

Determination

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

Applicant	Mr David Pisoni MP
Agency	Department of State Development
Ombudsman references	2014/08449; 2015/00462
Agency references	BRIEFC/14/2385; BRIEFC/15/159
Determinations	Application 1: The determination of the agency is varied. Application 2: The determination of the agency is reversed.

REASONS

Application for access

1. The applicant made two applications under the *Freedom of Information Act 1991 (the FOI Act)*, in which he requested access from the agency to:

All minutes of the Economic Development Board meetings from March 2013 until present [29 July 2014] [**Application 1**]

All agendas of the Economic Development Board meetings from March 2013 until present [17 December 2014] [**Application 2**].

Background

2. The Economic Development Board (**the Board; EDB**) is an independent advisory body tasked with providing 'high level strategic and policy advice to [the] Government on economic development and industry issues'.¹
3. The procedural steps relating to application 1 are set out in appendix 1.
4. The procedural steps relating to application 2 are set out in appendix 2.

Jurisdiction

5. These external reviews are within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

6. I provided my tentative view about the agency's determinations to the parties, by my provisional determinations dated 3 June 2015. I informed the parties that subject to my

¹ <http://economicdevelopmentboardsa.com.au/purpose-statement/> accessed on 25 May 2015 and 11 January 2016 and the document dated 13 March 2015 providing an 'Overview of South Australian vision and EDB priorities', provided to me on 18 March 2015.

receipt and consideration of submissions from the parties I proposed to reverse the agency's determinations.

7. The agency provided detailed submissions in response, both in writing and in person. The agency's submissions included letters from two Board members. I have considered these submissions in this determination.
8. By email dated 10 June 2015, the applicant's office advised that he did not have any submissions to make.
9. I have also considered the views expressed by interested parties during consultations undertaken by my Office.

Relevant law

10. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.²
11. 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.
12. The agency claims that the documents are exempt as documents affecting business affairs (clause 7(1)(c)); internal working documents (clause 9(1)); documents containing confidential material (clause 13(1)(b)); and documents concerning the operations of agencies (clause 16(1)(a)(iv) with clause 16(1)(b)).³ 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 9(1)

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

- (a) that relates to—
 - (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and
- (b) the disclosure of which would, on balance, be contrary to the public interest.

² *Freedom of Information Act 1991*, section 12.

³ The agency originally relied only on clause 9(1), Schedule 1, *Freedom of Information Act 1991*. During my external review, in an attachment to its letter dated 6 August 2015, the agency raised the other three exemption clauses.

Clause 13(1)(b)

- (1) A document is an exempt document—
 - (b) if it contains matter obtained in confidence the disclosure of which—
 - (i) might reasonably be expected to prejudice the future supply of such information to the Government or to an agency; and
 - (ii) would, on balance, be contrary to the public interest.

Clause 16(1)(a)(iv) with clause 16(1)(b)

- (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.

13. Although not claimed by the agency, having regard to submissions made by the agency in an attachment to its letter dated 6 August 2015,⁴ I have also considered whether some of the documents are exempt as Cabinet documents (clause 1(1)(e)).⁵ The relevant parts of clause 1 provide as follows:

Clauses 1(1)(e), 1(2), 1(2a) and 1(3)

- (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...
- (2) A document is not an exempt document by virtue of this clause—
 - (a) if it merely consists of factual or statistical material (including public opinion polling) that does not—
 - (i) disclose information concerning any deliberation or decision of Cabinet; or
 - (ii) relate directly to a contract or other commercial transaction that is still being negotiated; or
 - (ab) merely because it was attached to a document described in subclause (1); or
 - (b) if 20 years have passed since the end of the calendar year in which the document came into existence.
- (2a) A document is not an exempt document by virtue of this clause if—
 - (a) the document has been submitted to Cabinet by a Minister; and
 - (b) a Minister has certified that Cabinet have approved the document as a document to which access may be given under this Act.
- (3) In this clause, a reference to Cabinet includes a reference to a committee of Cabinet and to a subcommittee of a committee of Cabinet.

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

⁴ Attachment 4 to the agency's letter dated 6 August 2015. The header on the attachment itself refers to attachment 3, however.

⁵ 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].

