

Determination

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

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| Applicant | Mr John Houlahan |
| Agency | Environment Protection Authority |
| Ombudsman reference | 2014/08985 |
| Agency reference | 05/21961 |
| 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:

All correspondence, including electronic, records of meetings and telephone conversations between: EPA and City of Onkaparinga, between EPA and Consultants, between EPA and developers regarding Bluewater Development, Sellicks Beach, sewage system and treated effluent/reclaimed water and the Sellicks Beach Waste Water Treatment Plant (formerly Prodec).

2. The applicant later amended the scope of his request to encompass only correspondence dating from 2009 onwards.¹

Background

3. For ease of reference, the procedural steps relating to the application 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 the agency's determination to the parties by my provisional determination dated 5 December 2016. I informed the parties that, subject to my receipt and consideration of submissions from the parties, I proposed to vary the agency's determination.

¹ Letter from agency dated 11 May 2016.

6. By letter dated 15 December 2016 the agency notified my Office that it did not wish to make any submissions in response to my provisional determination.
7. By email dated 23 December 2016 the council notified my Office that it disagreed with my provisional views. The council otherwise declined to make further submissions in response to my provisional determination.
8. The interested party with respect to documents **50, 73B, 75D** and **75E** notified my Office that it had no objections to the release of these documents to the applicant.²
9. By letter dated 21 December 2016 the interested party with respect to documents **30** and **51** notified my Office that it had no objections to the release of these documents to the applicant, provided information it considered to constitute the personal affairs of various company officers was redacted. I have addressed these submissions elsewhere in this determination.
10. By email dated 15 December 2016 the interested party with respect to documents **72** and **85** notified my Office that it objected to the release of these documents. This interested party submitted that the documents are exempt under clauses 7, 8 and 9 of Schedule 1 of the FOI Act and 'are the property of the City of Onkaparinga'.
11. In my provisional determination I found that documents **72** and **85** were not exempt by virtue of exemption clauses 7(1)(c) or 9(1). The interested party has not provided me with any information to alter my conclusions with respect to these documents. Although mindful of the interested party's position, I am not ultimately satisfied that disclosure of either document would be contrary to the public interest. I address the application of exemption clause 8(1) to both documents elsewhere in this determination.
12. The interested party with respect to document **91** did not provide a response to my provisional determination.
13. The applicant did not provide a response to my provisional determination.

Relevant law

14. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.³
15. 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.
16. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
17. 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.

² Telephone call dated 22 December 2016.

³ *Freedom of Information Act 1991*, section 12.

Documents in issue

18. The agency identified 117 documents (including attachments) within the scope of the application. Of these, it determined:
 - four documents were to be released in full to the applicant
 - 88 documents were to be released in part to the applicant
 - 25 documents were to be refused to the applicant.⁴
19. In determining to refuse access to many of these documents, the agency made reference to a then-pending District Court appeal concerning the applicant's request for documents from the City of Onkaparinga (**the council**). The agency submitted that it would be contrary to the public interest to release these documents 'outside of the court process'.
20. By letter dated 11 May 2016, and following the judgment in *City of Onkaparinga v Houlahan*, the agency advised that it had revised its position such that it no longer opposes the release of a number of documents. The agency submitted that it considers the documents within the scope of the applicant's request to fall within two broad categories:
 1. Those related to the City of Onkaparinga's (Council) notification to the EPA under section 83 of the *Environmental Protection Act 1993* and immediate issues and correspondence related to that notification.
 2. Subsequent correspondence related to the ongoing management of the site such as changes to licence conditions, annual returns, general site management and the management of complaints. While it was acknowledged that licence condition changes were instigated by the S83 notification, they do not specify details directly related to the circumstances surrounding the notification.
21. The agency submitted that it was no longer opposed to the release of any of the 22 documents falling within the first category.
22. With regard to the second category, the agency submitted:

Regarding the remaining 75 documents, the EPA would claim partial exemption from release for documents containing third party personal affairs (e.g. documents 88, 89, 97) and for documents containing Council's trade processes or financial information (e.g. 22A, 68, 72, 73A, 73B, 75A, 75C, 75F, 86, 87, 94A & 95).
23. Although not expressed as such, I interpret the documents identified by the agency in the preceding paragraph to be an exhaustive list of the documents the agency considers exempt (insofar as it appears to mirror the agency's application of these exemption clauses in its determination).⁵
24. The agency has provided my Office with evidence of consultation that it has undertaken with interested parties as required by the FOI Act.
25. By email dated 11 September 2014 the agency sought to consult with the Department for Health and Ageing (**DHA**) with regard to the release of certain documents. By email dated 19 September 2014 the DHA advised that it had no objections to the disclosure of these documents.

⁴ This is by my own count after reviewing the schedule provided to the applicant. The agency's letter to the applicant however claimed that one document was to be provided in full, 75 in part and 21 refused.

⁵ Although I note that the agency in its determination purported to apply clause 6(1) to a range of documents identifying individual council officers, I understand the agency's position to have changed with regard to this information.

26. By letter dated 4 July 2014, the agency sought to consult with the council with regard to all documents within the scope of the applicant's request. By letter dated 30 July 2014, the council indicated that it considered all documents to be exempt pursuant to Schedule 1 of the FOI Act. The council submitted that a range of exemption clauses variously applied to these documents.
27. Both the applicant and the council sought an internal review of the agency's determination. It appears that the agency did not make a determination at internal review. By operation of section 29(5) of the FOI Act the agency is therefore taken to have confirmed the determination.
28. By email dated 2 November 2016, my Officer queried the council's position with regard to the documents in light of the applicant's consent, expressed in a telephone consultation with my Office on 20 September 2016, to amend the scope of his application so as to exclude information within the documents tending to identify individual council officers.⁶
29. By email dated 17 November 2016, the council revised its position such that it no longer opposes the release of documents **1–5, 10, 14, 21, 25, 28, 29, 31–35, 37–39, 39B, 40, 42–44, 46, 52, 53, 55–57, 59–61, 64, 67, 69–72, 74–79, 81–84, 86–90, 93, 96** and **97** with information tending to identify individual council officers redacted and, in the case of many of these documents, subject to other proposed redactions. I set out the council's position with regard to these documents in the table below:

| Document No. | Description | Proposed redaction ⁷ | Exemption clause |
|--------------|----------------------|---|------------------|
| 39 | Email | Reference to a corporate entity | 6 |
| 39B | Email | Reference to a corporate entity and information tending to identify an officer of that corporate entity | 6 |
| 42 | Email | Reference to three corporate entities | 6 |
| 43 | Email | Reference to a corporate entity | 6 |
| 44 | Email | Reference to a corporate entity | 6 |
| 53 | Email | Reference to a corporate entity | 6 |
| 55 | Email | Reference to a corporate entity; phrase within parting line | 6 |
| 61 | Email | Reference to a corporate entity | 6 |
| 64 | Email | Reference to two corporate entities | 6 |
| 67 | Email and attachment | Reference to three corporate entities | 6 |
| 72 | Email and attachment | Reference to a corporate entity; financial information | 5,6,7,9,16 |
| 74 | Email | Reference to two corporate entities | 6 |
| 75 | Email | Reference to a corporate entity | 6 |
| 78 | Email | Reference to two corporate entities | 6 |
| 81 | Email | Reference to three corporate entities | 6 |
| 82 | Email | Reference to a corporate entity | 6 |
| 83 | Email | Reference to two corporate entities | 6 |
| 84 | Email | Reference to a corporate entity and information tending to identify two officers of that corporate entity | 6 |
| 86 | Email | Reference to a corporate entity; financial information | 4,5,6,7,9,15,16 |

⁶ Specifically, the applicant consented to exclude information tending to identify individual council officers, namely 'names, position titles, email addresses, phone numbers and other contact details' appearing within 'the body of the communication, any greetings, signature lines, and the sent/received data which appears throughout email trails and on letters'. This reflects terms originally proposed by the council, most recently in its letter dated 16 September 2016, with regard to a separate external review requested by the applicant and involving documents held by the DHA.

⁷ That is, in addition to information tending to identify individual council officers.

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| 87 | Email | Reference to a corporate entity | 6 |
| 88 | Email | Information identifying a complainant | 6 |
| 89 | Email | Reference to a corporate entity and information tending to identify an officer of that corporate entity; information identifying a complainant | 6 |
| 90 | Email | Reference to a corporate entity; information identifying a complainant | 6 |
| 96 | Email | Password details | 6 |
| 97 | Email | Reference to a corporate entity; information identifying a complainant | 6 |

30. The council indicated that it otherwise opposes the release of the remaining documents. I set out the council's position with regard to these documents in the table below:

| Document No. | Description | Specific comments | Exemption clause |
|--------------|-------------------------------|---|------------------|
| 6 | Email and attachment | 'Attachment is internal working document' | 5,6,7,9,13 |
| 7 | Telephone conversation record | NA | 5,6 |
| 8 | Telephone conversation record | NA | 5,6 |
| 9 | Email | Clause 5 - 'harm relations' ⁸ | 5,6 |
| 11 | Email and attachment | NA | 5,6,7,9 |
| 12 | Email | NA | 4,5,6,9,13 |
| 13 | Email and attachment | NA | 4,5,6 |
| 15 | Email and attachment | NA | 5,6,7,9,13 |
| 16 | Email and attachment | NA | 5,6,7,9 |
| 17 | Email | NA | 5,6,7,9 |
| 18 | Email and attachment | NA | 4,5,6,7,9,13 |
| 19 | Email and attachment | NA | 4,5,6,9,16 |
| 20 | Email | NA | 5,6,9 |
| 22 | Letter | 'Letter contains private residents [sic] personal details & third parties [sic]' | 6,7,9,13,16 |
| 22A | Report | 'Third party report' | 4,5,13,16 |
| 22B | Letter | 'Third party report' | 4,5,13 |
| 22C | Table | 'EIP now publicly available, nothing to be gained' | 4,5,13 |
| 22D | Table | NA | 4,5,9,13 |
| 23 | Email and attachment | NA | 4,5,6 |
| 24 | Letter | NA | 4,5,6,13,16 |
| 26 | Email | NA | 4,5,6,9 |
| 27 | Email | NA | 4,5,6,9 |
| 30 | Email and attachment | 'Contains information that is of confidence to Council. There is public interest to know the plan exists however the release of the | 4,5,6,7,9 |

⁸ Out of an abundance of caution I have omitted another comment made by the council which discloses contents of this document.

