



Determination

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

Applicant:	Mr Rex Patrick
Agency:	SA Police
Ombudsman reference:	2023/00143
Agency reference:	23-0883
Determination:	<p>The determination of the agency is varied, the effect of which is:</p> <ul style="list-style-type: none">• documents 1 and 2 are exempt in full under clause 1(1)(b)• documents 6, 7, 17, and 21 are exempt in part under clause 1(1)(c)• documents 14 and 16-19 are exempt in part under clauses 9(1) and 16(2)• documents 20 and 21 are exempt in part under clause 6(1)
Date of Ombudsman's determination:	5 June 2023
Issues considered:	<p>Cabinet documents</p> <p>Documents affecting law enforcement and public safety</p> <p>Internal working documents</p> <p>Documents concerning operations of agencies</p>
Exemption clauses relied upon:	1,4, 9 and 16
Legislation considered:	<i>Freedom of Information Act 1991</i>

OFFICIAL

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (the FOI Act) the applicant requested access from the agency to:
 - 1) Any file held by the Police Commissioner that goes to the relocation of the Thebarton Police Barracks.
 - 2) Any emails to or from the Police Commissioner that goes to the relocation of the Thebarton Police Barracks
 - 3) Any file held by the Commander of SA Police Mounted Operations that goes to the relocation of the Thebarton Police Barracks
 - 4) Any emails to or from the Commander of SA Police Mounted Operations that goes to the relocation of the Thebarton Police Barracks.
2. Pursuant to section 18(2) of the FOI Act, the agency requested that the applicant narrow the scope of his application such that dealing with it would not substantially and unreasonably divert the agency's resources. The applicant subsequently agreed to amend the FOI application as follows:
 - 1) Any documents held by the Police Commissioner that goes to the site options, and analysis/consideration of those options, for the relocation of the Thebarton Police Barracks.
 - 2) Any emails to or from the Police Commissioner that goes to the site options, and analysis/consideration of those options, for the relocation of the Thebarton Police Barracks
 - 3) Any documents held by the officer in charge of SA Police Mounted Operations that goes to the site options, and analysis/consideration of those options, for the relocation of the Thebarton Police Barracks.
 - 4) Any emails to or from the officer in charge of SA Police Mounted Operations that goes to the site options, and analysis/consideration of those options, for the relocation of the Thebarton Police Barracks.

Background

3. For ease of reference, the procedural steps relating to the application are set out in Appendix One.

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 views about the agency's determination to the parties, by a provisional determination dated 22 March 2023. I informed the parties that subject to receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
6. The applicant and the agency both provided submissions in response. I have considered these submissions below.

Relevant law

7. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
8. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access.
9. The following clauses of Schedule 1 of the FOI Act are relevant to my external review:

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.

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.

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.

16—Documents concerning operations of agencies

- (2) A document is an exempt document if—
 - (a) it relates to an agency engaged in commercial activities; and
 - (b) it contains matter the disclosure of which could prejudice the competitiveness of the agency in carrying on those commercial activities.

10. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.

¹ Freedom of Information Act 1991 s 12.

11. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Documents in issue

12. The agency identified 21 documents within the scope of the application. The agency determined to refuse access to all documents. Following receipt of my provisional determination, the agency now submits that 5 documents can be released to the applicant in part. Where the agency submits that a document or part of a document can be provided to the applicant, I will not consider whether that material is exempt.

Issues in this review

13. Having regard to the agency's submissions and the exemption clauses provided in Schedule 1 of the FOI Act, it is for me to determine whether to confirm, vary or reverse the agency's determination in regard to the documents in issue in this external review.

Consideration

Clause 1(1)(a) and (b)

14. The agency submits that document 10 is exempt on the basis of clause 1(1)(a) as it is an extract from a document created by another agency which is being prepared for submission to Cabinet. The originating document is described as the 'New WCH Master Plan'. The agency acknowledges that it has limited information in relation to document 10, and has advised that it is willing to consult with the other agency to determine the status of the document.
15. In the circumstances of this matter, and noting that the agency has been provided with several extensions of time to provide submissions, I do not consider that it would be reasonable to provide further time for the agency to consult.
16. I note that the 'New WCH Master Plan' from which the extract is attributed is now publicly available, although does not appear to include document 10. Given that the purpose of the Plan, as published, appears to be to provide an overview of a development project, I am unable to determine whether document 10 was specifically prepared for submission to Cabinet. Therefore, I am not satisfied that clause 1(1)(a) is applicable to document 10.
17. The agency submits that clause 1(1)(b) is applicable to documents 1, 2 and 10.
18. As I am not satisfied that document 10 was prepared specifically for submission to Cabinet, for the same reasons I am not satisfied that it is a preliminary draft of such a document.
19. Documents 1 and 2, labelled as 'Submission for Cabinet' and 'Cabinet Note' are drafts as evidenced by their watermarks. Accordingly, I accept that both documents are exempt in full by virtue of clause 1(1)(b) as they are preliminary drafts of such documents.

