



## Determination

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

<b>Applicant:</b>	The Hon John Darley MLC
<b>Agency:</b>	Department for Infrastructure and Transport
<b>Ombudsman reference:</b>	2020/03986
<b>Agency reference:</b>	2020/10367/01
<b>Determination:</b>	The determination of the agency is varied.
<b>Date of Ombudsman's determination:</b>	29 June 2021
<b>Issues considered:</b>	Definition of personal affairs Unreasonableness (personal affairs) Definition of commercial value Whether matter was obtained in confidence Out of scope or interpretation of scope Exercise of discretion
<b>Exemption clauses relied upon:</b>	clause 6(1) clause 7(1)(b) clause 7(1)(c) clause 9 clause 13(1)(b)
<b>Legislation considered:</b>	<i>Freedom of Information Act 1991</i> section 48 section 39(11)
<b>Terms of the original application:</b>	<ul style="list-style-type: none"><li>• Dealings between Hickinbotham and DPTI</li><li>• Dealings between Rod Hook and SCAP</li><li>• Dealings between Rod Hook and DPTI</li><li>• Dealings between Hickinbotham and SCAP</li></ul>

## REASONS

### Application for access

1. By four applications under the *Freedom of Information Act 1991 (the FOI Act)* the applicant requested access from the agency (formerly the Department for Planning Transport and Infrastructure) to:

#### **Dealings between Hickinbotham and DPTI**

All documentary and electronic information on the dealings between Hickinbotham Group, Zarman Pty Ltd and their representatives including Michael Hickinbotham, Martyn Evans, Ruth Vanarelli, Julie Dixon, David Luu and others, representatives from MFY Consultants including Melissa Mellen and others, representatives from Fyfe Pty Ltd including Michael Osborn and others and representatives from DMAW Lawyers and DPTI representatives including Jim Psyridis, Phillip (Phil) Lawes and Tony Braxton Smith and others that in any way relate to the roundabout which is to be sited partly on Harrocks Highway and Partly on Hickinbotham/ Zarmen Pty Ltd land.

#### **Dealings between Rod Hook and SCAP**

All documentary and electronic information on the dealings between Rod Hook as Independent Case Manager and the State Commission Assessment Panel that in any way relate to the roundabout proposed by Hickinbotham Group for Harrocks Highway which is to be sited partly on Harrocks Highway and partly on Hickinbotham/ Zarmen Pty Ltd land.

#### **Dealings between Rod Hook and DPTI**

All documentary and electronic information on the dealings between Rod Hook as Independent Case Manager and DPTI representatives including Jim Psyridis, Phillip (Phil) Lawes and Tony Braxton Smith and others that in any way relate to the roundabout proposed by Hickinbotham Group for Harrocks Highway which is to be sited partly on Harrocks Highway and partly on Hickinbotham/ Zarman Pty Ltd land.

#### **Dealings between Hickinbotham and SCAP**

All documentary and electronic information on the dealings between Hickinbotham Group, Zarman Pty Ltd and their representatives including Michael Hickinbotham, Martyn Evans, Ruth Vagnarelli, Julie Dixon, David Luu and others, representatives from MFY Consultants including Michael Osborn and others and representatives from DMAW Lawyers and the State Commission Assessment Panel that in any way relate to the roundabout proposed by Hickinbotham Group for Harrocks Highway which is to be sited partly on Harrocks Highway and partly on Hickinbotham/ Zarmen Pty Ltd land.

2. The above terms of request arose under separate individual applications but were dealt with by the agency as a single request. This is not at issue in this review.

### Background

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

### Jurisdiction

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

### Provisional determination

5. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 5 March 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.

6. The interested parties and the agency provided submissions in response. I considered and addressed these submissions in my revised provisional determination of 21 May 2021.
7. The interested parties and the agency made further submissions. I have considered and addressed those submissions in this determination.

### Relevant law

8. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.<sup>1</sup>
9. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access.
10. 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.
12. The agency refused access to the documents pursuant to clauses 6(1) and 7(1)(c) of Schedule 1 of the FOI Act. MFY and Hicktinbotham Group (**the interested parties**) also claimed clauses 7(1)(b), 9(1) and 13(1) applied.
13. Clauses 6(1), 7(1)(b) and (c), 9(1) and 13(1) state:

#### **6—Documents affecting personal affairs**

- (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

#### **7—Documents affecting business affairs**

- (1) A document is an exempt document—
  - (a)...
  - (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.

<sup>1</sup> *Freedom of Information Act 1991*, section 12.