15. 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

16. The agency identified 14 documents within the scope of the applications, six in relation to application 1 (numbered 1 to 6) and eight in relation to application 2 (numbered 7 to 14):
 1. Minutes dated 28 February 2013
 2. Minutes dated 6 June 2013
 3. Minutes dated 5 September 2013
 4. Minutes dated 16 October 2013
 5. Minutes dated 6 December 2013
 6. Minutes dated 3 April 2014
 7. Agenda dated 6 June 2013
 8. Agenda dated 5 September 2013
 9. Agenda dated 16 October 2013
 10. Agenda dated 6 December 2013
 11. Agenda dated 3 April 2014
 12. Agenda dated 5 June 2014
 13. Agenda dated 5 August 2014
 14. Agenda dated 11 September 2014.
17. Document 1 predates the period covered by the application for access. My view is that it is outside the scope of the application. Accordingly, I do not intend to consider it further.
18. The agency has refused access to the documents in their entirety.

Issue in this review

19. The issue for me to consider is whether the agency has justified its determination to refuse access to documents 2 to 14 (**the documents**), or whether there is sufficient evidence before me from which I am able to be satisfied that the documents are otherwise exempt.⁶

Parties' submissions

The agency

20. The agency has submitted that:
 - '[m]any of the Board's specific projects/initiatives involve sensitive negotiations and/or obtained confidential information in the course of its functions'
 - the documents 'contain information about the internal workings of the Board that must have the ability to have free and frank discussions with the Government and to consult with industry leaders'.⁷
21. The agency has referred to a number of public interest factors both in favour of and against releasing the documents:
 - promoting 'scrutiny and transparency'

⁶ *Re Pope and Queensland Health* (1994) 1 QAR 616, [17]. A decision of the Queensland Information Commissioner in relation to the Queensland equivalent of section 48 of the South Australian FOI Act.

⁷ Notices of determination dated 7 October and 4 December 2014.

- ‘promoting access to documents that provide details of communications between the Government and the Board, particularly ... [regarding] impacts or potential impacts on the ... economy’
 - the seniority of the people communicating and the sensitivity of the issues involved; the more senior the people and the more sensitive the issues ‘the more likely the communication should not be disclosed’
 - preliminary matters or matters that have not been settled or adopted which ‘would impair the agency’s decision making process to a significant degree’
 - the possible unfairness to a decision maker and the prejudice to the decision making process of disclosing documents that ‘do not fairly disclose the reasons for a decision subsequently taken’
 - inhibiting ‘frankness and candour in future pre-decisional communications’
 - ‘public confusion and unnecessary debate’ that may result from ‘disclosure of possibilities’
 - the currency of ‘issues discussed in a document’ or their ‘relationship to current issues’.⁸
22. The agency concluded that disclosure of the documents would:
- ‘hamper ... exchanges [between the Government and the Board] of high level strategic advice(s)’⁹
 - ‘impede making recommendations to the Government by inhibiting frankness and candour’¹⁰
- and therefore would, on balance, be contrary to the public interest.
23. In response to my provisional determinations, the agency provided detailed submissions to my Office. The submissions included the following:
- 15 July 2015 letter:*
- that with the exception of the agency’s Chief Executive, who acts in an ex officio capacity, the Board is comprised of private individuals
 - ‘Board membership terms are made via private invitation to each individual board member from the Premier of the day’
 - the Board has no executive powers
 - the Board:
 - has again [recently] proven its value at the highest levels of decision making in the State, by bringing the views of industry directly to the Economic Development Cabinet Committee (EDCC)... The EDCC shapes the Government’s economic development priorities for the future.
 - the Board’s direction is determined at its Chair’s discretion, with advice from other Board members
 - the Board enables ‘business leaders and industry groups [to] share confidential information either directly at Board meetings or indirectly through relationships with members’
 - there is ‘a tacit understanding ... that the work of the EDB is maintained as confidential’
 - the State benefits from this ‘through the quality of non-political economic development advice to the Premier and ministers that they would not otherwise receive.’ The advice itself ‘is based on a combination of the individual, often commercial in confidence, experiences of Board members and the information it receives from external stakeholders and contacts’
 - the Board also explores and investigates ‘economic development issues that are highly sensitive from an independent, non-political position with a goal of providing advice on the best outcome for the State’

⁸ Letters to Ombudsman SA dated 18 November 2014 and 27 February 2015.

⁹ Notices of determination dated 7 October and 4 December 2014.

¹⁰ Notices of determination dated 7 October and 4 December 2014.

- disclosure of the documents will:
 - ... severely impede the Board's capacity to deliver high quality, independent and confidential advice. It places at risk the ability for Board members to contribute in an open and frank manner and damages its capacity to source confidential and commercial-in-confidence insights, information and data from the global private sector that directly contributes to the quality of advice it provides. In many cases it will have a detrimental impact on attracting and retaining high calibre, independent and globally recognised leaders to serve as EDB members.
 - ... impact on the Board's ability to successfully garner and deliver the needed advice on South Australia's economic imperatives, at a time where insightful, independent and commercial global advice is critical to the State's future.

