



Determination

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

Applicant:	Mr Phillip Martin PC0015 CMAR Pty Ltd ICD Land Pty Ltd
Agency:	City of Adelaide
Ombudsman reference:	2022/06805; 2022/06806; 2022/06975
Agency reference:	ADEL2022-016
Determination:	The determination of the agency is confirmed, the effect of which is that documents 1 and 3 are partially exempt on the basis of clause 16(2) and document 2 is to be released in full.
Date of Deputy Ombudsman's determination:	29 March 2023
Issues considered:	Business affairs Contract entered into by an agency Breach of contract Financial or property interest of an agency Prejudice to competitiveness of an agency
Exemption clauses relied upon:	7(1)(c), (3) 13(1)(a), (2), (6) 15 16(1)(a)(iv), (2)
Legislation considered:	<i>Freedom of Information Act 1991</i>

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:

The contract between the City of Adelaide and ICD for the redevelopment of the Central Market Arcade, the air rights and any associated components. I request the contract signed in December 2019 and each/all of the Annexures and Addenda.

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. All three applications for external review were lodged beyond the 30-day statutory period. The Ombudsman has exercised his discretion under section 39(4) of the FOI Act to extend the time for making an application for external review.
5. Although the agency made its determination on 11 October 2022, an administrative oversight resulted in the interested parties not being advised of that determination until 3 November 2022. Accordingly, the two external review requests by the interested parties on 30 November 2022 were lodged within 30 days of those parties receiving notice of the agency's determination. It is also noted that during a telephone call on 30 November 2022, the agency advised the Ombudsman's Legal Officer that it had no objection to the applications for external review being accepted out of time.
6. In light of the above, the Ombudsman considered it appropriate to accept the two applications for external review lodged by the interested parties.
7. Upon being notified of the commencement of this external review, the agency advised the applicant that access to any of the documents in issue would be deferred until the conclusion of the review. Subsequently, on 7 December 2022 the applicant contacted this Office requesting that he be provided a copy of the Ombudsman's provisional determination and be given an opportunity to comment on the same. It was noted that the applicant also took that opportunity to dispute a portion of the agency's determination. As such, the Ombudsman considered it appropriate to treat the applicant's request as another application for external review.
8. Although that application was also made out of time, as the Ombudsman was already conducting an external review at the request of the interested parties, he was satisfied that it was appropriate to also exercise his discretion to accept the applicant's request.

Provisional determination

9. The Ombudsman provided his tentative view about the agency's determination to the parties, by his provisional determination dated 10 January 2023. The Ombudsman informed the parties that subject to receipt and consideration of submissions from the parties he proposed to vary the agency's determination.

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10. By emails dated 24 February 2023 and 3 March 2023 respectively, the interested parties and the agency provided submissions in response. The Ombudsman was persuaded by the agency's submissions to depart from the view expressed in his provisional determination and therefore considered it appropriate to issue a revised provisional determination.
11. The Ombudsman provided his revised tentative views about the agency's determination to the parties, by his revised provisional determination dated 10 March 2023. The Ombudsman informed the parties that subject to receipt and consideration of submissions from the parties he proposed to confirm the agency's determination.
12. By emails dated 24 March 2023 the agency provided submissions in response. The agency has advised that although it accepts the Ombudsman's revised provisional views, it wished to make further submissions about the Ombudsman's comments on the applicability of clause 13. I have addressed those submissions in this determination.
13. The interested parties also provided a response to the Ombudsman's revised provisional views by email dated 24 March 2023. The interested parties maintain that the position set out in their February submissions is the preferable construction of the relevant provisions of the FOI Act, but also advise that it would not be constructive to re-state those matters at this point in time, noting that the parties have an opportunity to seek a review by the South Australian Civil and Administrative Tribunal.
14. The interested parties did however comment on three specific points in the Ombudsman's revised provisional determination. I confirm that I have addressed those comments in this determination.
15. The applicant did not respond to the Ombudsman's revised provisional determination.
16. Having considered the submissions provided, I advise that I am not inclined to depart from the Ombudsman's revised provisional views. Accordingly, save for my responses to the additional submissions from the agency and interested parties, this determination is in the same terms as the Ombudsman's revised provisional determination.

