

## Determination

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

Applicant	Mr Dan van Holst Pellekaan MP
Agency	Department of the Premier and Cabinet (formerly Department of State Development)
Ombudsman reference	2017/00990
Agency reference	BRIEFC/17/171
Determination	The determination of the agency is varied.

## REASONS

### Application for access

1. By application under the *Freedom of Information Act 1991* (**the FOI Act; FOIA**) the applicant requested access from the Department of State Development (**the department; DSD**) to:  

all correspondence, emails, minutes of meetings, memos and notes regarding the cost and supply of electricity for BHP Billiton since 1 January 2016.
2. DSD received and determined the applications for access and internal review. From 1 April 2017, machinery of government changes resulted in the transfer of the relevant division within DSD, the Energy and Technical Regulation Division, to the Department of the Premier and Cabinet (**DPC; the agency**). DPC is therefore the relevant agency under the FOI Act. I understand, however, that DSD remains involved in this review.

### Background

3. For ease of reference, procedural steps relating to the application and the external review are set out in the appendix.

### Jurisdiction

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

### Provisional determination

5. I provided my tentative view about DSD's determination to the parties, by my revised provisional determination dated 16 August 2017. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary DSD's determination.

6. DPC and some of the interested parties provided submissions in response. I have considered these submissions in this determination. I have also considered submissions in response to my provisional determination dated 9 June 2017.

### 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. DSD and/or DPC claim that the documents are exempt as Cabinet documents (clauses 1(1)(c), 1(1)(e) and 1(1)(f)<sup>2</sup>); documents containing information concerning business affairs (clause 7(1)(c)); documents containing confidential material (clause 13(1)(b)); documents affecting the economy of the State (clause 14(a)(i) with clause 14(b)); and documents concerning operations of agencies (clause 16(1)).<sup>3</sup> Although not expressly claimed by DSD or DPC, having regard to the claim that 'disclosure [of the documents] would constitute a breach of confidence', I have also considered clause 13(1)(a). Interested parties 4 and 7 rely on some of these clauses as well. In addition, interested party 4 claims that the documents are exempt as internal working documents (clause 9(1)) and documents affecting the economy of the State (clause 14(a)(ii) with clause 14(b)).
10. The relevant parts of these clauses provide:

#### Clauses 1(1), 1(2) and 1(3)

- (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 that is 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
  - (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.

...

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

<sup>2</sup> DPC raised clauses 1(1)(c) and 1(1)(f) in response to my provisional determination.

<sup>3</sup> The agency has failed to specify the relevant part(s) of clause 16(1)(a) relied upon in either its determination or schedule of documents, although the reasons proffered suggest that it is relying on clause 16(1)(a)(iv) with clause 16(1)(b).

- (3) In this clause, a reference to Cabinet includes a reference to a committee of Cabinet and to a subcommittee of a committee of Cabinet.

**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.

**Clauses 13(1)**

- (1) A document is an exempt document—
- (a) if it contains matter the disclosure of which would found an action for breach of confidence; or
  - (b) if it contains matter obtained in confidence the disclosure of which—
    - (i) might reasonably be expected to prejudice the future supply of such information to the Government or to an agency; and
    - (ii) would, on balance, be contrary to the public interest.

**Clause 9(1)**

- (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.

**Clauses 14(a)(i) and 14(a)(ii), both with clause 14(b)**

A document is an exempt document if it contains matter the disclosure of which—

- (a) could reasonably be expected—
  - (i) to have a substantial adverse effect on the ability of the Government or an agency to manage the economy, or any aspect of the economy, of the State; or
  - (ii) to expose any person or class of persons to an unfair advantage or disadvantage as a result of the premature disclosure of information concerning any proposed action or inaction of the Parliament, the Government or an agency in the course of, or for the purpose of, managing the economy of the State; and
- (b) would, on balance, be contrary to the public interest.

**Clause 16(1)**

- (1) A document is an exempt document if it contains matter the disclosure of which—
- (a) could reasonably be expected—
    - (i) to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency; or

- (ii) to prejudice on the attainment of the objects of any test, examination or audit conducted by an agency; or
  - (iii) to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or
  - (iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions; or
  - (v) to have a substantial adverse effect on the conduct of industrial relations by an agency; and
- (b) would, on balance, be contrary to the public interest.
11. Section 20(4) provides that if it is practicable to give access to a copy of a document from which the exempt matter has been deleted, and it appears that the applicant would wish to be given access to such a copy, the agency must give the applicant access to a copy of the document to this limited extent.
12. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
13. 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.

### Documents in issue

14. DSD identified two documents (**the documents**) within the scope of the application:
- Document 1 - Briefing to Minister from DSD, dated 11 July 2016
  - Document 2 - Chief Executive Speaking notes, dated 13 July 2016.<sup>4</sup>
15. DSD refused access to the documents in their entirety.

### Issues in this review

16. It is for me to consider whether the agency has justified its determination to refuse access to the documents in issue, 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 parties are established.<sup>5</sup>

### Submissions

#### DSD and DPC

17. DSD provided the following reasons in support of its claims of exemption:

Clause 1(1)(e) - documents 1 and 2:

The ... documents ... were used to inform Cabinet of specific information. Release of this information would disclose a deliberation or decision of Cabinet.

While the two identified documents do not visibly state they are Cabinet related, ... Document 1... was used to inform a Cabinet Submission and the options outlined ... contain matter, the disclosure of which would disclose information concerning a deliberation or decision of Cabinet. Document 2 contains speaking points used to address

<sup>4</sup> DSD described the documents as such in the schedule attached to its notice of determination following internal review dated 17 January 2017.

<sup>5</sup> *Re Pope and Queensland Health* (1994) 1 QAR 616, [17].

a committee of Cabinet on this particular issue and also contains a deliberation and identifies specific options around a decision of Cabinet...<sup>6</sup>

Clause 7(1)(c) - document 1:

... disclosure could reasonably be expected to prejudice the future supply of such information from BHP to the Government and would be contrary to the public interest.

