

## Determination

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

Applicant	Mr Bill Cumpston
Agency	Department of Planning, Transport and Infrastructure
Ombudsman reference	2016/07112
Agency reference	2016/07147/02
Determination	The determination of the agency is confirmed.

## 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:

Any plans or other documents that indicate the possible routes through Mile End of the proposed North-South Corridor. Of particular interest is the section between Henley Beach Road and Sir Donald Bradman Drive. This information is being requested to determine if my property at 187/189 South Road Mile End is likely to be affected.

### 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 15 March 2017. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
5. By email dated 27 March 2017 the agency advised my Office that it did not wish to make submissions in response to my provisional determination.
6. The applicant did not provide a response to my provisional determination.

## Relevant law

7. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.<sup>1</sup>
8. 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.
9. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
10. 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.

## Issues in this review

11. In its determination the agency invoked section 18(1) of the FOI Act, which provides:

### **18—Agencies may refuse to deal with certain applications**

- (1) An agency may refuse to deal with an application if it appears to the agency that the nature of the application is such that the work involved in dealing with it within the period allowed under section 14 (or within any reasonable extension of that period under section 14A) would, if carried out, substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.

12. The agency also observed:

As you are aware, the timing and funding of projects that would complete the remaining North-South Corridor are currently subject to negotiations between the State and Federal Governments and are not yet funded. It is not possible to provide reliable advice in relation to potential property impacts for businesses and residential homes along the corridor. For your information, major projects are also subject to Ministerial approval, Cabinet approval and a Parliamentary Works Committee approval.

[...]

As with all major projects, the department wishes to minimise any affect [sic] on the community in question. As you would appreciate, numerous land owners along the North-South Corridor are interested in the future plans, however, the premature release of preliminary designs that are subject to change could have an undesirable impact and cause unnecessary stress for potentially affected community members. For this reason DPTI cannot provide information showing the possible route options for the North-South Corridor in the location in question at this time.

13. The agency confirmed its determination at internal review. The agency's principal officer observed:

As was stated in the original determination, I reiterate that as with all major projects, the department wishes to minimise any effect on the community in question. The premature release of preliminary designs that are subject to change, for a project that is not funded, years before its potential commencement would have an undesirable impact and cause unnecessary stress for potentially affected community members. For this reason DPTI

<sup>1</sup> *Freedom of Information Act 1991*, section 12.

cannot provide information showing the possible route options for the North-South Corridor in the location in question at this time.

## Submissions of the parties

### *Submissions of the applicant*

#### 14. The applicant submitted at external review:

My [understanding] is that information should be made available unless it is explicitly exempted. I am not sure that causing stress is a valid exemption.

It is worth noting that the lack of information is already creating a great deal of stress. The building I have on South Road is purpose built for specialised Defence work and it will take considerable time to build a replacement. It is critical to the employment of a number of people that I have as much notice as possible if the building is likely to be demolished.<sup>2</sup>

### *Submissions of the agency*

15. There was initially some confusion as to the precise nature of the agency's position at external review. The agency's initial determination invoked section 18(1) as its basis for refusing to deal with the applicant's request, however the agency in this determination also observed that release of the documents (presumably once located) could be expected to have 'an undesirable impact' on the community. At internal review, the agency's principal officer purported to 'uphold' the initial determination, however made no mention of section 18(1) and again submitted that release of the documents would be 'undesirable'.

16. By email dated 23 November 2016 the agency clarified that, in the event documents within the scope of the applicant's request could be located, it could be expected to claim all information within these documents tending to satisfy the applicant's queries as exempt under clause 9(1) of Schedule 1 of the FOI Act.

17. Clause 9(1) provides:

#### **9—Internal working documents**

- (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) the disclosure of which would, on balance, be contrary to the public interest.

18. The agency also submitted that this information could also be exempt under clauses 1(1)(e), 5(1) and, possibly, 15. The agency observed that it was difficult to definitively identify relevant exemption clauses without retrieving, collating and reviewing the relevant documents.

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<sup>2</sup> Email dated 4 October 2016.

19. There was also some initial confusion as to the agency's interpretation of the scope of the applicant's request for records. By email dated 13 December 2016, a representative of the agency advised my Office:

[The applicant] advised (in writing) that he was not after every document we held, he was after a "couple of plans" that showed his property in Mile End and how the future roadway would impact on his property (ie would it be acquired or not).

From my understanding the issue [the applicant] has is that he believes we hold concrete plans on how the future corridor through the area will be aligned and we are refusing to provide them to him. Whereas the reality is this is an unfunded future project that is essentially at the "thought bubble" stage. Any alignment would be impacted by funding (can overpasses/underpasses be incorporated in the budget allocated by the State/Federal Govts), community consultation, engagement with stakeholders (is there an unmoveable substation in scope such as there was with T2T), service relocation/cost, political direction/input, etc. This portion of the NSC has not had the aforementioned investigations done yet and therefore there is no set "plan" that [the applicant] feels we hold.