Relevant law

17. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
18. 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.
19. The following clauses of Schedule 1 of the FOI Act are relevant to my 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* s 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.
- (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.

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.
- (2) A document that is a contract entered into by the Crown or an agency after the commencement of this subclause is not an exempt document by virtue of subclause (1) unless—
 - (a) it contains matter the disclosure of which would, under a term of the contract, constitute a breach of the contract or found an action for breach of confidence; and
 - (b) that term of the contract has been approved by—
 - (i) in the case of a contract entered into by the Crown—a Minister; or
 - (ii) in the case of a contract entered into by a State Government agency—the responsible Minister for the agency; or
 - (iii) in the case of a contract entered into by an agency that is not a State Government agency—the agency.
- ...
- (6) If a Minister or agency approves a term of a contract in accordance with subclause (2), the Minister or agency must, as soon as practicable, notify the Minister administering this Act, in writing, of that fact.

15—Documents affecting financial or property interests

- A document is an exempt document if it contains matter the disclosure of which—
- (a) could reasonably be expected to have a substantial adverse effect on the financial or property interests of the State or 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

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- (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.
20. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
21. 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

22. The agency identified three documents within the scope of the application and determined that two documents are partially exempt and the remaining document can be released in full.

Issues in this review

23. 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 7(1)

24. The agency determined that documents 1 and 3 are partially exempt on the basis of clause 7(1)(c). In their consultation response, the interested parties submitted that all three documents ought to be exempt in their entirety on the basis of clause 7(1)(a), (b) and (c).
25. In his provisional determination the Ombudsman concluded that although the agency and both interested parties had provided an explanation for their claim of exemption, he did not consider it necessary to address those submissions in detail as he was satisfied that clause 7(3) prevents the application of clause 7(1) to all three documents.
26. Clause 7(3) applies to contracts entered into by an agency after 2005. It is noted that the applicant specifically requested access to a contract, and as set out in the agency's determination, the documents identified as falling within scope include a Project Delivery Agreement, Guarantee and Indemnity and Deed of Amendment to the Project Delivery Agreement. Each of these documents were signed by the agency and other parties in 2019 and 2022.
27. It is noted that both documents 1 and 3 contain annexures. It is clear that both documents were signed in a format containing the annexures. Additionally, it is noted that the contents page of the Project Delivery Agreement indicates that the substantive terms of the agreement together with the annexures ought to be treated as a single instrument. Accordingly, the Ombudsman advised in his provisional determination that he was satisfied that the annexures in document 1 and 3 therefore form part of each respective document.
28. In light of the above, the Ombudsman stated in his provisional determination that clause 7(3) operates to prevent the application of clause 7(1) to all portions of the documents in issue. Based on the submissions received in response, the interested

parties appear to have accepted this view and did not make any further submissions regarding the application of clause 7(1). In contrast, the agency has maintained that document 3 is partially exempt.

29. The basis of the agency's further submissions is that clause 7(3) applies to contracts, and document 3 is a deed rather than a contract. The agency submits that a deed and a contract are distinguishable and has referenced case law supporting this submission. Having considered the agency's submissions and the referenced cases carefully I advise that, whilst I do not dispute the differences between a deed and a contract, in the circumstances I remain satisfied that clause 7(3) ought to extend to document 3.
30. Firstly, although I acknowledge that document 3 is a standalone document, its relationship to document 1 cannot be ignored. That is, the Deed of Amendment is an instrument to amend the Project Delivery Agreement which is accepted to be a contract. Additionally, the interpretation clause within the Project Delivery Agreement specifies that 'a reference to this agreement or another instrument includes any variation or replacement of them'. In my view this clause operates such that although document 3 is a deed, it can also be considered part of the substantive contract.
31. I consider that this approach is consistent with the South Australian case referenced by the agency, in which Justice Stanley considered whether a document described as being a deed could nonetheless take effect as a contract.² It is clear that the two types of documents are not mutually exclusive; a document executed as a deed may additionally fulfil the requirements of a binding contract. Whilst it is accepted that document 3 was executed as a deed, the agency has not established that the document is not also a contract.
32. At their core, both a deed and a contract reflect an enforceable agreement between parties. Furthermore, both kinds of documents are underpinned by common principles. In all of the circumstances I remain of the view that the Parliamentary intention of clause 7(3) would include its application to document 3.