Clause 13(1)(b) - document 1:

... disclosure would constitute a breach of confidence and might reasonably be expected to prejudice the future supply of such information from BHP and would be contrary to the public interest.

Clause 14 - document 1:

... disclosure could be expected to have a substantial adverse effect on the ability of Government or the department to manage the economy, and aspects related to the energy market and major industrial businesses within the State and would be contrary to the public interest.

Clause 14 - document 1:

... disclosure could reasonably be expected to have a substantial adverse effect on the effective performance by the department of its functions related to economic growth and job creation and would be contrary to the public interest.

18. By email dated 7 June 2017 DSD reiterated that it considers the information concerning one of the interested parties in particular to be 'highly confidential and Cabinet in Confidence'.

19. In response to my provisional determination, DPC maintained that the documents were exempt under clause 1(1)(e), and supplemented this with claims of exemption under clauses 1(1)(c) and 1(1)(f). In so doing, DPC repeated some of the submissions previously made by DSD. DPC further claimed that document 1 'contains a specific extract' from the Cabinet submission and 'was specifically prepared for the use of a Minister in relation to a Cabinet matter'. Regarding the Cabinet exemption generally, DPC submitted that it:

... is absolute and no public interest test is required ...

The means by which it is intended to achieve the objects of the Act ensure that information concerning the operations of Government is readily available to members but should not negate the rights of individuals or companies in preserving their own personal and business affairs...

20. In response to my revised provisional determination, DPC provided 'confidential' submissions. In summary, however, DPC claims that:

- the documents 'were prepared for use by a 'Cabinet Task Force', of which the Premier and some other Ministers are members
- the documents would disclose information concerning a deliberation of the task force, and noted by full Cabinet
- weight must 'be given to the words "information concerning" a deliberation or decision of Cabinet'
- '... that the matter was for noting is not determinative of its status as an exempt document'

<sup>6</sup> This paragraph was included in DSD's letter to my Office dated 27 February 2017. The other submissions were set out in DSD's notices of determination.

- the Cabinet exemptions apply ‘to the task force as a committee of Cabinet by operation of clause 1(3) of Schedule 1’ to the FOI Act because:
  - ‘[p]roposals submitted for consideration by the task force are required to be on regular Cabinet templates’<sup>7</sup>
  - ‘Cabinet committees and task forces are established by Cabinet to assist in the conduct of Cabinet business by providing a forum for consideration of strategic policy direction on major issues requiring dedicated attention before their referral to Cabinet’<sup>8</sup>
    - ‘Cabinet task forces have authority to make decisions in their own right’
    - ‘Cabinet committee and taskforce documents have the same status as Cabinet documents, so the same security measures must be provided to them to preserve confidentiality’<sup>9</sup>
    - the task force meets in the Cabinet room
- document 1 was prepared shortly before a scheduled task force meeting and document 2 represents speaking points used by the Minister to inform the task force
- the task force’s prepared agenda was deferred to enable a different discussion
- disclosure of ‘commercially significant information received at an early stage of high level negotiations in relation to matters of significance to the economy of the State’ will prejudice the future supply of such information to the Government
- with reference to the following factors, ‘the public interest in retaining the confidentiality of this type of information significantly outweighs the interest in disclosure’:
  - The documents contain sensitive commercial information that is not publicly available;
  - The documents are directly referable to high-level Government decision-making in relation to the economy of the State...;
  - The disclosure will inhibit frankness and candour between parties and internally in the Government in relation to commercially significant and sensitive negotiations. It would also discourage commercial organisations from disclosing information early on in negotiations, without the protection of a formal confidentiality agreement;
  - The disclosure ... would prevent the Government being fully informed at an early stage in negotiations of significance to the State economy and would prejudice the Government’s negotiating status and its ability to respond to issues of public importance; and
  - Absolute candour and frankness is particularly relevant in this case, as the Cabinet task force required highly confidential information and commercially significant details in order to properly consider best options for Government.

21. In support of the clause 1(1) claim, DSD/DPC provided my Office with a three-page Cabinet document dated 31 August 2016 (**the Cabinet submission**) and draft minutes of a Cabinet task force, totalling seven pages, dated 13 July 2016 (**the draft minutes**).<sup>10</sup>

<sup>7</sup> Department of the Premier and Cabinet, *Cabinet Guide Number 8 - Cabinet Committees and Taskforces: Operational Framework*, available at [http://www.dpc.sa.gov.au/\\_\\_data/assets/pdf\\_file/0007/16873/Cabinet-Committees-and-Task-Forces-Guide-8.pdf](http://www.dpc.sa.gov.au/__data/assets/pdf_file/0007/16873/Cabinet-Committees-and-Task-Forces-Guide-8.pdf) (accessed 4 September 2017).

<sup>8</sup> Department of the Premier and Cabinet, *Cabinet Guide Number 8 - Cabinet Committees and Taskforces: Operational Framework*, 2, available at [http://www.dpc.sa.gov.au/\\_\\_data/assets/pdf\\_file/0007/16873/Cabinet-Committees-and-Task-Forces-Guide-8.pdf](http://www.dpc.sa.gov.au/__data/assets/pdf_file/0007/16873/Cabinet-Committees-and-Task-Forces-Guide-8.pdf) (accessed 4 September 2017), cited in the agency’s submission.

<sup>9</sup> Department of the Premier and Cabinet, *Cabinet Guide Number 8 - Cabinet Committees and Taskforces: Operational Framework*, 9, available at [http://www.dpc.sa.gov.au/\\_\\_data/assets/pdf\\_file/0007/16873/Cabinet-Committees-and-Task-Forces-Guide-8.pdf](http://www.dpc.sa.gov.au/__data/assets/pdf_file/0007/16873/Cabinet-Committees-and-Task-Forces-Guide-8.pdf) (accessed 4 September 2017), cited in the agency’s submission.

<sup>10</sup> By email dated 4 April 2017, my Office specifically requested ‘a copy of any Cabinet documents that support the agency’s claim of exemption under clause 1(1)(e)’.

