

DETERMINATION

External review pursuant to *Freedom of Information Act 1991*

Applicant: Hon Mark Parnell MLC
Agency: Department of Planning and Local Government
Ombudsman reference: 2010/00097
Determination: The determination of the agency is reversed

REASONS FOR DETERMINATION

Background

1. In a letter dated 25 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 all reports, submissions or similar documents (including drafts) prepared by Delfin and/or Connor Holmes and submitted to the Department of Planning and Local Government for the purposes of the Gawler East DPA process (excluding documents already in the public realm).

2. In her determination dated 31 July 2009, Ms Amanda Nicholls, an accredited freedom of information officer of the agency,¹ 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 some of the requested documents in accordance with Section 20 of the *Freedom of Information Act 1991* (the Act). The grounds for refusal are identified in the Schedule.

3. Twelve documents are identified on the Schedule attached to Ms Nicholls' determination:

1. ?/09/2008 Concept information provided to Department by Delfin regarding development at Gawler East;
2. 08/12/2008 'With Compliments' slip from Connor Holmes to DPLG;
3. 08/12/2008 Draft Gawler East Development Plan Amendment;
4. 08/12/2008 Email from Connor Holmes to DPLG;
5. 09/02/2009 Email from Connor Holmes to DPLG and attached Progress Table;
6. 24/02/2009 Email from Connor Holmes to DPLG and attached draft Zone provisions;
7. 26/02/2009 Concept information provided to Department by Delfin regarding development at Gawler East;
8. 17/03/2009 'With Compliments' slip from Connor Holmes to DPLG;
9. 17/03/2009 Draft Gawler East Development Plan Amendment;
10. 17/03/2009 Email from Connor Holmes to DPLG and attached Progress Table;
11. 03/04/2009 'With Compliments' slip from Connor Holmes to DPLG;
12. 03/04/2009 Draft Gawler East Development Plan Amendment.

¹ Albeit I note the determination was signed by Ms Joy Rowett, whom I understand is also an accredited freedom of information officer for the agency, for Ms Nicholls.

4. Documents 2, 8 and 11 (the 'with compliments' slips) were released to Mr Parnell, and they will not be discussed further. The reasons given by Ms Nicholls for refusing access to documents 1 and 7, as contained on the Schedule, are as follows:

Clause 9(1) - this material relates to consultation that occurred during the course of the decision making functions of the agency. Its disclosure is contrary to the public interest.

5. The reasons given by Ms Nicholls for refusing access to documents 3, 4, 5, 6, 9, 10 and 12, as contained on the Schedule, are as follows:

Clause 9(1) - this material was prepared during the course of the decision making functions of the agency. Its disclosure is contrary to the public interest.

6. On 4 September 2009 Mr Parnell applied for an internal review of Ms Nicholls' determination.

7. On 24 September 2009 Mr Ian Nightingale, 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.

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

Relevant provisions of the FOI Act

9. Under section 48 of the FOI Act the onus is on an agency to justify its determination in my external review.
10. 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.
11. Clauses 7(1)(c), 9(1) and 13(1) 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.

7- Documents affecting business affairs

- (1) A document is an exempt document—
- (c) if it contains matter—
- (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
- (ii) the disclosure of which—
- (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
- (B) would, on balance, be contrary to the public interest.

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.

Submissions

12. In a letter 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 Delfin Lend Lease (**Delfin**) 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, Delfin and Connor Holmes. I have not considered it necessary to seek formal submissions from Mr Parnell.

The agency's submissions

13. The agency has, to an extent, revised its views since its internal review determination. The agency agrees that 'the public interest test is in favour of disclosure of documents 3, 9 and 12, namely the drafts [of the Development Plan Amendment] prepared before the publicly released draft', given that the 'decision-making processes of putting together the publicly released draft have been completed'. The agency considers that it is more appropriate for Connor Holmes and Delfin to respond to the remainder of my earlier letter, and recommends that I support the views held by Connor Homes and Delfin as to what else should be released.
14. Prior to turning to the views of Connor Holmes and Delfin, I consider it prudent to briefly discuss a further point made by the agency, if for no other reason than it appears to preface the agency's revised views regarding the drafts of the DPA. The agency wrote:

In relation to points 13 and 14 in your letter, you have stated you do not consider the range of matters envisaged by 9(a)(i) and 9(a)(ii) to encompass all material that is prepared during the course of the decision making functions of the Government, a Minister or an agency. However, the Freedom of Information Act does not exclude any documents either which are prepared during the course of the decision making functions of the Government, a Minister or an agency, and therefore, the decision to release or not would fall within the scope of public interest.