**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, 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.

**13—Documents containing confidential material**

- (1) A document is an exempt document—
- (a) if it contains matter the disclosure of which would found an action for breach of confidence; or
  - (b) if it contains matter obtained in confidence the disclosure of which—
    - (i) might reasonably be expected to prejudice the future supply of such information to the Government or to an agency; and
    - (ii) would, on balance, be contrary to the public interest.

**Documents in issue**

14. The agency identified 11 documents within the scope of the application.

**Issues in this review**

15. Having regard to the agency's determination and the submissions of all parties, 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 regards to the documents in issue.

**The Interested Parties' Submissions in response to my provisional determination**

16. I turn to consider the general submissions by the interested parties in response to my provisional determination here. I will consider the claims of exemption by the interested parties and their responses to my revised provisional determination below in my consideration of the documents.
17. The interested parties provided almost identical submissions in response to my provisional determination. I will, for the large part, address their submissions together.
18. The interested parties claimed that documents 1, 2, 3, 4, 6, 7, 9, 10, and 11 are exempt. In particular, the interested parties claimed:
- clause 7(1)(b) in respect of documents 1, 9 and 10
  - clause 7(1)(c) in respect of all documents (aside from documents 5 and 8)
  - clause 9 in respect of documents 7 and 11
  - Clause 13(1) in respect of all documents (aside from documents 5 and 8).
19. In respect of the interested parties' claim of clause 13(1), they have not distinguished between paragraphs (a) or (b) of the subclause. The difference between the two limbs is significant, however I do not consider that the substance of the interested parties' submissions addresses the elements of a breach of confidence at equity. Therefore, I proceed on the basis that the interested parties are claiming paragraph (b), which turns on the public interest.

20. The interested parties also indicated that documents 5 and 8 (to the extent they are not claimed to be out of scope by the agency) were now in the public domain. Document 5 is an email chain between MFY and the agency. Document 8 includes an internal agency email chain, a letter from MFY to the agency enclosing three drawings, which is largely redacted because of 'scope' claims by the agency. The letter of MFY dated 29 November 2017 was attached in documents 1, 8, 9 and 10.
21. The interested parties submitted that, were I inclined to disagree with their claims of exemptions, I should consider that the form of access should be 'inspection' rather than provision of a copy of the documents. The form of access by which a determination is effected is not a determination itself and falls on the agency to decide in accordance with the requirements of section 22(2). As such, I have not decided this matter in my external review of the agency's determination.

## Consideration

### Clause 6

22. The agency has redacted names and contact details of non-government employees under clause 6(1). I will address these in turn.
23. Whether information relating to a person's employment is covered by the term 'personal affairs' is dependent upon the content and context of the information.<sup>2</sup>
24. The term 'personal affairs' is defined in section 4(1) of the FOI Act to include a person's financial affairs, criminal records, marital or other personal relationships, employment records, and personal qualities or attributes. The definition is not exhaustive and has been held to involve 'matters of private concern to an individual',<sup>3</sup> whether it is known to other persons or not,<sup>4</sup> and includes the 'composite collection of activities personal to the individual concerned'.<sup>5</sup> Hence, it is clear that the definition of personal affairs is intended to be broad. However, information concerning those affairs will only be exempt insofar as disclosure of it would be unreasonable.
25. While the definition of 'personal affairs' in the FOI Act includes 'employment records', distinction has been drawn between personal affairs and information relating to the performance of employment duties. Importantly, there is a distinction between the official capacity of an employee (i.e. where he or she works or what work he or she does), and matters of the employment record (i.e. job application and Curriculum Vitae, employment contract, etc), which are the personal affairs of the employee concerned.<sup>6</sup>
26. The names of the employees engaging with the government are not their personal affairs as they are conveyed in the course of their official capacity as employees of an interested party. I further note that, based on searches conducted by my Legal Officer, the redacted names may be found on the website of their employer.
27. The employees' official email addresses are also not their personal affairs, for the same reasons.
28. Mobile phone numbers are, however, a matter of private concern as they enable a person to be contacted out of his or her official capacity. Mobile phone numbers would, therefore, constitute information concerning personal affairs of those employees. I

<sup>2</sup> *Chief Executive Officer, State Rail Authority v Woods* (GD) [2003] NSWADTAP 25, [17].

<sup>3</sup> *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606 at [625] citing *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 and *Young v Wicks* (1986) 13 FCR 85 at [88 - 89].

<sup>4</sup> *Colakovski v ATC* (1991) 29 FCR 429 at [436].

<sup>5</sup> *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606 at [625].

<sup>6</sup> *Priebe v SA Police* [2007] SADC 119.

consider that disclosure of mobile numbers would be unreasonable because, while not significantly advancing the public interest in disclosure under the FOI Act, the disclosure of the mobile numbers to an applicant would fall short of community expectations of privacy. Given that I am not determining to release this information, I am not required to consult.

