



**Determination pursuant to section 39(11) of the *Freedom of Information Act 1991*
*Hanna and the Adelaide City Council***

Background

1. In August 2008, Mr Kris Hanna MP (**the applicant**) sought access to '[d]ocuments relating to food outlets which have failed to meet Adelaide City Council [**the Council; ACC**] hygiene standards in the 2006/2007 and 2007/2008 financial years' pursuant to the *Freedom of Information Act 1991* (**the FOI Act**).

2. In September 2008, following a request from the Council, the applicant reframed his request in the following terms:

a list of premises ACC served with Improvement Notices, Prohibition Orders and Expiations in accordance with the *Food Act 2001* [**the Food Act**] in 2006/2007 and 2007/2008. However, within the scope of my initial request, I hope you can go a little further and provide some detail in relation to the most serious transgressions. I presume you would be able to determine this in some way, by looking at penalties or number of repeat offences per site. Such details I hope would include the nature of the transgression and the penalty or other outcome in, say, the most serious 5 cases.

3. The Council concluded that four documents were within the scope of the narrowed application:

- (1) A spreadsheet listing food premises issued with Notices, Orders and Expiations under the Food Act in 2007/2008
- (2) Details of the reasons Warnings, Notices and Expiations were issued under the Food Act in 2007/2008
- (3) A spreadsheet listing food premises issued with Notices, Orders and Expiations under the Food Act in 2006/2007
- (4) Details of the reasons Warnings, Notices and Expiations were issued under the Food Act in 2006/2007

I shall refer to these documents as 1, 2, 3 and 4 respectively in my determination.

4. In September and October 2008, the Council consulted with 23 affected businesses pursuant to section 27 of the FOI Act with respect to one or more of the four documents. It only received responses from some of the businesses consulted. In addition, of those that responded, only some objected to the information concerning their businesses being released.

5. Nevertheless, on 28 October 2008 the Council determined to refuse the applicant access to all four documents pursuant to clause 7(1)(c) of Schedule 1 to the FOI Act. Relevantly, the Council concluded that release of the information would have an adverse effect on the businesses concerned. In addition, it weighed up competing public interest considerations as follows:

While there is a public interest in the community being aware of food businesses who are not complying with regulations, it is considered that this interest would not be served by releasing outdated information, which is no longer an accurate reflection of the business' operations and as such in my view, it would, on balance, be contrary to the public interest to release the information.

6. The Council noted, however, that its 2007/2008 Annual Report, which was due to be presented a few weeks later, would include de-identified information of the sort requested by the applicant.
7. The applicant sought internal review, claiming that the original determiner had failed to give sufficient weight to the public interest factors in favour of release:

The lack of information on the face of it, suggests there are currently insufficient consequences of transgressing our food health laws. There would be a tremendous motivation on the part of businesses to improve if they stood the risk of being named for breaches of the standards - this would provide the public with much better protection.

8. In December 2008 the Council confirmed its original determination to refuse access to the four documents pursuant to clause 7(1)(c) of Schedule 1 to the FOI Act. The Council advised that it could 'see no additional benefit to the public interest by release of the four (4) identified documents as the information is by its nature dynamic and no longer an accurate reflection of the current state of affairs.' Instead, the Council provided information from its 2006/2007 and 2007/2008 Annual Reports to the applicant. Among other things, it claimed that this information highlighted the Council's 'diligence in inspecting premises', and its 'strong commitment towards ensuring that standards of food safety ... are maintained at a level which is supporting of Adelaide's residential, worker, student and visitor populations'.
9. Aggrieved by this, the applicant sought external review by my office pursuant to section 39 of the FOI Act. In so doing, the applicant reiterated the claims he had made in support of his application for internal review.

External Review

10. During the course of the external review, my office obtained oral and written submissions from the Council.
11. The Council's submissions including the following:
 - (1) The Council has various options in the event of non-compliance with food standards:
 - (a) general inspection report
 - (b) improvement notice
 - (c) expiation notice
 - (d) prohibition order
 - (e) prosecution

Improvement notices may be issued if there is an existing risk, or where there is the potential for risk, and do not necessarily reflect any wrongdoing on the part of a business.