Clause 1(1)(c)

20. The agency determined that clause 1(1)(c) applied to all 21 documents. In my provisional determination, I advised the agency that I was not satisfied that it had

provided sufficient information for me to reach the same conclusion. The agency now submits that clause 1(1)(c) is applicable to 5 of the 21 of the documents in issue, namely documents 6, 7, 10, 17 and 21.

21. Clause 1(1)(c) refers to a 'copy' or document containing an 'extract' of a document exempt pursuant to clause 1(1)(a) or (b). I consider that both of these words indicate that the subject document must be verbatim to an exempted document. That is, it is not sufficient if a document summarises the contents of a clause 1(1)(a) or (b) document, it must relay the contents of such a document in the exact same terms.
22. The agency has provided two documents which are exempt on the basis of clause 1(1)(a) or (b)- documents 1 and 2. Accordingly, unless it is clear that a document contains an extract of a clause 1(1)(a) or (b) document from its contents alone, I can only confirm exemption under clause 1(1)(c) to the extent that a document is identical to documents 1 or 2. In respect of the 5 documents, the agency submits 'that most of these documents contain material directly copied from the draft Cabinet submission that comprised document 1.'
23. Unless a document is a full copy of a clause 1(1)(a) or (b) document, section 20(4) together with the wording of clause 1(1)(c) indicates that the latter will only apply to a portion of a document. I am satisfied that clause 1(1)(c) can apply to portions of the documents only where they contain verbatim extracts of the information in documents 1 and 2. However, where the documents summarise or describe information in differing terms to those set out in documents 1 and 2, they are not exempt by virtue of clause 1(1)(c).
24. Having reviewed the documents in issue, I am satisfied that documents 6, 7, 17 and 21 contain certain extracts of information in documents 1 and 2, and that the documents are partially exempt only to the extent that the information is *an exact reproduction* of the material in documents 1 and 2. For instance, information under paragraph 21 of document 1 is replicated across documents 6, 7 and 17, and therefore is exempt pursuant to clause 1(1)(c) across all three documents.
25. In relation to document 10, the agency submits that it has been informed by a different agency that the document comprises an extract of another document being prepared for submission to Cabinet. As discussed above, there is no information before me to confirm that document 10 is an extract of such a submission. As document 10 is not an extract of either documents 1 or 2, I am not satisfied that it is exempt under clause 1(1)(c).

Clause 1(1)(e)

26. The agency submits that 14 of the documents in issue are exempt on the basis of clause 1(1)(e), documents 3, 5-9, 12-14, 16-19, and 21. Before assessing whether each of those documents are exempt, I consider it appropriate to address the applicant's submissions about clause 1(1)(e) and discuss its general application.
27. The applicant submits that in the decision of *Department of Treasury and Finance v Mullighan* [2021] SACAT 28 (**Mullighan**) President Hughes misconstrued clause 1(1)(e), giving it an excessively broad application at odds with the objects of the FOI Act and the intention of clause 1. I do not disagree with this submission and have voiced my misgivings about the approach taken in *Mullighan* in previous external reviews. For the applicant's benefit I will repeat those views again here.
28. In the decision of *Mullighan* the Tribunal considered that:

A deliberation can be understood as Cabinet's thinking processes.² A decision is an outcome or action agreed upon. As such, it includes 'noting'. As a collective decision-making body, the 'noting' of information is the formal mechanism by which the Cabinet and each of the Ministers in attendance is bound to the fact of knowledge of that information.³ The clause is directed at protecting the decision-making process, not the subject matter of the process.⁴ However, the revelation of the subject-matter may expose the process.

