

Determination

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

Applicant	Mr Dean Cosenza
Agency	South Australian Tourism Commission
Ombudsman reference	2019/02151
Agency reference	FOI 15/2018
Determination	The determination of the agency is confirmed.

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:
 1. Any and all documents that relate to the proposal submitted on 13.9.18 by Dean Cosenza for Juventus FC tour to Adelaide 2019 (“proposed event”) to Hitaf Rasheed for Events SA and Minister David Ridgeway for consideration and decision to refuse support for the proposed event at Adelaide Oval by Hitaf Rasheed for Events SA.
 2. For avoidance of any doubt, I require any and all documents and information inclusive from any third parties that considered the proposed event from 13.9.18 to date for purposes of making the decision. (“the information”) (sic).

Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.

Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.
4. **Provisional determination**
5. I provided my tentative view about the agency’s determination to the parties, by my provisional determination dated 16 April 2020. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency’s determination.
6. The agency provided submissions in response. In these submissions the agency maintains that the information under consideration in this external review is commercially sensitive, that release of the information would cause reputational

damage to the agency, would severely harm the State's competitive position and compromise future dealings with event organisers, and would result in a loss of confidence in dealing with the State. I have considered these submissions in this determination.

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.
9. The following clauses in Schedule 1 are relevant to this external review:

7—Documents affecting business affairs

- (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
 - (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 whose behalf an application for access to the document 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 an agency after the commencement of this subclause.

9—Internal working documents

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

- (a) that relates to—

- (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
- (ii) any consultation or deliberation that has taken place,

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

in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and

- (b) the disclosure of which would, on balance, be contrary to the public interest.

16–Documents concerning operations of agencies

(1) A document is an exempt document if it contains matter the disclosure of which–

- (a) could reasonably be expected–
- (i) to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency; or
 - (ii) to prejudice on the attainment of the objects of any test, examination or audit conducted by an agency; or
 - (iii) to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or
 - (iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions; or
 - (v) to have a substantial adverse effect on the conduct of industrial relations by an agency; and
- (b) would, on balance, be contrary to the public interest.

(2) A document is an exempt document if–

- (a) it relates to an agency engaged in commercial activities; and
- (b) it contains matter the disclosure of which could prejudice the competitiveness of the agency in carrying on those commercial activities.

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

12. The agency identified nine documents within the scope of the application.
13. The agency determined to release seven documents in full and partially released documents 6 and 7 in accordance with section 20(4) of the FOI Act after redacting material it determined to be exempt².

Issues in this review

14. The issue in this external review is whether the agency has correctly determined documents 6 and 7 to be exempt under Schedule 1 of the FOI Act.
15. For the sake of completeness, I note that, as part of his application to the agency for internal review of its original decision, the applicant raised the issue of whether the agency had further documents which it had not disclosed. As my jurisdiction does not extend to consideration of issues concerning the sufficiency of an agency's search for documents³, I have not considered this claim as part of my external review.

² Although not formally dealt with in its determination, the agency also redacted 'personal contact details' of individuals on the basis that the information was exempt under clause 6(1). I do not understand the applicant to have taken issue with these redactions.

³ *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5

Consideration

Clauses 7(1)(b) and 7(1)(c)

16. The agency redacted portions of documents 6 and 7 on the basis that the redacted information contains the business and commercial affairs of the agency. The agency, in its determination, does not suggest the information relates to the business or commercial affairs of, or would have commercial value to, any other agency or person.
17. Documents 6 and 7 are similar in content. Both documents are minutes, the former addressed to the Minister for Trade Tourism and Investment and the latter to the Premier. Each recommends approval be given to send a response to the President of the Committee for Italians Abroad South Australia in terms of a draft originally attached to the respective minute⁴. Each contains several small redactions of essentially the same material. The redacted information refers to the amount of funding available in a fund administered by the agency. I understand that the fund is utilised by the agency to provide financial support by way of grants or subsidies to approved events.
18. The agency relied on both clauses 7(1)(b) and 7(1)(c) in claiming the documents exempt.
19. The agency's submissions in support of its claimed exemptions are summarised as follows:
 - the agency is in the business of staging and managing major events on behalf of the State
 - these events deliver significant economic benefits for the State, supporting business and employment
 - the events industry is competitive and the agency competes to secure events for South Australia that will provide economic benefit for the State
 - the fund referred to in documents 6 and 7 is utilised by the agency to sponsor such events
 - disclosure of the value of the fund would impact on the agency's ability to compete against other jurisdictions for major events and would impact on the ability of the agency to negotiate with event operators
 - the value of the fund fluctuates regularly and to publish the value at a given point in time may create a false impression about the amount of funding available
 - sponsorship is vital to ensure major events are viable and disclosing the value of the fund at a given point in time will undermine the sponsorship process by giving potential sponsors a false impression about the government's ability to secure events.
20. I accept the validity of each these submissions.
21. Clause 7(2) provides that a document is not exempt by virtue of clause 7 merely because it contains matter concerning the business, professional, commercial or financial affairs of the agency.
22. I have turned to the decision of the Queensland Information Commissioner in *Cannon and Australian Quality Egg Farms Ltd*⁵, for guidance both on the manner in which clause 7(2) relates to clause 7(1), and in relation to the use of the word 'merely' in clause 7(2).
23. *Cannon* considered the effect of section 45(2) of the *Freedom of Information Act 1992* (Qld) (now repealed), worded in similar terms to clause 7(2), at [39]:

