

Determination

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

Applicant	The Honourable David Ridgway
Agency	South Australian Tourism Commission
Ombudsman reference	2012/08258
Agency reference	FOI 31/2012
Determination	The determination of the agency is reversed.

REASONS

Background

1. By application under the *Freedom of Information Act 1991 (the FOI Act)* received by the agency on 7 August 2012 the applicant requested access to:

Copies of all documents detailing timeframes, objectives and costs of work commissioned by the SATC to be undertaken by BDA Marketing Planning, relating to tourism in the Barossa region. I request these details for the periods of 1 July 2009 to 30 June 2010 and 1 July 2010 to 30 June 2011.
2. Accredited FOI officer of the agency, Ms Carmela Ferraro made a determination on 29 August 2012 to provide part access only to the one document identified as falling within the scope of the request.
3. The applicant requested an internal review of this determination, by application received by the agency on 7 September 2012.
4. The principal FOI officer of the agency, Ms Jane Jeffreys then confirmed the determination on 20 September 2012 (**the agency's determination**).

External review

5. By application received 12 October 2012, the applicant requested my external review of the agency's determination under section 39 of the FOI Act.
6. By letter dated 29 October 2012, I notified the agency of my review. I requested all relevant documents, including additional evidence and argument which the agency considered justified its determination, in light of the provisions of section 48 of the FOI Act.

Provisional determination

7. I provided my tentative view about the agency's determination to the parties, including the interested party BDA Marketing Planning by my provisional determination dated 18 January 2013. I informed the parties that subject to my receipt and consideration of submissions from the parties, I proposed to reverse the agency's determination pursuant to section 39(11) of the FOI Act.
8. The agency advised me by letter dated 7 February 2013 that it had no further submissions to make. I did not receive submissions from the interested party or the applicant.

Relevant provisions of the FOI Act

9. The objects of the FOI Act are set out in section 3, 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 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'.
10. It is further stated in section 3(2) that the means by which these objects are intended to be achieved are:
 - (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; ...
11. Section 3A(1) states that the parliament has intended:
 - (a) that this Act should be interpreted and applied so as to further the objects of this Act; and
 - (b) that a person or body exercising an administrative discretion conferred by this Act exercise the discretion, as far as possible, in a way that favours the disclosure of information of a kind that can be disclosed without infringing the right to privacy of individuals.
12. The FOI Act provides that upon receipt of an application for access to documents, an agency is entitled to make a determination to refuse access where the documents are 'exempt'. The term 'exempt document' is defined as 'a document which is an exempt document by virtue of Schedule 1.'¹ Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusal of access.
13. In this matter sub clauses 7(1)(b) and (c) of Schedule 1 to the FOI Act are relevant.

7—Documents affecting business affairs

- (1) A document is an exempt document—
 -
 - (b) if it contains matter—

¹ See section 4 and section 20(1)(a), FOI Act

- (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.

14. Sub clauses 16(1)(iv) and 16(2) of Schedule 1 are also relevant.

16 Documents concerning operations of agencies

(1) A document is an exempt document if it contains matter the disclosure of which -

(a) could reasonably be expected-

.....

(iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions; [and]

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

(2) A document is an exempt document if-

(a) it relates to an agency engaged in commercial activities; and

(b) it contains matter the disclosure of which could prejudice the competitiveness of the agency in carrying on those commercial activities.

15. Under section 48 of the FOI Act, the onus is on the agency to justify its determination 'in any proceedings'. In my opinion, this includes the external review process.

16. To justify its determination, the agency must give reasons for its determination and 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 determination process under the FOI Act;² and in my opinion, it is equally applicable in an external review.

17. 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.

The documents

18. There is one document identified by the agency as falling within the scope of the application: Agreement for the provision of services between South Australian Tourism

² Section 23(f), FOI Act

Commission and BDA Marketing Planning Pty Ltd (**the document**). The document is signed and dated 21 December 2009.

19. The agency's determination refers to the exempt portion of the document as being Schedule 3 of the document. I note that in the document provided to the applicant the monetary figure in clause 39.1.2 has also been redacted.

The agency's submissions

20. The agency determined that the redacted portion of the document is exempt under clause 7(1)(b) and (c) of Schedule 1 to the FOI Act. In relation to the claim under clause 7(1)(b) the agency submits that:

BDA Marketing Planning ... indicated that the fees and financial arrangements are commercially sensitive information, the disclosure of which would make it easy for competitors to undercut BDA Marketing Planning for the provision of similar services.

I believe this forms a valid argument for exemption under Clause 7(1)(b). With regard to the public interest I had regard to the public being informed and the need for openness and accountability. I also had regard to the commercially sensitive nature of this information to BDA Marketing Planning. I consider that on balance, disclosure of the fees and financial arrangements would be contrary to the public interest.

21. In relation to the claim under clause 7(1)(c) the agency submits:

The fees and financial arrangements are commercially sensitive information for BDA Marketing Planning, the disclosure of which would be detrimental to BDA Marketing Planning's business and financial affairs by allowing competitors to know what fees they charge for a service which is provided in a highly competitive industry. The amounts are commercially sensitive information that if disclosed could weaken the BDA Marketing Planning's negotiating position with future clients.