#### Clause 7(1)(b)

29. The interested parties claimed clause 7(1)(b) in relation to documents 1, 9 and 10. They indicated that the documents contained professional advice, for which another party paid MFY.
30. A document is exempt under clause 7(1)(b) if it contains information that has a commercial value to any agency or person that could be reasonably expected to be destroyed or diminished if disclosed. Disclosure must also be, on balance, contrary to the public interest.
31. 'Commercial value' is not defined in the FOI Act, but was considered by the Queensland Information Commissioner, who noted two possible interpretations of the phrase:<sup>7</sup>

The first (and what I think is the meaning that was primarily intended) is that information has commercial value to an agency or any other person if it is valuable for the purposes of carrying on the commercial activity in which the agency or another person is engaged. The information may be valuable because it is important or essential to the profitability or viability of a continuing business operation, or a pending 'one-off' commercial transaction...

The second interpretation of 'commercial value' which is reasonably open is that information has a commercial value of an agency or another person if a genuine arms length buyer is prepared to pay to obtain that information from that agency or person. It would follow that the market value of that information would be destroyed or diminished if it could be obtained from a government agency that has come into possession of it, through disclosure under the FOI Act...

32. This authority has recently been affirmed as relevant and applicable to the FOI Act.<sup>8</sup> In addition to the Commissioner's preference for the first interpretation, I note that the second interpretation could lead to the absurd construction of the terms of the Act that renders clause 7(1)(b)(ii)(A) superfluous, once clause 7(1)(b)(i) has been met.
33. In *Media Research Group Pty Ltd v Department of Premier and Cabinet (GD)* the New South Wales Administrative Decisions Tribunal Appeal Panel considered the Queensland Information Commissioner's decision in the context of considering clause 7 of the former New South Wales *Freedom of Information Act 1989*. The panel concluded:<sup>9</sup>

The term 'trade secret' when used in the FOI legislation is directed to commercial secrets of a high order to do with such things as produce ingredients or manufacturing processes ... Information of 'commercial value' may be something less than a 'trade secret' but, in our view it still should be something which has some measure of exclusivity.

...

<sup>7</sup> *Re Cannon and Australian Quality Egg Farms Limited* [1994] QLCmr 9, [54-55].

<sup>8</sup> *Anangu Pitjantjatjara Yankunytjatjara v the Ombudsman & Another (APY)* [2019] SASC 162, para 176.

<sup>9</sup> *Media Research Group Pty Ltd v Department of Premier and Cabinet (GD)* [2011] NSWADTAP 7, at paragraphs 39, 46, 48 and 50.

In our view, a bare statement setting out the amount paid annually under a contract by a government agency does not, on its face, involve anything that could be said, reasonably, to be of 'commercial value'.

...

In our view, information of 'commercial value' would ordinarily be information with a proprietary character, information of an internal character (such as specialised statistics) or information the product of some unique or special intellectual processes of a high order that might fall below the level of a 'trade secret'. There should, as we see it, be some uniqueness attaching to the information that justifies treating it as exclusive, secret or confidential.

...

Moreover, we think it is unrealistic to seek to ascribe a 'commercial value' to the amount paid by government for services rendered to a business party under a contract in the modern environment of government-business contracting.

34. I find this assessment of what constitutes information of 'commercial value' persuasive when considered together with the views expressed in *Cannon*, discussed above. I note the comment of Hinton J in *Anangu Pitjantjatjara Yankunytjatjara v the Ombudsman (APY)*, that *Media Research Group* may be unduly restrictive if considered exclusively.<sup>10</sup> As such, I have also had regard to the views of the Queensland Information Commissioner in *Cannon* in considering this submission
35. The interested parties clearly are engaged in commercial activities. I have no doubt that the subject matter of the documents is connected in some way with the commercial activity of the agency.
36. On this basis, I only accept that the letter dated 20 December 2018 (together with the table enclosed) is a document which contains information that has a commercial value to the interested parties.
37. In relation to whether diminution of commercial value of the information would arise from disclosure, the interested parties relied on *Re Organon*. In *Re Organon*, the Tribunal considered that the:

compilation of information in [the document] must have accounted for considerable time and money. To the extent that the statistical information contained in the document is dispersed to the world generally, the value of that investment must be substantially diminished.<sup>11</sup>

[Emphasis added]

38. The interested parties asserted, apparently based on this, that documents which 'required substantial time and money to produce can result in diminution in the information contained in it, irrespective of whether diminution can actually be demonstrated' (emphasis added). I reject these submissions. In *Re Organon*, the Tribunal concluded, after having considered the confidential documents in question, that disclosure could reasonably be expected to diminish the commercial value of the document *because* of the substantial time and money required to produce the documents. In that case, as a question of fact,<sup>12</sup> the Tribunal considered that the content of the documents was such that its widespread disclosure would *necessarily* ('must') diminish its value. At no point did the Tribunal lay down an exhaustive legal

<sup>10</sup> *Anangu Pitjantjatjara Yankunytjatjara v the Ombudsman & Another (APY)* [2019] SASC 162, para 176.

