

DETERMINATION

External review pursuant to *Freedom of Information Act 1991*

Applicant: Hon Mark Parnell MLC
Agency: Department of Planning and Local Government
Ombudsman reference: 2010/00091
Determination: The determination of the agency is confirmed

REASONS FOR DETERMINATION

Background

1. In a letter dated 15 July 2009 the Hon Mr Mark Parnell MLC applied to the Department of Planning and Local Government (**the agency**) under the *Freedom of Information Act 1991* (**the FOI Act**):

for the Growth Investigation Areas report and/or report prepared on behalf of the Department by Connor Holmes referred to in the Minister's media release of 6 November 2008, Growth Investigation Areas projection announced:

"The consultancy is to produce a detailed report that puts us in a better position to make informed decisions on this State's future growth areas," Mr Holloway says.

2. In her determination dated 12 August 2009, Ms Nicholls, an accredited freedom of information officer of the agency, advised Mr Parnell that:

Having reviewed the documents identified through the discovery process (as identified in the attached Schedule), it is determined to **refuse access** to the requested documents in accordance with Section 20 of the *Freedom of Information Act 1991* (the Act). The grounds for refusal are identified in the Schedule.

3. One document is identified on the Schedule attached to the determination:

1. June 2009 Growth Investigation Areas Project: Urban Growth Expansion of Greater Adelaide (**the document**, or **the GIA report**).

4. The reasons given by Ms Nicholls for refusing access to the document, as contained on the Schedule, are as follows:

Clause 9(1) of Schedule 1 (internal working document)

The document contains opinions, advice and recommendations that was [sic] obtained during the course, and for the purposes of, the decision-making functions of the Government. The disclosure of this information is, on balance, contrary to the public interest. While it is in the public interest to release information that would disclose the decision-making processes of Government, this is strongly outweighed by the consideration that release of opinions and advice relating to land development could lead to speculation that is not in the interests of the orderly and economic development of the State.

Clause 14 of Schedule 1 (affecting the economy of the State)

The document contains information relating to land development that could lead to inappropriate speculation and potential advantage or disadvantage to a class of persons holding land within the Project area. The information in the document is to be used to guide Government decision-making only and is not definitive, it is, on balance, contrary to the public interest to release the document.

5. On 4 September 2009, Mr Parnell applied for an internal review of Ms Nicholls' determination.
6. On 24 September 2009 Mr Ian Nightingale, the Chief Executive Officer of the agency wrote to Mr Parnell and advised:

Having reviewed the original determination, I have determined to **confirm** the original determination in accordance with Section 38 of the Act.

I confirm the original reasons provided to you for this determination.

7. Mr Parnell applied to me for external review on 12 October 2009.

Relevant provisions of the FOI Act

8. Under section 48 of the FOI Act the onus is on an agency to justify its determination in my external review.
9. Section 39(11) of the FOI Act provides that I may confirm, vary or reverse the determination of the agency, based on the circumstances existing at the time of review.
10. Clauses 1, 9(1), 13(1) and 14 of Schedule 1 to the FOI Act are relevant to my external review, in that they have been relied upon either by the agency or the interested party. The relevant parts of these clauses are below.

1– Cabinet documents

- (1) A document is an exempt document–
 - (a) if it is a document that has been specifically prepared for submission to Cabinet (whether or not it has been so submitted); or
 - (b) if it is a preliminary draft of a document referred to in paragraph (a); or
 - (c) if it is a document that is a copy of or part of, or contains an extract from, a document referred to in paragraph (a) or (b); or
 - (e) if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet; or
 - (f) if it is a briefing paper specifically prepared for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet.

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, 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.

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.

14– Documents affecting the economy of the State

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

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

Submissions

11. In a letter and attachment to the agency dated 26 February 2010 (**my previous letter**) I set out numerous issues I considered to be relevant to this external review. I asked the agency to consult with Connor Holmes, an interested party, by providing it with copies of my letter and attachment; and I invited submissions. It would have been clear to the agency and the interested party that I was not, at that time, satisfied that the document is exempt. In saying this, it should be noted that only clauses 9 and 14 had been raised at that time. I have now received submissions from the agency and Connor Holmes. Mr Parnell has not provided formal submissions.
12. Connor Holmes has asserted words to the effect that its submissions should not be disclosed to Mr Parnell, because to do so would disclose exempt matter. It further adds that its letter of submissions is an exempt document. This is despite the fact that in my previous letter (a copy of which Connor Holmes received) I asked that claimed exempt matter be put in a *separate* document, and that to the extent possible, submissions be provided in a form that can be provided to Mr Parnell.
13. I am mindful of section 39(15) of the FOI Act¹ and therefore I will not provide the submissions to Mr Parnell. However, Connor Holmes' submissions will become apparent in *general* terms from my reasoning. I cannot provide my determination in a vacuum. To the extent that it may not be clear from my determination, for completeness I can only advise that I have had regard to all submissions provided by the agency and Connor Holmes.