20. In response to queries from my Office, the agency clarified that it does not consider the applicant to have formally amended the scope of his request.<sup>3</sup> That is, the agency proceeded to a determination at internal review on the basis that the applicant seeks all documents within the agency's possession that tend to 'indicate the possible routes through Mile End of the proposed North-South Corridor.'
21. This notwithstanding, the agency has observed (I take it in recognition of its obligation under section 18(2) to endeavour to assist the applicant to amend his application to a more manageable scope) that even if the applicant were to amend the scope of his request at external review to seek only those documents that tend to identify the definite or most probable route of the North-South Corridor, no such records presently exist within the agency's possession.
22. In support of its section 18(1) refusal, the agency provided my Office with a cost estimate it prepared in relation to the applicant's request.<sup>4</sup> This document disclosed an estimated total of 350 documents within the scope of the applicant's request with an estimated total of 250 pages each. The agency estimated it would take approximately 140 hours to process the request. Although the agency did not issue the applicant with a request for advanced deposit, the agency estimated that its total fees in dealing with the applicant's request would amount to \$24,388.00.
23. The agency also provided my Office with an explanation of its record management system.<sup>5</sup> The agency advised:
- project documents are entered into 'KNET', a desktop-based Electronic Document and Records Management System, and saved on the department's shared network drive
  - KNET operates as a central share drive and provides a single point for users to store and retrieve information relating to a project
  - the shared network drive provides an interim storage location pending a document's addition to KNET
  - some additional documents relevant to the project are stored in hardcopy form in a secure office location
  - project documents are catalogued across KNET, individual workspaces and within hardcopy and electronic files
  - there are approximately 11.1 million documents stored within the KNET system

<sup>3</sup> Email dated 13 December 2016.

<sup>4</sup> Email dated 18 October 2016.

<sup>5</sup> Emails dated 23 November 2016 and 15 December 2016.

- the KNET user interface includes a search function that permits a user to search the following fields:
  - title
  - agency
  - section
  - unit
  - document keywords
  - file/part number
  - source application
  - document type
  - correspondence status
  - internal identifier
  - comments
  - normal location
  - file currently with
  - action officer
  - actions required
  - media type
  - external author/recipient
  - external organisation
  - external reference
  - date written
  - date received
  - date reply/action due
  - date interim reply sent
  - date replied/completed
  - from
  - to
  - email date
  - CC
- this search function also includes the ability to search for a document by its contents.

24. The agency also provided my Office with a copy of its internal correspondence concerning the agency's provisional attempts to locate documents within the scope of the applicant's request. This correspondence identified a range of network folders with the potential to hold documents within the scope of the request:

	No. of files
N-S Preliminary Planning Report Documents	34
Sth Road Planning - Planning & Design #4907155	26
- Concept Development (2010/18765/01)	12
Scheme Formation	39
Module Screening Spreadsheets Adelaide	3
Stormwater	1
Superseded	2
Incoming	8
Outgoing	1
Modules and Schemes - Estimated Sep 2011	30
- Design (2010/18766/01)	7
Phase 1 schemes	9
Phase 1, raw 3D models	11

5% design drawings	15
Leigh's presentation 23May2012	17
Anzac Highway to River Torrens	2
- Social Impact Assessment (2010/18771/01)	30
- KBR	42
- Technical Report	45
Prelim concept planning report	6
- Functional Requirements	5
Sth Rd Planning - Project Management	
Key Documents	
Preliminary Concept Planning Report (final)	5

25. At the request of my Office, the agency arranged for a demonstration of its record management systems at its premises.<sup>6</sup> On this occasion, the department advised and confirmed by demonstration:
- although KNET includes a folder and sub-folder system, there is no single folder containing all documents within the scope of the applicant's request
  - this notwithstanding, the majority of documents within the scope of the applicant's request are likely located in its 'South Road – Planning' folder
  - this folder contains a multitude of sub-folders
  - it is expected that the documents within the scope of the applicant's request fall within a variety of these subfolders, with a majority not being concentrated in any one specific subfolder
  - although KNET contains a 'file number' field, documents relating to the North-South Corridor do not bear a single file number and are dispersed across a range of file numbers.
26. At the request of my Officer, a representative of the agency accessed the South Road – Planning folder within KNET and selected a random document. This document was a .zip file approximately five gigabytes in size, itself comprising five .pdf documents of considerable size.
27. At the request of my Officer, a representative of the agency opened one of the .pdf files for inspection, revealing a series of sketches of various intersections. The location of each intersection and whether the sketch represented a current or prospective configuration of the intersection was not readily ascertainable from the contents of the document.
28. The agency explained that this was characteristic of a large number of documents within the relevant KNET folder. The agency advised that for this reason, it was not reasonably practicable to assign an officer with limited technical experience of the project (for example, a dedicated FOI Officer) to locate all documents within the scope of the applicant's request.
29. At the request of my Officer, a representative of the agency conducted a search, using KNET's search interface, for all documents identifying 'Mile End' within their title or contents. This search resulted in a dialog box identifying that more than 5000 documents had been located. A representative of the agency explained that owing to KNET's search algorithm, searching for, for example, 'Mile End and North-South Corridor' would broaden rather than narrow the field of results. This representative

