



OmbudsmanSA

## DETERMINATION

### External review pursuant to *Freedom of Information Act 1991*

**Applicant:** Hon Mark Parnell MLC  
**Agency:** Department of Planning and Local Government  
**Ombudsman reference:** 2010/00093  
**Determination:** The determination of the agency is reversed

## REASONS FOR DETERMINATION

### Background

1. In a letter dated 18 June 2009 the Hon Mr Mark Parnell MLC applied to the Department of Planning and Local Government (**the agency**) under the *Freedom of Information Act 1991* (**the FOI Act**):

for any correspondence or other documents including emails, faxes, letters, filenotes, or records involving Mr Dean Day and/or DayCorp concerning development in the Mount Barker region from 2005 to the present day.

2. On 10 July 2009, Mr Ian Nightingale, Chief Executive Officer of the agency, determined to extend the time within which the agency had to deal with the application under section 14A of the FOI Act. The extension was until 19 August 2009.

Also on 10 July 2009, Ms Amanda Nicholls of the agency wrote to Mr Dean Day of DayCorp, a spokesperson for a consortium of developers in the Mount Barker region (**the consortium**), and Mr Stephen Holmes, Director of Connor Holmes, for the purpose of seeking the consortium's and Connor Holmes' views regarding release of the relevant documents under section 26, 27 and/or 28 of the FOI Act.

3. On 14 August 2009, Ms Natasha Jones of Wallmans Lawyers responded on behalf of Mr Day and the consortium. Also on 14 August 2009 Mr David Colovic, of Kelly and Co Lawyers, responded on behalf of Connor Holmes. Ms Jones and Mr Colovic advised Ms Nicholls that the consortium and Connor Holmes were of the view that the documents were exempt documents under clauses 7, 8, 9, 13 and 14 of Schedule 1 to the FOI Act.
4. In her determination dated 27 August 2009, Ms Joy Rowett, an accredited freedom of information officer of the agency, advised Mr Parnell that:

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

5. Five documents are identified on the schedule attached to Ms Rowett's determination:
  1. 04/07/2009 File note record of meeting between DPLG staff and Stephen Holmes, Richard Dwyer;

2. 05/05/2009 Email string between DPLG and Connor Holmes regarding point of contact;
  3. 01/05/2009 Minute to Minister regarding initiation of 'Mount Barker Township Expansion Development Plan Amendment';
  4. 14/05/2009 Attachment to letter entitled 'Mount Barker Township Expansion Development Plan Amendment Initiation Document By the Minister'; and
  5. 26/05/2009 Letter to Mr Day regarding a Ministerial Development Plan Amendment which will affect the Mount Barker (DC) Development Plan.
6. In determining that the documents are exempt, Ms Rowett relied on various exemption clauses in Schedule 1 to the FOI Act.<sup>1</sup> The reasons given by Ms Rowett as to why documents are exempt under particular exemption clauses are as follows:

Clause 7(1)(a) of Schedule 1 (business affairs)

The document contains information the disclosure of which would disclose a trade secret, which is of value to a party. I am satisfied that release of the information would have an adverse affect on the party, being the owner of the trade secret.

Clause 7(1)(c)(i) and (ii) of Schedule 1 (business affairs)

The document contains information regarding business affairs. The information is of significant commercial value to a party and I am satisfied that release of the information would have an adverse affect on those affairs.

I am of the view that it could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government and, on balance, it would be contrary to the public interest to disclose this document.

Clause 8(1) of Schedule 1 (documents affecting the conduct of research)

The document contains information relating to the purpose of and results of research, including research that is yet to be commenced or yet to be completed.

I am of the view that disclosure of the document could reasonably be expected to have an adverse effect on a party or other person by or on whose behalf the research is being, or is intended to be, carried out and it would, on balance, be contrary to the public interest.

Clause 9(1) of Schedule 1 of the *Freedom of Information Act 1991*

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

<sup>1</sup> Ms Rowett determined that:

- document 1 is exempt under clauses 7(1)(a), 7(1)(c), 8(1), 9(1), 13 and 14;
- document 2 is exempt under clauses 7(1)(a), 7(1)(c), 13 and 14;
- document 3 is exempt under clauses 7(1)(a), 7(1)(c) and 14;
- document 4 is exempt under clause 14; and
- document 5 is exempt under clause 8(1) and 14.

Clause 13 of Schedule 1 of the *Freedom of Information Act 1991*

The document contains information obtained in confidence the disclosure of which might reasonably be expected to prejudice the future supply of such information to the Government and would, on balance be contrary to the public interest to release the document.

Clause 14 of Schedule 1 of the *Freedom of Information Act 1991*

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

7. On 4 September 2009 Mr Parnell applied for an internal review of Ms Nicholls' determination.
8. On 24 September 2009 Mr Nightingale wrote to Mr Parnell and advised:
 

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

I confirm the original reasons provided to you for this determination.
9. Mr Parnell applied to me for external review on 12 October 2009.

