OmbudsmanSA

DETERMINATION

External review pursuant to *Freedom of Information Act 1991*

Applicant:	**Ms Vickie Chapman MP**
Agency:	**Department of Planning and Local Government**
Ombudsman reference:	**2010/03233**
Agency reference:	**PLAN F2010/000853**
Determination:	**The determination of the agency is varied**

REASONS FOR DETERMINATION

Background

1. On 12 May 2010, the Department of Planning and Local Government (**DPLG**) received an application made under the *Freedom of Information Act 1991* (**the FOI Act**) from Ms Vickie Chapman MP, a member of State Parliament (**the applicant**). Ms Chapman requested access to:

> The submissions listed as "unavailable for public inspection at the request of the submitter" on the list of submissions received by the State Government in regard to the Draft 30-Year Plan for Greater Adelaide.

2. On 9 June 2010 Ms Amanda Nicholls, an accredited freedom of information officer with DPLG, determined to grant 'partial access' to the requested documents. Ms Nicholls released 32 documents, but determined that 89 documents in full, and 10 documents in part, are exempt under section 20(1)(a) of the FOI Act. At the request of Ms Chapman's office, Ms Nicholls provided reasons for her determination in an email on 10 June 2010.

3. Relying on clauses 7(1)(b) (business affairs) and 6(1) (personal affairs) of Schedule 1 to the FOI Act, Ms Nicholls stated:

> Many of the documents contain information of a commercial nature (for example, intentions for future development proposals) that, if released, could be expected to diminish or destroy entirely the commercial value of that information. Some submissions also contain information relating to the financial affairs of individuals. On balance, I did not consider that the public interest in [sic] release of these documents outweighed those arguments of public interest against disclosure.

4. Ms Chapman applied for an internal review of Ms Nicholls' determination on 10 June 2010. On her application form she questioned 'whether all material refused is commercially sensitive'.

5. Mr Ian Nightingale, DPLG's Chief Executive Officer, determined the application for internal review on 30 June 2010. Mr Nightingale confirmed the earlier determination, but furthered the reasoning behind DPLG's exemption claims. With respect to 53 of the documents submitted by 'individuals who were

concerned about being identified by their contact details or by contextual information in their submissions', Mr Nightingale made an exemption claim under clauses 4(1)(a) (documents affecting law enforcement and public safety) and/or 6(1) of Schedule 1 to the FOI Act based upon the following (inclusive) reasons:

- possibility of being harassed by neighbours they were in dispute with;
- fear of being identified by former spouse in relation to domestic abuse;
- not wanting individual viewpoints to be publicly available which may be in conflict with their employer's viewpoints; and
- not wanting to be harassed by developers to sell their land or to be taken advantage of by developers in any future negotiations.

6. With respect to the documents subject to an exemption claim under clause 7 of Schedule 1 to the FOI Act, Mr Nightingale stated:

> In terms of the commercial submissions which were not on the internet and were not released in accordance with the FOI Act, many submitted several parts to their submissions, and therefore, on the schedule there may be 4 entries for the one submitter. In these instances, the third parties were consulted regarding all parts, and where the submissions have not been released, it is because the third party has requested it not be released in accordance with Schedule 1 Clause 7(1b) [sic] of the Act (business affairs).

7. Mr Nightingale noted the 'partial releases' before concluding:

> The remaining 32 submissions within scope which were not on the internet have been released in full. Please note however, that even though 89 submissions have been determined as exempt in this application, considering that the original number of submissions totals 578, having nearly 500 submissions released in full or partially on the internet or through this FOI application should be considered reasonable considering the number of exemptions which individuals and businesses could request.

8. Ms Chapman applied to me for an external review of Mr Nightingale's determination on 11 July 2010. In her letter she asserted:

> 1) The 30 Year Plan for Greater Adelaide is a document prepared to guide development and public policy for the next 30 years. A public call for submissions was made and therefore it could be assumed all documentation surrounding the formulation of the plan is *in the public interest*.
>
> 2) It would appear extremely unlikely that a person making a submission of this nature would want their details withheld for fear of being identified by a former spouse in relation to domestic abuse. If a person was in this situation it would be far more likely they would have made an anonymous submission.

9. Ms Chapman also drew my attention to Mr Nightingale's comment that obtaining access to 500 out of 578 documents should be 'considered reasonable'. Whilst I do not intend to address this point in detail, I simply make the comment that Mr Nightingale's comment might be seen as unfortunate, to the extent that, from my experience, any such comment would likely constitute a 'red rag' to many persons who avail themselves of the FOI Act and also to some who don't.

External review process

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 department, based on the circumstances existing at the time of review.

12. On 23 November 2010 I wrote to the parties (or suitable representatives of the parties) that put in submissions during DPLG's consultation process for the 30 Year Plan. I sent 97 letters, some via email. On some occasions, several letters were sent to the one person, for instance where a developer or planning consultant made several submissions on the Draft 30 Year Plan on behalf of several different landholders.

Relevant exemption provisions

13. Section 20(1)(a) of the FOI Act provides that an agency may refuse access to a document if it is an 'exempt document'. An 'exempt document' is defined by section 4 as 'a document that is an exempt document by virtue of Schedule 1' (the exemption clauses). However, section 20(4) further provides that if it is practicable to give access to a copy of a document from which *the exempt matter* has been deleted, and it appears that the applicant would wish to be given access to such a copy, the agency must give access to the document to that limited extent.

14. Numerous exemption clauses have been relied upon by DPLG and the interested parties, either expressly or by implication. The following is from my consultation letters to the interested parties to my external review.

