

7 July 2010

Mr Chris Wheeler  
Deputy Ombudsman  
NSW Ombudsman  
Level 24, 580 George Street  
SYDNEY NSW 2000

cc: Sydney Water

Dear Mr Wheeler

The Australian Sustainable Business Group (ASBG) wishes to provide input into the current investigation and determination of Mr Kelvin Bissett's Freedom of Information (FOI) application of 4 March 2009.

The Australian Sustainable Business Group (ASBG) is a leading environment and energy industry representative body that specialises in providing the latest information, including changes to environmental legislation, regulations and policy that may impact industry, business and other organisations. We operate in NSW and Queensland and have over 150 members comprising of Australia's largest manufacturing companies. Many of these members are among Sydney Water's top 50 customers.

ASBG has been made aware of this matter by Sydney Water and its members, and from what we understand the FOI request relates to the release of Sydney Water's customer data at an individual business customer level for water usage. The top 50 usage companies are to be individually singled out.

Industry and business operate in competitive national and international markets. As a consequence, data on a company's, or individual site's, usage of raw materials, especially utility supplies, are considered sensitive commercial data. As most of Sydney region's manufacturing sites have national and international competitors, release of such data is considered to be potentially damaging to the local economy as well as the national economy.

There has been a considerable contraction of industrial activity in the Sydney Region over the last 15 years and an increasingly competitive environment. Accompanying this is the correspondingly loss of higher paid manufacturing jobs.

Much of Sydney's industry has embraced water conservation activities which of course decreases their costs. Considerable advances in efficient water usage have been achieved. Sydney Water's Every Drop Counts program has been one of the more successful programs in the world and its results (including the Stockholm Industry Water Award in 2006) speak along these lines. Since 2005 the undertaking of Water Savings Action Plans (WSAP) has been a requirement on companies using over 50Ml of water per annum. This is administered by the Department of Environment Climate Change and Water (DECCW). Accompanying WSAPs has been a number of Water Savings grant rounds administered by the DECCW. Identification of the largest water users is a poor correlation to the efficiency by which they use water.

It may appear counter intuitive that where industry has improved its water use performance that confidentiality is still of concern. International competition and trade barriers are the short answer. There are a number of examples of other countries taking Australian companies to the World Trade Organisation citing government support as an unfair trade advantage or that product being subsidized. Intense competition between countries and companies has lead to trade barriers being imposed on grounds that companies have been assisted by government policy. Hence, even good news on water efficiency could, for some companies, potentially lead to lengthy legal disputes on international trade issues and the potential introduction of trade barriers.

ASBG is also concerned that an approval to release Sydney Water's largest customers sets precedence for similar FOI claims on other Government agencies handling sensitive information. While the release of one data set may have a small substantial impact, a collection of data sets would be more damaging. It is a concern that assessment of future FOI applications could be considered in isolation and not viewing the greater impact of other data sets that are available or under consideration.

There are many examples where Government schemes, data and programs specifying, sometimes in legislation, the need to treat such data in confidence. Some examples of this include:

*Guidelines For Energy Savings Action Plans* **Confidentiality**

Information provided to DEUS<sup>1</sup> by a designated user through the Plan process will be treated confidentially when it is commercially confidential in its nature and nominated as such by the user.

*National Greenhouse and Energy Reporting Act* **Confidentiality**

The GEDO<sup>2</sup> sets out strict security measures to protect the confidentiality of any greenhouse and energy information that is disclosed to other persons or bodies.

Under the NGER Act it is an offence for anyone to disclose greenhouse and energy information obtained in an official capacity unless the disclosure is made in accordance with the NGER Act or for the purposes of another law of the Commonwealth or of a State or Territory.

The NGER Act provides for a penalty of 2 years imprisonment for unauthorised disclosure of greenhouse and energy information. The conduct may also be an offence against the *Crimes Act 1914* (Cth).

The need for confidentiality of resource use data has many justifications including:

- Competitors assessing the production levels of a site for future planning and obtaining additional market share.
- Competitors ascertaining product formulations, recipes, costs and other proprietary information.
- Competitors identifying sensitive resources and entering into price wars during times of supply shortage.
- Countries assessing, by the release of such data, that a local company has been provided with a form of government assistance, thereby launching international court challenges which can lead to trade barriers being established.

As implied from the above identification of direct harm to a company from the release of such data is not straight forward. Loss of market share due to use of confidential information is not quantifiable, if even identifiable, without the very unlikely cooperation of a competitor/s receiving the data. Information that one competitor has over another is likely covertly advantageous to the receiving party's interest.

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<sup>1</sup> Referred to as the NSW Department of Energy and Utility Services, now part of the NSW Department of Environment, Climate Change and Water


<sup>2</sup> Greenhouse and Energy Data Officer who collects the energy and greenhouse emissions data for the NGER Act

In conclusion, ASBG wishes that consideration be given that some form of commercial harm may come to one or more of Sydney Water's top consumption customers if their names and performance was released. So even one harmful outcome, in ASBG's consideration, would not be in the public interest. Commercial harm can come in many forms, which can impact on Sydney jobs and future investment in NSW.

Secondly, the release of such data at an individual company level sets a precedence whereby further commercially sensitive data held by government agencies could also be more likely to be released.

Should you require ASBG to clarify or elaborate on the above matter please contact me.

Yours Sincerely

A handwritten signature in black ink, appearing to read "Andrew Doig". The signature is fluid and cursive, with a large loop at the end of the last name.

Andrew Doig  
National Director  
AUSTRALIAN SUSTAINABLE BUSINESS GROUP