

Determination

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

Applicant	Mr Dan van Holst Pellekaan MP
Agency	Minister for Mineral Resources and Energy
Ombudsman reference	2015/10743
Agency reference	MMRE15D00305
Applicant reference	FOI2015/117
Determination	The determination of the agency is reversed.

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 documents received from Alinta Energy relating to the potential closure of their Northern Power Station at Port Augusta.

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.

Provisional determination

4. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 28 July 2016. I informed the parties, including the interested party, that subject to my receipt and consideration of submissions from the parties I proposed to reverse the agency's determination.
5. Following a request for an extension of time, on 2 September 2016 the agency provided submissions in response to my provisional determination. I did not receive submissions from the applicant or the interested party in response to my provisional determination, however by letter dated 2 September 2016 the applicant sought to draw the Ombudsman's attention to a report, published in The Australian newspaper on 24

August 2016, which made reference to documents obtained by The Australian purporting to 'show Alinta took a transition plan to the government on May 6 last year, warning that without financial support, a transition to closure would be "difficult". In his letter, the applicant asked the Ombudsman to:

investigate to determine if [the agency] has classified documents exempt for my application and released the same documents to another applicant. If so, please advise if there are acceptable policies and practices in place to ensure Freedom of Information requests are processed appropriately and compliant with the Freedom of Information Act.

6. On 15 September 2016 my Officer advised the applicant by email that, on the information before the Ombudsman, the report in The Australian did not appear to refer to the document that is the subject of the present external review.

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
8. 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 the agency has refused access on the basis of clause 7(1)(c). I set out clause 7 in its entirety as follows:

7 - Documents affecting business affairs

- (1) A document is an exempt document—
- (a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other persons; or
 - (b) if it contains matter—
 - (i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and
 - (ii) the disclosure of which—
 - (A) could reasonably be expected to destroy or diminish the commercial value of the information; and
 - (B) would, on balance, be contrary to the public interest; or
 - (c) if it contains matter—
 - (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
 - (ii) the disclosure of which—
 - (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
 - (B) would, on balance, be contrary to the public interest.
- (2) A document is not an exempt document by virtue of this clause merely because it contains matter concerning the business, professional, commercial or financial affairs of the agency or other person by or on who behalf an application for access to the documents is made.
- (3) A document is not an exempt document by virtue of this clause if it is a contract entered into by the Crown or the agency after the commencement of this subclause.

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

9. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
10. 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

11. The agency identified one document within the scope of the application which it refused access to in full.

Consideration

12. The agency claims that the document is exempt pursuant to clause 7(1)(c). Its determination provides as follows:

One document was identified as within scope of your application. Consequently, in accordance with Clause 7(1)(c) of Schedule 1, I have determined access is refused on the basis that the document contains matters which consists of information concerning the business affairs of Alinta Energy, the disclosure of which would be contrary to the public interest.

13. I remind the agency of its obligations, as set out in section 23(2)(f) of the FOI Act, that if a determination is to the effect that access to a document is refused, the notice must specify the reason for the refusal including (relevantly in this matter) the reasons why disclosure of the document would be contrary to the public interest and the findings of any material questions of fact underlying the reasons for refusal. The agency did not provide adequate reasons for its decision. It indicated that it considered the information to concern the business affairs of Alinta Energy Finance Pty Ltd (**Alinta**) however it did not indicate whether it considered the remaining elements of clause 7(1)(c) to be satisfied. The determination of the agency does not comply with the requirements of section 23(2)(f).
14. The agency did not initially make any submissions to me in support of its determination on review. Nor did the agency consult with Alinta, as an interested party, as to its view on the disclosure of the information in the document. Section 39(10) of the FOI Act provides that I must not make a determination to the effect that access is to be given to a document which may affect business affairs unless I have taken steps as are reasonably practicable to obtain the views of any interested person as to whether the document is an exempt document.
15. My Office wrote to Alinta by letter dated 26 February 2016 and sought submissions as to whether the document is an exempt document pursuant to clause 7(1)(c).
16. By email dated 18 March 2016, the Executive Director - External Affairs of Alinta submitted that:

The disclosure of this information could reasonably be expected to have an adverse interest on our business affairs. Additionally, if disclosed, it would prejudice the future supply of similar or related information to the Government. In our view this would be contrary to the public interest.
17. Having read the document I am satisfied that the document contains information concerning the business, professional, commercial or financial affairs of Alinta.