## The applicant

22. When applying for external review, the applicant provided the following submissions:

I disagree ... the release of documents could reasonably be expected to prejudice the future supply of such information from BHP. Often agencies do not consult with the company. Furthermore, electricity usage by major users in SA affects the stability of the grid and it is in the public's interest that this information be released, particularly document 1.

## Interested parties

23. Pursuant to section 39(10) of the FOI Act, I consulted seven interested parties referred to in the documents. I provided extracts of the documents to each of the interested parties detailing the information concerning their business affairs.<sup>11</sup>

### *Responses to my provisional determination*

24. Interested party 1 sought further clarification from my Office, but ultimately did not advise me of its views about release of the information concerning its business affairs. To date, interested parties 3 and 5 have not responded to my Office.
25. Interested party 6 consented to the release of information concerning it, but made some submissions which I have had regard to, namely that it:
- has not verified the information in the documents concerning its business affairs but such information is publicly available on the Internet
  - 'would expect' some of the information in document 1 'to be regarded as confidential' by other interested parties. (Only one of the affected interested parties has claimed as such, however.)
26. Interested party 2 objected to release of the documents. In the alternative, interested party 2 claimed that references to it and its representative should be redacted from the documents. In summary, interested party 2 provided the following submissions in support of its position:

### *Document 1:*

- does not refer to BHP Billiton, and BHP Billiton was not the subject of interested party 2's communication (the communication having been summarised in the document), and:
  - is therefore outside the scope of the access application
  - the summary of interested party 2's communication could be misconstrued as referring to BHP Billiton, 'which is misleading and inaccurate'
- could reveal issues of commercial sensitivity, and disclosure could detrimentally affect unnamed entities

### *Document 2:*

- interested party 2 confirmed the communication referred to but advised that it was not in relation to BHP Billiton or two other named companies; the words in the extract provided to interested party 2 are therefore 'misleading and confusing'.
27. Interested party 7 provided confidential submissions to my Office in response to my original provisional determination, claiming both documents are exempt under clauses 7(1)(c), 13(1)(a) and 13(1)(b). Briefly stated, however, interested party 7 claims that:
- prices relevant to it are commercially sensitive and disclosure of such information could reasonably be expected to adversely affect it, for example by giving an advantage to any future contract counterparties and competitors

<sup>11</sup> I took the view that it was not practicable to provide the documents in their entirety to the interested parties as the documents contained information concerning each of the interested parties.

- communications were undertaken on a confidential basis (which is supported by document 1) and disclosure may deter it from engaging in such communications in the future, which would be contrary to the public interest given its potential
- disclosure of confidential communications may deter it and other companies from engaging 'on an open basis with the Government', including in relation to matters important to South Australia's future
- the dollar amount referred to on page 2 of document 2 is 'factually inaccurate'; disclosure could potentially damage its reputation and may prompt it to issue a public statement by way of correction.

*Responses to my revised provisional determination*

28. Interested party 2 reiterated its view that 'document 2 was capable of being misleading as it inferred a relationship and a disclosure with companies named in the document that did not exist'.
29. Interested party 4 made confidential submissions to my Office claiming that the documents are exempt under clauses 7(1)(c), 9(1), 13(1)(b) and 14(a)(ii). Briefly stated, interested party 4 claims that:
- the information in the documents contains sensitive information concerning its business, commercial or financial affairs
  - if disclosed, it will reassess whether to provide further such information to the Government or any agency
  - such information is 'important to the Government' and its policy development
  - any public interest in its position and views is likely to be 'fleeting' and is outweighed by the consequences of such information not being provided in the future and the negative consequences disclosure would have on it
  - the information was obtained by DSD for the purpose of briefing and advising the Government
  - it provided the information 'in the expectation that it would be kept confidential'
  - disclosure of the documents could reasonably be expected to expose it to an 'unfair disadvantage' and affect its relationship with others:
    - as a result of the premature disclosure of information concerning any proposed action or inaction of the Parliament, the Government or an agency in the course of, or for the purpose of, managing the economy of the State.
30. Interested party 7 advised that it disagreed with my revised provisional determination for the reasons provided in response to my provisional determination, but did not wish to make any further submissions.

## Consideration

### **Is document 1 within the scope of the access application?**

31. Interested party 2 claims that document 1 is outside the scope of the access application as it does not refer to BHP Billiton.
32. As indicated above, only extracts of the relevant documents were provided to each of the interested parties for the purposes of consultation.
33. Although I accept that the extracts provided to interested party 2 do not refer to BHP Billiton, having regard to the entirety of the document, I am satisfied that document 1 is within the scope of the application.
34. I will therefore consider whether or not it is exempt under the FOI Act.

### Clauses 1(1)(c), 1(1)(e) and 1(1)(f)

35. DSD and DPC claim that the documents are exempt as Cabinet documents (clauses 1(1)(c), 1(1)(e) and 1(1)(f)).
36. I have only received the Cabinet submission and the draft minutes. I have not received any drafts of the Cabinet submission or a settled version of the draft minutes.
37. The documents both appear to pre-date the Cabinet submission by approximately six weeks.<sup>12</sup> Document 1 pre-dates the draft minutes by two days. Although document 2 is dated the same date as the draft minutes, it must have been prepared prior to the task force meeting for the Minister to have relied on it during the meeting.

### *Clauses 1(1)(c) and 1(1)(f)*

38. I consider that in the context of clause 1(1) the word 'specifically' means 'specially' prepared for submission to Cabinet or for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet.
39. It will be sufficient if submission to Cabinet or preparation for a Minister's use in relation to such a matter was 'the dominant purpose or one of a number of significantly contributing purposes' for the document's creation.<sup>13</sup>
40. Whether a document has been prepared for submission to Cabinet or for a Minister's use in relation to such a matter is to be ascertained by reference to the events at the time the document was created.<sup>14</sup>
41. Having regard to DPC's submissions in response to my revised provisional determination, I accept it is arguable that the task force is a committee of Cabinet within the meaning of clause 1(3). Accordingly, I will proceed on this basis when assessing DSD and DPC's clause 1(1) claims. I do not consider it necessary to decide the issue definitively at this time, however.