⁴ The signed approval letter was released to the applicant as document 8 in response to his FOI request.

⁵ (1994) 1 QAR 491

Section 45(2) therefore provides an exception to the operation of s.45(1), i.e., that matter is not exempt under s.45(1) merely because it concerns the business, professional, commercial or financial affairs of the applicant for access⁶. The presence of the word “merely” in s.45(2), however, places a significant qualification on the scope of s.45(2) exception: if matter concerns the business, professional, commercial or financial affairs of another person as well as those of the applicant for access, and the two are inextricably interwoven such that severance ... is not practicable, then the ... exception ... does not apply.

and at [41]

The use of the term "business, professional, commercial or financial affairs" in s.45(2) does not restrict that subsection to operating as an exception only to s.45(1)(c). In the scheme of s.45, that term has been selected because it is the lowest common denominator of the nature of the kinds of information covered by s.45(1)(a), (b) and (c). The term is to be read distributively across s.45(1)(a), (b) and (c) in order to determine whether the s.45(2) exception is applicable to the exemptions provided for by s.45(1)(a), (b) and (c)⁷.

24. I adopt the Information Commissioner's reasoning in support of my view that clause 7(2) of Schedule 1 is intended to qualify both clauses 7(1)(b) and 7(1)(c).
25. As the agency's submissions were to the effect that the redacted information in documents 6 and 7 relates to the business and commercial affairs of the agency, and, as there is no suggestion that the information relates to the business or commercial affairs of, or would have commercial value to, any other agency or person, I have concluded that the effect of clause 7(2) is that the agency cannot rely on either clause 7(1)(b) or clause 7(1)(c) in the present circumstances, even if it were able to satisfy the criteria for application of either exemption.

Clause 16(2)

26. The agency determined the same redacted material in documents 6 and 7 to be exempt pursuant to clause 16(2) of Schedule 1.
27. To be exempt pursuant to clause 16(2), it must be established that the document:
 - relates to an agency engaged in commercial activities; and
 - contains matter the disclosure of which could prejudice the competitiveness of the agency in carrying out those commercial activities.
28. The term 'commercial activities' is not defined in the FOI Act. I have had regard to the ordinary meaning of the word 'commercial' as provided by the Macquarie Dictionary, which defines commercial as 'engaged in commerce; capable of returning a profit, preoccupied with profits or immediate gains'⁸.
29. The agency's submissions, which are summarised at paragraph 19 above, identify the business that the agency undertakes. However the agency has not established that it undertakes this business as a commercial activity; that is, a business undertaken for profit.
30. The agency's functions and powers are set out in Part 3 of the *South Australian Tourism Commission Act 1993*.

⁶ Section 45(2) of the *Freedom of Information Act 1992* (Qld) differs from clause 7(2) of Schedule 1 of the *Freedom of Information Act 1991* (SA) in that the former applies only to matter concerning the affairs of the applicant whereas the latter also includes the affairs of the agency [to which the application has been made].

⁷ Sections 45(1)(a), 45(1)(b) and 45(1)(c) of the repealed *Freedom of Information Act 1992* (Qld) are also worded similarly to clauses 7(1)(a), 7(1)(b) and 7(1)(c) respectively of the *Freedom of Information Act 1991*, Schedule 1

⁸ *Macquarie Dictionary*, 3rd edition.