<sup>6</sup> Meeting on 7 February 2017.

further advised that it was not possible to narrow such a search to only those file numbers relevant to the North-South Corridor project.

30. The agency advised that although documents within KNET may undergo an Optical Character Recognition process, automated searches for documents by their contents, or for specific words or phrases within their contents, would not tend to return any sketches, maps or other images owing to their formatting.
31. My Officer queried whether there was a single document or organised collection of documents tending to provide an overview of the various routes relevant to the applicant's request actively under consideration in relation to the North-South Corridor project. The agency advised that the closest thing to such a document in its possession is a document entitled 'North-South Corridor: South Road Planning Study (Regency Park to Anzac Highway)' (**the Concept Planning Report**).
32. The agency produced the Concept Planning Report in hardcopy form for inspection by my Officer. This document comprised approximately eight A3 lever arch folders of double-sided pages. A representative of the agency explained that information falling within the scope of the applicant's request could be expected to be dispersed throughout this document.
33. At the request of my Officer, and acknowledging that this represented a significantly narrowed request than that made by the applicant, the agency agreed to review this document for pages tending to identify the possible routes of the North-South Corridor with the potential to impact (or demonstrate no impact to) the applicant's property.
34. By email dated 2 March 2017 the agency produced a 35-page sample from the Concept Planning Report. This sample included a description of six 'schemes' that appear to have been shortlisted by the department. Each scheme description tends to identify the proposed manner in which the Corridor is to traverse the segment of road relevant to the applicant's request.
35. The sample also includes a section entitled 'Preferred Concept Design Development', which appears to identify proposed development relevant to the section of road between Sir Donald Bradman Drive and Henley Beach Road, including a (very brief) discussion of the expected property impacts of the model. From the information provided, I infer that this 'preferred concept' has been identified through the short-listing and evaluation of the six schemes described within the report. I consider this page of the Concept Planning Report to be most likely to satisfy the applicant's request for information from the agency.
36. I observe that the title page of the Concept Planning Report and each page thereafter is marked '*Prepared for Cabinet in confidence.*'

## Consideration

37. When an agency is making a decision about the impact that processing an application would have on its resources it can take into account the resources involved in:
  - identifying, locating and collating documents
  - deciding whether to give or refuse access to documents, or give access to redacted documents
  - consulting relevant third parties about documents
  - making copies of documents.
38. The above list is not exhaustive and additional relevant factors relating to resources required to deal with an application can also be considered.

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39. In order to satisfy the requirements of section 18(6), and to establish that the application satisfies the section 18(1), the agency should include in its determination the findings of fact in relation to the matters outlined above and the evidence on which those findings are based.
  40. Section 18(1) requires that the diversion of the agency resources must be both substantial and unreasonable. To satisfy section 18(1) it is not sufficient in and of itself that the agency will be required to expend significant resources to process an application. It must also be established that the diversion of resources from the agency's normal operational functions is unreasonable. The agency's determination should set out the basis upon which it has reached the conclusion that the diversion of resources is unreasonable.
  41. Having reviewed the agency's record management system I am satisfied that it would take a considerable amount of time for the agency to identify and review all documents within the scope of the applicant's request. Any attempt to do so would in my estimation require the agency to dedicate a person with technical expertise and familiarity with the project (that is, not a standard FOI officer) to collate relevant records on a fulltime basis over a number of working weeks. This would necessarily prevent that employee from undertaking his or her usual duties.
  42. Even once collated, I consider it would take an unusually large amount of time for an FOI officer of the agency to then review each page of each document for information that is outside of the scope of the applicant's request or that is otherwise exempt. Owing to the nature and complexity of the documents at issue, such a review would in my view also require close consultation with a member of the project team.
  43. I accept the agency's submission that the time required to comply with the applicant's request has been exacerbated by the departure of the officers of the agency most familiar with the project.
  44. It is somewhat unclear to me whether in invoking section 18(1) of the FOI Act the agency has properly turned its attention to the requirement to comply with section 18(2). I would ordinarily expect an agency seeking to invoke section 18(1) to explicitly warn an applicant of this fact and provide suggestions for how the scope of the applicant's request might be best reduced to ensure the application is processed.
  45. I note that representatives of the agency did meet with the applicant in person and attempted to explain their difficulty in meeting his request. I am satisfied that the agency at least considered the possible consequences if the applicant were to amend the scope of his request so as to encompass only those records likely to demonstrate the impact of the project upon his land. In the agency's estimation, this would likely have resulted in a determination that no such records existed within its possession. Section 18(2) was unable to be satisfied.
  46. I remind the agency of its obligation under section 18(6) to specify the reasons for a refusal under section 18(1) and 'the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based.'
  47. In my view, the agency's initial determination and determination at internal review were both deficient insofar as they failed to properly engage with the operative requirements of section 18(6).
  48. Moreover, the agency's apparent attempt to engage with the public interest test within both determinations appears to have confused the applicant as to the basis for the