29. I query whether the Tribunal concluding that 'noting' something constitutes a decision of Cabinet is consistent with its later statement that the clause is directed at protecting the decision-making process. In my view, 'noting' a document can more closely be likened to an acknowledgment rather than a decision. There does not appear to be any substantial process associated with 'noting' a document that needs to be protected.

30. The Tribunal also concluded that:⁵

Looking to the words of the provision, there is no requirement of any sufficiency of relationship between the information and a deliberation or decision. There is no constraint on the proximity of the relationship between the information in the document proposed for release and the Cabinet deliberation or decision.

31. This approach appears to me to have the effect of making clause 1(2)(ab) redundant. Noting the Tribunal's incredibly broad application of clause 1(1)(e), it is difficult to foresee any circumstances in which clause 1(2)(ab) would be applicable. In response to my provisional determination, the agency submits that it does not concur with this view, however has not provided any particular arguments as to why the practical effect of the Tribunal's reasoning would not give rise to such an outcome.

32. It also appears that, by concluding that there is no requirement of any sufficiency of relationship between the information and a deliberation or decision, this will inevitably have the effect of ensuring the protection of the subject matter of the process, which I do not believe is the intent of clause 1(1)(e).

33. That said, I acknowledge that although my own views differ from those expressed in *Mullighan*, I am bound by the Tribunal's reasoning.

34. The applicant has also submitted that the decision in *Mullighan* is inconsistent with the earlier decision in *Department of State Development v Pisoni* [2017] SADC 34 (*Pisoni*). As such, the applicant contends that the doctrine of stare decisis requires me to follow the decision in *Pisoni* in lieu of that in *Mullighan*.

35. Having carefully reviewed both *Mullighan* and *Pisoni*, I am of the view that the two rulings are not inconsistent with one another. Rather, the two matters focussed on different elements of clause 1(1)(e), resulting in *Mullighan* addressing matters which *Pisoni* was merely silent on.

36. For example, the applicant submits that the statement in *Mullighan* that 'Proximity is not a relevant criterion'⁶ is inconsistent with *Pisoni* because the latter specifically constrained the interpretation of clause 1(1)(e) to exclude only 'temporal proximity'. In my view, this characterisation of the *Pisoni* decision contains a small but crucial error. *Pisoni* did indeed exclude temporal proximity as a requirement of clause 1(1)(e), however it was not explicitly said that this was the only form of proximity excluded. Rather, *Pisoni* is silent as to whether other forms of proximity are required to establish

² *Re Waterford and Department of the Treasury (No.2)* [1984] AATA 67; (1984) 5 ALD 588.

³ See generally the discussion of Cabinet processes in *Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301 including the observation that a "deliberation" may occur even where no decision occurs at [88].

⁴ *Secretary to the Department of Infrastructure v Asher* (2007) 19 VR 17; [2007] VSCA 272 at [4]-[6] (Buchanan JA).

⁵ *Department of Treasury and Finance and Stephen Mullighan* [2021] SACAT 28, at [90].

⁶ *Department of Treasury and Finance and Stephen Mullighan* [2021] SACAT 28, at [91].

the application of clause 1(1)(e), leaving it open to President Hughes to conclude that not to be the case.

37. Similarly, whilst *Pisoni* indicates that clause 1(1)(e) requires a consideration as to whether the document in issue reveals a ‘thinking process’ or what Cabinet ministers ‘had on their minds’,⁷ I am mindful that those comments were made in the context of considering what might constitute a deliberation of Cabinet. *Pisoni* was silent as to whether the same is required of a decision of Cabinet, allowing *Mullighan* to conclude that the process of noting something can be said to amount to a decision of Cabinet without contradicting *Pisoni*.
38. Consequently, although I share the applicant’s concerns, I remain satisfied that I am bound to follow the reasoning in *Mullighan*.
39. That said, although I must accept the broad application of clause 1(1)(e), the agency still bears the onus of justifying its determination before me.⁸ Insofar as the agency has relied upon clause 1(1)(e), this includes providing evidence that there has been a relevant deliberation or decision of Cabinet, and that the documents contain information concerning that deliberation or decision.⁹
40. In my provisional determination, I advised the agency that should it wish to provide further submissions regarding clause 1(1)(e), the following should be considered:
- the document/s must relate to the actual deliberation or decision of Cabinet, not merely the subject matter of a deliberation or decision of Cabinet. That is, the agency must establish a connection between the documents and an actual deliberation or decision; merely showing that Cabinet happens to have considered the topic referred to in the documents will not be sufficient¹⁰
 - “disclose” means to reveal for the first time. To the extent that the documents contain information in the public domain, clause 1(1)(e) will not be applicable¹¹
 - any further submission should address the specific contents of the documents claimed to be exempt rather than make blanket claims of exemption.
41. The agency submits that:
- there is overlap with the documents that the agency submits attract clause 1(1)(c) and where those document paraphrase, rather than repeat the matters set out in document 1 the agency submits that 1(1)(e) would clearly apply in that the document reveal the matters put to Cabinet.
42. While I understand that the matters set out in documents exempt by virtue of clause 1(1)(c) could also be exempt in other documents by virtue of clause 1(1)(e) where they are paraphrased rather than exact copies, I would need to be satisfied that the matters had indeed been before Cabinet for deliberation or to be decided. Clause 1(1)(c) applies to documents that contain extracts of information specifically prepared for Cabinet or drafts of such documents. There is no requirement that the material has actually been submitted to Cabinet. However, to attract the exemption in clause 1(1)(e), the information in the documents must have been before Cabinet such that a relevant deliberation or decision is made.
43. Documents 3 and 5-9 are described as ‘Commissioner’s Briefing Papers.’ The agency submits that these documents have been prepared for the purpose of providing the