Part 3—Operations of Commission

19—Functions of Commission

- (1) The Commission has the following functions:
 - (a) to promote South Australia (internationally and domestically) as a tourist destination;
 - (b) to identify tourism opportunities for the State (including opportunities for events and festivals, regional tourism and cultural tourism);
 - (ba) to promote such events, festivals or other activities in the State as are consistent with the object of this Act;
 - (c) to contribute to the preparation and implementation of economic development plans for or relating to the tourism industry of the State;
 - (d) to prepare a plan or series of plans (consistent with relevant economic development plans) for tourism promotion for the State and formulate policies and strategies for implementation of the plan or plans by government, industry and community action;
 - (e) to encourage industry participation in and financial support for co-operative tourism marketing programmes;
 - (f) to assist regional bodies engaged in tourism promotion;
 - (g) to ensure the provision of appropriate tourism and travel information and booking services;
 - (h) to work with and provide advice to operators for improvement of the quality of tourism services and products;
 - (i) to encourage government, industry and community action to enhance visitors' experiences of the State;
 - (j) to advise and provide reports to the Minister on matters relating to tourism and the tourism industry of the State;
 - (k) to carry out any other functions assigned to the Commission by the Minister, or conferred on the Commission under another Act, that are consistent with the object of this Act.
- (2) The Commission must carry out its functions—
 - (a) in consultation with the Minister; and
 - (b) in co-operation with other Government agencies, industry, local government and relevant regional and community bodies or groups.
- (3) The Commission must ensure that its plans and initiatives are consistent with and give effect to the Government's economic development, social, employment and environmental objectives.

20—Powers of Commission

- (1) The Commission has the powers necessary or incidental to the performance of its functions.
- (2) The Commission may, for example—
 - (a) enter into any form of contract or arrangement; and
 - (c) engage consultants or other contractors; and
 - (d) provide services within areas of the Commission's expertise on terms and conditions with respect to the payment of fees or any other matter as determined by the Commission; and
 - (e) establish committees (consisting of directors, other persons or a combination of directors and others) and assign to the committees advisory functions or delegated powers.

31. Having regard to these functions and powers, I have formed the view that the agency does not engage in commercial activity as a core part of its operations.
32. I note from the agency's 2018-19 Annual Report that it does derive some income from provision of goods and services including entry fees, licence fees and merchandising sales. Insofar as these might be considered to be commercial activities (and I make no finding on this point), it is my view that the documents in issue are not documents that relate to the agency's engagement in such activities.
33. The provision of grants and subsidies is not ordinarily regarded as a commercial activity. I am of the view that the amount of funding available to the agency to support approved events and the provision of funding by way of grants or subsidies are not matters which relate to commercial activities carried on by the agency.
34. The agency's contention that its competitiveness would be prejudiced by disclosure of information in the documents is predicated on its ability to compete with other jurisdictions for the State to host major events and to secure sponsors for such events for the benefit of the State as a whole, rather than in connection with activity that it carries out for the purpose of generating profit itself.
35. My view is consequently that the requirements of clause 16(2) have not been satisfied and the redacted material in documents 6 and 7 is not exempt by virtue of this clause.

Clause 9(1)

36. Although the agency does not claim that the information in documents 6 and 7 is exempt pursuant to clause 9(1) of Schedule 1, I have considered whether that might be the case.
37. Clause 9(1) relates to internal working documents of an agency. Its purpose is to protect the integrity and viability of the governmental decision-making process. It is only if the release of the documents would impair this process to a significant or substantial degree, and there is no countervailing benefit to the public which outweighs that impairment, that it would be contrary to the public interest to grant access⁹.
38. Both documents record a recommendation that was made for the purpose of the decision making functions of a Minister (the Minister for Trade Tourism and Investment and the Premier respectively). The documents consequently satisfy the criteria in clause 9(1)(a).
39. In order for a document to be exempt under clause 9(1) it must also satisfy the public interest test set out in clause 9(1)(b). This test requires a balancing of competing public interest considerations in favour of, and against, disclosure. As the agency in this case has already determined to release the majority of both documents under consideration, I have confined my assessment of public interest considerations to the material which the agency has caused to be redacted from them.
40. In considering where the balance of the public interest lies I am mindful that the balance is between '... the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper working of government and its agencies on the other ...'¹⁰ and that the test requires an objective balancing of these competing interests without a presumption in favour of disclosure.¹¹