Clause 6(1) - personal affairs

Clause 6 of Schedule 1 to the FOI Act relevantly provides that:

> (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

To successfully claim that the documents are exempt under clause 6(1), I would have to be persuaded that:

- the documents contain information concerning your personal affairs, *and*
- the disclosure of such matter would be unreasonable.

If you consider that information concerning your personal affairs is contained in your submission, I may conclude that such information would no longer concern your personal affairs if your identity is not tied to the information (ie, if your name and other identifying material is deleted). Therefore, if you consider your submission exempt under clause 6, I also ask that you canvass the possibility of the submission being released in this regard (see section 20(4) of the FOI Act).

Clause 7(1)(c) - business affairs

Clause 7(1)(c) provides:

7—Documents affecting business affairs

(1) A document is an exempt document—

(a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person; or

(b) if it contains matter -

(i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and

(ii) the disclosure of which-

(A) could reasonably be expected to destroy or diminish the commercial value of the information; and

(B) would, on balance, be contrary to the public interest; or

(c) if it contains matter—

(i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and

(ii) the disclosure of which—

(A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and

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

There are numerous tests in clause 7, several of which may need to be satisfied, depending upon your particular exemption claim. For instance, to successfully claim that the documents are exempt documents under clause 7(1)(c), I would have to be persuaded that:

- the documents contain information concerning your business, professional, commercial or financial affairs; and
- disclosure of that information could reasonably be expected to either:
  - have an adverse affect on those affairs; or
  - prejudice the future supply of such information to the government or to an agency; and
- disclosure of that information would, on balance, be contrary to the public interest.

Clause 13 - confidential material

Clause 13(1) provides:

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.

Unless there is a contractual obligation of confidence, for it to be said that the disclosure of the submission would or 'could'[1] found an action for breach of confidence, several elements would need to be established:[2]

[1] See *Bray and Smith v Workers Rehabilitation & Compensation Corporation* (1994) 62 SASR 218 at 226.
[2] *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443 per Gummow J.

- The confider (in this case the person making the submission) 'must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question'.
- The confider must be able to show that 'the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge)'.
- The confider must be able to show that 'the information was received . . . in such circumstances as to import an obligation of confidence'.
- The confider must be able to show that 'there is actual or threatened misuse of that information'.

I note that the Plan 'SUBMISSION COVER SHEET' contained the following matter.

All submissions will be available for inspection on level 5 RMH 136 North Tce Adelaide after the completion of consultation period unless they are marked 'CONFIDENTIAL'. If you wish your submission to be treated as confidential please clearly mark it "**IN CONFIDENCE**" and tick the box: □ My submission is confidential. (see note below) If your submission is not confidential please tick the box: □ I give permission for my submission to be made available for public inspection at Roma Mitchell House, 136 North Terrace Adelaide 5000. (see note below)
Please note: • All personal details other than your name and suburb in which you reside will be removed from your submission before being made available for public inspection.

The mere fact that you ticked the 'my submission is confidential' box does not necessarily mean that your submission is confidential. It is my view that often, not all of a submission marked confidential may be considered confidential. Therefore, the above elements would need to be established with respect to discrete parts of the submission for clause 13(1)(a) to apply to those parts.

If you make a claim under clause 13(1)(b), you may wish to identify discrete parts of your submission, say why those parts were 'obtained in confidence', and give detailed reasons as to why you would not provide such information in similar circumstances in the future, if it were known that they might be divulged to other parties.

At present, I am not satisfied that the submission is exempt under clause 13 of Schedule 1 to the FOI Act.

15. For completeness I note that DPLG also relied upon clause 4(1)(a) of Schedule 1 to the FOI Act, which provides that a document is an exempt document if it contains matter the disclosure of which could reasonably be expected to endanger the life or physical safety of any person. With respect to DPLG's reliance on clause 4(1)(a), in a letter to me dated 16 December 2010 Mr Nightingale submitted:

> As you are aware, this subclause does not contain a public interest test. It is sufficient to determine that if it is to be *reasonably expected* that disclosure *could* endanger the life or physical safety of any person, the document may be refused access as it is an exempt document. It is reasonable to consider that in relation to points 1 & 2 of the above list, submitters may have concern that the release of

their submission or personal details may cause their physical safety to be endangered through those details being released to 'the world at large'.

I have weighed up the benefit of the applicant having access to the information over the interests of the submitters and I am satisfied that where a submitter has indicated a real or perceived threat to their safety (whether actual evidence has been provided to me or not), it would not be responsible for me to release their submissions.

16. As there is no public interest test in clause 4(1)(a), it is not necessary to 'weigh up' the benefit of releasing a document against the interests of the person who produced the document. However, for a document to be exempt under clause 4(1)(a), something more than the subjective test adopted by DPLG is required. Sufficient evidence is required before it can be concluded that the disclosure of a document could reasonably be expected to endanger the life or physical safety of any person. What constitutes sufficient evidence will depend case by case, but the mere perception of an interested party, without more, is insufficient.

17. It appears to me that, in the course of DPLG's consultations whilst processing the FOI application, 7 people can be said to have raised concerns of harassment.[3] It is not clear to me that anybody expressed a fear of being identified by a former spouse, or a concern that their views might differ from those of their employer. In my view, and whilst I have no reason to question people's concerns, there is insufficient evidence to conclude that disclosure of any of the documents could reasonably be expected to endanger the life or physical safety of any person. In one case (where concerns of harassment were raised), a submission to the Draft 30 Year Plan was substantially in the same terms as a submission about the Mount Barker Draft Plan Amendment Report, which is available for download on the Planning SA website. Nevertheless, the concerns of harassment that have been expressed should otherwise be allayed by my determination in due course.