#### Further documents

10. On 21 January 2010 Ms Nicholls advised my office that the agency had discovered additional documents that fall within the scope of Mr Parnell's application. They are:
  - 6.1 10/03/2009 An additional attachment to document 3, namely a copy of the District Council of Mount Barker's 'Minutes of the Council Meeting held on 10 March 2009';
  - 6.2 undated An additional attachment to document 3, namely a map entitled 'Mount Barker Township Expansion - Area Affected Map 1';
  7. 01/04/2008 Unsigned letter to the Minister for Urban Development and Planning (and attachments), as referred to in document 2;
  8. 08/10/2008 Minute to Minister for Urban Development and Planning regarding Mount Barker Township;
  9. 16/06/2008 Letter to Minister for Urban Development and regarding Mount Barker;
  10. 06/08/2008 Letter from Minister for Urban Development and Planning regarding Mt Barker;
  11. 14/08/2008 Letter to Minister for Urban Development and Planning regarding Mt Barker;

12. Undated Letter from Minister for Urban Development and Planning regarding Mt Barker.
11. It should be noted that the agency's reasons and the views provided by the consortium and Connor Holmes prior to my external review were not tailored to documents 6.1 to 12.

### Relevant provisions of the FOI Act

12. Under section 48 of the FOI Act the onus is on an agency to justify its determination in my external review.
13. Section 39(11) of the FOI Act provides that I may confirm, vary or reverse the determination of the agency, based on the circumstances existing at the time of review.
14. Clauses 1, 7, 8, 9, 13 and 14 of Schedule 1 to the FOI Act are relevant to my external review, in that they have been relied upon either by the agency or the interested parties. The relevant parts of these clauses below.

#### *1– Cabinet documents*

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

#### *7– Documents affecting business affairs*

- (1) A document is an exempt document–
- (a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person; or
  - (b) if it contains matter–
    - (i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and
    - (ii) the disclosure of which–
      - (A) could reasonably be expected to destroy or diminish the commercial value of the information; and
      - (B) would, on balance, be contrary to the public interest; or
  - (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.

#### *8– Documents affecting the conduct of research*

- (1) A document is an exempt document if it contains matter–

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

#### *9– Internal working documents*

- (1) A document is an exempt document if it contains matter—
  - (a) that relates to—
    - (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
    - (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and
  - (b) the disclosure of which would, on balance, be contrary to the public interest.

#### *13– Documents containing confidential material*

- (1) A document is an exempt document—
  - (a) if it contains matter the disclosure of which would found an action for breach of confidence; or
  - (b) if it contains matter obtained in confidence the disclosure of which—
    - (i) might reasonably be expected to prejudice the future supply of such information to the Government or to an agency; and
    - (ii) would, on balance, be contrary to the public interest.

#### *14– Documents affecting the economy of the State*

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

### **Submissions**

15. In a letter (plus attachments) to the agency dated 26 February 2010 (**my previous letter**) I set out numerous issues I considered to be relevant to this external review. I asked the agency to consult with two interested parties, namely the consortium and Connor Holmes, by providing them with copies of my letter; and I invited submissions. It would have been clear to the agency and the interested parties that I was not, at that time, satisfied that the documents are exempt. I have now received submissions from the agency, the consortium and Connor Holmes. I have not considered it necessary to seek formal submissions from Mr Parnell.

#### *The agency's submissions*

16. After considering my previous letter the agency has, to an extent, altered its position with respect to the exemption status of the documents, and accordingly it is useful to cite in full the agency's revised position. Mr Nightingale wrote:

Having reviewed the issues raised in your letter and the documents in scope of the Freedom of Information (FOI) application, I make the following points:

In consideration of the extra documents found to be within scope during the more recent discovery for your external review, and considering the recent public release of the 30 Year Plan for Greater Adelaide, I have chosen to vary my original Internal Review decision and make a further determination regarding the FOI application in question.

It is determined to grant partial access to the documents requested in accordance with Sections 19 and 20 of the Freedom of Information Act 1992 [sic] (the Act). As outlined in the attached schedule, it is determined to **refuse access** to Items 6.2, 7, 9 and 11 because the documents are considered to be exempt in accordance with Schedule 1(1), (9) and (14), or with Section 27(2) of the Act.

In addition, it is determined to grant **partial release** to Items 1, 2, 3, 5, 8, 10 and 12 in accordance with Section 20 of the Act. Due to parts of these documents being related to business affairs of third parties, it is determined to not release this information in accordance with 27(2) of the Act as consultation with the third party/ies has not been finalised. It is also determined to **release in full** the remaining documents, namely Items 4 and 6, in accordance with Section 19 of the Act. Please find attached a copy of the released documents.

In consideration of the other points in your letter, it is more appropriate for Connor Holmes and Dean Day to respond because these points directly affect their business. In confirming the determination during the time of the original internal review, I was satisfied that the information presented by Connor Holmes and Dean Day was sufficient to justify the business affairs exemption.

Further to this, I recommend:

- Forwarding a copy of this letter and a copy of the attached schedule and released documents within scope as per my further determination to Mr Parnell; and
- Where the information relates to business affairs of third parties, DPLG supports the view held by Connor Holmes and Dean Day as to what is appropriate to be released.

