

Determination

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

Applicant	Mr Mark Parnell MLC
Agency	Department of Planning, Transport and Infrastructure
Ombudsman reference	2013/07261
Agency reference	2013/08319/01
Determination	The determination of the agency is varied.

REASONS

Application for access

1. After the state government released a masterplan for the development of the Torrens Riverbank precinct, Walker Corporation Pty Ltd (**Walker Corporation**) won a state government tender to provide proposals for the redevelopment of the Adelaide Festival Centre Carpark.
2. By application to the agency under the *Freedom of Information Act 1991* (**the FOI Act, the Act**), the applicant requested access to:

a copy of any correspondence, submission, reports, (or filenotes, emails, minutes, memos or any other documentation describing communication) with Walker Corporation concerning development plans for the Riverbank precinct and/or Adelaide Festival Centre carpark.

Background

3. For ease of reference, procedural steps relating to the application and the external review are set out in the appendix.

Jurisdiction

4. I exercised my discretion under section 39(4) of the FOI Act to extend the time for making the application. The agency did not object to this, therefore this external review is within my jurisdiction as a relevant review authority under the Act.

Provisional determination

5. I provided my tentative view about the agency's determination to the parties, including the interested party, Walker Corporation by my 'provisional determination' dated 23 September 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.

6. The agency and the legal representatives of Walker Corporation provided submissions in response. I have considered these submissions in this determination

Relevant law

7. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹ The Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access.
8. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
9. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Documents in issue

10. The agency has provided my office with a copy of a schedule of the documents numbered 1 - 66, and copies of the documents themselves. The schedule indicates that the following documents can be released to the applicant.

1	2	2.1	3	4	6	7	7.1	9.1	12
19	19.1	21	25	26	28	29	30	31	32
33	34	35	36	37	38	51	54	60	61
62	65	66							

11. None of the parties have claimed exemption over these documents; and I do not consider that they are exempt documents within the meaning of the Act.
12. The schedule shows that that the agency has refused access to the following documents (**the documents**).

1.1	2.2	3.1	5	6.1	7.2	9	10	11	12
14	15	21.2	24	27	39	41	42	43	44
45	46	47	48	50	52	53	55	56	57
58	59	63	64						

13. There is no need for me to describe the contents of the documents, as they have been helpfully described in the schedule, a copy of which is provided as attachment 1 to this determination.

Issues in this review

14. The agency has claimed clauses 1(1)(e), 7(1)(b), 7(1)(c), 9(1) and 13(1)(b) of Schedule 1 to the Act as a basis for refusing access to the documents. The issue which lies for my consideration is whether the agency has justified its determination in refusing access, pursuant to its burden under section 48 of the Act.

Submissions

15. The documents relate to stage 2 of the Request for Proposals (**RFP**) process for the redevelopment of the Adelaide Festival Centre Car Park/Plaza (**the project**). Walker

¹ *Freedom of Information Act 1991*, section 12.

Corporation was selected to progress to stage 2 of the RFP process and was provided with a period of exclusivity in which to further develop its proposal.

16. The agency provided submissions in response to my provisional determination by letter dated 11 October 2013. Walker Corporation's legal representative provided submissions by letter dated 28 October 2013.

17. In its submissions, the agency wrote:

...the Government is engaged in a procurement process with Walker Corporation. This process is on-going. It may not result in the Government entering into a development contract with Walker Corporation. In the event that the Walker Corporation and or the Government decide not to proceed with the development proposal, the Government will then consider other options to progress with another respondent to the RFP. The disclosure of confidential material at this stage of the process will have an adverse impact on the process...²

18. Similarly, Walker Corporation submitted:

It is important to note that Walker Corporation holds a right of exclusivity only and not a right to proceed with the proposed development...

The proposed development, in its current status, remains the subject of further review by DPTI, Government, Walker Corporation, and relevant authorities. Until these processes are complete and the proposed development revised in light of the feedback received, it would be premature to release the proposed development to the public...³

19. The agency and Walker Corporation submit that the documents related to stage 2 of the RFP should not be released while the process is on-going, for fear of prejudicing the project. Since these submissions were made, the project has progressed.