Clause 13(1)

33. Similar to the submissions above, the agency submits that as document 3 is a deed rather than a contract, clause 13(2) is not applicable to that document. For the reasons set out above, particularly the clause within the Project Delivery Agreement stating that a reference to the agreement includes any of its variations, I remain satisfied that clause 13(2) is relevant to document 3.
34. In his provisional determination the Ombudsman noted that although the interested parties had not explicitly referred to clause 13(1), they did refer to the confidentiality provision contained within the documents. For completeness, the Ombudsman therefore considered it appropriate to provide his provisional view that the contractual nature of the documents would prevent the application of clause 13(1).
35. Clause 13(2) states that a contract entered into by an agency may only be exempt pursuant to clause 13(1) if it contains matter the disclosure of which would constitute a breach of a term of the contract, and that term has been approved by a relevant Minister or agency; the person who must give that approval is dependent upon who has entered into the contract. Where the contract has been entered into by a non-State Government agency as is the case in this matter, the term of the contract must be approved by the agency.

² *Bendiog and Adelaide Bank Limited (CAN 068 049 178) & Ors v Kenneth Ross Picjard & Anor* [2019] SASC 123, at [73].

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36. In his provisional determination the Ombudsman accepted that document 1 contains a confidentiality provision which might satisfy the requirements of clause 13(2)(a). The Ombudsman subsequently advised in his revised provisional determination that he accepted the interested parties' submissions that all three documents ought to be regarded as part of the Project Delivery Agreement and therefore the confidentiality provision contained therein extends to all three documents.
37. The Ombudsman noted in his provisional determination that the substantive contract does not include an approval by the agency as required by clause 13(2)(b). The Ombudsman advised the parties that he had turned his mind to whether the signing of a contract is sufficient to amount to an approval for the purposes of clause 13(2), but had formed the view that it is not.
38. The wording of clause 13(2) indicates that the requirement of approval is a secondary step to a contract having been entered into. Firstly, in the case of a contract entered into by the Crown or a State Government agency, the required approval must be provided by a person external to the contract. As such, it is clear that the mere signing of the contract cannot amount to an approval in those circumstances.
39. The Ombudsman considered that the same logic ought to be applied to contracts entered into by an agency. To take an alternative approach would provide an unfair advantage to non-State Government agencies. Additionally, the Ombudsman considered that if Parliament had intended for such contracts to be treated differently, it would have inserted clause 13(2)(c) in terms such as 'it is a contract entered into by an agency that is not a State Government agency', in lieu of clause 13(2)(b)(iii).
40. In light of the above, the Ombudsman concluded in his provisional determination that clause 13(2) requires approval as a separate and additional step to the signing of a contract. The Ombudsman also stated that:

I have also had regard to clause 13(6) which states:

(6) If a Minister or agency approves a term of a contract in accordance with subclause (2), the Minister or agency must, as soon as practicable, notify the Minister administering this Act, in writing, of that fact.

Absent any submission or evidence from the agency indicating a compliance with clause 13(6), I am satisfied that there has been no approval as required by clause 13(2)(b)(iii). Noting that the requirements of clause 13(2)(a) and (b) are cumulative, I am satisfied that clause 13(2) operates to prevent the application of clause 13(1).

In responding to this provisional determination, should the agency wish to make any claim of exemption pursuant to clause 13(1), I request that the agency provide me with a copy of the written notification required by clause 13(6).