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| | | Plan creates a risk to Council & [a corporation]' | |
| 36 | Email | NA | 5,6,9 |
| 39A | Report | 'Only release if publically available otherwise we object to the release' | 5,6,7,13 |
| 41 | Email | NA | 4,5,6,7,13 |
| 41A | Report | NA | 4,5,7,13 |
| 41B | Report | NA | 4,5,7,13 |
| 41C | Report | NA | 4,5,7,13 |
| 41D | Report | NA | 4,5,7,13 |
| 45 | Email and attachment | 'Third party report subject to copyright' | 5,6,13 |
| 47 | Email | NA | 5,6,9 |
| 48 | Email and attachment | NA | 4,5,6 |
| 49 | Email | NA | 5,6,9 |
| 50 | Email and attachment | NA | 5,6,7,13 |
| 51 | Email and attachment | 'Draft historical document not endorsed by Council' | 4,5,6,7,9,15,16 |
| 54 | Email | NA | 5,6,9 |
| 58 | Email and attachment | NA | 5,6,7,9 |
| 62 | Letter | NA | 5,6,9,13,16 |
| 63 | Email and attachment | 'EIP is unsigned & undated. Final document would be publicly available' | 6,9 |
| 65 | Email and attachment | 'EIP is unsigned & undated. Final document would be publicly available' | 6,9 |
| 66 | Email | 'EIP is unsigned & undated. Final document would be publicly available' | 6,9 |
| 68 | Email and attachment | 'Monitoring plan is in draft' | 5,6,9 |
| 73 | Email | NA | 5,6,7 |
| 73A | Report | 'Document is unsigned & undated' | 5,7,9,13,16 |
| 73B | Report | 'Third party report subject to copyright' | 5,7,9,13,16 |
| 75A | Plan | 'Document is a draft & not endorsed by Council' | 9 |
| 75B | Procedure | NA | 9 |
| 75C | Report | NA | 7,9,13,16 |
| 75D | Report | NA | 7,9,13,16 |
| 75E | Simulation | NA | 7,9,13,16 |
| 75F | Plan | NA | 7,9,13,16 |
| 80 | Email and attachment | NA | 6,9 |
| 85 | Email and attachment | 'Third party document subject to copyright' | 5,6,7,9,15,16 |
| 91 | Email and attachment | NA | 4,5,6,7,9 |
| 92 | Email | NA | 4,5,6,7,9 |
| 94 | Email | 'Draft document not endorsed by Council' | 6,9 |
| 94A | Plan | 'Noting that the document is a draft & not endorsed by Council' | 4,5,6,9,16 |
| 94B | Report | 'Third party document subject to copyright' | 4,5,6,9,16 |
| 94C | Report | 'Third party document subject to | 4,5,6,9,16 |

| | | | |
|----|----------------------|---|----------|
| | | copyright' | |
| 95 | Email and attachment | 'Noting that the document is a draft & not endorsed by Council' | 4,5,6,16 |

Issues in this review

31. At external review I am ordinarily required to determine whether or not an agency has been justified in its determination to release or refuse access to documents.
32. The circumstances of the present external review are somewhat different. The agency has revised its position such that it no longer opposes the release of many of the documents in full to the applicant.
33. Moreover, many of the exemption clauses claimed by the council are not such that would ordinarily attract a requirement on the part of an agency to consult with an interested party such as the council under the FOI Act.
34. Notwithstanding these issues and the agency's present position, I consider it appropriate in my external review to consider the full range of the council's submissions insofar as they relate to the documents at issue.

Consideration

The applicant

35. The applicant has submitted that there is a strong public interest in release of the documents in full. In this regard, the applicant points to the significant cost to ratepayers arising out of an incident involving the Sellicks Beach Community Wastewater Management Scheme and the need to determine the degree of culpability on the part of the council and other parties in regard to this incident.
36. The applicant has advised that, as a resident within the council area, he has been further impacted by the Sellicks Beach incident insofar as it resulted in burden-sharing amongst the various Septic Tank Effluent Disposal Schemes within the region.
37. The applicant has further advised that he is in the process of preparing an in-depth report on the Sellicks Beach incident and associated response efforts. He has submitted that the documents at issue are likely to be of utility in preparing this report.
38. The applicant made detailed submissions to the agency at internal review. Many of these submissions related to the impact of the then-pending District Court appeal concerning the applicant and the council. The applicant otherwise submitted that to the extent that various exemption clauses might apply to some of the documents, release of these documents would not, on balance, be contrary to the public interest.

The agency

39. I have set out the agency's position earlier in this determination.
40. With regard to the information the agency maintains is exempt, I understand the agency to be relying upon exemption clause 6(1) (personal affairs) and exemption clause 12(1) (documents the subject of secrecy provisions).

41. With regard to the latter clause, the agency has submitted that information pertaining to the council's 'trade processes or financial information' was obtained in the administration or enforcement of the *Environment Protection Act 1993*. The agency has submitted that release of this information absent the council's consent would constitute a breach of section 121 of that Act.⁹
42. The agency's letter to my Office dated 11 May 2016 suggests that it considers exemption clause 6(1) to apply to documents **88, 89** and **97** and exemption clause 12(1) to apply to information within documents **22A, 68, 72, 73A, 73B, 75A, 75C, 75F, 86, 87, 94A** and **95**.

The council

43. The council, by letter dated 30 July 2014, provided lengthy submissions to the agency. These submissions have been supplemented by submissions made to my Office on 6 May 2016¹⁰ and 17 November 2016. Although I consider the council's present position to be reflected in its email dated 17 November 2016, I make it clear that I have considered the full range of the council's submissions expressed over the course of this matter.
44. The council has submitted that exemption clauses 4, 5, 6, 7, 9, 13, 15 and 16 variously apply to the documents at issue. For the most part, the council has not identified which exemption subclauses are said to apply or which specific information within the documents the council considers exempt. This has made my external review more difficult than it otherwise would need to be.

Consideration

45. I first turn to the exemption clauses claimed by the agency.

Clause 6(1)

46. Both the agency and the council have submitted that exemption clause 6(1) applies to various documents within the scope of the applicant's request. As the applicant has agreed to amend the scope of his request so as to exclude information tending to identify individual council officers, I need only consider this exemption clause insofar as it may apply to other individuals.
47. Clause 6(1) of Schedule 1 of the FOI Act 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).
48. For information to be exempt pursuant to clause 6(1) of Schedule 1 of the FOI Act, the information must concern the personal affairs of someone other than the applicant and it must be unreasonable to release it.

⁹ Agency determination (as provided to applicant) dated 23 September 2014, attached table.

¹⁰ These submissions were made with regard to a separate external review requested by the applicant and involving documents held by the DHA. By letter dated 30 June 2016 the council confirmed its position that these submissions apply to the documents the subject of the present external review.

49. The term 'personal affairs' is defined in section 4(1) of the FOI Act, although the definition is not exhaustive. The term has been held to involve 'matters of private concern to an individual'¹¹ and the 'composite collection of activities personal to the individual concerned'.¹²
50. Both the council and the agency have submitted that information within documents **88**, **89** and **97** is exempt pursuant to clause 6(1) insofar as these documents tend to disclose the identity of a complainant. The council has correctly observed that document **90** also appears to refer to this person.
51. I observe that these documents variously include the name of the complainant (a member of the public) as well as that person's address, telephone number, the substance of the complaint and the various efforts of the council and the agency to respond to the complaint.
52. Having reviewed these documents, I am satisfied that the following information constitutes the personal affairs of an individual other than the applicant:
- the name of the complainant
 - their address
 - their telephone number
 - information identifying a family member of the complainant.
53. In addition to the above information, the agency appears to have redacted all references to the complainant's gender (and that of the complainant's family member) where this appears within the documents. I do not consider this information to amount to the personal affairs of the complainant or the complainant's family member, nor do I consider this information identifies the complainant or their family member so as to otherwise reveal their personal affairs.
54. In deciding whether disclosure of the information would be unreasonable, I must give consideration to all the circumstances, including:
- the nature of the information that would be disclosed
 - the circumstances in which the information was obtained
 - the likelihood of the information being information that the person concerned would not wish to have disclosed without consent
 - whether the information has any current relevance.¹³
55. In addition, unreasonableness has 'at its core, public interest considerations',¹⁴ such as the protection of personal privacy (the FOI Act generally does not restrict the use of information once it is released), the objects of the legislation being satisfied and ensuring transparency and accountability within representative government.
56. In all the circumstances, I am satisfied that it would be unreasonable to disclose the information I have identified in paragraph 52 of this determination. I am satisfied that the information is clearly of a kind the complainant (and/or the complainant's family member) would not want disclosed absent their consent. I consider the public interest in members of the public being able to privately make complaints of this sort to be of paramount importance in the circumstances.
57. I otherwise vary the agency's determination with respect to documents **88**, **89**, **90** and **97** so as to release information identifying the gender of both the complainant and their family member where this appears within the documents.

¹¹ *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.

¹² *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606 at 625.

¹³ *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALD N257 at 259.

¹⁴ *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429 per Lockhart J at 438.