### *Clause 1(1)(c)*

42. In order to satisfy clause 1(1)(c), the agency must show that the document under review is:
  - a copy of a document or draft document specifically prepared for submission to Cabinet; or
  - a copy of part of a document or draft document specifically prepared for submission to Cabinet; or
  - contains an extract from a document or draft document specifically prepared for submission to Cabinet.
43. The word 'copy' is not defined in the FOI Act or the *Acts Interpretation Act 1915*, and so should be accorded its ordinary meaning. The word 'copy' is defined in the *Macquarie Dictionary* to include 'a transcript, reproduction, or imitation of an original'.<sup>15</sup>
44. I accept that the documents, Cabinet submission and draft minutes include some of the same information. They are not identical, however.

<sup>12</sup> Document 1 is dated 11 July 2016. According to the schedule of documents attached to DSD's notice of determination following internal review, document 2 is dated 13 July 2016. The Cabinet submission is dated 31 August 2016.

<sup>13</sup> *Secretary to the Department of Treasury and Finance v Dalla-Riva* [2007] VSCA 11, [13] per Buchanan JA.

<sup>14</sup> *Re Fisse and Department of Treasury* (2008) 101 ALD 424, 434.

<sup>15</sup> *Macquarie Dictionary Online* (Macmillan Publishers Australia, 2017), available at <https://www.macquariedictionary.com.au> (accessed on 3 August 2017).

45. I am not satisfied that either of the documents is:
- a copy of a document or draft document specifically prepared for submission to Cabinet
  - a copy of part of a document or draft document specifically prepared for submission to Cabinet
  - contains an extract from a document or draft document specifically prepared for submission to Cabinet.
46. Having regard to when the documents, Cabinet submission and draft minutes were created, it appears more likely that the Cabinet submission and draft minutes drew on information contained in the documents (i.e. the Cabinet submission and draft minutes are copies of parts of the documents), rather than the other way around.

*Clause 1(1)(f)*

47. The documents were clearly prepared at a time when much was happening in the South Australian energy market.
48. Having regard to their contents, the documents both appear to have been created to address immediate issues and events unfolding by the end of July 2016, and not specifically for the Minister's use in relation to a matter submitted or proposed to be submitted to Cabinet. In saying this, I have had particular regard to the draft minutes (particularly item 1 on page 2), when the decision to defer the task force's scheduled agenda was made, the Cabinet submission, and the following parts of the documents:

*Document 1:*

- the second and third dot-points on the first page
- the first section on the second page
- the second and ninth dot-points on the fourth page

*Document 2:*

- the first section on first and second pages
- the seventh dot-point on the second page
- the final dot-point on the third page.

49. In addition, I note that the document schedule attached to DSD's notice of determination following internal review DSD described document 2 as 'Chief Executive Speaking notes', suggesting that it was created for the Chief Executive rather than the Minister. DPC did not claim otherwise in response to my revised provisional determination, stating only that document 2 was 'used by' the Minister.
50. Accordingly, I am not satisfied that either of the documents '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'.

*Clause 1(1)(e)*

51. Whether or not releasing a document would disclose information concerning any deliberation or decision of Cabinet is a question of fact to be decided in light of all the circumstances.<sup>16</sup>
52. Both documents appear to pre-date the Cabinet submission and the task force meeting.

<sup>16</sup> *Anderson and Department of Special Minister of State No 2* (1986) 11 ALN N239, [27].

53. The fact that a document pre-dates Cabinet meetings does not preclude the application of clause 1(1)(e).<sup>17</sup> The NSW Administrative Decisions Tribunal considered the mirror provision in the *Freedom of Information Act 1989 (NSW)* in *McGuirk v Director General, The Cabinet Office*.<sup>18</sup> In affirming the original decision to grant an exemption for the release of certain documents, Judicial Member Montgomery commented that:

[In] my view it is possible that a document that pre-dates a Cabinet meeting could still contain information that is 'relevant to' or 'concerns' the deliberative or decision-making process... To the extent that any document is so central to a Cabinet meeting that it shapes the course of, or outcome of, any deliberations of Cabinet, the disclosure of its contents could reveal information concerning the process of deliberation or decision-making.

54. In a recent judgment of South Australian District Court, his Honour Judge Tilmouth had cause to consider clause 1(1)(e).<sup>19</sup> Citing a Victorian decision,<sup>20</sup> His Honour commented:

Vincent JA considered the question is 'what the document itself would convey in the circumstances',<sup>21</sup> and providing that there is nothing in the document enabling one to 'draw any inferences as to what may have been the subject of deliberation or decision', the document is unprotected.<sup>22</sup> Redlich JA was of a similar view in *Secretary to the Department of Infrastructure v Asher*. His Honour considered there was nothing on the face of the subject documents permitting 'the conclusion that their disclosure would involve disclosure of any "deliberation" or "decision" of the Cabinet'.<sup>23</sup>

55. Later in the judgment, his Honour went on to say:

... the noun 'deliberation' does not capture material presented to Cabinet but not discussed or considered by it as to its merits: *Re Rae and Department of Prime Minister and Cabinet*,<sup>24</sup> or the debate in Cabinet by way of deliberation or formal decision making process: *Re Porter and Department of Community Services and Health*.<sup>25</sup> That is to say, speaking generally the protection is aimed at preventing the disclosure of documents that shed light on the decision making process in Cabinet.<sup>26</sup>

... This is the gist of the decision of the Victorian Court of Appeal in *Secretary to the Department of Infrastructure v Louise Asher MP* (discussed above). As expressed by Buchanan JA, disclosure involves 'what use ... Cabinet made of any part of the [material]', and 'the manner in which Cabinet deals with a topic', or 'Cabinet's treatment of a subject matter'.<sup>27</sup> For that reason the exemption applies to the disclosure of the content of any deliberation or decision of the Cabinet: *Re Ryan and the Department of Infrastructure*.<sup>28,29</sup>

56. I am not satisfied that disclosure of the documents would disclose information concerning a deliberation or decision of Cabinet. In my view, it is not possible to draw any inferences about what may have been the subject of either the full Cabinet's or the task force's deliberations or decision-making from the contents of the documents. I note also that the Cabinet submission was submitted for noting only, and does not appear to have required Cabinet to deliberate or make a decision about it.