41. In response to the Ombudsman's provisional determination both the agency and the interested parties provided further submissions in support of clause 13(1). Both responses refer to an instrument of delegation which was approved by the agency at its 25 June 2019 council meeting. The delegation confers the powers and functions under the FOI Act upon specific employees of the agency.
42. The interested parties submitted that:

The very existence of that standing delegation (specifically tied, as it is, to clause 13(2)(b)(iii) of Schedule 1 of the FOI Act) indicates that, separately to the consideration and authorisation of any specific contract, the Council has specifically turned its mind to the requirement of clause 13(2)(b)(iii) and has given its blanket approval for the inclusion of confidentiality provisions such as that contained in the PDA. That approval must,

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logically, be assumed to subsist for so long as an officer of the Council holds the standing delegation.

The PDA was executed on behalf of the Council by the CEO at a time when the standing delegation to the CEO (among others) subsisted. Therefore, in the language of clause 13(2)(b)(iii), at the time of the execution of the PDA, the confidentiality provision within it "...has been approved by - ... - the Agency". Not only has it been approved by the Council, but it has been approved by the Council for the specific purposes of clause 13(2)(b)(iii).

43. Similarly, the agency submitted that:

In Council's view, all that was necessary for Clause 13(2) to be engaged is for the relevant contract to contain a confidentiality Clause, and for that clause to have been approved by an officer of the Council with the appropriate authority to do so (or the Council itself by resolution). In this case, the fact that the confidentiality clause was included in the contract and the contract approved by a person with the specific authority to approve the clause is sufficient to engage Clause 13(2).

44. The Ombudsman advised in his revised provisional determination that he was not persuaded by these submissions. Firstly, having reviewed the agency's delegation register, it was noted that a total of 59 functions and powers under the FOI Act have been delegated; essentially any reference to an agency being permitted or required to do something has been included. Contrary to the interested parties' submissions it is clear that no special or specific consideration was given to clause 13(2)(b)(iii), however even if that were the case the Ombudsman advised that he would remain of the view that the agency's delegation is not sufficient to enliven clause 13(2).
45. Clause 13(2) was inserted into the FOI Act by the enactment of the *Freedom of Information (Miscellaneous) Amendment Act 2004*. It is noted from numerous Hansard extracts that clause 13(2) was intended to create some consistency between the exemption clauses within the FOI Act and South Australia's commitment to the proactive disclosure of government contracts. The objects of the Act were simultaneously amended to promote greater disclosure of agency information.
46. The Ombudsman advised in his revised provisional determination that when considered in this context, he was not satisfied that a 'blanket approval' is sufficient to satisfy the requirements of clause 13(2). Rather, the Ombudsman considered that the agency must be able to establish that it turned its mind to approving the specific confidentiality clause in issue, in this case clause 15 of document 1. To this point, the Ombudsman confirmed that he had reviewed the provided agenda reports and decisions from 28 November 2019 and noted that these documents contain nothing indicating that clause 15 of the contract was specifically considered in any greater detail than the contract as a whole.
47. The agency submitted that it is not necessary for an approval of the confidentiality clause to specifically be included within the Project Delivery Agreement or for there to be any record of such an approval. Whilst the Ombudsman acknowledged that clause 13 is silent as to whether an approval under clause 13(2) need actually be contained in the contract itself, he disputed that there need not be some record of it. Without such a record it is difficult to see how an agency could establish that specific consideration was given to the confidentiality clause in issue.
48. At a minimum, the approval of a confidentiality clause must be documented in accordance with clause 13(6) which requires the agency to notify the Attorney-General of an approved term of a contract in writing as soon as practicable.
49. The agency conceded that it had not complied with clause 13(6) but further submitted that this non-compliance would not invalidate an approval of the confidentiality clause

by the agency. The Ombudsman agreed. He considered that the notification required by clause 13(6) is a procedural matter subsequent to the approval itself, and that a defect in the notification process would not invalidate a valid approval.³

50. That said, had the agency been able to produce a clause 13(6) notification to the Attorney-General from around the time that the contract was entered into, the Ombudsman advised that he would have treated such a notification as being indicative of a valid approval by the agency. As it stands, the agency is yet to provide evidence that there has been a valid approval of the confidentiality clause.

