

DETERMINATION

External review pursuant to *Freedom of Information Act 1991*

Applicant: Hon Michelle Lensink MLC
Agency: Department of Environment and Natural Resources
Ombudsman reference: 2010/07076
Determination: The determination of the agency is reversed

REASONS FOR DETERMINATION

Background

1. On 22 September 2009 the Hon Michelle Lensink MLC (**the applicant**) made an application under the *Freedom of Information Act 1991* (**the FOI Act**) to the Department of Environment and Natural Resources (**the agency; DENR**). The applicant sought access to 'all correspondence between the South Australian Heritage Council and the Minister for Environment and Conservation from 2009 to present.'
2. The agency failed to make an 'active' determination within the 30-day period required by the FOI Act, and is therefore 'deemed' to have refused access to the documents under section 19(2) of the FOI Act.
3. In a letter dated 10 November 2010 the applicant applied to Mr Allan Holmes, the Chief Executive of the agency, for an internal review of the agency's 'deemed' refusal.
4. The agency failed to make an 'active' determination within the 14-day period required by the section 29(5) of the FOI Act, and is therefore 'deemed' to have again refused access to the documents.

External review process

5. In a letter received on 6 December 2010, the applicant applied to me for an external review of the agency's 'deemed' determination to refuse her access to the documents under the FOI Act.
6. On 17 February 2011 Mr Holmes determined to grant full access to 34 of the 36 documents identified as within the scope of the application, as permitted by section 19(2a) of the FOI Act. Mr Holmes advised that the two remaining documents (numbered 32 and 34) were subject to consultation with third parties who claimed that they were exempt, in full or in part.
7. My office obtained a copy of documents 32 and 34 and supporting documentation from the agency. In addition, throughout the course of the external review, Ms Tonia Nielsen of my office has communicated extensively with Ms Lyn Metcalf of the agency.
8. The agency is of the view that document 34 is not exempt and that document 32 is exempt in part under clause 9(1) of Schedule 1 to the FOI Act. On 7 February 2011 Ms Metcalf advised the Ministers for Health and Environment and Conservation of the

agency's views, and consulted them about document 32 and documents 32 and 34, respectively. By email dated 16 March 2011, Ms Fay Hart, office manager to the Minister for Environment and Conservation, advised that the Minister was satisfied with the agency's proposal. In a minute dated 17 March 2011, Ms Kath Thomas advised that the Minister for Health agreed that document 32 is exempt in part, as identified by the agency, but claimed that further parts of document 32¹ are also exempt under clause 9(1) of Schedule 1 to the FOI Act.

9. Document 32 was created following the provisional listing of Eastwood Lodge on the SA Heritage Register. It consists of four parts:

- Part 1 - a one-page letter dated 23 August 2010
- Part 2 - a four-page minute to the Minister for Environment and Conservation from the Minister for Health
- Part 3 - a three-page report, marked 'attachment A'
- Part 4 - a two-page letter, marked 'attachment B'.

10. The Minister for Health agrees with the agency that part 3 is exempt and that part 4 of document 32 is not exempt. Adopting the paragraph numbering applied by the Minister for Health's office to part 2, the agency claims that paragraphs 15, 16, 18 and 19 are exempt. In addition to those paragraphs, the Minister for Health claims that paragraphs 13, 21 and 22 of part 2 and the substance of part 1 (that is, below the addresses) are exempt. The agency relies on clause 9(1) of Schedule 1 to the FOI Act to support its claim. The Minister for Health supports the agency's claim regarding paragraphs 15, 16, 18 and 19 of part 2 and part 3, and relies on a number of exemption clauses regarding his additional claims.

11. On 29 March 2011 Ms Nielsen sought clarification from Ms Thomas about the Minister for Health's position regarding paragraph 13 of part 2, and parts 3 and 4 of document 32. At the time, Ms Nielsen advised Ms Thomas that, in her view, where the Minister's claims went further than those raised by the agency the Minister bore an evidential onus.

