

Determination

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

Applicant	Ms Jody Harris
Agency	District Council of Grant
Ombudsman reference	2017/06562
Agency reference	DCG 151865
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**) the applicant requested access from the agency to:

... a hard copy of all information pertaining to 37 Black Forest Road, Yahl and 194 Valise Road, Wandilo including but not limited to development applications, all written and electronic correspondence, meeting notes, file notes, site inspections, health and building matters, rates notices etc. for the period 1.7.13 - 1.4.15.

Background

2. For ease of reference, procedural steps relating to the application and the external review 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 18 January 2018. 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. The agency provided submissions by letters dated 7 and 13 February 2018. I have considered the submissions in this determination.
6. To date, I have not received submissions from the applicant or interested parties.

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.¹
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. In this matter, the agency has refused access to documents pursuant to clauses 6(1), 7(1)(a), 7(1)(b), 9(1)(a)(i) and 10(1) of Schedule 1 of the FOI Act.
10. They provide:

6-Documents affecting personal affairs

- (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).

7-Documents affecting business affairs

- (1) A document is an exempt document –
 - (a) if it contains matter the disclosure of which would disclose trade secrets of an agency or any other person;
 - (b) if it contains matter –
 - (i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and
 - (ii) the disclosure of which –
 - (A) could reasonably be expected to destroy or diminish the commercial value of the information; and
 - (B) would, on balance, be contrary to the public interest; or

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;
 -

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.

10-Documents subject to legal professional privilege

- (2) A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.

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

11. Although not claimed by the agency, I have also considered whether the documents are exempt on the basis of clause 7(1)(c)² which provides:

7-Documents affecting business affairs

(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.

12. Section 20(1)(b) provides that an agency may also refuse access to a document if it is available for inspection at that or some other agency.
13. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
14. 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

15. The agency identified 67 documents within the scope of the application.
16. The schedule attached to the agency's notice of determination indicates that five documents were released in full, one document is available for inspection, 31 documents were partially released and 30 documents were refused.
17. I note, however, document 29 was marked as suitable for full release but was only partially released.³ Similarly, document 38 was marked as suitable for partial release but it appears that only the top right quarter of the page was provided making the document unintelligible.
18. I also note that page 1 of document 35 was partially provided to the applicant while the remaining pages are available for inspection.
19. In this regard, section 22(2)(c) provides that access to documents may be granted by giving the applicant a reasonable opportunity to inspect them. An agency's decision to do so is not a determination for the purposes of the FOI Act, so cannot be reviewed by an external review authority where they are available for full inspection. Therefore, I need not review document 19 or pages 2-5 of document 35.

² 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].

³ Document 29 contains redactions to the 'Name of Appellant', 'Residential Address', 'Telephone', 'Email', 'Address for Service of Documents & Notices' and the organisation concerned. The document will be considered under both clause 6(1) and clause 7(1).

Issues in this review

20. It is for me to consider whether the agency has justified its determination to refuse access to documents, or parts thereof, on the bases of section 20(1)(b) or clauses 6(1), 7(1)(a), 7(1)(b), 9(1)(a)(i) or 10(1) of Schedule 1 of the FOI Act.

Consideration

21. I will address the applicability of section 20(1)(b) and each exemption clause in turn.

Section 20(1)(b) - Refusal on basis it is already available for inspection

22. The agency relied on section 20(1)(b) to refuse access to the following five documents:

Table 1			
21	22	48	52
58	-	-	-

23. Section 20(1)(b) provides that an agency may refuse access to a document if it is available for inspection at that or some other agency in accordance with Part 2 of the FOI Act, or in accordance with a legislative instrument other than the FOI Act, whether or not inspection of the document is subject to a fee or charge.
24. The five documents listed above are publicly available in the agency's Council Minutes dated 3 March 2014, 23 April 2014, 19 May 2014 and 16 June 2014. These are available from the agency's website.
25. Council minutes are made available for inspection in accordance with section 91 of the *Local Government Act 1999*.
26. Accordingly, it is my determination that access to the documents listed in Table 1 may be refused on the basis of section 20(1)(b).

Clause 6(1) - documents affecting personal affairs

27. The agency relied on clause 6(1) to refuse access to the following five documents:

Table 2			
1	17	29 ⁴	59
61	-	-	-

28. When claiming clause 6(1) as the basis for refusing access to a document it is necessary to demonstrate that the document contains material which, if disclosed, would involve the unreasonable disclosure of information concerning the personal affairs of any person other than the applicant.
29. The term 'personal affairs' is defined in section 4(1) of the FOI Act to include a person's financial affairs, criminal records, marital or other personal relationships, employment records, and personal qualities or attributes. However, the definition is not exhaustive.
30. The term has been held to involve 'matters of private concern to an individual'⁵ and the 'composite collection of activities personal to the individual concerned'.⁶

⁴ As per paragraph 14, document 29 contains redactions on the basis of clause 6 but was listed as having been released in full.