17. My office has clarified with the agency the nature and effect of its revised position. The agency has not sent anything direct to Mr Parnell, and I have not provided a copy of the agency's letter, the schedule or documents to Mr Parnell. In the circumstances, I do not think it appropriate to consider Mr Nightingale's letter to me as a *further determination* under section 19(2a) of the FOI Act.<sup>2</sup> The main reason is that the interested parties may have a wider interpretation of what may constitute information concerning their business affairs, or confidential information. It is more appropriate to merely take the agency to have revised its position. The practical effect is that some information within the documents will be claimed exempt by the interested parties, but not by the agency.
18. In a schedule attached to the agency's more recent letter there are a small number of further submissions that were not on its initial determination. I will refer to these in due course.

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<sup>2</sup> Section 19(2a) provides that 'nothing prevents an agency from making a determination to give access to a document on an application after the period within which it was required to deal with the application (and any such determination is to be taken to have been made under this Act)'.

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### *Interested party submissions*

19. Both interested parties have asserted words to the effect that their submissions should not be disclosed to Mr Parnell, because to do so would disclose exempt matter.<sup>3</sup> Connor Holmes further adds that its letter of submissions is an exempt document. This is despite the fact that in my previous letter (a copy of which both interested parties received) I asked that claimed exempt matter be put in a *separate* document, and that to the extent possible, submissions be provided in a form that can be provided to Mr Parnell.
20. I am mindful of section 39(15) of the FOI Act<sup>4</sup> and therefore I will not provide the submissions to Mr Parnell. Nor will I ask the parties to provide modified versions of their submissions. Rather, I have elected to disclose the submissions, in general terms, in an attachment to my determination. I cannot provide my determination in a vacuum. To the extent that it may not be clear from my determination, for completeness I can only advise that I have had regard to all submissions provided by the agency, the consortium and Connor Holmes.

### **Determination**

21. I begin with some overarching comments.
22. It seems to me that commercial entities, when they come up against the FOI Act, commonly claim that all matter relating to a commercial matter is either confidential, or exempt under the business affairs provisions. Put another way, I find it all too common that commercial entities expect to be able to do business with the government under a complete veil of secrecy. I find such claims very difficult to accept: exemption claims levelled at discrete information to do with a commercial matter are more justifiable.
23. Connor Holmes generally asserts that it is a commonly accepted industry practice that information provided to the government in commercial matters will be kept confidential. Whilst the industry might prefer that information provided to the government will not be further divulged, the government cannot guarantee that all information provided to it in like circumstances will be accepted in confidence.
24. The government often engages in commercial dealings with individuals and commercial entities, and it cannot be expected that all information concerning these dealings will be kept from the public. The government cannot, as a private person or business might purport to, give a blanket assurance that all information provided to it will be kept secret or 'confidential'. The government must always act in the public interest, whether or not it is fulfilling its obligations under the *Development Act*, engaging in commercial dealings with other entities, or putting out tenders for services. The government is accountable for its decisions and actions, and this may necessitate releasing information concerning other parties. If no information, or substantially no information about a commercial enterprise or a tender process involving the government is released, the openness and accountability of the project or process will suffer. In my view the FOI Act (see, in particular, the objects of the FOI Act) is at odds with any notion of blanket confidentiality over commercial matters.

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<sup>3</sup> Albeit the consortium adds that a modified version of its submissions can be provided if requested.

<sup>4</sup> Section 39(15) provides that I should avoid disclosing in my reasons for my determination any matter that the agency claims is exempt matter (whether or not I agree with that claim). In the interests of the objects of the FOI Act, I will also avoid disclosing any matter that a relevant interested party claims is exempt matter.

25. This is not to say that all information relating to commercial matters will be released to the public if it is requested. In certain circumstances, it may be appropriate that particular information held by the government concerning the affairs of commercial entities is not released if it is sought under the FOI Act. Obvious examples might include trade secrets and specific financial capabilities. In these circumstances, it is usually easy to tie the particular information to clauses 7 and 13 of Schedule 1 to the FOI Act. This does not give rise to a blanket claim however.
26. I note that Judge Lunn in *Ipex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54 (*Ipex*) stated in relation to a commercial tender process:

Part of the tender documents stated:

"4 FOIA. The main objective of the FOIA is to extend as far as possible the rights of the public to obtain access of information held by Government. However, proprietary technical data, trade secrets and other information concerning the business, professional, commercial and financial affairs of a business which are contained in tender submissions are exempt from the provisions of the Act. These matters will remain confidential and will not be released to anyone without the written permission of the tenderer who provided that information. Other information about the purchase tender, for example, the evaluation methodology may be disclosed provided that the application is in writing and the prescribed fee is paid in advance. The tendered price will not be disclosed without the prior consultation with the tenderer. Where the decision is taken to disclose the tender price despite the tenderer's objection, the tenderer will be informed of their rights of review or appeal under the FOIA, and the price will not be disclosed until after those review or appeal periods have expired. However because the tendered price is only one of the factors in awarding a contract it is government policy not to release the price without a detailed explanation of the evaluation methodology."

