

## DETERMINATION

### External review - section 39 *Freedom of Information Act 1991*

**Applicant:** Ms Vickie Chapman MP  
**Agency:** South Australian Water Corporation  
**Ombudsman reference:** 010//06593  
**Agency reference:** SAW66063  
**Provisional Determination:** The determination of the agency is confirmed.

## REASONS

### Background

1. The Adelaide Desalination Project (**ADP**) is being developed by the agency as part of the SA Government's Water Proofing Adelaide Strategy Plan. The project includes the construction of a desalination plant at Port Stanvac and a transfer pipeline. AdelaideAqua Pty Ltd was awarded the contract by the government to design, build, operate and maintain the infrastructure of the desalination plant. AdelaideAqua is a multi-national consortium of companies comprising McConnell Dowell Constructors, Abigroup Contractors, ACCIONA Agua and United Utilities Australia (**the operator**).

### FOI application for access

2. By application under the *Freedom of Information Act 1991 (FOI Act)* dated 9 September 2010 (received by the agency on 13 September 2010), the applicant requested access to:  

The Operation and Maintenance Contract involving Adelaide Aqua Pty Ltd, whose shareholders are Acconia Aqua Adelaide Pty Ltd, and United Utilities Pty Ltd (a member of United utilities PLC of the United Utilities PLC Group), for the Adelaide Desalination Plant, excluding all monetary figures. (**the contract**)
3. Mr Andrew Atterton, Accredited FOI Officer of the agency determined the application on 12 October 2010, refusing access on the basis of clause 13(1)(a) of Schedule 1 to the FOI Act .
4. The applicant exercised her rights under the FOI Act and applied for an internal review of Mr Atterton's determination. This was received by the agency on 14 October 2010. The then Chief Executive of the agency, Ms Anne Howe confirmed Mr Atterton's determination by letter to the applicant dated 28 October 2010.
5. The applicant subsequently applied to my office for an external review of Ms Howe's determination (**the agency's determination**).

## Notification of external review

6. By letter dated 18 November 2010, I notified the Chief Executive of the agency of my external review. I asked for copies of all relevant documents, and a report giving reasons for the agency's determination. I asked the agency to show the findings on any material questions of fact underlying these reasons, together with a reference to the sources of information on which those findings are based. This is a requirement of an agency in the agency's determination process under the FOI Act;<sup>1</sup> and in my opinion, it is equally applicable in an external review.
7. On 7 December 2010, my deputy, Ms Megan Philpot met with Mr Andrew Morecroft, Corporate Counsel of the agency, and perused the agency's FOI file generated in response to the applicant's FOI application, as well as a copy of the contract. Ms Philpot considered that this documentation was sufficiently detailed to inform my office, in the first instance, of the agency's reasons for the determination. Ms Philpot advised Mr Morecroft that no discrete report was required at that stage.
8. By cover letter dated 9 December 2010, Mr Morecroft formally forwarded the agency's FOI file and a copy of the contract (with schedules) to my office.

## Relevant provisions of the FOI Act

9. The FOI Act provides that an agency is entitled to refuse access to an 'exempt document'. The term 'exempt document' is defined as 'a document which is an exempt document by virtue of Schedule 1.'<sup>2</sup> Schedule 1 to the FOI Act lists numerous clauses which may be claimed by an agency as a basis for refusing access to a document.
10. The agency's determination to refuse access to the contract is based on the contract being an 'exempt document' under clause 13(1)(a) of Schedule 1 to the FOI Act.
11. Under section 48 of the FOI Act, the onus is on the agency to justify their determination in an external review.
12. Section 39(11) of the FOI Act provides that I may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

## Clause 13(1)(a) of Schedule 1

13. Clause 13(1)(a) of Schedule 1 to the FOI Act 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) ...

---

<sup>1</sup> Section 23(f) FOI Act

<sup>2</sup> Section 20(1)(a) and section 4 definition FOI Act

(2)A document that is a contract entered into by the Crown or an agency after the commencement of this subclause is not an exempt document by virtue of subclause (1) unless—

- (a) it contains matter the disclosure of which would, under a term of the contract, constitute a breach of the contract or found an action for breach of confidence; and
- (b) that term of the contract has been approved by –
  - (i) in the case of a contract entered into by the Crown—a Minister; or
  - (ii) in the case of a contract entered into by a State Government agency—the responsible Minister for the agency; or
  - (iii) in the case of a contract entered into by an agency that is not a State Government agency—the agency.