⁷ *Department of State Development v Pisoni* [2017] SADC 34, at [26].

⁸ *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor* [2019] SASC 162, at [163].

⁹ *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56, [81].

¹⁰ *Department of Treasury and Finance and Stephen Mullighan* [2021] SACAT 28, at [99].

¹¹ *Department of Treasury and Finance and Stephen Mullighan* [2021] SACAT 28, at [82].

OFFICIAL

Minister via the Commissioner of Police with information relating to matters 'before and to be discussed in Cabinet.' The agency submits:

Where the agency is asked to propose a matter for the Minister to take to Cabinet, support the Minister in taking a matter to Cabinet or comment on a matter before Cabinet, the process adopted is for a Commissioner's briefing paper to be prepared before the briefing or draft in question goes to the Minister. This briefing paper is not a separate document to brief the Commissioner but should properly be regarded as part of the process of preparing the brief or draft for the Minister.

In each of the briefing papers in question it is clear that the matters addressed involve matter for the Minister to take to Cabinet as part of Cabinet's consideration of both the project and the proposed legislative response.

The purpose of each of these minutes is to propose or respond to a matter before Cabinet and disclosure of any of the contents of these documents would inherently disclose information concerning the deliberations and decisions of Cabinet in question. As such the agency would submit that the briefing papers attract clause 1(1)(e).

44. Relevantly, the applicant submits:

... no view of a department, no thinking of a department and no anticipation of a department as to what may or may not happen in the Cabinet room can properly be construed to be the actual view of a minister within Cabinet or the thinking of minister in Cabinet or the collective view/decision of the Cabinet and therefore cannot be subject to the doctrine of cabinet confidentiality.

45. I agree with the applicant's submissions that the agency's expectation that a matter will be considered by Cabinet does not amount to the same thing as a decision or deliberation of Cabinet.
46. It is unclear from the agency's submissions whether the matters have been submitted to Cabinet or are due to be submitted at some later date. As discussed in my provisional determination, unless evidence has been provided of a relevant decision or deliberation taking place, I cannot be satisfied that clause 1(1)(e) is applicable.
47. While I can see that some documents, for example document 3, anticipated a Cabinet decision being made by way of noting, there is insufficient information available to me to conclude that the decision did in fact eventuate. The agency has not provided me with sufficient particulars with respect to any Cabinet deliberation or decision to be satisfied that the documents are exempt under clause 1(1)(e).
48. Document 12 consists of a report by Renewal SA and includes various relocation options for the SA Police barracks. The agency submits that the report was prepared for the Commissioner of Police to inform a submission to Cabinet. Without any further information as to whether that information has been submitted or what the ultimate form of that submission was, I cannot be satisfied that the document is exempt under clause 1(1)(e).
49. Documents 13, 14, 16, 18 and 19 appear to be briefings prepared for the Minister for Police, Emergency Services and Correctional Services about matters which were submitted or proposed to be submitted to Cabinet. As discussed, on the basis of the information before me, I am not satisfied that the matters have been submitted to Cabinet, as the agency has not provided sufficient particulars to demonstrate this, and as such I am not persuaded that the documents are exempt under clause 1(1)(e).
50. As I have already found the material in document 21 to be exempt under clause 1(1)(c), I will not consider whether it also exempt under clause 1(1)(e).

