



## DETERMINATION

### Section 39(11) *Freedom of Information Act 1991 (SA)*

**Ombudsman file reference:** 78185D01

**Applicant for review:** Hon Rob Lucas MLC

**Agency:** Minister for Health

**Determination:** The agency's determination is varied

## REASONS FOR DETERMINATION

### Background

1. On 31 October 2008, pursuant to the *Freedom of Information Act 1991 (the FOI Act)*, the applicant applied to the 'Office for the Minister for Health' for access to:

Since 2005, copies of all documents, including emails and notes of telephone conversations, that includes [sic] references to the body "SA Progressive Business".

2. An accredited FOI officer for the Minister for Health (**the Minister**) initially determined that there were no documents within the scope of the request.
3. On 21 January 2009 the Minister confirmed this determination on internal review, commenting that '[m]y documents, as an agency to which the [FOI] Act applies, are those which relate to the departments or other Crown agencies for which I am the Minister responsible.'
4. By letter dated 21 February 2009 the applicant applied to my office for external review.
5. The Minister, as opposed to the 'Office for the Minister for Health', is an agency for the purposes of the FOI Act. I do not consider documents relevant to other ministerial portfolios which the Minister for Health holds, or has held, to be within the scope of the application.

### Extension of time

6. Based on normal office procedures, the Minister's office has submitted that the letter of determination following internal review would have been posted on 21 January or 22 January 2009 at the latest.
7. The application for external review is dated 21 February 2009, but was only received by my office on 5 March 2009 (in an envelope postmarked 3 March 2009).

8. The application for external review therefore appears to have been received by my office one week later than section 39(3) of the FOI Act provides for.
9. On 9 February 2010 Ms Tonia Nielsen of my office first sought the Minister's views about granting an extension of time to the applicant. After expressing some reservations, Ms Carolyn Lee requested an opportunity to speak to the Minister's chief of staff about the issue. The following morning, Ms Nielsen requested the Minister's submissions by close of business on 11 February 2009. When no response had been received by 9:40am on 12 February 2010, Ms Tonia Nielsen of my office advised Ms Lee as follows:

according to Mr Lucas, he received the Minister's determination on 27 January 2009 (after the Australia Day public holiday). Although his office does not keep records of when mail is posted, his office's procedures make it likely that his application for external review was posted early the week after it was signed (21 February 2009 was a Saturday). [My office received submissions from Mr Lucas' office during the afternoon of 11 February 2010.]

It is also possible that some of the delay between posting of the application and receipt by this office is attributable to the article being redirected from the Ombudsman's street address (to which it was addressed) to a post office box. There was a redirection facility in place at that time. [The possible effect of redirection was only considered after receipt of submissions from Ms Lucas' office.]

Please email any submissions on this issue to me by **12:00pm today** (even if you posted submissions yesterday). Please note that if I have not received any further submissions from you by then I will proceed to finalising my recommendation to the Ombudsman based on the views you expressed during our discussion of 9 February 2010.

10. Ms Lee's response to Ms Nielsen by email dated 12 February 2010 included the following:

... Thank you for the opportunity to comment, however I am concerned that I didn't receive one group of important facts until 9.45 this morning. In these circumstances I neither consent nor object, but in exercising his discretion I would ask that the Ombudsman take into account the following significant concerns.

I am concerned that the Issue [sic] of late receipt of the external review was only raised on 9 February and not at the beginning of the process.

A further significant concern is that as a part of the external review process we have consulted with people involved and some were extremely apprehensive that their information would be released to the public given that their attendance was with an understanding of confidentiality...

My concerns generally are further exacerbated by the timing of this determination in the current political climate, should the Ombudsman determine to release these documents...

11. The applicant, who is experienced in applying for external review, cannot explain the delay between the date of the application for external review and receipt of the application by my office.
12. In addition to the matters referred to above, my view is that there is considerable merit in the application for external review. Prior to the application for external review it was the Minister's position that he held no documents within the scope of the application for access for the purposes of the FOI Act. The Minister no longer holds this view.

13. Neither my office's delay in seeking submissions from the parties on this issue, nor 'the current political climate', detract from the significant factors in favour of granting the applicant an extension of time, including the minimal delay, the possibility that some of the delay was caused by Australia Post's redirection of the application, and the merits of the application for external review itself.
14. Having regard to the matters referred to above, I have decided to exercise my discretion pursuant to section 39(4) of the FOI Act and accept the application for external review dated 21 February 2009, and received by my office on 5 March 2009.

#### **External review process**

15. In response to preliminary enquiries by my office, the Minister's office advised that documents 'were determined not to be departmental documents and not subject to the FOI Act.' Following a 'case by case' assessment, such documents were considered 'private documents in relation to party political activities.'
16. By letter dated 28 April 2009 my predecessor expressed a provisional view that documents intrinsically linked to the Minister's health portfolio are within the scope of the application. At the same time, my predecessor requested copies of relevant documents and sought submissions from the Minister. My predecessor accepted that in order for the Minister to hold documents for the purposes of the FOI Act he must do so in his capacity as a Minister of the Crown, rather than as a member of the Australian Labor Party (**ALP**). It is relevant to note that section 4(3) of the FOI Act provides that:

A reference in this Act to documents held by or in the possession of an agency is, where the agency is a Minister, a reference only to such of those documents as relate to agencies for which the Minister is responsible.

