

OmbudsmanSA

Determination

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

Applicant	Mr Casey Briggs
Agency	Adelaide Venue Management Corporation
Ombudsman reference	2019/07783
Agency reference	107/19
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:
 - Any combustibility reports produced in relation to the Adelaide Convention Centre building; and
 - Any document (including but not limited to text messages, emails, letters, minutes, calendar entries and notes) relating to cladding on the Adelaide Convention Centre building, since 1 July 2018.
2. By telephone on 12 September 2019, Ms Rebecca Puddy agreed on the applicant's behalf that all mobile telephone numbers be removed from the scope of the application for external review. Where I determine that documents are to be released in part or full, I am not authorising release of any mobile telephone number and such numbers should be redacted.

Background

3. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.
4. This application arises in the context of a government audit of Aluminium Composite Cladding (ACP), which when containing polythene in high levels, can be combustible.

Jurisdiction

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

Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
7. 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.
8. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
9. 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

10. The agency identified over 45 documents within the scope of the application. It did not identify all documents individually, and attachments to emails were treated as part of the emails themselves. These were substantive documents in themselves and therefore require individual consideration. I have therefore numbered these documents.
11. The documents that I have demarcated are:
 - document 7a is a letter to the agency
 - document 9a is attached to document 9
 - documents 11a and 11b, which are attached to document 11
 - document 12a, which is an email to Mr Kirchner dated 8 August 2018
 - document 12b, which is attached to document 12a
 - document 16a, which is an attachment to document 16
 - document 25a which is an attachment to document 25
 - documents 27a, 27b, 27c, 27d, 27e, 27f, 27g which are attachments to document 27
 - document 34a which is an attachment to document 34.
12. Among the documents I identified two duplicates. Document 9b is an incomplete copy of document 12a. Document 20a is a copy of 7a. I will not consider these two documents individually.
13. The agency by its determination released two documents and refused access to 58 documents.
14. Documents 1, 2, 3, 4, 5, 6, 7, 7a, 8, 9, 9a, 10, 11, 11a, 11b, 12, 12a, 12b, 13, 16, 16a, 17, 18, 19, 20, 21, 22, 23, 24, 25, 25a, 26, 27, 27a, 27b, 27c, 27d, 27e, 27f, 27g 28, 29, 30, 31, 32, 33, 34, 34a 35, 36, 37, 38, 39, 40, 41, 42, 43, and 44 are the documents in issue.

Provisional determination

15. I issued my provisional determination on 10 October 2019. I indicated that I was minded to vary the determination of the agency, providing access in full to the majority of the documents within the scope of the applicant's determination. My provisional

¹ Freedom of Information Act 1991, section 12.

determination largely accepted the relevance of the exemptions, but I provisionally determined that disclosure was not, on balance, contrary to the public interest.

16. The applicant contacted my Office on 14 October 2019 and informed my Legal Officer that he had no further submissions to make in response to my original provisional determination.
17. On 8 November 2019, the agency by its solicitor revised its position, contending that I should not determine to release information concerning the location of the ACP cladding.
18. On 11 November 2019, the agency provided me with a statement of a senior officer of the South Australia Police supporting the revised position of the agency.
19. On 22 November 2019, the agency provided a copy of the Attorney-General's assessment of the public interest in this matter. The Attorney-General's position was consistent with the revised position of the agency. I will address the implications of the Attorney-General's assessment below.
20. In its submissions of 8 November 2019, the agency contended that I should:
 - Confirm the determination of the Agency in relation to documents 4, 5, 27a, 27b, 27c, 27d, 27e, 27f, 27g and 44 that the documents are exempt from disclosure as set out in [the] provisional determination.
 - Vary the determination of the Agency in relation to documents 1, 2, 6, 7a, 8, 9, 11, 11a, 11b, 12, 12b, 13, 16, 17, 20, 21, 23, 24, 25, 25a, 28, 30, 34, 37, 40, 41 and 42 and release those documents in full as set out in [the] provisional determination.
 - Confirm the determination of the Agency that the whole of the documents 16a and 38 are exempt from disclosure pursuant to clauses 4(2)(a)(v), 7(1)(c), 9 and 15 of the Act.
 - Vary the determination of the Agency in relation to documents 3, 7, 9a, 9b, 10, 12a, 18, 19, 22, 26, 27, 29, 31, 32, 33, 34a, 35, 36 and 39 to release in part and determine that the parts referring to the location of cladding within the Adelaide Convention Centre are exempt pursuant to clauses 4(2)(a)(v), 7(1)(c), 9 and 15 of the Act.
 - Vary the determination of the Agency in relation to document 43 to release the document in part and determine that the parts relating to [matter claimed to be exempt] are exempt pursuant to clauses 4(2)(a)(v), 7(1)(c), 9 and 15 of the Act.
21. I note that the Attorney-General's assessment did not relate to documents referred to in the first, second and last paragraphs quoted above. The Attorney-General's assessment concluded that:

It is my assessment that the disclosure of documents 16a and 38 and the highlighted parts of documents 3, 7, 9a, 9b, 10, 12a, 18, 19, 22, 26, 27, 29, 31, 32, 33, 34a, 35, 36, 39 is contrary to the public interest and the public interest requires that the documents are exempt from disclosure.
22. The matter of particular concern of the agency's submissions and, implicitly, the Attorney-General's assessment is that which relates to the location of the ACP cladding onsite.
23. On 14 January 2020, I issued my revised provisional determination. In my revised provisional determination, I indicated that I proposed to uphold the Attorney-General's assessment in respect of information that would disclose the exact location of cladding on the buildings of the Adelaide Convention Centre, however I indicated that I otherwise considered that I had cogent reason to depart from the Attorney-General's views. In its response, the agency did not make submissions in response to my decision to do so.