Clause 1(1)(f)

51. The agency submits that documents 13, 14, 16, 18 and 19 are exempt pursuant to clause 1(1)(f). These documents are briefings prepared for the Minister for Police, Emergency Services and Correctional Services. The agency submits that the documents:
- clearly attract this clause as briefings on matters to be taken to Cabinet via a Cabinet Submission, responses to matters before Cabinet such as comments on proposed legislation, or updates on matters likely to be the subject of discussion at Cabinet such as correspondence with other agencies.
52. As noted in my provisional determination, it is not clear to me that the briefings were prepared for 'use' by the Minister. Rather, they appear to be merely updates. I advised that the agency would need to establish that these are documents prepared for use by the Minister in relation to a matter submitted, or proposed to be submitted to Cabinet.
53. In its submissions the agency responded that it would be willing to make enquiries with Cabinet as 'to the extent to which the documents are considered by Cabinet.' Given that the agency has already been provided with an opportunity to furnish this information, I do not consider that giving the agency further time to make enquiries with Cabinet is reasonable.
54. I further note that document 15 also includes a briefing to the Minister, which the agency has not claimed to be exempt under clause 1(1)(f). As that the agency has not provided sufficient information to demonstrate why the contents of the other briefings should be exempt, or why they may differ from document 15, I am not satisfied that the documents claimed to be exempt under clause 1(1)(f) are exempt.

Clause 4(2)(a)(iii), (iv), (v)

55. The agency submits that documents 4, 11, 15 and 20 are exempt on the basis of clause 4(2)(a)(iii), (iv) and (v). The agency submits that the material in three documents:
- contains information detailing the location of critical infrastructure & systems used by SAPOL, the release of which would pose a significant level of risk of malicious damage to those systems/structures
- Whilst there is a public interest in knowing the state of government critical infrastructure & systems, there is also a significant public interest in maintaining the integrity of that infrastructure to ensure that the safety and security of the infrastructure, and the absolute requirement for such protection far outweighs any generalised interest in the information.
56. In relation to the fourth document (document 20), the agency submits:
- This document contains information and provides detailed information SAPOL use to protect the community and ensure public safety, it is necessary to protect the integrity and confidentiality of the information so as not to prejudice the procedure for protecting the safety of the public. I have formed the view that protecting the safety of the community outweighs the interest in disclosure of the documents....
57. Having reviewed the relevant documents, it is unclear how any of the effects anticipated by subclauses 4(2)(a)(iii), (iv) and (v) could reasonably be expected to eventuate from their disclosure. The agency has speculated as to the risk of 'malicious damage' to its infrastructure, but has not provided any specific explanation as to why this could be reasonably be expected. Similarly, I am not satisfied that the information

OFFICIAL

in document 20 contains information sufficiently detailed to prejudice any system or procedure for the protection of persons or property.

58. In relation to the agency's submissions as to the public interest, I do not consider that the agency has sufficiently assessed the factors in favour of disclosure against those contrary to disclosure, or explained the relevance of each factor to the material at issue. Accordingly, I am not satisfied that the documents are exempt under clause 4(2)(a)(iii), (iv), (v).

Clause 9(1)

59. The agency submits that documents 12, 14, 17, 18 and 19 are exempt on the basis of clause 9(1). As discussed in my provisional determination, I accept that the scope of clause 9(1)(a) is sufficiently broad to capture the entirety of the documents, therefore exemption of the documents turns on whether disclosure would be contrary to the public interest.
60. In my provisional determination, I advised that I was satisfied that documents 14 and 16-19 are partially exempt on the basis of this clause insofar as they contain information relating to the preferred relocation site of the police barracks, noting that disclosure would likely cause detriment to the agency and Renewal SA in the following ways:
- undermine their ability to negotiate a competitive price
 - attract other potential buyers
 - ultimately be misleading if an alternative option is pursued.
61. I consider these factors to be weighted heavily enough to displace the public interest factors in favour of disclosure.
62. In response the agency submits:
- the relevant documents clearly fall within clause 9(1) on their face having regard to the nature of the request and the documents as a whole. It is not clear what further submission would be required from the agency to satisfy this aspect of the test.
63. It is unclear what the agency is referring to in the above submission, I advised in my provisional determination that I accepted that the documents in full were captured by clause 9(1)(a), however the application of the exemption would be dependent upon the relevant weighting of the public interest.
64. The agency submits that the following public interest factors are relevant:
- Considering the public interest in respect of the disclosure of the relevant documents under this clause the agency has noted the following factors in favour of disclosure:
- furthering the objects of the Act;
 - promoting openness and accountability of agencies;
 - enabling effective oversight of government expenditure; and
 - providing an individual with information that is of special interest to them.
- The agency is of the view, however that these matters are outweighed by the following factors against disclosure:
- the need for state agencies to get full and frank confidential briefings from Renewal SA to inform purchasing decisions;
 - the need to ensure that property decisions by the State are fully informed and considered before approaching the market;