Documents within the scope of and nature of the 'interested' or 'third' parties to my review

18. There are 107 documents falling within the scope of my external review, being 107 submissions on the Draft 30 Year Plan.[4]

19. I have generally categorised the documents into three groups, namely individual submissions, organisation submissions, and business submissions. The former consist of submissions made by individual community members, and relate to issues of concern to them (for instance population growth, 'sprawl', transit orientated developments, water and other sustainability issues). They are both for and against the Draft 30 Year Plan. I consider them separate from some of the 'business submissions' (some of which were also made by individual community members) because they do not tend to relate to the particular person's interest in land. The organisation submissions are similar to the first but were made by organisations (for instance community or interest groups). The latter consist of submissions made by development or related companies (for instance planning companies) or landowners. In the main, and

[3] Albeit not concerns of harassment by neighbours they were in dispute with. Such concerns were expressed more against the applicant (who was unknown to the interested parties at the time of the consultations), developers or in general terms.

[4] Of my 97 consultation letters, two letters each covered two submissions to the Draft 30 Year Plan. Furthermore, I did not consult with eight parties who made submissions on the Draft 30 Year Plan. This accounts for the 107 documents falling within the scope of my external review.

noting that the issues raised in the business submissions in some cases comment on or reflect community interests, these submissions urge the 30 Year Plan in directions that would, or may, be in the interests (and particularly financial interests) of the entity making the submission.

20. It is convenient to deal with the individual submissions first.

The individual submissions

21. In my view there are 44 individual submissions. I consulted with 37 of these parties. Of those that I didn't consult with, DPLG has already released the documents with only small amounts of matter deleted, namely the name of the party and contact details, or in one case just the named party's contact details. Prior to my consultations, Ms Chapman agreed to narrow the scope of her application by not pursuing this information. Documents 29, 84, 99, 110, 253, 266 and 517 therefore no longer form part of my external review.

22. Of the parties that I sent consultation letters to (including via email):

    22.1. six (documents 6, 114, 130, 165, 230 and 376) responded and advised that they consent to their submissions being released;
    22.2. five responded and narrowed their objections to the release of their submissions (216, 398, 399 and 532 consent to the release of their submissions provided that their names and contact details are deleted, whilst 526 only wants their email address deleted);
    22.3. 4 responded and objected to the release of their submissions (documents 71, 72, 357 and 448);
    22.4. 21 (8, 73, 113, 168, 192, 209, 218, 264, 272, 273, 274, 275, 299, 406, 409, 417, 434, 459, 487, 565 and 570) didn't respond; and
    22.5. one (80) responded and advised that his submission was already available on DPLG's website.

23. The documents listed in 22.1 above are not exempt under clause 6(1) of Schedule 1 to the FOI Act, given that those whose personal affairs may be involved in the document consent to the release of those personal affairs. These documents can be released to Ms Chapman immediately, as no appeal rights are relevant. Document 80 is not exempt but is already accessible.

24. On 8 December 2010 Mr Chad Reich of my office spoke to Ms Chapman and advised that a 'small percentage' of individual interested parties were concerned with their identities and contact details being released. At that time, my office did not envisage the number of individual interested parties that did not respond. Ms Chapman agreed to narrow the scope of her application by not pursuing access to the identities of these third parties, and I thank her for her cooperation in this regard.

25. To the extent that Ms Chapman has narrowed the scope of her application, the identities of the individual interested parties need not be disclosed as that matter no longer forms part of my external review. To the extent that Ms Chapman has not narrowed the scope of the application (merely because she has not been asked), I consider that the identities of the individual interested parties constitute exempt matter, and therefore the documents are exempt under sections 20(1)(a) and clause 6(1) of Schedule 1 to the FOI Act. I consider that the individual submissions to the 30 Year Plan, as whole documents, reveal the opinions of the individual interested parties that are personal in nature, and in context I consider that this qualifies as those parties 'personal

qualities or attributes'.[5] Therefore, the documents can be released to Ms Chapman with the identities of their authors deleted in accordance with section 20(4).

26. However, stripped of the identities of their authors, and of any other features that would tend to identify their authors (for instance contact details), the documents merely contain opinions that are not attached to any particular person, and therefore do not contain information constituting a person's personal affairs. Moreover, I consider that the 'public interest' component to the 'unreasonable disclosure' element in clause 6(1) would be satisfied if Ms Chapman obtained access to the individual submissions even in the absence of the identities of their authors. The 30 Year Plan is of large scale and an enduring government policy, and there is a strong public interest in divulging, not only to politicians but to the wider public, the cross-section of arguments expressed both for and against the 30 Year Plan. Where such arguments are not attached to particular land or a particular person's interests (as distinct perhaps from the interests of a wider class of persons), I do not consider that the public interest is further enhanced by also releasing the identities of those who made the submissions, especially where the party has objected to the release of their submission or their identity as the person who made the submission, or may not have been in a position to advise me of their views.[6]

27. The effect of the above is that I consider the identities of the interested parties covered by paragraphs 22.2, 22.3 and 22.4 above, as well as information such as contact details that might tend to identify those parties, to be 'exempt matter', and therefore the documents in paragraphs 22.2, 22.3 and 22.4 are 'exempt documents'. However, in accordance with section 20(4) of the FOI Act, copies of these documents should be provided with exempt matter deleted. I therefore vary DPLG's determination to this extent.