24. In its submissions, the agency noted that I considered that documents 4, 5 and 43 exempt pursuant to clause 15, but not 44. It suggested that there was no material difference in the content of 43 and 44 for the purpose of balancing the public interest. On reconsideration, I agree.

Issues in this review

25. It is for me to decide whether or not the agency has justified its determination to refuse access to the documents in issue, or whether there is sufficient evidence before me from which I am able to be satisfied that all the elements of the clauses relied on by any interested party are established.²

Consideration

26. The agency determined at first instance (by its principal officer) that all documents were exempt pursuant to clause 15. However, the agency provided documents 14 and 15 to the applicant enclosed with its notice, which I consider reveals an actual determination to claim an exemption over all but those two documents. In a subsequent letter, purporting to be an internal review, the agency further claimed clause 7(1)(c) and clause 9 in respect of the remainder of the documents.³
27. In its revised position, put to me on 8 November 2019, the agency contended that it further relied upon clause 4(2)(a)(v).
28. All clauses above require that disclosure, on balance, be contrary to the public interest.
29. I do not consider that documents 1, 6, 9, 11, 11a, 11b, 12, 12b, 13, 16, 21, 25, 25a and 28 attract any exemption. Even from a cursory glance, I do not consider that these documents meet the threshold for any clause claimed. Therefore, I have not considered the public interest in disclosing these documents. I determine to vary the agency's determination so as to give access to these documents.

Endangering Security of a Building

30. In response to my provisional determination, the agency revised its position to claim clause 4(2)(a)(v) in respect of documents 16a and 38 in their entirety and parts of documents 3, 7, 9a, 9b, 10, 12a, 18, 19, 22, 26, 27, 29, 31, 32, 33, 34a, 35, 36, 39 and 43.
31. I will address 9b as 12a, since the former is an incomplete duplicate of the latter.
32. For the documents to be exempt pursuant to clause 4(2)(a)(v) they must contain matter the disclosure of which could be reasonably expected to endanger the security of a building, structure or vehicle. Disclosure must also, on balance, be contrary to the public interest.
33. I consider that the phrase 'could reasonably be expected' requires an objective assessment of whether it is reasonable, as opposed to irrational, absurd or ridiculous to expect that disclosure would have the effect anticipated.⁴ This expectation must be based on reason and not be 'fanciful, far-fetched or speculative'.⁵

² *Re Pope and Queensland Health* (1994) 1 QAR 616,[17].

³ I note that the initial determination of the agency, on 23 July 2019, was made by its principal officer and therefore it was not eligible for internal review. The purported review by the agency's chief financial officer is not a determination. I have taken the CFO's letter to have the same effect as submissions.

⁴ *Ipex Information Technology Pty Ltd v Department of Information Technology Services SA* [1997] 192 LSJS 54, 63-64.

⁵ *Konieczka v South Australia Police* [2006] SADC 134 at [14].

34. In *Re Herbert and Ministry of Housing*,⁶ the WA Information Commissioner considered that disclosure of house plans could reasonably be expected to endanger the security of that property by facilitating burglaries. Whereas burglary rather than another offence was the concern in that case, I consider it to be relevant and persuasive.
35. In my view, security means protection of both the building itself and the building's ability to protect its contents or to exclude intruders, which is of concern in *Re Herbert*.
36. The matter that the agency and the Attorney-General have claimed exemption over includes references to the specific buildings containing ACP cladding and maps and charts denoting the location of the ACP cladding on the building. The distinction between individual buildings and specific locations on those buildings is significant, for reasons I give below.
37. I consider that the statement provided by South Australia Police, taken in isolation, could lead the agency to reasonably expect that disclosing information about the location of the ACP cladding could cause danger to the security of the affected building or buildings of the Adelaide Convention Centre. However, if information about its location already exists in the public domain, then it cannot be reasonable to expect that further disclosure of what is already available could endanger the security of the building.
38. I consider that both 16a and 38 contain matter concerning the precise location of the cladding. Such matter is the substance of these documents.
39. In two letters released to the applicant by the agency in its initial determination (documents 14 and 15), it is stated:

A Department of Planning, Transport and Infrastructure (DPTI) state-wide audit of buildings clad with aluminium composite panels (ACPs) has identified that the Adelaide Convention Centre (ACC) West Building contains aluminium composite panelling. ...[The agency is] conducting a Fire Engineering Study to remodel the performance solutions applied to the ACC west building giving due consideration to the additional fire load presented by the ACP.

40. I note that in its revised position, the agency understandably does not contest these documents, since they were released at first instance.
41. In a news article published on the Australian Broadcasting Corporation website and co-authored by the applicant, reference was made to the above letters and it was stated (I do not comment on its correctness):

A list outlining a dossier of briefings and emails identified through the Freedom of Information process shows the Government became aware of a "potential issue" with panelling used on the central and west buildings in July 2018.

...

In a statement, the MFS confirmed the presence of "black core" cladding on the Convention Centre, but stressed that the material was not on all of the building.

