

## DETERMINATION

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

**Applicant:** Hon Mark Parnell MLC  
**Agency:** Department of Planning and Local Government  
**Ombudsman reference:** 2010/00095  
**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 the following documents mentioned by Minister Holloway in the Legislative Council on the 3rd of June 2009:

*In its project proposal Connor Holmes disclosed in writing areas and projects where it had an interest either with private clients or in providing advice to the state government.*

and

*To ensure transparency, Connor Holmes has also provided DPLG with a letter identifying areas that are part of the investigations where the firm has advised clients.*

2. On 23 June 2009 Ms Amanda Nicholls of the agency wrote to Mr Stephen Holmes, Director of Connor Holmes, for the purpose of seeking Connor Holmes' views regarding release of the relevant documents under sections 26, 27 and/or 28 of the FOI Act.
3. On 13 July 2009, Mr David Colovic of Kelly and Co Lawyers responded on behalf of Connor Holmes. Mr Colovic advised Ms Nicholls that Connor Holmes was of the view that the documents were exempt documents under clauses 7(1)(c) and 13 of Schedule 1 to the FOI Act.
4. In her determination dated 31 July 2009, Ms Nicholls, an accredited freedom of information officer of the agency, advised Mr Parnell that:

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

5. Two documents are identified on the Schedule attached to Ms Nicholls' determination. They are:

1. 15/09/2008 Proposal for identifying and prioritising long term growth options for greater Adelaide (pp1, 26 only) (document 1, or the proposal); and
  2. 05/05/2009 Letter identifying author's involvement in development projects (document 2).
6. The reasons given by Ms Nicholls for refusing access to the documents, as contained on the Schedule, are as follows:

Clause 7(1)(c)(i) 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 would be contrary to the public interest to disclose this document on the basis that it could prejudice both the private tender process undertaken in this instance and for future processes.

7. On 31 August 2009 Mr Parnell applied for an internal review of Ms Nicholls' determination.
8. On 24 September 2009 Mr Nightingale, the Chief Executive Officer of the agency wrote to Mr Parnell and advised:

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

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

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

### **Relevant provisions of the FOI Act**

10. Under section 48 of the FOI Act the onus is on an agency to justify its determination in my external review.
11. 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.
12. Clauses 7 and 13 of Schedule 1 to the FOI Act are relevant to my external review, in that they have been relied upon either by the agency or the interested party. The relevant parts of these clauses are below.

#### *7- Documents affecting business affairs*

- (1) A document is an exempt document–
  - (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.

### *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.

## **Submissions**

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

### *The agency's submissions*

14. The agency's submissions concentrated principally on the views I expressed in my previous letter on the likelihood of any adverse effect on future tender processes which might be caused by disclosure of information in this matter. In his letter to me dated 29 March 2010 Mr Nightingale wrote:

Having reviewed the issues raised in your letter and the documents in scope of the Freedom of Information application, I make the following arguments from a government relations perspective:

In relation to points 32 to 36 in your letter, the release of this information will have a negative effect on government/business relations and the supply of quality tenders in the future. It is an expectation within government and business circles that commercial-in-confidence material is not released, and this is generally understood in the wider public realm also. Despite the tender process having finished in this instance, if the information is released, it is likely to jeopardise the future business dealings of Connor Holmes as the company's competitors will have access to this business information and will be able to base their future tender submissions around that of Connor Holmes' previous submission. This means that future tender processes will not be fair and equal as Connor Holmes' competitors will have an advantage. In addition to this, Connor Holmes and other businesses will question whether it is worth submitting a tender to government in the future considering the level of risk that their business will be exposed to if their submission is released through the Freedom of Information Act (FOI Act). If the businesses choose to submit a tender, then the businesses will also be wary of how much information they should supply in their submission, thus affecting the quality of future tender submissions received by government.

In addition to this, while the Freedom of Information Act has been in operation for nearly two decades, there has been an understanding between government and business circles that tender submissions will not be released through the FOI Act. This is the reason why in your experience the government has not struggled to attract interest in tender processes. However, if the Office of the Ombudsman continues to determine that tender submissions should be released as part of the FOI Act, then it is highly likely that the government in the future will struggle to attract interest in tender processes.