28. For the most part the exempt matter in these documents consists of names and contact details. In the case of document 526, only the email address need be deleted. However, with respect to document 448, I consider that the release of further matter (relating to a particular issue) would tend to identify the author. I have therefore provided the agency with copies of these documents with exempt matter highlighted. If this information is deleted from the copies to be provided, it will not be necessary to defer access as such copies do not concern the personal affairs of any particular persons.

The organisation submissions

29. In my view there are only six organisation submissions. I consulted with five of these parties. DPLG has already released the document relevant to the party I did not consult, with only a small amount of matter deleted, namely the name of the particular person who submitted the document, and that person's contact details. The name of the organisation itself was released by DPLG. Prior to my consultations, Ms Chapman agreed to narrow the scope of her application by not pursuing this person's identity. Document 437 therefore no longer forms part of my external review.

30. Of the five parties that I sent consultation letters to:

[5] See the inclusive definition of 'personal affairs' in section 4 of the FOI Act.
[6] There are various possible explanations for the high number of interested parties that did not respond to my consultation.

30.1. two (documents 347 and 490) responded and advised that they consent to their submissions being released; and
30.2. three (documents 109, 447 and 496) didn't respond.

31. The documents listed in 30.1 above are not exempt documents under Schedule 1 to the FOI Act, given that the organisations that submitted them consent to the release of the documents. These documents can be released to Ms Chapman immediately, as no appeal rights are relevant.

32. My views on the documents listed in 30.2 above are similar to my views regarding the individual submissions. To the extent that a public interest test might be relevant, there is a strong public interest in divulging the cross-section of arguments expressed both for and against the 30 Year Plan, including those expressed by these types of organisations, namely organisations comprised of residents of a particular locale, organisations representing particular industries, and organisations set up (and at least partially sponsored by the government) for a public purpose.

33. The inclusive definition of 'personal affairs' in section 4(1) of the FOI Act lists five factors, 'but does not include the personal affairs of a body corporate'. The parties in 30.2 all appear to be bodies corporate, and thus cannot have personal affairs under the FOI Act. Moreover, I have read the submissions and, whilst they certainly discuss matters of interest to the organisations, I am not satisfied that they contain matter 'consisting of information concerning the business, professional, commercial or financial affairs' of the organisations themselves or of any other person, or any other matter envisaged in clause 7 of Schedule 1 to the Act. Therefore, the documents listed in 30.1 and 30.2 above are not exempt by virtue of clauses 6 or 7 of Schedule 1 to the FOI Act.

34. As the parties in 30.2 above did not respond to consultation, and notwithstanding my views above, access to the relevant documents should be deferred. I will advise the parties of my determination and their appeal rights.

The business submissions

35. In my view there are 57 business submissions. I consulted with all of these parties. Of these:

35.1. nine (documents 26, 352, 361, 362, 363, 364, 385, 388 and 439) responded and advised that they consent to their submissions being released (one of these (439) had already been partially released by DPLG);
35.2. one (who submitted documents 301 and 412) responded and consented to the release of their submissions provided that only their surname and suburb is included but no other identifying details;
35.3. one (415) responded and consented to the release of their submission but not their identity and other personal details;
35.4. 11 responded and objected to the release of their submissions (documents 118, 208, 294, 306, 341, 374, 375, 382, 402, 493 and 569);
35.5. 34 (40, 59, 133, 155, 166, 242, 258, 287, 288, 289, 290, 291, 308, 309, 310, 312, 336, 338, 339, 340, 342, 360, 378, 395, 403, 495, 538, 539, 540, 541, 542, 543, 544 and 571) didn't respond.

36. The documents listed in 35.1 above are not exempt under clauses 6(1) or 7 of Schedule 1 to the FOI Act, given that those whose personal or business affairs may be involved in the documents consent to the release of those personal or

business affairs. These documents can be released to Ms Chapman immediately, as no appeal rights are relevant.

37. During my consultations, Ms Chapman agreed to narrow the scope of her application by accepting documents 301 and 412 with only the surname and suburb (but not other address and contact details) of the person who submitted the documents. These other details therefore fall outside the scope of the application and should not be released.

38. I have made the assumption that those parties that did not contact me object to the release of their submissions.

Submissions received regarding the business submissions

39. Whilst, in their level of detail, the submissions I received vary greatly, similar themes have emerged.

Submissions from DPLG and my response

40. DPLG provided reasons for its exemption claims in its initial and internal review determinations. These are cited above. Mr Nightingale also provided submissions in response to my request for further support of DPLG's exemption claims. The following arguments are taken from Mr Nightingale's letter dated 16 December 2010.

> DPLG is responsible for the provision of Planning Strategy for South Australia. In order to accommodate the State's growing population and to facilitate and sustain economic growth through land use across the State, The 30 Year Plan for Greater Adelaide was initiated and guided by the State Government's 2008 Planning Reforms.
>
> The Plan sets out policy reforms to support higher density development and new processes to achieve transit-oriented development across Greater Adelaide. It is a vital and visionary policy document which will have both influence and affect on the communities which make up the Greater Adelaide areas.
>
> As you are aware, in developing the strategic directions for the Draft Plan, DPLG engaged in extensive consultation with industry, councils, local community groups, focus groups and individuals. A broad call for public submissions was made in order to seek the widest community input possible, given the significant and far reaching implications of the Plan.
>
> It is my view that DPLG has an obligation to make provision for submissions provided by individuals and corporate entities to have their submissions kept confidential where requested. I consider it is reasonably credible that to not do so might exclude some citizens from having input into planning decision making.
>
> In my determination of 30 June 2010, I confirmed the original determination made by Amanda Nicholls on 9 June 2010. I provided the applicant with reasons for decision which included the application of clauses 4, 6 and 7 of Schedule 1 of the *Freedom of Information Act 1991* (the Act). My decision to confirm the original determination was based on the reasons for submitters requesting their submission and/or personal and business information be kept confidential.
>
> [matter regarding clause 4 omitted]
>
> Clause 6 – Documents affecting personal affairs

(1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

This subclause also does not contain a public interest test. I have taken a similar approach to the application of clause 4, with respect to the application of this clause.