21 July 2015 meeting:

In addition to reiterating some of the above submissions, the Chairman of the Board submitted that:

- experts and stakeholders elect to provide information and advice to the Board on the basis that it is provided in confidence
- Board members will resign if they believe that there is no assurance of confidentiality of the EDB business, and people who give advice to the Board for no pecuniary or other benefit or gain will withdraw the provision of such advice.

6 August 2015 letter and attachments:

- the agency is 'strongly' opposed to the release of the documents
- the Board's effectiveness 'is reliant on the close interaction with the private sector and their goodwill'
- '... preserving confidentiality of the information gained is pivotal...'
- Board members come from the private sector and academia
- The terms of appointment for Board members provides that they 'must preserve the confidentiality of information gained in the course of their membership of the EDB and must avoid conflicts of interest'
- although the Board engages consultants from time to time, it 'relies substantially on information input from particular businesses and professionals' who are not necessarily Board members
- much of the cooperation with the private sector, 'relies on personal relationships between EDB board members and business leaders and professionals'
- private sector individuals contribute to the Board's deliberations on the understanding that their involvement in deliberations is confidential
- participants from the private sector 'have no expectation of direct financial gain from their dealings with the EDB and it follows that they have no incentive to continue their involvement if this should prove politically or commercially embarrassing'
- some of the Board's 'recommendations are subsequently considered by Cabinet and adopted as formal [Government] policy', including two recommendations referred to in the documents¹¹
- at times, the Premier assigns policy implementation tasks to the Board following Cabinet approval and adoption by the Government; the documents include an example of this
- the Board 'may support or recommend a direct regulatory initiative by the Government'; the documents include examples of such
- the agency has also claimed that parts of the minutes:¹²
 - 'contain working documents which would disclose information that was intended for a decision by Cabinet'

¹¹ The agency has not claimed that the documents are exempt under clause 1, Schedule 1 to the *Freedom of Information Act 1997*, however.

¹² Attachment 4 to the agency's letter dated 6 August 2015. The header on the attachment itself refers to attachment 3, however.

- contain 'matters consisting of information concerning the business, professional, commercial and business affairs of another organisation'
- contain 'matter the disclosure of which would disclose information concerning any deliberations or decisions of Cabinet' or 'would disclose matters concerning deliberations or decisions of Cabinet'
- were 'based on commercial in confidence information sourced from non-government third parties'
- contain 'matters consisting of information concerning the business, professional, commercial and business affairs of EDB members'
- contain 'information related to commercial-in-confidence information and/or was provided to ... [a sub-committee] in-confidence, on the basis that the information would not be disclosed and only used for the purposes of informing EDB deliberations'
- 'release of the documents would have a significant impact on the [Board's] ability ... to engage with corporate investors in future and therefore, access commercial-in-confidence information in order to provide high quality advice to the Premier on the management of the economy'
- the agency's submissions addressing each of the claimed exemption clauses follow:¹³

Business Affairs - clause 7(1)(c)

The involvement of private sector businesses and individuals in the activities of the EDB constitutes an element of the "business, professional, commercial or financial affairs" of the businesses and individuals concerned; ie. both the fact of the involvement as well as the substance of the involvement...

... [T]he EDB works cooperatively with the private sector and relies on the voluntary contribution of ideas and information from the private sector. There is no expectation of "substantial and lucrative ventures". The disclosure of the involvement of businesses and individuals with the EDB, contrary to their wishes, could "reasonably be expected ... to prejudice the future supply of ... information" to the EDB.

Public interest

... The following submissions are intended to supplement the submissions on public interest previously made.

In *Re Howard* (1985) 7 ALD 626 at 634-635 the Federal Court referred to public interest factors that might militate against disclosure -

- '(a) the higher the office of the person between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed;
- (b) disclosure of communications made in the course of development and subsequent promulgation of policy tends not to be in the public interest;
- (c) disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest;
- (d) disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest;
- (e) disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision maker and may prejudice the integrity of the decision making process.'

It is submitted that the factors referred to in paragraphs (a), (b) and (d) apply, in varying degrees... Examples of the high-level communications between the EDB and Government and of policy development and promulgation are given ...

In addition, there is a risk of "confusion and unnecessary debate" if information on topics which have not yet resulted in Government policy is disclosed. This is particularly the case where regulatory changes are discussed The disclosure of

¹³ Paragraph numbers and footnotes omitted.

this information may even prompt businesses or individuals to take action pre-emptively, in expectation of a regulatory change.