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15. I fear we may be at cross-purposes. The main point of paragraph 14 of my previous letter was to highlight the duality of clause 9(1)(a) of Schedule 1 to the FOI Act. To qualify under 9(1)(a), not only must matter have been obtained, prepared or recorded, or relate to something 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, but the matter must also relate to an opinion, advice, recommendation, consultation or deliberation. This is a small but important point to make, as not all matter concerning the 'decision-making functions' of an agency will relate to opinions, advice, recommendations, consultations or deliberations. Notably, not all draft documents, or all parts of draft documents, will relate to opinions, advice, recommendations, consultations or deliberations. To the extent that the agency may be arguing that *all* matter (or documents) prepared during the course of the decision making functions of an agency qualify to proceed to the public interest test in clause 9(1)(b), I disagree.

Interested party submissions

16. Delfin only addressed documents 1 and 7 (both of which comprise numerous documents), as these are the only documents that originated from Delfin. Delfin does not object to parts of these documents being released.

17. Delfin submits that:

All information provided to DPLG in ascertaining the viability of a development proposal for Gawler East, therefore giving confidence to the DPA process, was provided with a verbal request that the information was confidential and required sensitive management. Therefore, it was understood by all parties to be commercial in confidence.

18. Particularly, Delfin submits that the disclosure of:

- in-house projections on dwelling settlements, occupation ratios etc particular to Delfin's business operation model for the Bentley, Gawler East and Mawson Lakes areas;
- in-house intellectual property particular to Delfin's business operation model relating to the 'Gawler East Community and Education Precinct (March 2008)'; and
- a presentation regarding Gawler East given on 31 July 2008, which contains some of the above information that is particular to Delfin's business operation model,

would provide an advantage to its competitors. This is because:

- with respect to Gawler East, given that the development is still unresolved, the possibility remains that competitors of Delfin could use this information to their advantage²; and
- in a wider sense, the information represents significant intellectual property arising out of Delfin's long history in land development. If this information is disclosed to competitors, the competitors will be advantaged and the value of Delfin's future offerings will be jeopardised.

² The word 'unresolved', and other words in this submission, are mine. I have not disclosed the full extent of Delfin's submission.

19. Delfin also submits that one page of document 1, with the title '*Enrolment Trends for 1996-2007*' cannot be released as it belongs to the Department of Education and Children's Services (DECS) and was given to Delfin in confidence.
20. Document 1 also contains 'test cases' relating to particular house styles, which contain floor plans, photographs and other information. Mr Parnell has indicated that he does not require access to these, so they no longer form a part of this external review. They should not be provided to Mr Parnell.
21. 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. 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 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.
22. I am mindful of section 39(15) of the FOI Act³ 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, Connor Holmes and Delfin.

Determination

23. I begin with some overarching comments. They are levelled mainly at Connor Holmes' submissions which are relatively general in nature.
24. 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.
25. 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.
26. The government often engages in commercial dealings with individuals and other 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

³ 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.

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.

27. 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.
28. 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 FOIA. 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.

29. 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.

30. 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.

31. This matter involves a Ministerial decision as to whether to amend a development plan under the *Development Act* in circumstances where it is a developer that seeks the amendment. Whilst, ultimately, the decision rests with the Minister, the commercial entity seeking the amendment will largely fund the drafting of the Development Plan Amendment, and make other submissions to the Minister. Connor Holmes submits that as a matter of industry practice, all consultation between the commercial entity, the Minister and the agency takes place strictly in confidence to protect the Ministerial functions.

32. Connor Holmes believes that releasing documents in this matter would reduce the number of similar consultations which take place between individuals or private firms and the Minister, and would create a reticence on the part of developers to communicate openly and extensively with the Minister, 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.

