

Determination

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

Applicant	Ms Elizabeth Krushka
Agency	District Council of Tumby Bay
Ombudsman reference	2013/10055
Agency reference	CTB 104279
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:
 1. All documents and communications related to South Australian Government Departments inclusive of but not exclusive of Planning SA, DMITRE, EPA, DEWNR, NRM, PIRSA etc for mining activities, development, stakeholder engagement for Centrex Metals Ltd, Eyre Iron Ltd and Lincoln Minerals Ltd, from 2003 onwards: (sic)
 2. All documents and communications from private citizens to council in relation to the aforementioned activities
 3. All responses from council to private citizens correspondence in relation to the aforementioned activities
 4. All documents/briefing notes to council on the aforementioned activities
 5. All documentation in relation to the council meeting of 10th August 2009, matters in confidence, Centrex Metals Ltd (folio 208 - 214)

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.
4. I have exercised my discretion under section 39(4) of the FOI Act to extend the time for making an application for external review.

Provisional determination

5. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 12 March 2014. I informed the parties that subject to

my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.

6. The interested parties provided submissions in response. I have considered these submissions in this determination

Relevant law

7. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.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. In this review clauses 5(1), 6(1) and 7(1)(c) are relevant.
9. Clause 5(1) provides:

5—Documents affecting inter-governmental or local governmental relations

- (1) A document is an exempt document if it contains matter—
 - (a) the disclosure of which—
 - (i) could reasonably be expected to cause damage to intergovernmental relations; or
 - (ii) would divulge information from a confidential intergovernmental communication; and
 - (b) the disclosure of which would, on balance, be contrary to the public interest.

10. Clause 6(1) provides:

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).

11. Clause 7(1)(c) 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. 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.

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

Documents in issue

14. The agency identified 157 documents within the scope of the application, and released 55 documents. I note that the agency provided the applicant with the schedule of documents.
15. The agency refused access to 16 documents numbered 5, 9, 10, 11, 12 13B, 14, 21, 23, 24, 27, 34, 49, 56, 67A and 89.
16. The agency determined to release 86 documents with information such as names of ratepayers, signatures, email addresses, telephone numbers, mobile telephone numbers, home addresses deleted. My office spoke with the applicant who advised that she did not seek review of the decision to delete this information from the documents. Therefore I have not considered these 86 documents in my review.
17. Having viewed documents numbered 21, 67A and 89 I am of the opinion that they are not within the scope of the application.
18. The applicant has been supplied with a document schedule with a description of each document. The applicant asserts that:
 - documentation requested in the form of briefing notes provided to council meetings have not been provided
 - documents for the entire period have not been included, and those released are segmented and not a full chronological record

Consideration

Information concerning personal affairs - clause 6(1)

19. The agency relies on clause 6(1) as a basis for refusing access to documents 23 and 24. Document 23 is an emails from a ratepayer to the agency and document 24 is a letter from the agency to that ratepayer. The documents includes the ratepayers name, email address, home address and mobile telephone number. As mentioned above, the applicant has indicated that she is not seeking review of the decision not to release information of this type.
20. The remainder of document 23 does not contain information concerning any person's personal affairs and should be released in accordance with section 20(4) of the Act.
21. The first page of document 24 contains the ratepayers name and home address and the rest of the page concerns a matter referred to by the ratepayer which is not relevant to the access application and so is outside of the scope of the application. All of the second page of document 24 should be release (in accordance with section 20(4) of the Act).

Documents affecting inter-governmental or local governmental relations - clause 5(1)

22. The agency relies on clause 5(1) as a basis for refusing access to document 12 which is a letter from the Eyre Regional Development Board to the agency.
23. Regional Development Australia - Whyalla and Eyre Peninsula Inc (**RDAWEP**) is the successor to the Eyre Regional Development Board and it has provided its view that the document should not be released.
24. RDAWEP's view is that the government's priority (as stated in the document) may have changed and therefore release of this document may affect inter-governmental relations. It also advised that this information was not in the public domain.

25. Neither the agency nor RDAWEP has provided any evidence as to how disclosure of the possibly out-dated government's priority would damage intergovernmental relations. Neither am I convinced that the document consists of a confidential intergovernmental communication. Furthermore, I do not have any evidence as to whether disclosure of this document would, on balance, be contrary to the public interest.
26. I am not satisfied that document 12 is exempt pursuant to clause 5(1).

Documents affecting business affairs - clause 7(1)(c)

27. The agency relies on clause 7(1)(c) as a basis for refusing access to documents 5, 9, 10, 11, 12, 13B, 14, 27, 34, 49 and 56.
28. Documents 5, 13B, 14, 27, 34 and 49 are communications between the agency and Centrex Metals Ltd.
- 29.
30. Document 9 is a letter to the agency from the Department of Trade and Economic Development, documents 10 and 11 are documents written by the Eyre Regional Development Board.
31. 'Business affairs' has been held to mean activities carried out with the view to make a profit, and not just affairs derived from or to do with business. The Queensland Information Commissioner has commented that:

For a matter to relate to 'business affairs' in the requisite sense, it should ordinarily, in my opinion, relate to the affairs of a business undertaking which is carried on in an organised way (whether full time or only intermittent) with the purpose of obtaining profits or gains (whether or not they actually be obtained).²

The relevant provision under the Queensland legislation³ considered by the Information Commissioner mirrors clause 7(1)(c).