⁵ *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.

⁶ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

31. In this matter, documents 1, 59 and 61 are Rates Notices, document 17 is a Decision Notification Form and document 29 is a Notice of Appeal. The material redacted from these documents comprises names, addresses, a mobile telephone number and an email address.
32. I am satisfied that the names, contact details and private residential or postal addresses redacted from documents 1, 59, 61 and 17 (the Rates Notices and the Decision Notification Form) do concern the personal affairs of the relevant people given the nature of the documents.
33. I also am satisfied that the name, residential address, mobile telephone number, email address and address for service redacted from document 29 (the Notice of Appeal) concern the personal affairs of the appellant.
34. I must then turn my mind to whether disclosure would be unreasonable.
35. In *Treglown v SA Police* the South Australian District Court said that when interpreting 'unreasonable' in clause 6, a decision maker needs:

... to consider not merely the content of the information which is sought to be disclosed, although in some circumstances that may be sufficient, but, as well, its relationship with other material known to the applicant, its level of sensitivity, the attitude of the person affected by the disclosure, the circumstances in which the information was originally obtained, whether it was already known to the applicant, the nature of the applicant's interest in it and any disclosed intentions with respect to its use.⁷
36. In addition, unreasonableness has 'as its core, public interest considerations',⁸ such as the protection of personal privacy, the objects of the legislation being satisfied and ensuring transparency and accountability within representative government.
37. Section 26 of the FOI Act relates to clause 6 in that it requires an agency to consult with any person whose personal affairs might be revealed in documents before providing access to those documents. It requires that the agency take such steps as are reasonably practicable to obtain the views of the person concerned as to whether or not the document is exempt by virtue of clause 6.
38. In this case, the agency consulted with three interested parties in accordance with section 26 of the FOI Act. The consultation related to documents 1, 29, 59 and 61.⁹
39. The responses received from interested parties whose personal affairs were contained in documents 1, 59 and 61 indicate that these parties consented to release of these documents subject to removal of their names and addresses.
40. Leaving aside document 29 for a moment, I am satisfied that it would be unreasonable to disclose information of the sort identified above. The information is not generally known or ascertainable to the general public and it appears that the interested parties consented to disclosure on the basis that these details would be redacted.
41. Returning to document 29, I note that the agency's schedule reveals the identity of the person concerned. In accordance with section 39(15) of the FOI Act I must avoid disclosing matter the agency claims to be exempt. However, to address the reasonableness of release in this instance it will suffice to say that the personal details

⁷ *Treglown v SA Police* [2011] SADC 139 (Unreported, South Australian District Court, Judge Herriman, 20 December 2011), [133], considering *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALD N257, 259 and *Victoria Police v Marke* (2008) 23 VR 223, [18] and [106]-[103].

⁸ *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429 per Lockhart J at 438.

⁹ It is worth noting that the personal details contained in document 17 were redacted from the document without requiring consultation with that party given the remainder of the document did not concern its personal affairs.

redacted from the first and last page of this document are publicly available. Moreover, the person concerned responded to the consultation process indicating that the document could be released in its entirety. In light of this, I am not satisfied that it would be unreasonable to release this information.

42. Accordingly, it is my determination that the personal details contained in documents 1, 17, 59 and 61 are exempt and should remain redacted on the basis of clause 6(1). Please note, these details are exempt wherever they appear in other documents not included in Table 2.
43. The personal details in document 29 are not exempt and should be released in full.
44. Please note, where I have determined to lift redactions applied on the basis of alternative exemption clauses, additional documents may contain personal details of third parties. This is discussed in greater detail at paragraphs 103, 104 and 105.

Clause 7(1) - documents affecting business affairs

45. The agency relied on clause 7 to refuse access to the following 31 documents, or parts thereof:

Table 3							
2	3	4	7	10	11	12	14
15	17	18	24	29 ¹⁰	34	35	37
38	41	42	43	53	54	55	56
57	62	63	64	65	66	67	-

46. Clause 7 is concerned with protecting the business affairs of an agency or any third party, and contains three subclauses which act as alternatives to each other. Clause 7(1)(a) is concerned with protecting trade secrets, clause 7(1)(b) is concerned with protecting commercially valuable information and clause 7(1)(c) is concerned with protecting any other information concerning business affairs.
47. Each subclause consists of criteria which must be satisfied in order to succeed in claiming it as a basis for refusing access to a document. These will be addressed in greater detail below.
48. The agency's notice of determination indicates that clause 7 was applied to 'documents containing matter that would disclose trade secrets or consisting of information that has a commercial value'. This suggests that the agency relied on exemption clauses 7(1)(a) and 7(1)(b); however, the agency did not indicate which subclause applied to each document with specificity.
49. The Act states that if an agency makes a determination to refuse access to the requested documents, it must give reasons in its notice of determination.¹¹ I remind the agency that it 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.¹²
50. I also note that the agency has not made submissions in relation to whether disclosure of these documents would be contrary to the public interest, as is required by clause 7(1)(b). Merely satisfying the initial criteria of an exemption clause which includes a

¹⁰ As per paragraph 14, document 29 contains a redaction on the basis of clause 7.

