

Determination

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

Applicant	Ms Vickie Chapman MP
Agency	Urban Renewal Authority (known also as Renewal SA)
Ombudsman reference	2014/05108
Agency reference	08-06-06-97-0007
Determination	The determination of the agency is varied.

REASONS

Application for access

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

All valuations undertaken for land identified in the Gillman Master Plan received by, or created by, Renewal SA for the period 2009 to present.

Scope of application

2. In June 2014 the agency published the *Gillman Master Plan*, a report dealing with the future plans for certain land at Gillman.
3. A map (**the map**) appears on page 2 of the Gillman Master Plan indicating an area referred to as the Subject Site and an area referred to as the Study Area. The Subject Site is described as an area of approximately 465 hectares of largely undeveloped land vested in the agency. The Study Area is described as an area of approximately 915 hectares of land held in various ownerships which is partially developed, and includes the land forming the Subject Site.
4. By way of a statutory declaration of Mr Jason Rollison, dated 16 September 2014, the agency advised as follows:

Having now had the opportunity to consider the terms of the request and the valuations that were considered to be within scope by the relevant FOI officer, I am of the view that the Knight Frank valuation (dated May 2013) and the Maloney valuation (dated June 2013) do not refer to the subject Site as defined in the Gillman Master Plan but rather to the adjacent land defined as the "Study Area" and accordingly are not within the scope of the request.

5. On 22 September 2014, my legal officer emailed the applicant and asked her to advise of her understanding of the term 'land identified in the Gillman Master Plan' by reference to the map that appears on page 2 of the Gillman Master Plan. By email dated 23 September 2014, the applicant advised that she was referring to both the areas identified as the Subject Site and the Study Area.

6. It is my opinion that the term 'land identified in the Gillman Master Plan' in the applicant's access application includes both the land identified as the Subject Site and the Study Area in the map.
7. On 15 May 2015, the applicant advised that she no longer pursued access to the redacted information on page 12 of document 2. I therefore have not considered this information as part of this determination.

Documents in issue

8. By determination dated 26 May 2014, the agency advised that there was one public document within the scope of the application and six other documents. The six documents identified as within scope by the agency were:
 1. Knight Frank, Valuation Report Proposed Allotment 134 Hanson Rd, Dry Creek, May 2013
 2. Maloney Field Services, Assessment of Market Value, Portion of Dean Rifle Range and Overshoot Area, June 2013
 3. Savills (SA) Pty Ltd, Valuation Report Allotments 500, 31 & 107 off Eastern Parade Gillman SA, 11 February 2010
 4. Savills (SA) Pty Ltd, Valuation Report Allotments 500, 31 & 107 off Eastern Parade Gillman SA, 19 December 2008
 5. Southwick Goodyear, Valuation Report prepared for Adelaide City Council, Dean Rifle Range & Overshoot Land Allotments 500, 31 & 107 Gillman & Dry Creek SA, , 27 February 2012
 6. Savills (SA) Pty Ltd, Valuation Report Allotments 500, 31 & 107 off Eastern Parade Gillman SA, 9 August 2013.
9. On 10 September 2014, my legal officer requested that the agency conduct a further search for documents within the scope of the application in light of:
 - the evidence given on 30 May 2014 by Mr Hansen (at the time the Chief Executive of the agency) to the Legislative Council Select Committee Sale of State Owned Land at Gillman. In his evidence Mr Hansen advised that eleven valuations had been prepared for the land in issue
 - the statement in the agency's 2012-13 Annual Report that an independent valuation of all of the agency's land inventories was conducted as at 30 June 2013.
10. In a statutory declaration dated 16 September 2014, Mr Jason Rollison, Director of Industrial Projects, Industrial Project Delivery declared that the eleven valuations referred to by Mr Hansen were:
 - documents 1, 2, 4 and 5 as listed above
 - a valuation prepared for accounting purposes by Maloney dated July 2013 (as referred to in the Annual Report)
 - a valuation dated June 2008 which falls outside of the date range of the access application
 - 4 consolidations of the separate statutory valuations for land at Gillman and Dry Creek, prepared by the Valuer-General for the purposes of assessing property values for rating and taxing purposes for 2010/2011, 2011/2012, 2012/2013 and 2013/2014 respectively
 - a reference to the Adelaide Capital Partners offer, for comparative purposes.
11. My legal officer advised the agency on 9 February 2015 of my opinion that part of the document Valuations for Accounting Purposes by Maloney Field Services, July 2013 is within the scope of this application. In this determination this document is referred to as document 7.