#### ***The documents***

17. The Minister's office then identified 38 documents within the scope of the application. On 4 June 2009, following consultation with third parties, the Minister's office released 29 of these documents to the applicant. The Minister's office undertook consultations with respect to the remaining nine documents (seating plans and lists of attendees, or prospective attendees, at functions) (**the relevant documents**) after the applicant confirmed his interest in obtaining copies.
18. Briefly stated, the relevant documents, numbered 30 to 38, may be described as follows:
  - 30 Pictorial seating plan for a function on 23 April 2008
  - 31 Alphabetical attendance list for a function on 23 April 2008
  - 32 Draft seating plan/attendance list for a function on 3 September 2008
  - 33 Alphabetical attendance list for a function on 5 November 2008, marked 'alpha list'
  - 34 Seating plan/attendance list for a function on 5 November 2008

- 35 Alphabetical attendance list for a function on 17 April 2007, faxed on 17 April 2007
- 36 Alphabetical attendance list for a function on 17 April 2007, faxed on 11 April 2007
- 37 Seating plan/attendance list for a function on 4 October 2007, faxed on 28 September 2007
- 38 Attendance list for a function on 4 October 2007, faxed on 26 September 2007

***Consultation with third parties***

19. The Minister's office identified 71 third parties with whom it considered consultation about the relevant documents was required pursuant to section 27 of the FOI Act (**third parties**) (that is, excluding Ministers and current support staff). The Minister's office undertook consultations with these parties at my office's request and with input from my office. The pro forma response form provided to the third parties enabled them to consent to the release of information about them, or to claim that the information was exempt pursuant to clauses 6 or 7 of Schedule 1 to the FOI Act, or for some other reason under the FOI Act.
20. On 24 August 2009 the Crown Solicitor's Office (**CSO**) wrote to my office on behalf of the Minister and provided supporting documentation, including a supporting letter from the ALP on behalf of SAPB dated 21 August 2009, and statutory declarations made by Mr Christopher Picton and Ms Lee of the Minister's office dated 21 August and 20 August 2009, respectively. The CSO summarised the outcome of the consultation process about the relevant documents and raised a claim that the relevant documents were exempt pursuant to clause 13(1)(a) of Schedule 1 to the FOI Act in any event. Information obtained during the consultation process gave rise to this claim.
21. Briefly stated, consultation responses were obtained from 58 third parties, the majority of whom consented to disclosure. Notwithstanding these consents, SA Progressive Business (**SAPB**) objected to disclosure of all of the relevant documents in their own right pursuant to clause 7(1)(c) of Schedule 1 to the FOI Act.
22. I have ascribed a number to each of the third parties, as well as Ministers and their support staff, from one to 79. I will provide a list to the Minister's office, linking the names of third parties to the number ascribed to them.<sup>1</sup> I have not ascribed a number to SAPB.
23. The following are general observations about the positions of the various third parties referred to in the relevant documents and SAPB:
  - (a) Third parties one to 27, 29 to 32 and 34 to 40, and/or the organisations they represented, consented to disclosure
  - (b) Third parties 28, 33 and 41 to 44 consented to disclosure, with conditions or reservations
  - (c) Third parties 47 to 58, and SAPB, objected to disclosure

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<sup>1</sup> The list refers to the first and last name of each attendee or prospective attendee. It does not refer to any company that the third party was then, or is now, associated with.

- (d) Third parties 59 to 61 did not respond to the letter of consultation
- (e) Third parties 62 to 71 could not be located<sup>2</sup>
- (f) Third parties two and 72 to 79 are, or were at the relevant time, Ministers of the State or Federal Government or their support staff. At the time of consultation third party two did not hold the position they held at the time of the relevant function
- (g) There is a question mark as to whether third parties 1, 20, 32, 37, 42, 54 to 56 and 60 attended the one function they are linked to; third parties 33, 36 and 47 attended one of the two functions they are linked to; and third party 74 attended one of the three functions they are linked to. In saying this I have had regard to the fact that they appeared on a waiting list, and/or the fact they only appear on the first version of a list of attendees, and/or submissions made by the third parties about themselves and/or their then colleagues.

