

Determination

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

Applicant	Ms Vickie Chapman
Agency	Minister for Planning
Ombudsman reference	2015/05252
Agency reference	15/0404
Applicant reference	2015-09
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 correspondence between the Office of the Minister for Planning and Urban Development and Walker Corporation, including but not limited to representatives of that company acting as Lobbyists, for the period 2010 to present.

Background

2. For ease of reference, procedural steps relating to the application and the external review 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. The Deputy Ombudsman provided her tentative view about the agency's determination to the parties by her provisional determination dated 24 December 2015. She informed the parties that subject to her receipt and consideration of submissions from the parties she proposed to vary the agency's determination.
5. The applicant advised me it did not intend to provide any submission in response to the provisional determination.
6. The agency advised me it did not intend to provide any submission in response to the provisional determination.

7. Clayton Utz, on behalf of the Walker Corporation Pty Ltd (**Walker/the third party**), responded on 19 February 2016 providing extensive submissions which included submissions about my Office's external review process. I have considered all of the submissions and note that the third party maintains its objection to release of the document on the basis of the business affairs exemption, and raises the following points about the Deputy Ombudsman's provisional determination:
- a reliance upon the media as a source of evidence to establish facts upon which to base a decision is wrong, accordingly there is no evidence available to the Ombudsman that there is any binding written development agreement between the Government and Walker for the carrying out of the development
 - given there is no binding written development agreement relating to the proposed development, the Government could elect to deal with other parties about such development and as such the document continues to contain information that is of commercial value to Walker and/or concerns Walker's business and commercial affairs
 - in the absence of a binding written development agreement between Walker and the Government, the document continues to concern a significant commercial development which has been, and remains, the subject of complex negotiations between Walker and the Government over several years
 - in the absence of a binding written development agreement between Walker and the Government, there is a serious public interest in not inhibiting frank communications between the Government and a developer such as Walker and those discussions should not be disclosed prematurely
 - the decision to enter into a binding written agreement with Walker, is a critical decision which will have to be made by the Government and for which the Government will have to take political responsibility, in the meantime, it is not in the public interest in any sense that free and frank communications between Walker and the Government, including antecedent discussions and negotiations, should be disclosed prematurely.

Relevant law

8. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
9. 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.
10. In this matter the agency has claimed that the document is exempt pursuant to clause 7(1)(b) and clause 7(1)(c) of Schedule 1 of the FOI Act. The clauses provide:

Clause 7(1)(b)

7(1) A document is an exempt document-

(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

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

(B) would, on balance, be contrary to the public interest.

Clause 7(1)(c)

7(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.

11. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
12. 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.

Issues in this review

13. The agency identified one (1) document within the scope of the application (**the document**).
14. The document comprises correspondence from Walker to the Honourable John Rau regarding the Adelaide Festival Centre Carpark Project.
15. It is noted that Walker on its website under news articles (dated 12 February 2014) announced that it had entered into an agreement with the State Government to develop the carpark.²
16. A further news article dated 19 March 2015 on Walker's website notes that:

Walker Corporation has committed \$600 million to revitalise the centre of Adelaide, with the development of a brand new Festival Plaza, featuring a combination of dynamic entertainment and commercial amenities for both locals and tourists.³
17. An article published in *The Advertiser* on 12 December 2015 states that draft plans for the Festival Plaza redevelopment have been formally lodged with the Development Assessment Commission. The article goes on to state that Walker has 'also committed \$40 million for works on the public plaza as part of a \$430 million plan'.⁴
18. In its original determination, the agency refused access to the document on the basis that the document was exempt as a document affecting business affairs pursuant to clause 7(1)(b) and clause 7(1)(c). Following internal review, the agency confirmed its refusal under both clause 7(1)(b) and 7(1)(c).
19. The document in its entirety is in issue in my review.

² See: <http://www.walkercorp.com.au/news/article/?view=153&returnPage=3> (at 2 December 2015).

³ See: <http://www.walkercorp.com.au/news/article/?view=195> (at 2 December 2015).

⁴ Sheradyn Holderhead, 'Plans get moving for future Plaza', *The Advertiser* (Adelaide), 12 December 2015, 8.

20. I must consider whether the agency has justified its determination to refuse access to the document on the basis of clause 7(1)(b) and clause 7(1)(c).

