

OmbudsmanSA

## Determination

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

Applicant	The Hon Robert Brokenshire MLC
Agency	Department of the Premier and Cabinet
Ombudsman reference	2015/00806
Agency reference	DPC14/1834
Applicant reference	14133
Determination	The determination of the agency is varied.

## REASONS

1. By application under the *Freedom of Information Act 1991* (the FOI Act) the applicant requested access from the agency to:

Copies of invoices, documents or other summary information demonstrating the full costs of the advertising budget on radio, print, television, billboards, online et cetera, and the stationery and graphic design costs for promoting:

- a. The State Government's campaign to fight the Federal Government's unfair cuts to South Australian [sic] campaign
- b. The 'Federal Cuts Hurt' campaign.

Time frame: January 2014 to current date [5 September 2014].<sup>1</sup>

## Background

2. For ease of reference, the procedural steps relating to the application are set out in the appendix.

## Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.
4. The applicant lodged his application for external review beyond the 30 day statutory period. On 16 February 2015, I exercised my discretion to extend the time for making the application.<sup>2</sup> In so doing, I had particular regard to the relatively short delay in making the application for external review; office closures and staff absences during the period in which the applicant should have applied for external review; the applicant's efforts to follow up the matter with the agency; and a discussion between one of my

<sup>1</sup> The application form is dated 13 August 2014. The applicant emailed it to the agency on 4 September 2014 (timed 5:01pm). The agency received it on 5 September 2014.

<sup>2</sup> *Freedom of Information Act 1991*, section 39(4).

legal officers and the agency's Acting Manager, Freedom of Information of 9 February 2015.

### Provisional determination

5. I provided my tentative view about the agency's determination to the applicant, the agency and the five interested parties, by my provisional determination dated 8 July 2015. I informed them that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
6. The agency advised that it did not intend to make any further submissions. Three of the interested parties advised that they did not object to the release of the documents about which they were consulted, or did not submit that such documents were exempt.
7. To date, the applicant and two of the interested parties have not provided a response to my provisional determination.
8. In these circumstances, I have made this (my final determination) in the same terms as my provisional determination.

### Relevant law

9. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.<sup>3</sup>
10. The FOI 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.
11. The agency has claimed that the documents are exempt as documents affecting business affairs (clause 7(1)(c)) and documents containing confidential material (clause 13(1)(a)).
12. These clauses provide:

#### Clause 7(1)(c)

- (1) A document is an exempt document—

...

- (c) if it contains matter—

- (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) 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.

#### Clause 13(1)(a)

- (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

<sup>3</sup> Freedom of Information Act 1991, section 12.

13. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
14. 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

15. The agency identified seven documents within the scope of the application (**the documents**). The agency's schedule of documents was set out in appendix 2 to my provisional determination.
16. The agency is deemed to have refused access to the documents in their entirety.
17. Some of the dates referred to in the documents post-date 5 September 2014, being the end of the period covered by the application for access. One of my Legal Officers sought clarification from the agency about this. The agency's Acting Manager of FOI advised that the agency had included such information in an attempt to be as fair and transparent as possible. The agency's approach was designed to capture invoices dated prior to 5 September 2014, but not entered until after that date. I accept the agency's submissions about this and will therefore consider entries in the documents dated after 5 September 2014.
18. Documents 1 to 7, excluding the account numbers from documents 1 to 5,<sup>4</sup> (**the documents**) are in issue in my review.

#### Issues in this review

19. The issue for me to consider is whether the agency has justified its determination to refuse access to the documents, or whether there is sufficient evidence before me from which I am able to be satisfied that the documents are otherwise exempt.

#### Parties' submissions

##### The agency

20. By letter 19 May 2015 the agency advised my Office that in its view it would be practicable to release the documents after deleting the following claimed exempt and out of scope matter:<sup>5</sup>
  - account numbers from documents 1 to 5 (claimed exempt; clause 7(1)(c))
  - the 'Rate' and 'Total Cost' columns from document 6 (claimed exempt; clause 13(1)(a))
  - the 'MEC Rate' and 'Gross Media Cost' columns from document 7 (claimed exempt; clause 13(1)(a))
  - the 'Market Rate' and 'Rate Card Value' columns from document 7 (claimed outside the scope of the application for access as it 'does not relate to the full costs of the advertising budget').
21. The agency has advised that its position is consistent with an external review conducted by the former Acting Ombudsman, which involved the applicant, the agency, and MEC (**MEC; Media Edge**).<sup>6</sup>

<sup>4</sup> The applicant does not seek access to the account numbers from documents 1 to 5.