#### ***Consultation with the applicant***

- 24. On 18 September 2009 my office provided the applicant with a copy of the letter from the CSO, along with the letter from the ALP, and the statutory declarations made by Mr Picton and Ms Lee. At the same time, I invited the applicant to provide further submissions to my office. I advised him that I was particularly interested in whether he was 'aware of similar information having been released by other agencies', and of any information he had 'to indicate that the information in question does not have the claimed "necessary quality of confidentiality".' Part of the reason for this request was that the applicant had previously provided a copy of a determination made by an accredited FOI officer of the Department for the Premier and Cabinet (**DPC**) in response to an application he had lodged with the 'Office of the Premier'. The applicant did not respond to this request. As a result, in late January 2010 my office made enquiries of DPC. In February 2010 Ms Bridget Randall of DPC advised that no seating plans or lists of attendees akin to the relevant documents were dealt with in the context of the relevant determination, although names of people in emails and other documents were released.
- 25. The applicant responded to two subsequent requests. On 30 October 2009 my office requested a seating plan referred to in *Hansard* from one of the applicant's Liberal party colleagues.<sup>3</sup> The applicant provided the requested information.<sup>4</sup> In addition, on 12 November 2009, Mr Daniel Gannon confirmed by email that the applicant did not wish to pursue access to the dietary preferences of attendees. Such information has therefore been excluded from further consideration.

#### **Relevant exemption clauses and submissions**

##### ***Clause 7(1)(c)***

- 26. Clause 7(1)(c) of the FOI Act provides as follows:

##### **7—Documents affecting business affairs**

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<sup>2</sup> This was due to a lack of current contact details. The organisations with which some individual attendees were associated had been placed into administration, or had had creditors appointed, at by the time of the consultation process.

<sup>3</sup> South Australia, *Hansard*, House of Assembly, 28 October 2009, 4515 (Steven Griffiths).

<sup>4</sup> Roy Eccleston, 'Attack on the Premier: What Happened Inside the Wine Centre', *The Advertiser* (Adelaide, Australia) 3 October 2009, 14-17.

- (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.

27. To justify a claim that a document is exempt pursuant to clause 7(1)(c), it is necessary to demonstrate that:

- (a) information in the document consists of information (other than trade secrets or information that has a commercial value to any agency or any other person) concerning the business, professional, commercial or financial affairs of an agency or person.<sup>5</sup>
- (b) disclosure of that information could *reasonably* be expected to either:
- (i) *have an adverse effect on those affairs.*

It will be sufficient:

if any adverse effect is established... However, it must be something which can be properly categorised as an adverse effect and not something so de minimis [sic] that it would be properly regarded as inconsequential... It will be sufficient if the adverse effect is produced by that document in combination with other evidence which is before the Court on the appeal.<sup>6</sup>

- (ii) *prejudice the future supply of such information to the Government or to an agency.*

- (c) disclosure of the information would, *on balance*, be contrary to the public interest.

The public interest has many facets. For example, there is a public interest in the objects of the legislation being satisfied; in ensuring just, accountable, effective and efficient administration, and the public's ability to scrutinise it; and in the proper working of government and its agencies.

28. In their letter dated 24 August 2009 the CSO offered the following submissions in support of a claim that the relevant documents are exempt pursuant to clause 7(1)(c) of Schedule 1 to the FOI Act:

- (i) Seven people indicated that the release of their details would have a negative impact on their business or professional affairs.
- (ii) Two people objected as they considered that the documents concerned the business affairs and communication outside of Government and therefore, should be exempt from FOI release.

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<sup>5</sup> This is subject to clause 7(2) of Schedule 1 to the FOI Act.

<sup>6</sup> *Iplex Info Tech v Dept of Info Tech Services* (1997) 192 LSJS 54, 65.

- (iii) Three people objected to the release of their details as they did not attend the function and releasing the documents would be misleading.
- (iv) One person refused access because he had requested the name of the FOI applicant. However, when contacted Mr Lucas refused for his name to be released...

... SA Progressive Business contends that the release of these documents would have an adverse impact on its business affairs...

The Minister submits that the objection of SA Progressive Business in relation to the whole documents be upheld. Failing that, the Minister submits that the remaining objections should be upheld... [paragraph numbers omitted]

29. In a separate letter dated 21 August 2009, the ALP submitted, on behalf of SAPB, that:

[The] documents relate to the specific business, commercial and financial affairs of SAPB and the individuals and corporations listed. The information contains the membership and client details of SAPB. It also contains pricing information for SAPB functions. This information is owned by SAPB and is only publicly available as part of disclosure when funds raised meet the threshold under the Commonwealth Electoral Act 1918 (CEA). The competitors of SAPB have not been and would not be subject to the release of similar information under the FOIA outside of the CEA. Therefore release of these documents would have an adverse impact on the business affairs of SAPB and the individuals and corporations listed.

30. By email dated 7 October 2009 the Minister's office submitted:

that companies attending SA Progressive Business functions do not have a political alignment with the Australian Labor Party and release of information stating that they were in attendance at an SA Progressive Business event could be misleading and have an adverse affect on their business affairs.