Determination

14. In the interests of brevity I will not discuss clauses 9, 13 and 14 of Schedule 1 to the FOI Act in detail as I am satisfied, on the basis of material provided by the agency, that the GIA report is exempt under clause 1(1), which does not have an additional public interest test. I will however make the following general comments regarding the balance of the

¹ Section 39(15) provides that I should avoid disclosing in my reasons for my determination any matter that the agency claims is exempt matter (whether or not I agree with that claim). In the interests of the objects of the FOI Act, I will also avoid disclosing any matter that a relevant interested party claims is exempt matter.

exemption provisions relied upon by the agency and Connor Holmes, in response to submissions I have received.

15. I do not agree that the GIA report was 'clearly provided to the DPLG on a confidential basis', or that it was 'obtained by' the agency in confidence. Connor Holmes submits that this confidentiality is clear from the 'Consultancy Agreement for the GIA Report' between the Minister and Connor Holmes. I have had regard to the contract between the Minister and Connor Holmes. Whilst it seems clear that Connor Holmes owed, and still owes, an obligation of confidence to the Minister, upon my reading there is no such obligation owed to Connor Holmes by the Minister or the agency. Connor Holmes was contracted as a consultant to provide services to the Minister, and I note from clause 11 of the contract that upon the expiration of the contract, Connor Holmes was required to deliver to the Minister all documents produced by Connor Holmes in the course of performing services to the Minister. Presumably the GIA report is itself covered by this clause. In my view it would be an odd situation for the Minister or the agency to owe Connor Holmes an obligation of confidence in circumstances where, contractually, Connor Holmes is no longer entitled to possess a copy of the document said to contain the confidential information.
16. Clause 13(1) envisages, in my view, circumstances where it would be inappropriate for an agency to disclose information it had received from another party, and not the other way round. In this matter, it appears that nothing prevents the Minister, if he so chooses, from disclosing the GIA report. Therefore, it cannot be exempt under clause 13(1) of Schedule 1 to the FOI Act.
17. It has been submitted that disclosing the GIA report in this matter will discourage the private sector from dealing with the government in the future in relation to development projects and opportunities, as well as more globally; or that it will encourage the businesses that do engage with the government to restrict the amount of information they disclose. I am not persuaded by these general assertion, for reasons which have been made clear in other recent external reviews involving Mr Parnell, the agency and Connor Holmes.
18. The GIA report is said to contain 'sensitive content' such as:
 - 'recommendations as to density per hectare of housing in both Growth Areas and GIA Development Areas';
 - 'long term growth options boundaries detailed with cadastre particularity'; and
 - 'prioritisation of land supply between Growth Areas and GIA Development Areas based on specific criteria'.
19. It has been asserted that release of such information would undermine the 30 Year Plan because developers (and the public) would speculate 'as to future potential Government-designated areas for development not specified in the 30 Year Plan, being the GIA Development Areas'. This is because the GIA Development Areas are likely to be more affordable than areas designated for development in the 30 year plan. This will:
 - detract from the designated areas stated in the 30 Year Plan, thereby undermining the 30 Year Plan. As the 30 Year Plan works in conjunction with other specialist plans, those plans will also be undermined;
 - result in a waste of the tax payer dollars already spent on the 30 Year Plan;
 - drain government and council resources 'where developers engage in relevant due diligence processes and engage Government and Council personnel for consultation in GIA Development Areas'; and