Background

12. By determination dated 26 May 2014, the agency determined not to release any of the documents within scope of the application. The agency claimed the documents were exempt pursuant to clauses 11(b), 14 and 15.
13. On 3 June 2014, the agency received from the applicant a request for an internal review of that determination. The agency failed to determine that application within 14 days of its receipt and as such was taken to have confirmed its determination.¹ The applicant applied to this Office on 18 June 2014 for an external review of the determination.
14. In a letter to my predecessor dated 14 July 2014, the agency advised of its intention to invoke section 39(9) of the FOI Act. That section provides that if the Minister administering the FOI Act makes known to a review authority the Minister's assessment of what the public interest requires in the circumstances of the case subject to review, the review authority must in determining the application uphold that assessment unless satisfied that there are cogent reasons for not doing so.
15. The agency requested an extension of the time by which it was required to make submissions to this Office on the basis of the request to the Minister. On 14 August 2014 the agency advised that the Minister would not be making an assessment of the public interest in this matter.
16. By letter dated 16 September 2014, the agency put submissions to me as to why the release of certain documents would be contrary to the public interest. The agency requested that those submissions remain confidential.
17. In part, the agency based some of its claims for exemption on judicial review proceedings in the Supreme Court challenging the validity of an option agreement between the State and ACP: *Acquista Investments Pty Ltd & Anor v Urban Renewal Authority & Ors*. Given the nature of the submissions I considered it prudent to wait for the decision of the Supreme Court. The decision in that matter was handed down on 24 December 2014².
18. On 23 January 2015, my legal officer advised the agency of my intention to try to effect a settlement between the participants of the review.³
19. On 9 February 2015, my legal officer met with agency representatives to discuss the merits of the agency's determination. Following those discussions it was agreed that the agency would reconsider its determination.
20. By letter dated 27 February 2015, the agency advised the applicant that it had decided to provide her with copies of documents 1, 2 and 7 with information deleted (as detailed below).
21. On 2 March 2015, my legal officer spoke with the applicant. The applicant advised that she wanted the external review to proceed.

¹ Section 38(4) FOI Act.

² 2014] SASC 60.

³ Pursuant to section 39(5).

Jurisdiction

22. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

23. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 1 April 2015. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
24. I did not receive any submissions in response.

Relevant law

25. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.⁴
26. 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. In this matter clauses 11(b) and 16(2) are relevant.
27. Clause 11(b) provides that a document is an exempt document if it contains matter prepared for the purposes of proceedings (including any transcript of the proceedings) that are being heard or are to be heard before a court or tribunal.
28. Clause 16(2) provides that 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.
29. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
30. 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.

Consideration

Documents 3, 4, 5 and 6

31. The agency has claimed documents numbered 3, 4, 5 and 6 are exempt pursuant to clause 11(b). In order for this claim to be successful in respect of a document, it must be established that the documents contain matter prepared for the purposes of proceedings that are being heard, or are to be heard, before a court or tribunal.
32. These documents contain valuations of allotments 500, 31 and 107 off Eastern Parade Gillman, collectively known as the Dean Rifle Range. The Dean Rifle Range sits within the land identified in the Gillman Master Plan.

⁴ *Freedom of Information Act 1991*, section 12.