<sup>11</sup> *Re Organon (Australia) Pty Ltd and Department of Community Services and Health and Public Interest Advocacy Centre* [1987] AAT 396, paragraph 31.

<sup>12</sup> *Re Organon (Australia) Pty Ltd and Department of Community Services and Health and Public Interest Advocacy Centre* [1987] AAT 396, paragraph 29.



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principle of the kind suggested by the interested parties; rather it made a factual assessment of the document in that case. In any event, I have given consideration to the amount of time and money required to create the documents in question as a factor in my decision.

39. I turn to consider the documents in question.
40. The types of documents included in documents 1, 9, and 10 are:
  - correspondence within the agency
  - correspondence between the MFY and the agency
  - correspondence between the MFY and another party dated 20 December 2018
  - maps (enclosed with the letter dated 29 November 2017) and a table (enclosed with the letter dated 20 December 2018).
41. Having considered the documents, I accept that it is the latter two types of documents that, following the reasoning of *Re Organon*, clearly cost substantial time and money to create, such that I consider that their disclosure could reasonably be expected to diminish the commercial value of the information contained in those documents.
42. However, I am not convinced that other documents contained in Documents 1, 9 and 10 have commercial value, but I consider that if they do, it would not be diminished if the documents were disclosed. Therefore, those documents do not qualify for the exemption of clause 7(1)(b).
43. On this point, I note the interested parties' submissions that the remainder of Documents 1, 9 and 10 are commercially valuable and that diminution of the commercial value would occur if disclosed.
44. In particular, the interested parties submitted that the information contained in Documents 1, 9 and 10 were important or essential to the profitability or viability of a continuing business operation or a pending one-off commercial transaction. In considering these submissions, I note that a distinction should be made between the value of the information as opposed to the value of the activity of conveying the information. For example, drafting a document may mean that the document is commercially valuable, but it was the process of delivering the information and not the information itself that is commercially valuable. Also, a distinction needs to be made between *information that is about* commercial value and *information which has a* commercial value.
45. I am consequently unconvinced that the remainder of documents 1, 9 and 10 contain information of commercial value, since that information does not have a proprietary character, nor does it have a relevant internal character (such a specialised statistics), nor is it information that is a product of some unique or special intellectual process of a high order that nevertheless falls below the level of a trade secret. Rather, the information contained in the remainder of documents 1, 9 and 10 relates to an ongoing process between multiple parties including the interested parties, a council, and a government department about plans to build a roundabout on a public highway, the fact of which is in the public domain.
46. For those documents that do contain information of commercial value that would diminish if disclosed, I turn to consider whether the disclosure of the documents is contrary, on balance, to the public interest.
47. In particular, the interested parties allege that the letters of MFY to the agency contain commercially valuable information because Hickinbotham remunerated MFY for its services. Emphasis must be placed on the commercial value of the *information* in



question, not the service provided that conveyed the information. For example, the letters written to the agency by MFY on behalf of Hickinbotham may have costed Hickinbotham, but it is the provision of the service of drafting those letters that MFY alleges contains the commercial value. This confuses the commercial affairs captured by clause 7(1)(c) and the information that has a commercial value of clause 7(1)(b).

48. Factors in favour of disclosure include that disclosure would:
- enable scrutiny by the public of decision-making by the agency about public roads, transport and planning
  - enable the applicant to advance the role of Parliament in holding Executive Government to account
  - enable the public to observe interactions between businesses and the government
  - provide insight as to safety considerations on an important public highway
  - or could, enable review processes to be accessed should there be any reason to hold the agency's decision to scrutiny.
49. Factors contrary to disclosure include that disclosure would:
- diminish the value of information that the interested parties used in advancing their commercial activities
  - diminish the likelihood of developers providing the agency with copies of communications between non-government parties (noting that the letter dated 20 December 2018 appears to have been provided voluntarily).
50. In my view disclosure of the letter of MFY to a third party dated 20 December 2018 and its enclosure, would not advance the public interest factors in favour of disclosure, but the factors contrary to disclosure are significant (in light of their commercial value).
51. I therefore consider that the letter of MFY to a third party dated 20 December 2018, and its enclosures, are exempt.