32. The courts in Victoria have also held that for the 'business affairs' exemption to apply, the information must relate to matters of business, commercial or financial nature, and 'not merely be derived from a business or concerning it or have some connection with it'.⁴
33. I adopt these views in considering the meaning of 'business affairs' under clause 7(1)(c). 'Professional', 'commercial' and 'financial affairs' should be given their ordinary dictionary meaning.
34. Having reviewed the documents, I agree that these documents contain matter concerning the business, commercial or financial affairs of the agency and interested parties, except for document 27.

Document 27

35. Document 27 contains quotes for supplying essential services to council allotments. This information does not appear to concern the agency's or any interested parties' business, professional, commercial or financial affairs. Also, it appears that the information can be easily obtained by any member of the public who contacts the

² *Stewart and Department of Transport* (1993) 1 QAR 227, [103].

³ Section 45(1)(c) of the *Freedom of Information Act 1992 (Qld)*.

⁴ *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441; The President's view regarding the interpretation of 'business affairs' was upheld on appeal to the Full Court of the Supreme Court (*Accident Compensation Commission v Croom* [1991] 2 VR 322).

relevant service provider. As the information fails the first test, document 27 cannot be exempt pursuant to clause 7(1)(c).

Submissions

36. The agency has not provided any submissions to support its claims for exemption. I remind the agency of its obligations under section 48 of the FOI Act.

Centrex's submissions

37. Centrex was consulted regarding documents 5, 9, 10, 12, 13B and 14.
38. Mr Steven Bonnett from Kelly & Co. Lawyers for Centrex, submits that:

...each document requested is of an internal and confidential nature and contains matter concerning the business and commercial affairs of Centrex:

...

Centrex is concerned that the disclosure of such documents could have an adverse effect on its business and commercial affairs given that they do not provide an overall context to the matters considered within them,

The selective disclosure of such information could lead to an incorrect impression of Centrex's existing and proposed developments in the Eyre Peninsula region. In line with clause 7(1)(c)(ii)(A) of Schedule 1 of the FOI Act, such an incorrect impression could reasonably be expected to have an adverse effect on Centrex's ongoing relationships with key stakeholders, including its joint venture partners, government agencies and community groups and therefore the business and commercial affairs the subject of the documents.

In addition and as required by clause 7(1)(c)(ii)(B) of Schedule 1 of the FOI Act, the creation of such an incorrect impression of Centrex's business and commercial affairs through the disclosure of the documents would, on balance, be contrary to the public interest. Centrex is an ASX-listed company and, as such, is subject to strict disclosure obligations to the market and the community more generally. These disclosure obligations arise under both the *Corporations Act 2001* (Cth) and the ASX Listing Rules and Centrex takes such obligations very seriously.

It is important, and consistent with Centrex's disclosure obligations, that information in relation to its affairs is disclosed in a full and comprehensive manner taking into account all information that it has to hand. If selective internal and confidential documents are disclosed to third parties, it could lead to inaccurate information being disclosed to the market and the community. Such inaccurate disclosures would clearly be contrary to the public interest.

...

39. In response to my provisional determination, Mr Bonnett submits that:

For the reasons set out in our letter of 16 July 2013 Centrex maintains its objection to the release to the Applicant of the documents numbered 5, 9, 13B and 14. Centrex also notes its objection to the release to the Applicant of the further documents numbered 10 and 12 on the same grounds as those set out in our letter of 16 July 2013.

Centrex stresses that the matters set out in those documents in relation to its affairs remain sensitive. It also reiterates that as a publicly listed company it manages disclosure of such information carefully so as to ensure that accurate information is provided to the entire market in accordance with its continuous disclosure requirements. Centrex requests that the Ombudsman respect that position.

40. Centrex has not provided me with any new submissions to persuade me that the documents are exempt. I have not changed my provisional view.

