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Determination

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

Applicant:	Senator Rex Patrick
Agency:	SA Forestry Corporation
Ombudsman reference:	2021/03554
Agency reference:	2021/108
Determination:	The determination of the agency is varied.
Date of Ombudsman's determination:	9 November 2021
Issues considered:	Effective performance by agency of its functions Adverse effect on business affairs
Exemption clauses relied upon:	6(1) 16(1)(a)(iv) 16(2)
Legislation considered:	<i>Freedom of Information Act 1991</i>

Terms of the original application:

I seek access to all contracts drafted or entered into as a result of the outcome of Tender RFP 2021/30.

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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:

I seek access to all contracts drafted or entered into as a result of the outcome of Tender RFP 2021/30.

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. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 18 October 2021. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
5. I have received submissions from the applicant, agency and three interested parties.
6. The applicant indicated that he agreed with my provisional determination.
7. One of the interested parties stated that the information in issue should be exempt pursuant to clause 7(1). For the reasons stated in my provisional determination, clause 7(3) renders clause 7(1) inapplicable in the circumstances of this matter.
8. Two of the interested parties made further submissions in support of the agency's view that clause 16 applied.
9. I note that clause 16 relates to the operation of agencies. The interested parties were invited to provide their submissions on the basis that documents concerned their commercial, business, and financial affairs. Given that the interested parties are not the agency, I have found their submissions with respect to how disclosure could have an adverse impact on the agency to be unpersuasive.
10. I will however note that one interested party made a submission that non-disclosure of certain information would be consistent with the Department of Premier & Cabinet Circular 27 - Disclosure of Government Contracts (**the Circular**). The interested party stated that the Circular provides that information of the same nature as the redacted information would not be disclosed to the public.
11. I note that the Circular provides the following as its scope:
 3. Cabinet has approved this Circular applies to all public authorities as defined in the *Public Finance and Audit Act 1987*.

4. This Circular describes the obligations on Chief Executives in relation to the Disclosure of Eligible and Significant Contracts, executive contracts and the management of contract information. It does not derogate from any other obligations of the public authority to disclose information.
12. Based on the above scope, I do not consider the Circular has any binding impact on an agency's obligations to disclose information pursuant to the FOI Act. However, having reviewed the Circular, I consider the following extract to be relevant:

Information to be disclosed

17. The information to be disclosed about each contract is:
- Contract title
 - Full details of the contractor including name, address, phone number and contact officer
 - Name of the public authority
 - Date of the contract's execution
 - Start date and completion date of the contract
 - Goods, services or subject matter of the contract
 - Total value of the contract
 - Procurement process used to select the contractor
 - Contract identification number
 - Summary information relating to any variations over the term of the contract
 - Reasons for non-disclosure of part or all of the contract (if applicable)
 - Contact details for the public authority's Accredited Freedom of Information Officer
 - For Significant Contracts, the entire contract.
13. On my reading, the information in issue is information that is stated to be disclosed by the Circular, and so it is unclear to me why the interested party made this submission.
14. The further submissions of the agency have reinforced its position that the operations of the agency are tied to its commercial functions, and that it considers disclosure of the information would have a substantial adverse effect on its operations, and that, on balance, it would be contrary to the public interest.
15. For the reasons set out in my provisional determination, I remain of the view that disclosure of the documents, which are contracts, would not, on balance, be contrary to the public interest, regardless of any foreseen adverse effect.
16. I note that clauses 7(1)(a), (b) and (c) contemplate the disclosure of trade secrets, commercially valuable information and information related to the business affairs of any agency or interested party that, if disclosed, would have an adverse effect on those affairs, or would prejudice the future supply of such information to an agency. Those clauses are subject to a public interest balancing test.
17. By Parliament's inclusion of clause 7(3), it indicates an intention that, regardless of the extent of which any of the above adverse effects could potentially occur with respect to an agency or interested party, there is an overriding public interest in the disclosure of contracts entered into by an agency.
18. That is not to say that contracts can never be exempt from disclosure, noting that information concerning personal affairs in contracts are captured by clause 6(1).
19. However I consider the proper recourse for an agency to avoid the disclosure of sensitive commercial information in contracts is to rely on the appropriate confidentiality provisions and follow the requirements of clauses 13(2)(a) and (b).

20. The agency and interested parties have not done so in this instance.
21. In response to my views expressed regarding the application of clause 16(2), the agency has submitted that it foresees competition with interstate organisations.
22. I remain unpersuaded by this view, particularly in light of the agency's use of speculative terms with respect to potential interstate competitors.
23. I note that the agency made the following statement:

Prejudice to the ability of FSA to achieve the best financial return will mean that it will not be performing its commercial operations in accordance with prudent commercial principles. A prudent commercial operator would obviously safeguard, and keep confidential, information that is sensitive and which, if released publicly, would or could damage the operator.

