

OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 04/2003
Application 501/03

Participants:

READYMIX HOLDINGS PTY LTD
Applicant

PORT OF BRISBANE CORPORATION
Respondent

BRISBANE MINI MIX PTY LTD
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents received or brought into existence by the respondent in assessing and approving a development application lodged by the third party in respect of land vested in the respondent – whether documents excluded from the application of the *Freedom of Information Act 1992 Qld* by s.11A – whether documents were received or brought into existence by the respondent in carrying out its commercial activities.

FREEDOM OF INFORMATION – refusal of access – whether matter in issue concerns the business, commercial or financial affairs of the respondent or the third party – whether disclosure could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the respondent or the third party – application of s.45(1)(c) of the *Freedom of Information Act 1992 Qld*.

FREEDOM OF INFORMATION – refusal of access – whether matter in issue contains any information concerning personal affairs – application of s.44(1) of the *Freedom of Information Act 1992 Qld*.

Freedom of Information Act 1992 Qld s.11A, s.44(1), s.45(1)(c), s.78, Sch 2
Acts Interpretation Act 1954 Qld
Integrated Planning Act 1997 Qld
Transport Infrastructure Act 1994 Qld s.486
Transport Infrastructure and Another Act Amendment Act 2003 Qld

Attorney-General v Estcourt and the Wilderness Society Inc (1995) 4 Tas R 355
Cannon and Australian Quality Egg Farms Limited, Re (1994) 1 QAR 491
Christie and Queensland Industry Development Corporation, Re (1993) 1 QAR 1
English and Queensland Law Society Inc., Re (1995) 2 QAR 714
Hansen and Queensland Industry Development Corporation, Re (1996) 3 QAR 265
Stewart and Department of Transport, Re (1993) 1 QAR 227
*Wittingslow Amusements Group Pty Ltd v Director-General of the Environment
 Protection Authority of NSW* (Supreme Court of NSW, Equity Division, No. 1963 of 1993,
 Powell J, 23 April 1993, unreported)

DECISION

I set aside the decision under review (which is identified in paragraph 4 of my accompanying reasons for decision). In substitution for it, I decide that:

- (a) the documents of the respondent to which the applicant sought access are not excluded from the application of the *Freedom of Information Act 1992* Qld by s.11A of that Act and s.486 of the *Transport Infrastructure Act 1994* Qld; and
- (b) those documents do not qualify for exemption from disclosure to the applicant under the *Freedom of Information Act 1992* Qld.

Date of decision: 15 December 2003

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G J SORENSEN
DEPUTY INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant, Readymix Holdings Pty Ltd, seeks review of a decision by the Port of Brisbane Corporation (the Corporation) refusing the applicant access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to documents relating to a concrete batching plant operated on Corporation land by the third party, Brisbane Mini Mix Pty Ltd (formerly known as Northside Mini-Mix Pty Ltd and Brisbane Ready Mixed Group Pty Ltd). The applicant and the third party are competitors in the 'ready mix' concrete industry.
2. By letter dated 2 June 2003, the applicant applied (through its solicitor) to the Corporation for access, under the FOI Act, to documents described in these terms:
 1. *application for development approval for a concrete batching plant at Cnr Farrer Street & MacArthur Avenue East, Pinkenba Qld 4008; and*
 2. *development approval issued for the said plant.*
3. By letter dated 2 July 2003, Ms Marie Walker, the Corporation's FOI Co-ordinator, wrote to the applicant's solicitor stating that the requested documents (which she did not specifically identify) were excluded from the application of the FOI Act by s.11A of the FOI Act and s.199 of the *Transport Infrastructure Act 1994* Qld (the TI Act) because they were documents received or brought into existence by the Corporation in carrying out activities conducted on a commercial basis. (I should note that s.199 of the TI Act, as then in force, has since been renumbered as s.486, as a result of amendments made by the *Transport Infrastructure and Another Act Amendment Act 2003* Qld.) Ms Walker also stated that, even if the requested documents were subject to the application of the FOI Act, they would qualify for exemption under s.45(1)(c) of the FOI Act.