¹¹ *Freedom of Information Act 1991*, section 23(2)(f).

¹² 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>.

public interest test, is not enough to satisfy the test that disclosure would, on balance, be contrary to the public interest. Therefore, I also remind the agency that it must engage in a 'public interest balancing process' when applying the public interest test.¹³

51. In doing this, 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 too was discussed in the Ombudsman's 2014 FOI audit.¹⁴
52. The information redacted from the above documents predominantly consists of names, addresses and contact details of third parties. This was the case for all documents listed in the above table, except document 2 which is a development application with supporting material.
53. Section 27 of the FOI Act relates to clause 7 in that it requires an agency to consult with third parties whose business affairs might be affected by disclosure of documents before providing access to those documents. It requires that the agency take such steps as are reasonably practicable to obtain the views of the person concerned as to whether or not a document is exempt by virtue of clause 7.
54. In this case, the agency consulted with five interested parties, in accordance with section 27 of the FOI Act. That said, the consultation only related to disclosure of documents 2, 62, 63, 64, 65 and 67 despite numerous other documents containing information that appears to concern the business affairs of third parties.
55. In those instances the agency has simply redacted names from the document, presumably to prevent the identity of an organisation or person being connected with particular information, and has then released the remainder of the document without consulting the relevant interested party.
56. I appreciate that the agency may have done this in order to provide greater access to the documents; however, oftentimes it appears that the information concerning business affairs is contained in the content of documents, and so is not affected by disassociating information from the business owner. Additionally, when the documents are considered collectively, some of the redacted material is easily discernible, removing any effect disassociating material from a particular business owner might have had.
57. Moreover, in most instances, the name of an organisation or employees of a business will not constitute a trade secret, commercially valuable material or any other type of information clause 7 aims to protect.
58. Given the documents have already been partially released to the applicant, there is no value in me assessing whether clause 7 should have been applied more liberally. Instead, I have considered whether the redacted material is in fact exempt on the basis of clause 7.

Clause 7(1)(a) - trade secrets

59. When claiming clause 7(1)(a) as the basis for refusing access to a document it is necessary to demonstrate that the document contains material which, if disclosed, would reveal trade secrets of the agency or any other person.
60. The term 'trade secrets' is not defined in the FOI Act. However, when considering whether information amounts to a trade secret the following test was referred to by the

¹³ *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 70.

¹⁴ See 'An audit of state government departments' implementation of the *Freedom of Information Act 1991* (SA), May 2014, Part 7B.

Full Federal Court in *Re Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health*.¹⁵

- the information is used in a trade or business; and
- the owner must limit the dissemination of it or at least not encourage or permit widespread publication; and
- if disclosed to a competitor, the information would be liable to cause real or significant harm to the owner of the secret.

61. *Re Organon (Australia) Pty Ltd v Department of Community Services and Health*¹⁶ considered additional criteria that may assist in determining whether information amounts to a trade secret. However, I note that the Full Federal Court determined that the criteria were 'merely guides' and in particular, that the information does not need to be of a technical character in order to be considered a trade secret.¹⁷
62. Accordingly, the following criteria, although not exhaustive, may also provide a useful guide:
- the extent to which the information is known outside the business of the owner of that information
 - the extent to which the information is known by persons engaged in the owner's business
 - measures taken by the owner to guard the secrecy of the information
 - the value of the information to the owner and to his or her competitor
 - the effort and money spent by the owner in developing the information
 - the ease or difficulty with which others might acquire or duplicate the secret.¹⁸
63. I note the agency has not indicated how the information would reveal trade secrets of the agency or any other person.
64. The interested parties consulted in relation to documents 2, 62, 63, 64, 65 and 67 did not make submissions in this regard either.
65. Having considered the documents, I am not convinced that they contain matter which, if disclosed, would reveal trade secrets of any agency or any other person.
66. As stated above, the agency has predominantly redacted names, addresses and contact details of third parties which is plainly not information concerning trade secrets.
67. Whilst, access to document 2 was refused entirely and contains a substantial amount of material regarding a proposed development, I am not satisfied that the information contained in this document concerns trade secrets either.
68. In reaching this conclusion I have considered the fact that the application was made to the agency in full knowledge of the fact that it could have been assessed as a category of development requiring public notification in accordance with regulation 34 of the *Development Regulations 2008*. With this in mind, the owner of the information clearly did not intend to keep the information secret and it appears unlikely that it would have been provided to the agency if its disclosure was liable to cause real or significant harm.
69. In response to my provisional determination the agency submitted that document 2 contained two floor plans which are duplicates of those contained in document 19,

¹⁵ (1992) 108 ALR 163; Quoting *Lansing Linde Ltd v Kerr* (1990) 21 IPR 529, Staughton L.J. at 536.