Nor is it sufficient, in the context of the EDB, to say that that there will be no adverse effect from the disclosure of information about policy proposals that are not being progressed for the time being. By the nature of its work, the EDB will revive past proposals from time to time when circumstances change. The prior disclosure of the proposal may have an adverse effect on its later consideration. This will particularly be the case where the further development of the proposal is dependent on the goodwill and cooperation of the private sector...

In balancing the competing public interests (for and against disclosure), it is submitted that the public interest against disclosure should prevail.

Internal working documents - clause 9(1)

...

For the reasons discussed above ..., the public interest criterion in clause 9(1)(b) is also satisfied.

Documents containing confidential material - clause 13(1)(b)

As explained above ..., the EDB's deliberations and its interactions with the private sector are conducted confidentially. For the reasons discussed in relation to clause 7(1)(c), disclosure might reasonably be expected to prejudice the future supply of information and would be contrary to the public interest.

Documents concerning operations of agencies - clause 16(1)

Disclosure of the minutes and agendas could reasonably be expected to have a substantial adverse effect on the effective performance by the EDB of its functions (clause 16(1)(a)(iv)).

The EDB is a small agency that is not involved in actual service delivery or in administering fixed systems. It has no statutory powers, nor any direct policy-making role. The EDB's Charter shows that its primary functions are consultative, advisory and facilitative, It relies on goodwill and cooperation from other public sector agencies and the private sector. Its ability to continue to perform its functions will be compromised if its deliberations and consultations are disclosed and become subject to public debate and possible controversy.

- one Board member provided submissions in an undated letter attached to the agency's letter dated 6 August 2015. Briefly stated, the Board member opposed release of the documents for some of the reasons set out above
- the other Board member, who is not referred to in the documents, provided submissions by letter dated 7 August 2015. It included the following:
 - being subject to the FOI Act in another role, the member is '... wholly appreciative of its use and value in society today'
 - the Board's 'role, and consequently our internal working documents, sits clearly and squarely outside the intended scope and application of ... [the FOI Act]'
 - inclusion of the documents 'within FOI scope would give material cause to myself and many of my fellow members to consider our continued ability to function as effective members of the Board'
 - '... the FOI scope would give material cause to ... [the global network of independent] specialists' [invited to contribute by Board members] willingness and ability in the future to be forthcoming with the quality of advice and insights' it has to date.

The applicant

24. When applying for external review for, the applicant submitted that:

- he understands the importance of:
 - 'the Board being able to present information to the Premier and the Cabinet in a 'frank and free' manner' (application 1)
 - 'confidentiality of sensitive documents' (application 2)
- he should be entitled to a copy of the documents after redacting information:
 - 'specifically prepared for Cabinet' (application 1)
 - the disclosure of 'which would be contrary to the public interest' (application 2).

Interested parties

25. In its letter dated 6 August 2015 the agency submitted that I should consult 'affected individuals in the discovered documents who have had private dealings with the EDB (who are not board members or are not *Public Sector Act* employees)¹⁴
26. In an attachment to its letter dated 6 August 2015, the agency advised that it had identified businesses and individuals requiring consultation 'by highlighting on the copies of the minutes and agendas attached'. I note that the agency only included copies of the minutes with highlighting, however.
27. My Office undertook consultations with the following individuals about parts of various documents, as follows:¹⁵
- GK - document 2 (attendee list and item 4.a.)
 - AO - document 2 (attendee list and item 8.a.)
 - RD - document 4 (item 5.h.)
 - BE - document 4 (items 9(b)b (replicated in the schedule) and 9(b)c (first line only))
 - CS - documents 5 (attendee list) and 10 (items from 1:00pm to 5:45 pm)
 - SS - document 5 (attendee list)
 - FK - document 5 (attendee list)
 - CT 1 - document 5 ((attendee list)
 - CT 2 - documents 6 (item 5.a.), 12 (last row) and 13 (item 2)
 - TP - document 6 (item 5.a.).
28. I did not consult with members or employees of the Board (former or current) or public officers.¹⁶
29. CS and SS did not respond to consultation emails sent by my Office dated 18 January and 2 February 2016.
30. By email dated 1 February 2016, CT 2's assistant advised that CT 2 did not object to information about CT 2 in document 6 being released. However, in emails dated 9 February 2016, CT 2 objected to information about CT 2 being released. CT provided the following reasons:

With specific reference to the document 6:

... we have reviewed our engagement terms and regretfully advise that the information being sought is ... [a company's] confidential information for the ... Board.