58. With regard to documents **39, 39B, 42–44, 53, 55, 61, 64, 67, 72, 74, 75, 78, 81–84, 86, 87, 89, 90** and **97**, the council has submitted that information within these documents tending to identify one or more of five named corporate entities is also exempt pursuant to clause 6(1).
59. From the outset, I note that several of the documents specifically identified by the council (e.g. documents **44, 75** and **82**) do not appear to contain any reference to the corporate entities identified in the council's submissions. It is therefore quite beyond me what information (if any) the council purports to be exempt pursuant to clause 6(1) within these documents.
60. As I have already observed, section 4(1) provides a non-exhaustive list of the various matters which may amount to the personal affairs of an individual. Section 4(1) also makes it clear that the term 'personal affairs' is not to be taken to include 'the personal affairs of a body corporate'. I am therefore not satisfied that the information at issue is exempt (or ever could be exempt) pursuant to clause 6(1).
61. Although unnecessary at this point, I observe that information linking all five of the corporate entities identified by the council to works commissioned by the council and/or arising out of the Sellicks Beach incident already appears to be well within the public domain¹⁵ (in some cases on the website of the company itself). It is difficult therefore to see just how I could be satisfied that disclosure of this information would be unreasonable. The council does not appear to have addressed this requirement in its submissions.
62. With regard to documents **39B, 84** and **89**, the council has submitted that information tending to identify officers of these corporate entities is also exempt by virtue of clause 6(1). The council has submitted that, per the judgment in *City of Onkaparinga v Houlahan* [2015] SADC 91, 'all names, position titles, email addresses, phone numbers and other contact details must be redacted' wherever they may appear within these documents.
63. In this regard, I note the observations of Kirby P in *Commissioner of Police v District Court of New South Wales*:

[I]t cannot properly be said that the disclosure of the names of police officers and employees involved in the preparation of reports within the New South Wales police can be classified as disclosing information concerning their personal affairs. The preparation of the reports apparently occurred in the course of the performance of their police duties. What would then be disclosed is no more than the identity of officers and employees of an agency performing such duties. As such, there would appear to be nothing personal to the officers concerned. Nor should there be. It is quite different if personnel records, private relationships, health reports or (perhaps) private addresses would be disclosed. Such information would attract the exemption. But the name of an officer or employee doing no more than the apparent duties of that person could not properly be classified as information concerning the "personal affairs" of that person. The affairs disclosed are not that person's affairs but the affairs of the agency.¹⁶

64. Although Kirby P's observations in the preceding paragraph specifically refer to acts done by public officers in the performance of their duties, I consider these comments to be relevant in considering the application of the personal affairs exemption to information tending to identify other persons carrying out activities in the ordinary course of their employment.

¹⁵ See, e.g. Investigation Report in the matter of 2012/06102, Ombudsman SA, 30 September 2013 available at <<http://www.ombudsman.sa.gov.au/wp-content/uploads/City-of-Onkaparinga-Alleged-inadequate-management-of-waste-water-managing-scheme.pdf>> last accessed 24 November 2016.

¹⁶ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606 at 625.

65. As acknowledged in *Treglown v SA Police*, there may be circumstances where information of this kind may constitute the personal affairs of an individual notwithstanding its connection to that person's employment:

It appears to me that there is a marked distinction between the identity of and materials gathered by police officers carrying out an external investigation and reporting in the ordinary course of their duties and the identity of SAPOL members and the contents of statements and opinions proffered by them in the context of an internal police investigation into an applicant's conduct, the more so where the investigation is one of alleged bullying behaviour by an applicant of superior rank.

In the latter case, further and important considerations arise, including the sensitivity of the material, the possibility that disclosure might relate to the performance of a complainant in his workplace, although ordinarily that ought not be so; that it may involve opinions; that an officer is obliged under s 38 of the Police Act to report suspected breaches of the Code; that an officer can be directed to truthfully answer questions relating to internal investigations and any refusal or false statement may result in disciplinary proceedings (ss 25(5), 25(8) and 25(8a) of the PCDP Act); and that a member of the IIB may be constrained from revealing anything about the enquiry (s 25(3a) of PCDP Act). There is, as well, the impact of the mandatory provisions of the EDM relating to confidentiality. Finally, there are ordinary considerations as to confidentiality that do not apply to external police investigations.

In the ordinary course, information as to a person's work performance or capacity is not of itself to be regarded as the personal affairs of that person but that is not to say that it may not in a particular context or when coupled with other material be such nor that its disclosure would in some circumstances be unreasonable, nor that an expression of an opinion might not be a personal affair.¹⁷

66. I do not consider the conclusions expressed by Slattery DCJ in *City of Onkaparinga v Houlahan* to substantially depart from these observations. While it is correct that in those proceedings His Honour ultimately determined information tending to identify individual officers of the council to be exempt by virtue of clause 6(1), this occurred within the rather unique circumstances of that matter. As His Honour observed, the information at issue appeared within the context of somewhat critical statements and allegations made against (or with the potential to relate to) officers of the council in circumstances where those officers had not been afforded adequate opportunity to respond.¹⁸
67. I do not consider the information identified by the council in the present external review to be of a similar nature. It would appear to me that the individual officers of the corporate entities identified in the documents are named within rather routine correspondence concerning those entities, the council and the agency. There certainly appear to be no aspersions cast, either outright or implied, against the character or performance of any of these persons.
68. I do not consider the information at issue to constitute the personal affairs of the individuals named in these documents. Accordingly, I am not satisfied that this information is exempt for the purposes of clause 6(1) of Schedule 1.
69. Although unnecessary at this point, I observe that even if I were satisfied that this information did constitute the personal affairs of the persons named, I am not satisfied that it would be unreasonable to disclose this information in all the circumstances. In this regard, I note that three of the four individuals named appear to declare their current or previous employment with the entities in question in their public *LinkedIn* profiles.

¹⁷ *Treglown v SA Police* [2011] SADC 139 at [139] (citations omitted).

¹⁸ *City of Onkaparinga v Houlahan* [2015] SADC 91 at [105].

70. The council has submitted that a phrase appearing within document **55** is exempt insofar as the council considers that it amounts to the personal affairs of an individual. Simply put, I cannot fathom how the council has arrived at this conclusion (or indeed how the council could consider the disclosure of this phrase to be unreasonable in all the circumstances). I do not consider this information to amount to the personal affairs of a person and I am not satisfied that this information is exempt pursuant to clause 6(1).
71. The council has submitted that information within document **96** is exempt insofar as it identifies a username and password provided by the agency to the council to facilitate the council's submission of an annual return to the agency in accordance with its licence conditions. The council has submitted that this information is exempt pursuant to clause 6(1).
72. In its determination the agency appears to have determined this information to be exempt pursuant to clause 13(1) (documents containing confidential material).
73. With respect to both the council and the agency, I do not consider either of these exemption clauses to apply to the information at issue.
74. I note that the login details appear to have been provided by the agency to the council to facilitate the council's compliance with its obligations to the agency. The login and password appear to be sufficiently generic so as not to suggest that it has been purpose-made for an individual officer (and even then, I do not consider this would necessarily constitute that officer's personal affairs).
75. I observe that clause 13(1) requires that disclosure of the information at issue 'might reasonably be expected to prejudice the future supply of *such information* to the Government or to an agency' (emphasis added). Although I suppose that disclosure of the login credentials could reasonably be expected to jeopardise the agency's future supply of such credentials to other parties, in my view, the information is more appropriately exempt pursuant to clause 16(1)(iv). In this regard, I consider disclosure of the login credentials could reasonably be expected to have a substantial adverse effect on the effective performance by the agency of its functions and would, on balance, be contrary to the public interest.
76. The council in its most recent submissions has otherwise suggested that exemption clause 6(1) applies to information within documents **6–9, 11–13, 15–20, 22–24, 26, 27, 30, 36, 39A, 41, 45, 47–51, 54, 58, 62, 63, 65, 66, 68, 73, 80, 85, 91, 92, 94, 94A, 94B, 94C and 95**.¹⁹ With one exception, the council has not identified which information within these documents it considers exempt or why.²⁰
77. The interested party with respect to documents **30** and **51** has identified information within these documents which it considers to concern the personal affairs of its staff and other officers. In both cases, this information constitutes a table that discloses the name, position and contact details of various individuals employed by the interested party (and, in the case of document **51**, other entities such as the agency).
78. Consistent with the observations I have expressed in paragraphs 63 to 67 of this determination, I am not satisfied that the names, position titles or institutional contact details where they appear within the two subject tables constitute the personal affairs of the various persons identified.

¹⁹ I have omitted from this list the documents the release of which the council does not oppose.

²⁰ It may be that the council was intending to reiterate its position that information tending to identify individual council officers within these documents is exempt by virtue of this clause. I do not think this was necessary in light of the applicant's agreement to revise the scope of his application.

79. On balance, I am satisfied that the mobile telephone numbers identified in the two subject tables concern the personal affairs of the persons identified. Although not made expressly clear from the submissions of the interested party, I infer that these mobile telephone numbers may be used by the interested party's staff interchangeably for business and personal purposes.
80. Noting the interested party's objections to release of this information and the lack of any compelling public interest reason in favour of disclosure, I am satisfied that it would be unreasonable to release these mobile telephone numbers to the applicant.
81. I have reviewed each of the remaining documents identified by the council and I am satisfied that they do not contain information constituting the personal affairs of a person other than the applicant (noting in this regard my observations in paragraphs 62 to 69 of this determination). I observe that document **22** appears to disclose the identity of an individual lodging a complaint on behalf of the Onkaparinga Residents Association. I note that the description of the complaint itself appears to relate to a matter of general community concern (as opposed to a matter of private concern to an individual or a limited class of persons). I do not consider this information to be the personal affairs of the individual in question and I am accordingly not satisfied that this document is exempt pursuant to clause 6(1).

Clause 12(1)

82. The agency has submitted that exemption clause 12(1) applies to documents **22A, 68, 72, 73A, 73B, 75A, 75C, 75F, 86, 87, 94A** and **95**.
83. Clause 12(1) provides:

12–Documents the subject of secrecy provisions

- (1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act.

84. The agency has submitted that release of information within the documents at issue concerning the council's 'trade processes or financial information' would constitute an offence under section 121 of the Environment Protection Act.

85. Section 121 of the Environment Protection Act provides:

121–Confidentiality

A person must not divulge any information relating to trade processes or financial information obtained (whether by that person or some other person) in the administration or enforcement of this Act except—

- (a) as authorised by or under this Act; or
- (b) with the consent of the person from whom the information was obtained or to whom the information relates; or
- (c) in connection with the administration or enforcement of this Act; or
- (d) for the purpose of any legal proceedings arising out of the administration or enforcement of this Act.

Penalty: Division 5 fine.