Additionally, the disclosure of this information could be reasonably expected to prejudice the future supply of such information to the SATC. If BDA Marketing Planning cannot be guaranteed that the SATC will protect information that is confidential and has commercial value to them, this has the potential to discourage them from entering into further agreements with the SATC.

22. In her letter of 23 November 2012 Ms Jeffreys asserts that the redacted portion of the document is also exempt pursuant to clause 16(1)(iv) of Schedule 1 to the FOI Act.

Market assessment services are provided to the SATC by third parties who are generally engaged as a result of tender processes. These tender processes are undertaken on a regular basis as contracts end or additional services are required with the most recent marketing services tender undertaken in September 2011.

Disclosure of both the total amount and particulars of fees paid under previous contracts could also affect future tender processes in such a way as to reduce the competitiveness of the tenders either by discouraging companies from tendering (as it may lead them to losing more lucrative contracts elsewhere due to the disclosure) or by resulting in companies not putting in best price tenders as they are aware of the 'target' they have to hit to beat previous contractors.

Given the nature of SATC's functions, any such impact on the agency's ability to obtain the most effective services for the best price could reasonably be expected to have a substantial adverse effect on the effective performance by the SATC of its functions in terms of clause 16(1)(iv) of Schedule One of the Act.

23. The agency submits that any public interest in openness and transparency that may be served by the release of this information would be outweighed by the deleterious

impact the release of the information could have on the ability of the agency to effectively and efficiently carry out its functions as well as on the public purse.

24. The agency also submits that clause 16(2) applies to the information in the redacted portion of the document.

The SATC operates in a highly competitive events and tourism sector with its aims to attract events and promote tourism for the benefit of the State. In undertaking this, the SATC is competing with interstate and overseas tourism and events agencies who (sic) are largely significantly better resourced. In order to be competitive the SATC must thus find the most effective and efficient ways to maximise the use of resources it has and must take advantage of any competitive advantage it can find.

The ability to contract the most effective market assessment and planning services for the best price possible is one of the ways the SATC can so maximise the use of its resources and thus maximise its competitiveness.

The applicant's submissions

25. The applicant submits that the determination shows no regard to section 3 of the FOI Act. Although the document has, in part been released, it was determined that any fees and/or costs associated with the work is exempt. In the applicant's view this demonstrates an inconsistency with the purpose and spirit of the FOI Act and fails to promote openness in government and accountability of Ministers of the Crown and other government agencies.
26. The document states at clause 17 that the 'agreement may be disclosed to any person under the provisions of the FOI Act'. There is nothing in the content of the document that prohibits disclosure. The applicant therefore queries the decision of the agency to disclose part of the document but to make an 'arbitrary decision' to exempt the cost of work part of the contract.
27. The applicant also submits:

SATC and BDA Marketing were privy to the contract and knew that disclosure pursuant to the FOI Act was a possibility. This did not prevent either party from entering into the Agreement.

The SATC states that disclosure of costings would undercut BDA and/or SATC in providing and/or obtaining further information. From the reasons provided to us, it is beyond comprehension how disclosure would destroy or diminish the commercial value of services that have already been performed. This is a retrospective approach to the subject matter that is not within the expertise or control of the SATC and is pure speculation. In any event, surely the release of timeframes and objectives is far more 'commercially sensitive' than any and all costs of works for the services provided by BDA Marketing.

The agency has not provided a satisfactory explanation as to how disclosure would hinder the agency in obtaining further services.

There is a real public interest in disclosing information that shows how the agency is using public resources and such disclosure accords with the purpose and intention of the FOI Act.

The interested party's submissions

28. The agency consulted with Mr Dan Blair, Managing Director of BDA Marketing Planning, to ascertain his views about the release of the document. Mr Blair requested

that the fees (in Schedule 3 of the document) be removed 'as obviously this makes it easy for our competitors to undercut us for the provision of similar services'.