Consequently we are of the view that this information cannot be released.

¹⁴ In accordance with the *Freedom of Information Act 1991*, section 39(10).

¹⁵ I will refer to the interested parties with reference to initials and the documents they were consulted about, so as to avoid disclosing claimed exempt matter

¹⁶ Given this, I did not consider it necessary to consult with individuals identified at item 7.c. of document 2. See *Young v Wicks* (1986) 13 FCR 85, 90.

With specific reference to documents 12 and 13:

... we do object [to release] on the basis that the information and outcomes were provided directly to Premier and Cabinet on a commercial in confidence basis.

31. By email dated 10 February 2016 my Office invited CT 2 to 'provide further submissions ... [in support of CT 2's belief that] the documents are exempt under the FOI Act, along with a copy of the relevant terms of ... engagement'. To date, CT 2 has not done so.
32. The remaining interested parties advised that they did not object to information concerning them being released. My Office or the relevant interested party confirmed these views by email.

Consideration - are the documents exempt?

Clause 1(1)(e)

33. Although the agency has not expressly claimed clause 1(1)(e), it has submitted that parts of the minutes:
 - 'contain working documents which would disclose information that was intended for a decision by Cabinet'
 - contain 'matter the disclosure of which would disclose information concerning any deliberations or decisions of Cabinet' or 'would disclose matters concerning deliberations or decisions of Cabinet'.
34. I have therefore considered whether or not any of the documents are exempt under clause 1(1)(e).
35. Whether or not releasing the documents would disclose information concerning any deliberation or decision of Cabinet is a question of fact to be decided in light of all the circumstances.¹⁷
36. The fact that a document pre-dates a Cabinet meeting does not preclude the application of clause 1(1)(e).¹⁸
37. The agency must be able to demonstrate more than the fact that the document was considered by Cabinet, however.
38. In *National Parks Association of New South Wales Inc v Department of Lands and Anor*,¹⁹ Deputy President Hennessey considered the mirror provision in the New South Wales *Freedom of Information Act 1989*.

[In] my view the mere fact that a document, or part of a document, went before Cabinet or was considered by Cabinet when deliberating or reaching a decision, does not make the information in that document, information 'concerning' any deliberation or decision of Cabinet.

39. Having regard to the contents of document 2, I am satisfied that it is exempt under clause 1(1)(e). Item 8.b.b clearly refers to a past Cabinet deliberation.
40. Nevertheless, as permitted by section 20(4) of the FOI Act, I consider that it would be practicable to provide partial access to document 2, that is after deleting item 8.b.b.

¹⁷ *Anderson and Department of Special Minister of State No 2* (1986) 11 ALN N239, [27].

¹⁸ *McGuirk v Director General, The Cabinet Office* [2007] NSWADT 9 at 37.

¹⁹ *National Parks Association of New South Wales Inc v Department of Lands and Anor* [2005] NSWADT 124.

41. I am not satisfied that any of the other documents 'contain matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet', as required by clause 1(1)(e). Although some of the documents refer to possible future events concerning Cabinet, neither the agency nor CT 2 have provided any evidence to show that these items were actually the subject of Cabinet deliberations or decisions.
42. I am therefore not satisfied that the remaining documents, or the remaining parts of document 2, are exempt under clause 1(1)(e).
43. I will now proceed to consider whether or not the documents (excluding item 8.b.b of document 2) are exempt under any of the claimed exemption clauses.

Clauses 7(1)(c), 9(1), 13(1)(b) and 16(1)(iv) with 16(1)(b)

44. In order to satisfy each of the claimed exemption clauses, the agency must also satisfy the public interest test. Before addressing the public interest test, I will consider the other elements that must be satisfied with respect to each of the claimed clauses.

Clause 7(1)(c)(i)

45. 'Business affairs' has been held to mean activities carried out with the view to make a profit, and not just affairs derived from or to do with business. The Queensland Information Commissioner commented that:

For a matter to relate to 'business affairs' in the requisite sense, it should ordinarily, in my opinion, relate to the affairs of a business undertaking which is carried on in an organised way (whether full time or only intermittent) with the purpose of obtaining profits or gains (whether or not they actually be obtained).²⁰

46. The relevant provision under the Queensland legislation²¹ considered by the Information Commissioner mirrors clause 7(1)(c).
47. The courts in Victoria have also held that for the 'business affairs' exemption to apply, the information must relate to matters of a business, commercial or financial nature, and 'not merely be derived from a business or concerning it or have some connection with it'.²²
48. I adopt these views in considering the meaning of 'business affairs' under clause 7(1)(c). 'Professional', 'commercial' and 'financial affairs' should be given their ordinary dictionary meaning.
49. I accept that documents 2, 4, 5, 6, 10, 12 and 13 contain information concerning the business affairs of the interested parties identified above within the meaning of clause 7(1)(c)(i).
50. I am not satisfied that the documents concern the business affairs of the agency or any other person in the requisite sense, however.
51. In saying this, I have had particular regard to the contents of the documents.