51. The Ombudsman noted that the agency advised that:

I note that arising from your office brining [sic] this matter to my attention, I have now notified the Attorney-General (the relevant Minister for the purposes of Clause 13(6) of Schedule 1) of the fact that the Project Delivery Agreement contains a confidentiality clause for the purposes of Clause 13(2) of Schedule 1.

52. Annexed to the agency's submissions is a copy of the clause 13(6) letter to the Attorney-General dated 3 March 2023. The Ombudsman advised that he had turned his mind to whether this notification is sufficient to constitute an approval for the purposes of clause 13(2)(b)(iii), however he was not satisfied that it was for two reasons.

53. Firstly, having accepted the agency's submission that a defect in the notification process should not render an approval invalid, it has been made clear that the two processes are separate and distinct. This is also supported in the interested parties' submissions that compliance with clause 13(6) is not determinative of whether a document is exempt because the clause is not 'cumulative' as clause 13(2)(a) and (b) are.

54. Secondly, and perhaps more importantly, the Ombudsman considered that there must be some temporal proximity between the execution of a contract and the approval of its confidentiality clause. Again noting the intention of clause 13(2) being that an agency will actively turn its mind to whether a confidentiality clause ought to be approved, the Ombudsman was of the view that an approval given belatedly or as an afterthought will not be sufficient.

55. The Ombudsman noted that the current South Australian State Records Guidelines advises agencies that:

The *Confidential Information* exemption in clause 13 of Schedule 1 can not be claimed in relation to a contract unless the contract contains a confidentiality clause that has been approved by the responsible Minister (or his or her delegate) *before* the contract is executed.⁴ [original emphasis]

56. The Ombudsman agreed that requiring approval to be granted prior to a contract being executed not only makes sense procedurally, but would best achieve the intention of clause 13(2). That said, the Ombudsman accepted that the order of events is not specifically stipulated within the clause, and would therefore accept an approval as being valid if granted immediately after a contract has been executed. In this case the contract was entered into in November 2019 and notification to the Attorney-General was not provided until March 2023.

57. In light of the above, the Ombudsman advised in his revised provisional determination that he was not satisfied that the belated notification to the Attorney-General constitutes an approval for the purposes of clause 13(2)(b)(iii). The Ombudsman was also of the

³ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355.

⁴ *FOI and Contracting for State Government*, State Records of South Australia, approved on 13 February 2022.

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view that, due to the time which has lapsed since the execution of the contract, the agency is no longer entitled to approve the confidentiality clause contained therein and the documents therefore could not be exempt on the basis of clause 13(1).

58. The agency has submitted that:

The Ombudsman's revised provisional determination appears to suggest that the Council's delegations with respect to its powers and functions under the FOI Act more broadly, and in particular with respect to clause 13(2)(b)(iii), are invalid or ineffective.

59. I wish to clarify that this is not correct. It is accepted that the *Local Government Act 1999* permits the council to delegate a power or function conferred to it under an Act. Clearly this includes a delegation in respect of the power set out at clause 13(2)(b)(iii) of the FOI Act.
60. It is not in dispute that the council validly delegated the power to approve a term of a contract pursuant to clause 13(2)(b)(iii) to 'the person occupying the office of CEO' at its council meeting on 25 June 2019. Rather, the reason that I am not satisfied that the agency complied with clause 13(2)(b)(iii) is because the person occupying the office of CEO failed to exercise their delegated power at the time of entering into the relevant contract.
61. Contrary to the agency's further submissions, I remain of the view that clause 13(2)(b)(iii) requires a step which is additional and separate to the execution of the contract. If the opposite were true, every contract entered into by the council would be capable of exemption under clause 13(1), undermining the inclusion of clause 13(2) in the first place.
62. In response to the Ombudsman's revised provisional determination the interested parties submitted that there was no basis for the Ombudsman to conclude that the passage of time between the execution of the contract and the notification to the Attorney-General was so long as to render that notification ineffective. In my view, the Ombudsman reached no such conclusion.
63. As set out in the Ombudsman's revised provisional determination, the notification required by clause 13(6) is a separate matter to the approval itself, the former being merely indicative of the latter rather than determinative. The Ombudsman concluded that there must be a temporal proximity between the execution of the contract and the approval of the confidentiality term, not the notification to the Attorney-General. As there is no indication that an approval was validly given on or around the time that the contract was entered into, there is simply no need to comply with clause 13(6).
64. Conversely, if there were some other indication that an approval was validly made around the time that the contract was entered into, a delayed compliance with clause 13(6) would not render that approval invalid.