4. By letter dated 23 July 2003, the applicant's solicitor applied to the Corporation for internal review of Ms Walker's decision. By letter dated 5 August 2003, the Corporation's Chief Executive Officer, Mr Jeff Coleman, expressed his view to the applicant's solicitor that, as the requested documents were excluded from the application of the FOI Act by s.11A, the applicant was not entitled to an internal review. Nevertheless, Mr Coleman stated that he had decided to affirm Ms Walker's decision.
5. By letter dated 11 August 2003, the applicant's solicitor applied for review by the Information Commissioner, under Part 5 of the FOI Act, of Mr Coleman's decision.

External review process

6. Copies of the documents in issue (which are identified at paragraph 14 below) were obtained and examined. Those documents were forwarded under cover of a letter from Mr Coleman dated 27 August 2003, which contained brief submissions in respect of s.11A, and s.45(1)(c), of the FOI Act.
7. In a letter to the Corporation dated 18 September 2003, Assistant Information Commissioner (AC) Moss conveyed her preliminary view that the documents in issue were not excluded from the application of the FOI Act by s.11A of the FOI Act, nor did they qualify for exemption under s.45(1)(c) of the FOI Act. In the event that the Corporation wished to contest her preliminary view, AC Moss invited it to lodge written submissions and/or evidence in support of its case.
8. By letter dated 24 September 2003, AC Moss sent the third party a copy of her letter to the Corporation dated 18 September 2003. In the event that the third party objected to the disclosure of the documents in issue to the applicant under the FOI Act, AC Moss invited the third party to apply to be a participant in this review (in accordance with s.78 of the FOI Act), and to provide submissions or evidence in support of its case.
9. In a letter dated 6 October 2003, the Corporation advised that it accepted AC Moss' preliminary view. However, on 10 October 2003, the Corporation faxed a letter stating that it wished to clarify its position. The letter stated that the Corporation did not agree with AC Moss' preliminary view, but that it did not wish to make any further submissions.
10. In the intervening period between those two communications from the Corporation, the third party's solicitors had advised (by letter dated 8 October 2003) that the third party asserted that the documents in issue were exempt from disclosure to the applicant under s.44(1) and s.45(1)(c) of the FOI Act. It was not clear from the terms of the letter whether the third party objected to the disclosure of all, or only some, of the matter in issue. By letter dated 13 October 2003, AC Moss requested clarification of that issue. AC Moss also took the opportunity to explain why, in her preliminary view, the matter in issue could not qualify for exemption under s.44(1) of the FOI Act, and to explain the issues that would need to be addressed to establish a case for exemption under s.45(1)(c).
11. When no response had been received by 6 November 2003, AC Moss wrote again to the third party's solicitors, directing them to lodge any additional material in support of their client's case by no later than 13 November 2003. The third party's solicitors forwarded a letter dated 13 November 2003, containing brief submissions in support of the third party's claim for exemption under s.45(1)(c) of the FOI Act.
12. Copies of the third party's submissions were forwarded to the applicant, but it was not considered necessary to request a response from the applicant.

13. In making my decision in this case, I have taken into account the following material:

- the contents of the documents in issue;
- the applicant's FOI access application dated 2 June 2003, application for internal review dated 23 July 2003, and application for external review dated 11 August 2003;
- the Corporation's initial and internal review decisions, dated 2 July 2003 and 5 August 2003, respectively;
- the Corporation's letter dated 27 August 2003;
- the third party's submissions dated 8 October 2003 and 13 November 2003;
- relevant provisions of the TI Act and the *Integrated Planning Act 1997* Qld; and
- the Corporation's Land Use Strategy dated November 1998.

Matter in issue

14. The matter in issue consists of:

- (a) a development application lodged with the Corporation on 10 December 1999 by Hendriks House Consulting Engineers (Hendriks/House) on behalf of the third party;
- (b) a letter dated 5 January 2000 from the Corporation to Hendriks/House;
- (c) a letter dated 10 January 2000 from Hendriks/House to the Corporation; and
- (d) a letter dated 27 January 2000 from the Corporation to Hendriks/House (conveying development approval).