Cladding that has a thin layer of aluminium over a "black core" is typically made of high-density polyethylene that is black in colour.⁷

⁶ *Herbert and Ministry of Housing, Re* [2000] WAICmr 41 at [19] - [22].

⁷ Rebecca Puddy and Casey Briggs, 'Legal threat amid concerns over Adelaide Convention Centre cladding', *Australian Broadcasting Corporation* < <https://www.abc.net.au/news/2019-08-19/concerns-over-adelaide-convention-centre-aluminium-cladding/11370800> >, dated 19 August 2019, viewed on 12 February 2012.

42. It is not a reasonable expectation to contend that disclosure of content identifying the building or buildings of concern could endanger the Convention Centre, since such information has already found its way into the public domain, in part, by the agency's own doing. Any security value of maintaining secrecy about this has been lost.
43. In light of this, I consider that clause 4(2)(a)(v) does not apply to any part of documents 3, 9a, 12a (including 9b), 18, 29, 31, 32, 33, 34a, 35, 36, 36 and 39. It also does not apply to document 43.
44. Concerning document 7, my view is that the name of the building or buildings is not exempt but that the further details about where ACP cladding might be on those buildings is exempt. Concerning document 10, the content covered by the first redaction is not exempt but the content covered by the second redaction is exempt pursuant to clause 4(2)(a)(v).
45. I consider that documents 16a and 38 contain matter (not already in the public domain), the disclosure of which could reasonably be expected to endanger the security of a building or buildings. Further I consider that the content proposed to be redacted in documents 19, 22, 26 and 27 is beyond the information available in the public domain and its disclosure could reasonably be expected to endanger the security of the building or buildings. I therefore consider that these documents meet the threshold of exemption under clause 4(2)(a)(v).

Internal Working Documents

46. The agency also submits that the documents are exempt pursuant to clause 9 of Schedule 1 of the FOI Act. I have considered the agency's revised position in arriving at my view below.
47. The scope of clause 9(1)(a) is wide, particularly given the words 'that relates to'.
48. The 'opinion, advice or recommendation' must have been obtained, prepared or recorded, or the 'consultation or deliberation' must have taken place, 'in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency'.
49. Aurecon has been engaged to advise the agency and the State Government about the cladding and recommend a solution. The decision for the State Government and the agency will be what appropriate course of action is required to address the safety and property risk arising from the suspect cladding, if any.
50. Having considered the contents of the documents in issue, I am satisfied that documents 2, 3, 7, 7a, 8, 10, 12a, 16a, 17, 18, 19, 20, 22, 24, 26, 27, 29, 30, 31, 32, 33, 34, 34a, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44 contain matter that relates to:
 - opinions, advice and recommendation obtained; and/or
 - consultation or deliberations that took place, in the course of, or for the purposes of, the agency's decision-making functions with respect to the cladding.
51. I therefore consider that most documents that passed between Aurecon and the agency are internal working documents pursuant to clause 9(1)(a).
52. I also consider that numerous documents between the agency and other government agencies contain 'deliberation' which took place in the course of or for the purpose of the above decision-making function, either about the cladding issue or the associated decisions.

53. I have considered documents 27-27g separately and conclude that, of these documents, only document 27 is properly characterised as an internal working document. Documents 27a to 27g each lack the character of 'consultation or deliberation' in the course of, or for the purposes of, the decision making function of the government or the agency. They were simply attached to document 27. Further, documents 27a, 27b, 27c, 27d, 27f and 27g merely consist of factual material. I consider documents 27-27g to have met the requirements of clause 15(a) and therefore will address whether disclosure of the same would be contrary to the public interest later in this determination.

Whether the documents relate to the agency's Business Affairs

54. To invoke clause 7(1)(c) three requirements must be met. First, the document must contain matter *concerning* the business, professional, commercial or financial affairs of the agency, or another person. Second, clause 7(1)(c) requires that disclosure of the matter could reasonably be expected to have *an adverse effect on* those affairs (or the future supply of the information to the government). Third, disclosure must, on balance, be contrary to the public interest.
55. 'Business affairs' has been held to mean activities carried out with a view to making a profit, and not just affairs derived from or to do with business. The Queensland Information Commissioner has 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).⁸
56. The relevant provision under the now repealed Queensland legislation considered by the Information Commissioner mirrored clause 7(1)(c).
57. 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'.⁹
58. In considering the meaning of 'business affairs' under clause 7(1)(c), I adopt these views.
59. While accepting that the agency does carry out a business, I do not accept that the documents in question concern the business, professional, commercial or financial affairs of the agency. Rather they are predominantly about the review of the building's fire risk and fire safety systems. The question of whether the documents *concern* the business, professional or financial affairs of the agency is distinct from the question of whether disclosure could be reasonably expected to have an adverse effect on those business affairs. This distinction is particularly important for my views expressed in regards to clause 15. I have concluded that while the documents do not concern the business, professional, financial or commercial affairs of the agency, their disclosure may be reasonably expected to adversely affect the agency's property interests (the marketability of the building) to a significant degree.

⁸ *Stewart and Department of Transport* (1993) 1 QAR 227, [103].

⁹ *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).