33. In my view it is in the interests of a commercial entity seeking an amendment to a development plan to provide all information supportive of its position. A failure to provide all supporting information, or being restrictive in the information provided, will decrease the likelihood of the Minister making the sought-after decision. If there is specific information the party would like to keep confidential, it would be wise, at the time of providing it, 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. In my experience information relating to the formulation of Development Plan Amendments *is* released to the public. 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.

34. Connor Holmes has raised one other point said to support the assertion that the disclosure of these documents would be contrary to the public interest. It has submitted that Mr Parnell's statement, that Connor Holmes 'was asked by the Rann Government to 'evaluate' the potential for Gawler East for new housing as part of the 30 year Plan for

Greater Adelaide⁴, was 'erroneous and incorrect'. Connor Holmes states that this is incorrect as Gawler East was already located within the urban boundary of metropolitan Adelaide.

35. Whilst Connor Holmes might be correct - I have not checked the urban boundary for the relevant time - I do not necessarily agree with Connor Holmes about the magnitude of any error on Mr Parnell's part, given that Connor Holmes was contracted by the government to undertake evaluations within the wider Gawler area. In any event, I am not persuaded by its submissions that Mr Parnell's statements have done Connor Holmes the level of damage Connor Holmes asserts. Rather, I consider the provided information more indicative of the fact that there is robust debate about what is planned for Gawler East.

Delfin's intellectual property etc

36. I accept that, from Delfin's perspective, it would prefer that its intellectual property and industry know-how, developed over many years, did not make it into the public domain. This must be tempered against the fact that Delfin provided these documents to the Minister (and/or the agency) in the hope that the Minister would make a decision in Delfin's commercial interests, and that the decision would affect the wider public. Therefore, the wider public also has an interest in the decision, and in knowing how it was made.
37. I am not satisfied that the information identified by Delfin is exempt. This is for several reasons.
38. I accept that Delfin may have its own particular way of producing projections. I accept that Delfin's competitors may be interested in knowing exactly how they are produced. Having said that, Delfin's competitors will also produce projections, and the ways of producing projections cannot be dissimilar. I am not persuaded that any interest competitors may have in gaining access to projections produced by Delfin would give them a commercial advantage over Delfin.
39. In a more particular sense Delfin has submitted that, given the stage the development is up to, its competitors may be able to utilise this information and, in my words, 'muscle' their way into Gawler East. Whilst I consider this a possibility, it seems to me that Delfin is far enough entrenched into this project that the possibility is highly unlikely.
40. In any event, there is a wider public interest in this project. This interest is strong. In my view, the information within the projections helps explain the project, and also the government action necessary for the project to be realised. In essence, the information says how many new people are expected, and when; how many new pupils are expected, and when. I consider that, on balance, it would not be contrary to the public interest to disclose this information.
41. Other than the DECS data, which I will address shortly, I consider the remaining information identified by Delfin fairly innocuous. I am not persuaded that it is exempt.

DECS information

42. Delfin states that:

⁴ Mr Parnell's media release dated 31 July 2009.

this data is compiled by DECS from its annual statistical collection of school data for the purpose of determining patterns of growth, decline or stabilisation in individual school enrolments and for asset management purposes. It is then made available to principals and teachers to assist in making management decisions about their school.

Raw enrolment data for all schools in South Australia is publicly available from School Context Statements and School Annual Reports, which can be sourced through school principals and school websites. These sources are updated annually from data collected by DECS.

43. Whilst the information within the page may not be raw, in the sense that it is a compilation, it is still factual. It seems to me that if these facts can be sourced publicly, this page could easily be reproduced and therefore cannot be exempt.
44. I understand Delfin's reticence to 'consent' to the disclosure of information provided to it under the auspices of confidentiality. However, the government will be releasing the information.
45. 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 7, 9 or 13 of Schedule 1 to the FOI Act. I add that the small portion of information in document 7 referred to is no longer within the scope of the application and should not be released.

Right of Appeal

46. Any person aggrieved by my determination may appeal to the District Court of South Australia under section 40(2) of the FOI Act.
47. 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.
48. 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