- the need to ensure incomplete or inaccurate information does not affect the State's ability to participate in the market or have an impact on other operators in the market;
 - the need to ensure that the state is not at a disadvantage in the market when purchasing property;
 - the need for the State to manage the State's resources effectively and efficiently; and
 - protecting the commercial and financial interests of third parties.
65. I agree with the factors in favour of disclosure. In my provisional determination, I additionally noted the substantial community and media interest in the subject matter of the documents (rather than just the applicant's interest) and considered that the interest in promoting transparency around agency decision-making is particularly relevant.
66. In response, the agency submits that
- in respect of the assessment of the public interest factors the provisional determination notes the substantial community and media interest in the subject matter of the documents and appears to indicate that this gave the interest in promoting transparency around agency decision-making greater weight. With respect to the Ombudsman the agency submits that this approach is incorrect.
- Whilst weight must be given to those matters, this needs to be assessed in the context of the public interest as an objective matter and the question as to whether parts of the public may subjectively be interested is not something that should weigh in on that assessment one way or another. Indeed, a heightened media interest in a matter could in fact lead to greater risks that could be regarded as contrary to the public interests (for instance the risk that matters will be disseminated prematurely or out of context).
67. I acknowledge that the public interest test concerns matters that are in the interests *of* the public, rather than matters that are of interest *to* the public. However, I consider that the community interest in the subject matter of the documents is relevant to certain public interest factors in favour of disclosure. In particular, disclosure can inform debate on a matter of public importance, and reveal to members of the public the thinking behind certain decision-making processes. I agree with the applicant's submission that 'informed public participation' should be afforded some weight in the circumstances of this matter.
68. With respect to the remaining public interest factors against disclosure, it is not clear to me why Renewal SA would fail to provide full and frank briefings to agencies, or why an agency would not be fully informed or affected in its abilities to participate in the market, if the documents were disclosed. It is evident that engaging with state agencies in relation to land and property matters, and commercial negotiations for the purchase and development of State land are part of Renewal SA's core functions. I am not satisfied that disclosure of the documents would prevent Renewal SA from fulfilling those functions, as it would not be in its interest to do so.
69. The agency has made specific submissions in relation to document 12, which was prepared by Renewal SA and includes various relocation options for the SA Police barracks. The agency submits that disclosure of these options 'would clearly be likely to drive up the price of any future purchase,' thereby diminishing the ability of the State to obtain property at a competitive price.
70. Having reviewed document 12, I do not consider that the material in the document, such as the requirements for a future site or possible purchasing options, is revelatory of any particular information that could affect the ability of the State to compete in the market. Given the degree of public scrutiny that the project has received, it appears that much of the information in document 12 is already in the public domain. The requirements for relocation, and the State government's interest in potential sites, are

OFFICIAL

matters that have been the topic of some public discussion. Moreover, document 12 does not disclose a preferred relocation site, which I accept may undermine the State's ability to negotiate a competitive price.

71. In light of the above, I am not satisfied that disclosure of document 12 would be contrary to the public interest. However, as discussed above, I am satisfied that documents 14 and 16-19 are partially exempt pursuant to clause 9(1).