### ***Clause 13(1)(a)***

31. Clause 13(1)(a) of Schedule 1 to the FOI Act provides that:

- (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

32. To succeed in claiming clause 13(1)(a) 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.<sup>7</sup> An equitable obligation of confidence is a duty not to disclose information because the information was given and received in circumstances which would make it unconscionable for the confidant to disclose the information in a way the confider has not authorised. A number of criteria must be satisfied.<sup>8</sup>

33. In their 24 August 2009 letter the CSO offered the following submissions in support of the Minister's claim that the documents are exempt pursuant to clause 13(1)(a) of Schedule 1 to the FOI Act:

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<sup>7</sup> *Bray and Smith v WorkCover* (1994) 62 SASR 218, 226-227.

<sup>8</sup> *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 443.

A third party indicated that he objected to the disclosure of his name and that of his organisation under clause 7 of Schedule 1 for the reasons set out below. Note that the Minister has replaced the name of the organisation with "X Organisation".

*"The ALP assured X Organisation that participation in this type of event would be and would remain confidential. X Organisation participated on that basis. It would be unfair to X organisation and other participating organisations to break this trust. Engagement with political parties, and the disclosure of such participation is governed by various Electoral Laws. X Organisation and, we presume, the APL [sic] comply with these laws. The applicant should not be able to use the FOI legislation as a backdoor means of subverting the clear intentions and statutory limitations of the FOI Act and the Parliaments who drafted and enacted it. In short, this is an area that is and should be governed by the Electoral Laws and not generic FOI laws. Disclosure is against the public interest. Release of this information could harm our reputation in the eyes of sectors of the community including our customers. It would therefore harm our business, commercial and professional affairs".*

It was apparent from this response that clause 13(1)(a) possibly applied. Further enquiries were made and the following has been confirmed:

- (i) That under the *Commonwealth Electoral Act 1918* (Cth), a political party is only required to publicly disclose the name of persons who make donations if the donation is \$10,000.00 or more.
- (ii) That SA Progressive Business gives a promise of confidentiality that attendance at an event will be confidential...
- (iii) That at least one other third party specifically stated that he attended based on confidentiality...
- (iv) That the provision of the guest lists to the Chief of Staff, Mr Chris Picton and then to the Minister is confidential...
- (v) That SA Progressive Business correspondence is dealt with confidentially within the Minister's office...

The elements of an equitable breach of confidence and their application in this matter are set out below.

- (i) *"Identify with specificity, and not merely in global terms, that which is said to be the information in question"*  
The confidential information is the name of each person and each organisation.
- (ii) *"Show that the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge) "*  
Only a limited group of people are privy to the information. Those who know the information are under an obligation of confidence in regard to it. This is supported by the letter of SA Progressive Business, by the objection of the relevant third party, also by the third party who consented because he thought that his refusal would be released, and the statutory declarations of Mr Picton and Ms Lee. Total secrecy is not necessary.
- (iii) *"The information was received by the defendant in such circumstances as to import an obligation of confidence"*.  
The evidence is that SA Progressive Business gave the guest lists in confidence and that the Chief of Staff and subsequently the Minister understood them to be provided in confidence. The evidence is that they treated the guest lists so as to preserve confidentiality. Accordingly, the Minister received the guest lists in circumstances that impose an obligation of confidence.
- (iv) *"There is actual or threatened misuse of that information"*.

Release under the FOIA is in the nature of a “*threatened misuse*” as the guest lists were provided to the Minister for the limited purpose of preparing for the event. Therefore release under the FOIA is an unauthorised use. There is no material difference between an “*unauthorised use*” and a “*misuse*”.

- (v) *“It may also be necessary ... that unauthorised use would be to the detriment of the plaintiff”.*

This is not a confirmed element in the law of breach of confidence. When the Full Court of the Supreme Court of South Australia considered clause 13(a) (as it then was) it did not require detriment to be shown. Accordingly, it is not an element that needs to be shown in making a claim under clause 13(1)(a). Even if it is a necessary element, SA Progressive Business has indicated in its letter that it would suffer a detriment if the names are released.

The facts indicate that there was a contract between SA Progressive Business and guests at the events. It was a term of that contract that attendance was confidential. There was implied consent from the guests for SA Progressive Business to give the guest list to the Minister on the basis that the Minister preserved the confidentiality of their attendance. The Minister received the guest lists under an equitable obligation of confidence and he took all reasonable steps to meet that obligation. Disclosure of the information would found an action for breach of confidence. The information should be exempt from disclosure by virtue of clause 13(1)(a).

34. Statutory declarations were provided by two of the Minister's staff, namely Mr Picton and Ms Lee, declaring that SAPB correspondence is treated as confidential within the Minister's office. Mr Picton further declared that guest lists provided by SAPB are 'not considered agency documents as they pertain to party political affairs' and, as with other documents containing details of third parties, are treated in a confidential manner. Mr Picton, could not say when exactly he discussed the issue of confidentiality with SAPB, but declared that it had always been his understanding 'that this was the condition upon which the documentation was provided.'

35. In the ALP's August 2009 letter they submitted that:

when inviting organisations to attend functions, SA Progressive Business gives an undertaking to organisations that their attendance at the function would be treated in confidence. This undertaking is given to and expected by businesses.