It is unfortunate that this appeared in the document as it is not an entirely correct explanation of the legal position under the FOIA. It was suggested that insofar as tenderers could have expected their tender information to have been kept confidential in accordance with the passage cited above they would be reluctant in future to supply information on tenders to the government if more information was released on these tenders than the government had said would be released. The short answer to this is that the appellant's position cannot be prejudiced by the government having misrepresented, if that be the case, to tenderers what may or may not be kept confidential under the FIOA. Tenderers are deemed to have notice of the provisions of the FOIA and what its legal effect might be. In any event there is always the risk of compulsory disclosure to competitors under legal process such as Rule 60.

I do not find that any basis of exemption has been proved by the respondent on the grounds that the disclosure could reasonably be expected to have prejudiced the future supply of such information to the Government. It is neither subjectively nor objectively established by the respondent. I need not deal with the respondent's contention that any slight prejudice is sufficient for (c)(ii), in a similar way to "adverse effect", rather than prejudice on balance because there is no evidence to establish even slight prejudice.

27. Later, with respect to clause 9, Judge Lunn stated:

It was submitted that the confidentiality of information was a factor in assessing what was in the public interest: *Sankey v Whitlam* (1978) 142 CLR 1 at 42. Claims here for exemption on grounds of confidentiality under Clause 13 of the Schedule were abandoned, but that does not mean that confidentiality in conjunction with other factors may not be relevant to the public interest. However, as was stated in relation to Clause 7(1)(c)(ii), the degree of

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confidentiality which could be expected is always subject to the provisions of the FOIA and cannot be affected by any representation by the respondent that greater confidentiality might be accorded to material than properly reflects the effect of the FOIA. The degree of confidentiality will generally lessen with the passage of time.

28. Whilst *ipex* related to a particular tender process, in my view Judge Lunn's comments are relevant not only to tender processes in general, but also to commercial enterprises involving the government generally.
29. Using tenders as an example of individuals doing business with the government, Connor Holmes believes that releasing documents in this matter would reduce the flow of information and the quality of tenders to the government in the future. As a general proposition, I cannot accept that this would be the case. I have already accepted that in certain circumstances, particular information may be exempt from release to the public. A distinction needs to be drawn however between, say, the recipe for Coca-Cola and 'any and all' information relating to tenders or business transactions.
30. In my view it is in a tenderer's interests to provide all information supportive of its tender, or information required by the government agency conducting the tender process. A failure to provide all supporting information, or being restrictive in the information provided, will decrease a tenderer's chances of success. If there is specific information a tenderer would like to keep confidential, it would be wise, at the time of submitting the tender, for the information to be specified and the importance of non-disclosure explained. Even so, there would still be no guarantee of confidentiality, and if the information is requested under the FOI Act, the question of release will depend upon whether the specific matter satisfies the requirements of an exemption provision. It needs to be said however that information relating to tenders *is* released to the public, both in this and other jurisdictions. I am not convinced by the general assertion that businesses will forego the chance of gaining lucrative deals with the government merely due to the possibility of tender information being disclosed to the public.
31. My views regarding tender processes also apply in circumstances where a business entity wants something from the government, such as in the present matter where the Minister was approached and asked to make a particular decision under the *Development Act*. I am not convinced by the general assertion that businesses will forego the chance of the Minister (or another agency for that matter) making a decision that might be in the business' interests merely due to the possibility of relevant information being disclosed.
32. I now turn to the specific claims made by the consortium and Connor Holmes.

*A particular adverse effect will flow from release of the information*

33. I am not able to specify the adverse effect particularised, as to do so would risk disclosing matter claimed exempt by the parties. Whilst regrettable, this may make my reasoning a little difficult to follow.<sup>5</sup>
34. This submission relates to information which has already been placed within the public domain by a particular entity. Several other entities have commented on the issue, and in my view the varying positions of the different parties are quite clear. If they are not, it is open to the relevant parties to make their positions clear. In a sense, the success of the consortium's argument would require the public to reach a 'wrong' conclusion, and I am

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<sup>5</sup> This also applies elsewhere in my determination.

not satisfied either that the public would do this or, in a subjective sense, and where opinions may differ, *could* do this. For these reasons I am not satisfied that the disclosure of this information could reasonably be expected to have an adverse effect on the business affairs of the consortium (or its constituent members).

35. In the event that this information *could* be expected to have an adverse effect on the business affairs of the consortium, I am not satisfied that disclosure of this information would, on balance, be contrary to the public interest.
36. There is a strong public interest in the Minister's decisions under the *Development Act*, and there is therefore a strong public interest in information underlying his decisions being disclosed. Decisions of this nature tend to impact a wide variety of people, significantly the people living in surrounding areas, and not just those involved in the negotiations. Disclosure of relevant information assists openness and accountability. Any countervailing public interest factors tending against disclosure will have to be weighed against this.
37. More particularly, and in the light of the importance of these decisions made under the *Development Act*, it is my view that there is significant public interest in the actual issue surrounding this particular information, and a corresponding public interest in knowing that the government is appropriately handling such issues. Accordingly, to the extent that disclosure of this information could be expected to have an adverse effect on the business affairs of the consortium, I am not satisfied that this outweighs the overriding public interest in the release of the information.