¹⁶ (1987) 13 ALD 588.

¹⁷ *Re Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 108 ALR 163, [37].

¹⁸ *Re Organon* (1987) 13 ALD 588.

which is already available for full inspection. The agency therefore proposed to release document 2 on the condition that the floor plans would be treated in the same way.

70. As stated at paragraph 12, access to documents may be granted by giving the applicant a reasonable opportunity to inspect them.
71. I conclude that the documents listed in Table 3 are not exempt by virtue of clause 7(1)(a). The documents should be released following redactions to material that is exempt on the basis of clause 6(1).
72. For clarity, access to pages 27 and 30 of document 2 will be granted by giving the applicant a reasonable opportunity to inspect them.

Clause 7(1)(b) - Commercially valuable information

73. When claiming clause 7(1)(b) as the basis for refusing access to a document it is necessary to demonstrate that:
 - the document consists of information that has a commercial value which could reasonably be expected to be destroyed or diminished by disclosure.
 - disclosure of the document would, on balance, be contrary to the public interest.
74. The term 'commercial value' is not defined in the FOI Act. The Queensland Information Commissioner has noted that there are two possible interpretations of the phrase:

The first (and what I think is the meaning that was primarily intended) is that information has commercial value to an agency or another person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged. The information may be valuable because it is important or essential to the profitability or viability of a continuing business operation, or a pending, "one-off" commercial transaction...

The second interpretation of "commercial value" which is reasonably open is that information has commercial value to an agency or another person if a genuine, arms-length buyer is prepared to pay to obtain that information from that agency or person. It would follow that the market value of that information would be destroyed or diminished if it could be obtained from a government agency that has come into possession of it, through disclosure under the FOI Act. ...¹⁹

75. In *Media Research Group Pty Ltd v Department of Premier and Cabinet (GD)* the New South Wales Administrative Decisions Tribunal Appeal Panel commented that:

information of a 'commercial value' would ordinarily be information with a proprietary character, information of an internal character (such as specialised statistics) or information the product of some unique or special intellectual processes of a high order that might fall below the level of 'trade secret'. There should, as we see it, be some uniqueness attaching to the information that justifies treating it as exclusive, secret or confidential.²⁰

76. The phrase 'could reasonably be expected' requires that I make an objective judgment as to whether it is reasonable, as distinct from irrational, absurd or ridiculous, to expect that disclosure could destroy or diminish the commercial value of the information.²¹ The expectation must be based on reason and not be 'fanciful, far-fetched or speculative'.²²

¹⁹ *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, at paragraphs 54 -55, interpreting section 45(1)(b)(i) of the *Freedom of Information Act 1992* which is similar to section 7(1)(b).

²⁰ *Media Research Group Pty Ltd v Department of Premier and Cabinet (GD)* [2011] NSWADTAP 7 (4 March 2011), [48].

²¹ *Attorney-General's Department v Cockroft* [1986] FCA 35; (1986) 10 FCR, 180, 190.

²² *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111, 123; *Ipex Information Technology Pty Ltd v Department of Information Technology Services* [1997] SADC 3618; (1997) LSJS 54, 64; *Konieczka v South Australia Police* [2006] SADC 134 [14].

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77. The agency has not indicated how the information is of commercial value, how disclosure could reasonably be expected to destroy or diminish this value, or how disclosure would be contrary to the public interest.
 78. However, in response to the agency's consultation, one interested party made submissions partially addressing the criteria of clause 7(1)(b).
 79. The submissions came from the party consulted in relation to document 2; however, the submissions were provided on behalf of themselves and their client, who was not separately consulted in relation to disclosure of this document. This interested party also made submissions regarding clause 7(1)(c) which will be addressed later in these reasons.
 80. By letter dated 23 June 2017, the interested party submitted that document 2 reveals details about the nature and function of their client's business operations. It was also submitted that the client's business model was unique and that the document contained sensitive commercial information that has value to their client.
 81. The interested party also submitted that disclosure of the document would be contrary to the public interest because the application was treated by the agency as a Category 1 form of development which did not require public notification. It was argued that it would be inappropriate to disclose the document given there is a prescribed process for public notification under development legislation, and that the FOI Act should not be treated as a vehicle for gaining access to information about a development application if the legislation itself did not require it.
 82. Finally, the interested party submitted that there was a possibility that the document could be used against the firm or their client by commercial competitors or opponents of the client.
 83. The submissions of the interested party did not specifically address how disclosure could reasonably be expected to destroy or diminish the commercial value of the information.
 84. On the evidence before me I am not convinced that the business model is the product of some unique or special intellectual process of a high order such that it should be treated as exclusive, secret or confidential. In fact, much of the information about the business' operations and business model can be found on its website.
 85. Additionally, the document does not appear to reveal information which is valuable for the purposes of carrying on a commercial activity. Nor does it reveal information that is important to the profitability or viability of a continuing business operation, or a pending "one-off" commercial transaction given the current status of this particular application.
 86. Furthermore, if I were to accept that the information does have commercial value, it does not appear reasonable to expect that disclosure would destroy or diminish the value of the information. Contributing to this view is, again, the fact that the application was made to the agency in full knowledge of the potential that public notification may have been required.
 87. I acknowledge the interested party's submission that this application was not treated as a category of development which required public notification; however, this was a possibility at the time of drafting the proposal and deciding whether or not to include commercially valuable information. It seems unlikely that the interested parties would have included such information if there were real grounds to suspect that the value of the information could have been destroyed or diminished by disclosure given this was a possibility.