#### Clause 7(1)(c)

52. The agency claimed clause 7(1)(c) in respect of the documents broadly.
53. The interested parties claimed clause 7(1)(c) over all the documents aside from Documents 5 and 8.
54. I exclude from my following consideration of clause 7(1)(c) those documents that I accept are exempt pursuant to clause 7(1)(b).
55. The phrase 'business, professional, commercial or financial affairs' is not defined in the FOI Act, however, the Administrative Appeals Tribunal has commented that:
- they are words of very wide application, and cover all the aspects, both fiscal and administrative, of an organisation or undertaking: I do not think that they should be narrowly construed.<sup>13</sup>
56. Further to this, 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 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).<sup>14</sup>

<sup>13</sup> *Martin Saxon v Australian Maritime Authority* [1995] AAT 165, [99].

<sup>14</sup> *Stewart and Department of Transport* (1993) 1 QAR 227, [103].

57. I agree with the conclusion of the Queensland Information Commissioner and apply the same to this external review.
58. While I accept that the documents do contain matter relating to the business affairs of interested parties, the agency did not specify what information in the documents is sensitive nor provide any specific causal connection between the disclosure of the documents and an adverse effect those business affairs could reasonably be expected to suffer, or any way in which the future supply of information to the government would be prejudiced.
59. 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.<sup>15</sup> This expectation must be based on reason and not be ‘fanciful, far-fetched or speculative’.<sup>16</sup>
60. The agency did identify public interest considerations in its determination and engaged in a weighing up exercise, however I do not consider that it arrived at the correct conclusion. The same can be said for the submissions received from the interested parties.
61. Where the FOI Act provides for restrictions on the general purpose of disclosure, Parliament has deemed that the public interest in disclosure under the objects of the FOI Act and the public interest in withholding documents under clause 7(1)(c) are of competing weight<sup>17</sup> until resolved by weighing the specific factors of the individual disclosure of the document. The public interest captured in clause 7(1)(c) is the adverse effect on business affairs or prejudice to information supply to the government. Thus, failing to identify a way in which disclosure could reasonably be expected to<sup>18</sup> adversely affect the identified business affairs or prejudice the information supply, not only fails an essential requirement of the exemption but also negates the claim that disclosure is contrary to the public interest. In this case, the agency has suggested in its determination to the applicant that release of the information would hinder the competitiveness of the interested parties. However, it has not provided any degree of specificity in its determination, nor have its submissions explained this.
62. The interested parties both made submissions on this point. MFY stated in response to my provisional determination that:
- The conclusion reach [sic] in paragraph 27 of the provisional determination appears to be based on the Agency’s failure to identify a way in which disclosure would adversely affect or prejudice MFY. With respect, that is not the test. The Act is clear that the applicable test is whether it is reasonably expected [that] there be an adverse effect. The distinction is important.
63. I note that I was addressing the implications of the agency’s failure to identify an adverse effect on the public interest of the disclosure.
64. I do not accept the suggestion that requiring the agency to identify an expectation that is reasonable is contrary to the test; indeed, if it fails to do this, it has fallen short of its onus to justify its reliance on the exemption.

<sup>15</sup> *Iplex Information Technology Pty Ltd v Department of Information Technology Services SA* [1997] 192 LSJS 54, 63-64.

<sup>16</sup> *Konieczka v South Australia Police* [2006] SADC 134 at [14].

<sup>17</sup> *AG of South Australia v Channel Seven News Network* [2019] [1]; *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 [55].

<sup>18</sup> I have changed the word ‘would’ to ‘could reasonably be expected to’ to better reflect the language the terms of the FOI Act, having considered the submissions of the interested parties.

65. For an expected outcome of disclosure to be reasonable, the agency must have identified a logical link between disclosure and the expected adverse effect. It is not relevant whether that link is probable or likely, but simply whether the expectation is reasonably based.<sup>19</sup>
66. Generally speaking, the intention and plans of the interested party are already in the public domain.<sup>20</sup>
67. The agency stated in the public interest factors of its determination that disclosure would affect the free flow of information to government. However, it provided no evidence or particulars of how this may occur.
68. MFY further submitted:

The information contained within all of the Documents is directly relevant to MFY's current business affairs, and also those of Hickinbotham. Hickinbotham is carrying out land development. The Roundabout forms part of the development. MFY is a consultant engaged by Hickinbotham and other developers to provide advice and assistance in relation to matters such as the process for approval of traffic management systems such as the Roundabout. Clearly, these are business affairs of Hickinbotham and MFY.

As we have stated, at least one other developer has purported to object to the Roundabout. Access to documents not relied on by the Agency or the Council in making the decision to approve the Roundabout risks prejudicing the completion of Hickinbotham's development. Whilst we are of the view the approval cannot be reviewed or construction injected, that is not to say attempts will be made, or that something in the Documents is used as a basis for impugning the decision or process.

