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Determination

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

Applicant:	Mr Kevin Lawton
Agency:	Campbelltown City Council
Ombudsman reference:	2021/01554
Agency reference:	6470201
Determination:	The determination of the agency is varied.
Date of Ombudsman's determination:	6 July 2021
Issues considered:	Adverse effect on business affairs Public interest
Exemption clauses relied upon:	7(1)(c)
Legislation considered:	<i>Freedom of Information Act 1991</i>

Terms of the original application:

1. Copy of any invoice, receipt or transaction document between Campbelltown City Council and any individual, business, Company or enterprise of any kind related to the delivery of a document titled "Your Community, Your Future, Your Opportunity" to Adelaide Hills Council Residents in Rostrevor on 19/11/2020.
2. Copy of any handwritten or electronic document by the CEO either approving or suspending the delivery of this document.

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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:
 1. Copy of any invoice, receipt or transaction document between Campbelltown City Council and any individual, business, Company or enterprise of any kind related to the delivery of a document titled "Your Community, Your Future, Your Opportunity" to Adelaide Hills Council Residents in Rostrevor on 19/11/2020.
 2. Copy of any handwritten or electronic document by the CEO either approving or suspending the delivery of this document.

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 21 June 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 not received any further submissions from the parties. Accordingly my views are the same as those expressed in my provisional determination.

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. The following clause is 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–

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

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- (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.
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 five documents within the scope of the application.
11. The agency determined to disclose documents 1 and 2 in part, with information redacted pursuant to clause 7(1)(c).
12. The remaining three documents were identified as having been disclosed to the applicant in a previous application for access. The agency did not provide those three documents in the application under review on the basis that it did not wish to provide the documents again.

Issues in this review

13. The issue for me to determine is whether the agency has justified its determination that the documents are exempt in part, and to determine whether to confirm, vary or reverse the agency's deemed refusal in relation to the documents.

Consideration

Documents previously disclosed

14. The agency's determination identified that there were an additional three documents discovered within scope of the application for access. The agency determined that as it had supplied the documents to the applicant previously, it would not disclose the documents to the applicant as part of its response to the application under review.
15. It is my view that this approach is contrary to the FOI Act.
16. Section 19 of the FOI Act provides that after considering an application for access to a document, an agency must determine whether access to the document is to be given or refused. In this instance as the agency has declined to provide documentation to the

applicant as part of his application for access pursuant to the FOI Act, its determination can only be deemed as a refusal. The fact that access to the documents has been previously granted in the past is not a relevant factor for determination of the present application.

17. In the agency's determination to refuse access to these documents, it has failed to refer to a relevant provision under the FOI Act.
18. Section 20 of the FOI Act provides the reasons that an agency may rely on to refuse access to a document. The reasons are set out as follows:

20- Refusal of access

- (1) An agency may refuse access to a document -
 - (a) If it is an exempt document; or
 - (b) If it is a document that is available for inspection at that or some other agency (whether as part of a public register or otherwise) in accordance with Part 2, or in accordance with a legislative instrument other than this act, whether or not inspection of the document is subject to a fee or charge; or
 - (c) If it is a document that is usually and currently available for purchase; or
 - (d) If it is a document that -
 - (i) was not created or collated by the agency itself; and
 - (ii) genuinely forms part of library material held by the agency; or
 - (e) If it is a document that came into existence before 1 January 1987
19. Under section 20 of the FOI Act there is no basis for refusing access to documents because they have previously been supplied.
20. As the agency lacks a legal basis for refusing access to the additional three documents, it is my view that this aspect of the agency's determination should be varied to the effect that the additional three documents are disclosed to the applicant in response to the application subject to this external review.

Clause 7(1)(c)

21. The agency determined that documents 1 and 2 are exempt in part pursuant to clause 7(1)(c).
22. In order for a document to be exempt pursuant to clause 7(1)(c), the following three elements must be established:
 - It must contain matter consisting of information concerning the business, professional, commercial or financial affairs of any agency or any other person
 - The disclosure of the information could reasonably be expected to have an adverse affect on those affairs, or prejudice the future supply of such information to the Government or agency, and
 - The disclosure of the information would, on balance, be contrary to the public interest.
23. The information which has been redacted are the names of businesses, employees, account details, unit pricing for services and related information.
24. I am satisfied that this information concerns the business affairs of multiple persons, and I am satisfied that the first element of clause 7(1)(c) has been established.