This would have the flow-on effect of government not being able to award contracts to quality tenderers, and therefore, have the effect of government not being able to deliver quality services to the South Australian public. This is clearly not in the public interest. The State Procurement Board has also been contacted on this matter and the Board strongly supports the above views.

In consideration of the other points in your letter, it is more appropriate for Connor Holmes to respond because these points directly affect their business. In confirming the original determination, I was satisfied that the information presented by Connor Holmes was sufficient to justify the business affairs exemption. For the reasons stated above, I was also satisfied that it would be contrary to the public interest to release the information.

Further to this, I recommend:

- the previous determinations are confirmed and the documentation within scope should not be released in consideration of the negative effects of releasing commercial-in-confidence material; the subsequent adverse affects on government/business relations and related tender processes; and the less than favourable impact on services for the South Australian public; and
- where the Ombudsman considers that the documentation should be at least partially released, DPLG supports the view held by Connor Holmes as to what is appropriate to be released.

### *Connor Holmes' submissions*

15. Connor Holmes has asserted words to the effect that its submissions should not be disclosed to Mr Parnell, because to do so would disclose exempt matter. It further adds that its letter of submissions is an exempt document. This is despite the fact that in my previous letter (a copy of which Connor Holmes received) I asked that claimed exempt matter be put in a *separate* document, and that to the extent possible, submissions be provided in a form that can be provided to Mr Parnell.
16. I am mindful of section 39(15) of the FOI Act<sup>1</sup> and therefore I will not provide the submissions to Mr Parnell. However, Connor Holmes' submissions will become apparent in *general* terms from my reasoning. I cannot provide my determination in a vacuum. To the extent that it may not be clear from my determination, for completeness I can only advise that I have had regard to all submissions provided by the agency and Connor Holmes.

### **The nature of the information in the documents**

17. I consider it prudent to briefly refer to the nature of the information in question. In my previous letter, I said Mr Parnell wants access to information concerning:

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<sup>1</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.

- the areas and projects where Connor Holmes had an interest either with private clients or in providing advice to the state government; and
- the areas that are part of the investigations where Connor Holmes has advised clients.

18. I interpret this to mean the identification of geographical areas and projects, in which Connor Holmes has had or does have an interest, via its clients, as disclosed in writing to the agency.

### Determination

19. I begin with some overarching comments.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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 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.

26. 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.

27. 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. This is supported by

the agency's submissions. With respect, 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.

28. 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.
29. My views regarding tender processes also apply in circumstances where a business entity wants something from the government. I am not convinced by the general assertion that businesses will forego the chance of the government making a decision that might be in the business' interests merely due to the possibility of relevant information being disclosed.
30. I now turn to the specific claims made by Connor Holmes.

*Confidentiality - clause 13(2) of Schedule 1 to the FOI Act*

31. It has been argued that the documents 'are clearly exempt from production pursuant to s 13(2) of Schedule 1 of the FOI Act, as their disclosure would found an action for breach of confidence'. This is said to be based on 'a contractual rather than equitable basis, though it is not conceded that a claim in equity for breach of confidence could not be successfully made out'.
32. Whilst the reference to clause 13(2) may have been in error (instead of clause 13(1)), it should be clarified that documents cannot be exempt under clause 13(2) per se. This provision merely provides that a document 'that is a contract' cannot be exempt under clause 13 unless certain requirements are met. Clause 13(2) of Schedule 1 to the FOI Act is not relevant to this matter.

*Confidentiality - request to submit an offer makes confidentiality clear*

33. It has been argued that the documents giving rise to Connor Holmes' tender make the terms of confidentiality clear, in that:
  - 'the invitation to submit an offer to provide consultancy services was confidential, and was not publicly advertised';
  - 'the 'Conditions of Offer' imposed by the Government expressly provide that information in relation to the offer process is confidential';

- '[Connor Holmes] is required to keep all information supplied by or on behalf of the Minister confidential'; and
- 'the Minister recognised the need to keep commercial matters confidential'.