...

Using its "best endeavours" would require FSA to keep confidential information which could prejudice its ability to maximise its value.

24. I consider that a prudent commercial operator that wishes to keep sensitive information confidential that appears in a contract, knowing that it is an agency with obligations under the FOI Act, would take steps to make the sensitive information confidential by terms of the contract. This has not occurred.
25. In light of the above, whilst I have had regard to the submissions of the agency and interested parties, my views are substantially the same as those expressed in my provisional determination.

Relevant law

26. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
27. 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. The following clauses are relevant to this external review:

7–Documents affecting business affairs

(1) A document is an exempt document—

- (a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person; or
- (b) if it contains matter—
 - (i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and
 - (ii) the disclosure of which—
 - (A) could reasonably be expected to destroy or diminish the commercial value of the information; and
 - (B) would, on balance, be contrary to the public interest; or
- (c) if it contains matter—

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

- (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.

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 affairs.

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

29. 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

- 30. The agency identified four documents within the scope of the application.
- 31. All four documents in issue are contracts entered into by the agency.
- 32. The agency determined that the documents are exempt in part pursuant to clauses 6(1), 16(1)(a)(iv) and 16(2).
- 33. In his application for external review, the applicant stated that he does not seek access to information such as email addresses and mobile telephone numbers, and that he also does not seek access to insurance details that are mentioned in the contracts, or WorkCover registration details.

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34. As a result I will not be considering the application of clause 6(1) to the documents in issue, or whether insurance details or WorkCover registration details are exempt pursuant to clauses 16(1)(a)(iv) and (2).

Issues in this review

35. Having regard to the agency's submissions and the exemption clauses provided in Schedule 1 of the FOI Act, it is for me to determine whether to confirm, vary or reverse the agency's determination in regard to the documents in issue in this external review.

Consideration

Clause 16(2)

36. The agency determined that the four documents are exempt in part pursuant to clause 16(2).
37. In his application for external review, the applicant raised the following as a point that he considered to be an issue with the agency's determination:

In respect of clause 16(2)(a) and (b) of Schedule 1 of FOI Act 1991:

- . ForestrySA appear silent in their argument.
- i. Senator Patrick draws the Ombudsman's attention to his views in decision 2020/05758 at [35].

38. Whilst noting that the agency did make an argument with respect to the application of clause 16(2), in my view the agency's argument is deficient.
39. The agency's determination in this matter does not address the issues I identified with its application of clause 16(2) as stated in my previous determination that was referred to by the applicant, reference number 2020/05758.
40. I consider it prudent to quote the part of the determination that the applicant has referred to:

34. In response to my provisional determination the agency reiterated its position that portions of the document are exempt pursuant to clause 16(2) submitting that:

ForestrySA does not have other South Australian agency or corporation competition directly. Rather, it is ForestrySA's commercial relationships with potential customers and suppliers that ForestrySA considers critical to the "competitiveness of the agency."

ForestrySA considers that releasing this information... would adversely affect the negotiating power it holds with customers, and likely the competition existing between customers.

35. In my view, this is not a correct application of clause 16(2). 'Competitive' is defined as 'relating to, characterized by, or based on competition'.² The agency has advised that it does not have any direct competition in relation to the particular commercial functions in issue. It is nonsensical for the agency to assert that disclosure would prejudice the agency's competitiveness whilst simultaneously advising that the agency has no direct competition.

² *Merriam-Webster* (online at 26 February 2021) 'competitive' (def 1).

38. Whilst noting that the documents in issue are not the same documents that were in issue in my previous determination, I consider that the same issues are pertinent to this external review.
39. Whilst acknowledging the agency's further submissions in this matter, I still remain unconvinced of the application of clause 16(2).

Clause 16(1)(a)(iv)

40. The agency also determined that the documents are exempt in part pursuant to clause 16(1)(a)(iv).
41. A document is exempt pursuant to clause 16(1)(a)(iv) if its disclosure:
- could reasonably be expected to have a substantial adverse effect on the effective performance by an agency of the agency's functions, and
 - would, on balance, be contrary to the public interest.
42. The phrase 'substantial adverse effect' is not defined in the FOI Act, however the District Court has held that it relates to an effect that is sufficiently serious or significant to cause concern to a properly informed, reasonable person.³ The test was stated to be 'a high one'.⁴
43. Further, I note that the phrase 'could reasonably be expected' requires that I make an objective judgement of whether it is reasonable, as distinct from irrational, absurd or ridiculous, to expect that disclosure could result in the adverse effect envisioned by a particular clause.⁵ That is, the expectation must be based on reason and not be 'fanciful, far-fetched and speculative'.⁶
44. I again refer to the applicant's submissions raised in his application for external review, in particular:

In respect of clause 16(1)(iv) [sic] of Schedule 1 of the FOI Act 1991:

- i. The threshold "substantial adverse effect" has not been met and many of the claims made in argument by Forestry SA relate to "commercially sensitive information" - something that is more closely related to business affairs concerns in Clause 7 and something normally negated through Clause 7(3) in respect of contracts.
 - ii. It is noted that contracts revolve around the sale and management of public resources and there is strong public interest in the public having visibility of the redacted information.
41. With respect to the agency's claim of clause 16(1)(a)(iv), I accept the applicant's submission that the type of adverse effects the agency discussed in its determination would be better described as adverse effects occurring under clause 7(1). However, as noted by the applicant, if the documents in issue were claimed to be exempt pursuant to clause 7(1), then as the documents are contracts, clause 7(3) would negate the operation of clause 7(1).
42. Whilst noting that the agency has claimed clause 16(1)(a)(iv), given the types of adverse effects envisioned by the agency are related entirely to its commercial activities and financial affairs, which would not be exempt pursuant to clause 7(1), I find

³ *Konieczka v South Australian Police* [2006] SADC 134 [15], referring to *Re Thiess and The Department of Aviation* (1986) 9 ALD 454.

⁴ *Konieczka v South Australian Police* [2006] SADC 134 [18].

⁵ *Ipex Information Technology Pty Ltd v Department of Information Technology Services SA* [1997] 192 LSJS 54, 63-64.

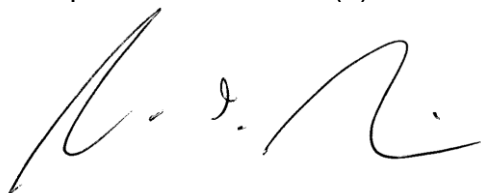
⁶ *Konieczka v South Australia Police* [2006] SADC 134 at [14].

it difficult to form a reasonable expectation that disclosure would have an adverse effect on the effective operation of the agency's functions within the meaning of clause 16(1)(a)(iv).

43. I also would not consider that such an adverse effect, if it could be reasonably expected to occur, would be sufficiently serious or significant to cause concern to a properly informed, reasonable person.
44. In forming this view, I again quote my previous determination in matter 2020/05758, and note that I have reservations about how the agency's operations could conceivably be adversely affected by disclosure of the documents to a *substantial* extent:
 38. Whilst I accept that disclosure may negatively affect the agency's negotiating power, I query the severity of this possible outcome, again noting that the agency has no direct competition in relation to the relevant commercial functions. Customers do not have the option of simply going to a competitor rather than the agency.
45. I do not consider that the agency has sufficiently established that the first element of clause 16(1)(a)(iv) has been established.
46. However, even if I were to be satisfied that the first element of clause 16(1)(a)(iv) were established, I would also have to be satisfied that disclosure of the documents would, on balance, be contrary to the public interest.
47. I consider that the existence of clause 7(3), which provides that a contract cannot be exempt pursuant to clause 7, indicates a view of Parliament that under the FOI Act, there is an overwhelming public interest in disclosure of contracts entered into by agencies insofar as they contain information concerning the business, professional, commercial or financial affairs of any agency or any other person.
48. Given this, I do not consider that the agency has put forward any substantial argument that would lead me to conclude it would, on balance, be contrary to the public interest to disclose the documents, even if the agency has sought to rely on the public interest test pursuant to clause 16(1)(a)(iv) rather than clause 7(1).
49. In light of the above, I am not satisfied that any aspect of clause 16(1)(a)(iv) has been established, and I do not consider that the documents are exempt pursuant to clause 16(1)(a)(iv).

Determination

50. In light of my views above, I vary the agency's determination to the effect that the documents are disclosed in full, with the exception of information that is exempt pursuant to clause 6(1).



Wayne Lines
SA OMBUDSMAN

9 November 2021

APPENDIX**Procedural steps**

Date	Event
14 May 2021	The agency received the FOI application dated 14 May 2021.
15 June 2021	The agency determined the application.
18 June 2021	The agency received the internal review application dated 18 June 2021.
1 July 2021	The agency confirmed the determination.
19 July 2021	The Ombudsman received the applicant's request for external review dated 19 July 2021.
20 July 2021	The Ombudsman advised the agency of the external review and requested submissions and documentation.
3 August 2021	The agency provided the Ombudsman with its submissions and documentation.
18 October 2021	The Ombudsman issued his provisional determination and invited submissions from the parties.