If the information contained within the Documents are released, it is conceivable that other land developers operating in Roseworthy could make use of that information to disrupt the process that is currently underway, for their own commercial advantage.

69. I consider that MFY has identified an adverse effect on its business affairs that is reasonably expected.
70. Nevertheless, I observe that the threat of review by a legitimate legal process is not likely to carry much weight when considering public interest. There is inherent public interest *in the process* of review authorised by the law. The converse of the interested parties' claim of adverse effect underscores the fact that there is a government decision that may be held to account. I will consider both factors when I consider public interest below.

#### Clause 9(1)

71. The interested parties claim clause 9(1) in respect of Documents 7 and 11. Document 7 is an email to which a copy of Minutes of a Meeting are attached. Document 11 is a copy of those Minutes.
72. In order for a document to be exempt pursuant to clause 9(1), two elements must be met under clauses 9(1)(a) and (b).
73. The scope of clause 9(1)(a) is wide, particularly given the words 'that relates to'.

<sup>19</sup> Attorney General's Department v. Cockcroft 64 ALR 97, page 106.

<sup>20</sup> The Bunyip, *Roundabout proposed for Harrocks Highway*, 1 December 2020 < <https://bunyippress.com.au/roundabout-proposed-for-harrocks-highway/>>, accessed in part on 19 February 2021.

74. The 'opinion, advice or recommendation', or 'consultation or deliberation' must nevertheless have been obtained, prepared or recorded in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency.
75. In order for an internal working document to be an exempt document, the disclosure of the document must, on balance, be contrary to the public interest.
76. I accept that the Minutes of Meeting contained in Documents 7 and 11 contain 'deliberations' in the course of agency decision-making functions.
77. The public interest objective of clause 9 is that government officers are free to provide frank and candid advice in order to promote good government decision-making.<sup>21</sup> I will consider this below when I assess the public interest.

#### Clause 13(1)

78. I now turn to consider the claim of the interested parties that clause 13(1) applies to the documents. As noted above, I am proceeding on the basis that the paragraph relied upon is paragraph (b) rather than (a), since the interested parties did not address the elements of the equitable doctrine of confidentiality.
79. I exclude from my following consideration of clause 13(1) those documents that I accept are exempt pursuant to clause 7(1)(b).
80. To rely on clause 13(1)(b) as a basis for refusing access to a document, each of the following criteria must be satisfied:
  - the matter in the document must have been 'received under an express or inferred understanding that [it] would be kept confidential'<sup>22</sup>
  - that disclosure of the information might reasonably be expected to prejudice the future supply of such information to the Government or an agency
  - that disclosure of the matter would, on balance, be contrary to the public interest.
81. I make the following observations of the documents between the agency and interested party:
  - the communications between MFY as representative of a developer and the agency are outward facing
  - none of the communications were specifically labelled or marked 'Confidential' or alike, aside from the usual disclaimer in the signature
  - no expectation of confidentiality is conveyed in the documents
  - one attachment to various documents, a letter dated 29 November 2017 with enclosures including maps of the proposed roundabout and development, is already in the public domain and this conveys similar information found elsewhere in the documents
  - references claimed to be particularly sensitive by the interested parties included reference to the terms of an infrastructure deed, which at law is a formal contract. I note that contracts themselves are not exempt documents under clause 13(1), unless they have been approved by a Minister.
82. In response to my revised provisional determination, the interested parties submitted that:
  - the fact that a document is marked as confidential or not is not *determinative* to the question of whether a document was received in confidence

<sup>21</sup> *Pizzino v SA Police* (Unreported, South Australian Civil and Administrative Tribunal, Stevens ESM, 2 January 2020).

<sup>22</sup> See *Re Maher and Attorney-General's Department* (1986) 7 ALD 731 [737].