*Information relating to the purpose or results of research*

38. Without disclosing the information said to constitute research by the consortium, I advise that I am not satisfied that this is the type of matter envisaged by clause 8 of Schedule 1 to the FOI Act. Whilst I agree that dictionary definitions can provide assistance where a term is not defined in legislation, I am of the view that the test proffered by the consortium is simply too wide, and lends itself more to any kind of 'investigation'. I think a more academic or scientific flavour is envisaged by clause 8.
39. In any event, even if this information did constitute research under clause 8, I would not be satisfied that its disclosure could reasonably be expected to have an adverse effect on the consortium or any other person, nor that it would be, on balance, contrary to the public interest. In my view it is not information which could be utilised by another party to the consortium's detriment, and to the extent that issues may not have been finalised, the fact of this can be clarified. The public realise that not all things considered in negotiations will come to fruition, and the ability to consider 'options' is part and parcel with the openness and accountability of the final decision.

*Further arguments regarding clause 9 and the public interest in general*

40. I do not think it matters that the process under the *Development Act* has not yet been completed, and that information within the documents may not reflect a party's final position or the Minister's final decision as to whether or not to amend a plan. Openness and accountability does not only start when a final decision has been made. Releasing preliminary information does not preclude a party from altering or clarifying its position - false expectations can be allayed - and releasing information at an early stage may encourage other parties to provide their input. An integral notion behind the concept of public consultation is that the public will from time to time make a useful contribution.

41. I have been referred to a general principle found in *Howard and the Treasurer of the Commonwealth of Australia* [1985] AATA 100 (**Re Howard**) - that, as a general principle, the disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest. I am not satisfied that any such principle has much to add to this external review. I question whether the Minister's administrative decision regarding a DPA can be categorised as mere policy.
42. I consider the assertion that, in the absence of any context, the public may misinterpret the information and its relationship with the process, to be paternalistic and unjustified. In any event, if the public is confused and asks questions, the questions can be answered.

*A further reason for the need for confidence*

43. One of the reasons put forward for the need for confidence over consultations between the Minister and other parties regarding DPAs is because it is inevitable that there may be the need to be critical of the actions or inactions of third parties. I do not consider something becomes confidential merely because it constitutes criticism of another party. Moreover, where there is, in a general sense, a strong public interest in a decision likely to affect many people, I do not consider there to be a comparatively strong public interest in not disclosing a criticism made by one party about another. Rather, the party being criticised may have something to add to the matter and good decision making will be enhanced.
44. Furthermore, I am not necessarily satisfied that any such criticism would create a detriment to the relationship between the party making the criticism and the party being criticised or, to the extent that it may, that such detriment should carry much weight. If a party to a process under the *Development Act* is a public entity, its decisions should be made with regard to the public interest and should continue to be so made in the future, irrespective of whether it has had cause to make a criticism or has been the recipient of criticism. If a party to a process under the *Development Act* is a private entity, I would suggest that it would continue to make decisions based upon its own interests irrespective of whether it has given or received criticism in the past.

*Matter in the documents identifies land owned by the consortium*

45. I accept that certain information within the documents identifies land owned by the consortium, and that this concerns the consortium's business or commercial affairs. However, I am not satisfied that releasing this information could reasonably be expected to have an adverse effect on those affairs on the grounds that it might be accessed by competitors. The submissions do not provide persuasive evidence in support of the assertion that the information identifying the locations of land owned by the consortium could be utilised to the consortium's detriment by its competitors. For reasons already given I do not accept that disclosure of 'this type of information' in this case will prejudice future dealings between individuals, private enterprise, and the government.

*Matter concerning a particular member's business affairs*

46. I accept that certain information within the documents concerns the business affairs of a particular member of the consortium. However, I am not satisfied that disclosure of this information could reasonably be expected to have an adverse effect on those affairs on the grounds that it might be accessed by competitors. The submissions do not provide persuasive evidence that the information could be utilised by competitors to the

consortium's (or the particular member's) detriment. For reasons already given I do not accept that disclosure of 'this type of information' in this case will prejudice future dealings between individuals, private enterprise, and the government.

47. Having said that, I have clarified with Mr Parnell as to whether he wants access to the locations referred to in this particular passage. He does not, so the scope of his application, and this external review, is narrowed to this extent.

*Attachments to document 7 that are 'guidelines' only*

48. If these documents are not meant to be taken literally, this can be clarified upon release and any rogue attempts to misrepresent them can be rectified. It is unnecessarily paternalistic and, I might add, a trifle offensive to assert that release of these documents will lead to 'fear' or, 'at worst, widespread panic' amongst 'the vast majority of the public who do not properly understand the nature of the document[s]'.