<sup>5</sup> *Freedom of Information Act 1991*, section 20(4).

<sup>6</sup> Ombudsman SA reference: 2014/02025; agency reference: DPC13/2843; applicant reference: 08594. The Acting Ombudsman's determination dated 8 September 2014 is available from the Ombudsman SA website:

## Interested parties

22. There are five interested parties for the purposes of this external review:
  - MEC.<sup>7</sup> MEC is a company 'that provides integrated marketing services across all media channels and communications disciplines', including media planning and buying.<sup>8</sup>
  - Crown Solicitor<sup>9</sup>
  - Projection Graphics<sup>10</sup>
  - Star Printing<sup>11</sup>
  - Essential Media Communications.<sup>12</sup>
23. During the course of my review I consulted the interested parties. In so doing, I provided them with a copy of my provisional determination, reasons and the two appendices to it, along with the documents or parts of documents containing information concerning their business affairs.
24. Two of the interested parties advised my Office that they did not object to the release of the parts of the documents about which they were consulted (Essential Media Communications and Projection Graphics). The Crown Solicitor advised that he did not submit that the documents about which he was consulted were exempt.
25. To date, two of the interested parties (MEC and Star Printing) have not contacted my Office.

## Consideration

### Documents 1 to 5

26. The agency is of the view that it would be practicable to release all but the account numbers from documents 1 to 5. The applicant is not seeking access to the account numbers.
27. I will nevertheless consider whether documents 1 to 5, excluding the account numbers, are exempt under clause 7(1)(c).<sup>13</sup>
28. Documents 1 to 5 include dollar amounts invoiced by the interested parties. I accept that such information concerns their business affairs within the meaning of clause 7(1)(c)(i).
29. The agency has not claimed, and there is no evidence before me to indicate, that disclosure of documents 1 to 5, after redacting the account numbers:
  - could reasonably be expected to have an adverse effect on the interested parties' affairs or prejudice the future supply of such information to the Government or an agency, as required by clause 7(1)(c)(ii)(A)
  - would, on balance, be contrary to the public interest, as required by clause 7(1)(c)(ii)(B).
30. In assessing the public interest, I have had particular regard to:

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<http://www.ombudsman.sa.gov.au/wp-content/uploads/Department-of-the-Premier-and-Cabinet.pdf> accessed on 29 June 2015.

<sup>7</sup> An interested party with respect to documents 2, 6 and 7.

<sup>8</sup> <http://www.mecglobal.com.au/what-we-do/> accessed on 9 June 2015.

<sup>9</sup> An interested party with respect to documents 1 and 4.

<sup>10</sup> An interested party with respect to document 2.

<sup>11</sup> An interested party with respect to document 3.

<sup>12</sup> An interested party with respect to document 5.

<sup>13</sup> I have a discretion to consider exemptions not relied upon by the agency: *Department of the Premier & Cabinet v Redford* (2005) 240 LSJS 171 [29].

- the objects of the FOI Act, particularly the strong public interest in members of the public being aware of how public money is spent and whether the government is getting value for its expenditure of public money; to ensure transparency and accountability within representative government; and to promote openness
- the fact that the information relates to particular points in time; the information is now more than ten months old.

31. In my view documents 1 to 5, excluding the account numbers, are not exempt under clause 7(1)(c), and should therefore be released.