The content of the submissions put to DPLG varies broadly. However I consider, irrespective of whether the submitters' views are general or specific, the submission can be taken as relating to the personal affairs of the submitter due the spatially specific nature of the Draft Plan. I consider that the submitter may have formed their views based on a perception that the Draft Plan will have *real life implications* for them individually and that these implications are relevant to their affairs. Due to the Plan being spatially specific, it is foreseeable, as indicated by the submitters, that release might have a negative impact on the submitter's relationships with employers, neighbours and/ or other community members.

It would be unreasonable to disclose these submissions without being fully aware of the potential detriment this may cause.

I further consider that on balance it would be counteractive for DPLG to release them as it might reduce public faith and confidence in the confidential process offered during the consultative phase of planning decision making.

I take this view based on the views of the Commonwealth Administrative Appeals Tribunal in *Re Vangel Colakovski v Australian Telecommunications Corporation (1991) FCA 152* which states:

> "... disclosure of information is generally unreasonable where it will reveal the personal affairs of a person that are not generally known or ascertainable by the public at large, and that are not specifically known or specifically ascertainable by the person making the request for the information, and where the person whose personal affairs they are does not consent to their disclosure."

Further, to release information explicitly requested to be kept in confidence may cause those community members to no longer supply valued and necessary input into future development proposals for fear of having personal information made public. This is counterproductive to both DPLG and the public as it may result in a loss of future public participation.

Clause 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;...

The submissions which I consider are exempt under clause 7 relate to the submitter's current land use and future intentions of land use in relation to the Draft Plan. They contain recommendations to DPLG for the submitter's land to be

incorporated in, or removed from the Draft Plan and discuss initiatives the submitter's businesses may engage in subject to the outcome of the Draft Plan.

I recognise that the Plan has been launched and therefore consideration should be given to the fact that the submissions were lodged at a particular point in time and may no longer be relevant to the submitter's business requirements. However, I also recognise that the information supplied is regarded as being 'not generally known' to the broader public and so therefore retains its commercial value to the submitters.

In weighing up the public interest factors, I have taken into account the following points for and against disclosure.

For Disclosure:

1. Release may facilitate the public's more comprehensive understanding of the types of submissions made during the consultative phase of planning strategy. It may also provide the public with a greater understanding of how submissions may have a bearing on planning decisions by the Government.

2. The public will be aware of the interests corporate entities may have in the Plan and planning strategy.

Against Disclosure:

1. Release is to 'the world at large'. Once in the public domain the entity may experience financial detriment to their business interests.

2. Release might jeopardise future supply of information to DPLG by industry, resulting in a loss of public participation in planning strategy. This may be the case where there is *either* an explicit *or* tacit expectation for DPLG to receive corporate information in confidence.

41. I accept and agree that the 30 Year Plan is an important government policy. As I have noted previously, it is a policy of large scale and one that will have an enduring effect, not only on individuals but the community at large. However, by virtue of this, I am not satisfied that the submissions provided to the Draft 30 Year Plan shouldn't be released, either to Ms Chapman or the wider community who will be affected by the 30 Year Plan. I make the following comments on DPLG's submissions.

42. I disagree that 'DPLG has an obligation to make provision for submissions provided by individuals and corporate entities to have their submissions kept confidential where requested'. Rather, I am of the view that DPLG cannot purport to give an assurance that any and all information provided to it will be kept secret, and I consider it unfortunate that many of the parties who made submissions on the Draft 30 Year Plan relied upon what they considered an assurance by a government agency. That is not to say that all such information provided will be released to the public if it is requested, and in certain circumstances it may be appropriate not to release particular information held by the government concerning the affairs of commercial or other entities. However, this does not give rise to a blanket claim of confidentiality.

43. 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.

44. 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.

45. 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 other commercial enterprises and the consultation processes involved in government policy and legislation. In this case, I do not agree that DPLG can guarantee confidentiality, and I am not persuaded that releasing submissions in

cases where the party has sought confidentiality will prejudice the future supply of such information to the government. Whilst many parties ticked the confidentiality box because it was offered, I suspect that many of them would have made submissions even if the confidentiality box was absent.[7]

46. I concede that there *may* be information within the submissions, the release of which could have a negative impact on the submitting party. However, without more, this does not invite the conclusion that 'it would be unreasonable to disclose these submissions without being fully aware of the potential detriment this may cause'. With respect, a conclusion that there will or may be detriment can only be made if there is evidence to support it. Very few of the parties who responded to me attempted to make other than vague and generalised assertions in this regard.