Clause 16(2)

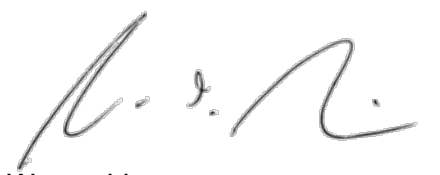
72. The agency submits that documents 12, 14, 17, 18 and 19 are exempt on the basis of clause 16(2). The agency has repeated its submissions with respect to clause 9(1) in support of this exemption. The applicant submits that the agency itself cannot be considered to be engaged in commercial activity. I do not disagree with this position, however it is evident that Renewal SA, who has provided some of the information in the documents is engaged in such activity.
73. I accept that the purchase of land for government functions is a commercial activity. I also accept that, in conducting this activity, Renewal SA will find itself in competition with other prospective buyers of land. That said, I am not satisfied that the disclosure of the documents would prejudice that competitiveness. As discussed above, I consider that as the site relocation options, and potential sites for State government purchase, have been revealed in the public domain no claim of prejudice can be made out.
74. I accept that if the documents indicated an intention to pursue one particular relocation site or revealed a proposed sale offer this might be sufficient to enliven clause 16(2), however as set out in my assessment of clause 9(1) that is not the case. I do however accept that this reasoning enlivens the application of clause 16(2) to the same portions of documents 14 and 16-19 which I consider to be exempt on the basis of clause 9(1).
75. I am not satisfied that the agency has justified any further reliance upon clause 16(2).

Clause 6(1)

76. The agency has applied clause 6(1) to documents 20 and 21 in relation to the mobile telephone numbers of agency staff. I accept that this information, insofar as it allows staff to be contacted outside of working hours, constitutes personal affairs for the purposes of clause 6(1). I also consider that disclosure would be unreasonable in the circumstances as the inclusion of the telephone numbers is tangential to the subject matter of the documents and provides no insight into the information itself.

Determination

77. In light of my views above I vary the agency's determination in accordance with Appendix Two.



Wayne Lines
SA OMBUDSMAN

5 June 2023

APPENDIX ONE

Procedural steps

Date	Event
21 October 2022	The agency received the FOI application dated 21 October 2022.
25 October 2022	The agency advised the applicant that it anticipated making a determination in accordance with section 18(1), and requested that the applicant narrow the scope of the FOI application.
25 October 2022	The applicant agreed to narrow the scope of his FOI application.
31 October 2022	The agency extended the time to deal with the application until 16 December 2022. ¹²
16 December 2022	The agency determined the application.
20 December 2022	The agency received the internal review application dated 20 December 2022.
28 December 2022	The agency confirmed the determination.
9 January 2023	The Ombudsman received the applicant's request for external review dated 9 January 2023.
9 January 2023	The Ombudsman advised the agency of the external review and requested submissions and documentation.
13 January 2023	The agency provided the Ombudsman with its submissions and documentation.
17 February 2023	The applicant provided the Ombudsman with submissions.
22 March 2023	The Ombudsman issued a provisional determination, seeking submissions in response by 5 April 2023.
31 March 2023	The agency sought an extension of time to provide submissions to 1 May 2023.
5 April 2023	The applicant provided submissions in response to the provisional determination.
21 April 2023	The agency sought a further extension of time to 12 May 2023
15 May 2023	The agency provided submissions in response to the provisional determination.

¹² *Freedom of Information Act 1991*, section 14A.

APPENDIX TWO

Document in issue	Description	Agency's Submissions	Ombudsman's provisional determination	Information to be released
1	SA Police - Thebarton Barracks Relocation Submission for Cabinet	Fully exempt on the basis of clause 1(1)(b)	Fully exempt on the basis of clause 1(1)(b)	None
2	SA Police - Thebarton Barracks Relocation Cabinet to note	Fully exempt on the basis of clause 1(1)(b)	Fully exempt on the basis of clause 1(1)(b)	None
3	Commissioner's Briefing Paper - Thebarton Barracks Relocation - Cabinet Note dated 20 October 2022	Fully exempt on the basis of clause 1(1)(e)	Not exempt	Release in full
4	Commissioner's Briefing Paper - New W&CH construction update - Cabinet Note dated 26 October 2022	Partially exempt on the basis of clauses 4(2)(a)(v) and 4(2)(b)	Not exempt	Release in full
5	Commissioner's Briefing Paper - New W&CH Bill - dated 19 October 2022	Fully exempt on the basis of clause 1(1)(e)	Not exempt	Release in full
6	Commissioner's Briefing Paper - SA Police - Thebarton Barracks Relocation planning dated 6 August 2022	Fully exempt on the basis of clauses 1(1)(c), 1(1)(e) and 1(1)(f)	Partially exempt on the basis of clause 1(1)(c)	Release excepting information replicated from documents 1 and 2
7	Commissioner's Briefing Paper - SA Police - Thebarton Barracks Relocation planning dated 8 November 2022	Fully exempt on the basis of clauses 1(1)(c) and 1(1)(e)	Partially exempt on the basis of clause 1(1)(c)	Release excepting information replicated from documents 1 and 2
8	Commissioner's Briefing Paper - New W&CH Bill - dated 8 November 2022	Fully exempt on the basis of clause 1(1)(e)	Not exempt	Release in full
9	Commissioner's Briefing Paper - Thebarton Barracks Relocation - Cabinet Submission dated 15 November 2022	Fully exempt on the basis of clause 1(1)(e)	Not exempt	Release in full
10	Early works proposal - SAPOL decant dated 18 October 2022	Fully exempt on the basis of clauses 1(1)(a), 1(1)(b), and 1(1)(c)	Not exempt	Release in full
11	Commissioner's Briefing Paper - New W&CH construction updated -	Partially exempt on the basis of clauses	Not exempt	Release in full