36. On 18 September 2009 my office requested:

- (a) the terms of the assurance/undertaking claimed to have been given by SAPB to attendees or prospective attendees of their functions, and any corresponding assurance/undertaking required/obtained from the attendees or prospective attendees
- (b) whether SAPB was able to explain the circumstances that gave rise to claimed obligation on the Minister to treat the relevant documents confidentially. The request was directed to SAPB on the basis that Mr Picton did not appear to recall the underlying circumstances.

37. The Minister's office responded to these requests by email dated 7 October 2009. In their response to my office's first request, the Minister's office advised that 'the body of evidence indicates that an assurance and undertaking of confidentiality is given orally and is also implied from the circumstances by the parties, ie SA Progressive Business and the guests.' The Minister's office again pointed to the letter from SAPB and the responses received from two of the third parties consulted. It was submitted that such examples 'demonstrate an understanding of confidentiality between all parties, that is, SAPB, all attendees and staff handling the documents'.

38. In their response to my office's second request, and with reference to Mr Picton's statutory declaration, the Minister's office responded as follows:

My interpretation of this passage is that he did not recall the specific date of a particular conversation but he recalled the underlying circumstances. They are that SA Progressive Business provides the guest lists etc confidentially to the Minister. I understand him to be saying that they are documents of such a nature that on receiving them, he realised that they were and remain confidential. The specific nature of the documents is that they contain the details of third parties. In his further dealings with the documents, he continued to treat them so as to maintain confidentiality.

I further submit that the correctness of Mr Picton's approach is corroborated by other evidence [namely the letter from SA Progressive Business and responses of two of the third parties consulted]...

### **Other relevant provisions**

39. Section 12 of the FOI Act provides that 'a person has a legally enforceable right to be given access to an agency's documents in accordance with this Act'.
40. Under section 20(1)(a) of the FOI Act, 'an agency may refuse access to a document if it is an exempt document'.
41. 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.<sup>9</sup> 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—
    - (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; ...
42. In my external review, and based on the circumstances existing at the time of the review, I may confirm, vary or reverse the determination of the agency pursuant to section 39(11) of the FOI Act.

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<sup>9</sup> Section 3A(1)(a) of the FOI Act.

## **Consideration of submissions and conclusion**

43. I have had regard to the submissions received from the parties to the review; the views of the third parties referred to in the relevant documents; the relevant documents; information in the public domain or previously released pursuant to the FOI Act; the applicable law; and the present circumstances.

### ***Clause 13(1)(a)***

#### *The information in question*

44. The CSO claims that the name of each person (other than Ministers and their current support staff) and each organisation listed on one or more of the relevant documents is exempt pursuant to clause 13(1)(a) of Schedule 1 to the FOI Act.
45. The ALP, on behalf of SAPB, appears to be claiming that the name of each organisation listed on one or more of the relevant documents is exempt pursuant to clause 13(1)(a) of Schedule 1 to the FOI Act.

#### *Quality of confidentiality*

46. The CSO claims that this information has the 'necessary quality of confidentiality' as '[o]nly a limited group of people are privy to the information' and those people 'are under an obligation of confidence in regard to it'.
47. I am not satisfied that the identities of third parties who attended SAPB functions, or the names of the organisations they were associated with, have the necessary quality of confidentiality. A number of people attended each function from different organisations. Attendees are no doubt aware of the identities of other attendees and participating organisations. In addition, at least one of the functions referred to in the relevant documents was held at a public venue (the function on 17 April 2007 was held at Georges on Waymouth Street, Adelaide).<sup>10</sup>
48. Information in the public domain is also relevant to my assessment. Searches conducted by my office reveal that there is information in the public domain linking various third parties, or the organisations they are/were associated with, to one or more SAPB function:
  - (a) Third parties 49, 74 and 75 are not named in documents released by the Minister under the FOI Act, but the same documents envisage that someone in their position would attend the relevant function
  - (b) The organisations third parties 9, 15 to 17, 22, 23, 25, 27, 28, 32, 33, 35, 41 to 44, 48, 49, 57 to 59, 61, 67 and 68 are associated with are referred to in the media and/or *Hansard* (although not necessarily in the context of the functions referred to in the relevant documents).<sup>11</sup> Publicly available information links the

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<sup>10</sup> I understand that subsequent functions have also been held at public venues, for example the Wine Centre (see Russell Emmerson and Joanna Vaughan, 'Battle Scarred Premier', *The Advertiser* (Adelaide, Australia) 3 October 2009, 1 and 14; Roy Eccleston, 'Attack on the Premier: What Happened Inside the Wine Centre', *The Advertiser* (Adelaide, Australia) 3 October 2009, 14-17); and Jolly's Boathouse (see David Winderlich, Australia, 'Winderlich calls on Labor cash for access cows to support Salvo appeal', available from [www.davidwinderlich.com](http://www.davidwinderlich.com) at 6 October 2009).