Consideration

Agency's submissions

21. In the initial notice of determination dated 1 May 2015, the agency included the following in support of its claim:
- the document contains information which is of commercial value to Walker and concerns its business affairs
 - disclosure could reasonably be expected to have an adverse effect on the affairs of Walker
 - the document concerns a significant commercial development between the Government and Walker which is yet to be finalised.
22. The agency acknowledged the public interest factors in favour of release of information including meeting the objects of the Act and promoting public participation in government. However, the agency indicated this was outweighed by the public interest in:
- developers including Walker having the ability to engage frankly with Government before arrangements are finalised
 - a reasonable expectation that release of the document could harm the interests of Walker.
23. Following internal review, on 23 June 2015 the agency confirmed the original determination, that the document was exempt on the basis that it was a document affecting business affairs.

Third party submissions

24. By letter dated 21 April 2015, Clayton Utz on behalf of Walker wrote to the agency objecting to the release of the document on the following basis:
- a. the document contains information which is of commercial value to its client and, or, concerns its client's business and commercial affairs
 - b. disclosure of the document could reasonably be expected to destroy or diminish the commercial value of the information and, or, is likely to result in an adverse effect on its client's affairs
 - c. the document contains a significant commercial development negotiation between Walker and the Government over several years
 - d. while the project has been announced in the media, the legal documentation recording the project's arrangements is not yet finalised⁵
 - e. it is in the public interest that the document not be released while finalisation of the arrangements with the Government remain pending.
25. Further to its correspondence of 21 April 2015, Clayton Utz on behalf of Walker made a number of submissions to my Office on 19 February 2016 in relation to the provisional determination, outlining the basis upon which they disagreed with the determination.
26. I note one of the submissions of the third party is that in the absence of a binding written development agreement between Walker and the Government in relation to the development, the Deputy Ombudsman could not conclude that the finalisation of the arrangement has occurred.

⁵ Letter from Clayton Utz to Ms Wilhelmina Chapman, Freedom of Information Officer, Attorney General's Department, 21 April 2015.

27. I acknowledge submissions made on behalf of the third party in relation to there being a lack of evidence before me upon which to base a decision to establish the status of an agreement between Walker and the Government. I note that the agency has not made submissions in relation to the Deputy Ombudsman's provisional determination. I note also the specific articles referred to in the provisional determination which are located on Walker's website:
- a. Walker on their website under news articles dated 12 February 2014 announced, *'Walker Corp chairman Lang Walker said yesterday that the company had worked on the project for 18 months and was "delighted" to enter into an agreement to develop the Carpark'*.⁶
 - b. Walker on their website under news articles dated 19 March 2015 announced, *'Walker Corporation has committed \$600 million to revitalise the centre of Adelaide, with the development of a brand new Festival Plaza...We look forward to working closely with the government to develop this very exciting project, which has taken three years to attain approval, concluded Mr Walker'*.⁷
28. Further information related to the development located on Walker's website provides:
- 'this \$1 billion project will see the delivery of a new Festival Plaza Square, reviving the heart of Adelaide city to create a destination that will become one of the world's most exciting public spaces...the project will commence early 2016 and is expected to be complete in 2018'*.⁸
29. From the above information a reasonable inference can be made that an agreement (whether it be a binding written development agreement or not) has been reached between Walker and the Government with development due to commence soon, if not already. Regardless, however, of whether or not there is a binding agreement between Walker and the Government, I am not satisfied that the document is exempt under clause 7(1)(c) for the reasons set out later in this determination.

Clause 7(1)(b)

30. The agency claims that the document is exempt under clause 7(1)(b). The following criteria must be satisfied for the exemption to apply:
- a. the document must contain information (other than trade secrets) that has a commercial value to any agency or person. The term 'commercial value' is not defined in the FOI Act, and should be accorded its ordinary meaning
 - b. disclosure of that information could reasonably be expected to destroy or diminish the commercial value of the information
 - c. the disclosure would, on balance, be contrary to the public interest.
31. Information has a commercial value to an agency or another person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged.⁹ Information may be valuable because it is important or essential to the profitability or viability of a continuing business operation.
32. I do not consider that the agency has been able to establish that the document contains information that has a 'commercial value'. The agency advised the applicant in their correspondence of 23 June 2015 that pursuant to section 20(4) of the FOI Act they had considered whether it was practicable to give access to a copy of the document from

⁶ See <http://www.walkercorp.com.au/news/festival-plaza-promised-46-5m> (at 11 March 2016).