OFFICIAL

	Cabinet Note dated 26 October 2022	4(2)(a)(v) and 4(2)(b)		
12	SAPOL barracks relocation options - Renewal SA dated 1 September 2022	Fully exempt on the basis of clauses 1(1)(e), 9(1) and 16(2)	Not exempt	Release in full
13	Minutes forming enclosure to Minister for Police Emergency Services and Correctional Services re new W&CH Bill - dated 19 October 2022	Fully exempt on the basis of clauses 1(1)(e), and 1(1)(f).	Not exempt	Release in full
14	Minutes forming enclosure to Minister for Police Emergency Services and Correctional Services re Thebarton Barracks Relocation - dated 20 October 2022	Fully exempt on the basis of clauses 1(1)(e), 1(1)(f), 9(1) and 16(2)	Partially exempt on the basis of clauses 9(1) and 16(2)	Release excepting paragraphs 2 and 3 on page 2
15	Minutes forming enclosure to Minister for Police Emergency Services and Correctional Services re Thebarton Barracks Relocation - construction updated - dated 7 November 2022	Partially exempt on the basis of clauses 4(2)(a)(v) and 4(2)(b)	Not exempt	Release in full
16	Minutes forming enclosure to Minister for Police Emergency Services and Correctional Services re New W&CH Bill - dated 10 November 2022	Fully exempt on the basis of clauses 1(1)(e) and 1(1)(f)	Partially exempt on the basis of clauses 9(1) and 16(2)	Release excepting paragraph 5 on page 2
17	Letter from SAPOL Commissioner of Police to Acting Under Treasurer - dated 11 November 2022	Fully exempt on the basis of clauses 1(1)(c), 1(1)(e), 9(1), and 16(2)	Partially exempt on the basis of clauses 1(1)(c), 9(1) and 16(2)	Release excepting paragraphs 2 and 3 after the salutation, and from the two dot points at the end of page 2 through to the second to last paragraph in the document, and information replicated from documents 1 and 2
18	Minutes forming enclosure to Minister for	Fully exempt on the basis of	Partially exempt on the basis of	Release in full except

OFFICIAL

	Police Emergency Services and Correctional Services re Thebarton Barracks Relocation - dated 11 November 2022	clauses 1(1)(e), 1(1)(f), 9(1), and 16(2)	clauses 9(1) and 16(2)	paragraphs 2 and 3 of page 1
19	Minutes forming enclosure to Minister for Police Emergency Services and Correctional Services re Thebarton Barracks Relocation - dated 17 November 2022	Fully exempt on the basis of clauses 1(1)(e), 1(1)(f), 9(1), and 16(2)	Partially exempt on the basis of clauses 9(1) and 16(2)	Release excepting paragraphs 2 and 4 on page 1, and the only paragraph on page 2
20	Email chain last from Inspector Pusey dated 19 October 2022	Partially exempt on the basis of clauses 4(2)(iii)(iv)(v), 4(2)(b), and 6(1)	Partially exempt on the basis of clause and 6(1)	Release in part- mobile phone numbers excluded
21	Email chain last from S/Sgt Taylor dated 20 October 2022	Partially exempt on the basis of clause 1(1)(c) and 1(1)(e) and 6(1)	Partially exempt on the basis of clause 1(1)(c) and 6(1)	Release excepting the two quoted sentences in the email dated 20 October 2022 at 7:47