20. In mid-February 2014 it was announced that Walker Corporation has been engaged as the chosen developer.⁴ As I understand it, stage 2 of the RFP is now finalised.

21. Also in response to my provisional determination, Walker Corporation advised that:

Walker Corporation would have no objection to the disclosure of the documents following the completion of the RFP process and determination is made that Walker Corporation is the chosen developer to implement the proposed development.⁵

22. The agency, however, advised that:

On 11 February 2014, the Government entered into an Agreement to Lease (ATL) with the Walker Corporation with regards to the AFC car park (but not the plaza). This arrangement provides the Walker Corporation the ability to address a number of fundamental design, commercial and planning matters over a 12 month period associated with the car park development. Subject to the Government agreeing to Walker's development proposal before the end of the ATL period, Walker Corporation will be granted a Development Agreement to commence construction of the car park. Please note that Walker does not have approval to commence construction of the car park at this point of time.

In conclusion we advise that:

- Walker [Corporation] has entered into a legal agreement with the Government to develop the car park subject to the satisfactory resolution of a number of confidential commercial, design and planning conditions

² DPTI response to Ombudsman provisional determination dated 11 October 2013, p2.

³ Walker Corporation response to Ombudsman provisional determination dated 28 October 2013, p4.

⁴ See <http://dpti.sa.gov.au/vibrant/article?item=343>; <http://www.abc.net.au/news/2014-02-11/walker-corp-scores-adelaide-plaza-car-park-deal/5252446>; <http://www.walkercorp.com.au/news/article/?view=153&returnPage=1>.

⁵ Walker Corporation response to Ombudsman provisional determination dated 28 October 2013, p4.

- Conceptual development plans (including the plaza) proposed by the Walker Corporation in 2013 are not finalised and remain confidential
- The disclosure of this confidential material will have an adverse impact in progressing the current arrangements with the Walker Corporation.

23. In light of the developments above, I consider many of the submissions put forward by the agency and Walker Corporation are now less relevant. In any event, I have addressed the specific concerns raised by the parties below.

Consideration of the documents

24. The agency has claimed that item 4.3.1 of document 2.2 and item 4.3.1 of document 3.1 refer to a Cabinet decision and are therefore exempt under clause 1(1)(e).

25. Clause 1(1)(e) provides:

1–Cabinet documents

- (1) A document is an exempt document–
- (e) if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet; ...

26. I am satisfied that part of items 4.3.1 from documents 2.2 and 3.1 are exempt under clause 1(1)(e). I have provided the agency with a copy of these documents, with the parts I consider to be exempt highlighted in yellow. The remainder of documents 2.2 and 3.1 should be released.⁶

27. Documents 1.1, 6.1, 7.2, 9 and 55 are all minutes of meetings of a joint working group, consisting of representatives from the government and Walker Corporation, established for stage 2 of the RFP process. Both the agency and Walker Corporation have raised particular concern about the release of certain ‘items’ in each of these documents. Such items are described as ‘details of negotiations’ ‘timings, strategy and stakeholder consultation’⁷ and ‘details of the proposal... not publically known’.⁸

28. As I understand it, the purpose of the meetings between the agency and Walker Corporation was to facilitate stage 2 of the RFP process. The discussions and negotiations recorded were preliminary and comprised the consultation process of the government in making a decision to engage Walker Corporation as the chosen developer. As noted above, stage 2 is now complete.

29. Documents 11 and 12 are concept designs and plans for the project submitted by Walker Corporation to the working group as part of stage 2 of the RFP process. According to Walker Corporation the release of such designs prior to the conclusion of stage 2 of the RFP would destroy the value of the information and have an adverse effect on its affairs.

30. Walker Corporation has also claimed that document 14 is exempt. Document 14 is a letter from the then Chief Executive of the agency, advising Walker Corporation that it had been accepted to the shortlist to advance to stage 2 of the RFP process. The letter contains the ‘confidential terms and conditions’ on which Walker Corporation was accepted to the shortlist. Walker Corporation submit that document 14 should not be released while stage 2 of the RFP is incomplete.