33. The Minister for Environment and Conservation (**the Minister**) compulsorily acquired the Adelaide City Council's (**the ACC**) fifty percent interest in the Dean Rifle Range on 11 February 2010. The land was compulsorily acquired pursuant to the *Land Acquisition Act 1969*, and pursuant to section 22B of that Act the ACC was entitled to compensation.
34. Section 23A of the Land Acquisition Act provides:
- 23A—Offer of compensation and payment into court**
- (1) When the Authority gives notice of the acquisition of land, it must make an offer to the person or persons whom it believes to be entitled to compensation for the acquisition, stating the amount of compensation the Authority is prepared to pay.
 - (2) The offer must (where appropriate) differentiate between, and quantify, the component of compensation representing the value of the acquired land and the component referable to disturbance or other compensable matters.
 - (3) The Authority must, within seven days after making an offer of compensation, pay the amount offered into the Court.
 - (3a) However, if the Authority has already paid an amount into the ERD Court under Division 1 in relation to the proposed acquisition, the Authority is required only to pay into the Court the amount (if any) by which the amount of the offer exceeds the amount already paid into the ERD Court.
 - (4) Until compensation paid into Court under this section is applied by order of the Court, the money must be invested by the proper officer of the Court in an authorised trustee investment (bearing interest that compounds at intervals of one month or less) and the interest and other accretions accruing on the investment—
 - (a) must be paid to—
 - (i) the person who would, but for the acquisition of the land, have been entitled to the rents and profits of the land; or
 - (ii) a body constituted under the law of the State or the Commonwealth as trustee for the claimants to whom the compensation is offered; or
 - (b) must be dealt with in some other manner specified by the Court.
35. I am satisfied that the process of offering compensation and payment of the amount offered into court are rightly characterised as legal proceedings.
36. I am mindful of my obligations pursuant to section 39(15) of the FOI Act to avoid disclosing in my reasons for determination any matter that the agency claims is exempt. Having viewed documents 3 and 4, I am satisfied they were prepared for the purpose of those proceedings.⁵
37. In 2011 the ACC instituted proceedings in the Supreme Court of South Australia disputing the amount of compensation payable for the compulsory acquisition of the ACC's interest in the Dean Rifle Range. Having viewed documents 5 and 6 I am satisfied that they were prepared for the purpose of those proceedings.⁶ Those proceedings are continuing in the Supreme Court. Although two separate matter numbers have been assigned to these proceedings I am satisfied that the matter LVD 222 of 2010 is continuing in the Supreme Court as LVD 518 of 2012.
38. I am therefore satisfied that documents 3, 4, 5 and 6 are exempt pursuant to clause 11(b).

⁵ *The Corporation of the City of Adelaide v Minister for Sustainability, Environment and Conservation* LVD 222 of 2010.

⁶ *The Corporation of the City of Adelaide v Minister for Sustainability, Environment and Conservation* LVD 518 of 2012.

Documents 1 and 2

39. Redacted versions of documents 1 and 2 were released to Ms Chapman by letter dated 27 February 2015.
40. The agency claims that there is matter within documents 1 and 2 that is exempt pursuant to clauses 11(b), 15 and 16(2). Despite this claim there is no information in either document 1 or 2 that has been redacted pursuant to clause 15 and as such I have not considered it in this determination.

Clause 11(b)

41. The agency has claimed that information redacted from document 1 on page 11 is exempt pursuant to clause 11(b).
42. The agency has advised me that the redacted information consists of information that has been quoted from two Expert Reports that were submitted to the Supreme Court of South Australia in relation to the compulsory acquisition proceedings. I am satisfied on the evidence before me that this information is exempt pursuant to clause 11(b).