60. Specifically, the agency has a stewardship function (to manage and operate certain public building facilities) and a commercial development function among other things.¹⁰ I consider that ensuring the fire safety of the Adelaide Convention Centre's cladding to be correctly characterised as arising from the agency's stewardship of the venue, rather than as being beneficial to its business enterprises. This is supported by the multi-agency and whole-of-government response to cladding concerns. For this reason, I do not consider that the documents concern the business, professional, commercial or financial affairs of the agency.
61. As a result, I consider that only documents 4, 5 and 43 concern the business, professional, commercial or financial affairs of the agency consistent with clause 7(1)(c). It is the purpose of those documents and the relationship of the agency to the third party that makes the content of the documents concern the business affairs of the agency. However, I have noted that disclosure of the same could not be reasonably expected to have an adverse effect on those business, professional, commercial or financial affairs (see paragraph 100). I therefore have considered them under clause 15.
62. It is important to note that had I considered that the other documents did concern the business affairs of the agency, I would still have considered that disclosure of the documents was not, on balance, contrary to the public interest.
63. I now consider whether disclosure of documents 4, 5 and 43 could reasonably be expected to have an adverse effect on the agency or prejudice the future supply of information to the agency.
64. The term 'could reasonably be expected' appears in both clause 7(1)(c) and clause 15 relating to the words 'to have an adverse effect' on an agency's business affairs or 'to have a significant adverse effect' on the agency's property or financial affairs respectively.
65. Regarding the phrase 'could reasonably be expected to have an adverse effect', the District Court has commented that:
- We are in the field of predictive opinion. The question is whether there is a reasonable expectation of adverse effects... that is not fanciful, imaginary, or contrived, but rather is reasonable, that is to say based on reason, namely 'agreeable to reason: not irrational, absurd or ridiculous'...¹¹
66. It will be sufficient:
- if any adverse effect is established... However, it must be something which can be properly categorized as an adverse effect and not something de minimus [sic] that it would be properly regarded as inconsequential... It will be sufficient if the adverse effect is produced by that document in combination with other evidence which is before the Court on appeal.¹²
67. The reasonably expected adverse effect must be upon 'those affairs' that the documents concern. In this case, I do not consider that the disclosure of documents 4, 5 or 43 could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs to which those documents relate.

¹⁰ *Public Corporations (Adelaide Venue Management Corporation) Regulations 2013* r 13. I note that the corporation is a subsidiary of the Minister (per regulation 5) that may pay dividends.

¹¹ *Ibex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54, applying *Re Actors Equity Association of Australia* (No 2) (1985) 7 ALD 584, 590. See also, *State of South Australia (Department of Planning, Transport & Infrastructure) v the Hon Robert Brokenshire MLC* [2015] SADC 68 (unreported, Judge McIntyre, 1 May 2015), [36].

¹² *Ibex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54, 65.

68. Neither do I consider that disclosure could reasonably be expected to prejudice the future supply of information to the agency, when it is the agency's own information.

Whether there are Property or Financial Interests

69. For clause 15 to be claimed, some property or financial interests must be identified, which it is reasonably expected could be significantly adversely affected. In this case, I consider that the interest identified by the agency is a property interest.
70. The agency in its determination of 23 July 2019 and its letter of 13 August 2019, claimed the following 'property or financial interests' of the State or agency:
- potential litigation against builders and insurance implications
 - the risk of damage to the building itself from damage
 - marketability of the Adelaide Convention Centre
71. In *Re Hart and Deputy Commissioner of Taxation*,¹³ the Commonwealth Administrative Appeals Tribunal held that information about the respondent's process for recovery of debts which might have prejudiced the ability of the Commonwealth to enforce its recovery of taxation debts was not a financial interest.
72. In particular the Tribunal stated:
- Although the Commonwealth is generally interested in the amount of revenue it collects through the tax system, that is not the same thing as a financial interest in the sense intended by the section. Revenue collection is a process, and one does not have an interest in a process. To analogise, one does not have a financial interest in one's employment, even though it yields revenue that might be deposited in the bank. One has a financial interest in the contents of that bank account, or in any investments that are purchased using that money (although they would also qualify as property interests), and in the income streams generated through those assets. I do not think the taxpayer is the same as an asset in that sense in which the Commonwealth has an interest.¹⁴
73. It continued:
- Section 39 apparently intends to provide the Commonwealth and its agencies with the same level of confidentiality that a private individual or business would enjoy in managing its own financial and property assets.¹⁵
74. In *Connolly and Department for Finance*, the Commonwealth was held to have a financial or property interest in the value and marketability of its uranium stockpile.¹⁶ Disclosure of this, the Tribunal held, could reasonably be expected to cause significant adverse effect to that interest because in a slim market for uranium in Australia, the information released would undermine the Commonwealth's competitiveness in selling it.
75. The first limb of the Commonwealth exemption provision dealt with in *Re Hart* and *Connolly* is similarly termed to clause 15. I adopt the Tribunal's views about the meaning of financial interests.
76. In respect of any anticipated potential legal proceedings, I do not accept that this is a property or financial interest. The case management and evidential integrity of potential litigation is neither the agency's property or financial interest. It is distinct to the right to

¹³ [2002] 51 ATR 1086, [42].

¹⁴ Ibid.

¹⁵ [2002] 51 ATR 1086, [43].

¹⁶ *Connolly and Department of Finance* [1994] AATA 167 (28 June 1994).

litigate, which is property (a chose in action). I do not accept potential litigation to be the basis of the kind of financial or property interest that clause 15 addresses. I will however consider it when discussing the public interest.