Jurisdictional issue

15. The nature and extent of the powers and functions of the Information Commissioner in relation to jurisdictional issues of the kind raised by the Corporation have been addressed in a number of cases, including *Re Christie and Queensland Industry Development Corporation* (1993) 1 QAR 1 at pp.4-6, *Re English and Queensland Law Society Inc* (1995) 2 QAR 714 at pp.719-720, and *Re Hansen and Queensland Industry Development Corporation* (1996) 3 QAR 265 at p.269. For the reasons there given, I am satisfied that the Information Commissioner (or his delegate) has both the power, and a duty, to consider and determine issues relating to the limits of the Information Commissioner's jurisdiction when they are raised as an issue in an application for review lodged under Part 5 of the FOI Act. (See also the comments on the obligation of a tribunal to decide a dispute over the limits of its jurisdiction, contained in the judgment of Wright J of the Supreme Court of Tasmania in *Attorney-General v Estcourt and the Wilderness Society Inc* (1995) 4 Tas R 355 at pp.365-367.) In this case, that power extends to deciding whether or not the Corporation is entitled to refuse access to the documents in issue on the ground that they are excluded from the application of the FOI Act by s.11A of the FOI Act and s.486 of the TI Act.

Application of s.11A of the FOI Act

16. Section 11A of the FOI Act provides:

11A. This Act does not apply to documents received, or brought into existence, in carrying out the activities of a GOC mentioned in schedule 2 to the extent provided under the application provision mentioned for the GOC in the schedule.

17. Schedule 2 relevantly provides:

APPLICATION OF ACT TO GOCs

Section 11A of the Act

GOC

Application provision

1. Queensland Rail, or a port authority Transport Infrastructure Act 1994,
(within the meaning of the Transport section 486
Infrastructure Act 1994) *that is a GOC*

18. Section 486 of the TI Act relevantly provides:

Application of Freedom of Information Act and Judicial Review Act

486.(1) *The Freedom of Information Act 1992 does not apply to a document received or brought into existence by a transport GOC in carrying out its excluded activities.*

...

(3) *A regulation may declare the activities of a transport GOC that are taken to be, or are taken not to be, activities conducted on a commercial basis.*

(4) *In this section—*

"commercial activities" *means activities conducted on a commercial basis.*

"community service obligations" *has the same meaning as in the Government Owned Corporations Act 1993.*

"excluded activities" *means—*

(a) *commercial activities; or*

(b) *community service obligations prescribed under a regulation....*

"transport GOC" *means a GOC whose functions relate mainly to transport.*

19. It is clear that the Corporation is a transport GOC within the meaning of the TI Act. The Corporation has not argued that the documents in issue were brought into existence in the course of carrying out community service obligations that have been prescribed as excluded activities under a regulation. Accordingly, the question for determination is whether the documents in issue were received, or brought into existence, in carrying out the commercial activities of the Corporation, i.e., activities conducted on a commercial basis.

Activities conducted on a commercial basis

20. No regulation has been made under s.486(3) of the TI Act declaring activities of the Corporation that are taken to be, or are taken not to be, activities conducted on a commercial basis. Section 486(4) of the TI Act simply defines "commercial activities" as activities conducted on a commercial basis. No other definition of "commercial" is contained in that

Act, or in the *Acts Interpretation Act 1954* Qld. In *Re Hansen*, the Information Commissioner discussed the application of s.11A of the FOI Act and the meaning, in a similar context, of "commercial activities" (at pp.274-275; paragraphs 25-26):

25. *Major dictionaries give the primary meaning of the adjective "commercial" as "of, connected with, or engaged in, commerce; mercantile" (Collins English Dictionary, Third Aust. Ed), "of, engaged in, bearing on, commerce" (Australian Concise Oxford Dictionary), "of, or of the nature of, commerce" (Macquarie Dictionary). The corresponding primary meaning of the noun "commerce" is "the activity embracing all forms of the purchase and sale of goods and services" (Collins English Dictionary, Third Aust. Ed.), "exchange of merchandise or services ... buying and selling" (Australian Concise Oxford Dictionary), "interchange of goods or commodities" (Macquarie Dictionary). ...*
 26. *There is a subsidiary meaning of the adjective "commercial" which may be appropriate to the context of the phrase "activities conducted on a commercial basis" in s.35 of the Queensland Industry Development Corporation Act 1994, that is, "having profit as the main aim" (Collins English Dictionary, Third Aust. Ed.), "capable of returning a profit; ... preoccupied with profits or immediate gains" (Macquarie Dictionary). ...*
21. In determining the question framed at the end of paragraph 19 above, the contents of the documents in issue are relevant only to the extent that they assist the task of properly characterising the nature of the activity carried out by the Corporation, during the course of which the documents in issue were received by it or brought into existence. It is possible for a document containing information about the Corporation's commercial activities to have been brought into existence in carrying out an activity that was not conducted on a commercial basis e.g., accounting to the shareholding Minister of the Crown for the performance of the Corporation's functions. In such a case, the document would be subject to the application of the FOI Act, and a decision would be required as to whether any of the information contained in that document qualified for exemption under any of the exemption provisions contained in Part 3, Division 2, of the FOI Act (e.g., whether some commercially sensitive information qualified for exemption under s.45(1)(c) of the FOI Act, as the Corporation argues in the alternative in this case). If, on the other hand, the document was brought into existence in carrying out a commercial activity, the document would be excluded from the application of the FOI Act.