*Further submissions of the agency*

49. The agency submits that document 6.2:

forms part of the Growth Investigations Areas report which informed Cabinet. As such, it is an exempt document in accordance with Schedule 1 (1) of the Act.

It is also exempt because the Growth Investigations Areas report continues to be used as an internal working document for decision-making processes for government as per Schedule 1 (9) of the Act. The report is also exempt in accordance with Schedule 1 (14) because it is a document affecting the economy of the state.

On balance of the public interest test, it is considered to be against the public interest to release the document. The document contains detailed advice to Government of potential dwelling yields for certain areas of land. The process of rezoning land involves negotiation with developers regarding land yields block sizes and infrastructure. Government undertakes these negotiations in the public interest to produce maximum return to the community in terms of density and infrastructure. Release of the report would prejudice Government's ability to negotiate with developers regarding desirable outcomes. This would be against the public interest as it places Government in an unequal bargaining position with developers who will have their own expert advice regarding potential outcomes. Such a commercial advantage to negotiating developers is against the public interest.

50. I am not convinced by the agency's arguments above as to why it would, on balance, be contrary to the public interest to release this document. I agree, of course, that the government undertakes its decision making processes under the *Development Act* in the public interest. I do not accept, however, that its negotiations with other parties need to take place in secret to achieve this aim, as ultimately rezoning decisions are made by the government. I do not see why the government cannot make a decision in the public interest and still attract developers to work in accordance with the government's decisions. I have not been persuaded that releasing this document would provide developers with a commercial advantage to the detriment of the government and the public at large. Generally speaking, I have been provided with no evidence to support the agency's assertions.
51. Nor am I convinced that this document forms part of the Growth Investigations Areas report. I have a copy of the Growth Investigations Areas report and I cannot locate this particular map within it. I am therefore not satisfied that it is a cabinet document.

*Recent events*

52. Recent media reports have alerted my office to the fact that the draft DPA for the Mount Barker region has now been released for public consultation. This recent 'turn of events' has the potential, in my view, to negate or diminish the effect of some of the arguments put to me. Nevertheless, given the conclusions I have reached, it is not necessary to pursue this avenue.
53. In light of my reasoning above, I reverse the agency's determination (as revised), pursuant to section 39(11) of the FOI Act. I do not consider the documents exempt under clauses 1, 7, 9, 13 or 14 of Schedule 1 to the FOI Act.

**Right of Appeal**

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

Richard Bingham  
**SA OMBUDSMAN**

24 June 2010

## Attachment - submissions provided by interested parties

### *The consortium's submissions*

1. The consortium has reconsidered its position with respect to document 3. Given information which is already publicly available, the consortium is prepared to agree to partial release, and has enclosed a copy of document 3 'in the form provided to the consortium for consultation purposes'. It appears that the consortium was only provided with the last third or so of page 7 of document 3, from which several words have been deleted. I can advise that the words relate to somewhere other than Mount Barker, albeit the information conveyed by the deleted words is already in the public domain.
2. As document 6.1 is publicly available, the consortium does not consider it exempt. Nor does it consider documents 10 and 12 exempt, as they only contain general information which is of public knowledge.
3. The consortium claims that documents 1, 2, 5, 6.2, 7 (in part), 8, 9 and 11 are exempt under clauses 7(1)(c)(ii), 8(1) and 9(1) of Schedule 1 to the FOI Act.

### *Clause 7(1)(c) - documents 1, 2, 6.2, 7 (in part), 9 and 11*

4. The consortium argues:
  - if the matter within documents 1 and 2 is released, it could reasonably be expected that a particular adverse effect on the business affairs of the individual developers would follow. I will not disclose the particular adverse effect feared by the consortium, but it asserts that:
    - the above fear is based upon events that have already occurred;
    - the adverse effect is not inconsequential and 'could reasonably be expected'. The consortium quotes Judge Lunn in *Iplex*; and
    - the information within the documents is insufficient to 'clear the air' if it is released, and release 'will serve no more than to raise an issue that has already been addressed';
  - documents 6.2, 7 (in part), 9 and 11 contain certain types of information about their proposal, the release of which may cause unnecessary and misdirected public criticism of the proposal prior to a Ministerial Development Plan Amendment being prepared and released for public consultation; and
  - documents 6.2, 7 (in part), 9 and 11 contain confidential 'preliminary' information which was never intended to be made public. Disclosure of this information would therefore be contrary to the public interest as it would damage the relationship between the consortium and the government, adversely affect the future supply of information to the government and cause premature and inaccurate judgment of the proposed DPA.

### *Clause 8(1) - documents 1 and 5*

5. The consortium argues:
  - in the absence of a definition of 'research' in the FOI Act, the Oxford Colour Dictionary (2001 Second Edition) definition of 'the study of materials and sources in order to establish facts and reach new conclusions' may provide some guidance;
  - the documents contain certain comments based on certain studies, and such studies clearly fall within the above definition of research;
  - a report based upon research is referred to, and the documents contain an assertion by the consortium based upon the report and research. As the assertion may not have been fully decided or communicated to others, disclosure of the information could reasonably be expected to have an adverse effect on the developers' affairs; and
  - document 5 refers to the purpose of certain research (thereby satisfying the first element of clause 8(1)), and the release of document 5 in conjunction with the release of document 1

could reasonably be expected to have an adverse effect on the developers' affairs for the same reasons given with respect to clause 7.