77. In my consideration of the agency's claim of clause 15(1), I identify three possible interests that may be relevant, which are:
 - the capital value of the building itself
 - the security of the building itself
 - the goodwill associated with the venue
78. I consider that of the three, only the final interest (goodwill) could reasonably be expected to be significantly adversely affected by disclosure of the documents.
79. I refer to paragraphs 64 to 66 for my consideration of the meaning of 'could reasonably be expected'.
80. In *Connolly and Department for Finance*, dealing with the phrase 'substantial adverse effect' in the equivalent exemption clause in the Commonwealth legislation, Member McMahon held that:

Although there does not appear to have been any judicial consideration of the terms of s 39, the phrase "a substantial adverse effect" has been considered in the context of other sections of the Act. There must be a degree of gravity before this exemption can be made out (*Harris v Australian Broadcasting Corporation* [1983] FCA 242; 50 ALR 551 at 564); the effect must be "serious" or "significant" (*Re James and Australian National University* 2 AAR 327 at 341). Normally a value judgment has to be made as to whether an adverse effect is or is not substantial when considering exemptions claimed under other sections.¹⁷
[emphasis mine]

Capital Value of Adelaide Convention Centre

81. The Adelaide Convention Centre is clearly an asset. It could be sold, should the government be so minded, and thus its capital value is a property and financial interest.
82. I have turned my mind to the potential argument that disclosure of the documents may be reasonably expected to have a substantial adverse effect on the capital value of the building, however I consider that any substantial adverse effect of this nature would have already occurred, since it is no secret that the building contains cladding of concern. Since much information is already in the public domain, potential future purchasers are likely to already be warned.
83. In any event, a prospective purchaser of this type of building would likely have the building inspected prior to purchasing, whether because of the publically available information or directors' duties of a purchasing company or to meet insurance requirements. Such due diligence is likely to the extent that it renders unreasonable the expectation that non-disclosure would avert the significant adverse effect on the capital value of the building.
84. I conclude that it could not reasonably be expected that disclosure of the documents would significantly adversely affect the capital value of the Adelaide Convention Centre.

¹⁷ *Re Connolly and Department of Finance* (1994) 34 ALD 655 [25].

Security of Building

85. I have otherwise dealt with this matter above. As I have indicated, I accept that matter which relates to the exact location of cladding on buildings would endanger the security of the Adelaide Convention Centre. However, clause 15 does not deal with disclosures endangering buildings, but rather deals with disclosures that could reasonably be expected to have a significant adverse effect on a property or financial interest.

Goodwill

86. The agency has essentially claimed that it has a financial interest in the ongoing marketability of the Adelaide Convention Centre, because the agency derives an income from that Adelaide Convention Centre. However, it is important to distinguish between a source of income and a saleable asset. In my view, the interest is not the source of income that the marketability provides to the agency but rather the value of the marketability itself of the Adelaide Convention Centre, such that, should the business of the agency at the Centre be sold, it would be at a reduced value.
87. I consider that the agency's submissions about its interest in the marketability of the Adelaide Convention Centre would be better characterised as goodwill and therefore a property interest. I explain why below.
88. Goodwill is 'the right or privilege to make use of all that constitutes "the attractive force which brings in custom."' ¹⁸
89. It is a longstanding principle of property law that goodwill is a whole item of property. ¹⁹ In a High Court decision, it was held:

Goodwill is inseparable from the conduct of a business. It may derive from identifiable assets of a business, but it is an indivisible item of property, and it is an asset that is legally distinct from the sources - including other assets of the business - that have created the goodwill. ²⁰

90. Lord Macnaghten described it as an 'attractive force which brings in custom' and 'goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates'. ²¹ Given these remarks were cited with approval by the High Court, I consider myself bound by them. I consider the issue of the Adelaide Convention Centre's marketability is really an interest in goodwill and therefore a property interest of the agency. This has been further elaborated by the High Court.
91. There are three 'aspects' of goodwill:
- ...goodwill has three different aspects - property, sources and value which combine to give definition to the legal concept of goodwill. What unites these aspects is the conduct of a business. As Barwick CJ pointed out in *Geraghty v Minter*, "goodwill is not something which can be conveyed or held in gross: it is something which attaches to a business. It cannot be dealt with separately from the business with which it is associated". ²² [citations omitted]
92. Thus, goodwill is a whole item of property attached to a business, arising from various sources in the conduct of business, for which potential buyers will pay over and above

¹⁸ *Commissioner for Taxation v Murry* [1998] HCA 42, [23].

¹⁹ *ICR v Muller & Co Margarine Ltd* [1901] AC 217 at 224.

²⁰ *Commissioner for Taxation v Murry* [1998] HCA 42, [7]. I note that this reference to the conduct of business is a broader concept than that referred to in 7(1)(c) of Schedule 1 of the FOI Act.

²¹ *ICR v Muller & Co Margarine Ltd* [1901] AC 217 at 223-224 cited with approval in *Commissioner for Taxation v Murry* [1998] HCA 42, [17].

²² *Commissioner for Taxation v Murry* [1998] HCA 42, [22].

the bare value of the assets of the business itself. In this case, the agency's ability to market its venues depends on its privilege to make use of all that constitutes 'the attractive force which brings custom'. One constituent of this attractive force is the safety of the venue, its branding and the overall positive image presented of the venue.