<sup>17</sup> *Department of State Development v Pisoni* [2017] SADC 34 (unreported, Judge Tilmouth, 6 April 2017), [19].

<sup>18</sup> *McGuirk v Director General, The Cabinet Office* [2007] NSWADT 9 at 37.

<sup>19</sup> *Department of State Development v Pisoni* [2017] SADC 34 (unreported, Judge Tilmouth, 6 April 2017).

<sup>20</sup> *Secretary to the Department of Infrastructure v Asher* (2007) 19 VR 17.

<sup>21</sup> *Secretary to the Department of Infrastructure v Asher* [50].

<sup>22</sup> [51].

<sup>23</sup> *Department of State Development v Pisoni* [2017] SADC 34 (unreported, Judge Tilmouth, 6 April 2017), [21].

<sup>24</sup> (1986) 12 ALD 589, 602.

<sup>25</sup> (1988) 14 ALD 403, 407.

<sup>26</sup> *Department of State Development v Pisoni* [2017] SADC 34 (unreported, Judge Tilmouth, 6 April 2017), [25].

<sup>27</sup> Above [5], [6].

<sup>28</sup> [2004] VCAT 2346, [44]-[49].

<sup>29</sup> *Department of State Development v Pisoni* [2017] SADC 34 (unreported, Judge Tilmouth, 6 April 2017), [27].

### Conclusion

57. Accordingly, having regard to the contents of the documents and the Cabinet submission, I am not satisfied that the documents are exempt under clauses 1(1)(c), 1(1)(e), or 1(1)(f).

### Clause 7(1)(c)

58. I accept that information in the documents concerns the business affairs of multiple interested parties.
59. 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’...<sup>30</sup>

60. 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.<sup>31</sup>

61. DSD claimed that disclosure of the documents could reasonably be expected to prejudice the future supply of such information from BHP to the Government. It has provided no evidence to support this claim, however, and BHP has raised no such claim.
62. I am not satisfied that disclosure of the documents could reasonably be expected to ‘prejudice the future supply of such information to the Government or to an agency’ by BHP or anyone else. In saying this, I have borne in mind the commercial reasons that the majority of the interested parties, including interested party 4, provided the information concerning them to DSD in the first place, along with information in the documents that is publicly accessible.<sup>32</sup>
63. Having regard to the submissions provided to date, I am not persuaded that disclosure of the documents could reasonably be expected to have an adverse effect on any agency’s or interested party’s business affairs either. Again, I have had particular regard to information that is publicly accessible, and events that have occurred since the documents were created, including the South Australian Government’s March 2017 energy plan,<sup>33</sup> and its subsequent agreement with Neoen and Tesla.<sup>34</sup>

<sup>30</sup> *Ipex Info Tech v Dept of Info Tech Services* (1997) 192 LSJS 54, applying *Re Actors Equity Association of Australia* (1985) (No 2) 7 ALD 584 at 590.

<sup>31</sup> *Ipex Info Tech v Dept of Info Tech Services* (1997) 192 LSJS 54, 65.

<sup>32</sup> On 25 May 2017 my Office conducted searches of the documents’ contents via [www.google.com.au](http://www.google.com.au). So as to avoid disclosing claimed exempt matter I will refrain from citing the websites disclosing information in the documents. Rather, by letter dated 9 June 2017, I provided the citations directly to DSD. I understand a copy of this letter was forwarded to DPC. I now intend to provide a further citation directly to DPC. Such publicly available information is also relevant to my consideration of other claims of exemption raised by the agency.

<sup>33</sup> South Australian Government, ‘Our Energy Plan’ (available via <http://ourenergyplan.sa.gov.au/>). See also: Jay Weatherill, ‘South Australia is Taking Charge of its Energy Future’, 14 March 2017 (available at <http://www.premier.sa.gov.au/index.php/jay-weatherill-news-releases/7198-south-australia-is-taking-charge-of-its-energy-future>); Jay Weatherill, ‘New Legislation Puts Power Back in South Australians’ Hands’, 28 March 2017 (available at <http://www.premier.sa.gov.au/index.php/jay-weatherill-news-releases/7263-new-legislation-puts-power-back-in-south-australians-hands>); Isabel Dayman and Lauren Waldhuter, ‘SA power: Businesses buoyed by Government power announcement, but question energy costs’, *ABC News*, 14 March 2017 (available at <http://www.abc.net.au/news/2017-03-14/sa-government-plan-must-lower-expensive-power-cost-business-say/8353736>); Nick Harmsen and Angelique Donnellan,

64. Given interested party 7's special position as set out in the documents I do not accept that disclosure of the 'prices relevant to it' could reasonably be expected to adversely affect interested party 7 commercially or by reputation.
65. In response to interested party 2's submissions, I do not think it is possible to identify the unnamed entities based on the information in the documents and therefore fail to see how the unnamed entities would be detrimentally affected by disclosure of the documents. In saying this, I have reviewed interested party 2's website.<sup>35</sup>
66. Clause 7(1)(c) also includes a public interest test. I have considered the public interest test below.<sup>36</sup>

#### Clause 9(1)(a)

59. Interested party 4 claims that the documents are exempt as internal working documents (clause 9(1)).
62. The scope of clause 9(1)(a) is wide, particularly given the words 'that relates to'.
63. 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'.
64. Having considered the contents of the documents, I am satisfied that they contain matter that relates to:
  - opinions, advice and recommendations obtained; and
  - consultations that took place,
in the course of, or for the purpose of the Government's decision-making functions.