<sup>11</sup> My office conducted searches via <http://www.google.com.au> and <http://www.parliament.sa.gov.au/Hansard> using various search terms, including 'sa progressive business'; 'government probity'; and 'political donations'. Consistent with section 39(15) I have opted

premises of the organisation that third party 52 represented to an ALP fundraiser. I have not identified any direct links between the organisation that third party 52 represented and SAPB, however.

- (c) Without reference to Ministers and their support staff, third parties 16, 22, 24, 25, 29, 32, 33, 35, 40, 44, 47, 48, 51 and 58 are named in the media and/or *Hansard* (although not necessarily in the context of the functions referred to in the relevant documents) and/or the documents released by the Minister under the FOI Act.<sup>12</sup> One of these third parties nevertheless claims to have assumed that their attendance at one or more of the functions referred to in the relevant documents was in confidence.
49. The names of various individuals and organisations, including the hosts of functions, revealed in documents released by the Minister's office to the applicant under the FOI Act no longer have the necessary quality of confidentiality required to found an action for breach of confidence for the purposes of clause 13(1)(a) of Schedule 1 to the FOI Act.
50. Likewise, I am not satisfied that the names of individuals and organisations that have been published in the media and/or *Hansard* have the necessary quality of confidentiality required to found an action for breach of confidence for the purposes of clause 13(1)(a) of Schedule 1 to the FOI Act. I say this notwithstanding the fact that these names were not necessarily published in the context of the functions referred to in the relevant documents. The publicly accessible link between the individuals and/or organisations and SAPB or ALP functions is sufficient, in my view, to undermine the claim.

#### *Obligation of confidence*

51. Two claims of confidentiality have been raised in the context of this external review. The first claim is contractual and relates to communications between SAPB and organisations the attendees or prospective attendees represented. SAPB and two attendees have raised this claim. SAPB claims that the obligation extends to them and the organisations. The second claim relates to communications between SAPB and the Minister and his office. This equitable claim has been raised by, and on behalf of, the Minister's office. The claimed obligation of confidentiality between the Minister's office and SAPB is of particular relevance for the purposes of my external review.
52. There is insufficient evidence from which I may be satisfied that the relevant documents were communicated to the Minister or his office in confidence. This facet of the claim of confidentiality has only been raised by the Minister. The standard disclaimer that appears on two SAPB facsimile cover sheets associated with the provision of some of the relevant documents to the Minister's office is insufficient to establish that the relevant documents were communicated in confidence. SAPB has not asserted that the relevant documents were provided to the Minister or his office in confidence (only that an obligation of confidence existed as between it and participating organisations). In statutory declarations, both Mr Picton and Ms Lee state their understanding that correspondence from SAPB was to be treated confidentially. Mr Picton goes on to declare that it has always been his understanding that confidentiality 'was the condition upon which the documentation was provided'.

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not to include a list of the documents and websites I have considered in the reasons for my determination. I will nevertheless provide a list to the Minister and SAPB.

<sup>12</sup> As above.

This apparently unilateral understanding appears to be premised on Mr Picton's understanding that correspondence from SAPB was considered 'party political' (which the Minister now concedes is not always the case) and that the documents contain the details of third parties. In any event, a unilateral understanding does not, in and of itself, evidence an 'obligation of confidence'. The fact that the objects of the FOI Act include to promote the 'accountability of Ministers' makes it even more difficult for me to accept that there could have been an understanding of confidence in the circumstances.

53. One of the third parties consulted claims that they attended one or more relevant SAPB functions in confidence. This third party has, however, been identified publicly and has consented to release of information concerning them. Another third party claims that the organisation they represented was given an assurance of confidentiality by the ALP (although publicly accessible information suggests a link between the organisation's premises and at least one ALP fundraising event).
54. The ALP has submitted, on behalf of SAPB, that all participating organisations are given an undertaking that their attendance will be treated in confidence, and that such an undertaking is expected in return. None of the other third parties consulted raised such a claim, despite provision on the 'response form' for them to raise an exemption other than clauses 6 or 7 of Schedule 1 to the FOI Act.
55. There is no evidence before me to corroborate the claim made on behalf of SAPB that the attendees and/or the organisations they represented undertook to keep their attendance at SAPB functions confidential. I find the existence of such an undertaking to be inherently unlikely. In saying this I note that publicly available information identifies attendees at SAPB functions, including as a result of public comments made by individual attendees.
56. Even if an obligation of confidence existed between SAPB and individual attendees/organisations about their attendance, there is no evidence that the claimed contractual obligation of confidentiality required them to keep the identities of other participants confidential.
57. With respect to the claimed obligation of confidence on SAPB, it is relevant to note that the majority of third parties (one to 44) have consented to disclosure of information concerning them, albeit some subject to conditions. In effect, they have waived any obligation of confidence that SAPB owed them.
58. Of the third parties who objected to information concerning them being disclosed (45 to 58), or did not respond (59 to 61), or could not be located (62 to 71):
  - (a) four (47, 48, 51 and 58) have been linked to SA Progressive Business functions in documents released under the FOI Act and/or the media and/or *Hansard*
  - (b) two (49 and 59) were employed by the host of a relevant function
  - (c) five (52, 57, 61, 67 and 68) are linked to organisations that have been publicly linked to SAPB or ALP functions
  - (d) three (54, 55 and 56) claim not to have attended the relevant event. In my view it does not follow that there is an obligation of confidence with respect to their prospective attendance at an SAPB function, however.