Whether the documents in issue were received or brought into existence by the Corporation in carrying out commercial activities

22. In his letter dated 27 August 2003, the Corporation's CEO argued that:

The lease of Corporation land to...[the third party]...and the development approval granted in respect of that lease were undertaken by the Corporation wholly in pursuit of the Corporation's commercial activities. That is, the lease and subsequent development approval were undertaken by the Corporation for its own commercial benefit and the documents in question were received or brought into existence by the Corporation with that purpose or intention.

As such, the documents are covered by the exemption contained in s.11A and Schedule 2 of the Act with the result that the Act does not apply to the documents.

23. However, on the material before me, I am satisfied that there were two materially different, and conceptually distinct, processes undertaken by the Corporation. I note that in the letter dated 27 January 2000 from the Corporation's Assessment Manager to the third party conveying development approval, there is an indication (in the second last paragraph) that the grant of land use planning approval should not be taken to imply anything in respect of the separate (and then ongoing) negotiations in relation to an agreement for lease of the relevant land.
24. The applicant has not sought access to the lease agreement between the Corporation and the third party, or documents concerning the negotiation of terms of the lease. The applicant has sought access only to documents relating to the application for development approval in respect of the relevant land. While the leasing of land may comprise an activity conducted on a commercial basis, I consider that the activities of the Corporation in receiving, assessing and approving/rejecting a development application in respect of land vested in the Corporation must properly be characterised as a public regulatory activity, not a commercial activity.
25. Since December 2000, the Corporation has been designated as an assessment manager under the *Integrated Planning Act 1997* Qld for development applications in respect of land vested in the Corporation. In my view, that is clearly a traditional governmental function of a public regulatory character, undertaken pursuant to statutory authority to ensure compliance with statutory obligations and/or government policy requirements, and ultimately to ensure that wider considerations of public interest and public benefit are taken into account in the assessment of new land development proposals.
26. The development application in issue was lodged in December 1999 when the *Integrated Planning Act* did not apply to strategic port land vested in the Corporation (see the former s.172(1) of the TI Act as then in force) except to the extent specified in the former s.172(2) of the TI Act. However, the activities of the Corporation in receiving, assessing and approving the third party's development application were essentially identical in character to those described in the preceding paragraph.
27. Part 4 of the TI Act required the Corporation to formulate a land use plan, for approval by the Minister. The former s.173(1) of the TI Act provided that a port authority must not use its strategic port land in a way inconsistent with its current land use plan. A land use plan approved by the Minister therefore governed the land use decisions made by port authorities such as the Corporation, including the assessment and approval/rejection of development applications of the kind lodged by the third party.
28. The Corporation has provided me with a copy of a document entitled "Land Use Strategy - November 1998" ('the Strategy'). (I note that, although relevant provisions of the TI Act employ the term 'land use plan', the Corporation has advised my staff that the Strategy comprised the land use plan applicable as at December 1999, when the third party's

development application was lodged with the Corporation.) Section 1.0 of the Strategy sets out the Corporation's "Land Use Vision" for the strategic port lands controlled by it, and includes the following statements (at p.1):

The port will be integrated into the broader planning context of the region by its own strategic planning framework which will:

- *recognise its role as a good neighbour in Brisbane City by progressively refocusing its activities to land adjacent to the river mouth as opportunities arise;*
- *...*
- *recognise the need to incorporate best-practice environmental management into all aspects of port planning, development and operations;*
- *separate or buffer its key facilities from potentially incompatible land uses;*
- *provide for industrial and commercial development, including that which requires port access;*
- *...*
- *encourage the clustering of like and interrelated industries and support facilities within individual precinct locations; and*
- *respond to related planning documents including the Brisbane Gateway Ports Area Strategy, Brisbane City Plan, Brisbane River Management Plan and Moreton Bay Strategic Plan.*

29. Section 3.1 of the Strategy defines a number of port 'precincts', each of which relate to discrete geographical areas of Corporation land. Development applications lodged with the Corporation were to be assessed against the guiding principles set out in the Strategy, and, specifically, the criteria relevant to a particular precinct. As the opening paragraph of section 3.1 of the Strategy explained (at p.2):

The precincts provide a comprehensive and structured approach to the planning and management of the strategy area. They form the basis of the preferred planning and land use development outcomes in specific locations.