(3)Subject to subclause (4), a Minister may, by instrument in writing, delegate the power to approve a term of a contract under subclause (2) to a specified person or to the holder of a specified office.

(4)A delegation under subclause (3) may be made subject to such conditions and restrictions as the Minister thinks fit and specifies in the instrument of delegation.

(5)A delegation by a Minister under subclause (3) is revocable at will, and does not derogate from the power of the Minister to act personally in any matter.

(6)If a Minister or agency approves a term of a contract in accordance with subclause (2), the Minister or agency must, as soon as practicable, notify the Minister administering this Act, in writing, of that fact.

(7)The Minister administering this Act must, in a report under section 54, state the number of contracts containing terms approved in accordance with subclause (2) during the period to which the report relates.

14. The term ‘found an action for breach of confidence’ in clause 13(1)(a) relates to an action for breach of an equitable obligation of confidence, as well as breach of a contractual obligation of confidence.<sup>3</sup> It is the latter which I am considering in this review.
15. Clause 13(2) was inserted by section 11(j) *Freedom of Information (Miscellaneous) Amendment Act 2004* and commenced operation on 1 January 2005.
16. In the context of this external review, to be satisfied that the contract is exempt under clause 13(1)(a), I must be persuaded that:
  - (a) the contract contains matter which if disclosed, would, under a term of the contract, be a breach of the contract or would found an action for breach of confidence (clause 13(2)(a)); and
  - (b) that term of the contract has been approved in the manner required under subparagraphs (i), (ii) or (iii) of clause 13(2)(b).
17. It is not necessary for the contract to wholly consist of exempt matter before it can attain exempt status.<sup>4</sup> However, by virtue of section 20(4) of the FOI Act, if there is non exempt

<sup>3</sup> See *Bray v Worker’s Rehabilitation and Compensation Corporation...*

<sup>4</sup> *Ekaton Corporation Pty Ltd v Chapman & Department of Health, Department of Health v Chapman* [2010] SADC 150, 9 December 2010 (unreported) per Judge Brebner at paragraph 15.

matter in the contract and it is 'practicable' to excise the exempt matter, the agency should provide a copy of the contract to the applicant with the exempt matter deleted if it is practicable to do so and it if appears that the applicant would wish to have access to such a copy.

### Request for further information from the agency

18. After considering the agency's FOI file and the provisions of the contract (which contain a confidentiality clause - clause 54(2)), Ms Philpot requested Ms Anne Westley of the agency to provide additional information such as:

- whether Ms Howe signed the contract (I did not have a signed copy)
- the time of signing the contract; and whether it was signed after or before approval had been given for the confidentiality clause in the contract (clause 13(2) of Schedule 1)
- whether Ms Howe referred her approval to the Minister responsible for the FOI Act per clause 13(6) of Schedule 1; and if so, when
- whether the agency was agreeable to providing the applicant with copy of the confidentiality clause in the contract.

I thank Ms Westley for her responses; and I incorporate them into my comments below.

### Submissions of the agency in justification of the determination

19. The following information was provided to my office by the agency:

- On 15 February 2009 acting under the FOI Act, the then Minister for Water Security responsible for the agency delegated to the holder of the office of Chief Executive of the agency, the 'power to approve a confidentiality clause as a term of a contract under clause 13, sub clause (2), concerning matter the disclosure of which would constitute a breach of contract or found an action for breach of confidence by virtue of clause 13, sub clause (1)'. (My office was provided with a copy of this signed delegation of the Minister.)
- By 'Minutes forming Enclosure' dated 16 February 2009, the Project Director of the ADP, Mr Milind Kumar recommended to Ms Howe that she approve *inter alia*:

... contractual provisions in the project documents [which include the contract] for the Adelaide Desalination Plant project whereby obligations of confidentiality will be assumed by SA Water (for the purposes of clause 13(2) of Schedule 1 of the Freedom of Information Act 1991), in accordance with the delegation by the Minister for Water Security.

