

MADDOCK LONIE AND CHISHOLM AND DSS

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: 94053
Decision Ref: D01595**

Participants:

Maddock Lonie and Chisholm (a firm)
Complainant

- and -

Department of State Services
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to tender offer - clause 4(3) matter related to the business, professional, commercial or financial affairs of a person - whether disclosure of documents would reveal information about business, professional, commercial affairs of unsuccessful tenderers - whether disclosure of information could reasonably be expected to have adverse effect - whether disclosure of information could reasonably be expected to prejudice future supply of information - public interest considered - onus on complainant to establish that access should be given to documents where matter *prima facie* exempt under clause 4(3) - whether the documents constitute confidential communications and future supply of that kind of information will be prejudiced - business or commercial information - adverse effect of disclosure.

Freedom of Information Act 1992 (WA) ss. 30; 68(1); 69(3); 72(1)(b); 75(1); 102(1); 102(3); Schedule 1 clauses 4(2), 4(3), 4(7), 8(2); Division 5 of Part 2 to FOI Act; Part 5 to FOI Act.

Freedom of Information Regulations 1993 (WA) regulation 10.

Freedom of Information Act 1982 (C'wlth) ss. 43(1)(c).

Re Kobelke and Minister for Planning and Others (Information Commissioner, WA, 27 April 1994, unreported).

Attorney-General's Department v Cockcroft (1986) 10 FCR 180.

Re Maher and Attorney General's Department (No. 2) (1986) 4 AAR 266.

DECISION

The decision of the agency is varied. The following matter is not exempt:

- (i) the matter contained in Table 1 on page 12 of Document 2; and
- (ii) the matter contained in paragraph 4 of Document 5.

Otherwise, the disputed documents are exempt under clause 4(3) of Schedule 1 to the FOI Act.

**B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER**

2 June 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the Department of State Services ('the agency') to refuse access to documents of the agency requested under the *Freedom of Information Act 1992* ('the FOI Act'). In this instance, the access application was made by Marks Healy Sands, Barristers and Solicitors, as agent for Maddock, Lonie and Chisholm, Barristers and Solicitors ('the complainant').
2. On 20 August 1993, the State Supply Commission called for tenders in respect of Tender No. 280A1993 for the supply of Photo-Licence Equipment and Accessories capable of producing photographic licences at Police Licensing and Services Centres and selected collecting agencies throughout Western Australia. The State Supply Commission ('the related agency') is a related body to the agency for the purposes of the FOI Act in accordance with regulation 10 of the *Freedom of Information Regulations 1993*. The tender closed on 16 September 1994 and tender offers were received from three companies, Leigh Mardon Pty Ltd, Data Card Division, ('Leigh Mardon') Polaroid Australia Pty Ltd ('Polaroid') and Tom Green Pty Ltd ('Tom Green').
3. Each tenderer addressed the tender specifications satisfactorily and each was invited by a Tender Evaluation Committee to demonstrate its equipment and further elaborate on its tender offer. Each tenderer subsequently demonstrated its equipment to the Tender Evaluation Committee in late October 1993. However, as none of the three tenderers demonstrated the equipment specified in the tender offers and, as final costings were not fully resolved, further supplementary information was requested from each of the tenderers, within the original tender specifications. Among other things, the related agency requested each of the tenderers to demonstrate the equipment specified in the tender offers and to advise whether the tenderer was *"prepared to supply and install the proposed equipment at all licensing centres and charge Police Licensing and Services for a cost per transaction fee, and if so, for how much?"*
4. On 23 November 1993, Polaroid demonstrated the equipment proposed in its tender offer. On 24 November 1993, Leigh Mardon demonstrated the equipment proposed in its tender offer to the agency. Tom Green did not formally respond to the related agency until 17 December 1993 and did not avail itself of the opportunity to demonstrate the equipment proposed in its tender offer. Following the equipment demonstrations by Polaroid and Leigh Mardon, on 1 December 1993, the Tender Evaluation Committee invited Polaroid and Leigh Mardon to provide further information to the related agency as to the possible final cost per transaction, for a fixed contract for two years. Tom Green was apparently not invited to submit this additional pricing information to the Tender Evaluation Committee. On 20 December 1993, the

related agency accepted the tender offer of Leigh Mardon to perform the contract for a cost of \$2.48 per transaction.