12. The response provided by Ms Thomas on behalf of the Minister for Health on 6 April 2011 raised the following claims of exemption regarding those parts of document 32 not claimed exempt by the agency:

- Substance of part 1 - clauses 7(1); 9(1) and 13(1)
- Paragraph 13 of Part 2 - clauses 5(1); 7(1); 9(1) and 13(1)
- Paragraphs 21 and 22 of Part 2 - clauses 7(1); 9(1) and 13(1)

13. I have proceeded on the basis that the agency and the two ministers consulted are prepared to release document 34 and part 4 of document 32 in full; the majority of part 2 of document 32; and the top third of part 1. The remainder of my determination will therefore focus on the substance of part 1; paragraphs 13, 15, 16, 18, 19, 21 and 22 of part 2; and part 3 of document 32.

Legislative Framework

14. Section 12 of the FOI Act provides that 'a person has a legally enforceable right to be given access to an agency's documents in accordance with this Act'.

¹ The minute specified that paragraphs 13, 15, 16, 18, 19, 21 and 22 of part 2 and part 3 were exempt. In the attached documents, the handwritten notation agreed that paragraph 13 could be released. The response did not clearly address parts 3 and 4 of document 32.

15. Under section 20(1)(a) of the FOI Act, 'an agency may refuse access to a document if it is an exempt document'.
16. Section 48 of the FOI Act places the onus on the agency to justify its determination in my external review. Nevertheless, where the Minister for Health's claims go further than the agency's, my view is that the Minister has an obligation 'to ensure that there is material before ... [me] from which I am able to be satisfied that all elements of the exemption provision relied upon are established.'²
17. One of the 'principles of administration' in the FOI Act is that the FOI Act 'should be interpreted and applied' so as to further its objects.³ Section 3 of the FOI Act provides:

3 Objects

- (1) The objects of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament-
 - (a) to promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State; and
 - (b) to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies.
 - (2) The means by which it is intended to achieve these objects are as follows:
 - (a) ensuring that information concerning the operations of government (including, in particular, information concerning the rules and practices followed by government in its dealings with members of the public) is readily available to members of the public and to Members of Parliament; and
 - (b) conferring on each member of the public and on Members of Parliament a legally enforceable right to be given access to documents held by government, subject only to such restrictions as are consistent with the public interest (including maintenance of the effective conduct of public affairs through the free and frank expression of opinions) and the preservation of personal privacy; ...
18. Section 39(11) of the FOI Act provides that in my external review, and based on the circumstances existing at the time of my review, I may confirm, vary or reverse the agency's determination.

Exemption clauses

Clause 5(1)

19. Clause 5(1) of Schedule 1 to the FOI Act provides as follows:
- (1) A document is an exempt document if it contains matter-
 - (a) the disclosure of which-
 - (i) could reasonably be expected to cause damage to intergovernmental relations; or
 - (ii) would divulge information from a confidential intergovernmental communication; and
 - (b) the disclosure of which would, on balance, be contrary to the public interest.

² *Re Pope and Queensland Health* (1994) 1 QAR 616 at paragraph 17. A decision of the Queensland Information Commissioner in relation to the Queensland equivalent of section 48 of the South Australian FOI Act. I consider these comments applicable to section 48.

³ Section 3A(1)(a) of the FOI Act.

20. To justify a claim that a document is exempt pursuant to clause 5(1), each of the following criteria must be satisfied:

- (a) The document contains information the disclosure of which either:
 - (i) could reasonably be expected to cause damage to intergovernmental relations
 - (ii) would divulge information from a confidential intergovernmental communication.
- (b) The disclosure of the matter would, on balance, be contrary to the public interest.

This means showing that there is something adverse to the public interest likely to flow from disclosure of the document, and that 'on balance the factors in the public interest against disclosure outweigh the factors in favour of disclosure'.⁴

The public interest has many facets. For example, there is clearly a public interest in the effective and efficient workings of representative government and its agencies, as well as in ensuring just administration and accountability within representative government and the ability to scrutinise public administration.