30. Section 3.2 of the Strategy, entitled "Development Assessment", contains an explanation of the manner in which the Corporation dealt with development applications lodged with it in respect of strategic port land. The first two paragraphs of that section state (at p.3):

The Corporation will assess any proposal in the Strategy area as against its commercial viability, its consistency with the Land Use Vision for the port, the intent of the relevant precinct, and its ability to adequately meet relevant performance criteria.

It will undertake this assessment in its roles as assessment manager for development on its lands and in commenting on proposed development of other land in the Strategy area.

31. Section 4.2.7 of the Strategy deals with the Pinkenba precinct, in which the land that the third party sought to develop was located. The statement of intent for this precinct outlines the significance of the precinct, and goes on to outline future possible uses. The final paragraph states:

Future development of this precinct should respect the existing residential community at Pinkenba. Appropriate buffering of this area should be provided and higher impact industry development excluded from establishing in the precinct. Where possible, the buffers should offer a recreational opportunity to this community. Alternative road transport connections will also be investigated to reduce the impact of heavy vehicle traffic using Eagle Farm Road.

32. Section 4.2.7 also sets out five specific performance criteria to be applied by the Corporation in assessing development applications relating to land located in its Pinkenba precinct (at p.14):

- *Development must meet the performance criteria set out in Section 3.4 of this strategy, including those which address environmental impacts, on-site vehicle areas and landscaping [Section 3.4 of the Strategy sets out general 'performance criteria' against which development applications and Corporation land use decisions were to be assessed];*
- *Development should be port related or require port access;*
- *Alternatively, development will be related to, or demonstrate a synergy with, the adjoining airport operation;*
- *Development is to be established and operated in a manner which manages impacts on the residential area at Pinkenba; and*
- *Traffic generated by development is to be accommodated within the capacity of the road network system.*

33. The quoted passages are sufficient to indicate the character of the activity in which the Corporation was engaged in receiving and assessing the third party's development application. While commercial implications of proposed developments were a factor to be taken into account, the Corporation was obliged to take into account a variety of non-commercial factors including compliance with the land use plan approved by the Minister, and several important community-related criteria relevant to the Pinkenba precinct including environmental management, residential amenity and local traffic flows.

34. I find that in receiving, assessing and approving the third party's development application, the Corporation was carrying out a public regulatory activity, not an activity conducted on a commercial basis. I therefore find that the documents in issue are not excluded from the application of the FOI Act by s.11A of the FOI Act and s.486 of the TI Act.

35. It is therefore necessary to consider whether the documents in issue qualify for exemption under s.44(1) or s.45(1)(c) of the FOI Act, as submitted by the third party and the Corporation.

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

36. 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.

37. Only the third party raised the application of s.44(1) of the FOI Act to the matter in issue. In her letter to the third party's solicitors dated 13 October 2003, AC Moss referred to the Information Commissioner's leading decision on s.44(1), *Re Stewart and Department of Transport* (1993) 1 QAR 227, and stated that the Information Commissioner had made it clear in numerous cases that the words "personal" and "person" in s.44(1) must be construed as referring only to natural persons. Section 44(1) has no application to companies, businesses, clubs or other organisations, which are incapable of having personal affairs as that term is used in s.44(1) of the FOI Act (see *Re Stewart* at p.237, paragraphs 20-21).
38. The third party did not respond to AC Moss' preliminary view regarding s.44(1) of the FOI Act, but nor did it formally withdraw its claim for exemption under s.44(1). Accordingly, for the sake of completeness, I will simply record my finding that none of the matter in issue qualifies for exemption under s.44(1) of the FOI Act.

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

39. 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.