86. I am satisfied that the documents set out in paragraph 82 are exempt under clause 12(1) of Schedule 1 of the FOI Act if their release to the applicant would be contrary to section 121 of the Environment Protection Act.
87. For exemption clause 12(1) to apply in the circumstances, I need to be satisfied that the documents at issue contain information 'relating to trade processes or financial information obtained [...] in the administration or enforcement' of the Environment Protection Act.
88. Document **22A** is an Audit and Asset Revaluation commissioned by the council. I am satisfied that information within this document relates to the financial information of the council, specifically:
- all dollar values (including unit pricing) appearing on pages 4, 5, 16, 17, 18, 19, 20, 21 and 22
 - the percentage figures appearing on page 22
 - all information within Attachment 1.
89. I am satisfied that information within the attachment to document **72** relates to the financial affairs of the council, specifically:
- the fee estimates provided on page 2
 - the rates per hour provided in Table 1
 - all information within Attachment 1.²¹
90. I am satisfied that dollar values appearing on pages 2 and 3 of documents **73A** and **75C** relate to the financial affairs of the council.
91. I am satisfied that the dollar values appearing on pages 5 and 6 of document **73B** relate to the financial affairs of the council.
92. I am satisfied that a sentence appearing in documents **86** and **87**, referring to 'financial implications', relates to the financial affairs of the council.
93. I am unable to identify any information relating to the council's trade processes or financial information within documents **68**, **75A**, **75F**, **94A** and **95**.
94. Although not raised by the agency, I am satisfied that the dollar values appearing on pages 5 and 6 of document **75D** relate to the financial affairs of the council.
95. I am satisfied that the information identified above was obtained by the agency in the course of its administration and/or enforcement of the Environment Protection Act. I am satisfied that release of this information to the applicant would not be authorised by section 121. I am accordingly satisfied that exemption clause 12(1) applies to information within documents **22A**, **72**, **73A**, **73B**, **75C**, **75D**, **86** and **87**. I consider it practicable for the agency to release these documents to the applicant with exempt material deleted.

Clause 4(2)

96. The council has submitted that exemption clause 4(2) applies to information within documents **12**, **13**, **18**, **19**, **22A**, **22B**, **22C**, **22D**, **23**, **24**, **26**, **27**, **30**, **41**, **41A**, **41B**, **41C**, **41D**, **48**, **51**, **86**, **91**, **92**, **94A**, **94B**, **94C** and **95**.

²¹ Although this information appears within the context of a quote provided to the council, I am satisfied that this information nonetheless 'relates to' the financial information of the council, as it appears the council went on to engage this contractor on same or similar terms.

97. The council has not identified which subclause it considers applies to information within each of these documents, nor has it identified which information within these documents it considers to be exempt by virtue of this clause.

98. The council has nonetheless provided my Office with a 'standard comment' for documents to which it considers clause 4(2) to apply:

Where this clause is ascribed to a document [...] it means that all or a combination of clauses 4(2)(a)(i) - (iv) are enlivened, in that the document contains information the release of which could prejudice the ongoing oversight by the Department [sic] of the wastewater facility, to the detriment of the public interest.

99. I do not consider these submissions to be of much assistance in understanding the council's position with respect to these documents.

100. I observe that clause 4(2) of Schedule 1 provides:

4—Documents affecting law enforcement and public safety

[...]

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

(a) could reasonably be expected—

- (i) to prejudice the investigation of any contravention or possible contravention of the law (including any revenue law) whether generally or in a particular case; or
- (ii) to enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be ascertained; or
- (iii) to prejudice the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law (including any revenue law); or
- (iv) to prejudice the maintenance or enforcement of any lawful method or procedure for protecting public safety; or
- (v) to endanger the security of any building, structure or vehicle; or
- (vi) to prejudice any system or procedure for the protection of persons or property; and

(b) would, on balance, be contrary to the public interest.

101. In its correspondence with the agency, the council submitted that clause 4(2)(a)(i) 'would clearly apply to ongoing investigations but would also apply here as the licence is still operational and any previous actions may affect future monitoring.' The council further submitted that clause 4(2)(a)(iii) 'is broader and deals with material which, if released, would prejudice the ability to detect contraventions' and would 'clearly [encompass] ongoing EPA monitoring.'

102. In this same correspondence, the council submitted that clause 4(2)(a)(ii) is of 'vital significance' insofar as it 'applies to any email which "enables the existence or identity of council staff to be "ascertained".'

103. The council otherwise submitted to the agency that it considers clause 4(2)(a)(iv) to apply to the documents at issue.

104. I have reviewed each of the documents identified by the council. I observe that the majority of these documents contain correspondence between the agency and the council following the council's section 83 notification relating to the Sellicks Beach

incident. In the course of this correspondence the agency sometimes makes comments that are variously critical and complimentary of the council's activities. The remaining documents appear to be draft management plans, consultants' reports and associated material forwarded by the council to the agency in the course of its efforts to respond to the agency's various directions.

105. I note that the majority judgment in *Attorney-General's Department v Cockcroft* [1986] FCA 35 observed that the words 'could reasonably be expected to' are to be given their ordinary meaning. That is, 'they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous.'²² Sheppard J, in a separate concurring opinion, observed:

I do not myself feel able to derive from the presence of the word "reasonably" in the relevant expression a great deal of assistance. The difficulty is to give full weight to the meaning of the word "expected". It is only then that one can turn one's mind to the question of the significance of the qualification of it by the word "reasonably". The words are expressed in the passive voice - "could reasonably be expected". What is required is that the decision-maker act reasonably. For the document to be exempt his conduct must be taken to be that of the reasonable man. But then comes the difficulty. So acting, the decision-maker must expect that disclosure of the document could prejudice the future supply of information. In my opinion he will not be justified in claiming exemption unless, at the time the decision is made, he has real and substantial grounds for thinking that the production of the document could prejudice that supply. But, stringent though that test may be, it does not go so far as to require the decision-maker to be satisfied upon a balance of probabilities that the production of the document will in fact prejudice the future supply of information.²³

106. I consider it to be of particular significance that the agency itself no longer appears to be of the view that disclosure of any of the documents could reasonably be expected to prejudice its enforcement of the Environment Protection Act or the associated regulatory framework. I imagine that the agency is in the best position to assess the potential impact of disclosure upon its own operations.
107. I also consider it significant that the agency's investigation into the Sellicks Beach incident appears to have long concluded. Having reviewed the documents at issue, I do not consider that disclosure of their contents could reasonably be expected to prejudice the agency's ongoing monitoring of the council's compliance with its licence conditions or its future investigations into suspected contraventions of this or other environmental authorisations. It does not appear to me that the documents at issue reveal anything that could be considered particularly sensitive to the agency's investigations and compliance monitoring, generally speaking.
108. While I accept that these documents were produced in the course of the agency's attempts to investigate and deal with various possible breaches of the Environment Protection Act and the *Environment Protection (Water Quality) Policy 2003* (as identified in the agency's 'show cause' notice to the council within document **13**), I am not satisfied that disclosure of these documents could reasonably be expected to either:
- prejudice the investigation of a contravention or possible contravention of the law, either generally or in this particular case
 - prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention of the law
 - prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety.

²² *Attorney-General's Department v Cockcroft* [1986] FCA 35 at [29] (per the majority).

²³ *Attorney-General's Department v Cockcroft* [1986] FCA 35 at [12] (per Sheppard J).

109. Although unnecessary in light of the applicant's agreement to amend the scope of his request to the agency, I make it clear that I do not agree with the council's position that disclosure of information tending to identify its individual officers would reveal the identity of a 'confidential source of information' within a manner contemplated by clause 4(2)(a)(ii).
110. In light of the above, I am not satisfied that any of the documents at issue are exempt by virtue of clause 4(2).

Clause 5(1)

111. The council has submitted that exemption clause 5(1) applies to information within documents 6–9, 11–13, 15–20, 22A, 22B, 22C, 22D, 23, 24, 26, 27, 30, 36, 39A, 41, 41A, 41B, 41C, 41D, 45, 47–51, 54, 58, 62, 68, 72, 73, 73A, 73B, 85, 86, 91, 92, 94A, 94B, 94C and 95.

112. 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.

113. The council's 'standard comment' with regard to these documents states:

The document contains information disclosed in confidence between government authorities, and release of that information could negatively impact upon frank dealings between Local Government and State Government on matters of public health, to the detriment of the public interest.

114. In support of its position, the council seeks to rely upon various authorities provided to the agency in its submissions dated 30 July 2014.²⁴ These authorities are *Arnold (on behalf of Australians for Animals) v Queensland & Anor* (1987) 73 ALR 607 (**Arnold**); *Guy v the Department of Transport* (1987) 12 ALD 358 (**Guy**); *Re Shopping Centre Council of Australia and Australian Competition & Consumer Commission* (2004) 78 ALD 494; and *Ravlich v Department of Productivity and Labour Relations* [2000] WAICmr 58 (**Ravlich**).

115. With respect to these authorities, the council has submitted:
- *Arnold*, insofar as it considers the operation of a similar provision within the *Freedom of Information Act 1982* (Cth), establishes that documents are 'excluded' (which I take to mean exempt) in circumstances where they have been provided in confidence
 - *Guy* and *Ravlich*, considering the Commonwealth Act and the *Freedom of Information Act 1992* (WA) respectively, establish that documents in the normal course are to be 'excluded' where one of the parties to the correspondence 'strongly opposes their release'. That is, in the absence of an 'overwhelming' public

²⁴ The council in fact refers to its '15 October 2014 response letter', however I note that this was provided to the DHA in a separate but related matter. I take the council to be referring to its 30 July 2014 letter to the agency (the substance of which is in any case very similar to its later letter to the DHA).

interest in favour of disclosure, release in the face of strong opposition on the part of the council would damage intergovernmental relations.

- *Guy* and *Ravlich* establish that, where the release of documents is opposed by an interested person, the documents 'can only be released if it is in the public interest to do so', which is 'not a discretionary decision, but is an assessment of fact.'

116. The council has submitted that in the present case it opposes release of the documents 'to the threshold required' by *Guy* and *Ravlich*.