²⁰ *Stewart and Department of Transport* (1993) 1 QAR 227, [103].

²¹ Section 45(1)(c) of the *Freedom of Information Act 1992 (Qld)*.

²² *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441; The President's view regarding the interpretation of 'business affairs' was upheld on appeal to the Full Court of the Supreme Court (*Accident Compensation Commission v Croom* [1991] 2 VR 322).

52. In addition, I note that:
- remuneration paid to Board members is in the form of an annual fee but such details are not contained in *the documents*²³
 - non-Board member attendees at Board meetings are not remunerated
 - the Board does not operate for the purpose of obtaining profits
 - the Board is an advisory body
 - the Board is independent of the agency.

Clause 7(1)(c)(ii)(A)

53. The agency has claimed that disclosure of the documents would result in Board members and other contributors to Board meetings not providing information or not providing as much information to the Board (and by extension the agency and the Government). It has provided letters from two Board members in support of this submission.
54. Board members are remunerated for their involvement with the Board, either as part of their executive salary as public servants, or in the form of an annual fee. In addition, I note the likelihood of Board Members being categorised as ‘public officers’, and of their obligations in this event.²⁴
55. Whilst non-Board members do not receive any ‘direct commercial gain’, their involvement with the Board affords them unique opportunities to influence the State’s public policy direction and future priorities, and to gain insights into such matters and other professional development opportunities.
56. In light of such benefits (whether pecuniary or not), it is my view that individuals or companies are unlikely to be deterred from providing information to the Board in the future. In saying this, I have again had particular regard to the contents of *the documents* under review.
57. It is also relevant that the majority of the interested parties have not objected to information concerning them being disclosed.²⁵
58. Further and in any event, I note that minimal information is attributed to individual attendees and businesses in the documents.
59. Accordingly, I am not satisfied that disclosure of *the documents* could reasonably be expected to prejudice anyone’s business affairs or the future supply of information to the Government or an agency.

Clause 9(1)(a)(ii)

60. The scope of clause 9(1)(a) is wide, particularly given use of the words ‘that relates to.’
61. I am satisfied that the documents contain matter that relates to a consultation or deliberation that has taken place in the course of, or for the purpose of, the Government’s decision making functions.

²³ http://dpc.sa.gov.au/sites/default/files/pubimages/documents/boards-committees/BC_AR-2013.pdf and http://dpc.sa.gov.au/sites/default/files/pubimages/documents/boards-committees/BC_AR-2014.pdf accessed on 12 January 2016.

²⁴ *A v C* (2015) 123 SASR 477; *A v C* [2015] SASC 35 (4 March 2015).

²⁵ I note that CS and SS did not respond to my Office’s consultation emails, and CT 2 has objected to information about them (in documents 6, 12 and 13) being released, however.

Clause 13(1)(b)(i)

62. To satisfy clause 13(1)(b) the information in the document must have been ‘received under an express or inferred understanding that [it] would be kept confidential’.²⁶
63. The agency claims that the Board’s ‘deliberations and its interactions with the private sector are conducted confidentially’ and that the Board ‘obtained confidential information’ in the performance of its functions. The agency and one of the Board members have submitted that this is a ‘tacit’ understanding.
64. The minutes are all marked ‘confidential’ and include a ‘draft’ watermark. One of the interested parties, CT 2, has also claimed that information in document 6 is a company’s ‘confidential information’ and information in documents 12 and 13 was provided ‘on a commercial in confidence basis’. Such factors are not sufficient, in and of themselves, to satisfy clause 13(1)(b).
65. Ultimately, there is insufficient evidence to satisfy me the information contained in the documents was obtained in confidence as required by 13(1)(b).
66. I note that expectations of confidentiality are ‘always subject to the provisions of the FOIA [the FOI Act] and cannot be affected by any representation ... that greater confidentiality might be accorded to material than properly reflects the effect of the FOIA’.²⁷
67. Nevertheless, even if I were to accept that the information was obtained in confidence, for the reasons set out above, I am not satisfied that disclosure of *the documents* ‘might reasonably be expected to prejudice the future supply of such information’ to the Government or an agency.