## Documents 6 and 7

### *Information claimed outside the scope of the application*

32. The agency has claimed that the information in the 'Market Rate' and 'Rate Card Value' columns in document 7 is outside the scope of the application for access as it 'does not relate to the full costs of the advertising budget'.
33. Most of the figures in the 'Market Rate' and 'Rate Card Value' columns differ from the figures in the 'MEC Rate' and 'Gross Media Cost' columns. To the extent that the figures are different, I am satisfied that they do not demonstrate the full costs to the agency and are outside the scope of the application for access and my external review (**out of scope information**). I have therefore excluded such information from further consideration.
34. With respect to two of the rows, the figures that in the 'Market Rate' and 'MEC Rate' columns and the 'Rate Card Value' and 'Gross Media Cost' columns are the same. I am satisfied that these figures are within the scope of the application. I will therefore consider whether or not this information is exempt.

### *Clause 13(1)(a)*

35. I must consider whether documents 6 and 7 are exempt under clause 13(1)(a).
36. To succeed in claiming clause 13(1)(a) as a basis for refusing access to a document it is necessary to demonstrate that the relevant documents contain matter 'the disclosure of which would found an action for breach of confidence'. The word 'would' should be read as 'could'.<sup>14</sup>
37. As the agency has claimed that the obligation of confidence in this instance is contractual, I must be satisfied that documents 6 and 7 contain matter, the disclosure of which would, under a term of a contract, be a breach of the contract or would found an action for breach of confidence.
38. The contract is between the State of South Australia and Media Edge ('Master Media Agency'). It is dated 18 February 2010 and was signed by the Premier on behalf of the State of South Australia (**the contract**). Clauses 13(2) to 13(7) of Schedule 1 to the FOI Act do not apply as the contract itself is not under review.
39. Clause 11.4 of the contract requires that:

The State shall use its best endeavours to ensure that ... each Client keeps confidential the rates negotiated on the State's behalf by the Master Media Agency.

<sup>14</sup> *Bray and Smith v WorkCover* (1994) 62 SASR 218 at 226 to 228.

40. Clause 1.1.4 provides that the term 'client' 'means the government departments, statutory authorities, crown instrumentalities and other bodies specified in Schedule 1 of this Deed'.
41. I am satisfied that disclosure of the following information would found an action for breach of contract under a term of the contract because it would breach clause 11.4:
- in the 'Rate' and 'Total Cost' columns from document 6 (that is, the information that appears below the row containing those headings and above the row commencing with the words 'Gross Media Cost')
  - in the 'MEC Rate' and 'Gross Media Cost' columns from document 7 (that is, the information that appears below the row containing those headings, and above the sixth to last row of the table, which is shaded and contains figures)
  - information in the 'Market Rate' and 'Rate Card Value' columns that is the same as information in the 'MEC Rate' and 'Gross Media Cost' columns, respectively.
42. To my knowledge, such information is not publicly known.
43. Accordingly, I am satisfied that documents 6 and 7 are exempt under clause 13(1)(a).
44. I am not satisfied that information in addition to that described above (**the residual information**) is exempt under clause 13(1)(a). I have come to this view because the residual information is not subject to a confidentiality clause within the contract.

*Clause 7(1)(c)*

45. Although not claimed by the agency, I have considered whether the residual information in documents 6 and 7 is exempt under clause 7(1)(c).
46. Briefly stated, the residual information in documents 6 and 7:
- identifies the relevant media outlets
  - describes what was purchased from them, such as formats, dates and numbers
  - details various dollar figures, including:
    - gross media cost
    - subtotals
    - costs excluding GST
    - MEC's fee
    - search engine marketing cost
    - ad serving/production costs
    - budget
    - media rebate.
47. I accept that the residual information in documents 6 and 7 contains information concerning the business affairs of the agency and MEC within the meaning of clause 7(1)(c)(i). In my view, the residual information in documents 6 and 7 does not represent information concerning the business affairs of the named media outlets. Accordingly, the named media outlets are not interested parties for the purposes of my external review.
48. I accept it is possible that the disclosure of the amounts charged by MEC could reasonably be expected to have an adverse effect on MEC's business affairs in future tendering processes. I am not satisfied that disclosure could reasonably be expected to prejudice the agency's business affairs or prejudice the future supply of information to the agency. In my view, businesses that have a financial interest in dealing with the government and agencies are unlikely to be deterred from contracting with them, or offering them innovative and competitive proposals, in the future as a result of the disclosure of such information. In this case, I do not accept that disclosure of the

residual information would make it less likely that the government would receive discounted rates, even if other clients and consumers demanded discounts, because the government is a large consumer of advertising.