*Clause 9(1) - documents 1, 6.2, 7 (in part), 8, 9 and 11*

6. The consortium argues that the documents contain information that satisfies clause (1)(a), and disclosure of the information would be contrary to the public interest, when balanced against the need for the information to be disclosed. The consortium argues that:
- the Development Plan Amendment process has not yet been completed, and the information within the documents may not reflect the final position of the consortium and the investigations undertaken for it;
  - the documents contain certain information such as assertions which may have changed, or may change;
  - in referring to the case of *Re Howard*:
    - the Commonwealth Administrative Appeals Tribunal said that as a general principle, the disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest, and these documents contain information of this nature;
    - notably, the information (or some of it) is of a very preliminary nature;
    - in the absence of any context, the public may misinterpret the information and its relationship with the process that was occurring;
    - with respect to these documents, 'the general principle articulated in the case of *Re Howard* should not be overridden. That is, on this occasion it is not in the public interest to disclose communications made in the course of the development and subsequent promulgation of policy'; and
  - the premature release of the documents could result in premature prejudgment of the proposed DPA, prior to it being finalised and released for public consultation.

*Connor Holmes' submissions*

1. Connor Holmes does not object to the release of document 6.1, on the basis that it is publicly available on the District Council of Mount Barker's website.
2. Connor Holmes claims that the remaining documents are exempt under clauses 7, 9 and 13 of Schedule 1 to the FOI Act.

*Clause 9 - documents 7, 8, 9, 10, 11 and 12*

3. Connor Holmes argues that:
  - documents 7, 8, 9, 10, 11 and 12 constitute correspondence prepared or received by the Minister in the course of consulting with Connor Holmes under the *Development Act 1993*, and therefore it is clear that they constitute documents which contain matter that relates to opinions, advice or recommendations that have been obtained, prepared or recorded, or consultations or deliberations that have taken place, in the course of or for the purpose of the decision-making functions of the Minister;
  - when a private developer, or other firm or person with a business or personal interest in a particular area asks the Minister to exercise his powers regarding Development Plan Amendments, the Minister must be satisfied that there exist sufficient and reasonable grounds to take the action sought and this is why, practically, the process assumes the nature of a consultation between the Minister and the interested party;
  - as a matter of practice this consultation takes place strictly commercially in confidence and this was the understood basis of consultation on this occasion. This is so because the inevitable nature of such consultations is that it may be necessary for the interested party to be critical of the actions or inactions of third parties. The confidential nature of such

consultations is familiar to and accepted by the Minister and other parties alike. Connor Holmes points to an example of such criticisms, and argues that ‘the necessity for any consultation between private firms and the Minister to remain strictly confidential is as obvious as it is paramount’;

- should these documents be released, a message would be sent to any private firms or individuals consulting with or wishing to consult with the Minister on such matters that any correspondence exchanged ‘would not necessarily [be] protected from public release by the confidential nature of the consultation otherwise contemplated by the parties’. This would in turn reduce the number of consultations which take place between individuals and private firms and the Minister, and therefore undermine the legislative function of the Minister under the *Development Act*;
- release of certain matter within document 7 might cause detriment to one of Connor Holmes’ commercial relationships. This would be contrary to the public interest;
- document 7 identifies specific areas of land which are owned by the consortium. This information, which concerns the business affairs of Connor Holmes and the consortium, is not in the public domain and release of it could reasonably be expected to have an adverse effect on those affairs. This is because the information might be accessed by competitors which could potentially prejudice future dealings between individuals, private enterprises and the government, which would be contrary to the public interest;
- some of the information in document 7 is ‘highly speculative’ and:
  - the production of highly speculative data which does not reflect a proposal or policy adopted by the Government is contrary to the public interest as individuals and businesses with land interests in the relevant areas may become concerned by the data leading to widespread informal consultations with the Minister and the Council and adverse public criticism of DPA’s based on speculative data rather than actual proposals, which would undermine the consultation process provided for and contemplated by the Development Act (concerning actual DPA’s and related matters). This would, on the balance, be contrary to the public interest;
- document 7 contains speculative matters which might be described as conditional offers, and the release of such matter which may not come to fruition may give rise to false expectations in the community and is contrary to the public interest;
- document 7 contains a figure which is highly speculative and does not reflect a proposal or policy adopted by the government. Release of this figure would be contrary to the public interest;
- document 7 contains ‘commercially sensitive information’ of one of Connor Holmes’ clients, which was only intended for the consideration of the Minister. The disclosure of this matter would reasonably be expected to have an adverse effect on the business affairs of the client, in that the information might be accessed by competitors, and therefore potentially prejudice future dealings between individuals, private enterprises and the government, which would be contrary to the public interest;
- document 7 contains a speculative comment which, if released, could give rise to an incorrect public expectation, and therefore release is contrary to the public interest;
- all attachments to document 7 (maps and other material) are not in the public domain. They were provided to the Minister as ‘guidelines only’ to ‘give the reader a stronger perception of how a proposed development might be presented in a particular area’, and are not meant to be taken literally. Connor Holmes submits that release of such matter could cause fear in land-holders and, at worst, ‘widespread panic in the relevant community amongst the vast majority of the public who do not properly understand the nature of the document’. Release would therefore be contrary to the public interest;
- document 9 contains:
  - highly speculative matter which does not reflect a proposal or policy adopted by the government. Some of this matter might be described as conditional offers, and the release of such matter which may not come to fruition may give rise to false expectations in the community and is contrary to the public interest;
  - certain matter, the release of which might cause detriment to one of Connor Holmes’ commercial relationships. This would be contrary to the public interest;