88. With regards to the interested party's submission that the FOI Act should not be used to circumvent designated processes for disclosure prescribed under development legislation, I acknowledge that this is a relevant public interest consideration. However, given the initial criteria of clause 7(1) has not been satisfied there has been no need to consider public interest factors for or against disclosure.
89. However, even if this consideration were necessary, in the circumstances I would not necessarily consider this to outweigh the public interest factors in favour of disclosure given the age and current status of the application.
90. As for the remaining documents, I am not satisfied that the names, addresses or contact details of third parties is commercially valuable information that is capable of being destroyed or diminished by disclosure. This is particularly so given the extent of information already disclosed and known to the applicant.
91. Accordingly, it is my determination that the documents listed in Table 3 are not exempt by virtue of clause 7(1)(b). The documents should be released following redaction of material that is exempt on the basis of clause 6(1).

Clause 7(1)(c) - Other business affairs information

92. To succeed in claiming clause 7(1)(c) as the basis for refusing access to a document it is necessary to demonstrate that:
- the document consists of information (other than trade secrets or information referred to in paragraph 7(1)(b)) concerning the business, professional, commercial or financial affairs of any agency or any other person
 - disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of such information to the Government or to an agency
 - disclosure of the document would, on balance, be contrary to the public interest.
93. The phrase 'business, professional, commercial or financial affairs' is not defined in the FOI Act, however, the Administrative Appeals Tribunal has commented that:
- ...they are words of very wide application, and cover all the aspects, both fiscal and administrative, of an organisation or undertaking; I do not think that they should be narrowly construed.²³
94. The Queensland Information Commissioner in *Cannon and Australian Quality Egg Farms Ltd* relevantly observed:
- The words "business, professional, commercial or financial" are hardly apt to establish distinct and exclusive categories; there must in fact be substantial overlap between the kinds of affairs that would fall within the ambit of the ordinary meanings of the words "business", "commercial" and "financial", in particular. The common link is to activities carried on for the purpose of generating income or profits. (I refer to income because some government agencies are established to provide goods or services to the community for a fee, but with no expectation of ever generating profits: rather the aim is to pursue some government policy objective, e.g. regional development, and/or to obtain income to offset some of the cost of providing a service to the public, which probably could not be profitably supplied on a fully commercial basis).²⁴ (my emphasis)
95. The term 'could reasonably be expected' has been dealt with above and will be applied here in the same manner.

²³ *Martin Saxon v Australian Maritime Authority* [1995] AAT 165, [99].

²⁴ (1994) 1 QAR 491 (30 May 1994)

96. In regards to the 'adverse effect' the District Court has commented that:

It is sufficient for s7(1)(c)(ii) 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.²⁵

97. The agency did not claim clause 7(1)(c) in relation to the documents.

98. However, the interested party referred to above also provided submissions regarding the applicability of 7(1)(c) to document 2. Again the submissions were made on behalf of themselves and their client, who was not separately consulted in relation to disclosure of this document.

99. The interested party echoed the submissions made in regards to 7(1)(b) and also indicated that the information may be used inappropriately by competitors, or persons opposed to the client's operations, if disclosed.

100. It was also submitted that people ought to enjoy a relative degree of certainty that information concerning their business affairs provided as part of a development application, would not be released at large or to unknown applicants, and doing so would prejudice the future supply of such information to the agency if businesses could not be certain of this surety.

101. In relation to its own affairs the interested party submitted that the document contains specific professional advice which was produced for their client and for the restricted purpose of the development application. In their view, the document remains their intellectual property.

102. Given the broad application of clause 7(1)(c), I acknowledge that document 2 contains information concerning the business affairs of both the interested party and their client.