117. I have considered these authorities in a separate external review concerning documents held by the DHA and involving both the applicant and the council. For the benefit of the agency, I restate my observations below.

118. The council has submitted that, per *Guy* and *Ravlich*, I can be satisfied that disclosure of the documents at issue could reasonably be expected to cause damage to intergovernmental relations by virtue of the council's strong objections to the release of these documents.

119. In *Guy*, the Administrative Appeals Tribunal (AAT) considered the decision of an agency under the Commonwealth Act to refuse access to a document that had been provided by a State agency to an agency of the Commonwealth. At [14], the Deputy President of the AAT observed:

It would not, in my view, be an exaggeration to say that the relationship between the units of a Federation can be quite as complex and difficult as that between nation states, and that trust and confidence are vital to the nourishment of bodies like the [Australian Motor Vehicle Certification Board] which are examples of Federal/State relationships based on mutual co-operation and not merely on the assertion of legislative power.

It follows that I consider that a disclosure of the [document] against the wishes of the Government of Queensland could reasonably be expected to cause damage to relations between the Commonwealth and the State of Queensland.

120. I observe that in reaching this conclusion the AAT was informed by evidence adduced by the State agency that disclosure would lead to a reluctance on that agency's part to provide information of a similar nature to its Federal counterpart in the future.

121. In *Ravlich*, the Office of the Information Commissioner (WA), considering the application of the Western Australian Act, concurred with the conclusion of the AAT in *Guy*. The Commissioner observed, referring in part to submissions from one agency as to the effect disclosure would likely have on future communications between the agencies, that the reasonableness of the objections to disclosure expressed by that party was not relevant in assessing the likely impact of disclosure.²⁵ That is, an agency's strong objections to disclosure, however irrational the views underpinning those objections may be, must be considered in assessing whether disclosure could reasonably be expected to damage intergovernmental relations.

122. I accept that the council staunchly opposes the release of the information at issue to the applicant and that the council has formed the view that disclosure of that information will necessarily impact upon the nature and content of the council's future dealings with this and other agencies.

123. I have considered the decisions in *Guy* and *Ravlich* insofar as they may be of persuasive value in my interpretation of the standard applicable in this jurisdiction. I have also considered the decision in *Arnold*, where Burchett J observed of the Commonwealth legislation:

²⁵ *Ravlich* at [22].

A feature of the drafting of para. (a) of s.33A(1) is that it does not require a finding that disclosure would cause damage to relations between the Commonwealth and a State. It provides the alternative: "or could reasonably be expected to cause (such) damage". It is now established that this does not require a probability, though a possibility which fails to reach the level of probability must be sufficiently tangible to answer to the notion of a reasonable capacity to be expected.²⁶

124. In my view, the objection of an interested party to disclosure cannot be determinative, in and of itself, of whether disclosure could reasonably be expected to damage relations between that party and an agency. That is, per *Arnold*, that there must at least be some tangible possibility of the damage advanced.²⁷
125. Taking into account the council's opposition to disclosure of the documents at issue, a position it has resolutely expressed and maintained over the course of several years, I am ultimately satisfied that there is a possibility in the present case (albeit somewhat remote) that disclosure of information within the documents could reasonably be expected to damage the relationship between the council and the agency. I am accordingly satisfied that disclosure of the documents could reasonably be expected to cause damage to intergovernmental relations within the meaning of clause 5(1)(a)(i).
126. The council in its submissions to the agency made further arguments as to the application of clause 5(1)(a)(ii). I do not consider it necessary to consider these arguments in light of my finding above.
127. Having found that disclosure of the documents could reasonably be expected to cause damage to intergovernmental relations; it next falls upon me to consider whether disclosure of the documents would, on balance, be contrary to the public interest.
128. In this regard, the council has submitted that *Guy* and *Ravlich* establish that, where disclosure of a document relating to intergovernmental communications is opposed by the agency or an interested party, 'the documents can only be released if it is in the public interest to do so.'
129. With all respect to the council, insofar as these decisions might be of persuasive value within this jurisdiction, *Guy* and *Ravlich* establish no such thing. The Commonwealth Act as it existed at the time of *Guy*, and the Western Australian Act as it existed at the time of *Ravlich*²⁸ both required a decision maker to determine whether release of a document 'would, on balance, be in the public interest'.
130. This is not the standard applicable in this jurisdiction. Instead, as I have already observed, I am required to determine whether disclosure would, on balance be *contrary* to the public interest. This is so even where I am already satisfied (as in the present case) that disclosure of a document could reasonably be expected to cause damage to intergovernmental relations.
131. As the District Court of South Australia observed in *Ipex Info Tech v Department of Info Tech Services* [1997] SADC 3618:

[I]t is for the respondent to show on the balance of probabilities that the disclosure in question would be contrary to the public interest. This does not mean merely showing that there is something adverse to the public interest likely to flow from disclosure of the

²⁶ *Arnold* at [18] (per Burchett J).

²⁷ See also *Shopping Centre Council of Australia and Australian Competition and Consumer Commission* [2004] AATA 119 at [60]: ('The Tribunal is satisfied that the apprehension or expectation of damage to relations is one that is reasonable in the circumstances of this case.')

²⁸ With regard to the Western Australian Act, this continues to the present day.

document, but that on balance the factors in the public interest against disclosure outweigh the factors in favour of disclosure.

132. The council has submitted that disclosure of the documents at issue would be contrary to the public interest in that it 'could negatively impact upon frank dealings between Local Government and State Government on matters of public health'. The council, in its earlier submissions concerning the public interest factors relevant to clause 5(1), relevantly relied upon the following factors said to weigh against disclosure:
- the material was provided in confidence
 - the documents at issue are 'internal working documents submitted for review and commentary to the auspices of the EPA'
 - the material contains 'confidential employee information and confidential information about third parties'
 - the council has already provided the community with a summary of the conclusions within the documents at issue such that 'there is no real relevance to any of the material'
 - some of the documents at issue are already publicly available in their final forms
 - the Sellicks Beach incident is now 'historical, as it relates to a matter which is several years old'
 - the applicant has not indicated that he has 'any legal rights or interests affected by the information'.
133. I have also considered specific comments provided by the council with respect to some of these documents (as identified in the table within paragraph 21 above).
134. The council has not articulated its basis for suggesting that disclosure would impact upon its future dealings with State agencies on matters of public health, or explained just how this consideration is said to relate to the documents at issue.
135. I take the council to be suggesting that, generally, in the event of disclosure it may be less likely to engage in full and frank communications with this or other public agencies.
136. I accept that there is a public interest in full and frank communications between public authorities on matters of public health.
137. Although I accept that, to the extent that I have already determined that disclosure of the documents could reasonably be expected to cause damage to intergovernmental relations, this will in turn inform my consideration of the public interest, I do not consider the likelihood of any impact of disclosure on intergovernmental relations to be particularly high in the circumstances, nor do I consider that any such impact would be particularly severe.
138. The council is, of course, an agency that is itself subject to the FOI Act. It is axiomatic that council officers will be aware, generally speaking, of the council's obligations under the FOI Act and the possibility that communications made in the course of their official duties may ultimately be released to members of the public.
139. Moreover, the council is in any case compelled to furnish information to the agency by virtue of both its environmental authorisation and a range of legislative and regulatory provisions (e.g. sections 52(1) and 83 of the Environment Protection Act).
140. With regard to the council's submissions concerning the applicant's lack of 'any legal rights or interests affected by the information' within the document, I observe that the applicant is a ratepayer to the council with a clear and enduring interest in the circumstances surrounding the Sellicks Beach Community Wastewater Management Scheme incident. The applicant, most recently on 17 November 2016, has repeatedly

affirmed his interest in determining culpability for this incident and in assessing the response to it.

141. I am unable to identify any 'confidential employee information and confidential information about third parties' contained within the documents. In any case, I consider these matters to have been sufficiently addressed in my consideration of clause 6(1) above.
142. I do not consider the Sellicks Beach incident, which occurred in or around 2011, to be 'historical'. I do not consider this to be a factor affecting the public interest in the present circumstances.
143. I consider there to be a strong public interest in individuals having access to information relating to serious public health incidents such as that involving the Sellicks Beach Community Wastewater Management Scheme. In my view, this would extend to communications arising out of and in response to such an incident, such as those comprising many of the documents at issue. There is also a clear public interest in scrutiny of the response of public authorities to these incidents, as well as in apportioning responsibility between the various agencies involved in order to better avoid future incidents.
144. I consider there to be a public interest in individuals being able to understand the evolution of an agency's response to incidents of this nature, including the various factors under consideration in determining and developing this response. I consider such a public interest may be achieved, in part, through access to successive drafts of relevant documents.
145. I have also considered the public interest in fulfilling the objects of the FOI Act, particularly the public interest in promoting openness and accountability within government.
146. These factors in favour of disclosure are to be weighed against the other considerations outlined above, namely:
 - the public interest in full and frank dealings between public authorities on matters relating to public health
 - that the council considers the documents at issue to have been provided in confidence
 - the public interest in the proper working of government and its agencies during deliberative processes
 - that some of the documents are publicly available in their final form.
147. Having considered these factors and all the circumstances, I am of the view that disclosure of each of the documents at issue would not, on balance, be contrary to the public interest. In my view, the public interest in (1) openness and accountability within government; (2) in the public being able to determine and apportion responsibility for serious public health incidents; and (3) in the public being able to understand how such incidents are to be avoided in the future are of primary weight in the circumstances.
148. Accordingly, I am not satisfied that these documents are exempt pursuant to clause 5(1).

Clause 7(1)

149. The council has submitted that exemption clause 7(1) applies to information within documents 6, 11, 15–18, 22, 30, 39A, 41, 41A, 41B, 41C, 41D, 50, 51, 58, 72, 73, 73A, 73B, 75C, 75D, 75E, 75F, 85, 86, 91 and 92.

150. In its 'standard comment' with regard to this exemption clause, the council has stated:

The document contains information concerning the business affairs of the Council and/or other companies. Disclosure of the information could damage supply relationships with important contractors necessary for the running of Council water operations, to the detriment of the public interest.