⁷ See <http://www.walkercorp.com.au/news/2015/03/wlker-corporation-to-create-new-city-centre-in-adelaide> (at 11 March 2016).

⁸ See <http://www.walkercorp.com.au/commercial/festival-plaza/> (at 11 March 2016).

⁹ *Re Metcalf Pty Ltd and Western Power Corporation* [1996] WAICmr 23.

which the exempt matter had been redacted. Although the agency determined it was not practicable to delete the exempt matter from the document as to do so would render it unintelligible or useless, they did not specify which words of the document had a commercial value. Further, the agency did not explain how disclosure of the document might be expected to destroy or diminish the commercial value of the information.

33. Having considered the information provided by the agency it is my view that its disclosure could not reasonably be expected to destroy or diminish any purported commercial value of that information.
34. I now turn to consider on balance whether disclosure would be contrary to the public interest.
35. Having noted the above, I make the following observations:
 - since the agency's submissions it appears that the scope of the development has been finalised and development approval sought¹⁰
 - the thrust of the information in the document appears to be in the public domain
 - it appears that the information contained in the document reiterates the original Request for Proposal and what this involves
 - it appears that Walker had already, at the date of the document, commenced engagement with all stakeholders as part of the development.
36. Section 23(2)(f)(i) of the FOI Act provides that agencies must address the public interest test in an exemption clause and provide reasons why disclosure would, on balance, be contrary to the public interest. The agency must do more than assert that something adverse to the public interest will flow, any adverse effect must be identified. Further, merely showing that something adverse to the public interest will likely flow from the disclosure is not sufficient, the agency must show that on balance, the factors in the public interest against disclosure outweigh factors in favour of disclosure.¹¹ In doing so, an agency should always turn its mind to the objects of the FOI Act, to extend as far as possible, the rights of the public to obtain access to information held by the government. This issue was discussed in the Ombudsman's recent FOI audit.¹²
37. I note the agency has not made submissions in relation to considerations concerning the public interest, other than:

The public interest in non-disclosure includes that developers, including the Walker Corporation, should have the ability to engage frankly with Government before arrangements are finalised. It is reasonable to expect that release of the document could harm the interests of the Walker Corporation.
38. Although the agency has stated that there is a reasonable expectation that release of the document could harm the interests of Walker, the agency has not identified exactly how this is the case or how information contained in the document (or how the nature of the information) could harm the interests of Walker or prohibit them from engaging in frank discussions with government. I note a development application has been made to the Development Assessment Commission.¹³
39. Regardless, even if the information is commercially valuable, I am not satisfied that disclosure would be contrary to the public interest for the following reasons:

¹⁰ The agency in its submissions dated 1 May 2015 noted that the document contained a significant commercial development between Walker and the Government, which was yet to be finalised.

¹¹ *Iplex Information Technology Group Pty Ltd v Development of Information Technology Services SA* (1997) 192 LSJS 54, 70.

¹² Ombudsman SA, *An audit of state government departments' implementation of the Freedom of Information Act 1991 (SA)*, (May 2014), Part 7B, available at <http://www.ombudsman.sa.gov.au/wp-content/uploads/An-audit-of-state-government-departments-implementation-of-the-Freedom-of-Information-Act-1991-SA1.pdf>.

¹³ Holderhead, above n, 5.

- a. information shared between government and private contractors should be subject to the same degree of public scrutiny and accountability as information held solely by government
 - b. tendering processes and the decision making of government should be open to scrutiny so that government is held accountable for its decision making
 - c. there is a strong public interest in members of the public being aware of how public money is spent in order to promote transparency and accountability within government.
40. In this instance, I am of the view that the public interest in promoting openness in government outweighs the interests of the third party as claimed by the agency. Accordingly, I do not consider the document to be exempt pursuant to clause 7(1)(b).