34. The first point is, in my view, of no consequence. That the invitation to submit a tender may not have been publicly advertised, and may have been 'confidential',<sup>2</sup> does not lead to the conclusion that the tender itself is confidential. Additionally, the mere fact that something is not publicly advertised does not guarantee that it is confidential.
35. The third point merely talks about an onus on Connor Holmes. It does not appear to be reciprocal, in that it does not attempt to impose an onus on the government. That is covered by the fourth point, and I agree that the 'Conditions of Offer' indicate that 'the Minister understands the need to keep commercial matters confidential in appropriate circumstances'. This needs to be understood in context however, and I note the phrase 'in appropriate circumstances'. The government cannot, as held in *Ipex*, give a greater promise of confidentiality than is consistent with the FOI Act. In my view, the agency's understanding of the 'need to keep commercial matters confidential' will need to be carefully tempered by what are 'appropriate circumstances'; most notably in this case the FOI Act, and my comments above that not *all* information concerning commercial matters can be considered confidential. Consequently, and with respect to the second point above, I do not consider the confidential process imposed by the 'Conditions of Offer' as clear as Connor Holmes does. The government may wish to reflect on the wording of its tender invitations if parties are reading them too widely, and it may be prudent to specifically refer to the FOI Act. Whilst I note that clause 13 provides that 'any resulting contract from this officer is subject to disclosure pursuant to' the FOI Act, it might also be prudent to indicate that any offer or tender received by the government is also subject to the FOI Act.
36. Clause 9.3 of the 'Conditions of Offer' (which talks about the Minister's understanding to keep commercial matters confidential) proceeds to refer to circumstances in which the Minister might disclose some or all of the contents of an offer, for instance, as required by a constitutional convention. Whilst disclosure in accordance with an application under the FOI Act is not specifically referred to, the views I have expressed in the previous paragraph remain the same.

#### *Confidentiality on a contractual basis*

37. I am not satisfied that there is a contractual obligation of confidence on the Minister or the agency. In my view, the Minister's invitation to make an offer (or submit a tender), in conjunction with the fact that Connor Holmes accepted the offer by submitting a tender, falls short of forming a contractual relationship. Elements of the 'Conditions of Offer' support this view, as the Minister stipulated that 'no contract will necessarily result from the submissions of any offer' (see clause 1.3), and 'the Request for Offer does not constitute a Purchase Order of any type of offer capable of acceptance' (see clause 1.5). It appears to me that a contractual relationship would only arise once all tenders had been processed, a decision made, and a tender accepted.
38. Connor Holmes was the successful tenderer. I have perused the resultant contract between Connor Holmes and the Minister which does not appear to place the Minister or the agency under an obligation of confidence.

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<sup>2</sup> I am not sure that the invitation to submit a tender could be confidential, given that it is public knowledge that Connor Holmes was the successful tenderer.

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*Confidentiality - otherwise*

39. I turn now to whether the documents are exempt because they contain matter the disclosure of which would found an action for breach of confidence on an equitable basis (see clause 13(1)(a)), or because they contain matter obtained in confidence 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.
40. In my previous letter, at paragraph 18, I indicated that 'it is apparent from searching the internet that Connor Holmes' involvement in the majority of the geographical areas and projects it disclosed to the agency, and moreover the identities of many of its clients, is already in the public domain' (see the 'nature of the information' section above). In the attachment to my previous letter, I documented some of the information already in the public domain. In paragraphs 19, 20 and 21 of my previous letter, I asked that numerous questions be answered if Connor Holmes (and the agency) maintain that the identities of Connor Holmes' clients are not already in the public domain. In paragraph 20 of the attachment to my previous letter, I stated:
- If a claim under clause 13 of Schedule 1 to the FOI Act is maintained, Connor Holmes and the agency will need to provide detailed submissions. If the claim is under clause 13(1)(a), evidence should be provided to address all elements of a breach of confidence. If the claim is under clause 13(1)(b), evidence should be provided with respect to the matter in the documents being obtained in confidence, and the submissions will need to address the comments I have already made in my covering letter which are relevant to 13(1)(b)(i) and 13(1)(b)(ii).
41. Connor Holmes has submitted that 'the considerations expressed at paragraphs 18 to 19' of my previous letter '(which are addressed in more detail below) are not relevant having regard to the obligations of confidence in relation to [Connor Holmes'] offer to provide consultancy services (Document 1) and [Connor Holmes'] subsequent letter (Document 2).'
42. Given that I do not accept Connor Holmes' submissions arising from the 'Conditions of Offer' discussed above, it is my view that the matter discussed in my previous letter and its attachment remains relevant. Notably, I consider the question of whether information is already in the public domain will always be relevant to whether the same or similar information can be said to be exempt under either clause 13(1)(a) or 13(1)(b).
43. This will also have a bearing on clause 7, so I will address the issues Connor Holmes has raised in that context. At this point it is suffice to say that for the above reasons, and those which follow, Connor Holmes has not satisfied me that the documents are exempt under clause 13 of Schedule 1 to the FOI Act.