⁶ In accordance with section 20(4) of the *Freedom of Information Act 1991*.

⁷ Walker Corporation response to Ombudsman provisional determination dated 28 October 2013, p3.

⁸ DPTI response to Ombudsman provisional determination dated 11 October 2013, p2.

31. Although the documents may contain information concerning the business affairs of a relevant third party, I have not been persuaded by the agency or Walker Corporation that the other requirements of exemption clause 7(1)(b) or (c) are satisfied: in particular, that release could reasonably be expected to destroy or diminish the commercial value of the information or have an adverse effect on the business, professional, commercial or financial affairs of any party **and** would, on balance, be contrary to the public interest.
32. The parties have also claimed clauses 9(1) and 13(1)(b) as a basis for refusing access. Like clause 7(1), these provisions also have a public interest test.
33. The current legal position is that while the concept of the public interest cannot be clearly defined, the following factors are relevant:⁹
- the age of the document
 - the importance/significance/sensitivity of the issues discussed
 - the continuing relevance of the issues in relation to matters under consideration
 - the extent to which the subject matter of the documents is already in the public domain
 - fulfilling the objects of the FOI Act
 - whether disclosure would contribute to debate on a matter of public interest
 - whether disclosure would enhance scrutiny of government decision making processes and improve accountability and public participation.
45. It has been suggested that the following factors are possibly not relevant to the question of what is contrary to the public interest:¹⁰
- that disclosure would confuse the public
 - that disclosure would lead to a loss of confidence in government
 - that disclosure might cause the applicant to misinterpret or misunderstand the information contained in the document, or the incomplete or draft nature of the document.

The strength of these factors will depend on the contents of the documents.

34. Having considered the current status of the project, namely that stage 2 of the RFP process is now complete and Walker Corporation has been engaged as the developer, I do not accept that it would, on balance, be contrary to the public interest to release the documents.

Additional exemption claims

35. The agency also included a line at the conclusion of its submissions that 'DPTI and Renewal SA therefore submit that all of the documents, or parts of the documents, listed above are exempt under clauses 14, 15 and 16(1)..., in addition to the other grounds of exemption identified.' This submission is not supported by any evidence and the agency has failed to discharge its burden under section 48.
36. In light of the above, with the exception of parts of documents 2.2 and 3.1, the documents are not exempt under Schedule 1.

Copyright - documents 11 and 12

37. Although documents 11 and 12 are not exempt, I am satisfied that they are subject to copyright. In light of this, in accordance with section 22(2)(c) of the FOI Act access

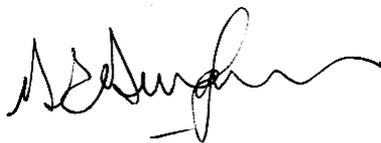
⁹ See *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* [1993] QICmr2 (30 June 1993); *Re Lianos and the Department of Social Security* (1985) 7 ALD 475, *Re Hulls and Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

¹⁰ *Re Chapman & Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 43 ALD 139, 152.

should be provided by allowing the applicant the opportunity to inspect documents 11 and 12.

Determination

38. In light of my views above, I vary the agency's determination.

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

Richard Bingham
SA OMBUDSMAN

15 May 2014

Att

APPENDIX

Procedural steps

Date	Event
19 April 2013	Agency receives FOI access application dated 18 April 2013
28 May 2013	Agency receives application for internal review dated 24 May 2013
25 July 2013	Ombudsman receives application for external review
26 July 2013	Ombudsman notifies agency of external review
16 August 2013	Ombudsman receives response from the agency dated 15 August 2013, with attached schedule of documents
20 August 2013	Ombudsman office receives permission to provide a copy of the schedule of documents to the applicant, showing the claimed exempt status of some of the documents. Ombudsman provides a copy of the schedule to the applicant and requests a response by 30 August 2013.
30 August 2013	No response is provided by the applicant.