However, Alinta has not provided me with any evidence as to the way in which disclosure of the document could reasonably be expected to have an adverse impact on its business affairs.

18. Similarly, Alinta has not provided me with any evidence as to the way in which disclosure of the information could reasonably be expected to prejudice the future supply of similar or related information to the Government.
19. In response to my provisional determination, by letter dated 2 September 2016 the agency advised that it maintained its position that the document is an exempt document pursuant to clause 7(1)(c). The agency submitted, *inter alia*, that:
 - even if, as foreshadowed in my provisional determination, I am satisfied that Alinta has not provided me with any evidence to support its assertion that disclosure of the document could reasonably be expected to have an adverse impact on its business affairs, a determination to release the document ‘should not be made over such an assertion’
 - Alinta’s submission that disclosure could reasonably be expected to have an adverse impact on its business affairs is ‘in and of itself’ evidence that disclosure could also reasonably be expected to prejudice the future supply of such information to the Government
 - the document contains information, provided on a voluntary basis, relating to decisions of the Board of Alinta regarding ongoing investment in its electricity operations in South Australia, including the closure of operations in South Australia to be completed over the coming years
 - as Alinta has voluntarily provided ‘sensitive information’ relating to its business affairs and has indicated that disclosure of that information would prejudice the future supply of such information, ‘it is clear that [Alinta] is unlikely to provide such information again’
 - other businesses will be unlikely to voluntarily supply information regarding their business affairs, and in particular their board deliberations on capital investment operations in South Australia, ‘in circumstances where the release of such information has the potential to impact on their business affairs and there is a risk it will be subsequently released’
 - such a situation will in turn undermine business confidence and negatively affect the flow of vital business-related information to the Government
 - the public interest would not be served by the release of the document, and there is a greater public interest in not releasing the document insofar as its release would threaten the future supply of similar information and thereby deprive the Government of information necessary to ‘make informed decisions and respond to emerging issues in a timely fashion.’
20. From the outset, I must say that I am somewhat troubled by the agency’s submission that an interested party’s assertion that release of information could reasonably be expected to impact on its business affairs or prejudice the future supply of such information should be determinative, in and of itself, of the merit of the underlying claim. In my view, this submission betrays a fundamental misunderstanding of the consultation requirements within the FOI Act.

21. Nevertheless, I accept that there may be situations where, on an agency's own analysis, and based on the evidence before it, a claimed exemption applies notwithstanding an interested party's failure to properly articulate the evidence supporting that claim.
22. I am not persuaded that this is such a situation. In particular, I note that I have still received no evidence, either from the agency or Alinta itself, to support Alinta's claim that disclosure of the document could reasonably be expected to have an adverse impact on its business affairs. Having carefully assessed the information contained within the document against the information already in the public domain,² I am not satisfied that there are real and substantial grounds to suspect that disclosure of the document, which is largely confined to Alinta's stated position on 22 January 2015 regarding its Flinders assets, will have an adverse impact on Alinta's business affairs.
23. I am similarly not persuaded that there are real and substantial grounds to suspect that disclosure of the document will prejudice the future supply of such information to the Government. Although I accept the agency's submissions concerning the importance of effective and timely communications between the Government and businesses operating within South Australia, I am not satisfied that the information contained within the document is sufficiently sensitive such that Alinta or other businesses would be likely to abstain from voluntarily supplying similar information in the future. In this regard, I note that there is no information within the document pertaining to the deliberations of the Board of Alinta that a reasonably informed individual would not have anticipated to find.
24. On the information before me, I am of the view that the criteria set out in clause 7(1)(c)(ii)(A) has not been met. That is, that either:
 - the disclosure of the document could reasonably be expected to have an adverse effect on Alinta's business affairs, or
 - the disclosure of the document could reasonably be expected to prejudice the future supply of such information to the Government or to an agency.
25. For completeness, I turn now to consider whether the criteria set out in clause 7(1)(c)(ii)(B) has been met. That is, that disclosure of the document would, on balance, be contrary to the public interest.
26. In the event that I found that disclosure of the document would be likely to have an adverse impact on the business affairs of Alinta or prejudice the future supply of information to the Government, this would represent a public interest factor favouring non-disclosure.
27. Public interest factors favouring disclosure would include meeting the objects of the FOI Act including promoting openness in government and accountability of Ministers of the Crown, and facilitating more effective participation by members of the public in the processes involved in the making and administration of laws and policies.
28. I note that the agency in its submissions to me, whilst acknowledging these considerations, has submitted that 'it is not the case that the public interest would be served this way in the present case.'
29. I am not persuaded by these submissions. I note that the document contains information, submitted by Alinta to the Government, concerning Alinta's plans, as of 22