*Business affairs*

44. I am not satisfied that the identity of the geographical areas where Connor Holmes has some form of interest is, in and of itself, information that is commercially valuable as required by clause 7(1)(b)(i). The commercial value lies in the relationships between

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Connor Holmes and its clients, rather than the names of clients with whom it has relationships or the names of the locations of clients' property. Moreover, clauses 7(1)(b) and 7(1)(c) are considered mutually exclusive - that is, matter can be one or the other but not both. I accept, in a general sense, that the identities of Connor Holmes' clients concern Connor Holmes' business affairs.

*Information already in the public domain?*

45. I iterate the relevance of information already within the public domain.
46. Connor Holmes took the opportunity of addressing only three of the more than fifteen areas and projects listed in the documents where Connor Holmes had or has an interest either with private clients or in providing advice to the state government. I will refer to these areas and/or projects respectively as area 1, area 2 and area 3.
47. In addressing these areas, it was submitted that the question of the exemption of the documents cannot be determined simply with regard to whether the identities of Connor Holmes' clients are already in the public domain. The nature and scope of a project itself will also be relevant.
48. Connor Holmes has specified what, in its view, will be revealed if the information in the documents relating to area 1 is disclosed. Connor Holmes acknowledges that certain information relating to area 1 is already in the public domain. However, the information already in the public domain is not the complete extent of information relating to area 1. That is, there is information relating to area 1 not already in the public domain. Due to confidentiality obligations, Connor Holmes has said that it is not in a position to fully disclose to me all of the information relating to area 1 not already in the public domain.
49. I am not convinced, on the basis of the submissions Connor Holmes considers itself able to provide, that disclosure of the information within the documents concerning area 1 will reveal what Connor Holmes asserts. In my view, it is entirely feasible that if the information within the documents concerning area 1 is released, people will be able to determine no more than that which is already in the public domain. Approached from a slightly different angle, I consider it feasible that the information already within the public domain regarding area 1 is sufficient to explain the information within the documents concerning area 1, if it were to be released.
50. Connor Holmes has specified what, in its view, will be revealed if the information in the documents relating to area 2 is disclosed. Connor Holmes did not tell me the identity of its client regarding area 2 for reasons of confidentiality. Connor Holmes submits that disclosure would also reveal to its competitors the fact that Connor Holmes acts in relation to area 2.
51. The owner of area 2 can be ascertained from the internet. Therefore, I have been able to deduce Connor Holmes' client in area 2. I am not aware of a direct link, already in the public domain (ie via internet browsing), between Connor Holmes and this particular client. What is known, however, is that the owner of area 2 is pursuing a development. Moreover, given other information already in the public domain, I do not think anybody would be particularly surprised to learn that Connor Holmes was acting for the owner of area 2. Therefore, indirectly, I am not convinced that the release of the information within the documents concerning area 2 would reveal very much.

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52. Connor Holmes has specified what, in its view, will be revealed if the information in the documents relating to area 3 is disclosed. Connor Holmes acknowledges that certain information relating to area 3 is already in the public domain. However, the information already in the public domain relevant to area 3 is not the complete extent of information relating to area 3, and release of the information in the documents relating to area 3 would disclose the nature and/or scope of development being considered for area 3. Connor Holmes submits that this information is not in the public domain.
53. In my view, Connor Holmes' submissions tend to minimise what might already be extrapolated about area 3. Whilst present general knowledge might not be exact, in my view the nature and/or scope of the development being considered in area 3 can be deduced.
54. Furthermore, recent events concerning area 3 have clarified matters even further. In my view, the scope of the intended development is a matter of public knowledge.