40. The correct approach to the interpretation and application of s.45(1)(c) is explained in *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at pp.516-523 (paragraphs 66-88). In summary, matter will be exempt under s.45(1)(c) if:
- (a) the matter in issue is properly to be characterised as information concerning the business, professional, commercial or financial affairs of an agency or another person (s.45(1)(c)(i)); and

(b) disclosure of the matter in issue could reasonably be expected to have either of the prejudicial effects contemplated by s.45(1)(c)(ii), namely:

- (i) an adverse effect on the business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns; or
- (ii) prejudice to the future supply of such information to government;

unless disclosure of the matter in issue would, on balance, be in the public interest.

s.45(1)(c)(i)

41. The correct approach to the characterisation test required by s.45(1)(c)(i) is explained in *Re Cannon* at pp.516-520, paragraphs 67-77. The Information Commissioner adopted the confined approach to the construction of the term "*concerning the business, ... commercial or financial affairs of ...*", which accords with the approach taken by Powell J of the NSW Supreme Court in *Wittingslow Amusements Group Pty Ltd v Director-General of the Environment Protection Authority of NSW* (Supreme Court of NSW, Equity Division, No. 1963 of 1993, Powell J, 23 April 1993, unreported). The relevant passage from Powell J's decision is reproduced in *Re Cannon* at p.518, paragraph 72. A similar approach has also been adopted by Victorian judges (see the cases analysed in *Re Cannon* at pages 517-518, paragraphs 69-71). It is not enough that the matter in issue has some connection with a business, or has been provided to an agency by a business, or will be used by a business in the course of undertaking business operations. The matter in issue must itself be information about business, commercial or financial affairs, in order to satisfy this requirement.
42. The Corporation claims that the documents in issue concern the business, commercial or financial affairs of both itself and the third party. In his letter dated 27 August 2003, the Corporation's CEO stated:

Even if the Act did apply to the requested documents then the documents would be exempt pursuant to s.45(1)(c) of the Act as the documents constitute matter, the disclosure of which would disclose information relating to the business and commercial affairs of both the Corporation and the third party which, if disclosed, could reasonably be expected to have an adverse effect on the business and commercial affairs of the Corporation and/or the third party. The documents include references to [the third party's]:

- (a) storage capacities;
- (b) settling ponds capacity;
- (c) procedures for truck washdown;
- (d) number of deliveries per day;
- (e) plans for a concrete batching plant;
- (f) day to day operations;
- (g) pollution control procedures;
- (h) site plan.

Notably, the applicant ... is a business competitor of [the third party]

The Corporation's position is supported by the comments of the Queensland Information Commissioner in Cairns Port Authority v Department of Lands (1994) QIC NR 17 (11 August 1994) at paragraphs 8 & 84 where the

Information Commissioner found that there was ample evidence to justify a finding that the "Cairns Port Authority is an agency which has 'business or commercial affairs' within the meaning of s.45(1)(c) of the Act". In that case, a lease entered into by the Cairns Port Authority (the CPA) was not an isolated incident for the CPA, but merely one incident of its ordinary or commercial activities, which include entering into leasing arrangements, on commercial terms, in respect of land vested in the CPA.

43. However, as I explained at paragraphs 23-24 above, the documents in issue are not about the negotiation of, and entering into, a commercial lease. They are about the assessment and approval of the third party's development application. The matter in issue consists almost entirely of information about the third party's proposed development of the land and its future operations. While it is clear that a GOC such as the Corporation can have business, commercial or financial affairs within the meaning of s.45(1)(c) of the FOI Act, I am not satisfied that any of the matter in issue in this case can be properly characterised as information concerning the business, commercial or financial affairs of the Corporation.
44. On the other hand, it is clear from my examination of the matter in issue that it concerns the business affairs of the third party, and that s.45(1)(c)(i) is satisfied on that basis.

s.45(1)(c)(ii)

45. Neither the Corporation nor the third party sought to rely on the second limb of s.45(1)(c)(ii) (prejudice to the future supply of similar information to government), and in my view there is clearly no reasonable basis for expecting that businesses would not continue to supply the necessary information to support an application for development approval (*cf. Re Cannon* at p.521, paragraph 85).
46. As regards adverse effect, the Corporation merely asserted that disclosure of the documents in issue could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the Corporation and/or the third party. It did not identify the particular adverse effect(s) which it contended could reasonably be expected to follow from disclosure of the matter in issue. As I have indicated above, the matter in issue does not concern the business, commercial or financial affairs of the Corporation, and I am satisfied that its disclosure could not reasonably be expected to have an adverse effect on the Corporation's business, commercial or financial affairs (*cf. Re Cannon* at p.520, paragraph 80).
47. The third party's submissions dated 8 October 2003 merely contained general assertions that disclosure may have an adverse effect on the third party's business. For example, the third party argued that the documents "contain matters relating to the operation of [the third party's] business which are commercially sensitive" and "could reasonably be expected to arm [the applicant] with information which could be utilised by it in such a way as to have an adverse effect on our client's business." The submissions did not identify the specific adverse effect(s) on the third party's business affairs that the third party apprehended, and explain how disclosure of matter in issue could reasonably be expected to lead to those adverse effects. They did not, for example, explain how particular segments of the matter in issue could be used by a competitor in a way that would disadvantage the third party's commercial operations, or give the competitor an unearned competitive advantage.