*Misuse of the information*

59. I accept that if the other criteria for founding an action for breach of confidence are satisfied, release under the FOI Act would constitute misuse of the information in question.

*Detriment*

60. It may be necessary to establish that unauthorised use would be to the detriment of the confider. I am not persuaded that the attendees, the organisations they represented, or SAPB could establish detriment (despite claims made by SAPB and third parties 46, 47, 50 and 52). In saying this I have had regard to information that is publicly available, the consent to release given by the majority of the third parties (with or without conditions), and general acceptance that organisations lobby both the Government and the Opposition. I think it is highly unlikely that individuals or organisations would be deterred from being involved with SAPB, or attending an SAPB function, as a result of release of the relevant documents. To my knowledge SAPB is in a unique position as the only not-for-profit organisation established to raise funds for the ALP in South Australia. I note that the functions referred to in the relevant documents catered for a limited number of attendees, and appear to have been well attended.

***Clause 7(1)(c)***

61. Given my conclusions regarding clause 13(1)(a) of Schedule 1 to the FOI Act, I will consider clause 7(1)(c) of Schedule 1 to the FOI Act.

*Business affairs*

62. I am not satisfied that the identities of the third parties, or the organisations they are associated with, constitute the business affairs of the individuals or the organisations in the context of the relevant documents. The information is, in essence, about individuals attending a lunch or a cocktail style function with designated speakers, and reveals the organisations that most were associated with at the relevant time. Nevertheless, I accept that it is arguable that the identities of the third parties constitutes their business affairs, and I have proceeded on that basis.
63. The ALP has submitted, on behalf of SAPB, that the documents about which they were consulted contain 'pricing information'. Although I accept that pricing information can constitute an organisation's business affairs, I see very little that could be regarded as 'pricing information' in the relevant documents. They contain no dollar amounts, and only two of the relevant documents indicate whether or not attendance at the function was even subject to payment. I note, however, that there are references to pricing information in some of the documents that the Minister's office has released to the applicant under the FOI Act (for example, documents 17, 18 and 19). Further and in any event, there is a significant amount of information accessible via the Internet about the cost of attending SAPB functions.<sup>13</sup>

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<sup>13</sup> See for example: Hendrik Gout, *The Independent Weekly*, Australia, 'Scandal over cash for access', <http://www.independentweekly.com.au/news/local/news/general/scandal-over-cash-for-access/1602758.aspx> at 22 August 2009 and Kim Wheatley, *The Advertiser*, Australia, 'Big business pays, just ask Labor', <http://www.news.com.au/adelaidenow/story/0,22606,24316016-5006301,00.html> at 9 September 2008.

*Adverse effect or prejudice future supply*

64. Certain third parties (46, 47, 50, 52 and SAPB) claim that releasing identifying information would adversely affect the organisations they are associated with. One such interested party (52) claims that '[r]elease of the information could harm our reputation in the eye of sectors of the community including our customers'. SAPB implies that release of the information would affect their competitiveness. No other submissions have been provided as to what the adverse effects would be.
65. I am sceptical that it could reasonably be expected to follow that the third parties, or organisations they represented, would be adversely affected by release of the relevant documents. In saying this I note that it is commonly understood that organisations lobby the Government and the Opposition alike, and that this does not necessarily mean an affiliation exists with a particular political party. Such an approach is thought to demonstrate good business acumen. Furthermore, as I have previously indicated, a significant amount of information about existing links between SAPB or the ALP and named individuals and/or organisations is publicly available, or has previously been released to the applicant under the FOI Act.
66. I have not been persuaded that disclosure of such information in the context of the relevant documents could reasonably be expected to adversely affect the business affairs of SAPB as required by clause 7(1)(c) of Schedule 1 to the FOI Act. In saying this, I have borne in mind SAPB's unique position as a not-for-profit organisation raising funds for the ALP, information that is publicly available, and consent by the majority of third parties consulted to release of information about them.
67. I am prepared to accept that release of the relevant documents could reasonably be expected to result in SAPB not providing seating plans and lists of attendees for its functions to the Minister (and possibly other Ministers) in the future. To this extent I am prepared to accept that clause 7(1)(c)(ii)(A) of Schedule 1 to the FOI Act has been satisfied.