*Further arguments regarding areas 1, 2 and 3*

55. Connor Holmes argues that release of the information in the documents concerning areas 1, 2 and 3 will destroy or diminish the commercial value of the information, or, in the alternative, will have an adverse affect on Connor Holmes and its clients. I am not satisfied that this is the case, simply because I am not satisfied that disclosing the information in the documents relating to areas 1, 2 and 3 will reveal anything, or much, that is not already in the public domain or is otherwise readily discernible.
56. Nevertheless, for the sake of completeness, I will briefly address some of Connor Holmes' specific arguments.
57. I am not convinced that disclosing this information will provide Connor Holmes' competitors with information they could use to Connor Holmes' detriment. I do not pretend to know Connor Holmes' business more than Connor Holmes, and I accept that the industry is competitive. However, some of these clients are long standing clients, and would presumably not desert Connor Holmes at the first approach by a competitor.
58. I do not accept that Connor Holmes' reputation will be adversely affected by the release of this information if it is known that Connor Holmes played a part in it becoming publicly known. My determination has taken into account Connor Holmes' strong objections, and these objections can be made known if necessary.
59. In my view, the level of 'public attention' any development is likely to attract will largely depend upon the development itself, rather than the particular consultant the developer chooses to engage. It seems to me that Connor Holmes is over-inflating any 'infamy' it may have attracted as a result of criticism for its involvement in the Growth Investigations Area Report. The fact is, Connor Holmes is, and continues to be, publicly active in advocating its clients' interests. That much is evident from the internet searches conducted by my office, and it belies the existence and scope of any 'adverse effect' to its business affairs that can be expected from the release of this information. I add that nor am I convinced that any criticism attached to Connor Holmes might rub off on its clients, thereby adversely affecting the relationships between Connor Holmes and its clients. The submissions do not provide persuasive evidence in support of this assertion.

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60. I consider it unwarranted to suggest that ‘unnecessary public debate and unfounded agitation as to development in the relevant area[s] would be incited’ by release of the information. Development has the tendency to affect the public at large, and not merely developers. Decision makers (whether the Minister, the government or councils) will make their decisions in the public interest. Public views, as well as the merits of the development, will be relevant considerations. That, on occasions, decisions will be influenced by a loud public voice does not lead to the conclusion that the public should be excluded in other matters.
61. In my view the notion of intellectual property is irrelevant to my review, as Mr Parnell does not want all of the tender document. The information in dispute cannot be categorised as intellectual property.

*The public interest*

62. The submissions I have been provided with regarding the public interest (other than those which flow from the above arguments) focus on the early stages of development. I query the meaning of the phrase ‘unnecessary and ill informed public debate’. In my view, without particularity, it adds very little.
63. It has been submitted that the ‘extensive’ public consultation provisions in the *Development Act* would be ‘undermined’ by premature debate based on ‘pure speculation’ as a result of release of information in this matter. Disclosure of the information would therefore be contrary to the public interest. Firstly, I am not satisfied that the disclosure of information in this matter would lead to ‘pure speculation’, given my conclusions about what is already in the public domain. In any event, I do not agree that providing information otherwise than in accordance with the consultation required under the *Development Act* would undermine the legislation or any functions under the legislation. Consultation provisions in the *Development Act* provide the minimum that is required. Given the strong public interest in development matters, I do not consider there to be any general bar to releasing information outside of the consultation period.
64. I add that, in my view, there is a general public interest in knowing how public money is spent. There is a public interest in disclosing the details of government actions, for example to show that the government has satisfied itself that there are no actual conflicts of interest, or to show that the government has appropriate measures in place, in circumstances where ‘perceived’ conflicts may be apparent. I consider this issue relevant in this matter, given that the relevant information was provided to the agency by Connor Holmes, in addition to spruiking its experience, for the purpose of disclosing any potential conflicts of interest. I therefore consider there to be a public interest in favour of disclosing these documents.

*Partial release - section 20(4)*

65. Connor Holmes has, to an extent, addressed the issue of partial release, albeit this strikes me predominantly as a list of Connor Holmes’ priorities. Connor Holmes considers the documents exempt in full. It will be clear that I do not agree. Connor Holmes then outlines three categories of information. While it may be a moot point, in my view its submissions were only directed at one of these categories.

66. In light of my reasoning above, I reverse the agency's determination, pursuant to section 39(11) of the FOI Act. I do not consider the documents exempt under clauses 7 or 13 of Schedule 1 to the FOI Act.

**Right of Appeal**

67. Any person aggrieved by my determination may appeal to the District Court of South Australia under section 40(2) of the FOI Act.
68. 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.
69. 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