49. The agency has not claimed, and there is no evidence before me to indicate, that disclosure of the residual information from documents 6 and 7 would, on balance, be contrary to the public interest. In saying this, I have had regard to the public interest considerations set out above in relation to documents 1 to 5.
50. I am not satisfied that the residual information is exempt under clause 7(1)(c).

#### Section 20(4)

51. In accordance with section 20(4) I consider that it would be practicable to release the documents after redacting some information from the documents. I have described the information that, in my view, ought to be redacted below.

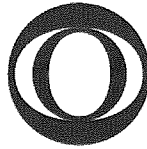
#### Determination

52. In light of my views above, I vary the agency's determination to enable release of:
- documents 1 to 5, after redacting the account numbers
  - document 6, after redacting the information in the 'Rate' and 'Total Cost' columns (that is, the information that appears below the row containing those headings and above the row commencing with the words 'Gross Media Cost')
  - document 7, after redacting:
    - the information in the 'MEC Rate' and 'Gross Media Cost' columns (that is, the information that appears below the row containing those headings, and above the sixth to last row of the table, which is shaded and contains figures)
    - the information in the 'Market Rate' and 'Rate Card Value' Columns, below the row containing those headings.



Emily Strickland  
DEPUTY SA OMBUDSMAN

25 August 2015



OmbudsmanSA

## APPENDIX - 2015/00806

### Procedural steps

Date	Event
5 September 2014	The agency received the FOI application form dated 13 August 2014 by email dated 4 September 2014 (timed 5:01pm).
October 2014	The agency failed to determine the application within the 30 day period required by the FOI Act, <sup>1</sup> and is deemed to have refused access to the documents. <sup>2</sup>
27 November 2014	The agency received the internal review application dated 26 November 2014.
28 November 2014	The agency acknowledged the application for internal review.
December 2014	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. <sup>3</sup>
11 December 2014 and 20 January 2015	The applicant made enquiries with the agency about the status of his internal review application and was advised that it was being progressed.
4 February 2015	The Ombudsman received the applicant's request for external review by email.
9 February 2015	Ombudsman SA notified the agency of the application for external review by telephone and sought the agency's view about extending the time for the applicant to make his application.
10 February 2015	The Ombudsman acknowledged the application for external review and sought reasons as to why the application for external review was delayed.
11 February 2015	The applicant's office provided reasons for the delay in applying for external review.
16 February 2015	The Ombudsman exercised his discretion to extend the time for the applicant to apply for external review. <sup>4</sup>
	Ombudsman SA notified the applicant of the Ombudsman's decision to extend the time for him to make his application.

<sup>1</sup> *Freedom of Information Act 1991*, section 14(2).

<sup>2</sup> *Freedom of Information Act 1991*, section 19(2).

<sup>3</sup> *Freedom of Information Act 1991*, section 29(5).

<sup>4</sup> *Freedom of Information Act 1991*, section 39(4).



	Ombudsman SA advised the agency of the external review and the Ombudsman's decision to extend the time for the applicant to make his application, and requested submissions and documentation.
20 May 2015	The agency provided the Ombudsman with its submissions and documentation by letter dated 19 May 2015.
2 June 2015	Ombudsman SA sought and received information from the agency.
	Ombudsman SA asked whether or not the applicant seeks access to some information from documents 1 to 5.
29 June 2015	A representative of the applicant's office advised that the applicant does not seek access to account numbers from documents 1 to 5 by telephone.
8 July 2015	The Ombudsman issued his provisional determination, and notified the agency, the applicant and interested parties.
14 July 2015	The agency advised that it did not intend to provide a submission in response to the provisional determination by email.
20 July 2015	Ombudsman SA received a letter from the Crown Solicitor dated 16 July 2015, advising that he did not submit that the excerpts of the documents about which he was consulted were exempt.
	Projection Graphics advised by telephone that it did not object to the release of the documents about which they were consulted.
22 July 2015	Essential Media Communications advised by email that it did object to the documents about which they were consulted being released.