151. The council has not indicated precisely which information within these documents it considers to be the business affairs of the council and/or these other companies.

152. 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.

153. The term 'business affairs' is not defined in the FOI Act. The Administrative Appeals Tribunal, in considering a similarly worded provision within the Commonwealth Act, has observed:

The intention of the legislature, in enacting [this provision], is to protect information concerning business affairs which might either affect a business adversely or which could prejudice the future supply of information to the Commonwealth or an agency. The information, however, must be "concerning" the business, commercial or financial affairs of an organisation. It is difficult to see how the name of an organisation alone could be said to be information concerning its business etc. affairs in the absence of that name being associated with other material which disclosed information as to its business etc. affairs.²⁹

154. The Queensland Information Commissioner in *Stewart and Department of Transport* also relevantly observed:

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 it be full time or only intermittent) with the purpose of obtaining profits or gains (whether or not they actually be obtained).³⁰

155. The Administrative Appeals Tribunal of Victoria has 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'.³¹

²⁹ *Re Ralkon Agricultural Company Pty Ltd and Aboriginal Development Commission* [1986] AATA 162 at [95].

³⁰ *Stewart and Department of Transport* [1993] QICmr 6 at [103].

³¹ *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).

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156. Having reviewed the documents at issue, it appears to me that the council is in some cases suggesting that mere reference to a corporate entity within its correspondence with the agency amounts, in and of itself, to information concerning that entity's 'business affairs'. For example, document **73** is an email between the council and the agency which makes reference to (without disclosing the contents of) a Chlorination Assessment prepared by a consultant to the council.
157. In my view, in the ordinary course the term 'business affairs' should not be read so broadly as to encompass information which merely discloses that a company has performed work for an agency consistent with that company's ordinary activities. That said, it may be possible that information identifying a company or person could concern that entity's 'business affairs' if, for example, it has the potential to reveal that entity's 'branching out' into new and previously undeclared business activities.
158. In other cases, the council appears to be suggesting (e.g. in the case of document **39A**) that a report prepared by a business on behalf of the council is (or contains) information concerning that entity's business affairs.
159. Again, I do not consider that such information, in and of itself, discloses any more than that an entity has performed work for an agency consistent with its ordinary activities. In the vast majority of cases, I do not consider that such information could be said to concern an entity's business affairs within a manner contemplated by clause 7(1)(c)(i).
160. I accept, however, that such reports may disclose information (for example, non-standard methodologies) which has the potential to concern an entity's business affairs.³²
161. Having reviewed the documents at issue, and in light of my observations above, I do not consider documents **6, 11, 15–18, 22, 39A, 41, 41A, 41B, 41C, 41D, 58, 73, 75F** and **92** to contain information concerning the business affairs of the council or any other entity. I make specific comments about some of these documents below.
162. I do not consider information concerning a Community Corporation's compliance with its development approval conditions within documents **6** and **51** to concern that entity's business affairs. Per *Stewart*, I query whether the undertakings of an entity established under the *Community Titles Act 1996* could ever be said to have 'the purpose of obtaining profits or gains'.
163. In the circumstances, I do not consider advice and a 'guarantee' purportedly provided by a company to the council and paraphrased in the council's internal communications within documents **11** and **15** to concern that company's (or the council's) business affairs, nor do I consider the test results attached to these emails to concern either entity's business affairs.
164. I do not consider reference to a fee reduction granted to an entity and the circumstances surrounding that reduction as described within documents **16** and **17** to concern the business affairs of that entity.
165. I do not consider the information contained within the various analytical reports comprising documents **41A, 41B, 41C** and **41D** to concern the business affairs of the entity providing those reports. I do not consider there to be sufficient information within these documents so as to disclose any non-standard methodology adopted by this entity in preparing these reports.

³² See *Re Ralkon Agricultural Company Pty Ltd and Aboriginal Development Commission* [1986] AATA 162 at [95]: ('However, insofar as the cattle survey reports contain information as to the method used by the surveyor for the conduct of a survey, this could be regarded as being information concerning the surveyor's business affairs.')

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166. I do not consider information within document **86** suggesting that a company approached by the council 'may not be able to hold [a] quotation for 9 months' (noting this document does not include the quotation itself) to concern that company's business affairs in a manner contemplated by clause 7(1)(c).
167. I am satisfied that documents **73A** and **75C** contain information concerning the business affairs of the council.
168. I am satisfied that documents **30** (specifically, the attached Emergency Response Plan), **50** (specifically, the methodology described on page 2 of this document) and **51** (specifically information within the attached draft Management Plan) contain information concerning the business affairs of an entity other than the council.
169. Although not raised by the council, I consider document **22A** contains information appearing to concern the business affairs of an entity other than the council. It appears however that this entity was deregistered in 2014. As such, I am not satisfied that this document contains information concerning the business affairs of a 'person' within the meaning of the FOI Act.
170. Document **75E** appears to be an 'Irrigation Water Balance' assessment prepared by a consultant with regard to a proposed upgrade of the Sellicks Beach Wastewater Treatment Plant. It is predominantly of a technical nature such that it is not clear to me whether its contents disclose non-standard methodologies of the preparing consultant. I consider there is at least some possibility this document contains information concerning the business affairs of the consultant. In the circumstances I consider it appropriate to err on the side of caution and consult with this interested party.
171. Similarly, I consider it possible that document **85** (specifically the attached Hydrogeological Assessment) and document **91** (specifically the attached Certificate of Analysis) may disclose non-standard methodologies of the preparing entities. I therefore consider there is at least some possibility the documents contain information concerning the business affairs of these entities. In the circumstances I consider it appropriate to consult with these interested parties.
172. I am satisfied that documents **72**, **73B** and **75D** contain information concerning the business affairs of the council and another entity.³³
173. Documents **22A**, **86** and **87** contain information concerning the business affairs of the council which I have already found to be exempt pursuant to clause 12(1). I do not consider it necessary to further consider clause 7(1)(c) with respect to this information.
174. I am therefore satisfied that the following documents contain information concerning the business affairs of the council or another entity:
- in the case of the council's business affairs, documents **22A**, **72**, **73A**, **73B**, **75C**, **75D**, **86** and **87**
 - in the case of the business affairs of another party, documents **30**, **50**, **51**, **72**, **73B**, **75D**, **75E**, **85**, **91**.
175. I do not consider there to be enough information before me to be satisfied that disclosure of any of the information identified above could reasonably be expected to have an adverse effect on the business affairs of the council or the other entities or otherwise prejudice the future supply of such information to the Government or an

³³ Documents 72 and 73B contain information I have already found to be exempt pursuant to clause 12(1). However, I consider the information concerning the business affairs of these entities to extend beyond the information to which I have found clause 12(1) applies.

agency. On the information before me I am also not satisfied that disclosure of this information would be contrary to the public interest.

176. Section 39(10) of the FOI Act provides that I must not make a determination to the effect that disclosure of these documents be made until I have taken steps as are reasonably practical to obtain the views of the interested parties toward disclosure. In my provisional determination I therefore invited submissions from the council and the other interested parties on the issues I have identified in the preceding paragraph.
177. I have not received any information from the interested parties with the effect of altering the conclusions expressed above.
178. I am not satisfied that information within the documents at issue is exempt pursuant to clause 7(1).

Clause 8(1)

179. The interested party with respect to documents **72** and **85** has submitted that these documents are exempt by virtue of exemption clause 8(1).
180. Clause 8(1) provides:

8—Documents affecting the conduct of research

- (1) A document is an exempt document if it contains matter—
- (a) that relates to the purpose or results of research (other than public opinion polling that does not relate directly to a contract or other commercial transaction that is still being negotiated), including research that is yet to be commenced or yet to be completed; and
 - (b) the disclosure of which—
 - (i) could reasonably be expected to have an adverse effect on the agency or other person by or on whose behalf the research is being, or is intended to be, carried out; and
 - (ii) would, on balance, be contrary to the public interest.

181. The interested party has not identified how it considers exemption clause 8(1) to apply to the two documents at issue, how the disclosure of these documents could reasonably be expected to have an adverse effect on the agency or the council, or why it considers disclosure would, on balance, be contrary to the public interest.
182. Document **72** is a formal proposal to ‘undertake a hydrogeological assessment and develop a monitoring plan’ submitted by the interested party to the council. Document **85** is the hydrogeological assessment itself.
183. For a document to be exempt under clause 8(1), I must firstly be satisfied that it contains matter ‘that relates to the purpose or results of research’. The term ‘research’ is not defined in the FOI Act. I have been unable to identify any South Australian case law or legislative materials that provide guidance on the construction of this term.
184. The Queensland Information Commissioner in *O’Dwyer and The Workers’ Compensation Board of Queensland* considered the dictionary definition of the term in ultimately determining that a report concerning the business operations and performance of an entity was not ‘research’ for the purposes of the *Freedom of*

Information Act 1992 (Qld).³⁴ I consider it appropriate to adopt a similar approach in the present matter.

185. *The Macquarie Dictionary* defines ‘research’ as ‘diligent and systematic inquiry or investigation into a subject in order to discover facts or principles: *research in nuclear physics*.’ *The New Shorter Oxford English Dictionary* defines the term as ‘[a] search or investigation undertaken to discover facts and reach new conclusions by the critical study of a subject or by a course of scientific inquiry.’
186. I observe that central to both definitions is the purpose of the relevant investigation or line of inquiry: either undertaken ‘in order to discover facts or principles’ or ‘to discover facts and reach new conclusions’.
187. Both documents at issue describe the nature of the inquiries made by the interested party on behalf of the council. For example (and I see no harm in revealing this to the applicant), both documents disclose that a hydrogeological assessment was (or, in the case of document **72**, was to be) commissioned in order ‘to determine the groundwater gradient; the presence of fractured rock aquifers; the presence of perched aquifers; the presence of permeable soils’ and ‘[a]ny other relevant geotechnical and hydrogeographical information required to assess the site for potential offsite impacts or irrigation activity.’
188. In my view, a hydrogeological assessment undertaken in relation to a specific site and for a practical purpose limited to that site (or its immediate surrounds) cannot properly be classified as ‘research’ in a manner contemplated by clause 8(1). Critical to my conclusion in this respect is the lack of any wider implication for the ‘investigation’ undertaken; I think the situation would be considerably different if, for example, the activities conducted by the interested party were part of a greater academic inquiry into the effect of irrigation practices on the region’s water table quality.
189. In any case, I can see nothing in the relevant documents at issue to suggest disclosure could reasonably be expected to have an adverse effect on the agency or the council. Similarly, in all the circumstances I am not satisfied that disclosure would be contrary to the public interest.
190. Accordingly, I am not satisfied that documents **72** and **85** are exempt pursuant to clause 8(1).