This document was stamped and signed 'approved' by Ms Howe on 16 February 2009. My office was provided with a copy of this document.

- At the conclusion of this 'Minutes forming Enclosure', it is shown that Ms Howe has signed the following words, dated 16 February 2009:

I ... approve the confidentiality clause for inclusion substantially in the form set out above (subject to inclusion of appropriate party names) in the Project documents listed above to be entered into by SA Water for the Adelaide Desalination Plant project, for the purposes of clause 13(2) of Schedule 1 of the Freedom of Information Act 1991.

(My office was provided with a copy of this document.)

- Ms Howe (and the other parties) signed the contract on the evening of 16 February 2009, after she approved the confidentiality clause in the contract following receipt of the Minister's delegation.
- Ms Howe's approval of the confidentiality clause was referred to the Minister responsible for the FOI Act (per clause 13(6) of the FOI Act) on 19 January 2010. (The agency provided my office with a copy of the relevant entry in the Freedom of Information Management System operated by State Records.)
- With the permission of the agency, I can advise that the confidentiality provision (clause 54(2)) provides:

**54.2 Project Documents are confidential**

- (a) SA Water and the Operator each:
  - (i) acknowledge that the Project Documents are confidential to the parties and are deemed Confidential Information for the purposes of clause 54.1; and
  - (ii) subject to clause 54.1, agree to keep the Project Documents confidential, except that SA Water may disclose or give the Project Documents
    - (A) to any person to whom disclosure is reasonably necessary for the proper performance of its obligations under the Project Documents;
    - (B) to officers, employees, legal and other advisers, consultants and auditors of SA Water or any SA Water Associate (as the case may be) who are under a duty of confidence;
    - (C) to any Government Agency, provided the recipient agrees to act consistently with this clause;
    - (D) as required by Law; and
    - (E) to the Ministers and the Government of South Australia, and it is acknowledged that a Minister of the Crown has a duty to report to Parliament in accordance with the principles of Ministerial Responsibility, and that if it becomes necessary to do so, neither a Minister nor SA Water will be taken to have breached any obligation under this document.
- (b) It is acknowledged that if the approval of the Minister responsible for SA Water as contemplated in clause 13(2) of Schedule 1 of the Freedom of Information Act has not been obtained in respect of this clause 54.2, then if and to the extent that SA Water is obliged to disclose Project Documents under the Freedom of Information Act 1991, that disclosure will not be a breach of the obligation of confidentiality assumed by SA Water under this clause 54.2.
- (c) ...
- (d) Nothing in this clause derogates from:
  - (i) the Operator's obligations under any provisions of this document;
  - or
  - (ii) the provisions of the *Freedom of Information Act 1991* (SA).

The contract falls within the definition of 'Project Documents' in the contract.

20. Recordings of recollections of officers of the agency and the Crown Solicitor's Office regarding the timing of signing the contract were provided to my office by the agency.

**Provisional determination**

21. I informed the parties of my 'provisional determination' expressed in the terms above, on 22 December 2010. I was of the tentative view that the contract was an exempt document, as I was satisfied that:
- the contract was entered into by the agency after the commencement of subclause (2) of clause 13 of Schedule 1
  - the contract contains matter the disclosure of which would, under a term of the contract (clause 54(2)) constitute a breach of the contract within the meaning of clause 13(2)(a) of Schedule 1, and

- that term of the contract (clause 54(2)) has been approved by Ms Howe as the holder of the office of Chief Executive of the agency, acting under written delegation from the Minister responsible for the agency, by virtue of clause 13(2)(b)(ii) and clause 13(3) of Schedule 1 (I expressed the opinion that I had no reason to doubt the agency's submission that Ms Howe signed the contract after the Minister's delegation and her approval of a confidentiality provision in the contract.)
- none of the exceptions in clause 54(2)(a)(ii)(A)-(E) are applicable
- clause 54(2)(b) is not applicable.

