

Determination

External review - section 39 *Freedom of Information Act 1991*

Applicant	Hon Tom Koutsantonis MP
Agency	Department of Planning, Transport and Infrastructure
Ombudsman reference	2018/09937
Agency reference	6994574
Determination	The determination of the agency is reversed.

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (the FOI Act) the applicant requested access from the agency to:

Copies of any and all documents (including but not limited to physical, electronic, or written briefs, reports, draft reports, minutes, emails, diary entries, meeting notes and other correspondence) regarding the right hand tram turn at King William Street and North Terrace [from 17 March to 13 July 2018].

Background

2. For ease of reference, the procedural steps relating to the application are set out in the appendix.

Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 7 January 2019. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to reverse the agency's determination.
5. The agency and the interested party advised my Office that they did not wish to make any further submissions in response. To date, the applicant has not responded to my provisional determination. Accordingly, this (my final) determination is in the same terms as my provisional determination.

Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
7. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access.
8. The agency claims that the one document in issue is exempt as a document affecting personal affairs (clause 6(1)) and an internal working document (clause 9(1)).² They provide as follows:

Clause 6(1)

A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

Clause 9(1)

A document is an exempt document if it contains matter—

- (a) that relates to—
 - (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and
- (b) would, on balance, be contrary to the public interest.

9. I have also considered whether the document in issue is exempt under clause 7(1)(c), which provides:³

Clause 7(1)(c)

- (1) A document is an exempt document—

...

- (c) if it contains matter—
 - (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
 - (ii) the disclosure of which—
 - (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
 - (B) would, on balance, be contrary to the public interest.

10. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
11. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

¹ *Freedom of Information Act 1991*, section 12.

² This is according to the schedule of documents attached to the agency's belated notice of determination. The agency's notice of determination only provides reasons in support of its clause 9(1) claim.

³ I have a discretion to consider exemptions not relied upon by the agency: *Department of the Premier & Cabinet v Redford* (2005) 240 LSJS 171 [29].

Document in issue

12. The agency identified 20 documents within the scope of the application.
13. The agency belatedly determined to grant full or partial access to 17 of these documents. It refused access in full to documents numbered 1, 4 and 12.
14. In response to the agency's belated determination, the applicant advised my Office that he only remains aggrieved by the agency's refusal to release document 12. Accordingly, only document 12 is in issue for the purposes of my external review.

Issues in this review

15. It is for me to decide whether or not the agency has justified its determination to refuse access to document 12, or whether there is sufficient evidence before me from which I am able to be satisfied that all elements of the clauses relied on by the interested party are established.⁴

Summary of evidence and submissions

The agency

16. In its belated determination the agency claimed that document 12 contains information that the agency 'considers to be the personal affairs of individuals (i.e. names, direct phone / mobile numbers and email addresses)' and is therefore exempt under clause 6(1).⁵ With respect to its clause 9(1) claim, the agency submitted that:

... it contains opinions, advice and recommendations from the Project Manager to DPTI for the purpose of aiding in the execution of decision making functions...

[Public interest] Factors in favour of release include:

- The public interest in fulfilling the objects of the FOI Act, and promoting openness and accountability within government.
- The public interest in scrutiny of government decision making.

[Public interest] Factors against release include:

- The public interest in ensuring the effective conduct of the agency's functions.
- The need for some confidentiality to allow the agency to operate efficiently.^[6]
- The public interest in encouraging the free exchange of ideas during deliberative processes, including through frank and candid assessment of information.

17. In correspondence with my Office, the agency reiterated the above submissions, and referred to the interested party's submissions (summarised below). The agency noted that clause 7(1)(c) may be relevant, but advised that it had not explored this given its clause 6(1) and 9(1) claims.

The applicant

18. The applicant provided the following submissions in support of his application for external review:

If these documents do contain personal affairs, I [the applicant] seek your review as to whether their disclosure would be unreasonable in the circumstances ... In doing so I note your ruling that -

⁴ *Re Pope and Queensland Health* (1994) 1 QAR 616, [17].

⁵ The agency's clause 6(1) claim over document 12 is only apparent from its schedule of documents. It has not addressed why disclosure of such information would be unreasonable.

⁶ I note, however, that the agency has not made a claim under clause 13(1) (documents containing confidential material).