5. On 18 January 1994, the complainant lodged an access application with the agency seeking access under the FOI Act to documents concerning the unsuccessful tenderers for Tender No. 280A1993. The unsuccessful tenderers were Tom Green and Polaroid.
6. On 21 January 1994, the agency asked the complainant to clarify the ambit of the access application by specifying the kind of information sought. On 27 January 1994, the complainant advised the agency that it was seeking access to the following specific information:

- "(a) names of unsuccessful tenderers;*
- (b) prices quoted by unsuccessful tenderers;*
- (c) equipment proposed to be used by unsuccessful tenderers; and*
- (d) specific processes or proposals relating to how the equipment is to be used."*

The complainant further advised the agency that:

"We appreciate that business confidentiality is an exception to the Freedom of information [sic] Act and accordingly if all the information requested cannot be supplied we would seek on an alternative basis the following information:

- (a), (b) and (c) or (a), (b) or (d) or (b),(c) and (d);*
- alternatively*
- (a) and (b) or (a) and (c) or (a) and (d) or (b) and (c)*
- or (b) and (d) or (c) and (d)."*

7. On 4 February 1994, Mr M Torrens, FOI Co-ordinator of the agency, informed the complainant that, on 2 February 1994, Mr M Price, Director, State Supply, at the agency, had decided to refuse the complainant access to the documents, containing the information requested ('the disputed matter'), because each of the documents in dispute was exempt under clauses 4(2), 4(3), and 8(2) of Schedule 1 to the FOI Act. In its notice of decision to the complainant, the agency neither described nor identified the number or type of documents it had determined to be within the ambit of the complainant's access application. In addition, the agency did not include full details of the reasons for refusal, nor the findings on the material questions of fact underlying those reasons. The notice of decision merely stated that access had been refused and quoted the relevant exemption provisions from Schedule 1 to the FOI Act.
8. On 23 February 1994, the complainant applied to my office for review of the decision of Mr Price, on the basis that the complainant was of the view that Mr Price was the principal officer of the agency and, therefore, internal review was not available to the complainant. On 24 February 1994, my office notified the complainant that internal review was available by another officer of the agency

and my office referred the complainant's application for internal review to the agency on the same day for processing in accordance with the provisions of Division 5 of Part 2 of the FOI Act.

9. On 10 March 1994, Mr J R Carruthers, Manager, Administrative Services of the agency, informed the complainant that Mr G Duffield, the agency's General Manager, had conducted an internal review of the initial decision of Mr Price and had decided to confirm the original decision to deny access to the documents containing the information sought by the complainant. The agency's notice of decision on internal review merely confirmed the initial decision. On 6 May 1994, the complainant sought external review of that decision by the Information Commissioner.

REVIEW BY THE INFORMATION COMMISSIONER

10. On 12 May 1994, in accordance with my obligation under s.68(1) of the FOI Act, I advised the agency that I had received and accepted this complaint for review. Pursuant to my authority under ss.75(1) and 72(1)(b) of the FOI Act, I sought the production to me of the documents in dispute together with the FOI file maintained by the agency in respect of this matter. As the agency had not identified the number and type of documents in dispute, I also requested the production of a schedule, listing and describing each document identified by the agency as being within the ambit of the access application, the exemptions claimed for each document, or part thereof, and a clear indication of the part or parts of the document to which each exemption claim was made.
11. In my view, neither the notice of decision in the first instance, nor the notice of decision on internal review, was in a form that complied with the requirements of s.30 of the FOI Act. Neither notice contained sufficient detail for me or the complainant to understand the reasons for the agency's decisions. Therefore, I required the agency to provide me with further information as to the reasons for the decision to deny the complainant access to the requested documents.
12. The originals of the documents in dispute and the further information required, were provided to me on 20 May 1994. The information provided to me by the agency in response to my request of 12 May 1994 was inadequate to satisfy my request to identify the precise information within the documents which the agency claimed to be exempt and under which of the exemption clauses claimed. At that stage of proceedings, the agency maintained its claim that each of the documents in dispute was exempt under clause 4(2), clause 4(3) and clause 8(2) of Schedule 1 to the FOI Act.
13. Following receipt of the documents, negotiations were conducted with the parties in an attempt to reduce the ambit of the dispute. During the course of those negotiations, it became apparent that Tom Green and Polaroid may be affected by a decision made on this complaint. Whilst Tom Green and Polaroid did not seek to be joined as parties to this complaint, and were not joined, my

office contacted both Tom Green and Polaroid to obtain their views and to receive submissions from them, pursuant to my power under s.69(3) of the FOI Act. On 12 August 1994, a representative of Polaroid advised my office that Polaroid did not object to the release of that company's name as a tenderer for the photo-licensing equipment and the agency was advised accordingly.