Clause 7(1)(b)

21. Clause 7(1)(b) of Schedule 1 to the FOI Act provides as follows:

- (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

22. To justify a claim that a document is exempt pursuant to clause 7(1)(b), each of the following criteria must be satisfied:

- (a) The document contains information (other than trade secrets) that has a commercial value to any agency or person.

The terms 'commercial' and 'value' are not defined in the FOI Act, and should be accorded their ordinary meaning.

- (b) Disclosure of that information could reasonably be expected to destroy or diminish the commercial value *of the information* [my emphasis].
- (c) The disclosure of the matter would, on balance, be contrary to the public interest.

⁴ *Iplex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54 at 70 per Judge Lunn. These comments were made in relation to clause 9(1)(b) of Schedule 1 of the FOI Act, but are relevant to the public interest test in clauses 5(1), 7(1)(b), 7(1)(c), and 13(1)(b).

Clause 7(1)(c)

23. Clause 7(1)(c) of Schedule 1 to the FOI Act provides:

- (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) [“information (other than trade secrets) that has a commercial value to any agency or any other person”]) 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.

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

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

It will be sufficient:

if any adverse effect is established... However, it must be something which can be properly categorised as an adverse effect and not something so de minimus [sic] that it would be properly regarded as inconsequential... It will be sufficient if the adverse effect is produced by that document in combination with other evidence which is before the Court on the appeal.⁵

- (ii) prejudice the future supply of such information to the government or to an agency.
- (c) disclosure of the information would, on balance, be contrary to the public interest.

Clause 9(1)

25. Clause 9(1) of Schedule 1 to the FOI Act provides that:

- (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,

⁵ *Iplex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54 at 65.

in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and

(b) would, on balance, be contrary to the public interest.

26. To justify a claim that a document is exempt pursuant to clause 9(1), it must be shown that the document satisfies paragraphs (a) and (b) of clause 9(1). The scope of clause 9(1)(a) is wide, particularly given use of the words 'that relates to'. Clause 9(1)(b) introduces a public interest test, which limits the expansive scope of clause 9(1)(a).

Clause 13(1)

27. Clauses 13(1)(a) and 13(1)(b) of Schedule 1 to the FOI Act provide that:

(1) A document is an exempt document—

(a) if it contains matter the disclosure of which would found an action for breach of confidence; or

(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.

28. To succeed in claiming clause 13(1)(a) it is necessary to demonstrate that the relevant document contains matter 'the disclosure of which would found an action for breach of confidence'. The obligation of confidence may be contractual or equitable, and 'would' should be read as 'could'.⁶

29. An equitable obligation of confidence is a duty not to disclose information because the information was given and received in circumstances which would make it unconscionable for the confidant to disclose the information in a way the confider has not authorised. A number of criteria must be satisfied:⁷

(a) The information must be capable of being identified with specificity.

(b) The information must have the necessary quality of confidence.

(c) The information must have been received in circumstances which import an obligation of confidence.

(d) There must be actual or threatened misuse of the information.

It may also be necessary for the confider to show '(at least for confidences reposed within government), that unauthorised use would be to the detriment of the' confider.⁸ If detriment is an essential element, my view is that it is easily established.

30. To succeed in claiming clause 13(1)(b) as a basis for refusing access to a document, each of the following criteria must be satisfied:

⁶ *Bray and Smith v WorkCover* (1994) 62 SASR 218 at 226 to 227.

⁷ *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150 (Unreported, Judge Brebner, 9 December 2010) at [38] affirming the test from *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443.

⁸ See, however, *Trevorrow v State of South Australia* (2005) 94 SASR 44.

- (a) The information in the document was obtained on a confidential basis⁹
- (b) Disclosure of the information might reasonably be expected to prejudice the future supply of such information to the Government or an agency
- (c) Disclosure must, on balance, be contrary to the public interest.