93. I turn to consider if there could be a reasonable expectation of a significant adverse effect.
94. I consider that the safety of the venue is likely to be a priority for potential clientele, in booking a venue for any engagement. I consider the safety of the Adelaide Convention Centre is a key source of goodwill; that is, people hire a facility at the Adelaide Convention Centre because it is an attractive, suitable and safe location. I consider the safety of a building therefore part of a source of goodwill. Information that places the safety of the Adelaide Convention Centre in a bad light, may also depreciate the goodwill the agency enjoys.
95. In this case, it is not difficult to see how a business (albeit owned by the government) which hires out its venues for functions and other purposes is likely to suffer depreciation of its ability to enjoy a force of attraction to customers (goodwill) if information about ACP cladding in its venue is revealed to the world at large. In this case, however, the suggestion that there is ACP cladding at the Adelaide Convention Centre is already widely known.²³ If some significant adverse effect is to take place due to knowledge of the presence of ACP cladding, it has already happened.
96. It may be reasonably open to the agency to argue that disclosure of the documents would cause further and significant adverse effect on the goodwill of the agency's business, due to the public debate and criticism that may arise from the information contained in the documents. I say this, noting the considerable public scrutiny this matter has already attracted as a result of news reports.
97. Goodwill could reasonably be expected to be significantly adversely affected not merely by the content of the criticism but also the association with criticism regardless of its content. That is, the mere reagitating of the topic in the news could be adverse to the attractiveness of the Centre as a venue for events. Disclosure could be reasonably expected to give more material on which to base criticism. Such criticism of the venue's safety may be reasonably expected to hurt both its brand by association and the perception that the Centre is a safe venue.
98. If the depreciation of the goodwill of the agency means that it cannot effectively draw custom as it used to, then a potential buyer of the venue, or the operations of the venue, would likely pay less for the itemised goodwill.
99. In respect of clause 15, I consider that disclosure of documents 2, 3, 4, 5, 7, 7a, 8, 10, 12a, 16a, 17, 18, 19, 20, 22, 24, 27, 27a, 27b, 27c, 27d, 27e, 27f, 27g, 29, 30, 31, 32, 33, 34, 34a, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44 could reasonably be expected to have a significant adverse effect on the value of goodwill to the agency.
100. I reiterate that documents 4, 5 and 43 are the only documents that I consider contain information concerning the business affairs of the agency. I have also said that I do not consider that disclosure of those documents could be reasonably expected to adversely affect *those* business affairs. The property interest of the agency in its goodwill is not to be confused with the business, professional, commercial or financial affairs of the agency. They may be related but they are not the same matter. I have concluded that disclosure of these documents could be reasonably expected to cause a significant adverse effect to the *goodwill* of the agency. This is about an adverse effect on the

property of the agency and is not the same as it causing an adverse effect on those business affairs which I consider documents 4, 5 and 43 concern.

Attorney-General's assessment of the Public Interest

101. All exemptions claimed by the agency require that the disclosure of the documents be, on balance, contrary to the public interest.
102. In my first provisional determination, I indicated that it was my provisional view that the public interest favoured disclosure of the documents.
103. On 22 November 2019, the Attorney-General informed me that she had assessed what the public interest required in the circumstances. The Attorney-General's assessment was that that disclosure of documents 16a and 38 and parts of documents 3, 7, 9a, 9b, 10, 12a, 18, 19, 22, 26, 27, 29, 31, 32, 33, 34a, 35, 36, 39 (as enclosed with her letter) would be contrary to the public interest. The assessment only affects content about the location of the cladding.
104. The Attorney-General's assessment was that disclosure of those documents or portions, would lead to a heightened risk of attacks targeting those buildings and that such an attack would have a significant impact on the safety of the public, the buildings themselves, and the State's economy.
105. The Attorney-General's assessment was, at least in part, informed by a statement of a senior police officer of South Australia Police, which was also provided to my Office.
106. As stated above, I am required by the FOI Act to uphold such an assessment, unless I consider that there are cogent reasons for me not doing so.
107. I do not comment on whether I agree with the Attorney-General's view concerning all the documents over which she has assessed, however I do not consider that merely disagreeing with the assessment is a 'cogent reason' within the meaning of subsection 39(9), as such a construction would render the subsection without meaningful operation.
108. I consider however that I have cogent reason to depart from the Attorney-General's assessment in relation to the identification of specific buildings with cladding of concern. The Attorney-General's assessment turns on the premise that maintaining secrecy of the location of the cladding will reduce the risk to Adelaide Convention Centre. But refusing to disclose content identifying those buildings no longer serves the purpose of the building's security. The building or buildings in question are already identified in the public domain, and I have quoted these instances above. This, in part, is because the agency released part of the information to the applicant in documents 14 and 15. If information is already in the public domain, disclosure cannot be contrary to the public interest for the reasons given. I therefore will depart from the Attorney-General's determination to the extent that the documents refer to the specific building or buildings, however I will uphold the Attorney-General's assessment beyond that.
109. I therefore consider that I have cogent reason to depart from the Attorney-General's assessment of documents 3, 9a, 9b, 12a, 18, 29, 31, 32, 33, 34a, 35, 36, 36 and 39 and the matter of documents 19, 22, 26 and 27 that refer to the specific buildings with cladding of concern in the audit. As identification of the buildings is already in the public domain, I consider disclosure the information is not contrary, on balance, to the public interest.