103. That said, it is unclear from the submissions how the information could be used by competitors to the detriment of the organisation or its legal representative. I am not convinced it is reasonable to expect that this could occur. This is particularly so given the application is now over four years old and is no longer being deliberated upon by the agency. Again, the fact that the application was made in full knowledge of the potential that public notification may have been required has influenced my decision in this regard.

104. Similarly, given the requirements prescribed by the *Development Act 1993*, I am not convinced that it is reasonable to expect that disclosure of this document will prejudice the provision of information to the agency in the future. Ultimately, any person wishing to undertake development will be required to seek approval from the relevant authority. This will involve the provision of information to that authority and also entitles that authority to request further information if reasonably required.²⁶

105. A separate interested party also provided submissions regarding the applicability of clause 7(1)(c) to document 65. The submissions were prepared by the interested party's legal representative.

²⁵ *Iplex Info Tech v Dept of Info Tech Services* (1997) 192 LSJS 54, 65.

²⁶ *Development Act 1993*, section 39

106. By letter dated 20 June 2017, it was submitted that the document:

... contains information which tends to reveal the business affairs of our client and thus it would be unreasonable for the information to be disclosed. These documents are exempt documents under clause 7 of Schedule 1 of the Act and must not be released.

...

The email exchange exposes the identity of one of our client's employees. This is information concerning the business and professional affairs of our client and the disclosure of which could have an adverse effect on those affairs.

107. Again, given the broad application of clause 7(1)(c), I acknowledge that document 65 contains information concerning the business affairs of the interested party.

108. However, the submissions do not specify how disclosure of the information could reasonably be expected to have any adverse effect on the client's business or professional affairs and it is not apparent how it will.

109. In light of the above, I am not satisfied that clause 7(1)(c) is applicable to document 2 or document 65.

110. As for the remaining documents, I am not satisfied that it is reasonable to expect that disclosure of the documents could have an adverse effect on business affairs or prejudice the future supply of such information to an agency. This is particularly so given the extent of information already disclosed and known to the applicant.

111. It is worth noting that many of the documents contained in Table 3 have had people's names, email addresses and mobile telephone numbers redacted on the basis of clause 7(1). In my view, personal contact details should have been redacted on the basis of clause 6(1) and may remain redacted on this basis.

112. This does not apply to business names or business telephone and facsimile numbers that are already in the public domain.

113. Accordingly, it is my determination that the documents listed in Table 3 are not exempt by virtue of clause 7(1)(c). The documents should be released following redaction of material that is exempt on the basis of clause 6(1).

Clause 9(1)(a)(i) and (b) - Internal working documents

114. The agency relied on clause 9(1)(a)(i) to refuse access to the following 9 documents:

Table 4							
6	8	9	13	16	23	25	27
60	-	-	-	-	-	-	-

115. When claiming clause 9(1)(a)(i) as the basis for refusing access to a document it is necessary to demonstrate that:

- the document contains matter that relates to an opinion, advice or recommendation that has been obtained, prepared or recorded in the course of, or for the purposes of, the decision-making function of the agency
- disclosure of the document would, on balance, be contrary to the public interest.

116. Although not claimed by the agency, I have also considered the applicability of clause 9(1)(a)(ii) which provides that a document is exempt if it:
- contains matter that relates to any consultation or deliberation that has taken place in the course of, or for the purposes of, the decision-making function of the agency
 - disclosure of the document would, on balance, be contrary to the public interest.
117. The use of the words 'that relates to' make the scope of clause 9(1)(a) quite broad. However, clause 9(1)(b) introduces a public interest test, which serves to limit this broad ambit.
118. Again, the agency did not link the exemption to the actual contents of the documents, nor has it engaged in a public interest balancing process as required.
119. Documents 6, 8, 16 and 27 are Councillor Information Bulletins dated 4 November 2013, 27 November 2013, 20 January 2014 and 3 March 2014. Attachments to the bulletins show the current status of pending development applications as well as approved development applications.
120. Relatedly, document 23 captures extracts from the attachments.
121. In my view, documents 6, 8, 16 and 27 are largely out of scope given the content does not relate to the properties specified in the applicant's request. Information pertaining to 37 Black Forest Road, Yahl, or 194 Valise Road, Wandilo, is within scope.
122. In my view, the columns headed 'Type of Development', 'Status' and 'Comments' constitute material relating to opinions, advice or recommendations that were obtained, prepared and recorded by the agency in the course of and for the purposes of its decision-making functions under the Development Act.
123. These particular columns were not included with the extracts appearing in document 23. I am, therefore, not satisfied that document 23 contains any material relating to opinions, advice or recommendations that has been obtained, prepared or recorded in the course of, or for the purpose of, the decision-making functions of the agency.
124. The remaining documents, 9, 13, 25, and 60, comprise an internal memo prepared by the Chief Executive Officer of the agency, file notes of conversations with a law firm and a draft email to a law firm.
125. I am satisfied that these documents also fall within the ambit of clauses 9(1)(a)(i) and potentially 9(1)(a)(ii); however, I have refrained from describing the content of these documents in compliance with section 39(15) of the FOI Act.²⁷
126. Although the agency did not claim clause 9 in relation to document 2, I also consider that this document contains information which falls within the ambit of clause 9(1)(a)(ii) as it contains matter relating to the council's deliberation of proposed development.
127. I now turn to consider the public interest factors for and against disclosure in relation to documents 2, 6, 8, 9, 13, 16, 25, 27 and 60.
128. The Administrative Appeals Tribunal (**AAT**) had cause to consider section 36, now 47C, of the *Freedom of Information Act 1982* (Cth),²⁸ which is in substantially the same terms as clause 9(1)(a) of the FOI Act (SA). The Tribunal observed that the purpose of section 37 was to protect the integrity and viability of the governmental decision-making