Submissions

31. By way of background, the agency has advised that Eastwood Lodge, part of Glenside Campus, was provisionally listed on the SA Heritage Register by the SA Heritage Council in 2010, pursuant to section 17 of the *Heritage Places Act 1993*. Prior to that it was scheduled for demolition as part of the government's plans to redevelop the Glenside Hospital site. My understanding is that the government wishes to transform the land currently occupied by Eastwood Lodge into a community park and wetlands. The agency has advised that as at 17 March 2011 no decision regarding the permanent listing of Eastwood Lodge had been made. Its future is therefore in a state of flux.
32. The agency relies on clause 9(1) of Schedule 1 to the FOI Act. It claims that opinions contained in document 32 were provided 'as an initial response to the provisional listing of Eastwood Lodge, and the majority of the information provided was subsequently included in the Minister for Health's formal submission to the SA Heritage Council on the provisional listing.' The agency is of the view that disclosure of information contained in the written submission made by the Minister for Health (as owner of the building) prior to a final decision being made:
- may have an adverse affect on the future flow of information to a regulatory authority (in this case, the SA Heritage Council)... [and] would impact on the Council's ability to make a balanced and fair assessment of nominations.
- The impact of releasing the information on the future flow of information to the SA Heritage Council is considered to be significant, as owners or other interested parties would potentially be reluctant to express opinions or comment on a provisional listing if their submission was able to be released to the public before a decision was made. The Heritage Council would then potentially miss out on the benefit of considering a diverse range of views and opinions to assist in their decision making process to confirm an entry in the Heritage Register.
33. On 17 March 2011, the Minister for Health made the following submissions regarding the claim that paragraphs 13, 21 and 22 of part 2 of document 32 are exempt under clause 9(1):
- ... these paragraphs contain sensitive information which is considered to be deliberative opinions, and recommendations made as a part of the consultation process between parties on a matter which has not been settled.
- It could be argued that there is a general public interest in government held information being accessible. However, in this case a final decision is yet to be made and release of the information at this stage could cause confusion and mislead debate on this issue and prejudice the integrity of the decision making process. The paragraphs are concerned with matters that are not yet settled and recommendations that were not adopted and release would not make a valuable contribution to public debate.
34. The submissions provided by Ms Thomas on behalf of the Minister for Health on 6 April 2011 repeated the submissions referred to in paragraph 33, and applied them to part 1 of document 32. No submissions were proffered in support of the claims under

⁹ *Re Maher and Attorney General's Department* (1985) 7 ALD 731 at 737.

clauses 5(1) or 13(1) of Schedule 1 to the FOI Act. In support of the Minister's claim regarding clause 7(1) of Schedule 1, Ms Thomas provided the following submissions:

... the information in the document could have a commercial value to an entity external to Government and the disclosure of the information could be reasonably expected to adversely affect the agency in its business affairs.

The sensitive nature of the issues discussed in the paragraphs could be used by an entity external to Government and prejudice any potential future business affairs on the issue discussed. On balance the release of this information would be contrary to public interest because of the substantial adverse impact it may have on future negotiations between Government and external parties.

Consideration of submissions and determination

35. I have had regard to the submissions provided by the agency and the Minister for Health when assessing the claims of exemption regarding parts of document 32, and note that the Minister for Environment and Conservation supports the agency's position. In addition, I have had regard to document 32, and the information in documents 32 and 34 intended for release; publicly accessible information, including media articles;¹⁰ the applicable law; and the present circumstances.
36. Before addressing the clauses relied upon, I will make some general comments about two of the claims raised by the Minister for Health.
37. The Minister for Health claims that disclosure of the information 'as this stage could cause confusion and mislead debate.' This is one of the factors identified in *Re Howard and the Treasurer of the Commonwealth of Australia*¹¹ (*Re Howard*). I simply note that recent amendments to the *Freedom of Information Act 1982* (Cth) have made it clear that when considering the public interest it is irrelevant that disclosure of a document 'could result in confusion or unnecessary debate'.¹² In any event, *Re Howard* has been frequently criticised.¹³ To the extent that there may be confusion regarding any given matter in a document, agencies are at liberty to clarify the situation, by providing further information or an explanation. It is also worth noting that a date appearing on a document will often serve to put it into context.
38. The Minister for Health's claim that 'release [of matters that are not settled and recommendations that were not adopted] would not make a valuable contribution to public debate' is misguided in my view. In saying this I am mindful that the public interest test in clauses 5(1), 7(1)(b), 7(1)(c), 9(1) and 13(1)(b) of Schedule 1 to the FOI Act is that 'disclosure must, on balance, *be contrary* to the public interest [my emphasis]'