Public Interest

110. I now consider the public interest in relation to all the exemption clauses and all documents (excluding those documents over which I am upholding the Attorney-General's assessment). I have considered the public interest factors both in an overall sense and in respect of individual documents.
111. Public interest factors in favour of disclosure include that disclosure would:
- better serve the safety of the South Australian public by informing them about a potentially flammable cladding that is reportedly onsite
 - assist public scrutiny as to whether a South Australian publically owned building is at danger due to the cladding
 - allow the public to have clarity about a matter of serious concern
 - better satisfy public concerns about the cladding by the public being allowed insight into the process of investigation
 - serve to ensure that the objects of the FOI Act in transparency and accountability of government are served.
112. Public interest factors against disclosure include that disclosure would or could:
- put the safety of members of the public using their facilities at risk and put the facilities at risk of damage, because information released could be used to exploit the vulnerability of the cladding in an attack
 - harm the ability of the agency to establish a successful action against contractors who installed the cladding
 - cause a significant adverse effect on the goodwill associated with the Centre (which is publically owned property)
 - impact on the ability to sell the building and its operations
 - inhibit the frankness of advice and deliberation.
113. On balance, I consider that the factors in favour of disclosure outweigh those against. Having had regard to the level of information already available in the public domain, I consider that having a more exact understanding of the situation is unlikely to be as harmful as the more vague but still potentially alarming information that is already permeating the news.
114. Information that my Legal Officer has found online (and I do not comment on its correctness) suggests:
- there is cladding of concern in the Convention Center
 - the Metropolitan Fire Service intends to send twice the amount of services to attend call-outs to the Convention Centre
 - the buildings of concern are the Central and West buildings
 - there has been alleged unauthorized disclosure about the internal deliberations of Aurecon to recommend an option other than replacing the panels concerned, if possible
 - there is a threat of legal action against the builder
 - that no sampling had been undertaken of the panels of concern.
115. It is not disputed that the cladding in question poses a serious safety concern, with the agency's initial public interest submissions conceding this.
116. The agency submitted that 'disclosure of the information contained in the exempt documents may lead to a security risk and/or targeted attack on an AVM building/s which puts occupants and others at serious risk as well as causes significant property

damage'.²⁴ Initially, no evidence was provided to my Office to suggest that there is a likelihood of such an attack, however this point is a double-edged sword. If this is of serious concern, then the public ought to know about it and be warned. I consider that this is a factor supporting disclosure.

117. The following factors reduce my concern that releasing documents about the cladding will pose a danger to the public. I consider that
 - information about the building or buildings of concern is in the public domain (I do not comment here on whether it is correct)
 - this is not a multistorey complex which people occupy continuously, such as an apartment tower or hospital
 - the significant information already in the public domain has likely already led to much of the risk that could have been averted by secrecy (excluding secrecy of the content relating to specific location of the ACP cladding)
 - the safety of the public is more likely to be assisted by release of information; secrecy is not the only option available to the government to ensure the safety of those who use the Adelaide Convention Centre.
118. The public function fulfilled by the agency is stewardship of public venues, and therefore the decision about how to address the ACP cladding is a decision about public resources. By reference to public resources I include both the Adelaide Convention Centre itself, the goodwill associated with the business carried out at that venue and the public funds to be used in addressing the dangerous cladding. This adds force to the public interest in favour of disclosure.
119. The object of the FOI Act accepts that the public are better off informed about decisions made about them, no less when those decisions affect their safety. The importance of government accountability concerning public safety is a public interest factor of the weightier kind. Since good governance and respect for the law are better served by open and responsible government to which end the FOI Act operates, providing information about such serious safety risks (something neither party contests) is more likely to ensure good governance in respect of the decision making functions of the Government and agency in addressing cladding of concern.
120. The agency also made the following point:

In addition, AVM must be afforded the opportunity to work through the issues unhindered by public speculation to avoid adverse impacts on its general business affairs. The speculation resulting from disclosure of exempt documents is likely to inhibit AVM's ability to successfully market its building/s...
121. I note that there is (without having access to the information) little the public can do but speculate. The vague information available in the public domain only fuels the speculation. The answer to the issue of speculation is clarification and I therefore consider that concerns about public speculation can only weigh in favour of disclosure.
122. The FOI Act presupposes that the public are capable of forming competent, valid opinions based on the information available. As there is nothing inherently confusing in the information contained in the documents, it is entirely appropriate to expect that the public are able to comprehend the redacted matter contained in the documents.
123. In respect of documents 4, 5, 44 and the content of the second redaction proposed by the agency in 43, I consider that disclosure of this content is, on balance, contrary to the public interest. Factors that have added weight to a determination of non-disclosure

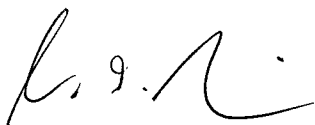
²⁴ Agency letter of 13 August 2019.

include the lack of additional and insightful information in those documents that would be of benefit to the public beyond the other information provided as well as the sensitivity of those communications.