Consideration of the submissions and the agency's determination

29. The agency submits that Schedule 3 of the document is exempt pursuant to clause 7(1)(b). The test in clause 7(1)(b) comprises three limbs each of which must be satisfied before a document qualifies for exemption.
30. First, the document must contain information (other than trade secrets) that has a commercial value to any agency or any other person. Information is considered to have 'commercial value' if it is valuable for the purposes of carrying on a commercial activity, and the information is important to the future profits of the business or a one off business transaction.³ It may also have 'commercial value' if a genuine buyer would be prepared to pay to obtain that information.⁴
31. In support of its submission that the information has commercial value the agency states that BDA Marketing Planning indicated that the 'fees and financial arrangements are commercially sensitive information, the disclosure of which would make it easy for competitors to undercut BDA Marketing Planning for the provision of similar services'.
32. The document has a commencement date of 1 January 2009, leading to the conclusion that the terms of this agreement would have been settled in 2008. I am not convinced that the fees charged under this agreement have any current commercial value. It is my view that clause 7(1)(b) does not apply to the document.
33. The test in clause 7(1)(c) also comprises three limbs each of which must be satisfied for the exemption to apply. First, the document must contain information concerning the 'business, professional commercial or financial affairs' of the agency or any other person. Having considered the document I am of the opinion that the redacted matter does contain information that concerns the business affairs of BDA Marketing Planning.
34. The second limb of clause 7(1)(c) contains two alternative requirements, that disclosure of the information 'could reasonably be expected':
 - 'to have an adverse effect on the business, professional, commercial or financial affairs of the agency or some other person' or
 - 'to prejudice the future supply of such information to Government or to an agency'.
35. The agency submits that the redacted information of the document satisfies both of these alternatives. It submits that disclosure of the information would have an adverse effect on the business and financial affairs of BDA Marketing Planning by 'allowing competitors to know what fees they charge for a service which is provided in a highly competitive industry. The amounts are commercially sensitive information that if disclosed could weaken BDA Marketing Planning's negotiating position with future clients'.
36. I do not consider that any adverse effect can reasonably be said to flow from the release of the amount of the successful 2008 tender.
37. The agency also submits that release of the information 'could be reasonably expected to prejudice the future supply of such information to the SATC. If BDA Marketing Planning cannot be guaranteed that the SATC will protect information that is confidential and has commercial value to them, this has the potential to discourage them from entering into further agreements with the SATC'.

³ *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, [54].

⁴ *Ibid*, [55].

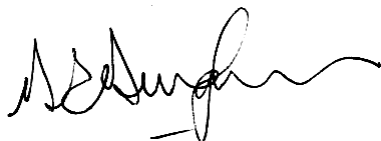
38. I am not convinced by the assertion that a business such as BDA Marketing Planning will forego the chance of obtaining work with the government merely due to the possibility of tender information being disclosed to the public.
39. Even if it could be established that the second limb of the 7(1)(c) test was satisfied, it needs to be established that the third limb of the test is satisfied: that disclosure 'would, on balance, be contrary to the public interest'.
40. The government often engages in commercial dealings with individuals and commercial entities, and it cannot be expected that all information concerning these dealings will be kept from the public. Indeed the Agreement includes, at clause 17, an acknowledgement that '[t]he SATC may disclose this Agreement to any person under the provisions of the Freedom of Information Act 1991'. The government must always act in the public interest, whether it is engaging in commercial dealings with other entities, or putting out tenders for services. The government is accountable for its decisions and actions, and this may necessitate releasing information concerning other parties. If no information, or substantially no information, about a commercial enterprise or a tender process involving the government is released, the openness and accountability of the project or process will suffer.
41. I am of the opinion that disclosure of the document would not, on balance, be contrary to the public interest and as such is not exempt pursuant to clause 7(1)(c).
42. The agency also claims exemption for the redacted material pursuant to clause 16(1)(iv). In order to satisfy the requirements of that exemption the agency must satisfy a two limb test. Firstly it must be established that the disclosure of the matter claimed as exempt could reasonably be expected to have a substantial adverse effect on the effective performance by the agency of its functions.
43. The agency claims the 'substantial adverse effect' that could reasonably be expected to flow from disclosure of the information is that it would 'impact on the agency's ability to obtain the most effective services for the best price'. Firstly, I am not convinced that disclosing successful tender amounts could reasonably be expected to have the stated impact. The agency appears to have made this assertion but has not provided sufficient evidence to support its view. Secondly clause 16(1)(iv) requires *substantial* adverse effect. The South Australian District Court has indicated that the 'substantial adverse effect' test is a high one, significantly higher than the test set out in clause 4 of Schedule 1 to the FOI Act⁵. I do not consider the agency has put forward any information to establish that, even if disclosure could cause adverse effect on the agency's functions, any such effect would be substantial.
44. The second limb of clause 16(1)(iv) is that disclosure of the matter would, on balance, be contrary to the public interest. As discussed above, I am of the opinion that disclosure of the information would not, on balance, be contrary to the public interest. I consider my views regarding public interest in the context of clause 7(1)(c) to be equally applicable to clause 16(1)(iv). On the basis of these views it is my opinion that no part of the document is exempt pursuant to clause 16(1)(iv).
45. The agency also claims exemption for the redacted material pursuant to clause 16(2). In order to establish this exemption the agency must establish firstly that the exempt matter relates to an agency engaged in commercial activities. I have considered the agency's submissions and I accept that the agency is engaged in commercial activities and that the information in the document relates to those commercial activities.

⁵ *Konieczka v South Australian Police* [2006] SADC 134, [18]

46. The second limb of the test under clause 16(2) is that the disclosure of the matter could prejudice the competitiveness of the agency in carrying on those commercial activities. I do not consider the agency has put forward any convincing argument as to the way releasing of the tender amount from January 2009 could prejudice its competitiveness. I am of the opinion that clause 16(2) does not apply to the document.

Determination

47. In light of the above, I reverse the agency's determination pursuant to section 39(11) of the FOI Act

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

Richard Bingham
SA OMBUDSMAN

12 February 2013