¹⁰ Adam Todd, *Eastern Courier Messenger*, Australia "Rare" Glenside building saved', <http://eastern-courier-messenger.wherelive.com.au/news/story/rare-building-saved/>, at 15 June 2010; Tim Lloyd, *The Advertiser*, Australia 'Caica sets dangerous precedent', available from <http://www.news.com.au/adelaidenow/>, at 9 October 2010.

¹¹ (1985) 7 ALD 626.

¹² Section 11B(4)(d) of the *Freedom of Information Act 1982* (Cth).

¹³ See for example, *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60; *Re Rae and Department of Prime Minister and Cabinet* (1986) 12 ALD 589; *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54; Senate Standing Committee on Legal and Constitutional Affairs, 'Report on the Operation and Administration of the Freedom of Information Legislation' (1987) at paragraph 11.7-13; Rick Snell, *The Australian*, Australia, 'Reclaim the public interest high ground', 22 July 2004.

Clause 5(1)**Paragraph 13 of part 2**

39. Clause 5(1) of Schedule 1 to the FOI Act is one of the clauses the Minister for Health relies upon to claim paragraph 13 is exempt.
40. I am not satisfied that the information in paragraph 13 'could reasonably be expected to cause damage to intergovernmental relations' as required by clause 5(1)(a)(i), or that it comprises an 'intergovernmental communication' within the meaning of clause 5(1)(a)(ii). Part 2 of document 32 is a communication between two South Australian ministers. Paragraph 13 refers to South Australian government agencies, a statutory authority, a private company, and a building. In my view, the term 'intergovernmental communication' means a communication between different entities of government, whether Commonwealth, State or local government, and not communications between members within the same government entity. This interpretation is supported by clause 3(a) of Schedule 1 which refers to an 'intergovernmental communication to the Government of South Australia or a council'. Given the parties to part 2 and the contents of paragraph 13 I fail to see how its disclosure could reasonably be expected to cause damage to intergovernmental relations as required by clause 5(1)(a)(i).
41. I am not satisfied that paragraph 13 of part 2 is exempt under clause 5(1) of Schedule 1 to the FOI Act.

Clause 7(1)(b)

42. Clause 7(1)(b) of Schedule 1 to the FOI Act appears to be one of the clauses that the Minister for Health relies upon to claim part 1, and paragraphs 13, 21 and 22 of part 2 exempt. In saying this I have had regard to the claim that 'information contained in the document could have a commercial value to an entity external to Government' in the 6 April 2011 submissions.¹⁴
43. I am not satisfied that part 1 or paragraphs 13, 21 or 22 of part 2 contain information that has a commercial value to 'an entity external to Government' or to the government. It is therefore my view that part 1 and paragraphs 13, 21 or 22 of part 2 are not exempt under clause 7(1)(b) of Schedule 1 to the FOI Act.

Clause 7(1)(c)

44. Clause 7(1)(c) of Schedule 1 to the FOI Act appears to be one of the clauses that the Minister for Health relies upon to claim part 1, and paragraphs 13, 21 and 22 of part 2 exempt. My assessment is based on the claims that 'disclosure of the information could reasonably be expected to adversely affect the agency in its business affairs' and 'prejudice any potential business affairs' in the 6 April 2011 submissions.¹⁵
45. I am not satisfied that part 1 or paragraphs 13, 21 or 22 of part 2 contain information concerning the business or commercial affairs of the government or any other person within the meaning of clause 7(1)(c)(i). Although the relevant parts contain references to South Australian government agencies, a statutory authority, a private company, and a building, they do so in a very general way.