124. As noted above, I consider that documents 27-27g are documents that meet the requirements of clause 15(a). I have also noted that document 27 meets the requirements of clause 9(1)(a). These documents were provided by a third party without compulsion. Document 27 is an email from that third party and documents 27a to 27g are attachments. I take the view that provision of documents 27a to 27g would likely be a deterrent to the voluntary disclosure by private third parties of their information to the government and therefore consider that provision of those documents is contrary, on balance, to the public interest. I consider that disclosure of document 27 is not contrary to the public interest.
125. I therefore consider that it is, on balance, contrary to the public interest to disclose 4, 5, 16a, 27a, 27b, 27c, 27d, 27e, 27f, 27g and 38 and the parts of documents 7, 10, 19, 22, 26 and 27 to the extent that these describe the exact locations of the cladding (including by describing its appearance) on the buildings, but not to the extent that they identify the buildings of concern. In respect of the remainder of the documents, I do not consider disclosure of these would be contrary, on balance, to the public interest. I determine to reverse the agency's determination to disclose the remainder of the documents.

Determination

126. In light of my views above, I vary the agency's determination.
127. A summary of my determination to vary the agency's determination is set out in annexure 2.
128. As previously stated, all mobile telephone numbers are beyond the scope of this external review and therefore should be redacted from documents, even when I have proposed disclosure in full.



Wayne Lines
SA OMBUDSMAN

14 February 2020

APPENDIX 1

Procedural steps

Date	Event
19 July 2019	The agency received the FOI application.
23 July 2019	The Principal Officer of the agency determined the application. There is no right of internal review from a Principal Officer's determination.
1 August 2019	The agency received the internal review application dated 29 July 2019. This application was not valid as there is no right of internal review.
13 August 2019	The Chief Financial Officer purported to vary the determination. This was not a valid determination and I have taken its contents instead as submissions.
21 August 2019	The Ombudsman received the applicant's request for external review.
26 August 2019	The Ombudsman advised the agency of the external review and requested submissions and documentation.
30 August 2019	The agency provided the Ombudsman with its submissions and documentation.
10 October 2019	The Ombudsman issued his Provisional Determination
14 October 2019	The applicant confirmed that he had no further submissions.
8 November 2019	The agency, by the Crown Solicitor, provided its submissions, revising its position.
13 November 2019	The agency presented a statement by an Assistant Commissioner of Police signed 11 November 2019.
22 November 2019	The agency provided further submissions and the assessment of the Attorney-General pursuant to clause 39(9) of the FOI Act.
14 January 2020	The Ombudsman issued his revised provisional determination.
20 January 2020	The agency provided its submissions.

APPENDIX 2

Document in issue	Description	Agency's determination	Ombudsman's determination	Information to be Released
Document 1	Email	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 2	Email chain	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 3	Email chain	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 4	Email chain	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Confirm	nil
Document 5	Email chain	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Confirm	nil
Document 6	Email chain	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 7	Board Report 2 August 2018	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Vary	All information aside from information concerning exact location of ACP cladding on buildings.
Document 7a	Letter dated 26 July 2018	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 8	Board Minutes	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Release all of item 3.2 (redacting out of scope information)
Document 9	Email	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 9a	Attachment to Document 9 (a letter)	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document

Document 9b	Email	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 10	Email	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Vary	All information aside from information concerning exact location of cladding on buildings.
Document 11	Email	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 11a	Infographic	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 11b	Media release	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 12	AVMC Board Report	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 12a	Email	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 12b	Media Release	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 13	AVMC Board Minutes	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 16	Email	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 16a	Aurecon Stage 1 Report	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Confirm	Nil
Document 17	Email	Wholly Exempt	Reverse	Whole

		Clause 7(1)(c), Clause 9, Clause 15		document
Document 18	Email	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 19	AVMC Board Minutes	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Vary	Whole document, aside from redactions proposed by agency
Document 20	Email chain	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 21	AVMC Board Minutes	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 22	Email chain	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Vary	Whole document, aside from redaction proposed by agency
Document 23	Email chain	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 24	AVMC Board Report	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 25	Email chain	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 25a	Email	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 26	Email chain	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Vary	Whole document, aside from redactions proposed by

				agency
Document 27	Email chain	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document, aside from redactions proposed by agency
Document 27a	Attachment 1	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Confirm	nil
Document 27b	Attachment 2	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Confirm	nil
Document 27c	Attachment 3	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Confirm	nil
Document 27d	Attachment 4	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Confirm	nil
Document 27e	Attachment 5	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Confirm	nil
Document 27f	Attachment 6	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Confirm	nil
Document 27g	Attachment 7	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Confirm	nil
Document 28	Email chain	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 29	Email chain	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 30	Email chain	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 31	Email chain	Wholly Exempt	Reverse	Whole

		Clause 7(1)(c), Clause 9, Clause 15		document
Document 32	AVMC Board Minutes	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 33	AVMC Board Minutes	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 34	Email	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 34a	Letter	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 35	Email chain	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 36	Email chain	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 37	Email	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 38	Letter	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Confirm	Nil
Document 39	AVMC Board Report	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 40	Email	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 41	AVMC Board Report	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Reverse	Whole document
Document 42	AVMC Board	Wholly Exempt	Reverse	Whole

	Minutes	Clause 7(1)(c), Clause 9, Clause 15		document
Document 43	AVMC Board Report	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Vary	Whole document, aside from the second redaction only proposed by agency
Document 44	AVMC Board Minutes	Wholly Exempt Clause 7(1)(c), Clause 9, Clause 15	Confirm	Nil