Clause 16(1)(a)(iv)

68. The phrase ‘substantial adverse effect’ is important when considering the clause 16(1)(a)(iv). It is not defined in the FOI Act. In the decision of *Treglown v SA Police* the South Australian District Court said that the phrase:

should be interpreted as indicating a ‘degree of gravity’ ... or an effect ‘that is “sufficiently serious or significant to cause concern to a properly informed reasonable person” ... (references omitted).²⁸

69. I am not satisfied that releasing *the documents* could reasonably be expected to have a substantial adverse effect on the effective performance by an agency of its functions, however. In saying this, I note that the Board is independent of the agency and the Government, and is not an agency within the meaning of the FOI Act.

Public interest test - clauses 7(1)(c)(ii)(B), 9(1)(b), 13(1)(b)(ii) and 16(1)(b)

70. In order to satisfy any or all of the claimed exemption clauses, the agency must also show that disclosure of the documents would ‘on balance, be contrary to the public interest’.²⁹

²⁶ See *Re Maher and Attorney General's Department* (1985) 7 ALD 731 at 737.

²⁷ *Iplex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54, 70. In addition, the FOI Act has been in operation for more than 20 years.

²⁸ *Treglown v SA Police* [2011] SADC 139 (Unreported, South Australian District Court, Judge Herriman, 20 December 2011), [203], considering *Harris v ABC* (1983) 50 ALR 551 and *Konieczka v South Australian Police* [2006] SADC 134 (unreported, Judge Boylan, 8 December 2006), following *Thiess and The Department of Aviation* (1986) 9 ALD 454.

²⁹ Clause 9(1)(b), Schedule 1 to the *Freedom of Information Act 1991*.

71. Briefly stated, the minutes detail attendees and apologies; the topics discussed; presentations delivered; and various actions and their status. They include limited information of a summary nature in a format that is common for minutes.
72. The agendas set out the timing and topics for discussion and the nominated speakers or leaders for discussions. They contain minimal information.
73. Based on the information currently before me, I am not satisfied that disclosure of *the documents* would:
- inhibit frankness and candour in the future
 - inhibit the exchange of advice between the Government and the Board
 - prejudice the agency's, the Government's or the Board's decision-making processes
 - be unfair to the Board or the Government
 - create confusion and unnecessary debate.
- In saying this, I am mindful of the Board's relationship with the Government and its unique position as an independent advisory body,³⁰ as well as the factors set out in the paragraph below.
74. In considering whether or not disclosure of the documents would, on balance, be contrary to the public interest I have had regard to the following factors:
- fulfilling the objects of the FOI Act, particularly the public interest in promoting openness and accountability³¹
 - the submissions of the parties
 - the views expressed by the interested parties
 - the contents of the documents
 - publicly available information, such as information about current and former Board members; attendees who were public servants at the time of the relevant meetings; and various projects and initiatives with which the Board is associated³²
 - that the documents are 17 or more months old; a number of projects and initiatives that they refer to appear to have been completed or have progressed since the documents were created
 - the documents themselves show when they were created, thereby putting them into context
 - the nature of the Board and its purpose and charter³³
 - the Board's role in providing high level advice to the Government and the fact that Board's Chair and Deputy Chair are representatives on the Economic Development Cabinet Committee.
75. Ultimately, I am not satisfied that disclosure of *the documents* would, on balance, be contrary to the public interest.
76. Accordingly, I am not satisfied that the documents are exempt under clauses 7(1)(c), 9(1), 13(1)(b) or 16(1)(iv) with 16(1)(b).
77. My view is based on the particular facts of these applications. I can conceive of instances where disclosure of particular minutes and agendas of the Board might be

³⁰ <http://economicdevelopmentboardsa.com.au/purpose-statement/> accessed on 25 May 2015 and 11 January 2016.

³¹ In my view, the significance of these factors is heightened given the likelihood of Board members being categorised as 'public officers': *A v C* (2015) 123 SASR 477; *A v C* [2015] SASC 35 (4 March 2015).

³² <http://economicdevelopmentboardsa.com.au>; <http://www.adelaidenow.com.au/news/south-australia/half-of-sas-economic-development-board-replaced-with-new-faces/story-fni6uo1m-1226923281033>; http://dpc.sa.gov.au/sites/default/files/pubimages/documents/boards-committees/BC_AR-2013.pdf accessed on 25 May 2015 and 11 January 2016.

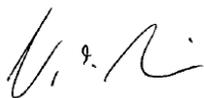
³³ <http://economicdevelopmentboardsa.com.au/purpose-statement/> accessed on 25 May 2015 and 11 January 2016.

contrary to the public interest. Each application for access will need to be assessed on its facts.