¹⁴ Although the Minister for Health has not made this submission with respect part 1, he does claim that part 1 is exempt under clause 7(1). I have therefore included part 1 in my considerations of this clause.

¹⁵ Although the Minister for Health has not made this submission with respect part 1, he does claim that part 1 is exempt under clause 7(1). I have therefore included part 1 in my considerations of this clause.

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46. In any event, having regard to their contents, I am not persuaded by the Minister's submissions that disclosure of part 1 and paragraphs 13, 21 and 22 of part 2 could reasonably be expected to have an adverse effect on anyone's affairs or prejudice the future supply of information to the government or an agency, as required by clause 7(1)(c)(ii)(A). The Minister has not provided any facts to support his claims.
47. It is therefore my view that part 1 and paragraphs 13, 21 and 22 of part 2 are not exempt under clause 7(1)(c) of Schedule 1 to the FOI Act.

Clause 9(1)

48. I am satisfied that parts 1, 2 and 3 of document 32 contain opinions and relate to consultation with the Minister for Health and deliberations by the Minister for Environment and Conservation and the SA Heritage Council for the purpose of making decisions about the future of Eastwood Lodge and the associated process. My determination will therefore turn on public interest considerations. The factors discussed below are equally applicable to clauses 5(1), 7(1)(b), 7(1)(c) and 13(1)(b) of Schedule 1 to the FOI Act.

Part 1 of document 32

49. Only the Minister for Health claims that part 1 is exempt.
50. Part 1 no doubt reflects the circumstances existing at the time the letter was signed. The letter is clearly dated. Based on information provided by the agency it is my understanding that a decision of the sort mentioned in part 1 was made in February 2011. Part 1 also provides a very brief summary of the contents of part 2. I note that the agency and the Minister for Environment and Conservation do not object to part 1 being released, and the Minister for Health does not object to the addressee or information about the author being released in the top third of the document. The submissions provided by the Minister have not persuaded me that disclosure of part 1 prior to a final decision being made about Eastwood Lodge 'could cause confusion and mislead debate ... and prejudice the integrity of the decision making process.' Bearing all of this, and the objects of the FOI Act in mind, including promoting openness and accountability, I am not satisfied that disclosure of part 1 would be contrary to the public interest.

51. In my view part 1 is not exempt under clause 9(1) of Schedule 1 to the FOI Act.

Part 2 of document 32

Paragraph 13

52. Only the Minister for Health claims that paragraph 13 of part 2 is exempt. It refers to a response to the provisional listing of Eastwood Lodge on the SA Heritage Register and part 3, and introduces paragraph 14 of part 2 (neither the agency nor the two ministers consulted object to paragraph 14 being released). The information is very general, and does not disclose the contents of paragraphs 15 and 16 of part 2 or part 3. It does, however, reveal how public resources have been used (by implication, although it does not reveal the cost). The submissions provided by the Minister for Health have not satisfied me that it would, on balance, be contrary to the public interest to release paragraph 13. In my view there is a public interest in the public being aware of the decision-making processes of government, both as a means of facilitating more effective participation in those processes and enhancing respect for the government. I consider that there is also a public interest in the public knowing how public resources have been used.

53. On balance, I am not satisfied that disclosure of paragraph 13 would be contrary to the public interest, or that it is exempt under clause 9(1) of Schedule 1 to the FOI Act.

Paragraphs 18 and 19

54. Neither the agency, nor the Ministers consulted, object to part 4 being released. Briefly stated, other than the first phrase in paragraph 18, paragraphs 18 and 19 of part 2 merely summarise the contents of part 4. The first phrase in paragraph 18 is an observation about a matter concerning Eastwood Lodge. The basis for this observation appears to be contained in the remainder of paragraphs 18 and 19 of part 2 and part 4. The submissions provided by the parties have not satisfied me that it would, on balance, be contrary to the public interest to release paragraphs 18 and 19 to the applicant. In particular, I am not satisfied that disclosure of the information in these paragraphs is likely to adversely effect the future flow of information to the SA Heritage Council, or that it would 'impact on the Council's ability to make a balanced and fair assessment' regarding Eastwood Lodge. In reaching this conclusion I have had regard to the objects of the FOI Act; the fact that the SA Heritage Council is an independent body; and my understanding that the SA Heritage Council has access to part 2.