⁹ *Re Murtagh and Commissioner of Taxation* [1984] AATA 249; (1984) 6 ALD 112

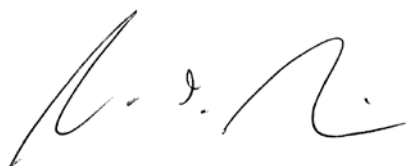
¹⁰ *Harris v Australian Broadcasting Corporation* (1983) 50 A:LR 551 per Beaumont J at 561

¹¹ *State of South Australia (Department of Planning, Transport and Infrastructure) v The Honourable Robert Brokenshire MLC* [2015] SADC 68 at [21] and [42]

41. The following public interest factors support disclosure of the redacted information in documents 6 and 7:
- promoting openness and accountability within government and transparency in government decision making
 - facilitating effective participation by members of the public in processes involved in the making and administration of laws and policies.
42. On the other hand, public interest considerations against disclosure include
- ... the efficient and economical conduct of government, protection of the deliberative processes of government, particularly at high levels of government and in relation to sensitive issues, and the preservation of confidentiality so as to promote the giving of full and frank advice.¹²
43. Factors against disclosing the redacted information in documents 6 and 7 specifically include:
- ensuring the agency is free to give full and frank advice to Ministers regarding the application of the fund, including its value at the time
 - the value of the fund fluctuates regularly and to publish the value at a given point in time may create a false impression about the amount of funding available
 - this would undermine the sponsorship process by giving potential sponsors a false impression about the government's ability to secure events
 - disclosure of the information would cause reputational damage to the agency and would severely harm the agency's ability to compete against other jurisdictions for major events and negotiate with event operators
 - disclosure would severely compromise future dealings with event organisers and result in a loss of confidence when dealing with the State
 - negative impact on the agency's competitive position as a consequence of disclosure would have a detrimental effect on the agency's ability to deliver significant economic benefits for the State, supporting business and employment.
44. In weighing all of the above factors, I have reached the conclusion that, on balance, the public interest lies against disclosure of the redacted information.
45. Consequently I consider that the redacted information in documents 6 and 7 is exempt pursuant to clause 9(1) of Schedule 1.

Determination

46. In light of my views above, I confirm the agency's determination in the manner set out in Appendix 2.



Wayne Lines
SA OMBUDSMAN

7 May 2020

¹² *Secretary, Department of Justice v Osland* [2007] VSCA 96 per Maxwell P at [77]

APPENDIX 1

Procedural steps

Date	Event
24 December 2018	The agency received the FOI application dated 19 December 2018 ¹ .
24 December 2018	The agency determined to extend the time limit for dealing with the application to 6 February 2019 pursuant to section 14A of the FOI Act ² .
6 February 2019	The agency failed to determine the application within the extended period required by the FOI Act, ³ and is deemed to have refused access to the documents. ⁴
11 February 2019	The agency provided the applicant with its determination.
11 February 2019	The agency received the internal review application dated 11 February 2019.
25 February 2019	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ⁵
25 February 2019	The Ombudsman received the applicant's request for external review dated 25 February 2019.
26 February 2019	The agency confirmed its 11 February 2019 determination.
6 March 2019	The Ombudsman advised the agency of the external review and requested submissions and documentation.
21 March 2019	The agency provided the Ombudsman with its submissions and documentation.
16 April 2020	The Ombudsman issued his provisional determination and invited submissions from the parties.

¹ The application was originally submitted to the Attorney General's Department on 19 December 2018 and transferred to the agency on 24 December 2018 pursuant to section 16 of the FOI Act.

² In his acknowledgement letter to the applicant dated 24 December 2018 the agency's principal officer 'requested' an extension of time to 6 February 2019. Having regard to the provisions of section 14A of the FOI Act, I consider this 'request' to be a determination for the purposes of that section.

³ *Freedom of Information Act 1991*, section 14A.

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

⁵ *Freedom of Information Act 1991*, section 29(5).

APPENDIX 2

Document in issue	Description	Agency's determination	Ombudsman's determination	Information to be released
6	Undated minute to Premier	Partially exempt clause 7(1)(b) clause 7(1)(c) clause 16(2)	Partially exempt clause 9(1)	No changes to information previously released to applicant
7	Undated minute to Minister for Trade Tourism and Investment	Partially exempt clause 7(1)(b) clause 7(1)(c) clause 16(2)	Partially exempt clause 9(1)	No changes to information previously released to applicant