22. However, I commented that I had reached this view with some disquiet, as I consider there is a public interest in release of the contract. I noted the breadth of the 'accountability' exceptions in clause 54(2)(a)(ii)(A)-(E) of the contract, and the objects and principles of administration of the FOI Act in sections 3 and 3A of the FOI Act.

23. I referred the parties to the public's legitimate interest in obtaining information about the affairs of public authorities and a decision of my counterpart in Queensland, the Queensland Information Commissioner in *Cardwell Properties Pty Ltd & Keith Williams and Department of the Premier, Economic and Trade Development & North Queensland Conservation Council Incorporated (Cardwell Properties)* at:

[http://www.oic.qld.gov.au/files/decisions/html/\[1995\\_S0006\]\\_\[Cardwell\\_Properties\\_Pty\\_Ltd;\\_Williams\]\\_\[29\\_07\\_1995\].htm](http://www.oic.qld.gov.au/files/decisions/html/[1995_S0006]_[Cardwell_Properties_Pty_Ltd;_Williams]_[29_07_1995].htm)

I referred the parties in particular to paragraphs 50-62 of this decision, which discuss the High Court's views in relation to this public interest.

I invited the parties to provide comment in response to my provisional determination, prior to finalising my view.

### **Response from the parties to my provisional determination and discussion**

24. The agency responded by advising that AdelaideAqua did not consent to release of the contract; and the agency confirmed the claim for exemption.

25. The applicant provided submissions, including the following:

- the agency should have provided my office with a copy of the executed contract, which is the document to which she requested access
- she has been provided with expurgated copies of the agency's board minutes dated 11 February 2009, in which the board approved the affixing of the seal and delegation of two directors to sign and execute a number of contracts
- she has been provided with expurgated copies of the board's 2 March 2009 minutes in which the board noted a summary of current developments concerning the ADP but there was no disclosed confirmation that the contract had been signed
- despite clause 54(2)(E), she noted that:

SA Water and the Minister have made public statements in respect of the contract, most recently to explain the terms of the warranty conditions. Further the Minister is reported to have made statements about the capacity for the plant to 'be mothballed for extended periods after 2015 if good rains continue but taxpayers would still have to pay' (*The Advertiser*, 22 January 2011).

The applicant commented that she presumes that the Minister had relied upon clause 54(2) to protect himself against any alleged breach of the confidentiality obligation under the contract and in pursuance of his ministerial responsibility.

26. Subsequently, Ms Philpot sought further responses from the agency; and I comment as follows:

- The agency provided me with a photocopy of the first and last page of the original contract (in addition to a copy of the body of the contract). The date of the contract is written on the first page as 16 February 2009. Ms Howe and Mr Phillip Pledge, Chair of the South Australian Water Corporation signed the contract as directors under the common seal of the agency on the last page of the contract. The agency advises that Ms Howe signed the contract as a director, pursuant to the authority of the South Australian Water Corporation Board for two directors to execute the contract. This is consistent with the Board's usual practice.

I accept the agency's submissions about the authenticity of the date of execution of the contract and Ms Howe's position as a director of the board and her signing of the contract.

- I have not investigated whether the public statements (outlined above in the last dot point of paragraph 25) made by the agency or the Minister responsible for the agency, contravened clause 54(2) of the contract. This is not within the purview of my review, and is a matter between the operator and the agency.
- Upon request, the agency provided me with copies of email communications with the operator, refusing permission to disclose the contract. The operator expressed concerns that the information contained within the contract is confidential and commercially sensitive, in so far as it contains information about the operator's:
  - internal costings and information about profit margins
  - technical and business method of operation
  - pricing structures that would reveal whether the operation is making a profit or a loss
  - intellectual property that relates to the operator's competitive position in the Australian Water Industry.
- Upon my request the agency also provided me, with copies of email communications with the Crown Solicitor's Office (on the basis that legal professional privilege is not waived by SA Water). I accept the legitimacy of these communications.