Clause 16(2)

65. Both the agency and the interested parties have submitted that the documents ought to be exempt on the basis of clause 16(2). Whilst the agency's submissions relate only to the portions of the documents it initially determined to be exempt, the interested parties submit that all three documents are exempt in full.
66. The Ombudsman noted that the majority of the interested parties' submissions focus on how disclosure would cause a competitive disadvantage to the interested parties. Whilst these concerns are noted, clause 16(2) applies only to disclosure prejudicing the competitiveness of the agency. Further, to the limited extent that the interested parties

have referred to the effect of disclosure on the agency, they have not identified how its competitiveness would be prejudiced. Accordingly, the Ombudsman advised in his revised provisional determination that he had placed little consideration on these submissions from the interested parties.

67. A commercial activity is one which reflects 'a business venture with a profit-making objective and, strictly speaking, would involve activity to generate trade and sales with a view to profit'.⁵ I am satisfied that large-scale redevelopments by the agency, and in particular the redevelopment of the Central Arcade, falls within this definition and the requirements of clause 16(2)(a) are met.
68. Turning to clause 16(2)(b), I accept that the progression of large-scale developments is a function that the agency will continue to undertake indefinitely and can therefore be said to be a commercial activity which the agency is 'carrying on'.
69. The agency has submitted that:
- In the context of a large-scale development such as the Central Market Arcade, it needs to be recognised that Council has gone into the marketplace and sought expressions of interest and then entered into sensitive and complex commercial negotiations in order to achieve an outcome as embodied within the Project Delivery Agreement.
- Disclosure of key commercial parameters and other financial information contained within that document (i.e. those parts of Document 1 to which I have proposed to withhold access) would clearly prejudice the Council's ability to be able to compete in the marketplace for investment by future potential developers.
- The parties in the marketplace that seek to invest in such projects is limited and there is, in that sense, a competition in respect of investment funds for this project and other comparable developments.
- Disclosure of key commercial information would affect the Council's ability to be able to attract that investment and prejudice its competitiveness as parties and potential investors would seek a premium or otherwise not be inclined to invest in a project involving Council, the detail of which was subject to public disclosure.
70. The Ombudsman accepted that the agency is in competition with other agencies, businesses and individuals seeking investment for large-scale developments. The Ombudsman also accepted that if the information identified by the agency in documents 1 and 3 were disclosed, this would likely have a deterrent effect upon other developers who might otherwise be inclined to invest in projects involving the agency.
71. Accordingly, the Ombudsman advised in his revised provisional determination that he was satisfied that disclosure of the information determined to be exempt by the agency would prejudice the competitiveness of the agency in carrying on a commercial activity.
72. As set out above, the interested parties submit that clause 16(2) is applicable to all three documents in issue in their entirety. Although the Ombudsman was persuaded by the agency's submissions that clause 16(2) is indeed applicable, he advised that he was not inclined to accept the assertion that it ought to extend further than the agency has submitted.
73. Clause 16(2) invites a consideration of the negative effect of disclosure upon the agency and, in this matter, invites a specific consideration of whether disclosure of the documents would prejudice the competitiveness of the agency in attracting investors for large-scale developments. The Ombudsman observed that the agency is better placed

⁵ *Re Johnston and Australian Postal Corporation* [2006] AATA 144, at [30].

than any other party to determine which portions of the documents prejudice its competitiveness if disclosed.