47. I agree that the majority, if not all of the business submissions, contain recommendations or requests that the submitter's land be incorporated in or removed from the Draft 30 Year Plan (mainly the former), and that they contain business initiatives that might be engaged in subject to the outcome of the 30 Year Plan. However, without more, this does not necessarily lead to the conclusion that the release of such information would lead to financial detriment to the holders of the information. DPLG has raised the 'possibility' but not supported it. In many cases, it is the land itself, rather than the information within these documents, that is of commercial value. There is widely varying information within these documents and I have not been directed to any specific parts of them by DPLG.

48. In my view, DPLG has provided only very general arguments and I have not been persuaded by its claims that any matter within the documents is exempt matter. Therefore, on the strength of DPLG's arguments, I am not satisfied that any of the documents are exempt documents.

Submissions from the third parties and my response

49. Some of the arguments provided by those who submitted the business submissions[8] are as follows:

- The information in the submissions identifies the parties, their land, other parties they may be in discussions with, and the purposes of their submissions and their intentions for their land, all of which constitutes confidential information.
- The submissions would not have been submitted as they were, if at all, if it was known that they would be released.
- The submissions could be misinterpreted by others with contrary ideas or competing interests.

[7] I hasten to add that I do not suggest that DPLG cannot *consider* requests to keep specific information confidential. However, the FOI Act can not be dispensed with, and I note the following wording that is commonly used when the Attorney-General's Department invites submissions on proposed legislative or policy amendment.

> Please be aware that, unless a request for confidentiality is made, information contained in any submission may be referred to publicly or published on the website. It may also be disclosed to applicants under the Freedom of Information Act. Any material identified as 'confidential' is still subject to the Freedom of Information Act. However, you will be consulted before any decision is taken to release material identified in your submission as 'confidential'.

I include this as an example only.

[8] I received consultation responses for documents 118 and 208 (associated parties); 294; 306; 341; 374 and 375 (same party); 382; 402; 493 and 569. It should be noted that some other parties responded to DPLG's consultations at an earlier stage.

- Early release of commercially sensitive planning and design processes could allow competitors to take pre-emptive action to frustrate projects. Competitors could gain advantages from any sort of information.
- Release of information will have an adverse effect on what they are trying to achieve.
- Release will jeopardise not only their requests to the government but also the financial costs already outlaid.
- It would be unreasonable to release the personal affairs in the documents.
- There is information within the documents that has a commercial value, and this value will diminish if the information is released.
- Release will have an adverse affect on the business affairs of the parties.
- Other land holders and developers have an interest in the intentions of the submitters, and could gain advantages if information is released or put in counter proposals.
- Submissions contain information regarding the viability of the present use of land. Such information has a commercial value to other landowners or potential purchasers, and release could be to the detriment of the submitters.

50. With respect, the above arguments have generally been offered as assertions without any significant supporting evidence. Submissions regarding documents 294 and 341, however, written by the same person, contain a much greater level of detail regarding the development industry. This context has been useful in putting the parties' concerns into perspective. Whilst I will not paraphrase these submissions (to avoid disclosing matter the parties might consider exempt) to an extent they may become apparent from the reasons for my determination.

Business submissions - personal or business affairs?

51. There are several categories of parties involved in the business submissions, namely landowners, developers and other planning entities. In the latter two cases, it is quite clear that the documents might contain those parties' business, commercial or financial affairs, rather than their personal affairs,[9] as these parties are in the day-to-day business of developing and/or planning. In the first category, however, any transaction (for instance the sale of land) is likely to be a one-off, and does not equate to a 'going concern'.

52. With respect to the first category I consider the stronger argument to be that the documents might contain the parties' personal rather than business affairs. However, given the similarity of the business submissions, it is my preference to deal with them together. I will therefore focus on clause 7. To the extent that some of the documents contain personal affairs, I consider that the question of whether it would be 'unreasonable' to disclose such matters can be answered with reference to the tests involved in clause 7, including the public interest test.

Clause 7 - business affairs

Do the documents contain:

- *trade secrets;*
- *matter consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; or*

[9] I again note that personal affairs does not include the personal affairs of a body corporate.

- *matter consisting of other information concerning the business, professional, commercial or financial affairs of any agency or any other person?*

53. I do not consider that the documents contain 'trade secrets' (clause 7(1)(a)), albeit I note that nobody specifically relied on this provision. In addition, the submissions are generally about land, and in my view it is the land itself that is of commercial value, rather than the information about land having a commercial value of its own (clause 7(1)(b)). This includes an intention to develop land - it is the land itself rather than the intention to develop that has commercial value. I acknowledge that information concerning planning and design processes might have a commercial value, in the sense that planning and design 'know-how' or expertise might be able to be bought and sold, however to the extent that such information is in these documents I consider it, in the main, relatively generalised. Much of the information concerns, for instance, the qualities and capabilities of the land but, again, it is the land itself that has a commercial value rather than the information within these documents.

54. I accept that the submissions contain matter consisting of information concerning the business, commercial or financial affairs of those involved (clause 7(1)(c)). In the main, what the parties have referred to is the very fact that certain parties have an interest in particular land, and they would like to develop this land. Such a claim, if accepted, would tend to bring a document's entire contents into the exemption clause as, in context, any information identifying the land would disclose the party's intentions to develop that land. The majority of my determination will address these wider claims, albeit some of the parties have also highlighted specific information within their submissions as concerning their business affairs.

55. I add that, subject to the wider claim that a document's entire contents is exempt under clause 7(1)(c), not all of the matter within the documents, in and of each particular piece of matter, can be said to constitute business affairs.