#### Clause 13(1)(a)

67. To succeed in claiming clause 13(1)(a) as a basis for refusing access to a document it is necessary to demonstrate that the relevant document contains matter 'the disclosure of which would found an action for breach of confidence'. The term 'would' should be read as 'could'.<sup>37</sup>
68. The Administrative Appeals Tribunal (AAT) had cause to consider section 45 of the *Freedom of Information Act 1982* (Cth),<sup>38</sup> which is in substantially the same terms as clause 13(1)(a) of the FOI Act (SA). After consideration of the authorities, Deputy President Forgie of the AAT determined that an action for breach of confidence can only mean an action for equitable breach of confidence.<sup>39</sup> In my view, the AAT decision has persuasive value.

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'SA power: Energy Minister to be given more control in state's \$500m plan to secure future', *ABC News*, 14 March 2017 (available at <http://www.abc.net.au/news/2017-03-14/sa-power-energy-minister-electricity-market-plan-jay-weatherill/8351450>); Nick Harmsen, 'SA power: State Government to unveil electricity market intervention plan', *ABC News*, 14 March 2017 (available at <http://www.abc.net.au/news/2017-03-14/sa-government-to-announce-power-intervention-strategy/8350878>), all accessed on 25 May 2017.

<sup>34</sup> Jay Weatherill, 'Tesla to pair world's largest lithium ion battery with Neoen wind farm in SA', 7 July 2017 (available at <https://www.premier.sa.gov.au/index.php/jay-weatherill-news-releases/7736-tesla-to-pair-world-s-largest-lithium-ion-battery-with-neoen-wind-farm-in-sa>), accessed 3 August 2017.

<sup>35</sup> So as to avoid disclosing claimed exempt matter, I will refrain from citing the website here. Rather, the citation was included in a letter to interested party 2 dated 16 August 2017.

<sup>36</sup> I have considered the public interest test in the context of clauses 7(1)(c)(ii)(B), 9(1)(b), 13(1)(b)(ii), 14(b) and 16(1)(b).

<sup>37</sup> *Bray and Smith v WorkCover* (1994) 62 SASR 218 at 226 to 227.

<sup>38</sup> *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244.

<sup>39</sup> *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244, [163].

69. An equitable obligation of confidence is a duty not to disclose information because the information was given and received in circumstances which would make it unconscionable for the confidant to disclose the information in a way the confider has not authorised. A number of criteria must be satisfied:<sup>40</sup>
- the information must be capable of being identified with specificity
  - the information must have the necessary quality of confidence
  - the information must have been received in circumstances which import an obligation of confidence
  - there must be actual or threatened misuse of the information.
70. The information may be identified as either all of the information in the documents or parts of the documents relevant to interested party 7, and possibly interested party 4,<sup>41</sup> according to the agency and interested parties 7 and 4, respectively.
71. Information that is publicly available cannot, in my view, have the necessary quality of confidence. Whilst I accept that not all of the information in the documents is publicly available, a significant amount of it is. This includes information about interested party 7 in this context,<sup>42</sup> and information on interested party 6's website that is relevant to other interested parties.
72. Having particular regard to the third dot-point on page 4 of document 1 (detailing the terms of a subsequent communication, as agreed by a DSD employee and a representative of interested party 7), I am satisfied that DSD received information concerning the dollar figure detailed on page 2 of document 2 in confidence. (I note that interested party 7 disputes the accuracy of this figure in any event.)
73. Based on the evidence currently before me, I am not satisfied that DSD received the information in document 1 or the remainder of document 2 (that is, other than the dollar figure detailed on page 2 of document 2), in circumstances which imported an obligation of confidence.
74. In saying this I note that DSD merely asserted that disclosure of the documents 'would constitute a breach of confidence'. It has not provided my Office with any evidence to support the existence of a contractual obligation of confidence or to establish that the circumstances in which the information was received would import an obligation of confidence. Interested party 4's 'expectation' that the information it provided would be kept confidential, without more, does not satisfy me that DSD or the Government *received* the information in confidence. Interested party 7 has merely referred to the third dot-point on page 4 of document 1 to support its claims. In my view, this is insufficient to establish that information other than the dollar figure detailed on page 2 of document 2 was received in confidence, however.
75. I accept that if the other criteria for founding an action for breach of confidence were satisfied, release of the documents under the FOI Act would constitute their misuse.
76. For the exemption to apply, it may also be necessary for the confider to show '(at least for confidences reposed within government), that unauthorised use would be to the detriment of the' confider.<sup>43</sup>

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<sup>40</sup> *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150 (Unreported, Judge Brebner, 9 December 2010) at [38] affirming the test from *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443.

<sup>41</sup> Interested party 4 has not expressly relied upon clause 13(1)(a). I have nevertheless considered its submissions in the context of clause 13(1)(a), given that interested party 4 claims to have provided the information about it 'in the expectation that it would be kept confidential'.

<sup>42</sup> Again, so as to avoid disclosing claimed exempt matter, I provided the citations directly to interested party 7 by letter dated 16 August 2017, rather than include them here.

<sup>43</sup> *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443. See, however, *Trevorrow v State of South Australia* (2005) 94 SASR 44.

77. If detriment is an essential element, my view is that it is easily established. It would be sufficient, for example, to show that disclosure would cause the confiders difficulty. I note also that Deputy President Forgie of the Administrative Appeals Tribunal commented that detriment:

may be that disclosure of information relating to his affairs will expose his actions to public discussion and criticism ... [or] the disclosure itself in circumstances in which the disclosure is neither consented to nor otherwise justified.<sup>44</sup>

78. I accept that disclosure of the dollar figure detailed on page 2 of document 2 would cause the confider detriment in the requisite sense.
79. I am not satisfied that document 1 is exempt under clause 13(1)(a). Although satisfied that document 2 is exempt under clause 13(1)(a), I consider that it would be practicable to release it after redacting the dollar figure detailed on page 2 in accordance with section 20(4) of the FOI Act.
80. I will now consider whether or not document 1 and the remainder of document 2 (that is, excluding the dollar figure detailed on page 2 of document 2) are exempt under clause 13(1)(b), 14 or 16(1).