- there are competitive and acrimonious relations between developers in relation to the Roseworthy development
  - in determining whether the documents were received in confidence it is necessary to consider the character of the documents and the context in which they were received.
83. I accept the above points. They do not, however, change my view.
84. I do not accept that the alleged acrimony in itself means that the documents were received in confidence. The communications between a developer's representative and a government decision maker are outward facing and are distinct from the communications between the representative and developer. Despite the outward facing nature of these communications, MFY has not marked its communications as confidential or otherwise conveyed any expectation of confidence.
85. Ultimately, I am not persuaded that the documents were received in confidence.
86. I am likewise not persuaded that disclosure might reasonably be expected to prejudice the future supply of such information to the agency. The Full Court of the Federal Court, in *Attorney-General's Department v Cockroft*<sup>23</sup> held, in the context of the *Freedom of Information Act 1982 (Cth)*, that the expression 'reasonably be expected to prejudice' was to be given its ordinary meaning and required a judgment as to what was reasonable, as distinct from something that was irrational, absurd or ridiculous.
87. I consider that developers have a strong financial interest in cooperating with government agencies for both developments and infrastructure upgrades needed to facilitate those developments. It seems to me to be absurd to suggest that MFY would not provide the information required of it to further the interests of its client. MFY did not disagree that it would provide the information *required* by the agency in future, but suggested that it and other similar persons might be less forthcoming with *additional* information. I respond with two points. First, if I were to accept the factual assertion, it would not carry considerable weight in a consideration of the public interest, since the agency would have the information it requires of the parties. Second, I do not accept that MFY or other similar persons would abstain from being forthcoming, given that it is in their own commercial interests to do so.
88. For completeness, I will nevertheless consider whether disclosure, on balance, is contrary to the public interest.

#### *Public interest*

89. I now consider whether disclosure of the documents for which clauses 7(1)(c), 9(1) and 13(1)(b) have been claimed is, on balance, contrary to the public interest. My consideration relates to all documents, aside from:
- the letter dated 20 December 2018, together with its enclosures
  - Documents 5 and 8 (including where those documents appear elsewhere).
90. The public interest factors I consider are in favour of disclosure include that disclosure would:
- enable scrutiny by the public of decision-making by the agency about public roads, transport and planning
  - enable the applicant to advance the role of Parliament in holding Executive Government to account

<sup>23</sup> (1986) 64 ALR 97, per Bowen CJ and Beaumont J at paragraph 156.

- 
- enable the public to observe interactions between businesses and the government, thereby increasing the transparency of these relations
  - provide insight as to safety considerations on an important public highway
  - or could, enable review processes to be accessed should there be any reason to hold the agency's decision to scrutiny.
91. The public interest factors I consider are contrary to disclosure include that disclosure would:
- or could, be adverse to the business interests disclosed therein
  - reveal deliberations by the agency in deciding, thereby potentially inhibiting frankness and candor
  - or could, prejudice the supply of information to government (however, I consider that this is implausible given that developers have strong incentives to provide such information to the government)
92. In considering whether disclosure would be contrary to the public interest I also observe that:
- the subject matter of the documents is about public infrastructure on a public road
  - the public infrastructure appears to be for a public safety purpose
  - there appears to be some controversy about the roundabout according to the interested party
  - the fact that another party might challenge or seek review against the decision to approve the development is not a public interest factor against disclosure (in fact, I consider that there is a public interest in reviews and challenges to government decision making)
  - I am not persuaded by the suggestion that disclosure of the documents is 'likely to only lead to "unnecessary debate" about a matter which is already finalised'; indeed, I do not consider that the *Howard Factors* apply favorably to the interested parties' case
  - I also note the inconsistency between the submissions made by the interested parties and addressed in the above two points; either debate is unnecessary and the matter finalised, or debate may still have value because review might be sought of the decision made.
93. These observations lead me to conclude that the factors in favour of disclosure are not outweighed by those against. Therefore, my view is that on balance, disclosure is not contrary to the public interest.
94. The interested parties submitted that the extent to which the documents enabled scrutiny of the decision 'to give the necessary approvals for the roundabout' was unclear on the documents and therefore the factor carried limited weight. I am not persuaded by this submission, since the documents do reveal representations made to the agency and the agency's responses to those representations. Scrutiny of a decision encompasses the deliberations within the agency and representations leading to it.
95. The interested parties sought explanation of how I consider that the *Howard Factors* do not apply favourably to their case. The particular factor claimed by the interested parties is that disclosure may lead to unnecessary debate. However, in light of its own submissions I do not consider that debate is unnecessary. There are parties who have differing views on a roundabout to be installed on a public highway. Parliament (as well as the public) is able to scrutinise the agency's decision making while it is a relevant issue. Further, other *Howard Factors* do not apply favourably. The matter does not relate to a policy decision. The advice, consultation or deliberation was not made at a significantly high level of government. Had I strictly applied the *Howard Factors* and no



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other considerations, I would have arrived at the same conclusion on the documents over which clause 9 applied.