... ordinarily, information about a person in a work context does not constitute that person's 'personal affairs'. - External Review 2015/06345, handed down 13 May 2016

[Even if clause 9(1)(a) is satisfied, and with reference to one of my previous external review determinations (2018/03527), dated 20 September 2018] ... these documents may be in the public interest to release for the following reasons-

- Fulfilling the objects of the Act, including the public interest in promoting openness and accountability of senior public servants;
- The ongoing relevance of the information contained within these documents to myself and to the broader public;
- The public interest in the community being able to understand the reasoning behind decisions made by senior public servants and Ministers, and to put these decisions in context;
- The public interest in effective management of the health system;
- Individuals receiving fair treatment in accordance with the law and having access to what is recorded about them in such communications;
- The likelihood that the information contained in these Minutes would contribute to, rather than hinder, public debate; and
- The disclosure of the documents would enhance public scrutiny of decision making within Government, promoting accountability and improving participation.

Interested party

19. The agency consulted one interested party in relation to parts of document 12. The interested party objected to disclosure of those parts for the following reasons:

Professional advice and assumptions that sit behind the email, have not been displayed here, nor have been the series of decisions and events that lead to this exchange, given this was simply an email between the Project Manager and its client at a high level of advice. None of the advice presented has been modelled and therefore the advice could be misconstrued by third parties... [T]he impact could lead to commercial disadvantage and prejudice the future supply of information to the Government.

20. The interested party advised my Office that they 'respect' my provisional determination.

Consideration

21. Document 12 is an email chain dated 11 May 2018 to 14 May 2018, consisting of internal agency emails as well as emails between the agency and the interested party, and one attachment. The majority of the emails contain minimal information. Two of the emails (dated 11 May 2018 (timed 10:19am) and 14 May 2018 (timed 9:34am)) are more detailed.

Clause 6(1)

22. The term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act. The term has also been held to involve 'matters of private concern to an individual'⁷ and the 'composite collection of activities personal to the individual concerned'.⁸
23. I am not satisfied that document 12 contains information concerning anyone's personal affairs. In saying this, I have had particular regard to the contents of document 12, and therefore the context in which the employees' names, email addresses and telephone numbers appear. The names, email addresses and telephone numbers all form part of correspondence created in connection with the performance of the employees'

⁷ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625, citing *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 and *Young v Wicks* (1986) 13 FCR 85 at 88-89.

⁸ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

employment duties. I note also that all of the telephone numbers appear within the employees' signature blocks.⁹

24. Relevantly, in my view, in *Commissioner of Police v The District Court of New South Wales and Perrin Kirby P*, as he then was, commented that:

... the name of an officer or employee doing no more than the apparent duties of that person could not properly be classified as information concerning the personal affairs of that person.¹⁰

25. Accordingly, I see no reason to consider whether disclosure of document 12 would be unreasonable.
26. I am not satisfied that document 12 is exempt under clause 6(1).

Clause 9(1)

27. The scope of clause 9(1)(a) is wide, particularly given the words 'that relates to'.
28. The 'opinion, advice or recommendation' must nevertheless have been obtained, prepared or recorded, or the 'consultation or deliberation' must have taken place, 'in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency'.
29. Having considered the contents of document 12, I am satisfied that it contains matter that relates to:
- opinions, advice and recommendations obtained; and/or
 - deliberations that took place,
- in the course of, or for the purposes of, the agency's and/or the Government's and/or a Minister's decision-making functions.
30. Accordingly, my view is that the agency has satisfied clause 9(1)(a).
31. I have therefore considered whether or not the public interest test set out in clause 9(1)(b) has been met. In so doing, I have had particular regard to the parties' submissions and the contents of document 12.
32. The agency claims that disclosure of document 12 would, on balance, be contrary to the public interest.
33. Neither the agency nor the interested party has satisfied me that disclosure of document 12 would impede 'the effective conduct of the agency's functions', particularly having regard to the Government's recent decision not to introduce a right hand tram turn at King William Street and North Terrace.¹¹
34. Whilst I accept that there can be a 'need for some confidentiality to allow the agency to operate efficiently' it is not apparent to me that any such 'need' extends to document 12

⁹ *Murphy and Queensland Treasury* (1995) 2 QAR 744, citing with approval: *Commissioner of Police v The District Court of New South Wales and Perrin* (1993) 31 NSWLR 606; *Re Stewart and Department of Transport* (1993) 1 QAR 227; *Re Pope and Queensland Health* (Information Commissioner Qld, Decision No. 94016, 18 July 1994, unreported); *Colakovski v Australian Telecommunications Corporation* (1991) 100 ALR 111; *Re Anderson and Australian Federal Police* (1986) 4 AAR 414. The provision under the now repealed Queensland legislation considered by the Queensland Information Commissioner in *Murphy and Queensland Treasury* (section 44(1) of the *Freedom of Information Act 1992 (Qld)*) is almost identical to clause 6(1) of South Australia's FOI Act.