48. When invited by AC Moss to provide further submissions explaining how the matter in issue qualifies for exemption under s.45(1)(c), the third party's solicitors submitted the following arguments (in a letter dated 13 November 2003):

Our client operates its business profitably.

Our client has had regard to economies, and our client operates a certain number of cement mixing trucks of a certain particular size and makes a certain number of deliveries each day.

The Applicant is a competitor of our client, and we are instructed by our client that the Applicant is not an operator of cement mixing trucks of the size operated by our client, and has previously endeavoured to ascertain how our client operates its business profitably.

Accordingly, the information contained in the documents that relates to the number of trucks, the capacity of the trucks or the number of trips or traffic movements each day is commercially sensitive information.

The disclosure of that information to a competitor will have an adverse effect on our client's business, as it will be information which can be usefully applied in order to enable the Applicant to compete in a particular segment of the market against our client, to the detriment of our client.

49. I should note that the only information contained in the documents in issue that relates to the size of the third party's trucks and the details of the trips they make, is a brief paragraph in the development application which outlines the number of trucks that will operate from the proposed plant, together with the number of anticipated deliveries and total traffic movements to and from the site per day. That information is clearly relevant to the Corporation's assessment of the impact that the proposed development could have on traffic flows, and the amenity of residents, in the Pinkenba precinct. The paragraph makes no reference to the specific size or type of vehicles to be used. If information of this type, i.e., truck size and number of trips per day, were capable of giving a competitor a commercial advantage, the competitor need only have stationed an employee opposite the entrance of the third party's plant to record relevant observations. I am not satisfied that disclosure of information of that kind under the FOI Act could reasonably be expected to have an adverse effect on the third party's business affairs.
50. Neither the Corporation nor the third party have supplied sufficient evidence or explanation to establish a reasonable basis for expecting that disclosure of any other part of the matter in issue could reasonably be expected to have an adverse effect on the third party's business, commercial or financial affairs. The documents relate to a site-specific proposal for the design and construction of a concrete batching plant. The documents are now more than three and a half years old. The third party's application was approved and the batching plant has been constructed and commenced operations. Much of the matter in issue would now be capable of observation by an interested member of the public. I am not satisfied that disclosure of any of the matter in issue could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the third party. I find that the test for exemption imposed by s.45(1)(c)(ii) is not satisfied, and accordingly I find that the matter in issue does not qualify for exemption under s.45(1)(c) of the FOI Act.

Public interest balancing test

51. Given my findings above, it is not strictly necessary for me to consider the public interest balancing test incorporated in s.45(1)(c) of the FOI Act. However, I should note that, in my view, there is a significant public interest in enhancing the accountability of the Corporation for its decision-making in respect of development applications, and in enabling any interested member of the public to understand how the impacts of a proposed development on the community and environment have been assessed, and to be aware of any conditions imposed on the development. It would have been necessary to weigh public interest considerations of that kind against any prejudicial effect that the Corporation or the third party had been able to establish within the terms of s.45(1)(c)(ii).

Conclusion

52. For the foregoing reasons, I set aside the decision under review (being the decision dated 5 August 2003 made by Mr Coleman on behalf of the Corporation). In substitution for it, I decide that:
- (a) the documents in issue are not excluded from the application of the FOI Act by s.11A of the FOI Act and s.486 of the TI Act; and
 - (b) those documents do not qualify for exemption from disclosure under s.44(1) or s.45(1)(c) of the FOI Act, and the applicant is therefore entitled to be given access to those documents under the FOI Act.
53. I have made this decision as a delegate of the Information Commissioner's powers, under s.90 of the FOI Act.

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 G J SORENSEN
DEPUTY INFORMATION COMMISSIONER