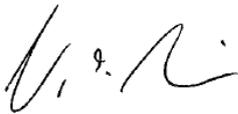
² See, e.g., 'Closure of Flinders Operations', Alinta Energy, <<https://alintaenergy.com.au/about-us/power-generation/flinders-operations>> last accessed 13 September 2016; 'Flinders Operation Announcement', Alinta Energy, 11 June 2015 <<https://alintaenergy.com.au/about-us/news/flinders-operations-announcement>> last accessed 13 September 2016.

January 2015, for its Flinders operations. At the time of the applicant's request for information from the agency, Alinta had already announced its decision to close these operations,³ and at the time of the agency's submissions in response to my provisional determination Alinta had given effect to that closure.⁴ This decision had an impact upon hundreds of Alinta employees, as well as residents within the surrounding communities. Those affected by the decision to close Alinta's Flinders operations have a clear interest in understanding the circumstances leading up to that decision.

30. The agency has submitted that the public interest is in this case better served by the Government continuing to receive similar information relating to capital investment in South Australia. While I accept that this is a relevant factor for consideration in determining whether disclosure would, on balance, be contrary to the public interest, as I have already found that disclosure of the document would not be likely to prejudice the future supply of similar information to the Government, I am not satisfied that this is a consideration to be weighed in the present case.
31. Accordingly, I am satisfied that, on balance, it would not be contrary to the public interest to disclose the document.

Determination

32. In light of my views above, I reverse the agency's determination.



Wayne Lines
SA OMBUDSMAN

19 September 2016

³ 'Flinders Operation Announcement', Alinta Energy, 11 June 2015 <<https://alintaenergy.com.au/about-us/news/flinders-operations-announcement>> last accessed 13 September 2016.

⁴ 'Closure of Flinders Operations', Alinta Energy, <<https://alintaenergy.com.au/about-us/power-generation/flinders-operations>> last accessed 13 September 2016.

APPENDIX

Procedural steps

Date	Event
5 May 2015	The agency received the FOI application dated 7 May 2015
8 June 2015	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
3 December 2015	The agency received the internal review application dated 25 November 2015.
14 December 2015	The agency confirmed the determination.
17 December 2015	The Ombudsman received the applicant's request for external review dated 17 December 2015.
21 December 2015	The Ombudsman advised the agency of the external review and requested submissions and documentation.
20 January 2016	The agency provided the Ombudsman with its submissions and documentation.
26 February 2016	Ombudsman SA consulted with the interested party Alinta.
18 March 2016	Submission of Alinta received by Ombudsman SA.
28 July 2016	Provisional determination provided to the parties.
19 August 2016	The agency requested an extension of time to provide submissions on the Ombudsman's provisional report and the Ombudsman granted an extension of time until 2 September 2016.
2 September 2016	The agency provided the Ombudsman with its submissions in response to the Ombudsman's provisional determination.
2 September 2016	The applicant made additional enquiries to the Ombudsman.

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

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