14. However, it was not until November 1994 that I became aware that, on 18 March 1994, a representative of Tom Green had also advised the agency that that company did not object to the release of that company's name as a tenderer for the photo-licensing equipment. Following extensive negotiations with my office, the agency eventually agreed to release the names of the unsuccessful tenderers to the complainant. With the release of those names, the complainant's request with respect to item (a) of the disputed matter was satisfied. All other attempts by my office to further conciliate this complaint to a satisfactory resolution or to reduce the ambit of the complaint were unsuccessful. That process was made more difficult by the fact that the complainant, and the unsuccessful tenderers, are located in the eastern states.
15. Following my initial request of 12 May 1994, my office attempted on numerous occasions to obtain the agency's assistance in identifying the matter within the documents which, if disclosed, would reveal information that has commercial value to Tom Green and Polaroid or would reveal information about the business, professional, commercial or financial affairs of Tom Green or Polaroid. Those consultations took place by way of telephone conversations, letters and meetings. Throughout the course of those consultations, the reasons for the need to specifically identify the exempt matter concerned, particularly as the exemptions provided by clause 4(2) and clause 4(3) are stated in Schedule 1 to the FOI Act to be mutually exclusive, were explained to several officers of the agency. However, in spite of the efforts of my office, limited assistance was received from officers of the agency in this regard and, in November 1994, the agency was advised that I would deal with the complaint on the information then before me.
16. In my view, the agency's consultations with Tom Green and Polaroid in the first instance were inadequate to obtain their views as to the nature of the information within the documents in dispute. If the agency's consultations had been adequate at that early stage, Tom Green and Polaroid may well have been able to provide the agency with specific advice in relation to the information within the documents in dispute. The availability of such information to the agency would, no doubt, have been of assistance to the agency to justify the agency's claim that some, or all, of the information contained within the documents in dispute is exempt under clause 4 of Schedule 1 to the FOI Act. However, on the evidence available to me, it appears that the decision-makers in the agency have abrogated their obligations and responsibilities under the FOI Act, and have made no apparent effort to give effect to the objects of the FOI Act, particularly the accountability of government agencies for the decisions which they make.

17. On 22 February 1995, after examining the documents in dispute and considering the various submissions of all parties, I informed both the complainant and the agency of my preliminary view on this complaint. Taking into account the complexities of this complaint, in my view it was essential to inform the parties of my views as to the scope of the complaint. Accordingly, I informed the parties that I had determined, on the basis of the complainant's advice to the agency of 27 January 1994 as to the specific information required by the complainant, that the scope of the access application, and consequently this complaint, related only to the matter specified in sub-paragraphs (a) to (d) of paragraph 4 above. I informed the parties that I would determine the complaint on that basis. Neither the complainant nor the agency disputed or objected to my proposed course of action. Accordingly, I have proceeded on that basis.
18. I advised the agency that it was my preliminary view that the agency had not discharged its onus under section 102(1) of the FOI Act to establish that its decision to deny the complainant access to the documents on the basis that the documents are exempt under clause 4(2) and clause 8(2) of Schedule 1 to the FOI Act was justified. However, I advised the agency that it was my preliminary view that the disputed documents contain information relating to the business, professional, commercial or financial affairs of Tom Green and Polaroid which information may be exempt under clause 4(3). In the absence of any assistance in isolating the specific matter which was considered exempt under clause 4(3), I formed the view, from my own examination of the documents, that the exempt matter may be inextricably intertwined with other matter so that access could not be provided to the balance of the disputed documents. In light of this view, I invited the agency to withdraw its claims for exemption under clause 4(2) and clause 8(2).
19. On 24 May 1995, a full three months after receiving my preliminary view on the matter, and whilst I was in the process of finalising my decision on this complaint, the agency responded to my preliminary view. The agency informed me that, taking into account my preliminary view that the information contained in the disputed documents may be exempt under clause 4(3), the agency withdrew its exemption claims under clause 4(2) and clause 8(2).
20. My preliminary view was also conveyed to the complainant, who was invited to reconsider the complaint in light of my preliminary view. Alternatively, if the complainant wished to continue with the complaint, I invited the complainant to make any additional submissions the complainant wished to make to support the claim that the disputed documents were not exempt under clause 4(3). No additional submissions were received from the complainant. However, the complainant requested a formal decision on the matter. Accordingly, I have proceeded to formally determine this matter on the basis of the agency's claims that each of the documents is exempt under clause 4(3) of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENTS

21. There are 5 disputed documents which are described as follows:

No	Date	Subject matter
1	13 September 1993	Tender submitted by Tom Green
2	November 1993	Supplementary tender information supplied by Tom Green
3	15 September 1993	Tender submitted by Polaroid (Option A)
4	15 September 1993	Tender submitted by Polaroid (Option B)
5	2 December 1993	Supplementary tender information supplied by Polaroid

22. The documents in dispute consist of the tender submissions of the unsuccessful tenderers. Documents 1, 3 and 4 are the initial tender submissions of Tom Green and Polaroid, based on the related agency's tender specifications. After considering the initial submissions, the related agency invited the tenderers to provide additional information to either expand upon details already provided or to provide an alternative proposal to that submitted in the first instance. Documents 2 and 5 were provided to the related agency by Tom Green and Polaroid following that request.

23. The documents in dispute contain, *inter alia*, the information to which access was requested by the complainant, being the names of the unsuccessful tenderers, the prices quoted by the unsuccessful tenderers, detailed analyses of the manner in which the tender prices were calculated, detailed analyses of the systems and equipment proposed by the unsuccessful tenderers and the specific proposals and processes of how that equipment would be used. As noted in paragraph 17 above, that information is the only information with which my decision is concerned. The documents in dispute also contain other unrelated information which formed part of the tender submissions, including information such as details of the particular company, its staff and its past business activities. As that information is not information of the kind requested by the complainant, and is therefore not within the ambit of the access application, I am not required to make a decision with respect to that other information.

THE EXEMPTION CLAIMED BY THE AGENCY

Clause 4 - Commercial or business information

24. The agency claimed that each of the documents in dispute is exempt under clause 4(3) of Schedule 1 to the FOI Act. Clause 4 provides:

"4. Commercial or business information

Exemptions

(1) *Matter is exempt matter if its disclosure would reveal trade secrets of a person.*

(2) *Matter is exempt matter if its disclosure -*

(a) would reveal information (other than trade secrets) that has a commercial value to a person; and

(b) could reasonably be expected to destroy or diminish that commercial value."

(3) *Matter is exempt matter if its disclosure -*

(a) would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and

(b) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.

Limits on exemptions

(4) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*

(5) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant.*

(6) *Matter is not exempt matter under subclause (1), (2) or (3) if the applicant provides evidence establishing that the person concerned consents to the disclosure of the matter to the applicant.*

(7) *Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest."*

Clause 4(3)

25. In order to establish an exemption under any of the sub-clauses of clause 4, the agency must identify the specific matter within the document which it considers to be exempt under that particular clause by reference to page, paragraph and the like, and it must satisfy me that the alleged effect that it claims would follow from disclosure of that matter is one that could reasonably be expected.
26. Although requested to do so on a number of occasions, the agency declined to identify the specific matter within the documents in dispute which it claimed is exempt under clause 4(3), but maintained its claims that all of the disputed matter within each of the documents was exempt clause 4(3). However difficult it may have been for the agency to identify with any degree of specificity which matter within the disputed documents it considered to be exempt under clause 4(3), the agency is required to do so under the provisions of the FOI Act.
27. The exemption provided by clause 4(3) is general in its terms. It is directed at protecting from adverse effects the disclosure of information about the business, professional, commercial or financial affairs of a person who has business dealings with an agency, in order to ensure that the flow of business information to an agency is not diminished, and to prevent the exposure of persons who have business dealings with an agency to any unfair disadvantage.
28. To establish the exemption under clause 4(3), disclosure of the documents in question must reveal information of the type mentioned about a person, not necessarily the person who wrote the document, in circumstances where the disclosure of that kind of information could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency. Accordingly, to establish the exemption it must be shown that it would be reasonable to expect that disclosure would produce some adverse effect on the person's business, professional, commercial or financial affairs, or would prejudice the future supply of information of that kind to the agency (see *Re Kobelke and Minister for Planning and Others* (27 April 1994, unreported).
29. However, it is not sufficient that paragraphs (a) and (b) of clause 4(3) are satisfied. Clause 4(7) contemplates that certain information that is otherwise within the exemption provided by clause 4(3) may be disclosed if the public interest, on balance, requires this to occur. The complainant bears the onus of establishing that disclosure would, on balance, be in the public interest. However, it is my view that if an agency claims an exemption it must consider whether any of the limits on the exemption apply and must, therefore, at least consider the public interest, where the exemption is expressly limited by a "public interest test."