- (2) Food premises are categorised as low, medium, or high risk. Most restaurants and cafés are categorised as medium risk, and are generally inspected annually (although this may be increased to biannually). In addition, food premises may be subjected to spot checks. Inspections of this nature are unannounced.
 - (3) The Council's decision as to how to proceed in the event that breaches of food standards are detected may be influenced by the business' history, the number of issues detected, and the types of issues detected.
 - (4) Food premises are inspected for compliance with notices. Either businesses are assessed as being compliant, or the Council takes further action. In the case of prohibition orders, businesses are not allowed to trade until a certificate of clearance is obtained from an authorised officer of the Council.
 - (5) As at 17 March 2009, the Council had not commenced any prosecutions under the Food Act.
 - (6) Businesses may elect to be prosecuted if they dispute an expiation notice. Businesses may seek review of a decision to issue a prohibition order, or to refuse to issue a certificate of clearance, by the Administrative and Disciplinary Division of the District Court. No rights of review or appeal exist with respect to the issuing of improvement notices.
 - (7) The Council is trying to develop a relationship with businesses in an effort to facilitate compliance with the Food Act, rather than simply acting as an enforcement authority. According to the Council, a lot of businesses use inspection times to ask questions about their obligations.
 - (8) From time to time, authorised officers receive telephone calls from businesses advising them of problems they have detected, including difficulties they are experiencing with contractors. The Council gave an example of a business that had contacted it spontaneously to advise of a problem. The Council felt obliged to serve an improvement notice on the business as a result, but recognised that but for the contact from the business it may never have known of the problem. In addition, the Council has a general advice line available to the public and businesses alike. The Council is concerned that if details of improvement notices in particular are released, businesses may not be proactive in their dealings with the Council, and the Council would find it more difficult to obtain information from them.
12. Documents 1 and 3 are schedules of the premises issued with notices and orders, and the resultant penalty. They do not include the underlying reasons. Documents 2 and 4 relate only to businesses, that in the Council's view, were the 'worst premises' for each of the financial years, including a brief description of the reasons underlying the issue of the notices and/or orders. For the most part it is not apparent from the schedule whether the reasons resulted in an improvement notice and/or an expiation notice and/or a prohibition order being issued.

13. During the course of the review, my office was provided with copies of six expiation notices and two prohibition orders served on seven businesses. In addition to seeking a list of premises served with notices and orders, the applicant requested the nature of the transgressions in at least the 5 most serious cases. In 2006/2007 six improvement notices, and one prohibition order, were issued. In 2007/2008 16 improvement notices, six expiation notices (for three different amounts), and one prohibition order, were issued. In my view, the terms of the application (as clarified) captures the expiation notices and prohibition orders themselves, as they contain reasons for their issue.
14. I have consulted with the seven businesses that were issued with expiation notices and/or prohibition orders about those notices and orders (**the interested parties**). In order to avoid identifying individual businesses, I have ascribed a number (from 1 to 7) to each business for the purposes of this determination. I will provide the Council with information to link the businesses to their ascribed numbers.
15. When consulted by the Council, only one of the seven businesses objected to information about them being released (business number 1).
16. In response to my consultation under section 39(10) of the FOI Act, as at 25 May 2009 I had received responses from four of the seven businesses (1, 4, 5 and 6). Two of these businesses (1 and 5) objected to information about them being released.
17. In response to the agency's letter of consultation, solicitors acting on behalf of business number 1 claimed that the information was of little relevance to the public interest, as it had paid the expiation fee and complied with the Council's requirements. In its submissions to my office solicitors acting for business number 1 advised that it 'strongly' objected to the information being released. Among other things, they referred to the fact that almost 15 months have elapsed since the Council's inspection. Approximately 11 months have elapsed since the notice was issued. The solicitors further claim that although the expiation notice was not challenged, the allegations contained in it were never admitted. After the inspection, the business took the opportunity to upgrade its kitchen and 'overhaul and replace' several of its kitchen staff, apparently impressing the inspector. The business claims to have had 'no previous or subsequent issues in respect of its food handling and health practices whether under the Food Act or otherwise' despite operating the business for many years, and claims that releasing the information may give a 'false and/or misleading impression of the Business and the premises'. In addition, I have taken it into account a commercially sensitive matter raised on behalf of business number 1, the substance of which I do not intend to repeat here.
18. Among other things, solicitors acting on behalf of business number 5 submitted to my office that it has a duty to 'satisfy the needs of the public ... and intends to continue to do so'. It further submitted that:

The matters in issue were resolved 12 to 15 months ago and on that basis alone their disclosure cannot be said to be in the public interest any longer; moreover;

Their disclosure now may very well mislead and confuse the public who may form the impression that the state of ... [its] kitchen last year is in some way related to the present condition of the kitchen. This is clearly not the case. As a consequence the public may choose not to avail of ... [the premises] now at a time when there is no issue in relation to the standard of ... [its] kitchen. This can be verified by the agency which has conducted subsequent routine inspections.

Exemption Clause

19. Clause 7(1)(c) of Schedule 1 to the FOI Act provides that:

- (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) ['information (other than trade secrets) that has a commercial value to any agency or any other person']) 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.

20. I accept that the documents contain information concerning the business affairs of a number of different businesses, and that disclosure of that information could reasonably be expected to have an adverse effect on those affairs (in a financial sense and to their reputation generally). In coming to this view, I note the comments of Judge Lunn in *Ipex Info Tech v Dept of Info Tech Services* (1997) 192 LSJS 54 at 65:

... it is sufficient for s7(1)(c)(ii) if any adverse effect is established by the respondent. However, it must be something which can be properly categorised as an adverse effect and not something so de minimus that it would be properly regarded as inconsequential.

21. My determination therefore turns on whether disclosure of that information would, on balance, be contrary to the public interest.

Determination

22. Pursuant to section 39(11) of the FOI Act, I may confirm, vary or reverse the Council's determination.
23. I have had regard to the contents of the documents; the submissions made by the applicant, the agency, and the interested parties who have responded; the applicable law; and the present circumstances.
24. Importantly, one of the 'principles of administration' in the FOI Act is that the Act 'should be interpreted and applied' so as to further its objects.¹ Section 3 of the FOI Act includes the following:

3—Objects

- (1) The objects of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament—

¹ Section 3A(1)(a) of the FOI Act.

- (a) to promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State; and
 - (b) to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies.
 - (2) The means by which it is intended to achieve these objects are as follows:
 - (a) ensuring that information concerning the operations of government (including, in particular, information concerning the rules and practices followed by government in its dealings with members of the public) is readily available to members of the public and to Members of Parliament; and
 - (b) conferring on each member of the public and on Members of Parliament a legally enforceable right to be given access to documents held by government, subject only to such restrictions as are consistent with the public interest (including maintenance of the effective conduct of public affairs through the free and frank expression of opinions) and the preservation of personal privacy; ...
25. My determination is set out below.
26. The expiation notices and prohibition orders, and the fact that they were issued, are not, in my view, exempt under clause 7(1)(c) of Schedule 1 to the FOI Act. I therefore vary the Council's determination to enable the following to be released:
 - (1) parts of document 1, namely rows 1 to 4, 17 to 19, 21 and 24 of the schedule, and the key
 - (2) parts of document 2, namely the left-most column and the first two rows of the schedule (but not the types of breaches identified)
 - (3) parts of document 3, namely rows 1, 2 and 7 of the schedule, and the key
 - (4) parts of document 4, namely the left-most column, the first row of the schedule, and the name in the third to last column on the second row on the second page of the schedule.
 - (5) the six expiation notices, including the photographs attached to two of them
 - (6) the two prohibition orders.
27. In reaching this conclusion I consider that there is a public interest in promoting safe and hygienic practices within restaurants, and in diners being able to make informed choices about where they eat, having regard to the public health issues raised in the expiation notices and prohibition orders under the Food Act. I have borne in mind the objects of the Food Act, which include *inter alia* 'to ensure food for sale is both safe and suitable for human consumption'. I note that none of the expiation notices were challenged, nor were the prohibition orders appealed.
28. In addition, there is a public interest in furthering the objects of the FOI Act, particularly section 3(1)(b) in this instance. Disclosure of the expiation notices and prohibition orders would facilitate the Council's accountability in discharging its responsibilities under the Food Act and its administration of the legislation.