*Public interest*

68. I have balanced the submissions raised by the Minister, SAPB and selected third parties, against the public interest in promoting the objects of the FOI Act. The objects of the FOI Act include to promote 'accountability of Ministers' and to facilitate public participation within representative government.
69. In my view, there is a public interest in people knowing who has had access to the Minister at SAPB functions, given that SAPB itself claims to provide:

opportunities for its members to hear directly the government's views and intentions across the entire spectrum of its activity. This is an invaluable tool in ensuring your business is "in sync" with government direction.
70. Such an approach appears to be favoured by the Hon Mike Rann. In response to Queensland Premier Anna Bligh's move to ban her 'ministers from exclusive business fundraisers', Premier Rann is reported to have said that '[t]here is a different corporate culture in Queensland. And what we do is disclose everything and that is the difference.<sup>14</sup> The Premier is further quoted for his commitment in 2002 to 'lift standards of honesty, accountability and transparency in government':

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<sup>14</sup> Leah McLennan (Reporter), 'Calls For An ICAC', *Stateline*, South Australia, 7 August 2009.

Secrecy can provide the cover behind which waste, wrong priorities, dishonesty and serious abuse of public office may occur. A good government does not fear scrutiny or openness.<sup>15</sup>

71. The possibility that disclosure of the relevant documents would adversely affect the organisations that the third parties represented and SAPB may be a public interest factor against disclosure of information about them. For the reasons set out above, however, I consider this possible outcome to be unlikely at present. If, however, the organisations are of the view that disclosure of the relevant documents would result in less favourable outcomes for proposals they have submitted to the Government, my view is that this would represent a factor in favour of disclosure. The claimed obligation to keep information confidential is also a factor against releasing such information. This is so even though I am not satisfied that disclosure of the relevant documents would found an action for breach of confidence for the reasons set out above.
72. I acknowledge the limited obligation under the *Commonwealth Electoral Act 1918* to publicly disclose the names of people who have made political donations over a certain amount. The *Commonwealth Electoral Act 1918* does not displace the FOI Act, however.
73. I have borne in mind the apparent public interest in there being transparency in political fundraising, as reflected in the media and associated public comments.<sup>16</sup>
74. On balance, I am not satisfied that disclosure of the relevant documents would be contrary to the public interest as required by clause 7(1)(c)(ii)(B) of Schedule 1 to the FOI Act.

#### ***Determination varied***

75. Pursuant to section 39(11) of the FOI Act, I **vary** the Minister's determination. The dietary preferences of individual third parties are out of scope of the application (as narrowed on 12 November 2009) and should not be released to the applicant. Given the question mark over whether or not some third parties attended one or more of the relevant functions, I recommend that information identifying third parties 1, 20, 32, 37, 42, 54 to 56 and 60 by name accompany the release of any information about them from the relevant documents.

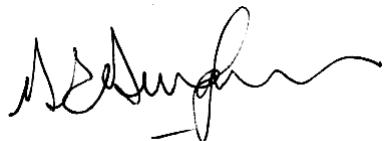
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<sup>15</sup> South Australia, *Hansard*, Legislative Council, 29 July 2008, 3789 (Rob Lucas).

<sup>16</sup> For example: Kim Wheatley, *The Advertiser*, Australia, 'The high price of dining with a pollie' ('Fundraising's high price of dining with a politician') and comments, available from <http://www.news.com.au/adelaidenow> at 12 February 2010; Melvin Mansell (editor), 'Cosy functions need to be transparent', *The Advertiser* (Adelaide, Australia) 9 February 2010, 16; Kim Wheatley, *The Advertiser*, Australia, 'Labor refuses to join donation ban', <http://www.news.com.au/adelaidenow/story/0,,26364733-2682,00.html> at 18 November 2009; Hendrik Gout, *The Independent Weekly*, Australia, 'Pressure builds on SA corruption', <http://www.independentweekly.com.au/news/local/news/general/pressure-builds-on-sa-corruption/1582903.aspx> at 1 August 2009; Tom Richardson, *The Independent Weekly*, Australia, 'SA corruption stance not credible', <http://www.independentweekly.com.au/blogs/state-politics/sa-corruption-stance-not-credible/1591624.aspx?storypage=0#> at 10 August 2009. The issue is also being debated interstate (see for example Paul Austin, *The Age*, Australia, 'Brumby is putting on the blinkers', <http://theage.com.au/opinion/politics/brumby-is-putting-on-the-blinkers-20090812-ei9b.html?page=-1> at 13 August 2009).

### **Right of Appeal**

76. The applicant and any other person aggrieved may appeal against my determination to the District Court of South Australia pursuant to section 40(2) of the FOI Act.
77. The Minister may also appeal against my determination, but only on a question of law and only with the permission of the court, pursuant to section 40(1) of the FOI Act.
78. Pursuant to section 40(3) of the FOI Act, any such appeals should be commenced within 30 days after receiving notice of my determination.
79. The Minister should defer releasing the relevant documents to the applicant pending the expiration of the appeal period, and any subsequent appeal.



Richard Bingham  
**SA OMBUDSMAN**

16 February 2010