The submissions of the agency and the unsuccessful tenderers

30. The agency did not identify the specific matter within the disputed documents which it considered to be exempt under clause 4(3). However, Mr Lloyd Graham, the Executive Director of the agency claimed that the agency has been *"...unable to provide the "material findings of fact" which your office has consistently sought as the arguments that have been put forward in support of our position are based largely on accepted business customs, ethics and practices that have been established in the commercial world over many years. The 'onus of proof' provisions of the FOI Act are practically impossible to comply with in the public tendering situation when, in instances such as this particular request, issues of potential commercial damage come down to matters of opinion based on industry experience and practice, and nobody can be proven right or wrong until damage actually occurs."*
31. Notwithstanding those claims, Mr Graham neither identified nor explained to me the nature and substance of those accepted business customs, ethics and practices, nor how they are applied by the agency as part of its tender procedures. Further, neither the agency's Annual Report, the related agency's Annual Report nor the agency's Information Statement, prepared and published in accordance with the requirements of Part 5 of the FOI Act, are of any assistance in this regard. Those publications neither refer to, nor describe, either in detail or at all, the policies, practices or precedents, or the rules or guidelines or the business customs, ethics and practices applied by either the agency or the related agency, in the tender process. Had that kind of information been given, it may well have provided the findings on the material questions of fact, and the material on which those findings were based, in support of the agency's claim that each of the documents in dispute was exempt under clause 4(3) of Schedule 1 to the FOI Act.
32. Nevertheless, the agency claimed that the disclosure of the documents in dispute could reasonably be expected to have an adverse effect on the affairs of Tom Green and Polaroid, because each tenderer was requested to provide innovative solutions in its tender offer in view of the emerging technology involved in the processes required to comply with the tender specifications. In addition, the supplier base capable of supplying the necessary technology was claimed to be known by the agency to be relatively small. Consequently, the agency submitted that the proprietary technology and the pricing structures of the tenderers are considered by the tenderers to be very sensitive.
33. Polaroid objected to the release of the information in the documents in dispute in relation to the pricing structure proposed by it and the specific processes and proposals for the equipment to be used by it if its tender offer was successful. Polaroid submitted that information on its pricing structure was clearly information of the kind referred to in clause 4(3), because the company's prices and pricing structure convey critical information about the company's margins, costs and approach to tendering. Polaroid claimed that if that information were

disclosed to a competitor, it could reasonably be expected to have an adverse effect on Polaroid's competitive position in future tenders because its competitors would be better able to anticipate Polaroid's pricing and commercial strategy. Further, Polaroid submitted that the disclosure of the information would make tenderers, including Polaroid, reluctant to supply detailed pricing information to an agency in future tender offers.

34. Although Polaroid advised my office that it did not object to the release of certain non-sensitive information from its tender documents, Polaroid did not provide sufficient information to me to enable me to identify, with particularity, the information within the tender documents which Polaroid claimed to be exempt. Of course, the onus of establishing the exemption remains the responsibility of the agency, and there is no obligation upon Polaroid to establish that the disputed matter contained within the documents in dispute is exempt matter under the exemption clauses claimed by the agency.
35. Tom Green claimed that disclosing the prices it quoted in its tender documents would give its competitors an advantage in future commercial dealings. Tom Green also submitted that significant amounts of money had been spent by the company in the research and the development of the equipment proposed to be used by it if its tender were successful. Tom Green claimed that disclosing the details of that equipment would provide competitors with a great advantage if they knew the brand, model and manufacturer of that equipment. In relation to the specific processes or proposals for the use of the equipment, Tom Green claimed that competitors constantly try to duplicate the products and processes developed by it and, as a result, Tom Green actively guarded that information from its competitors.