Clause 16(2)

43. The agency claims that there is information in documents 1 and 2 that is exempt pursuant to clause 16(2). That information has been redacted from the documents as follows:
 - document 1 on pages 2, 3, 32 and 33
 - document 2 on pages 2, 11 and 14The redacted information in both documents is the assessed market value.
44. Documents 1 and 2 were obtained by the agency to support the sale of Lot 201. The contract for the sale of that land has now settled and the purchase price of \$5.46 million (plus GST) is now in the public domain, due to the requirements of *DPC Circular PC027 - Disclosure of Government Contracts*.
45. For a document to be exempt pursuant to clause 16(2) it must be established that the document:
 - (a) relates to an agency engaged in commercial activities; and
 - (b) contains matter the disclosure of which could prejudice the competitiveness of the agency in carrying out those commercial activities.
46. The agency is established pursuant to regulation 4 of the *Housing and Urban Development (Administrative Arrangements)(Urban Renewal Authority) Regulations 2012 (the regulations)*. Regulation 6(1) sets out the functions of the agency which includes the disposal of land. It is apparent that the agency is engaged in commercial activities as is required for clause 16(2) to apply. I am satisfied that documents 1 and 2 relate to an agency that is engaged in commercial activity.
47. I turn then to consider whether disclosure of the redacted matter could prejudice the competitiveness of the agency in carrying out those commercial activities.
48. The agency argues that releasing the market values in the two valuations would provide private entities with an advantage in understanding the limitations (if any) associated with Renewal SA's process which is used to establish the purchase price in such circumstances. The agency argues that this would lead to an advantage in future negotiations in that other parties would be aware of the agency's position vis-à-vis the value placed on the land and other considerations contained in the valuations. The

agency argues that this may reduce the agency's negotiating power and may result in lower prices being obtained in future transactions.

49. The agency's sale process and pricing procedure is guided by its Real Property Marketing and Pricing Policy (the Policy) which was adopted by the agency on 29 April 2012. The objective of the Policy is:

to ensure that prices for all Renewal SA real property sales are properly benchmarked where appropriate and have a sound and consistent basis and that appropriate sales processes are undertaken.

50. The Policy includes the following provisions:

6.4 Off-market transactions - valuation requirements

As a general rule, off-market transactions (ie. sale of Renewal SA real property which has not been offered to the open market) to the private sector must be supported by two independent valuations. The higher of the two valuations will apply as the minimum acceptable price, unless the Chief Executive determines otherwise.

...

6.5 Valuations

Normally, approval for a sale requires an up-to-date current market valuation (see definition below) to ensure that an adequate value is being received for the property being sold. The Australian Property Institute's definition of Market Value is "the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and willing seller in an arms length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion." A current market valuation that is based on this definition is the appropriate form of valuation to support the sale of any real property assets.

It is preferable for the valuation to be less than six months old to ensure its currency, although in a highly volatile market it may be appropriate to have the valuation updated. If warranted by market conditions, an older valuation may be adopted at the discretion of the Chief Executive. Criteria which will be considered by the Chief Executive in exercising the above discretion include:

- there has been little movement in the market since the date of the valuation;
- latest sales evidence supports the valuation;
- the sale price is less than \$100,000 (excluding GST);
- an option or exclusive arrangement was negotiated committing Renewal SA to a set price for a defined period.

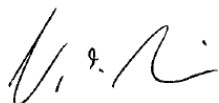
51. I do not think that revealing the extent of the difference between the two valuations will prejudice future negotiations. It is clear from the Policy that the agency was required to sell Lot 201 for a figure of at least the higher value of the two valuations.
52. Given that the sale price of Lot 201 is in the public domain I do not accept that the valuation figures will be relevant in future negotiations concerning the sale of land.
53. I do not accept the agency's submission that the disclosure of the two valuation figures will prejudice the competitiveness of the agency in carrying out its commercial activities.
54. It is my determination that there is no information in documents 1 and 2 that is exempt pursuant to clause 16(2).

Document 7

55. Document 7 has been provided to the applicant with some information redacted on the basis that it is outside the scope of the access application. I have considered the document and I am satisfied that the information that has been redacted is correctly classified as being outside of the scope of the application.

Determination

56. In light of my views above, I vary the agency's determination such that the following information is not exempt, and should be released to the applicant:
- the information redacted on pages 2, 3, 32 and 33 from document 1
 - the information redacted on pages 1, 11 and 14 from document 2.



Wayne Lines
SA OMBUDSMAN

18 May 2015