¹⁰ *Commissioner of Police v The District Court of New South Wales and Perrin* (1993) 31 NSWLR 606, 625; cited with approval in *Murphy and Queensland Treasury* (1995) 2 QAR 744, [30].

¹¹ 'SA Government scraps planned right-hand turn for Adelaide trams at North Terrace', *ABC News (online)*, 18 November 2018, available at: <https://www.abc.net.au/news/2018-11-18/sa-government-scraps-right-turn-for-adelaide-trams/10508610> (accessed 19 November 2018).

given its contents and the decision not to introduce a right hand tram turn. Further and in any event, expectations of confidentiality are 'always subject to the provisions of the FOIA and cannot be affected by any representation ... that greater confidentiality might be accorded to material than properly reflects the effect of the FOIA'.¹²

35. By implication, the agency appears to be claiming that disclosure of document 12 would inhibit 'the free exchange of ideas during deliberative processes, including through frank and candid assessment of information'. I am not satisfied that there is a risk that the provision of future internal or external advice would be inhibited having regard to the nature of the information in the document, the obligations imposed on public sector employees,¹³ and the Government's recent decision not to introduce a right hand tram turn. I note also that the FOI Act has been in existence for more than 25 years.
36. By way of comment, it is unclear to me how disclosure of document 12 would promote the public interest in either the 'effective management of the health system' or '[i]ndividuals receiving fair treatment in accordance with the law and having access to what is recorded about them', as claimed by the applicant. I have therefore not accorded these factors any weight.
37. Public interest considerations relevant to this matter are:

In favour of disclosure:

- fulfilling the objects of the FOI Act, particularly the public interest in:
 - promoting openness of the agency's decision-making processes
 - promoting the accountability of the agency's staff
 - facilitating more effective participation in, and scrutiny of, the agency's and the Government's decision-making processes
- the ongoing relevance of the information to the applicant and the public more generally
- information that is publicly available or has been disclosed to the applicant
- the Government's recent decision not to introduce a right hand tram turn at King William Street and North Terrace as previously planned

Contrary to disclosure:

- the agency's and interested party's original objections to disclosure.

38. I am not satisfied that it would be contrary to the public interest to release document 12. The public interest in promoting openness of the agency's decision-making processes, and the accountability of its staff, particularly in light of the Government's decision not to proceed with plans to introduce a right hand tram turn are persuasive considerations in reaching this conclusion.
39. Document 12 is not, in my view, exempt under clause 9(1).

¹² *Iplex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54, 70. In addition, the FOI Act has been in operation for more than 25 years.

¹³ Public sector employees:

- have a general duty to act honestly in the performance of their duties at all times: *Public Sector (Honesty and Accountability) Act 1995*, section 26(1)
- are required to observe the public sector code of conduct: *Public Sector Act 2009*, section 6
- should act 'with the utmost professional integrity': *Code of Ethics for the South Australian Public Sector* (2015), 3 (issued under the *Public Sector Act 2009*)
- 'must rely on evidence to provide objective advice to Government': *Code of Ethics for the South Australian Public Sector* (2015), 7
- should act 'truthfully, consistently, and fairly': *Code of Ethics for the South Australian Public Sector* (2015), 9
- 'must exhibit the highest standards of professional conduct': *Code of Ethics for the South Australian Public Sector* (2015), 10
- are to 'be diligent in the discharge of their role and duties and not act in a way that is negligent': *Code of Ethics for the South Australian Public Sector* (2015), 11.