The submissions of the complainant

36. The complainant did not directly dispute the fact that the information in the documents in dispute is information relating to the commercial, business and financial affairs of Tom Green or Polaroid. In fact, in its response to the agency of 27 January 1994, the complainant recognised that business confidentiality may be an exception to the FOI Act. However, the complainant submitted that the information contained in the tender documents is not exempt under clause 4(3), because it is unreasonable to conclude that, if the disputed documents were disclosed, a tenderer who voluntarily makes a bid in an effort to win a contract and make an economic gain for itself will decline to supply such information to an agency in the future.
37. The complainant referred me to a number of cases decided by the Commonwealth Administrative Appeals Tribunal in relation to s.43(1)(c) of the *Freedom of Information Act 1982* ('the Commonwealth Act'), which the complainant claimed is in the same terms as clause 4(3) of Schedule 1 to the FOI Act. The relevant section of the Commonwealth Act provides:

"43 (1) *A document is an exempt document if its disclosure under this Act would disclose:*

(a)...

(b)...

(c) information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking being information:

(i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or

(ii) the disclosure of which under this Act could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or a Territory or the administration of matters administered by an agency."

38. It can be seen, therefore, that the exemption in the Commonwealth Act incorporates a test of "unreasonableness" into s.43(1)(c) of that Act. The qualification of "unreasonableness" does not apply to, and does not form part of, the matters to be considered when determining whether a document is an exempt document under clause 4(3) of Schedule 1 to the FOI Act.

Consideration

39. I have examined each of the documents in dispute. In my view, the information set out within each of those documents is information about the business, commercial and financial affairs of Tom Green and Polaroid, as those terms are commonly understood. The information contained within each document includes information about the tenderer's tender price; specific pricing structures applicable to the tender; the equipment (including specifications) which the tenderer proposed to use; the processing times; the company profile; the hardware configurations and specifications; proposed operating procedures; pricing basis, quoted against foreign currencies including the Japanese yen and the US dollar; some financial details about the companies and staff; and client references. In my opinion, that information is, *prima facie*, information about the business, commercial and financial affairs of both Tom Green and Polaroid, and I am satisfied that the requirements of clause 4(3)(a) have been met.

40. However, I must also be satisfied that disclosure of all of the information within the disputed documents could reasonably be expected to have an adverse effect on the affairs of the unsuccessful tenderers, or to prejudice the future supply of information of that kind to the agency.
41. The Federal Court, in *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, discussed the meaning of the phrase "*could reasonably be expected*" in the context of s.43(1)(c)(ii) of the Commonwealth Act. The Court held, at page 190, that the words were intended to receive their ordinary meanings and required a judgement to be made by the decision-maker as to whether a suggested outcome is reasonable, as distinct from something that is irrational, absurd or ridiculous.
42. The agency claimed that it had been a long standing practice that the only information released in regard to State Government tenders is the name and price of the successful tenderer. The names and the prices of successful tenderers are published in the *Government Gazette*. The agency also submitted that it could be presumed as a consequence of this practice that companies submitting tenders did so in the knowledge that their tender offers are treated confidentially and will not be released to an outside party unless they are the successful tenderer. However, the agency offered no evidence which would show that its presumption had any basis in fact. The agency further claimed that release of tender information under the FOI Act would prejudice the ability of the related agency to obtain the information it required from tenderers because the tenderer would be discouraged from providing confidential information or lodging tenders if there were a possibility that competitors could access those details using the FOI Act.
43. I do not accept the proposition that the disclosure in accordance with the provisions of the FOI Act of the names of, and the prices offered by, unsuccessful tenderers could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the unsuccessful tenderers, or that it could reasonably be expected to prejudice the future supply of such information to the related agency. Further, it is not reasonable, in my view, to claim that a business which, for its own financial benefit, submits tender offers for the supply of goods and services such as those required by a government agency as outlined in a tender specification would decline to provide its name and the price offered in making a tender offer to the related agency in the future.
44. In my view, where a company or business organisation which is involved in the provision of equipment and services for economic gain chooses to participate in the tender process and, as a result, provides the agency with information, including the name of the company and the price for which it is prepared to provide its equipment and services, it cannot reasonably be expected that the agency will not be supplied with such information in the future if the disputed documents are disclosed. It is also my view that the disclosure by the agency of the names of Tom Green and Polaroid in this instance has not compromised the

confidential nature of the tender process. There may well be scope for the agency to modify its practices to provide, as a matter of policy, more information of this nature to tenderers upon request.