Detriment to the affairs of the interested parties - could disclosure:

- *reasonably be expected to destroy or diminish the commercial value of information?*
- *reasonably be expected to have an adverse effect on the parties' business affairs?*
- *reasonably be expected to prejudice the future supply of such information to the Government or to an agency?*

56. In general, I have not been convinced that the release of the submissions could reasonably be expected to lead to the parties suffering any particular detriment. I acknowledge the feasibility of detriment, but feasibility is not enough – the test is one of reasonable expectation. To the extent that the planning and design processes outlined in the submissions might have commercial value, I remain unconvinced that releasing such information could reasonably be expected to destroy or diminish the commercial value of the information. To the extent that other business affairs are involved, I am unconvinced that release 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 DPLG.

57. Whilst I accept that the parties would prefer to keep the information to themselves, in reality they cannot always do so. All of these parties made submissions because they had an interest in doing so. In essence, they wanted

something from the government, namely for government decisions (and particularly the rezoning of land) to be made which might give rise to their desire to develop becoming reality. What is perhaps different about this matter is that numerous business submissions were made en masse as a result of consultation because of a large scale government policy, but it is not uncommon for landholders, planning or development entities bringing such proposals to the government. Such documents have been released under the FOI Act before, and I do not accept that the government will no longer receive requests of this type in the future if these particular submissions are released - proponents will be relying virtually on coincidence that the land they have an interest in will be rezoned unless their proposal is brought to the attention of the government.

58. In support of the interested parties' submission, my attention has been drawn to what the government stands to gain by the provision of detailed information from developers and landholders - namely, the government needs to know what land can be 'brought to market' to enable it to address the lack of land that is zoned for housing. Therefore, to enable this to occur, DPLG offered to accept the information in confidence, and it is argued that no developer would provide such obviously confidential and commercially sensitive information if they knew it was going to be released. Rather, the government would receive only generalised and non-contentious information, and South Australia would be left with a housing shortage.

59. I accept that the government has something to gain from the provision of detailed information from the industry, but I am nevertheless unconvinced by this submission. It seems to me that, in at least this regard, the developers and landholders on the one hand and the government on the other share a symbiotic relationship. Whilst the government might rely on detailed information from the market to determine what land to rezone, the developers in turn rely on rezoned land to carry out their business, and land that they have an interest in might not be rezoned if the government is not provided with sufficient information.

60. What is 'sufficient' information will of course depend upon the circumstances, and I acknowledge that release of commercial information will cause developers and landholders to think about what information is released in the future. At the very least, however, the identities of particular land and that of the parties who wish to develop it will need to be brought to the attention of DPLG, and this is largely the type of information, in the form of 'whole documents', I am being asked to find exempt in this matter.

61. It seems to me that the development industry will continue to function as usual if these documents are released. It is already known by the industry how different parcels of land are zoned, and policies such as the 30 Year Plan and the Housing and Employment Land Supply Program Reports will indicate which areas might be rezoned in the coming years. I have been advised that competition for land amongst developers is fierce, and it is common for developers to approach landholders with suitable land, whether or not the land is on the market, and whether or not another developer may already be in talks with that landholder. In this regard it seems to me that little is likely to change from releasing these documents. Each developer will still have the opportunity of approaching landowners known to be interested in doing business or who own land capable of being developed. Landowners looking to sell or to form some other kind of agreement with the view to their land being developed are unlikely to be disadvantaged by a competitive development industry, or by

being approached by more than one developer. If this occurs already, I do not see why release of these submissions will alter the status quo, and lead to any unfairness. If agreements between landowners and developers are tenuous up until (or past) the point of land being rezoned (as has been stated to me), even without these documents being released there will still be publicly available information linking the developer to the land, for instance under the requisite public consultation processes in relation to the rezoning of land, and therefore encroachment from other developers is already possible while any deal over the land is still tenuous. If it is already possible for 'confidential relationships' to be discovered, and for others to make advances, release of these submissions is unlikely to lead to any detriment that could not already happen.

The documents in more detail

62. In general, I do not consider the planning and design processes or proposals contained within these documents to be particularly detailed. Whilst I acknowledge that each planner or developer will have their differences, I did not detect from these documents the level of detail that might, for instance, give rise to strong claims of 'intellectual property' or unique expertise. Again, the main thrust of the submissions is levelled at the land itself; why it is suitable for housing and similar land uses, and why it would be appropriate to build there. Releasing information relating to the 'suitability' of the land could not, in my view, reasonably be expected to have an adverse effect on any person's business affairs.

63. I accept that in some cases, the nature and detail of particular negotiations or relationships held between landholders and developers may be confidential. However, the documents in question do not contain the necessary level of detail. They generally disclose 'interests' in or 'control' over the land. I have already discussed the very 'fact' of a linkage between land and a particular developer, which would bring the whole document into an exemption claim.

64. Any argument to the effect that landholders' or developers' business affairs will be adversely affected because the public might misconstrue the document or politicians might 'undermine' business ventures is misguided. Any argument to the effect that business affairs will be adversely affected because local government authorities might catch wind of how development companies conduct their business must surely fail on the public interest test.

65. One party has submitted that prematurely disclosing the desire to develop their land will adversely affect their business affairs, as employees of a going concern business may resign prematurely if alerted to the fact that business will cease. I am not persuaded by this argument. Whilst I accept the feasibility of workers leaving in the event of a 'shelf-life' being put on the business, I consider that this would happen anyway if the business was to be wound up or development on the land was to be planned. If the landowner's submission to DPLG becomes known but the submission is unsuccessful (and development of the land is not possible), I do not accept that the landowner's submission alone would cause workers to resign. In the event of an unsuccessful submission, the landowner's intentions behind making it in the first place can surely be explained.