#### **Clause 13(1)(b)(i)**

81. To succeed in claiming clause 13(1)(b) as a basis for refusing access to a document, each of the following criteria must be satisfied:
- that matter in the document was 'received under an express or inferred understanding that [it] would be kept confidential'<sup>45</sup>
  - that disclosure of the matter might reasonably be expected to prejudice the future supply of such information to the Government or an agency
  - that disclosure of the matter would, on balance, be contrary to the public interest.
82. There is nothing before me to indicate that matter in document 1 or in the remainder of document 2 was received under an express or inferred understanding that it would be kept confidential.
83. Additionally, for the reasons discussed in relation to clause 7(1)(c), I am not satisfied that disclosure of document 1 or the remainder of document 2 might reasonably be expected to prejudice the future supply of such information to the Government or an agency.

#### **Clause 14(a)**

##### *Clause 14(a)(i)*

84. DSD has submitted that disclosure of the documents could:
- be expected to have a substantial adverse effect on the ability of Government or the department to manage the economy, and aspects related to the energy market and major industrial businesses within the State...
85. The phrase 'substantial adverse effect' is important when considering clause 14. It is not defined in the FOI Act. In the decision of *Treglown v SA Police* the South Australian District Court said that the phrase:

<sup>44</sup> *Re Callejo and Dept of Immigration and Citizenship* (2010) 51 AAR 308, [174].

<sup>45</sup> See *Re Maher and Attorney General's Department* (1985) 7 ALD 731 at 737.

should be interpreted as indicating a ‘degree of gravity’ ... or an effect ‘that is “sufficiently serious or significant to cause concern to a properly informed reasonable person” ... (references omitted).<sup>46</sup>

86. Again, to date, DSD and DPC have failed to provide any evidence to support this claim.
87. Further and in any event, the documents refer to circumstances that existed at the time they were created. Given the time that has elapsed, and events that have occurred since the documents were created, along with publicly accessible information, I fail to see how their disclosure would have the effect claimed by DSD.

*Clause 14(a)(ii)*

88. Interested party 4 claims that ‘the premature disclosure of information concerning any proposed action or inaction of the Parliament, the Government or an agency in the course of, or for the purpose of, managing the economy of the State’ could reasonably be expected to expose it to an ‘unfair disadvantage’ and affect its relationship with others.
89. Having regard to information that is publicly accessible, and events that have occurred in the 15 months since the documents were created, in particular the South Australian government’s March 2017 energy plan and its subsequent agreement with Neown and Tesla, I am not satisfied that disclosure of the documents would:
- expose interested party 4, or any person or class of persons, to an unfair advantage or disadvantage
  - represent a *premature* disclosure of information concerning any proposed action or inaction of the Parliament, the Government or an agency in the course of, or for the purpose of, managing the economy of the State.

**Clause 16(1)(a)**

90. To satisfy clause 16(1)(a) an agency must show that disclosure of a document could reasonably be expected to ‘prejudice’ or ‘have a substantial adverse effect’ on specified operations of ‘an agency’.
91. DSD did not specify which subclause(s) of clause 16(1)(a) it is relying on. It merely submitted that disclosure of document 1 ‘could reasonably be expected to have a substantial adverse effect on the effective performance by the department of its functions ...’
92. In the absence of further clarification from DSD or DPC, I proceed on the basis that they are relying on clause 16(1)(a)(iv).<sup>47</sup>
93. I have discussed the phrases ‘could reasonably be expected’ and ‘substantial adverse effect’ above in the context of clauses 7(1)(c) and 14, respectively.
94. Based on the evidence before me, I am not satisfied that disclosure of the documents could reasonably be expected to have a substantial adverse effect on the effective performance of either DSD’s or DPC’s functions. In saying this, I have had particular regard to events that have occurred since the documents were created and publicly accessible information.

<sup>46</sup> *Treglown v SA Police* [2011] SADC 139 (Unreported, South Australian District Court, Judge Herriman, 20 December 2011), [203], considering *Harris v ABC* (1983) 50 ALR 551 and *Konieczka v South Australian Police* [2006] SADC 134 (unreported, Judge Boylan, 8 December 2006), following *Thiess and The Department of Aviation* (1986) 9 ALD 454. The comments were made in the context of clause 16(1), but, in my view, apply equally to clause 14.

<sup>47</sup> I advised the parties of my intention to do so in my provisional and revised provisional determinations.

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**The public interest test - clauses 7(1)(c)(ii)(B), 9(1)(b), 13(1)(b)(ii), 14(b) and 16(1)(b)**

95. I have considered whether or not the public interest test has been met, even though I am not satisfied that all of the other necessary elements of the claimed exemption clauses have been satisfied.

96. In considering the public interest, I have had regard to the factors and submissions referred to above. 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 agencies' decision-making processes
  - promoting accountability of the government and the agencies
  - facilitating more effective participation by members of the public
- the ongoing relevance of the information to the applicant, and the public generally<sup>48</sup>
- the time that has elapsed, and events that have occurred, since the documents were created
- information in the documents that is publicly available
- 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'<sup>49</sup>

*Contrary to disclosure:*

- objections to disclosure raised by DSD and DPC and some of the interested parties
- the time that has elapsed, and events that have occurred, since the documents were created
- the relationship between the documents and 'high-level Government decision-making' (that said, I have not accorded this factor much weight in the circumstances, given publicly available information and events that have occurred since the documents were created)
- with respect to document 2, that, on its own, it can be incorrectly interpreted as revealing that interested party 2 communicated with the agency in relation to BHP Billiton and two other named companies).

97. I accept that one interpretation of part of document 2 is that interested party 2 communicated with DSD in relation to BHP Billiton and two other named companies. I consider this risk to be mitigated when considered in conjunction with document 1 and information in the public domain, however. It is evident from document 1 that interested party 2's communication did not concern BHP Billiton or two other named companies. This is supported by information in the public domain.<sup>50</sup>

98. Ultimately, I am not satisfied that disclosure of document 1 or the remainder of document 2 would, on balance, be contrary to the public interest. In saying this, my view is that the public interest in openness and accountability and facilitating more effective participation, the ongoing relevance of the information to the applicant, and the fact that much of the information in the documents is publicly accessible, are persuasive factors in this matter, and outweigh the factors against disclosure.