Clause 7(1)(c)

40. I have also considered clause 7(1)(c) in relation to document 12.
41. 'Business affairs' has been held to mean activities carried out with the view to make a profit, and not just affairs derived from or to do with business. The Queensland Information Commissioner commented that:
- For a matter to relate to 'business affairs' in the requisite sense, it should ordinarily, in my opinion, relate to the affairs of a business undertaking which is carried on in an organised way (whether full time or only intermittent) with the purpose of obtaining profits or gains (whether or not they actually be obtained).¹⁴
42. The relevant provision under the now repealed Queensland legislation¹⁵ considered by the Information Commissioner mirrors clause 7(1)(c).
43. The courts in Victoria have also held that for the 'business affairs' exemption to apply, the information must relate to matters of business, commercial or financial nature, and 'not merely be derived from a business or concerning it or have some connection with it'.¹⁶
44. I adopt these views in considering the meaning of 'business affairs' under clause 7(1)(c).
45. The interested party is clearly operating a business. I am satisfied that document 12 contains information concerning the interested party's business affairs within the meaning of clause 7(1)(c)(i), namely their professional advice.
46. Regarding the phrase 'could reasonably be expected to have an adverse effect', the District Court has commented that:
- We are in the field of predictive opinion. The question is whether there is a reasonable expectation of adverse effects... that is not fanciful, imaginary or contrived, but rather is reasonable, that is to say based on reason, namely 'agreeable to reason: not irrational, absurd or ridiculous'...¹⁷
47. It will be sufficient:
- if any adverse effect is established... However, it must be something which can be properly categorised as an adverse effect and not something so de minimus [sic] that it would be properly regarded as inconsequential... It will be sufficient if the adverse effect is produced by that document in combination with other evidence which is before the Court on the appeal.¹⁸
48. I am not satisfied that disclosure of information in document 12 could reasonably have an adverse effect on the business affairs of any party or prejudice the future supply of information to the Government or an agency. In saying this I note that the information relates to a specific project, which has since been abandoned, and the document itself qualifies some of the opinions set out within it. I also consider that businesses, such as

¹⁴ *Stewart and Department of Transport* (1993) 1 QAR 227, [103].

¹⁵ Section 45(1)(c) of the *Freedom of Information Act 1992 (Qld)*.

¹⁶ *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441; The President's view regarding the interpretation of 'business affairs' was upheld on appeal to the Full Court of the Supreme Court (*Accident Compensation Commission v Croom* [1991] 2 VR 322).

¹⁷ *Iplex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54, applying *Re Actors Equity Association of Australia (No 2)* (1985) 7 ALD 584, 590. See also, *State of South Australia (Department of Planning, Transport & Infrastructure) v the Hon Robert Brokenshire MLC* [2015] SADC 68 (unreported, Judge McIntyre, 1 May 2015), [36].

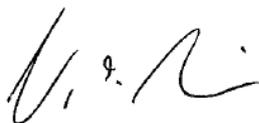
¹⁸ *Iplex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54, 65.

the interested party, that have a financial interest in dealing with the government and agencies are unlikely to be deterred from contracting with them or providing them with information in the future as a result of disclosure of the information in document 12.

49. Clause 7(1)(c) also includes a public interest test. I am not satisfied that disclosure of the information in these documents would, on balance, be contrary to the public interest for the reasons set out above in relation to clause 9(1).
50. I am not satisfied that document 12 is exempt under clause 7(1)(c).

Determination

51. I am not satisfied that document 12 is exempt under clauses 6(1), 7(1)(c) or 9(1).
52. In light of my views above, I reverse the agency's determination.



Wayne Lines
SA OMBUDSMAN

22 January 2019

APPENDIX - 2018/09937

Procedural steps

Date	Event
13 July 2018	The agency received the FOI application by email.
14 August 2018	The agency failed to determine the application within the 30 day period required by the FOI Act, ¹ and is deemed to have refused access to the documents. ²
15 August 2018	The agency consulted an interested party by email.
22 August 2018	The interested party provided their views.
28 August 2018	The agency received the emailed internal review application.
12 September 2018	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³
18 September 2018	The Ombudsman received the applicant's request for external review by email.
25 September 2018	Ombudsman SA emailed the parties about the external review application.
28 September 2018	The agency issued its belated determination. ⁴
19 October 2018	By email, the applicant confirmed that he remained aggrieved by the agency's belated determination with respect to document 12 and provided supporting documentation.
25 October 2018	The Ombudsman advised the agency's Principal Officer of the external review and requested submissions and documentation.
5 November 2018	The agency provided the Ombudsman with its submissions and documentation.
7 January 2019	The Ombudsman issued his provisional determination to the parties.
17 January 2019	The interested party responded to the provisional determination by email.
21 January 2019	By email, the agency responded to the provisional determination.

¹ *Freedom of Information Act 1991*, section 14(2).

² *Freedom of Information Act 1991*, section 19(2).

³ *Freedom of Information Act 1991*, section 29(5).

⁴ *Freedom of Information Act 1991*, section 19(2a).