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41. I do not accept that the release of these documents could lead to an incorrect impression of Centrex's business interests in the Eyre Peninsula, which could then adversely affect its affairs. My reasons are:
- the documents are dated (2008 to 2012) and much of the information is already in the public domain (for example documents 5, 13B, 14, 34 and 49)
 - Centrex conducted widespread community consultation when these matters were being debated. No doubt Centrex will continue to do so as matters progress, thereby bringing the community including its stakeholders up to date
 - under its 'strict disclosure obligations' to the market and the community more generally, it will continue to disclose information in relation to its affairs - as these currently stand - 'in a full and comprehensive manner'.
42. I understand that disquiet already exists within a segment of the community and I therefore consider it unlikely that disclosure of the information would adversely affect the agency's or Centrex's affairs. A mining company such as Centrex would have experience in dealing with detractors. It would also be aware that transparency in its dealings, in this instance, through the release of these documents may address some of the applicant's concerns and others similarly concerned with Centrex's affairs in the region.
43. Further, if it sees fit, it is always open to Centrex to put out an information sheet to clarify its affairs in the region, thereby ensuring that the community has the correct impression and the whole context.
44. Even if I could be persuaded that disclosure of these document could reasonably be expected to have an adverse effect on the agency's or Centrex's affairs, I am not satisfied that disclosure would, on balance, be contrary to the public interest.
45. While the concept of 'the public interest' cannot be clearly defined, the current legal position is that the following factors are relevant:⁵
- the age of the document
 - the importance/significance/sensitivity of the issues discussed
 - the continuing relevance of the issues in relation to matters under consideration
 - the extent to which the subject matter of the documents is already in the public domain
 - fulfilling the objects of the FOI Act
 - whether disclosure would contribute to debate on a matter of public interest
 - whether disclosure would enhance scrutiny of government decision making processes and improve accountability and public participation.
46. Under the *Local Government Act 1999*, two of the principles to be observed by the agency in the performance of its roles and functions are:
- provide open, responsive and accountable government
 - be responsive to the needs, interests and aspirations of individuals and groups within its community.
47. Similarly, one of the objects of the FOI Act is 'to promote openness in government and accountability...'
48. Some of the reasons in favour of disclosure include:
- much of the information is already in the public domain

⁵ See *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* [1993] QICmr2 (30 June 1993); *Re Lianos and the Department of Social Security* (1985) 7ALD 475, *Re Hulls and Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- there is a public interest in the transparency and accountability of the agency's decisions and financial commitments - and this information may go some way in allaying a segment of the community's fears
 - release of the document would fulfil both the objects of the FOI Act as well as principles in the Local Government Act
 - disclosure would contribute to debate on a matter of public interest
 - disclosure would enhance scrutiny of the agency's decision making processes and improve accountability and public participation.
49. Further, as much of the information is already in the public domain, any disclosure of these documents cannot on balance be contrary to the public interest.
50. Further, in my view, 'an incorrect impression' which might confuse the public appears to be a rather patronising argument and underestimates the public's ability to appreciate the context of the documents.

RDAWEP's submissions

51. RDAWEP was consulted on documents 12 (considered earlier), 9, 10 and 11.
52. RDAWEP opposes the disclosure of documents 10, 11 and 12 on the basis that the information:
- ...is not and has not been in the public domain. It also contains information of a sensitive nature both for Government and a commercial company.
- ...may consist of facts and figures, which are either not entirely correct and/or is out of date and/or superseded/misleading information, in accordance with clause 7 of the FOI Act; Affecting Business Affairs.
53. I am satisfied that the information concerns RDAWEP's business or commercial affairs. However I am not satisfied that disclosure would have the deleterious effect set out in clause 7(1)(c). I do not consider that documents 10, 11 and 12 are exempt.
54. Based on all of the above, documents 5, 9, 10, 11, 12, 13B, 14, 27, 34, 49 and 56 are not exempt documents pursuant to clause 7(1)(c).

Sufficiency of search

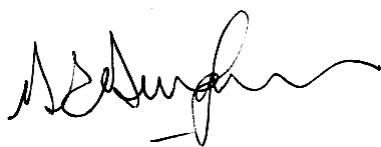
55. On 15 January 2014 my officer spoke with the applicant and asked:
- if she had any evidence of the existence of briefing notes or other documents that the agency had not provided
 - had she sighted such a document or if she held a copy of one.
56. The applicant did not have any evidence of the existence of any other documents, and could not provide me with any further information on this issue
57. On 16 January 2014 my officer spoke with the agency's FOI Officer in relation to the searches conducted in relation to the application for access.
58. The FOI Officer advised that:
- there are no briefing notes, however any reports to the council within the scope of the application which have not been identified, are already in the public domain
 - the agency does not have an 'electronic document record management system' so she:
 - physically searched the archives under the filing system which covered the period 1981 to 2004 and the period 2004 to 2006

- worked from the electronic spreadsheet which covers the period 2006 to date and physically searched the archives
- all documents for the period have been provided and the document schedule is in chronological order

59. On the basis of the information before me, my view is that the agency has conducted reasonable searches for information within the scope of the application and that there are no other documents.

Determination

60. In light of my views above, I vary the agency's determination.



Richard Bingham
SA OMBUDSMAN

13 May 2014

APPENDIX

Procedural steps

Date	Event
21/06/2013	The agency received the FOI application dated 20/06/2013.
01/08/2013	The agency determined the application.
27/08/2013	The agency received the internal review application dated 26/08/2013.
03/09/2013	The agency confirmed the determination.
21/10/2013	The Ombudsman received the applicant's request for external review dated 18/10/2013.
24/10/2013	The Ombudsman advised the agency of the external review and requested submissions and documentation.
18/11/2013	The agency provided the Ombudsman with its submissions and documentation.