25. With respect to the second element, I am also of the view that disclosure of the information could reasonably be expected to have an adverse effect on the business affairs of the persons involved.
26. In reaching this view, I have had regard to the circumstances surrounding this matter.
27. The application for access relates to an incident which occurred in Rostrevor on 19 November 2020.
28. On 19 November 2020, pamphlets which were titled “Your Community, Your Future, Your Opportunity” were delivered to residents in Rostrevor.
29. On 19 November 2020, the State of South Australia went into strict lockdown in response to COVID-19. The strict lockdown lasted until the end of 21 November 2021.
30. Concerns were raised by members of the community that the person handing out the pamphlets and the company employing the person were in breach of the lockdown protocols. This event was subject to criticism in an article published by *The Advertiser*, dated 20 November 2020.
31. The agency provided submissions indicating that this incident was the subject of heated discussions on a Facebook group, and noted that a member of the community confronted the person handing out pamphlets the day it happened. The person was photographed, and the photograph appeared in *The Advertiser* article.
32. The identity of the person, and the business the person worked for, currently remains anonymous to the public. I note that the individual who appeared in the photograph was wearing a hat and facemask, meaning they cannot be identified by information already available to the public.
33. I note that at the time of the incident, it was unclear if the business had authority to circumvent the lockdown requirements. The agency submits that the business was given authorisation from SA Health to carry out its business on 19 November 2020.
34. In my view, given the sensitive nature surrounding the incident and COVID-19 restrictions generally, I consider that disclosure of either the identity of the person or the identity of the business would have an adverse effect on the affairs of that business due to loss of good will and community standing.
35. I take this view regardless of whether the concerns over the potential breach of the lockdown protocols were warranted or continue to be warranted.
36. Having been satisfied that the first two elements have been established, I now turn my mind to whether disclosure of the information would, on balance, be contrary to the public interest.
37. In the agency’s initial determination, it identified the following public interest factors in favour of disclosure:
 - public awareness and confidence in effective Council decision making processes, and specifically during a time when South Australia was experiencing a resurgence in COVID-19 cases as a result of the Parafield cluster, necessitating the State Government to enforce a lockdown on 19 November 2020
 - the expectation of Council being open, transparent and accountable
 - the media article published on-line in *The Advertiser* on 20 November 2020 “Rostrevor residents claim Campbelltown City Council breached lockdown

rules”, resulting in some information already being available in the public domain.

38. The agency further identified the following public interest factors favouring non-disclosure:
- disclosure could reasonably be expected [to] have a substantial adverse effect on the business affairs of a small business with a potential to result in damage to the Company’s brand and image, as well as negative or objectionable behaviour by members of the public
 - disclosing the name of the business which Council engaged to do the flyer distribution could reasonably have the potential to lead to the identification of one of its staff members, as a photo was taken on 19 November 2020 and published on a Facebook page and on-line in *The Advertiser*, resulting in negative comments made about the unidentified person, which could reasonably have an adverse effect on the person’s mental and/or physical health.
39. In viewing the agency’s consideration of the public interest, I am inclined to agree that disclosure of the information in issue would be contrary to the public interest, in light of the surrounding circumstances.
40. Given the sensitivity of the incident in issue, and that the documents have specifically been requested for the date of the incident in question, I consider that further disclosure of the information in issue would have little benefit in promoting the general principles of government accountability and transparency when weighed against the potential adverse effects to private individuals that could follow if the information were disclosed.
41. I note that the applicant made the following submissions in his application for internal review:
- The greater public interest is served by not permitting Govt. instrumentalities to hide behind FOI based on trivial reasons that are nebulous.
There is a higher degree of public interest that ensure these Govt. institutions do not hide or conceal Contractual arrangements that may be based on nepotism or other sinister motive [sic] that are attempted to be hidden.
Schedule 1 Clause 7 s(1)(c)(i)(ii)A+B FOI is not designed for claims such as this. This is publicly accessible documentation.
42. The applicant made further submissions in his application for external review:
- The interpretation of the Freedom of Information Act 1991 has been incorrectly applied to my application by Campbelltown City Council (CCC) - contrary to the Object of the Act at Part 1, Section 3.
The documents produced have information that should be readily available redacted. Councils should not be able to shroud their business dealings in secrecy without openness, accountability or public confidence that there is no conflict of interest. To do so is not in the public interest. It is in the public interest to release information about who is receiving ratepayer funds.
43. I do not consider the applicant’s submissions to be persuasive in leading me to conclude that disclosure of the information would not be contrary to the public interest.
44. Whilst the applicant has raised as a general point that ordinarily it is in the public interest for agencies to be accountable and transparent in how funding is spent, I consider that under the circumstances of this matter, this interest is outweighed by the need to protect the affairs of third parties.