Paragraph 21

55. Only the Minister for Health claims that this paragraph is exempt. It is my understanding from information provided by the agency that a decision of the sort mentioned in paragraph 21 was made in February 2011. I am unable to say whether the substance of paragraph 21 had any influence on the February 2011 decision. The minute is dated.
56. For the same reasons as part 1, I am not satisfied that paragraph 21 of part 2 is exempt under clause 9(1) of Schedule 1 to the FOI Act.

Paragraph 22

57. Only the Minister for Health claims that this paragraph is exempt. It includes an opinion about a legislative provision and advises of an applicable deadline. The minute is dated.
58. For the same reasons as part 1, I am not satisfied that paragraph 21 of part 2 is exempt under clause 9(1) of Schedule 1 to the FOI Act.

*Paragraphs 15 and 16 of part 2 of document 32
Part 3 of document 32*

59. Paragraphs 15 and 16 of part 2 summarise findings set out in part 3. I will therefore consider them together. Part 3 also provides historical background and responds to factors that have been made public.
60. In my view, knowledge of the arguments both for and against listing Eastwood Lodge, a publicly owned asset, in the SA Heritage Register is likely to facilitate public debate about the building's future. There are clearly strong views on both sides.
61. I am not satisfied that disclosure of the information in paragraphs 15 and 16 or part 3 is likely to adversely effect the future flow of information to the SA Heritage Council, or that it would 'impact on the Council's ability to make a balanced and fair assessment' regarding Eastwood Lodge. In reaching this conclusion I have had regard to the objects of the FOI Act; the fact that the SA Heritage Council is an independent body; and my understanding that the SA Heritage Council has access to part 2. It is unclear to me whether the SA Heritage Council also has access to part 3.

Clause 13(1)(a) and 13(1)(b)

62. Only the Minister for Health claims that the substance of part 1, and paragraphs 13, 21 and 22 of part 2 are exempt.
63. Part 1 has been stamped 'confidential'. Part 2 may have accompanied part 1. It is unclear when the 'confidential' stamp was applied, or by whom.
64. I have proceeded on the basis that the Minister for Health claims there is an equitable obligation of confidence not to disclose the information for the purpose of clause 13(1)(a), as he has not submitted a contractual obligation exists.
65. There is insufficient evidence to satisfy me that parts 1 or 2 were received by their respective addressees in circumstances which would import an obligation of confidence as required by clause 13(1)(a), or that they were obtained on a confidential basis as required by 13(1)(b). Simply stamping a document 'confidential' is not, in my view, sufficient in and of itself to prove that a document was communicated in confidence as required by clauses 13(1)(a) and 13(1)(b). In addition, I note that neither the author of part 1 nor the recipient of part 2 have raised these claims.
66. Having regard to the contents of part 1 and paragraphs 13, 21 and 22 of part 2 I am not persuaded that their disclosure might reasonably be expected to prejudice the future supply of information to the government or an agency, as required by clause 13(1)(b)(i).
67. I am therefore not satisfied that part 1 and paragraphs 13, 21 and 22 of part 2 are exempt under clauses 13(1)(a) or 13(1)(b) of Schedule 1 to the FOI Act.

Determination

68. I am not satisfied that document 32 is exempt under the FOI Act. I therefore **reverse** the agency's determination, pursuant to section 39(11) of the FOI Act, to enable it to be released to the applicant. I note that the agency, with the consent of the Minister for Environment and Conservation, is prepared to release document 34 to the applicant.

Right of Appeal

69. Any person aggrieved by my determination may appeal to the District Court of South Australia under section 40(2) of the FOI Act.
70. 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.
71. 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.
72. The agency should defer giving effect to my determination until after the expiration of the appeal period, and until any appeals have been finally disposed of.

Richard Bingham
SA OMBUDSMAN

11 April 2011