Clause 7(1)(c)

41. For information to be exempt pursuant to clause 7(1)(c), the following criteria must be satisfied for the exemption to apply:
- a. the document must contain matter that consists of information (other than trade secrets or information that has a commercial value to any agency or any other person) that concerns the business, professional, commercial or financial affairs of any agency or any other person; and
 - b. disclosure of that information 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
 - c. disclosure of the information would, on balance, be contrary to the public interest.
42. The document contains information regarding the redevelopment of the Adelaide Festival Carpark and the Riverbank precinct and in my view, this information concerns Walker's business or commercial affairs pursuant to clause 7(1)(c)(i). However it is already in the public domain.¹⁴
43. Further, I am not satisfied that disclosure could reasonably be expected to prejudice the business affairs or prejudice the future supply of information between the third party and the government.¹⁵ Having regard to the objects of the *State Procurement Act 2004*¹⁶ and the government's adopted policies regarding procurement it is clear that there is an overriding interest in ensuring probity, accountability and transparency in the procurement process. 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 in the future as a result of the disclosure of such information, in particular in light of the government's adopted legislation and policies regarding procurement.
44. In any event, for the reasons set out above, I am not persuaded that the public interest test has been met. It is therefore my view that the document is not exempt under clause 7(1)(c).

Ombudsman Comment

45. The reasons provided by the agency in its notices of determination were, in my view, inadequate.
46. The FOI Act says that upon receipt of an access application, if an agency makes a determination to refuse access to the requested documents, it must give reasons in its notice of determination.¹⁷ Agencies must link the exemptions claimed to the actual

¹⁴ Holderhead, above n, 5.

¹⁵ In the Provisional Determination I erroneously referred to the 'agency' instead of the 'third party'.

¹⁶ *State Procurement Act 2004*, section 3.

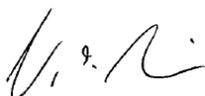
¹⁷ *Freedom of Information Act 1991*, section 23(2)(f).

contents of the documents, rather than make 'blanket' claims over the documents or merely cite the exemption clause(s) relied on by the agency.

47. It remains unclear from both the agency and the third party submissions what information in the document has a commercial value or how disclosure of the document could reasonably be expected to destroy or diminish the purported commercial value of that information.
48. The District Court has also made it clear that in recognition of the objects of the Act and under the FOI scheme generally, the 'principle role' of a government department (or agency) is as 'the custodian of documents'.¹⁸ In *Department of Planning and Local Government v Chapman*, the District Court said that in this role of custodian:
- ... the Department is subject to the rights of access conferred by the Act and charged with the function of deciding, upon receipt of an application, whether an exemption applies. ...the role of the Department under the Act has no element of entitlement to the exclusive retention of any document or of interest in the non-disclosure of any document. An individual agency such as the Department is not charged, under the Act, with the representation of the public interest or the interest of the government of the day.¹⁹
49. In addition, I remind the agency that it must engage in a 'public interest balancing process' in applying the public interest test.²⁰ Merely satisfying the initial criteria in an exemption clause with a public interest test under the Act, is not enough to satisfy the test that disclosures would, on balance be contrary to the public interest. Agencies should always turn their mind to the objects of the Act, to extend as far as possible, the rights of the public to obtain access to information held by the government.

Determination

50. In light of my views above, I reverse the agency's determination. The document is not exempt and is to be released to the applicant.



Wayne Lines
SA OMBUDSMAN

29 March 2016

¹⁸ *Ipex Information Technology Group Pty Ltd v Department of Information and Technology Services SA* (1997) 192 LSJS 54, 60-62; *Moore v The Registrar of the Medical Board* (2001) 215 LSJS 133, 147, in *Minister for Education and Child Development v Chapman* [2013] SADC 130, unreported (27 September 2013), [14].

¹⁹ [2012] SADC 120 (27 September 2012), [45].

²⁰ *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 70.

APPENDIX

Procedural steps

Date	Event
1 April 2015	The agency received the FOI application dated 30 March 2015.
1 May 2015	The agency determined the application.
11 May 2015	The agency received the internal review application dated 8 May 2015.
23 June 2015	The agency confirmed the determination.
8 July 2015	The Ombudsman received the applicant's request for external review dated 8 July 2015.
31 August 2015	The Ombudsman advised the agency of the external review and requested submissions and documentation.
21 October 2015	The agency provided the Ombudsman with its submissions and documentation.
24 December 2015	The Deputy Ombudsman notified all parties of her provisional determination.
11 January 2016	The applicant advised my Office that she did not intend to make any submissions in response to the provisional determination.
8 February 2016	The agency advised my Office that it did not intend to make any submissions in response to the provisional determination.
19 February 2016	Clayton Utz on behalf of the third party provided submissions.