Clause 9(1)

191. The council has submitted that exemption clause 9(1) applies to information within documents **6, 11, 12, 15–20, 22, 22D, 26, 27, 30, 36, 47, 49, 51, 54, 58, 62, 63, 65, 66, 68, 72, 73A, 73B, 75A, 75B, 75C, 75D, 75E, 75F, 80, 85, 86, 91, 92, 94, 94A, 94B** and **94C**.
192. Clause 9 provides:

9—Internal working documents

- (1) A document is an exempt document if it contains matter—
- (a) that relates to—
- (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
- (ii) any consultation or deliberation that has taken place

³⁴ *O'Dwyer and The Workers' Compensation Board of Queensland* [1995] QICmr 31 at [23].

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.
- (2) A document is not an exempt document by virtue of this clause if it merely consists of–
 - (a) matter that appears in an agency's policy document; or
 - (b) factual or statistical material.

193. For clause 9(1) to constitute a basis for refusing access to a document, I must firstly be satisfied that the document contains matter that relates to (1) any opinion, advice or recommendation that has been obtained, prepared or recorded; or (2) 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.

194. The council's 'standard comment' with regard to the documents at issue states:

The majority of documents who's [sic] exemption falls under this category are not formal documents pursuant to the investigation, are generally consultation or deliberation [sic] that has taken place for the purpose of the decision making functions of an agency (i.e. Council and the EPA as agency's [sic])

195. The council does not identify how it considers the documents not falling within the asserted majority to be exempt. I take it that the council may be suggesting that these documents are exempt pursuant to clause 9(1)(a)(i).

196. I have reviewed the documents at issue such that I am satisfied that all documents identified in paragraph 191 above contain information clearly satisfying clause 9(1)(a)(i) and/or 9(1)(a)(ii).

197. Although not claimed by the council, I consider document **52** also relates to consultation that has taken place between the council and the agency in the course of the decision-making functions of both parties.

198. It next falls upon me to consider whether disclosure of the information at issue within these documents would, on balance, be contrary to the public interest.

199. I have considered the public interest test with regard to many of the same documents when considering clause 5(1) above.

200. As for the manner in which the public interest for or against disclosure is to be weighed under clause 9(1), the Administrative Appeals Tribunal has observed:

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[.]³⁵

³⁵ *Re Lianos and Secretary to the Department of Social Security* [1985] AATA 38 at [81].

201. The public interest is to be assessed in light of the circumstances as they presently exist. In some cases '[i]t is quite possible that the balance of public interest may swing in favour of disclosure in the future, even in the near future, depending on how events unfold.'³⁶
202. I observe that many of the documents at issue are (or contain as attachments) successive draft iterations of various plans and reports prepared by the council at the agency's direction. For example, documents **63**, **65** and **67** contain successive drafts of an Environmental Improvement Program prepared by the council (document **67** purports to include a 'finalised draft' of this document) and, in the case of documents **65** and **67**, incorporating amendments suggested by the agency. In other cases (for example, document **94A**) these drafts contain track changes disclosing placeholder or deleted text (e.g. 'Insert geotechnical details regarding the site', etc.).
203. As I observed when considering the application of clause 5(1) to many of the same documents, I consider the public interest in individuals being able to understand the evolution of an agency's response to public health incidents (including the various factors under consideration in determining and developing this response) may be achieved, in part, through access to successive drafts of relevant documents.
204. I observe that there may be circumstances where the disclosure of draft documents and the consultation surrounding such documents has the potential to reveal information of a highly sensitive nature (for example, weaknesses discussed and identified in regard to such documents that could be exploited by members of the public). Having examined the documents at issue, I do not consider this to be a particularly relevant consideration in these circumstances. It appears that the changes made to these documents are of a predominantly technical nature (e.g. identifying the method through which groundwater levels are to be measured under a Site Monitoring Plan).
205. I also observe that the deliberative process to which the documents relate appears to have concluded some years ago.
206. Although relevant to the public interest test, I do not consider the fact that some of these documents may be available in their final form through the Public Register to be determinative of the public interest for or against their release. In cases where it appears that a document has been included in its final form (e.g. as attached to document **67**), the attached correspondence may nonetheless allow members of the public to identify when the document was submitted to the agency and, in some cases, the circumstances surrounding that submission.
207. As identified earlier in this determination, I consider the following factors to weigh in favour of disclosure in the circumstances:
- the public interest in individuals having access to information relating to serious public health incidents such as that involving the Sellicks Beach Community Wastewater Management Scheme, including information arising out of the response to such incidents
 - the public interest in scrutiny of the response of public authorities to such incidents (and in understanding the evolution of this response), as well as in apportioning responsibility between the various agencies involved in order to better avoid future incidents
 - the public interest in fulfilling the objects of the FOI Act, particularly the public interest in promoting openness and accountability within government.
208. I consider the following factors to weigh against disclosure in the circumstances:

³⁶ *Tunchon v Commissioner of Police, New South Wales Police Service* [2000] NSWADT 73 at [39].

- the public interest in the proper working of government and its agencies during deliberative processes
- the public interest in full and frank dealings between public authorities on matters relating to public health
- that the council considers some of the documents at issue to have been provided in confidence
- that some of the documents are publicly available in their final form.

209. Having considered these factors and all the circumstances, I am of the view that disclosure of each of the documents at issue would not, on balance, be contrary to the public interest. In my view, the public interest in (1) openness and accountability within government; (2) in the public being able to determine and apportion responsibility for serious public health incidents; and (3) in the public being able to understand how such incidents are to be avoided in the future are of primary weight in the circumstances.
210. Accordingly, I am not satisfied that these documents are exempt pursuant to clause 9(1).

Clause 13(1)

211. The council has submitted that exemption clause 13(1) applies to information within documents **6, 12, 15, 18, 22, 22A, 22B, 22C, 22D, 24, 39A, 41, 41A, 41B, 41C, 41D, 45, 50, 62, 73A, 73B, 75C, 75D, 75E and 75F.**
212. Clause 13(1) provides:

13—Documents containing confidential material

- (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.

213. The council's 'standard comment' with regard to the documents at issue states:

The document contains information received by the Council in confidence, including information received from companies and then communicated to the Department [sic]. Disclosure of the information could damage supply relationships with important contractors necessary for the running of Council water operations, to the detriment of the public interest.

214. The council therefore appears to be suggesting that these documents are exempt by virtue of clause 13(b). The council appears to be specifically suggesting that disclosure of the documents could prejudice the future supply of such information to the council (that is, not the supply of information by the council to the agency).
215. In its correspondence with the agency, the council has further submitted that the release of various documents 'could potentially lead to a claim for breach of confidence as established [sic] by section [sic] 13(1)(a)'. The council does not appear to have identified precisely which documents it considers to be exempt pursuant to this subclause.

216. 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 obligation of confidence may be contractual or equitable. In addition, 'would' should be read as 'could'.³⁷
217. The council has not identified what contractual obligation, if any, would prohibit disclosure of the documents by the agency. On the information before me, I cannot be satisfied that such a contractual obligation exists.
218. For an obligation founded in equity, it is necessary to satisfy specific criteria:
- The plaintiff (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question, and must also be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge) (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence and (iv) there is actual or threatened misuse of that information[.] It may also be necessary [to show] that unauthorised use would be to the detriment of the plaintiff.³⁸
219. On the information before me, I cannot be satisfied that an equitable obligation of confidence attaches to the documents at issue. As it stands I am completely unable to identify (1) what information in the documents, specifically, is said to be confidential; (2) whether this information has the necessary quality of confidentiality; (3) whether the council received this information in circumstances so as to import an obligation of confidence; and (4) what detriment, if any, disclosure would have upon the contractors in question.
220. To the extent that I could be satisfied that an obligation of confidence attaches to information within the documents (as suggested by the council), I query whether disclosure of that information *by the agency* could ever found an action for breach of confidence from the supplying contractor against either the council or the agency.
221. Accordingly, I am not satisfied that the documents at issue are exempt pursuant to clause 13(1)(a).
222. For a document to be exempt pursuant to clause 13(1)(b), it must contain information obtained in confidence, the disclosure of which might reasonably prejudice the future supply of such information to the Government or an agency and would, on balance, be contrary to the public interest.
223. The Supreme Court of Victoria has observed that the phrase 'communicated in confidence' should be given its ordinary meaning.³⁹ I also consider this to be the appropriate construction of the phrase 'obtained in confidence' within the meaning of clause 13(1)(b) of the FOI Act. I do not consider it necessary for an agency to demonstrate an action for breach of confidence could be founded in order to satisfy the requirements of this subclause.
224. I have reviewed each of the documents in question such that I am satisfied that they were obtained by either the agency or the council in confidence.
225. I am not satisfied that disclosure of documents **6, 12, 15, 73A, 75C and 75F** might reasonably prejudice the future supply of information to the council. These documents merely appear to recount information or services provided by a contractor to the council.

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

³⁸ *Re Corrs Pavey Whiting and Byrne v Collector of Customs of Victoria and Alphapharm Pty Ltd* [1987] FCA 266, per Gummow J at [14] (citations omitted).

³⁹ *Ryder v Booth* [1985] VicRp 86 at [35].