Would disclosure of the documents, or disclosure of particular matter within the documents, on balance, be contrary to the public interest?

66. As a general comment I readily accept that development is a competitive industry. This is clear given that the underlying premise of the submissions is that negative consequences may or will flow from the release of the business submissions to the Draft 30 Year Plan. If I project this line of reasoning however, I reach the conclusion that no information held by the government regarding development intentions could be released until the development was in the latter stages: where binding agreements had been made by all relevant parties (including land holders, developers, the state and local governments), and the release of information could no longer be said to carry with it the possibility that detriment to the developing parties may ensue. The problem with this approach, however, is it ignores or negates the fact that development, and more so large scale development or development where change in land use is involved, affects not only the involved parties and government, but the public in general. In my view, a strong public interest would be negated or minimised if no information could be released until these late stages. The general public's ability to make submissions or representations of their own, to have their say on development proposals likely to be considered in government decision-making which effects them, would be moot if the relevant decisions had already been made.

67. The 30 Year Plan is an important government policy, though the public interest requires that such policy is not developed behind closed doors. Such a large scale policy as this will have a lasting effect on individuals and the community at large. The very submissions received demonstrate that community beliefs and perceptions are not only strong but also divided. In my view there is a strong public interest in government decision making concerning the 30 Year Plan being as open as possible. This would not be achievable if the majority of submissions provided by a major stakeholder industry, and which no doubt had significant impact upon the final version of the plan, were not released.

68. To the extent that the business submissions contain information concerning the personal affairs of any person (not being a body corporate), I am not satisfied that it would be 'unreasonable' to release the information. In my view, the public interest in the release of these documents outweighs the interest in maintaining personal privacy.

69. To the extent that the business submissions contain information containing matter either consisting of:

- information (other than trade secrets) that has a commercial value to any agency or any other person, the disclosure of which could reasonably be expected to destroy or diminish the commercial value of the information; or
- other information concerning the business, professional, commercial or financial affairs of any agency or any other person, the disclosure of which 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,

I am not satisfied that it would, on balance, be contrary to the public interest to release the information. In my view, any detriment to the business affairs of the submitting parties is outweighed by the public interest in the release of these documents.

70. Therefore, the documents listed in paragraph 35 above are not exempt by virtue of clauses 6 or 7 of Schedule 1 to the FOI Act.

Clause 10 - documents subject to legal professional privilege

71. One party has raised the issue of legal professional privilege. Clause 10(1) of Schedule 1 to the FOI Act provides that:

> (1) A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.

72. Legal professional privilege, in general, applies to communications between lawyers and their clients pertaining to legal advice or requests for legal advice, or in some other cases documents pertaining to litigation commenced or reasonably foreseen. In this case, a party's legal representative made the submission to DPLG on the party's behalf. The privilege of any legal advice disclosed in this submission was in my view waived when it was provided to DPLG, a third and for present purposes unrelated third party.

73. Therefore, none of the documents are exempt by virtue of clause 10 of Schedule 1 to the FOI Act.

Clause 13 - documents containing confidential material

74. I have already discussed confidential information to a certain extent, and the elements that need to be satisfied in order for an action for a breach of confidence in equity to be found can be found in paragraph 14 of my determination.

75. With few exceptions where particular matter in a document has been highlighted to me, the parties have referred to whole documents, and the companion notion that it is the parties involvement with particular land and their intention to develop that land, that is the confidential information in question. Some parties have stipulated that this information is not generally known, so therefore has the 'necessary quality of confidentiality', albeit I could not agree that this is the case with all of the submissions. Most of the parties who made submissions to me referred to the fact that they ticked the box that was offered to them which was clearly marked 'my submission is confidential'.

76. Factually, I accept that the submissions were given and received in circumstances considered by the parties and DPLG to be confidential. However, I am not satisfied that the intention of the parties is sufficient to show that 'the information was received in such circumstances as to import an obligation of confidence'. In my view, some examination of the nature of the information in question is required before deciding whether an obligation of confidence is imported, and it is an objective 'reasonable person' test. Whilst the land is owned by individuals, the intention to develop the land effects not only the landowners, developers, the government and those few individuals who will subsequently buy the houses, but the public in general. I refer to my earlier comments about the public interest, and the ramifications of withholding the locations of land, the identities of parties connected to the land and their intentions to develop it. In purporting to agree to keep the information confidential, I am of the view that DPLG unnecessarily excluded from consideration the wider public in determining what the reasonable person would think, instead giving consideration only to the views of a particular

stakeholder industry. Having considered the issue carefully, and acknowledging that my views have the effect of reversing a purported promise by DPLG, I am not satisfied that this is the type of information intended to give rise to an obligation of confidence.

77. For reasons already given, I am not satisfied that disclosure of the documents might reasonably be expected to prejudice the future supply of such information to the Government or to an agency, nor would it be, on balance, contrary to the public interest. Therefore, the documents listed in paragraph 35 above are not exempt by virtue of clauses 13(1)(a) or 13(1)(b) of Schedule 1 to the FOI Act.

Determination

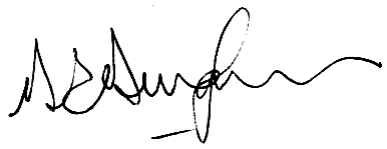
78. In light of my reasoning above, I reverse the department's determination, pursuant to section 39(11) of the FOI Act.

Right of Appeal

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

80. DPLG 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.

81. 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

2 March 2011