²⁷ Under section 39(15) of the *Freedom of Information Act 1991*, I should avoid disclosing matter that the agency claims is exempt

²⁸ *Re Murtagh and Commissioner of Taxation* [1984] AATA 249; (1984) 6 ALD 112.

process and only 'if the release of documents would impair this process to a significant or substantial degree and there is no countervailing benefit to the public which outweighs that impairment, [...] would it be contrary to the public interest to grant access'.²⁹

129. The tribunal made the following observations in relation to how the public interest for and against disclosure is to be weighed:³⁰

Relevant considerations include matters such as the age of the documents; the importance of the issues discussed; the continuing relevance of those issues in relation to matters still under consideration; the extent to which premature disclosure may reveal sensitive information that may be misunderstood or misapplied by an ill-informed public; the extent to which the subject matter of the documents is already within the public knowledge; the status of the persons between whom and the circumstances in which the communications passed; the need to preserve confidentiality having regard to the subject matter of the communication and the circumstances in which it was made. Underlying all these factors is the need to consider the extent to which disclosure of the documents would be likely to impede or have an adverse effect upon the efficient administration of the agency concerned ...

130. Given the age of the documents, and the fact that development application 732/189/13 was cancelled on 11 June 2014, as revealed by document 56, they do not appear to have any ongoing relevance. Nor is the application to which they relate still under consideration.
131. Further, disclosure of these documents would not appear to prematurely release sensitive information that could be misunderstood or misapplied, particularly given the extent of material already released to the applicant and publically available.
132. In fact, I consider that disclosure of these documents may enhance the agency's accountability, inform the community of the agency's operations in relation to this development proposal and reveal the contextual background that informed the agency's assessment of this application. Further, disclosure is not likely to impede or impair this process to a significant or substantial degree.
133. In the circumstances, I consider the following factors to weigh in favour of disclosure:
- the public interest in fulfilling the objects of the FOI Act, particularly the public interest in promoting openness and accountability within government
 - the public interest in scrutiny of government decision-making, achieved in part through public knowledge of the operations of the agency in relation to development applications
 - the public interest in the community having knowledge of the contextual background in relation to a development application that became the subject of public scrutiny.
134. I consider the following factor to weigh against disclosure:
- the public interest in ensuring the effective conduct of the agency's functions.
135. I consider the factors weighing in favour of disclosure to be most persuasive in the present circumstances and, therefore, conclude that disclosure would not, on balance, be contrary to the public interest.

²⁹ *Re Murtagh and Commissioner of Taxation* [1984] AATA 249; (1984) 6 ALD 112.

³⁰ *Re Lianos and Secretary to the Department of Social Security* [1985] AATA 38 at [81].

136. In response to my provisional determination the agency submitted that it remained of the opinion that document 9 is an exempt document but that it could be released following redaction of the names of meeting attendees. The agency submitted:

This document was prepared after a private meeting where opinions were made by the relevant parties.

Taking into account the public interest test, we believe that disclosure of [names of meeting attendees], could have a damaging effect on the parties concerned as it could be misunderstood or misapplied by an ill-informed public. They were personal opinions made by the parties.

137. I am not persuaded by the agency's submissions that full disclosure of document 9 would, on balance, be contrary to the public interest.
138. In my view, the reasons provided at paragraph 129 and 130 remain applicable and I am not convinced that disclosure would have a damaging effect on the parties as a result of the information being misunderstood or misapplied by an ill-informed public.
139. Accordingly, it is my determination that documents 2, 6, 8, 9, 13, 16, 23, 25, 27 and 60 are not exempt by virtue of clause 9(1). The documents should be released following redaction of material that is exempt on the basis of an alternative exemption clause.