74. The Ombudsman acknowledged that the interested parties may submit that any disclosure of the documents would deter them from engaging with the agency in future projects, however, the agency's submissions would indicate that even if that eventuates, a sufficient pool of potential investors would remain interested in the agency's projects such that partial disclosure of the documents would not prejudice the agency's competitiveness.
75. Accordingly, the Ombudsman proposed to confirm the agency's determination that documents 1 and 3 are partially exempt on the basis of clause 16(2), but the balance of the documents can be disclosed.
76. In response to the Ombudsman's revised provisional determination the interested parties submitted that although clause 16(2) refers to the effect of disclosure upon the agency, any negative effect suffered by the interested parties would deter parties from engaging in commercial activities with the agency in future, which in turn will affect the agency. The interested parties also submit that even if they are the only parties deterred by partial disclosure of the documents, this would still reduce the agency's competitiveness.
77. I agree with the Ombudsman's reasoning that the agency is best placed to comment on which portions of the documents would prejudice its competitiveness if disclosed. The agency is well aware of the interested parties' views and was at the time of making its determination and providing further submissions to this Office, and yet it maintains that the documents can be partially disclosed without prejudice to its competitiveness. I am therefore not inclined to depart from the Ombudsman's reasoning.

Clauses 15 and 16(1)(a)(iv)

78. The agency has also provided submissions about clauses 15 and 16(1)(a)(iv), however given that I intend to confirm the agency's determination and recent submissions on the basis of clause 16(2), I do not consider it necessary to address these submissions.

Final comments

79. The Ombudsman noted that in response to his provisional determination the interested parties requested to be given access to any additional submissions of the agency. Given that it is his determination which the parties are invited to comment on, the Ombudsman did not consider it appropriate to share the submissions of one party with another, save to the extent that he had quoted or summarised those submissions in his determination.
80. The interested parties also advised that they may wish to seek a review of this determination by the South Australian Civil and Administrative Tribunal (**SACAT**) and have requested that this Office provide an undertaking not to release the documents in issue until that review has finalised.
81. I advise the parties that this Office does not intend to release the documents in issue, nor is it usual practice to do so. Rather, if the 30-day period to apply for a review of this determination lapses, it will be up to the agency to give effect to the determination. Until that time, or until the conclusion of a review by SACAT, the agency is required to defer granting the applicant access to the documents as they concern the business affairs of the interested parties.⁶

⁶ *Freedom of Information Act 1991*, section 27(3)(d).

Determination

82. In light of my views above, I confirm the agency's determination.

A handwritten signature in black ink, appearing to read 'Steven Strelan', with a large, stylized initial 'S'.

Steven Strelan
DEPUTY OMBUDSMAN

29 March 2023

APPENDIX 1

Procedural steps

Date	Event
12 September 2022	The agency received the FOI application dated 9 September 2022.
11 October 2022	The agency's principal officer determined the application; the parties were not entitled to seek an internal review.
30 November 2022	The Ombudsman received two requests for external review from two of the interested parties dated 30 November 2022.
30 November 2022	The Ombudsman advised the agency of the external review and requested submissions and documentation.
7 December 2022	The Ombudsman received a request for external review from the original FOI applicant dated 7 December 2022.
9 December 2022	The Ombudsman advised the agency that a third external review application had been received.
15 December 2022	The agency provided the Ombudsman with its submissions and documentation.
10 January 2023	The Ombudsman issued his provisional determination and invited submissions from the parties.
24 February 2023	The interested parties provided submissions in response to the provisional determination.
3 March 2023	The agency provided submissions in response to the provisional determination.
10 March 2023	The Ombudsman issued his revised provisional determination and invited submissions from the parties.
24 March 2023	The agency provided submissions in response to the revised provisional determination.
24 March 2023	The interested parties provided submissions in response to the revised provisional determination.