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<sup>48</sup> Energy costs and security continue to be important issues, and the subject of regular media reports, at both a State and Federal level.

<sup>49</sup> *Ipex 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.

<sup>50</sup> So as to avoid disclosing claimed exempt matter I provided the relevant citation to interested party 2 directly, by letter dated 16 August 2017, rather than citing it here.

99. I am not persuaded by the agency's and some of the interested parties' claims that disclosure of the documents could reasonably be expected to:
- 'inhibit frankness and candour between parties and internally in the Government'
  - prejudice the future supply of information to the Government or an agency
  - have an adverse effect on anyone's affairs
- for the reasons set out above. In saying this, I have also had regard to the obligations imposed on public sector employees.<sup>51</sup>
100. I am not satisfied that the document 1 or the remainder of document 2 are exempt under clauses 7(1)(c), 9(1), 13(1)(b), 14 or 16(1).

## Comments

101. For the most part, the reasons proffered by DSD in its determinations simply restated elements of the exemption clauses relied upon without more. In addition, when DSD introduced additional claims of exemption on internal review that included a public interest test, it merely stated that disclosure of the documents 'would be contrary to the public interest'. In my view, this is inadequate.
102. The FOI Act says that on receipt of an access application, if an agency makes a determination to refuse access to the requested documents, it must give reasons in its notice of determination.<sup>52</sup> Agencies must link the exemptions claimed to the actual contents of the documents, rather than make 'blanket' claims over the documents. This issue was discussed in the Ombudsman's 2014 FOI audit.<sup>53</sup>
103. I remind both agencies that they must engage in a 'public interest balancing process' in applying the public interest test.<sup>54</sup> Merely satisfying the initial criteria in an exemption clause with a public interest test under the FOI Act is not enough to satisfy the test that disclosure would, on balance, be contrary to the public interest. Agencies should always turn their mind to the objects of the Act, to extend as far as possible, the rights of the public to obtain access to information held by the government. This issue was also discussed in the Ombudsman's audit.<sup>55</sup>
104. In my view, DPC and/or DSD should have made the submissions set out in DPC's letter to my Office dated 30 August 2017 (particularly those related to the task force and public interest factors) much earlier. This tardiness further delayed finalisation of my external review.

<sup>51</sup> 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*, 1 (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*, 7
- should act 'truthfully, consistently, and fairly': *Code of Ethics for the South Australian Public Sector*, 9
- 'must exhibit the highest standards of professional conduct': *Code of Ethics for the South Australian Public Sector*, 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*, 11.

<sup>52</sup> *Freedom of Information Act 1991*, section 23(2)(f).

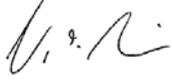
<sup>53</sup> See 'An audit of state government departments' implementation of the *Freedom of Information Act 1991* (SA), May 2014, Part 7A, available at <http://www.ombudsman.sa.gov.au/wp-content/uploads/An-audit-of-state-government-departments-implementation-of-the-Freedom-of-Information-Act-1991-SA1.pdf>.

<sup>54</sup> *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 70.

<sup>55</sup> See 'An audit of state government departments' implementation of the *Freedom of Information Act 1991* (SA), May 2014, Part 7B, available at <http://www.ombudsman.sa.gov.au/wp-content/uploads/An-audit-of-state-government-departments-implementation-of-the-Freedom-of-Information-Act-1991-SA1.pdf>.

**Determination**

105. In light of my views above, I vary the agency's determination to enable document 1 to be released in full and document 2 to be released after redacting the dollar figure detailed on page 2.



Wayne Lines  
**SA OMBUDSMAN**

23 October 2017

## APPENDIX - 2017/00990

### Procedural steps

Date	Event
22 July 2016	The Department of State Development ( <b>DSD</b> ) received the FOI application dated 18 July 2016.
8 November 2016	DSD determined the application.
22 December 2016	DSD received the undated internal review application.
17 January 2017	DSD confirmed the determination, albeit citing additional exemption clauses.
30 January 2017	The Ombudsman received the applicant's request for external review via the Ombudsman SA website.
3 February 2017	The Ombudsman advised DSD of the external review and requested submissions and documentation.
7 February 2017	By email, the applicant provided additional documentation relevant to the application.
27 February 2017	DSD provided the Ombudsman with its submissions and documentation, by letter.
4 April 2017	Ombudsman SA requested additional documentation from DSD, by email.
28 April 2017	By email, Ombudsman SA received an additional document from DSD.
5 June to 7 June 2017	Ombudsman SA liaised with DSD about consulting interested parties, by telephone and email.
9 June 2017	The Ombudsman issued his provisional determination to the parties.
13 June 2017	Interested party 1 sought and received clarification about the appendix to the consultation letter, by emails.
19 June 2017	By email and telephone, interested party 6 sought and received clarification about the appendix to the consultation letter.
21 June 2017	Interested party 7 provided its response to the Ombudsman's provisional determination, by email.

23 June 2017	Interested party 2 provided its response to the Ombudsman's provisional determination, by email.
	DPC responded to the Ombudsman's provisional determination, by email.
23 June to 26 June 2017	By emails, interested party 6 sought and received further clarification about the appendix to the consultation letter.
26 June 2017	Interested party 6 provided its response to the Ombudsman's provisional determination, by email.
16 August 2017	The Ombudsman issued his revised provisional determination to the parties.
23 August 2017	Interested party 7 provided its response to the Ombudsman's revised provisional determination, by email.
28 August 2017	By email, interested party 2 provided submissions.
	Interested party 4 provided its response to the Ombudsman's revised provisional determination, by email.
30 August 2017	DPC provided its response to the Ombudsman's revised provisional determination, by email.