29. I do not accept that the expiation notices, including any attached photographs, or the prohibition orders would create a false or misleading impression, as they include the date of, and the reasons underlying, their issue. The dates put the documents into a chronological context, and go some of the way to rebutting two of the interested parties' claims, namely that disclosure of the information may create 'false and/or misleading impression' (business 1), or 'mislead and confuse the public' (business 5) about the current state of the premises. Although documents 1 and 3 do not disclose the reasons underlying the notices or orders, they refer to the month and year the notices and orders were issued, and the amount required to expiate the offence.
30. I have borne in mind the apparent public interest in food safety issues in South Australia, interstate, and overseas, as reported in the media and accessible via Google. A New South Wales website about such matters, for example, had over one million hits from July to November 2008.² It is further reported that as at 12 May 2009 86% of 1268 participants in a survey linked to an online version of an article that appeared in *The Advertiser* on 11 May 2009³ agree that information identifying 'infringing restaurants' should be disclosed publicly.⁴ While I have no way of interrogating the significance of this data, it appears to reflect the public's concern about food safety standards in food premises.
31. I have balanced these factors against the adverse effect disclosure may have on the interested parties; the time that has elapsed since the notices and orders were issued and the inspections conducted, and changes that may have been made in the intervening period; and the possibility that the Council may be hampered in its ability to obtain information from businesses. Bearing in mind the powers available under the Food Act, I am satisfied that the Council will be able to discharge its functions under that Act, notwithstanding my determination to release information about expiation notices and prohibition orders.
32. I am satisfied that it would, on balance, be contrary to the public interest to release information revealing that improvement notices were issued, or the reasons they were issued, from documents 1 to 4. In reaching this conclusion I have had regard to the fact that improvement notices may be issued for many and varied reasons, and do not necessarily reflect any alleged failures on the part of individual businesses. The Council concedes that the risk to public health at the time that some of the improvement notices were issued was at the lower end of the scale. In addition, there is evidence that at least one of the improvement notices was issued at an unusually busy trading time, and another was issued as a preventative measure.
33. The reasons for issuing improvement notices and/or expiation notices and/or prohibition orders in documents 2 and 4 appear to be intermingled. As such, I do not consider it practicable to provide further partial access to these documents, as envisaged by section 20(4) of the FOI Act. I note, however, that some of the expiation notices and prohibition orders themselves refer to improvement notices. In my view, for the reasons given above, disclosure of references to improvement notices within expiation notices and prohibition orders would not, on balance, be contrary to the public interest.

²<http://www.foodauthority.nsw.gov.au/aboutus/media%2Dreleases/mr%2D21%2DNov%2D08%2Dname%2Dshame%2Dwebsites%2Done%2Dmillion%2Dhits/>

³The article is accessible via <http://www.news.com.au/adelaidenow/story/0,22606,25458249-2682,00.html>

⁴<http://indolentdandy.net/fitzroyalty/2009/05/21/foi-on-food-hygiene-in-the-city-of-yarra/>

Appeal Rights

34. The applicant and the interested parties may appeal against my determination to the District Court of South Australia.⁵
35. The Council may also appeal against my determination, but only on a question of law and only with the permission of the court.⁶
36. Any such appeals should be commenced within 30 days after receiving notice of my determination.⁷

KI MacPherson
ACTING OMBUDSMAN

... May 2009

⁵ Section 40(2) of the FOI Act.

⁶ Section 40(1) of the FOI Act.

⁷ Section 40(3) of the FOI Act.