the FOI Act (which was relied upon in Mr Garske's initial decision on behalf of the Council) provides:

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

...

(g) endanger the security of a building, structure or vehicle;

22. The nature of the test imposed by the phrase "could reasonably be expected to" was analysed in my reasons for decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, at pp.339-341 (paragraphs 154-160), by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the *Freedom of Information Act 1982* Cth. Those observations are also relevant here. In particular, I said in *Re "B"* (at pp.340-341, paragraph 160):

The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.

The ordinary meaning of the word "expect" which is appropriate to its context in the phrase "could reasonably be expected to" accords with these dictionary meanings: "to regard as probable or likely" (Collins English Dictionary, Third Aust ed); "regard as likely to happen; anticipate the occurrence ... of" (Macquarie Dictionary, 2nd ed); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).

23. I am not satisfied that there is any reasonable basis for expecting that disclosure of the matter in issue could endanger the security of a vehicle. The food vending vehicles operated by the third parties are required to be conspicuously inscribed with the vendor's name and Council-allocated licence number. The information which Mr Curtin seeks under the FOI Act is no more than he could obtain by approaching the relevant food vending vehicles when they are trading, and noting their respective vehicle registration numbers, vendors' names, and Council-allocated

licence numbers. I find that the matter in issue is not exempt matter under s.42(1)(g) of the FOI Act.

Application of s.45(1)(b)

24. Section 45(1)(b) of the FOI Act (which was also relied upon in Mr Garske's initial decision on behalf of the Council) provides:

45.(1) Matter is exempt matter if—

...

(b) its disclosure—

- (i) would disclose information (other than trade secrets) that has a commercial value to an agency or another person; and*
- (ii) could reasonably be expected to destroy or diminish the commercial value of the information; or*

...

25. The correct approach to the interpretation and application of s.45(1)(b) of the FOI Act was explained in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at pp.511-516 (paragraphs 50-65). The test imposed by the phrase "could reasonably be expected to" in s.45(1)(b)(ii) is the same as that explained in paragraph 22 above.
26. I am not satisfied that the matter remaining in issue has a "commercial value" to any of the third parties, according to either of the relevant meanings of "commercial value" explained in *Re Cannon* at pp.511-514 (paragraphs 51-57). In any event, the matter in issue comprises information that the third parties are required to publicly display (see paragraphs 6 and 23 above) and I consider that there is no possible basis on which the test imposed by s.45(1)(b)(ii) of the FOI Act could be satisfied in respect of the matter in issue. I find that the matter in issue is not exempt matter under s.45(1)(b) of the FOI Act.

Application of s.45(1)(c)

27. 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.

28. I analysed the requirements of s.45(1)(c) of the FOI Act at pp.516-523 (paragraphs 66-88) of *Re Cannon*. In order to find that the matter in issue is exempt matter under s.45(1)(c), I would need to be satisfied that:
- disclosure of the matter in issue would disclose information concerning the business, commercial or financial affairs of the third parties;
 - disclosure could reasonably be expected to (as to the test imposed by these words, see paragraph 22 above) have an adverse effect on those affairs, or to prejudice the future supply of like information to government; and
 - disclosure would not, on balance, be in the public interest.
29. I will assume for present purposes that the matter in issue concerns the business affairs of the third parties; however, I do not consider that the second requirement for exemption under s.45(1)(c) can be established in respect of the matter in issue.
30. I do not consider that disclosure of the matter in issue could reasonably be expected to prejudice the future supply of such information to government. If persons wish to be licensed to carry on business as itinerant food vendors from particular registered vehicles, in accordance with the regulatory framework established under the *Food Hygiene Regulation*, they must provide information of the kind in issue to the Council.
31. Nor am I satisfied that there is a reasonable basis for expecting that disclosure of the matter in issue could have an adverse effect on the business affairs of the third parties. Vague suggestions have been made to the effect that the applicant is a business competitor, and may somehow use the information to the detriment of the third parties, but no suggestion as to how that might possibly occur has been advanced. I am not satisfied that disclosure under the FOI Act of information which the third parties are required to publicly display, and which is ascertainable by any interested person in the manner indicated in paragraph 23 above, could reasonably be expected to have an adverse effect on the business affairs of the third parties.
32. The regulation by government agencies of private sector business activity is undertaken for the benefit of the public. Where, as in the present instance, regulation occurs through a licensing scheme, the public benefits by the assurance that licensees are required to observe prescribed standards for the conduct of their business (in the present case, the prescribed standards are mostly directed to protecting public health and safety, through regulating food hygiene, and the storage, carriage, preparation, *et cetera* of food for sale to the public), and by the assurance that there is a regulatory authority which monitors compliance with prescribed standards and to which complaints can be made in respect of alleged departures from proper standards. The public benefit of regulatory schemes of this kind is maximised by making basic information of the kind in issue available to any interested member of the public (even a competitor of the third parties, whose interest might lie in reporting any non-compliance with prescribed standards, or in reporting to the regulatory authority any unlawful trading by unlicensed food vendors). Indeed, it is difficult to see how it could serve the purposes of having a regulatory scheme for the benefit and protection of the public, if basic information as to who is, and who is not, licensed to provide services to the public, subject to that regulatory scheme, were not available to any interested member of the public.
33. Thus, even if the third parties had been able to demonstrate that disclosure of the matter in issue could reasonably be expected to have an adverse effect on their business, I would have been inclined to find that disclosure would, on balance, be in the public interest.

34. I find that the matter in issue is not exempt matter under s.45(1)(c) of the FOI Act.

Conclusion

35. For the foregoing reasons, I set aside the decision under review. In substitution for it, I decide that the matter remaining in issue, comprising the names of the five third parties and the registration numbers of the vehicles from which they are licensed by the respondent to carry on business as itinerant food vendors, is not exempt matter under the FOI Act, and accordingly the applicant has a right to be given access to it pursuant to s.21 of the FOI Act.

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F N ALBIETZ
INFORMATION COMMISSIONER