Clause 10(1) - documents subject to legal professional privilege

140. The agency relied on clause 10(1) to refuse access to the following 14 documents:

Table 5							
28	30	31	32	33	36	40	44
45	46	47	49	50	51	-	-

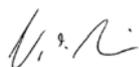
141. When claiming clause 10(1) as the basis for refusing access to a document it is necessary to demonstrate that it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.
142. In *Esso Australia Resources Limited v The Commissioner of Taxation*, the High Court decided that a document is privileged from production in legal proceedings if it is a confidential communication between a client and their solicitor that was created for the dominant purpose of obtaining or giving legal advice or if it is a confidential communication made for the dominant purpose of use, or obtaining material for use, in pending or anticipated legal proceedings.³¹
143. I note that documents 28, 31 and 33 comprise an email from a legal firm to the agency enclosing a Notice of Application for Review in the Environment, Resources & Development Court (**ERD Court**), an email from the agency to the ERD Court enclosing development application 732/189/13, and the Court's reply.
144. These documents do not contain confidential communications between a client and their solicitor. Therefore, legal professional privilege does not attach to these documents.
145. Document 40 is an email from the agency's legal representative to the agency enclosing a Book of Documents relating to an ERD Court matter. Whilst the email might be a confidential communication between the agency (a client) and its solicitor, it was not created for the dominant purpose of obtaining or giving legal advice. Nor was it created for the dominant purpose of use, or obtaining material for use, in litigation.

³¹ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

146. While the Book of Documents was clearly prepared for use in litigation, it was prepared in accordance with ERD Court Practice Directions for use by the Court and other parties to an appeal. Therefore, the Book of Documents is not confidential and legal professional privilege cannot apply.
147. Having considered the remaining documents (30, 32, 36, 44-47, 49, 50 and 51) I am satisfied that they comprise confidential emailed communications between the agency and its solicitors. I am also satisfied that each individual email was created for the dominant purpose of obtaining or giving legal advice, or for the dominant purpose of use in pending legal proceedings.
148. It is worth noting, as discussed in paragraph 14 above, document 38 was partially released to the applicant with redactions purportedly applied on the basis of clause 7. The material that was disclosed is unintelligible and it appears that this was an error on the part of the agency. As already stated, clause 7 does not apply to this document.
149. However, having considered the content of the full version, it is my view that the email dated "Wednesday, 19 March 2014 6:13 PM" is a confidential communication between the agency and its solicitors. Further, the portion of the document that was mistakenly released is too minimal to waive legal privilege. Therefore, document 38 should be regarded as exempt on the basis of clause 10(1).
150. Clause 10(1) is an absolute exemption clause which means that, if the elements of the clause are satisfied, the document must be regarded as exempt and there is no need to consider public interest factors or the reasonableness of disclosure.
151. Accordingly, it is my determination that documents 30, 32, 36, 38, 44-47, 49, 50 and 51 are exempt by virtue of clause 10(1).
152. Documents 28, 31, 33 and 40 are not exempt on this basis and should be released following redaction of material that is exempt on the basis of an alternative exemption clause.

Determination

153. In light of my views above, I **vary** the agency's determination, such that:
- Documents 21, 22, 48, 52 and 58 may remain exempt on the basis of section 20(1)(b)
 - Documents 30, 32, 36, 38, 44-47, 49, 50 and 51 may remain exempt on the basis of clause 10(1)
 - Documents 1, 2, 3, 4, 6, 7, 8, 10, 11, 14, 15, 16, 17, 18, 23, 24, 27, 28, 34, 40, 41, 42, 53, 54, 55, 56, 57, 59, 60, 61, 62, 65, 66 and 67 are to be released to the applicant following redactions of personal details of third parties that are not publicly available and out of scope material within documents 6, 8, 16 and 27
 - Documents 9, 12, 13, 25, 29, 31, 33, 37, 43, 63 and 64 are to be released to the applicant in full
154. Hardcopies of documents 5, 20, 26 and 39 have already been released to the applicant in full and document 19 and document 35 are to remain available for inspection.



Wayne Lines
SA OMBUDSMAN

16 February 2018

APPENDIX

Procedural steps

Date	Event
26 May 2017	The agency received the FOI application dated 26 May 2017.
26 June 2017	The Chief Executive Officer of the agency determined the application. ¹
28 June 2017	The Ombudsman received the applicant's request for external review dated 28 June 2017.
3 July 2017	The Ombudsman advised the agency of the external review and requested submissions and documentation.
12 July 2017	The agency provided the Ombudsman with its submissions and documentation.
18 January 2018	The Ombudsman provided his provisional determination to the parties.
7 February 2018	The agency responded to the provisional determination.
13 February 2018	The agency provided a further response to the provisional determination.

¹ *Freedom of Information Act 1991*, section 29 provides that a determination is not subject to internal review under this section if it is made by or at the direction of the principal officer of the agency