## Determination

27. My task is to consider whether release of the contract would found an action for breach of confidence (under the contract's confidentiality clause - 54(2)), within the meaning of clause 13(1)(a) of Schedule 1 to the FOI Act. As I articulated in my provisional determination, I consider there is a public interest in release of the contract.

28. In stating this, I cite the oft-quoted words about accountability of representative government, by Justice Paul Finn of the Federal Court:

The fundamental principle of a system of democratic government is that all government power ultimately rests on the sovereignty of the citizens. The citizens, being unable to govern a complex society for themselves, entrust this function to their elected representatives and to a range of government agencies legally empowered by these representatives. A condition of this public trust is that all public officials and public institutions should be accountable to the public for the exercise of what are essentially powers delegated by the people.<sup>5</sup>

<sup>5</sup> P Finn; 'Public Trust and Public Accountability', *Australian Quarterly* 65, Winter (1993), pp. 50-59.



29. The comments of Mc Hugh J in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at pp 190-191 are also apposite:

... governments act, or at all events are constitutionally required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest.

30. Despite these words and principles, the objects of the FOI Act, the case of *Cardwell Properties* and the High Court decisions discussed within,<sup>6</sup> it is again with some disquiet that I consider the agency is able to withhold the contract from disclosure under clause 13(1)(a) of Schedule 1 to the FOI Act. The provisions of clause 54(2) of the contract are extremely broad, and cover the entirety of the contract (see clause 54(2)(a)(ii)). In my opinion, the provisions of section 20(4) of the FOI Act are therefore not applicable.
31. I note in particular that although the High Court cases discussed in *Cardwell Properties*<sup>7</sup> considered the existence of a 'public interest exception' to an action for breach of confidence where government information is concerned, they concerned implied contractual obligations of confidence and equitable obligations of confidence concerning public authorities. There is little judicial consideration of this 'exception' that assists me in the context of the contract (and its broadly drafted confidentiality clause) and this review.
32. It might be said that the public interest in disclosure of the contract is served to some extent by clause 54(2)(a)(E) of the contract - which provides for disclosure of the contract in accordance with the principles of ministerial responsibility to the parliament. In response, I comment that this provision simply vocalises the doctrine of ministerial responsibility to the parliament (a confidentiality clause in the contract would probably be ineffective to prevent a minister informing the parliament of the contract).<sup>8</sup>

## Determination

33. I confirm the determination of the agency under section 39(11) of the FOI Act.

## Comment

34. It is desirable that where an agency claims confidentiality under clause 13(1)(a) of Schedule 1 in relation to a contract requested under the FOI Act, the agency make a genuine endeavour to both:
- provide to the applicant a copy of the contract's confidentiality provision, and
  - provide to the applicant a copy of the documentation evidencing the approval process relating to the provision under clause 13(2) of Schedule 1.
35. This may enable the applicant to understand the agency's reasoning in the determination process.
36. I encourage the agency to consider this when making their determinations in response to future FOI requests.

<sup>6</sup> *Commonwealth v. John Fairfax and Sons Ltd* (1980) 147 CLR 39; *Esso Australia Resources Ltd & Ors v Plowman (Minister for Energy and Minerals) & Ors* (1995) 69 ALJR 404.

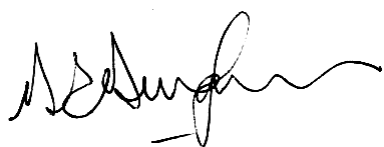
<sup>7</sup> *Esso Australia Resources Ltd & Ors v Plowman (Minister for Energy and Minerals) & Ors* (1995) 69 ALJR 404, in particular.

<sup>8</sup> See Selway, B *The Constitution of Australia*, Federation press, 1997, pp 193-194.



### Right of appeal

37. Any person aggrieved by my determination may appeal to the District Court under section 40(2) of the FOI Act.
38. The agency may appeal against my determination on a question of law under section 40(1) of the FOI Act.
39. All 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.

A handwritten signature in black ink, appearing to read 'Richard Bingham', with a long horizontal flourish extending to the right.

Richard Bingham  
**SA OMBUDSMAN**

8 February 2011