Determination

78. In light of my views above:

- I am satisfied that document 2 is exempt under clause 1(1)(e)
- I consider it practicable to release document 2 after deleting item 8.b.b, in accordance with section 20(4) of the FOI Act
- I vary the agency's determination with respect to application 1 to enable document 2 to be released in part (that is, after deleting item 8.b.b), and documents 3 to 6 to be released in full.
- I reverse the agency's determination with respect to application 2. Documents 7 to 14 should be released in full.



Wayne Lines
SA OMBUDSMAN

15 February 2016

APPENDIX 1 - 2014/08449; 2015/00462

Procedural steps - Application 1

Date	Event
29 July 2014	The agency received the FOI application dated 25 July 2014.
29 August 2014	The agency failed to determine the application within the 30 day period required by the FOI Act, ¹ and is deemed to have refused access to the documents. ²
30 September 2014	The agency received an application for internal review dated 26 September 2014.
7 October 2014	Although the application was deemed refused, the agency issued a notice of determination in response to the application for access.
8 October 2014	The applicant withdrew the internal review application dated 26 September 2014.
15 October 2014	The agency confirmed the determination following internal review.
16 October 2014	The agency received a further application for internal review dated 15 October 2014.
27 October 2014	The Ombudsman received the applicant's request for external review dated 23 October 2014.
3 November 2014	The Ombudsman advised the agency of the external review and requested submissions and documentation.
18 November 2014	The agency provided the Ombudsman with its submissions and documentation.
13 March 2015	The agency provided an additional document to the Ombudsman during a meeting.
3 June 2015	The Ombudsman issued his provisional determination and provided copies to the agency and the applicant.
9 June 2015	The Ombudsman advised the agency and the applicant of a typographical error in his provisional determination by letter.
10 June 2015	By email, the applicant's office advised that the applicant did not have any submissions to make in response to the provisional determination.

¹ *Freedom of Information Act 1991*, section 14(2).

² *Freedom of Information Act 1991*, section 19(2).

15 July 2015	Ombudsman SA received preliminary submissions from the agency by letter dated 15 July 2015.
21 July 2015	The Ombudsman received undated written submissions from the agency.
	The Ombudsman and Senior Legal Officer met with Mr Raymond Spencer of the agency, at the agency's request, during which Mr Spencer made oral submissions.
7 August 2015	Ombudsman SA received further written submissions from the agency by letter dated 6 August 2015, along with supporting documentation.
	Ombudsman SA received an additional supporting document from the agency by email dated 7 August 2015.
18 January to 10 February 2016	Ombudsman SA undertook consultations with interested parties.

APPENDIX 2 - 2014/08449; 2015/00462

Procedural steps - Application 2

Date	Event
14 October 2014	The agency received the FOI application dated 10 October 2014.
14 November 2014	The agency failed to determine the application within the 30 day period required by the FOI Act, ³ and is deemed to have refused access to the documents. ⁴
4 December 2014	Although the application was deemed refused, the agency issued a notice of determination in response to the application for access.
17 December 2014	The agency received an application for internal review dated 15 December 2014.
22 December 2014	The agency confirmed the determination following internal review.
20 January 2015	The Ombudsman received the applicant's request for external review dated 19 January 2015.
21 January 2015	The Ombudsman advised the agency of the external review and requested submissions and documentation.
27 February 2015	The agency provided the Ombudsman with its submissions and documentation.
13 March 2015	The agency provided an additional document to the Ombudsman during a meeting.
3 June 2015	The Ombudsman issued his provisional determination and provided copies to the agency and the applicant.
9 June 2015	The Ombudsman advised the agency and the applicant of a typographical error in his provisional determination by letter.
10 June 2015	By email, the applicant's office advised that the applicant did not have any submissions to make in response to the provisional determination.
15 July 2015	Ombudsman SA received preliminary submissions from the agency by letter dated 15 July 2015.
21 July 2015	The Ombudsman received undated written submissions from the agency.
	The Ombudsman and Senior Legal Officer met with Mr Raymond

³ *Freedom of Information Act 1991*, section 14(2).

⁴ *Freedom of Information Act 1991*, section 19(2).

	Spencer of the agency, at the agency's request, during which Mr Spencer made oral submissions.
7 August 2015	Ombudsman SA received further written submissions from the agency by letter dated 6 August 2015, along with supporting documentation.
	Ombudsman SA received an additional supporting document from the agency by email dated 7 August 2015.
2 February to 10 February 2016	Ombudsman SA undertook consultations with interested parties.