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226. I am not satisfied that disclosure of documents **18** and **22** might reasonably prejudice the future supply of such information to the council. I observe that these documents comprise correspondence from the council in response to the agency's 'show cause' notice. I simply cannot fathom how the disclosure of this document could ever prejudice the future supply of information to the council.
227. I am not satisfied that disclosure of document **22A** might reasonably prejudice the future supply of such information to the council. This document is an Audit and Asset Revaluation prepared by a contractor to the council. To the extent that disclosure of this document could prejudice the contractor in question against providing future reports to the council (which I do not consider at all likely), I do not consider there to be a shortage of firms capable of conducting such audits.
228. Document **22B** appears to be a report provided by a consultancy firm to the council. Having reviewed the contents of this document, I am not satisfied that its disclosure might reasonably prejudice the future supply of such information to the council.
229. For similar reasons, I am not satisfied that disclosure of documents **22C** (a table of proposed actions prepared by this same consultancy firm), **45** (an email and engineering certification), **50** (an email prepared by the consultancy firm following a site visit), **73B** and **75D** (both comprising a chlorination assessment) and **75E** (a water balance assessment) might reasonably prejudice the future supply of such information to the council.
230. Document **22D** appears to be a chronology of events (it appears prepared by the council) chronicling the discovery of the Sellicks Beach incident and its aftermath. It is quite beyond me how disclosure of this document might reasonably prejudice the future supply of such information to the council.
231. I am not satisfied that disclosure of document **24** might reasonably prejudice the future supply of information to the council. Document **24** is in fact a letter from the agency to the council. I observe that the agency is not of the view that exemption clause 13(1) applies to this document.
232. I am not satisfied that disclosure of document **39A** might reasonably prejudice the future supply of such information to the council. This document comprises the annual return by the council to the agency with respect to the Onkaparinga wastewater management schemes. This would appear to have been provided in compliance with the council's obligation to furnish such a return under the conditions of its environmental authorisation and section 48 of the Environment Protection Act. I do not consider disclosure of the information within this return that appears to have been provided by a contractor to the council might reasonably prejudice the future supply of such information to the council.
233. I am not satisfied that disclosure of document **41** might reasonably prejudice the future supply of such information to the council. Simply put, the contents of this document provide no reasonable basis for such a suggestion.
234. Documents **41A**, **41B**, **41C** and **41D** appear to be analytical reports prepared by another government agency. I do not consider disclosure of these documents might reasonably prejudice the future supply of such information to the council.
235. I am not satisfied that disclosure of document **62** might reasonably prejudice the future supply of such information to the council. This document comprises a letter from the agency to the council. I observe that the agency is not of the view that exemption clause 13(1) applies to this document.

236. It is unclear to me how the council considers the disclosure of document **63** might reasonably prejudice the future supply of such information to the council. In any case, the council's submission that exemption clause 13(1) applies to this document appears inconsistent with its position with regard to documents **65** and **67**.
237. Accordingly, I am not satisfied that any of the documents at issue are exempt pursuant to clause 13(1).

Clause 15

238. The council has submitted that exemption clause 15 applies to information within documents **51**, **85** and **86**.
239. Clause 15 provides:

15—Documents affecting financial or property interests

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

- (a) could reasonably be expected to have a substantial adverse effect on the financial or property interests of the State or an agency; and
- (b) would, on balance, be contrary to the public interest.

240. The council has not provided a 'standard comment' in relation to this exemption clause.
241. The council's correspondence with the agency suggests that it considers disclosure of information within these documents could affect the market value of an asset held by the council during a competitive process. The council has not indicated whether this process is still underway.
242. It is unclear to me what information within document **51** the council considers exempt by virtue of clause 15. It may be the council is intending to refer to a risk assessment appearing within the draft Management Plan attached to this document.
243. I have considered the meaning of the phrase 'could reasonably be expected to' earlier in this determination.
244. I observe that the term 'substantial' requires more than mere concern that an adverse effect might eventuate:
- Concern may be generated by matters of many differing degrees of gravity. What is required [if the exemption] is made out is an adverse effect that is real or of substance and not that which is insubstantial or nominal.⁴⁰
245. On the information available to me, I am unable to find that disclosure of document **51** could reasonably be expected to cause an adverse effect on financial or property interests of the council, or that such an effect would be substantial. The council has declined to supplement its submissions with respect to this document in response to my provisional determination.
246. Document **85** contains a Hydrogeological Assessment of a site operated by the council. It is unclear to me what information within this report the council considers exempt by virtue of clause 15. I note that this document speaks of a 'low to moderate risk' of an specific environmental incident involving this site and makes recommendations as to

⁴⁰ *Bayliss and Department of Health and Family Services* [1997] AATA 360 at [47].

how this risk might better be quantified. In the absence of more information (for example, the current status of the competitive process referred to above, whether the council undertook the investigations recommended within this report, etc.) I am unable to conclude that disclosure of this document could reasonably be expected to cause a substantial adverse effect on financial or property interests of the council.

247. I am unable to identify what information within document **86** the council considers exempt by virtue of clause 15. It appears to me that the only information meaningfully speaking to financial or property interests of the council within this document is the council's own reference to 'financial implications' in a comment made to the agency. I note that I have already found this sentence to be exempt pursuant to clause 12(1). I nonetheless observe that I do not consider such a general and commonplace observation satisfies the requirements of clause 15(a).
248. Accordingly, I am not satisfied that documents **51**, **85** and **86** are exempt pursuant to clause 15.

Clause 16(1)

249. The council has submitted that exemption clause 16(1) applies to documents **19**, **22**, **22A**, **24**, **51**, **62**, **72**, **73A**, **73B**, **75C**, **75D**, **75E**, **75F**, **85**, **86**, **94A**, **94B**, **94C** and **95**.
250. Exemption clause 16(1) provides:

16—Documents concerning operations of agencies

- (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.

251. The council's 'standard comment' with regard to these documents states:

The document contains information concerning inspections, assessments or works performed in respect of the wastewater treatment site, and the release of that information could have a substantial adverse effect on the Council and/or its personnel's ability and willingness to conduct such inspections, assessments or works, to the detriment of the public interest.

252. In its correspondence with the agency, the council submitted:

[T]he documents, at relevant parts, 'affect the conduct of an agency' for the purposes of this section. [...] This relates to section [sic] 16 generally. These documents can be considered on a case-by-case basis in respect of this section [sic].

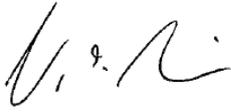
253. It is therefore somewhat unclear to me which subclause the council is suggesting applies to these documents (I also query how the agency could ever consider the application of exemption clauses to documents within the scope of the applicant's request other than 'on a case-by-case basis').
254. In the absence of further guidance, I consider the council to be suggesting that subclause 16(1)(iv) applies to the documents at issue.
255. It is unclear to me exactly what information within these documents the council considers exempt by virtue of clause 16(1). For example, documents **19, 24** and **62** constitute or contain letters from the agency to the council. I cannot see how disclosure of information within these letters could reasonably be expected to have a substantial adverse effect on the council's ability (or that of its officers) to 'conduct [...] inspections, assessments or works'.
256. Where these documents do contain explicit discussion of the council's 'inspections, assessments or works performed in respect of the wastewater treatment site' (for example, document **86**) I am unable to see how release of this information could impact upon the council's ability to perform such work in the future, let alone have a substantial adverse effect on this ability.
257. I can also see no basis to conclude that release of information of this type could reasonably be expected to have a substantial adverse effect on the 'willingness' of officers of the council to carry out such activities.
258. I have examined each of the documents at issue and I am not satisfied that the disclosure of information within any of these documents could reasonably be expected to have a substantial adverse effect on the effective performance by the council of its functions.
259. Accordingly, I am not satisfied that these documents are exempt by virtue of clause 16(1).

Determination

260. In light of my views above, I vary the agency's determination such that, after redacting all information tending to identify individual council officers (namely, names, position titles, email addresses, phone numbers and other contact details wherever they may appear) and in accordance with the views I have expressed above:
- document **30** is to be released to the applicant with all mobile telephone numbers appearing in part 9.2 deleted
 - document **51** is to be released to the applicant with the mobile telephone number appearing in the second row of Table 1 in part 1.3 deleted⁴¹
 - documents **88, 89** and **97** are to be released to the applicant with information concerning the personal affairs of the complainant deleted
 - document **96** is to be released to the applicant with password and login details deleted
 - documents **22A, 73A, 73B, 75C, 75D, 86** and **87** are to be released to the applicant with information relating to the financial information of the council deleted

⁴¹ Noting that the mobile telephone number belonging to a council officer will in any case be deleted in accordance with the revised scope of the applicant's request.

- all remaining documents are to be released to the applicant without further redaction.



Wayne Lines
SA OMBUDSMAN

10 January 2017

APPENDIX

Procedural steps

| Date | Event |
|-------------------|---|
| 11 June 2014 | The agency received the FOI application dated 11 June 2014. |
| 23 September 2014 | The agency determined the application. |
| 15 October 2014 | The agency received the internal review application of the applicant dated 15 October 2014. |
| 30 October 2014 | The agency failed to determine the applicant's application for internal review within the statutory time frame, and is taken to have confirmed the original determination. ¹ |
| 3 November 2014 | The agency received the internal review application of the agency dated 29 October 2014. |
| 16 November 2014 | The Ombudsman received the applicant's request for external review dated 16 November 2014. |
| 18 November 2014 | The agency failed to determine the council's application for internal review within the statutory time frame, and is taken to have confirmed the original determination. |
| 11 December 2014 | The Ombudsman advised the agency of the external review and requested submissions and documentation. |
| 22 January 2015 | The agency provided the Ombudsman with its submissions and documentation. |
| 12 June 2015 | The judgment in <i>City of Onkaparinga v Houlahan</i> is delivered. |
| 6 May 2016 | The council provided updated submissions in a separate but related external review concerning the DHA in light of the judgment in <i>City of Onkaparinga v Houlahan</i> |
| 11 May 2016 | The council provided updated submissions in light of the judgment in <i>City of Onkaparinga v Houlahan</i> |
| 5 July 2016 | The council adopted its 6 May 2016 submissions with respect to the present external review |
| 17 November 2016 | At the Ombudsman's request, the council clarified its position with respect to the present external review |
| 5 December 2016 | The Ombudsman provided his provisional determination to the parties |

¹ *Freedom of Information Act 1991*, section 29(5).