45. There is nothing before me to suggest that in this instance, the information is being 'hidden' for nefarious reasons, and I consider it reasonable to conclude that disclosure of further information in this matter would have an unreasonable and negative impact on the business affairs of third parties.
46. Further, the principles of the public interest tend to focus on the accountability of the Government and agencies, not specifically the accountability of third parties.
47. I note that the agency has disclosed the total expense incurred for the distribution of pamphlets on 19 November 2020 in document 2, indicating that the Council paid \$296.45 for the services rendered.
48. In light of the circumstances of this matter, I am satisfied that the agency has disclosed what is reasonably necessary to promote the public interest, and that further disclosure of information in this matter would not be in the public interest.
49. In considering the above, I am satisfied that disclosure of the information in issue would be contrary to the public interest, and that the information is exempt pursuant to clause 7(1)(c).
50. I note that there is some information in document 1 which is not related specifically to the business that is the subject of scrutiny in this matter. The information is related to other businesses.
51. It is my view that by disclosing the names of the other businesses, it may lead to the possibility of identifying which business was contracted by the agency by process of elimination. Accordingly I confirm that the names of all businesses referred to in document 2 should remain exempt.

Fees and charges

52. In addition to seeking a review of the agency's determination in relation to access to documents, the applicant has stated that he takes issue with the fee of \$28.20 charged for his application for access, which was charged on top of the initial application fee. The applicant has requested that I consider whether the fee should be waived.
53. Under section 53(3), when an agency determines a fee or charge it must, at the request of the person required to pay, review the fee or charge and, if it thinks fit, reduce it.
54. Section 53(4) provides that where a person is not satisfied with a decision of an agency made under section 53(3), that person may apply to the Ombudsman for a further review of the fee or charge.
55. The applicant has not stated whether he sought such a review under section 53(3). However, the fee was not mentioned in his application for internal review, and on my reading of the submissions before me, it appears that the applicant has not disputed the charge with the agency.
56. Accordingly, I do not have jurisdiction to consider whether the fee should be waived, confirmed or varied.

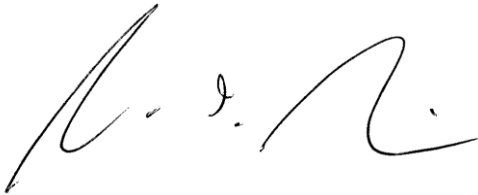
Applicant's concern over potential conflict of interest

57. In his application for external review, the applicant raised a concern that the internal review application was determined by the CEO of the agency, Mr Paul Di Iulio.

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58. The applicant has suggested that Mr Di Iulio was a party to the subject matter of the application for access, and that he considers there was a potential conflict of interest in how Mr Di Iulio handled the internal review process.
 59. I consider that the applicant's concern is outside of the scope of an external review and I do not consider it necessary or appropriate for me to address the concern.
 60. If the applicant considers that there was a conflict of interest, I recommend that he raise the issue with the agency at first instance.

Determination

61. In light of my views above, I vary the agency's determination to the effect that the additional documents found within scope are to be disclosed. I confirm the agency's determination with respect to documents 1 and 2.



Wayne Lines
SA OMBUDSMAN

6 July 2021

APPENDIX

Procedural steps

Date	Event
29 January 2021	The agency received the FOI application dated 29 January 2021.
11 February 2021	The agency determined the application.
26 February 2021	The agency received the internal review application dated 26 February 2021.
11 March 2021	The agency confirmed the determination.
1 April 2021	The Ombudsman received the applicant's request for external review dated 1 April 2021.
6 April 2021	The Ombudsman advised the agency of the external review and requested submissions and documentation.
27 April 2021	The agency provided the Ombudsman with its submissions and documentation.
21 June 2021	The Ombudsman issued his provisional determination and invited submissions from the parties.