- document 11 contains certain matter, the release of which would have a particular adverse effect on the consortium. The consequence of this would be that future dealings between individuals, private enterprise and the government could potentially be prejudiced, which would be contrary to the public interest;
- document 6.2 is of the same nature as the attachments to document 7; and
- documents 5 and 5 concern similar content to documents 7, 8, 9, 10, 11 and 12.

*Clause 7 - documents 1, 2, 3 (page 8, second dot point), 6.2, 7, 8, 9, 10, 11 and 12*

4. Connor Holmes argues:

- documents 1 and 2 contain information concerning the business, professional and commercial affairs of Connor Holmes and the consortium; and
  - Connor Holmes' involvement in Mount Barker has previously been the subject of adverse criticism (in conjunction with Connor Holmes' involvement in the preparation of the Growth Investigation Areas report);
  - disclosure of these documents may (incorrectly) incite the previous criticisms, and could reasonably be expected to have an adverse effect on the affairs of Connor Holmes' affairs; and
  - in circumstances where the criticism is incorrect, and that Connor Holmes and other parties (including the agency) share the view that the criticism is incorrect, release of this information would be contrary to the public interest;
- all dealings between Connor Holmes and the agency have been held strictly in circumstances of confidence. Had Connor Holmes been aware that any communications and dealings with the agency undertaken on a confidential basis would ultimately be released to the public, the nature of the communications and dealings would have varied drastically and, in any event, been significantly more. Release of documents 1 and 2 would undermine the integrity of all future dealings between the government and the private sector as:
  - the private sector would be reluctant to disclose certain business and commercial information 'without the legitimate protection that a confidential business relationship ordinarily affords'; and
  - individuals and private enterprise would be reluctant in the future to engage in dealing with the government, both in a development context and more broadly;
 which would be contrary to the public interest;
- with respect to the last point, Connor Holmes disagrees with my comment at paragraph 31 of my previous letter.<sup>6</sup> Connor Holmes argues that the provision of information would require a balancing of the interests of the person or enterprise successfully obtaining a request from the government (including successfully competing for a tender), against the risk of potentially disclosing personal or commercially sensitive information (including intellectual property) which may end up in the hands of competitors. In the case of tenders, Connor Holmes submits that:
  - it is the tender document, in addition to an enterprise's business reputation and credentials, that will dictate whether or not a tender is successful;
  - the commercial value of a tender document in this regard cannot be questioned, nor can the potential adverse effects endured by an enterprise, should the tender document be disclosed to competitors, who would potentially plagiarise the style or content disclosed in the successful tender document for use in competing for other tenders;
  - should any component of a tender document be made publicly available through an application under the FOI Act, it will only be a matter of time before it becomes known in commercial circles that tender documents submitted to the government could

<sup>6</sup> This paragraph read:

If a person (or other entity) approaches the government asking that a certain decision be made, or asking for something from the government, it is in that person's interest to disclose all information supportive of their position. It is not in the person's interest to not disclose something supportive of their position, or to be restrictive in the information they provide, as this will decrease the likelihood of the government making the decision, or giving the person what they want.

potentially be accessed by the public notwithstanding that they are submitted on a confidential basis;

- having regard to this, it is entirely foreseeable that a consequence of this would be a reduction in the quality and quantity of private tenders to the government which is clearly contrary to the public interest;
- more generally, it is apparent that businesses and consultants will be more reluctant to both engage in such dealings or, alternatively, provide full disclosure when engaging in such dealings in the knowledge that key and sensitive commercial information may be exposed to the public at large (including competitors), notwithstanding the confidentiality of those dealings. This is contrary to the public interest as the quality and quantity of members of the private sector that engage in dealings with the government and agencies of the government in relation to development projects, and more broadly, will be reduced and the quality of the ensuing projects and developments and the government's interests, will likely be compromised.

*Clause 13 - documents 1, 2, 6.2, 7, 8, 9, 10, 11 and 12*

5. Connor Holmes argues that for reasons already given above, these documents are exempt under clause 13(1) of Schedule 1 to the FOI Act in that they contain matter obtained in confidence by the Minister, the disclosure of which might reasonably be expected to prejudice the future supply of such information to the Government or to an agency and would, on balance, be contrary to the public interest.