45. I am not satisfied that the requirements of clause 4(3)(b) have been established with respect to the name and price submitted by each of the unsuccessful tenderers. In any event, as noted in paragraphs 13 and 14 above, neither of the unsuccessful tenderers objected to the release of its name to the complainant and, eventually, the agency released the names of the unsuccessful tenderers to the complainant.
46. However, from my examination of the documents in dispute and the matter contained therein, and taking into account the information and submissions received from Tom Green and Polaroid, I am satisfied that the remainder of the information - which includes the detailed descriptions of the manner in which the tender prices were calculated, the detailed descriptions of the systems and equipment proposed by the unsuccessful tenderers and the specific proposals and processes of how that equipment would be used - is, *prima facie*, information about the business, commercial and financial affairs of Tom Green and Polaroid. I am also satisfied that, if released, the disclosure of that information could reasonably be expected to have an adverse effect on the business, commercial and financial affairs of Tom Green and Polaroid by reducing their competitiveness in any future tender process.
47. Further, from my examination of each of the documents in dispute, the specific "per transaction" prices quoted by the unsuccessful tenderers, being the cost per transaction fee requested by the Tender Evaluation Committee, appear only in Document 2 and Document 5. I understand that this information is the kind of information that the agency would publish in the *Government Gazette* were either Polaroid or Tom Green the successful tenderer.

The public interest

48. As I have said in paragraph 29 above, the application of the exemption in clause 4(3) is limited by a public interest test expressed in clause 4(7), which indicates that some kinds of business or commercial information may be disclosed if, on balance, it would be in the public interest to do so. The onus of establishing that the disclosure of the disputed matter within the documents in dispute that is *prima facie* exempt matter is, on balance, in the public interest, lies on the complainant under s.102(3) of the FOI Act.
49. The complainant submitted that the public interest test in clause 4(7) required a consideration of whether it would be unreasonable for the information to be divulged. I was referred to a decision of the Administrative Appeals Tribunal in *Re Maher and Attorney General's Department (No 2)* (1986) 4 AAR 266 as authority for this proposition. However, the equivalent exemption in the Commonwealth Act is not limited by an express "public interest" test. Rather, the public interest in disclosure is simply a factor to be taken into account when

considering the applicability of the relevant exemption clause. As I stated in paragraph 38 above, the test of "unreasonableness" which forms part of the test for exemption under the Commonwealth Act is not a part of the requirements to establish the exemption in the FOI Act. Therefore, I do not consider that the decision in *Re Maher* is of assistance.

50. I recognise a public interest in members of the private sector being able to enter into business and commercial enterprises with government agencies. I also recognise a public interest in maintaining the confidentiality of sensitive commercial and business information about third parties which is in the hands of government agencies, including information submitted within a tender offer to an agency. Against these interests must be balanced the public interest in the accountability of government agencies for the decisions that they make.
51. The publication of Information Statements about agencies, as required by Part 5 of the FOI Act, is one means by which the accountability of agencies is reinforced. That part of the FOI Act requires an explanation of the decision-making functions of the agency as they affect members of the public, including, in this instance, tenderers.
52. In my view, the established procedures relied upon by the agency to deny access to the disputed documents are insufficient to make the related agency accountable for its tender decisions. More could be done, for example, by the establishment of policies which would address the needs of tenderers for information and explanation.
53. However, the complainant bears the onus of establishing that disclosure of the information within the disputed documents which otherwise meets the requirements of clause 4(3) would, on balance, be in the public interest. The complainant has not persuaded me on this point, and I find the disputed matter within the disputed documents - other than the name of, and the price proposed by, the unsuccessful tenderers - to be exempt under clause 4(3) of Schedule 1 to the FOI Act.