agency's refusal to meet his request. While nothing prevented the agency from observing that even if it were able to locate all documents within the scope of the applicant's request it would nonetheless consider those documents exempt (and I do not necessarily criticise the agency for determining to do so), the manner in which the agency communicated its position to the applicant was at best unclear.

49. For the reasons identified above and considering in particular the level of project knowledge and technical expertise needed to conduct meaningful searches, I am ultimately satisfied that the nature of the applicant's request is such that the work involved in dealing with it within any reasonable period of time would, if carried out, substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.
50. In the circumstances and owing to my observations above, I have considered whether the Concept Planning Report might be released to the applicant under either the present request for records (properly revised in scope) or an amended application under the FOI Act.
51. I observe that clause 1 of Schedule 1 of the FOI Act provides:

**1—Cabinet documents**

(1) A document is an exempt document—

- (a) if it is a document that has been specifically prepared for submission to Cabinet (whether or not it has been so submitted); or
- (b) if it is a preliminary draft of a document referred to in paragraph (a); or
- (c) if it is a document that is a copy of or part of, or contains an extract from, a document referred to in paragraph (a) or (b); or
- (e) if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet; or
- (f) if it is a briefing paper specifically prepared for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet.

(2) A document is not an exempt document by virtue of this clause—

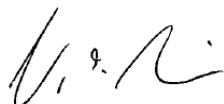
- (a) if it merely consists of factual or statistical material (including public opinion polling) that does not—
  - (i) disclose information concerning any deliberation or decision of Cabinet; or
  - (ii) relate directly to a contract or other commercial transaction that is still being negotiated; or
- (ab) merely because it was attached to a document described in subclause (1); or
- (b) if 20 years have passed since the end of the calendar year in which the document came into existence.

52. In my view, the document is plainly exempt by operation of clause 1(1)(a).
53. Even if the document were not so exempt, or even if another document exists in the possession of the agency with the tendency to reveal the information within the sample provided to this Office (that is, without also running afoul of clause 1(1)(c)), I tend to accept the agency's argument that such a document would in any case be exempt under clause 9(1).
54. That is, I accept that such a document would be a 'document [...] that relates to [...] any [...] 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'. For the reasons identified by the agency in its determination and in its subsequent submissions to this

Office, I tend to agree that disclosure in the circumstances would be, on balance, contrary to the public interest.

**Determination**

55. In light of my views above, I confirm the agency's determination.



Wayne Lines  
**SA OMBUDSMAN**

13 April 2017

## APPENDIX

### Procedural steps

Date	Event
20 April 2016	The agency received the FOI application.
3 August 2016	The agency determined the application.
12 August 2016	The agency received the internal review application.
5 September 2016	The Ombudsman received the applicant's request for external review.
7 September 2016	The agency confirmed the determination.
4 October 2016	The applicant confirmed that he wished the external review to proceed in light of the agency's determination at internal review.
4 October 2016	The Ombudsman formally advised the agency of the external review and requested submissions and documentation.
18 October 2016	The agency provided the Ombudsman with its submissions and documentation.
28 October 2016	The Ombudsman sought further information from the agency.
23 November 2016	The agency provided submissions in response to the Ombudsman's queries.
13 December 2016	The Ombudsman sought further information from the agency.
13 December 2016	The agency provided submissions in response to the Ombudsman's queries.
15 December 2016	The agency provided further submissions in response to the Ombudsman's 13 December 2016 queries.
7 February 2017	Representatives of the agency met with an Officer of the Ombudsman.
2 March 2017	The agency provided a sample from the Concept Planning Report.
15 March 2017	The Ombudsman provided his provisional determination to the parties.
27 March 2017	The agency advised that it did not wish to make submissions in response to the Ombudsman's provisional determination.