*Refusals on the basis of scope*

96. The agency made a number of redactions to the documents on the basis of scope. An applicant must provide such information as is reasonably necessary to identify a document.<sup>24</sup> The identification of a document is not a determination but a prerequisite administrative act. Whether a document is identified by the terms of an application (i.e. is within scope) is not an issue that my Office may consider on external review. However, once a document has been identified within the scope of the application, the agency 'must' determine whether to give access to 'the document'.<sup>25</sup>
97. A redaction to a document that has already been identified by the agency within the scope of the application is a refusal of access. A refusal of access is a determination. It is therefore externally reviewable by me.
98. Section 20 lists the reasons for which access to a document may be refused and this does not include whether information is within 'scope'. The onus is on an agency to justify its determination to refuse access.
99. There may be occasions where an agency properly uses redactions to isolate a document within a broader collection of documents into which the document had become included. In those cases, the redactions are not a refusal of access, but a convenient way of isolating a document that already existed at the time of the application. The agency has not submitted that this is the case in relation to any of the documents in question. I am therefore left to conclude that the agency has determined to refuse access for a reason that is not properly justified under the FOI Act. The documents should be provided without any of the redactions the agency made on the purported basis of scope.
100. In response to my provisional determination, the agency submitted that
- The out of scope information relates to matters not the subject of the FOI request, and if such information was to be released further consultation may be required to be undertaken with various other third parties whose business affairs may be affected.
101. In response to my revised provisional determination, the agency submitted that the matter it had redacted on the basis of scope related to the business affairs of three third parties. I agree that consultation would be required for four sentences, but conclude that the public interest in this matter is found in the timely resolution of the matter before me.
102. Section 39(11) confers a broad discretion on me to confirm, vary or reverse a determination of the agency. The only restriction placed on that discretion in subsection 12 is that I may not disclose information that I consider to be exempt. Conversely, this discretion enables me to refuse access to documents or parts of documents even where I consider that they are not necessarily exempt.<sup>26</sup> In the present case, the sentences in question would require me at this late stage of the external review to consult with three additional interested parties, resulting in the delay of my determination, while concerning subject matter that does not directly correspond to the terms of the applicant's request. I therefore exercise my discretion to refuse access to the four relevant sentences in the Minutes of Meeting in Documents 9 and 11.

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<sup>24</sup> Section 13(1)(d).

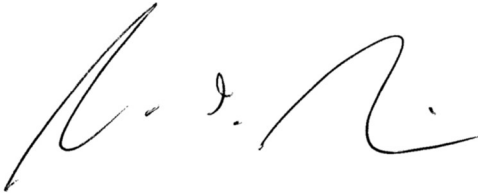
<sup>25</sup> Section 19(1)(a).

<sup>26</sup> *Acts Interpretation Act 1915* section 34.



**Determination**

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

A handwritten signature in black ink, appearing to read 'W. Lines', written in a cursive style.

Wayne Lines  
**SA OMBUDSMAN**

30 June 2021

## APPENDIX 1

### Procedural steps

Date	Event
1 May 2020	The agency received the FOI applications dated 1 May 2020.
	The principal officer of the agency extended the time for dealing with the application until 20 July 2020.
17 July 2020	The agency determined the application.
3 August 2020	The agency received the internal review application.
18 August 2020	The agency confirmed the determination.
19 August 2020	The Ombudsman received the applicant's request for external review.
20 August 2020	The Ombudsman advised the agency of the external review and requested submissions and documentation.
5 March 2021	The Ombudsman issued his provisional determination
16 April 2021	The interested parties provided their submissions.
21 May 2021	The Ombudsman issued his revised provisional determination
7 June 2021	The agency provided further submissions
11 - 14 June 2021	The interested parties provided their submissions

**OFFICIAL**

**APPENDIX 2**

Document	Name	Agency determination	Ombudsman Determination	Information to be released
Document 001	Email with attachments	Partial release	Vary	Release (without mobile numbers): <ul style="list-style-type: none"> <li>• Email of MFY to agency dated 9 May 2019</li> <li>• Letter of MFY dated 29 November 2017 together with enclosed maps</li> <li>• Email of agency to MFY dated 29 November 2017</li> <li>• Email chain of 27 July 2018</li> </ul> Refuse: <ul style="list-style-type: none"> <li>• Letter of MFY dated 20 December 2018</li> <li>• Table of Infrastructure</li> </ul>
Document 002	Email	Partial release	Vary	All aside from mobile numbers
Document 003	Email	Refused	Vary	All aside from mobile numbers
Document 004	Email	Partial release	Vary	All aside from mobile numbers
Document 005	Email	Partial release	Vary	All
Document 006	Email	Partial release	Vary	All aside from mobile numbers
Document 007	Email with attachment	Partial release	Vary	All aside from mobile numbers
Document 008	Email with attachments	Refused	Vary	All
Document 009	Email with attachments	Partial release	Vary	All aside from mobile numbers and four sentences in Minutes of Meeting (as redacted by my Legal Officer)
Document 010	Email with attachments	Partial release	Vary	All aside from mobile numbers
Document 011	Minutes of Meeting	Partial release	Vary	All aside from four sentences (as redacted by my Legal Officer)