- 'to the extent that developers do not engage in relevant due diligence processes when pursuing development opportunities in GIA Development Areas, the purchase of relevant sites is likely to lead to considerable expenditure on the site, drafting concept plans and undertaking authority negotiations with little prospect of achieving a positive outcome'.
20. I am not persuaded that the 30 Year Plan will be 'undermined' by the release of the GIA report, or, if any of the above consequences occur, that they cannot be managed or minimised. The GIA report is specific whereas the 30 Year Plan appears more general and strategic. That said, all of the 'designated areas' in the 30 Year Plan appear to be in the GIA report, so I am not convinced that releasing the GIA report will 'detract' from those areas. That there is no guarantee that all areas within the GIA report will be adopted by the government for development should also be evident. If councils or the government are approached regarding land not destined for development, I would have thought the issue could be quickly clarified without the need for money to be spent.
21. I accept that the process of rezoning land involves negotiation between the government, developers and other entities such as councils. However, I am not persuaded that releasing the GIA report will effectively show the government's hand and place it in an unequal bargaining position. In my view this can be distinguished from negotiating with tenderers after indicating the potential budget. To my understanding, and irrespective of particular recommendations made by the consultant, the crux behind the GIA report was to identify land with the potential for development. The data arising from the report is, in essence, factual, and moreover it is data capable of being reproduced, I would imagine, by other parties. In my view, this goes against the notion that the government would be disadvantaged by the release of the GIA report. It also goes against the notion that release of the GIA report would lead to land speculation that would otherwise not occur.
22. In any event, at the end of the day the decision to rezone particular land rests with the Minister, and not with would be developers acting in their own interests.
23. It has been submitted that release of the GIA report will not 'level the playing field' as I suggested in a previous letter, as land-holders, not all of whom are sophisticated in the field, will not realise for instance that the 'potential yields' cited in the report are subject to significant discounts. This will create an imbalance between developers and land-holders, with the latter realising less than market value prices.
24. Whilst I acknowledge the importance of rectifying disadvantage, or ensuring it does not occur, I am not persuaded that the *withholding* of the information in the GIA report is the appropriate means of achieving the goal. Ordinarily, the provision of information serves to level the playing field, and the fact that certain quarters may wish to mischievously use information to their advantage is not, in and of itself, a conclusive reason against releasing it. In my view it can also be said that the imbalance between developers and land-holders already exists: developers are already in a position to be able to determine which land could be developed, whilst the land-holders that they approach may not be. Considered this way, the land-holders would be in no worse a position were the GIA report publicly available.

Cabinet exemption

25. The agency has not stipulated which part of clause 1(1) of Schedule 1 to the FOI Act it is relying on; merely that it was always intended that the GIA report be a Cabinet document. I will assume that the agency is relying on clause 1(1)(a), which provides that a document is exempt if it is a document that has been specifically prepared for submission to Cabinet

26. The information provided by the agency indicates that the 30 Year Plan was specifically prepared for submission to Cabinet, and that it was always intended that results from the GIA report would be incorporated into the 30 Year Plan. Notwithstanding that it was released, and was always intended for release, the 30 Year Plan would appear to qualify as an exempt document under clause 1(1)(a). This does not, in itself, mean that the GIA report is also exempt under clause 1(1)(a). However, the agency has shown that the GIA report was in fact submitted to Cabinet, and that Cabinet made the decision of which areas should be developed and which areas should not. I accept that it was always intended that Cabinet make this decision. Accordingly, the GIA report is exempt under clause 1(1)(a) as it can be said that it was specifically prepared for submission to Cabinet, notwithstanding that the Cabinet decision itself is evident from the publicly available 30 Year Plan.
27. In light of my reasoning above, I vary the agency's determination, pursuant to section 39(11) of the FOI Act. I do not consider the GIA report exempt under clauses 7, 13 or 14 of Schedule 1 to the FOI Act. It is however exempt under clause 1(1)(a) of Schedule 1 to the FOI Act.

Further matters - section 39(12) of the FOI Act

28. Section 39(12) of the FOI Act provides that if I am satisfied that a document is an exempt document, I do not have the power to make a determination to the effect that access is to be given to the document. I may however, if I think fit, offer reasons why the agency might give access to the document despite its exempt status. I consider it fitting in the circumstances to offer reasons why the agency might give access, notwithstanding its exempt status, to the GIA report. In my view, whilst it is exempt under the cabinet documents provisions in the FOI Act, the document which directly divulges the deliberations and decision of Cabinet - the 30 Year Plan - has already been released to the public. Moreover, I have indicated that I have not been persuaded by the other exemption claims put to me. In the circumstances the agency might agree that cabinet confidentiality would not be undermined if the GIA report was released, and I remind the agency of the objects of the FOI Act and its principles of administration under section 3 and 3A of the FOI Act.

Right of Appeal

29. Any person aggrieved by my determination may appeal to the District Court of South Australia under section 40(2) of the FOI Act.
30. The agency may also appeal against my determination, but only on a question of law and only with the permission of the court, under section 40(1) of the FOI Act.
31. Under section 40(3) of the FOI Act, any such appeals should be commenced within 30 days after receiving notice of my determination; or in the case of a person who is not given notice of my determination, within 30 days after the date of my determination

Richard Bingham
SA OMBUDSMAN

7 July 2010